BOOK REVIEW:

Review of Elisabeth McDonald, Rape Myths as Barriers to Fair Trial Process: Comparing Adult Rape Trials with those in the Aotearoa Sexual Violence Court Pilot
(Canterbury University Press, 2020)

Reviewed by Scott Optican*

Professor Elisabeth McDonald (University of Canterbury School of Law) has long been New Zealand's premiere researcher in — and advocate for — the reform of criminal trial processes involving adult victims of sexual violence. Her new and important book from Canterbury University Press, *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot*, is undoubtedly McDonald's most significant contribution to those areas of advocacy and scholarship.

The book summarises findings from 4 years of research analysing trial processes in 30 adult rape cases (2010–2015) where the defence was consent. It then compares those with 10 cases (2017–2018) from the Sexual Violence Court Pilot — a "judicially-led initiative" whose goal is "to improve the court experience for participants in sexual offence trials …".[1]

As described by McDonald herself:[2]

> … the motivation for the research was to investigate the possible reasons why adult rape complainants' reported experience of giving evidence has not altered over many years,

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1 Elisabeth McDonald *Rape Myths as Barriers to Fair Trial Process: Comparing adult rape trials with those in the Aotearoa Sexual Violence Court Pilot* (Canterbury University Press, Canterbury, 2020) at 21 [*Rape Myths*]. A digital edition of the book is freely available from the University of Canterbury Research Repository and can be accessed at <www.canterbury.ac.nz>.
Support for McDonald's work was provided by the Marsden Fund, the New Zealand Law Foundation, the Borrin Foundation and the University of Canterbury School of Law. University of Waikato law lecturer Paulette Benton-Greig — together with researchers Sandra Dickson and Rachel Souness — contributed to the book's research and writing. McDonald also acknowledges numerous members of the judiciary (particularly the heads of various courts), Ministry of Justice employees and others who helped her team by giving access to the necessary case file material and generously provided their time and expertise.

2 *Rape Myths*, above n 1, at 39.

> despite many changes to law and practice aimed at lessening the negative impact of the questioning process.

The principal answer given by the book to this question is that, such reforms notwithstanding, "rape myths" — defined as "descriptive or prescriptive beliefs about rape … that serve to deny, downplay or justify sexual violence that men commit against women" — continue to deeply infect the complainant questioning process.[3] Defence cross-examination, in particular, reinforces rape mythology, resulting in complainants' "heightened emotionality" and increased "levels of distress" in court.[4] This, in turn, inhibits "effective engagement of the complainant" in the trial process, makes the complainant feel like "she is on trial" and "impedes the ability of the complainant to give the best evidence" possible.[5] Indeed, McDonald's work demonstrates the significant connection between the "content and type of questioning" and victim upset when testifying.[6] Little wonder, then, that adult female complainants in rape cases have consistently described their courtroom experience as a traumatic and re-victimising event.[7]

Aimed at demonstrating "the impact of rape myths when relied on in the questioning of the complainant", the influence of those same fictions on "juries and jury deliberation processes" is beyond the scope of McDonald's study. However, as a necessary consequence of her research, the negative implications for considered and rational jury decision-making should be clear. Indeed, as McDonald notes, if jurors' understandings about sexual violence in adult rape trials "are based on stereotypical ideas about how a complainant will act, or what conduct amounts to rape, such understandings will influence what the jury believes is a fair and reasonable conclusion" on the facts of each case.[8] Equally, the explicable distress, traumatisation and defensiveness that complainants may manifest during adversarial questioning deprives the jury of the highest quality and most coherent evidence possible from the principal witness (the victim) in a rape case.

The impetus behind McDonald's work, the study of actual court proceedings and the conclusions reached in the book will not be wholly unfamiliar to those conversant with existing research on how the criminal justice system treats victims of sexual

3 *Rape Myths*, above n 1, at 43 (citing Heike Gerger and others "The Acceptance of Modern Myths About Sexual Aggression Scale: Development and Validation in German and English (2007) 33 Aggressive Behaviour 422 at 423 (citing Gerd Bohner and others "Rape myths as neutralizing cognitions: Evidence for a causal impact of anti-victim attitudes on men's self-reported likelihood of raping" (1998) 28 European Journal of Social Psychology 257)).

4 *Rape Myths*, above n 1, at 40.

5 At 40.

6 At 9.

7 At 2–3.

8 At 42.

violence. However, the true power and uniqueness of the book stems from the distinct method of analysis employed. McDonald and her team were able to access the actual audio files of the rape trials studied. This gives the book a rare insight, not only into the language used and narratives employed during the questioning of complainants by counsel, but also into the moments at which such questioning caused the most distress, upset and heightened emotionality for rape victims on the witness stand. The result, as fellow law professors Julia Quilter and Vanessa Munro write in the book's foreword, is a "'window' into the trial process like none before".[9]

The view from that window, unfortunately, is not particularly good, bright or welcoming. McDonald's review of the cases handily demonstrates just how rape myths surrounding the issue of consent underlie the distressing, irrational and misguided questioning of victims in court. Indeed, despite rules of evidence and procedure designed to rein in defence cross-examination at trial — and without much objection from prosecutors or judicial control from the bench — adversarial questions were routinely permitted in rape cases regarding: the complainant's disposition or propensity in sexual matters; her use of sex toys; previous consensual sex with others; clothing choices at the time of the assault; and the failure to cry out or leave during a sexual attack. The same is true of the irrelevant and intrusive probing of a victim's family background, qualifications and life experience — including questions about the complainant's relationship with her partner and his employment, drug use and criminal convictions. As McDonald persuasively observes, there is little to justify such queries — undertaken by both the prosecution and the defence — which "[carries] the risk of [jurors] making unfair … moral judgements about the complainant" or viewing her "less favourably and [as] less of a 'real' victim" in the case.[10]

Apart from inappropriate questioning, the book also documents other trial practices causing unwarranted upset to adult rape complainants. These include: the lack of "regular and responsive breaks" during testimony when victims manifest distress; a lack of pre-trial preparation that would allow complainants to give the best evidence possible in court; complainants being required to view and respond to disturbing exhibits and photographs; and the need for victims to give detailed explanations of sexual acts in language with which they were neither familiar nor comfortable.[11] McDonald also discusses problematic aspects of jury instructions and lawyers' submissions in adult rape cases, such as contentions — now thoroughly discredited by research — that the immediacy (or not) or a victim's disclosure of sexual violence is relevant to the assessment of her truthfulness on the witness

9 At XIII.
10 At 207–208.
11 At 71.

stand. The book likewise examines: gaps in the pastoral care of complainants during the trial process (including the distress caused by waiting to be called to testify in an unfamiliar courthouse environment); the failure of trial judges to adequately control defence questioning practices; and difficulties encountered with the use of alternative means of giving evidence (such as pre-recorded evidential video interviews) ostensibly aimed at minimising the stress on complainants and ensuring a high quality of testimony at trial.

Such trenchant critique of criminal trial processes in adult rape cases notwithstanding, the greatest strength of the research is McDonald's unwillingness merely to document the unjust, harmful and unfair practices described above. Indeed, the book makes clear that, in cases coming out of the Sexual Violence Court Pilot, there was greater judicial response to complainant distress, more judicial control of defence cross-examination, less admission of irrelevant evidence, increased and better use of alternative means for victims to give evidence and adjustments to jury instructions identifying rape myths and misconceptions. This suggests that, even in an adversarial system, self-conscious change regarding the conduct of sexual violence trials can work to protect female victims from upset and enhance their capacity to give the best and most credible courtroom evidence possible. Along these lines, the book concludes with 55 specific recommendations (both large and small) for reforming the law and practice examined in the previous chapters. These include: the greater use of agreed upon statements of fact to spare complainants intrusive questioning regarding genitalia and sexual activity; an expansion of the current "rape shield" law — set out in s 44 of the Evidence Act 2006 (Evidence Act or the Act) — designed to subject more defence cross-examination of complainants about their past sexual experience to heightened tests of evidential relevance and admissibility; ongoing education for judges and lawyers regarding rape myths and best trial practices in sexual violence cases; a revised definition of what it means to "consent" to sexual activity (coupled with clarifying the meaning of a defendant's "reasonable belief" in consent); and greater care of adult rape complainants before, during and after the trial process.

Will any of McDonald's proposals ever become part of New Zealand law — or be used to transform legal culture connected with the conduct of adult rape trials? We should hope so and perhaps have reason to hope. Indeed, McDonald's research has already impacted the latest version of the Sexual Violence Legislation Bill 2019 (the Bill) — a statute codifying recent initiatives from the Law Commission aimed at the

progressive reform of trial processes in sexual violence cases.[12] Citing her work — which concluded that "the manner and tone" of complainant questioning was not being adequately regulated in rape trials — Select Committee amendments to the Bill have now modified the "Unacceptable questions" rule currently set out in s 85 of the Evidence Act.[13] Accordingly, if and when the Bill becomes law, judges will have a duty to intervene when either the content of a question put to a witness "or the way in which it is asked" is improper.[14] In a change supported both by McDonald and the Law Commission, the Bill likewise extends the heightened relevance test codified in s 44 of the Act — which currently applies only to evidence of the complainant's past sexual experiences with third parties — to the complainant's sexual experience with the defendant as well.[15] Unfortunately, the Bill does not incorporate the book's recommendations — well-grounded in McDonald's research — that the definition of "sexual experience" in s 44(1) be clarified to include specifically a broad range of "sexualised behaviour" by the complainant, together with enumerated categories of evidence regarding the complainant's relationship status, contraceptive use, pregnancies, lack of sexual experience, sexual disposition and other matters claimed to be germane to the complainant's credibility or the issue of consent.[16] Without such precise and detailed amendment to s 44, McDonald's analysis suggests, a good deal of inappropriate, irrelevant and stigmatising evidence about the behaviour of adult rape complainants will continue to be admitted at trial under the weaker (and often misapplied) standard of ordinary relevance set out in s 7 of the Evidence Act.[17]

If McDonald's research shows us anything, it is that law reform connected with sexual violence trials has come a long way but still has a long way to go. For that reason, the book is an essential read for any judge, lawyer, law student, legislator, academic or policymaker interested in fair trial processes for rape victims — procedures that, as McDonald is careful to point out, are "unashamedly" focussed on complainants but also "crafted with the rights of defendants firmly in mind".[18] There is, in fact, no discernible conflict in her work between a "trauma-informed approach" to criminal justice reform and a defendant's right to a fair trial.[19] As the

12 Sexual Violence Legislation Bill 2019 (185-2). See Law Commission *The Second Review of the Evidence Act 2006 — Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142, 2019) (available at <www.lawcom.govt.nz>). See also *Government Response to the Law Commission report: The Second Review of the Evidence Act 2006 — Te Arotake Tuarua i te Evidence Act 2006* (presented to the House of Representatives on 2 September 2019) www.beehive.govt.nz.

13 Ministry of Justice *Departmental Report for the Justice Committee — Sexual Violence Legislation Bill* (March 2020) at [162].

14 Sexual Violence Legislation Bill 2019 (185-2) (Select Committee Report) at 10 (incorporating new cl 9(1)) (emphasis added).

15 *Rape Myths*, above n 1, at 148–149.

16 At 196–197 and 498–499 (Recommendation 40).

17 At 149 and 196–197.

18 At 5.

19 At 5.

author notes, the admitted goal of the research is "not … to increase conviction rates", but instead:[20]

> … to document what is occurring in [court], and to consider whether changes can be made to reduce complainant distress within the current adversarial process — while not impacting on the fair trial rights of defendants …

in sexual violence proceedings. The book achieves that goal admirably, making clear that fairness and justice to the accused does not require us to accept trial practices — or the admission of evidence at trial — that is both harmful and unfair to rape victims and/or accommodating of rape myths.

In a fraught and controversial area of study, this singular book is a capstone to McDonald's long research career in the areas of sexual and family violence, evidence and criminal justice processes. The outcome of the work, Quilter and Munro aptly conclude in their foreword, is a study "detailed in its analysis, rich in its insights and far reaching in its implications".[21] As a collaborator with the author on other volumes — and having been privileged to participate in a consultative workshop on some of the reform proposals generated by her investigations — I could not agree more. Indeed, the depth of scholarship demonstrated by McDonald's book is matched only by the moral clarity of her vision for reform. As a result, this pioneering volume reminds us first and foremost of our obligations towards adult rape victims testifying in court — that women courageous and trusting enough to tell their stories deserve all the backing available from just and fair processes of law.

20 At 5.
21 At XVI.