
**APPEAL COURT, HIGH COURT OF JUSTICIARY**

**[2023] HCJAC 40**
**HCA/2023/6/XM**

Lord Justice General
Lord Justice Clerk
Lady Paton
Lord Pentland
Lord Matthews
Lord Boyd of Duncansby
Lady Wise

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE GENERAL

in the Reference by

HIS MAJESTY'S ADVOCATE

Appellant

against

CLB

Respondent

**Appellant: The Lord Advocate (Bain KC), Harvey AD, Scullion AD; the Crown Agent**
**Respondent: The Dean of Faculty (Dunlop KC), S Latif, (sol adv), Culross, Loosemore; John Pryde & Co, SSC (for Craig Wood Solicitors, Inverness)**

18 October 2023

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**Introduction**

[1] There is no dispute that, "… no one shall in any case be convicted on the testimony of a single witness" (Hume: C*ommentaries on the Law of Scotland regarding Crimes* (Bell ed) ii, 383). Corroboration is required. The direct (eye witness) testimony of one witness may be corroborated not only by another eye witness but also by facts and circumstances which are spoken to by another witness or witnesses. A case may be proved solely by facts and circumstances; each fact being spoken to by only one witness (ii, 384). It is not for the court to decide whether or not this longstanding requirement of the law of evidence should be departed from. That is a matter for the Scottish Parliament. However, it is for the court to decide when, and to what, the requirement applies and what constitutes corroboration. That is something upon which the court has regularly ruled for over a century. Before revisiting that journey, it is important to make some observations on the context in which this debate is taking place; the prosecution of increasing numbers of sexual offence cases, especially rape.

[2] Throughout the whole of the nineteenth and twentieth centuries, rape could only be committed by a man. It was defined as having sexual intercourse with a woman by overcoming her will by force, including threats (Hume: *Crimes* i, 301). The reference to force may have been a change from an earlier formulation whereby the crime was committed simply by having vaginal intercourse without the woman's consent. In any event, as with most other common law crimes, the focus was on the accused's acts and intention. It was to the earlier formulation that the law returned in 2002 as a result of *Lord Advocate's Reference (No 1 of 2001)* 2002 SCCR 435, overruling *HM Advocate* v *Sweenie* (1858) 3 Irv 109. This Full Bench decision, by a majority of 5 to 2, determined that, if intercourse without consent were

proved, the required mental element was not an intention to have intercourse with the woman without her consent, but for the man either to know that the woman was not consenting or to be reckless in that regard.

[3] The Sexual Offences (Scotland) Act 2009 (section 1(1)) replaced the recently re-formulated common law definition so that rape could be committed against a man and could involve other forms of penile penetration. It introduced, as a constituent element of the crime, an absence of "reasonable belief" that the other party was consenting.

[4] These changes have, in recent years, caused significant practical problems for the courts and practitioners in understanding just what is needed to constitute a sufficiency of evidence for the crime of rape. For example, after the 2009 Act came into force, it was argued, on several occasions successfully, that this newly defined mental element required to be proved by corroborated evidence. Those advancing this submission relied upon the mental element having become a constituent of the crime, rather than a possible defence. This was despite clear guidance in *Spendiff* v *HM Advocate* 2005 JC 338, that the necessary mental element in rape could be inferred from the circumstances in which the act charged took place. This innovation was caused partly by what had been said about the need to prove crucial facts in *Smith* v *Lees* 1997 JC 73 and what these facts were thought to be. It was only with *Graham* v *HM Advocate* 2017 SCCR 497 that this notion, that the mental element of a crime required to be proved by corroborated evidence rather than be inferred from established fact, was conclusively dispelled (see also *Maqsood* v *HM Advocate* 2019 JC 45).

[5] Returning to corroboration as a generality, towards the end of the 19th century, in *Lees* v *Macdonald* (1893) 20 R (J) 55, 3 White 468, the Lord Justice Clerk (Macdonald)[1]

[1] Lord Kingsburgh

explained (at 57) that "in any case any fact can be proved by one witness although the whole *case* cannot be so proved" (emphasis added). Lord McLaren agreed with this in saying (at 58) that: "All that the law demands is that there should be two witnesses to prove a *case*… [A]ny fact… may be proved by the testimony of one credible witness" (emphasis added).

[6] In the years before the First World War, in *Lockwood* v *Walker* 1910 SC (J) 3, (1909) 6 Adam 124, the same Lord Justice Clerk (Macdonald) added (at 5) a gloss on this whereby not only were two witnesses required to prove a case, but also that every crucial fact in a case required such proof in the form either of two eye witnesses or one eye witness supplemented by corroborative facts and circumstances. This view was strengthened, at least in relation to the identity of an accused as the perpetrator, in the years leading up to the Second World War, by the Full Bench in *Morton* v *HM Advocate* 1938 JC 50.

[7] In the post war years, in another Full Bench decision, *Gillespie* v *Macmillan* 1957 JC 31, the Lord Justice General (Clyde) reiterated (at 35-36) that no person could be convicted on the evidence of a single witness, but two witnesses were not required to prove every fact. He continued (at 36):

> "In between these two extremes there is an infinite variety of possible situations in which the question of sufficiency can arise, and no single test of sufficiency which will solve every … situation has ever been or … can be laid down."

Thereafter, it was contended by many that there were two contrasting schools of thought; one following *Gillespie* v *Macmillan* and the other supporting *Lockwood* v *Walker*. For there to be two such schools on a central pillar of the law of evidence is highly undesirable. It leads to both uncertainty and inconsistency.

[8] The approach of the court shifted away, from what might have been regarded as a flexible approach in *Gillespie* v *Macmillan*, when a third Full Bench was convened, 40 years

later, in *Smith* v *Lees*. This decided, in short, that evidence from a witness that he or she had seen a complainer showing signs of physical distress immediately after alleged lewd practices had been directed against her, could corroborate that complainer's lack of consent but not what the complainer said had been done to her without her consent.

[9] The law relating to sexual offences and the requirement for corroboration have been shadowing each other down the years. Now, some twenty five years later, the Court has yet again convened a Full Bench, at the request of the Lord Advocate, to review whether *Smith* v *Lees* was correctly decided. The Lord Advocate's Reference has drawn into the equation, albeit at the suggestion of the court, some of the *dicta* in *Morton* about the evidential value of *de recenti* statements when they are coupled with observed distress, as they almost always are.

[10] The court's task of reviewing when, and to what, the requirement for corroboration applies, and what corroboration amounts to, is one which has been undertaken by successive generations of judges. That may be a benefit of a common law (or in Scotland's case a hybrid) system. Society's problems and attitudes alter over time. Evidential requirements may have to change with them in order to meet the public's expectations from its system of criminal justice. Unlike Parliament, the court cannot decline to consider these issues when asked to do so, either in an appeal or, as in this case, a Reference from the Crown. It must determine the issues in the context of modern societal values and thinking. These, and in particular the approach to be taken to the testimony of women, are not the same as they were in the 19th century or even, apparently in some cases, that of only a quarter of a century ago (*MR* v *HM Advocate* 2013 JC 212, at para [17]).

[11] If an informed bystander were to look at the developments in the evidential requirements in sexual offences cases over the last century, he or she may form the impression that the court has been, at times, not only making it increasingly difficult for the prosecution to meet the formal requirements of proof but has also introduced layers of complexity which make the direction of juries more and more difficult in areas with which they will not be familiar. The volume of sexual offence cases at an appellate level, many of which have resulted in acquittals because of misdirections of juries by judges, including some very experienced judges, illustrates the extent of the problem. It is one which has to be, and can only be, addressed by the court setting the parameters within which juries can operate satisfactorily. That is what this opinion is ultimately designed to achieve.

[12] Meantime, steps have been taken to address so called "rape myths". In *Donegan* v *HM Advocate* 2019 JC 81, the court observed (at para [56]):

> "In recent years, in line with the approach in other jurisdictions, notable steps have been taken in Scotland seeking to address and demystify for court users various supposed "myths" associated with the reporting of and the reliability of rape allegations; and to improve the experiences of those involved and those giving evidence. Procedures have been adopted to address the perceptions of the jury and the requirement of their role, most notably section 288DA of the Criminal Procedure (Scotland) Act 1995."

[13] Sections 288DA and 288DB of the 1995 Act are designed to address some of these myths. Their purpose is to reflect modern thinking, whereby the fact that a complainer may not have disclosed or reported the offence, or may not have physically resisted the accused, leads to an inference that the complaint is false. Since the introduction of these sections there has been a growing awareness of the effect of trauma on those who have been subjected to rape, sexual assault or sexual abuse. Different people may react in different

ways to having been subjected to these crimes. There is no set way in which individuals can be predicted to behave in the aftermath of a sexual offence.

[14] The issue of rape myths has been the subject of research, much of which is recorded in the Final Report from the Lord Justice Clerk's Review Group (March 2021) on *Improving The Management of Sexual Offence Cases* (at paras 5.17-5.19; and 5.37-5.44). The Report notes (at para 5.27):

> "… there remain opportunities for further enhancement of the current jury system to assist decision making and increase public confidence by the use of: plain language, educational materials, education about rape myths, clear and written directions, some form of route to verdict and other mechanisms…".

Following the Report, written directions for jurors have been introduced. A strong emphasis has been placed on the use of plain language to assist comprehension. The Review Group concluded (at para 5.54):

> "… it is necessary for information on certain rape myths to be communicated to the jury in an objective and clear manner. There seemed to be little disagreement about this, in principle, within the Review Group: what seems to be less settled relates to identification of the circumstances in which this should be done, and the best means of doing it... ".

The Group recommended (at para 5.57) that:

> "… there may be much to be said for relevant directions on rape myths being given by the judge both in their introductory remarks at the start of the trial, or otherwise as soon as such points arise."

That recommendation has been acted upon, in the form of directions set out in the Jury Manual (7.10/132-7.11/132); the guide book for judges and sheriffs when charging juries.

[15] It is important therefore to stress that the court does not address this Reference from any view that a complainer may, as a matter of course, be expected to exhibit distress in the aftermath of a sexual offence. The court proceeds entirely in accordance with the views expressed (at para 5.54) by the Review Group, *viz.*:

> "… there was no default presentation to be expected from someone who has been raped. She or he may show little emotion or may show considerable emotion. Given the importance which the law attaches to a witness's demeanour, this is one example of the need to address the potential for misconceptions to feature in jury deliberations."

[16] The circumstances of each individual complainer, and their reaction in the aftermath of an offence, may vary enormously from one individual to another. However, in the context of a system which requires corroboration for proof of a crime, these circumstances may take on a particular evidential significance, whether in relation to a physical injury, the observation of distress or the making of *de recenti* statements. It is important that the law is clear on the role which may be played by each of these features in the specific cases in which they arise. That is not to say that such features are always, or even usually, to be expected.

**Facts**

[17] The respondent was charged with the assault and rape of the complainer at an address in Inverness in March 2019. He was alleged to have supplied her with alcohol and an unknown substance, which had rendered her heavily intoxicated. The trial at Aberdeen High Court took place in November 2022. The complainer gave evidence in the form of a recorded interview with the police, which had taken place about six months after the incident, and a later pre-recorded commission to take her evidence, which included cross-examination. Both recordings were played to the jury during the trial. The complainer did not need to attend court.

[18] The circumstances, as described by the complainer, were that she had been provided with emergency accommodation in a block of flats in which the respondent also lived. She and her boyfriend had been smoking on the stairwell on the middle floor, where her flat was

located. The respondent, who was intoxicated, invited them up to his flat on the top floor. They drank some cans of lager. The complainer felt that the cans had been "spiked". At some point, the complainer's boyfriend left to find his tobacco. Shortly thereafter, the respondent attacked the complainer, threw her onto a bed, removed her clothing and had intercourse with her without her consent. Not long after that, the complainer's boyfriend returned. He knocked on the door. The respondent answered it whilst naked. When he did so, the complainer escaped.

[19] The complainer's boyfriend gave evidence at a pre-recorded commission. He had left the flat for only about 15 minutes. He returned and knocked on the door. The respondent answered by opening the door only slightly. He did not seem to have any clothes on; certainly no top. Very shortly afterwards, the complainer came out of the flat. She was very distressed. She was shouting and screaming that she had been raped. She was crying and in shock. Her hair was all messed up. Another witness saw the complainer in the stairwell, saying that someone had raped her. She was devastated, shaken up and scared. Her make-up was all over the place. She was upset, screaming and crying. She pointed up towards the respondent's door and said "It was him. He done it". There was evidence from the complainer's sister of a phone call from a friend after the incident, in which she could hear her sister crying and screaming in the background.

[20] The respondent did not give evidence. He had been interviewed by the police. In his interview, he denied having any sexual contact with the complainer. The respondent's account at interview was that, having remonstrated with the complainer and her boyfriend for loitering in the stairwell, he had invited them into his flat. This was something to do with shielding the boyfriend from the police and/or his father. There had been no physical

interaction. No drink was consumed. After an hour or so, the respondent asked the complainer and her boyfriend to leave. Later, a friend of the respondent arrived to watch a football match on television. He stayed overnight. On the following morning, the respondent was woken up by the police because his flat door was lying open. He could not remember much of what had happened during the previous evening.

[21] The trial judge correctly determined that there was sufficient evidence for the case to go to the jury; the evidence of witnesses, other than the complainer, on timings and the respondent's naked appearance at the door, being corroborative of the complainer's account along with the distress. The judge gave the jury the standard direction that, where there was an eye witness to an event, the corroboration did not have to be more consistent with guilt than innocence. All that was required was that it provided support for, or confirmation of, or fitted in with, the direct evidence of the complainer on the material facts. The judge told the jury that, for proof of rape, they had to be satisfied that: (1) the respondent had had sexual intercourse with (ie had penile penetration of) the complainer; and (2) the intercourse had been without the complainer's consent. Both elements required to be corroborated.

[22] The judge took considerable care to charge the jury on distress as corroboration. He directed them repeatedly and at length that, if they accepted that the distress had been genuine and had been caused by whatever had happened, it could both corroborate the complainer's lack of consent and support her general credibility. It could not, however, corroborate the complainer's evidence about what the appellant had done. In particular, it could not "of itself" corroborate her testimony that penetration had occurred. For penetration to be proved, the jury had to rely on more than just the distress, although the judge emphasised that the distress was a factor in the equation. They had to rely on the

other facts and circumstances, including the timings and the naked appearance of the respondent at the door. The judge was critical of the manner in which the Advocate depute had presented the case. It had lacked the correct focus, which ought to have been on the timings and the respondent's nakedness rather than the complainer's distress.

[23] On the statements made by the complainer to her boyfriend and others, both at the scene and on the phone, very soon after the rape was said to have happened (*de recenti* statements), the judge directed the jury that what the complainer had been reported as saying could not corroborate her testimony about what had happened. It was available only to help them in assessing the quality of the complainer's testimony. It was only a guide to credibility and reliability.

[24] On 15 November 2022, the jury found the case not proven by a majority verdict. The basis for the jury's reasonable doubt may have been prompted by the directions, notably those on the evidential effect of the complainer's *de recenti* statements and the inability of distress to corroborate penetration. Neither of these concepts in the law of evidence, as currently applied, is without difficulty. Yet the rules of evidence should be as simple as is consistent with their purpose (see Scottish Law Commission 100th Report – Evidence: *Report on Corroboration* (1986) para 1.3).

**The Corroboration Trail**

***Origins***

[25] Much has been written about the historical origins and development of the requirement for corroboration. Its Biblical, Roman and Canon law sources were outlined in the Carloway Review (2011, at para 7.1.1 *et seq* citing, *inter alia*, Gordon: *At the Mouth of Two*

*Witnesses* in Hunter (ed): *Justice and Crime – Essays in Honour of Lord Emslie* at 33). It is worth observing *in limine* that the requirement was, for obvious reasons, particularly important if the death penalty were involved (Numbers 35 v 30; Deuteronomy 17 v 6; cf 2 Corinthians 13 v 1-4)). Corroboration was not always a feature of the law of evidence in criminal trials. In the 10th to 12th centuries, in a God fearing world, trial by ordeal was in use until abolished in 1215 by the Fourth Lateran Council (see APS 1230 c 6).

[26] A realisation, that a determination by a judge might be an improvement on the results of an ordeal, prompted a change in approach. There remained a lack of confidence in the judgment of man, whether judge or jury, when compared to that of God. Throughout mainland Europe, over time, this culminated in the *ius commune's* (the common civil law) adoption of a requirement to have either a confession or the testimony of at least two witnesses. Circumstantial evidence alone would not, until much later, suffice to provide corroborative proof, either alone or in combination with direct testimony. Although the *ius commune* had little influence on the development of trial by jury in England, it did take hold in Scotland even if Norman customs, which employed a jury, were utilised from the early 13th century, once the church had refused to sanction ordeal (see Walker: *A Legal History of Scotland* I, at 231). It is unnecessary, or would at least be unproductive, to delve too deeply into the origins and development of the requirement, since ultimately the starting point must be with the Institutional Writers of the later Enlightenment. It is nevertheless worth noting that the ancient requirement is about the number of witnesses, not facts or sources of evidence.

***Relevant Institutional Writings***

[27] The Institutional Writers are those few outstanding individuals who stated the law

as it was up to or about the advent of the 19th century, before regular law reporting began to establish a system of precedent. Their works are a formal source of law, even if the court may decline to follow some of the principles which they espouse, where they are clearly not applicable in the modern world. Mackenzie had published his *Matters Criminal* as early as 1678, but he did not deal with sufficiency of evidence as a generality in any meaningful way (cf title 26, para 14 *et seq*). In 1693, the need for two, or in some situations up to seven, witnesses to prove an allegation was noted by Stair: *Institutions* IV 43.2, citing Biblical sources. Stair took a Biblical reference to "every word" as meaning each allegation. Stair did not detail the requirements of sufficiency much beyond that. It is thus best to start with David Hume, the nephew of the philosopher of the same name, in order to understand the requirement as it appeared at the end of the 18th and the beginning of the 19th century. This was an era in which some matters were not capable of proof by any amount of parole evidence. That approach has only recently been altogether left behind (Requirements of Writing (Scotland) Act 1995, s 11).

*Hume*

[28] Hume was an advocate, sheriff and the Principal Clerk of Session. He was professor of Scots law at Edinburgh before becoming Baron of the Court of Exchequer. He is primarily recognised as an academic in both civil and criminal law. His works reflect a scholarly approach.

[29] In Hume's introduction to his *Commentaries on the Law of Scotland respecting the Description and Punishment of Crimes* (1797) there is no general treatment of sufficiency beyond a statement that, whereas English juries could convict on the testimony of one witness, Scottish juries could not (i, at xlv). There is no obvious mention of corroboration.

Hume examined sufficiency of evidence and modes of proof but only on a crime by crime basis. He explained the rationale for that approach by reference to the kind of evidence which was normally available to prove a particular offence (see for example: theft at i, 151; hamesucken at ii, 38; and adultery at ii, 313). On rape, he wrote that the evidence of the complainer was necessary testimony without which a conviction could not normally be obtained. Owing to what Hume regarded (ii, 15) as the "secret" nature of the offence, and the resultant difficulty which an accused person would face in attempting to disprove a false allegation, the credit to be given to the complainer's testimony was to be evaluated according to the "probability of her story, (all circumstances considered), and the concurrent evidence which supports it".

[30] In his *Commentaries on the Law of Scotland respecting Trial for Crimes* (1800), Hume dealt (ii, 231) with "And of Proof in General" under a side note "Single witness is not lawful evidence". His treatment of the subject was repeated, almost verbatim, under the heading "Of Proof by Witnesses", in his *Commentaries on the Law of Scotland respecting Crimes* (1819; xiii, 369) and in what are regarded as the third (1829) and fourth (1844, adding Bell's notes) editions of that work ("*Crimes*"). The same side note is used. It is to the latter work that reference is commonly made. What is said there (ii, 383) is so ingrained as an accurate statement of the law that it requires to be set out in some detail.

[31] Hume explains that the subject of the competence of witnesses is a matter of law for the court. He refers (ii, 339 - 340) to the older practice, which was prevalent even in the 17th century, of excluding women from giving evidence. Exceptions could be made, and the evidence of a female witness could be admitted *cum nota* (with reservations as to weight; Trayner: *Latin Maxims* at 129) in respect of "all things done without doors" and *simpliciter*

(directly) for "things done within doors". However, Hume continues (ii 340) that, by the time he was writing, "reason and humanity at length [had] prevailed against this illiberal and iniquitous distinction and women's testimony was admitted and given equal credit to that of men "in all cases and situations". Hume explains (ii, 382 - 383) that he was "unwilling to engage" in the rules by which "a jury shall be guided in forming their opinion of the sufficiency of the evidence"; it being a matter for the jury to determine "what amounts to evidence, and what to grounds of suspicion only". He proffers (ii, 383), with some diffidence, "Two or three particulars … as grounded in the universal opinion, and confirmed with numerous examples", as follows:

> "One relates to the direct mode of evidence, by the testimony of such persons who have seen the deed done; and it is this, that no one shall in any case be convicted on the testimony of a single witness. No matter how trivial the offence, and how high soever the credit and character of the witness, still our law is averse to rely on his single word, in any inquiry which may affect the person, liberty, or fame of his neighbour; and rather than run the risk of such an error, a risk which does not hold when there is a concurrence of testimonies, it is willing that the guilty should escape."

[32] Having referred to several cases, and to the earlier practice, which was also prevalent in continental Europe, of inflicting a lesser form of punishment when proof was defective, Hume continues (ii, 384):

> "It would not however be a reasonable thing, nor is it our law, that the want of a second witness to the fact cannot be supplied by the other circumstances of the case. If one man swear that he saw the pannel [accused] stab the deceased, and others confirm his testimony with circumstances, such as the pannel's sudden flight from the spot, the blood on his clothes, the bloody instrument found in his possession, his confession on being taken, or the like; certainly these are as good, nay better even than a second testimony to the act of stabbing.
>
> Neither is it to be understood in cases of circumstantial evidence, either such as the foregoing case, or one where all the evidence is circumstantial, that two witnesses are necessary to establish each particular; because the aptitude and coherence of the several circumstances often as fully confirm the truth of the story, as if all the witnesses were deponing to the same facts."

[33] Hume cautions lawyers against laying down any rule in this area, before concluding (ii, 385) that he had assumed that it was lawful to convict on the basis of circumstantial evidence only; that being a position grounded "in reason and necessity, and the law and practice of all other civilised realms." Hume refers (ii, 384 and 386) to *Stewart Abercromby*, 14 January 1723, in which a number of circumstances were used jointly to infer guilt of murder even although a material circumstance, that the pannel was alone with the deceased in a tavern near where the murder was committed, was spoken to by only one witness. Mr Abercromby had left his hat in the tavern. In dealing with the inadmissibility of hearsay, Hume adds a footnote explaining (ii, 406-407) that it is necessary to distinguish hearsay from "words uttered to a witness [which] are a substantial part of the *res gesta*, told by such witnesses" which explain why the person uttering the words acted in a particular way. He uses an analogy of the victim of a highway robbery in which the victim describes the robbery and the robber to a witness. The witness pursues and finds a person of that description carrying incriminatory items. The witness's evidence of the victim's verbal account of what happened would be "equally admissible in evidence as the rest of the story". Hume gives another example of the victim of a rape reporting the rape to her mother "recently after the fact" and her mother then seeking medical assistance. "What passes between [the victim] and her mother is a necessary portion of the thread of the mother's story, and serves to connect and expound the facts she swears to". Bell includes (ii, 273) *Duncan McMillan* (1833) in his supplemental notes. There, the Lord Justice Clerk (Boyle) defined the limits of corroboration in a rape trial by saying that, whilst the testimony of one witness was not sufficient, "if there were a single witness, corroborated by circumstances 'sufficient to satisfy the jury', they were entitled to convict".

*Burnett*

[34] John Burnett's *Treatise on various branches of the criminal law* was published posthumously in 1811. Burnett was an advocate, Advocate depute and sheriff of Haddington during a career which culminated in his appointment as Judge Admiral. His work is incomplete. It is occasionally cited, but not with the frequency or authority of either Hume or Alison (*infra*). Burnett deals separately with direct evidence on the one hand and direct and circumstantial evidence on the other. On direct evidence, he states (at 509), following Biblical and Roman tracts, that "*legal*" direct evidence requires two concurring witnesses, but that proof of collateral circumstances renders the testimony of the single witness "*legal*". Like Hume, Burnett noticed the difference between Scotland and England. He explains (at 515) that "The rule we have mentioned, as to the necessity of *two* witnesses to separate facts", does not apply "to what are merely collateral *circumstances* either when brought in aid of direct proof, or when the whole evidence is circumstantial".

[35] Burnett refers (at 515) to proof of "the fact charged" and "the substantive fact charged". He states that it is "in few cases" that two witnesses are called to prove circumstances, either by confirming direct evidence or by making out a circumstantial case. In a footnote, having referred to two cases cited by Hume, Burnett mentions "a strong instance of the contrary rule, as applicable to *fundamental* facts". This may be the first mention of such facts. In the same footnote, Burnett describes what facts and circumstances were proved, and not proved, in that instance. He cites *Isobel Williamson*, 1723 at Ayr, in which two witnesses saw the accused go towards the place where the deceased was found dead. One witness saw the two together, with the accused having her hands on the deceased's shoulders. Another witness saw the two engaged in a severe struggle. Shortly

after this the deceased was found dead. One witness deponed to the deceased's cravat being tied as tightly as possible around his neck. The jury found the charge not proven and the accused was acquitted.

[36] Burnett continues in the same cautionary vein as Hume (at 516):

> "… [W]here the facts, in a circumstantial case, are what may be termed *fundamental* in the cause, and either apply to the *corpus delicti* [the offence], … - There, something more is in general requisite, than the testimony of one witness to such facts. But, in truth, no general rule can properly be laid down with regard to such cases; for the other circumstances proved will necessarily affect the proof of a *fundamental* fact, and render it complete, though established only by one witness, in the same way as circumstances go to complete the *semiplena probatio* [half proof] of one witness regarding the *corpus delicti*."

[37] Burnett starts his chapter on direct and circumstantial evidence by stating (at 518), with a side note "Direct and circumstantial evidence the most satisfactory", that:

> "Though the law hold one witness swearing to the fact directly as not sufficient, it allows his evidence, when supported by circumstances, to be considered as amounting to full legal proof; and this constitutes that mixed evidence which is so common in the prosecution of crimes, and which is in many cases quite conclusive and satisfactory. For though the law no doubt consider the evidence of two unexceptionable witnesses swearing to the fact, as the most perfect and complete, it may sometimes happen, that even this sort of proof is not so convincing to the mind, as the joint evidence arising from *circumstances* and *direct testimony*."

He continues (519), in a passage which will have a bearing on the probative value of a *de recenti* statement:

> "What those circumstances are which ought to confirm and render complete the *semiplena probatio* of *one* witness, it is impossible to determine by any rule, - as the result depends upon the nature and quality of each circumstance, and their joint effect when combined; and also on the view taken of them by those who are to judge of the case. This only may be noticed, that the circumstances founded on must be *extrinsic* of the witness. No evidence, which goes merely to support the credibility of the witness in the account he has given of the fact to be proved, as by establishing that he had recently after communicated what he had seen or heard to another person, and had been all along consistent in his story, will be held as sufficient to supply the want of another witness to the fact. For though circumstances of this sort be competent and admissible to strengthen the credit of a witness, they still leave the fact, he speaks to, resting on his *single* testimony."

[38] In dealing specifically with rape, Burnett refers (at 553) to Sir Matthew Hale's statement that "it is an accusation easy to be made, hard to be proven, but harder to be defended by the person accused though innocent" (*Pleas of the Crown* 835). Sir Matthew was Lord Chief Justice of England. Burnett distinguishes (at 554) the position in Scotland which "requires various corroborating circumstances". The "recency and manner of her complaining is … a circumstance of weight as a matter of evidence". Burnett cites (at 554 fn) the case of *Cook*, September 1774, Dumfries, in which the complainer, aged 14, testified to being raped. She was heard to cry out, but there were no marks of violence on "her person or privities", which the surgeon said there would be if an immature girl were raped by a grown man. The *nymphaea* had not been pierced. Nevertheless, the jury found Mr Cook guilty. Lord Auchinleck, who was the father of James Boswell, sentenced him to death. Dealing specifically with the rule against the admission of hearsay, Burnett explains (at 601) that a statement which is part of the *res gesta* is excepted from this rule. He continues (at 602) in relation to a woman who has been raped, but who could not be a witness:

> "… [I]t is competent, and may be a material fact, *in corroboration* of any witness's testimony, to prove what he said *de recenti*."

*Alison*

[39] Archibald Alison's *Principles of the Criminal Law of Scotland* was published in 1832. Whilst paying homage (Preface) to Hume's work, "which must always form the foundation of our Criminal Jurisprudence", Alison's work was intended to be, and is, one of more practical utility. Alison's career at the Bar culminated with his appointment as Sheriff (Principal) of Lanarkshire. He was otherwise generally well known as an historian.

[40] When dealing with murder, Alison wrote (*Principles* at 73, para 24):

> "Legal evidence in murder, is founded either on the direct testimony of two witnesses, or of one witness with a train of circumstances, or of such a train of circumstances by themselves, as leave no reasonable doubt in the mind that the pannel was guilty."

He comments that "perhaps" the most important branch of the criminal law in practice, *viz.* sufficiency of evidence, was one on which little or no information was to be found in books. Juries were "perpetually misled by erroneous statements of what is really necessary to constitute legal proof". Having analysed a significant number of murder trials, Alison continues (at 89), as with Hume and Burnett, in a cautionary tone:

> "… [T]he measure of legal evidence can be determined by no other rule than that it must be such a chain of circumstances or such direct proof, as appears inconsistent with the prisoner's innocence, and leaves no reasonable doubt … that the prisoner is guilty … Unquestionably the evidence of one witness will not in any case be sufficient; that is to say, it will not do for the prosecutor to examine one witness and close his case. But, on the other hand, the evidence of one witness, accompanied by a train of circumstances, each link of which is established by a single unexceptionable testimony, is unquestionably sufficient; nay, a chain of circumstantial evidence alone, proved in the same manner, of itself often amounts to the most conclusive legal proof. No more specific rule can be laid down for the weighing of such testimony, but that it must be such as produces conviction of guilt in a reasonable mind…".

[41] In his treatment of rape, Alison refers (at 220) to the prospect of the woman concocting an allegation in order to preserve her character before observing that:

> "The principal point to attend to is, whether her statement, in regard to the *violence* used, is duly corroborated; and this is done in the most unexceptional way by such physical appearances as afford real evidence of the truth of her story, and after that by the evidence in regard to her subsequent disclosure of the crime to her relations, or the public authorities, and her previous character for modesty and correct demeanour."

Under reference to Sir Matthew Hale's comment, Alison describes (at 221) what circumstances may support the woman's account, including signs of injury and the nature of the *locus*, along with those indicating otherwise.

[42] In his companion volume, *Practice*, Alison laments (at 505) the absence of legal literature dealing with the examination of witnesses. Writing about hearsay generally, he states (at 515):

> "Farther, even in the case of the actual sufferer, it is not every account which he has given to others, which will be allowed to be repeated in evidence. It is those accounts only to which this privilege is extended, which are connected, more or less directly, with the *res gesta* of the injury, or which were so recently given after it, as to form, in some sort, a sequel to the actual violence. Upon this principle, the account which the injured party has given of the assault to his family, or those with whom he lodged, when he returned home, and exhibited his wounds, is clearly admissible, or which fell from him on that or the following day, when recounting the transaction, or showing his wounds to his friends; but a different decision would be given if an attempt were made to prop up his evidence by the account which he gave of it to strangers some days or weeks afterwards, and without the intervention of any thing which connected it with, and rendered it in some degree, the natural sequel of the violence."

He continues (at 551) by describing the requirements for corroboration in clear terms under reference to Hume (ii, 383):

> "14 The evidence of a single witness, how clear and conclusive soever, is not sufficient to warrant a conviction; but the evidence of one witness is sufficient, if it is supported by a train of circumstances, or even a chain of circumstances alone is sufficient, if it is so strong as to leave no doubt in a rational mind."

He cautions (at 551) that:

> "… [T]his rule is to be taken in a reasonable sense, and is not to be carried to the extravagant length to which it is often pushed by counsel, desirous of perplexing juries in cases too clear to admit of dispute on any rational grounds."

The absence of a second witness may be cured by a chain of circumstances, each link in which is proved "only by a single testimony" (at 551). Convictions can proceed on circumstantial evidence alone, provided it is sufficiently clear and conclusive as to leave no reasonable doubt in an intelligent mind.

[43] In specific contrast to Burnett (at 516), Alison states (*Practice* at 552) that there is no authority in modern practice for the proposition that two witnesses are required to prove

"the *fundamental facts*", such as the *corpus delicti* (the offence). Numerous convictions had been returned:

> "on no other evidence, as to the *corpus delicti*, than a single witness, supported by circumstances tending to bring home the guilt to the prisoner."

The same *indicia* (signs or indications of something) could "fix the crime on the prisoner" (at 552); that is prove the identity of the perpetrator.

***The textbooks***

*Dickson*

[44] The first edition of William Dickson's *Evidence* was published in 1855, when he was 32. He had drafted it in his early years at the Bar. He was later Advocate General in Mauritius before returning to be a sheriff at Glasgow. Dickson wrote (at para 2038) that:

> "… the testimony of one witness, however credible, is not full proof of any ground of action or defence, either in a civil or a criminal case. … [I]f the only evidence in support of a case is the uncorroborated testimony of one witness, it is the duty of the Court to direct the jury that the proof is insufficient in point of law."

He cites Stair, Hume, Burnett and Alison and the civil jury case of *Cleland* v *Paterson* (1837) 15 S 1246, in which a Division determined (Lord Mackenzie at 1248-9) that the Lord President (Hope) had erred in directing the jury that they could find for a party if they accepted the testimony of one particular witness alone.

[45] Dickson continues (at para 2039), in much the same vein as Hume and Alison had done in the earlier part of the century, as follows:

> "But this rule does not require that two witnesses should swear to every fact in the case. The direct evidence of one witness, supported by facts and circumstances is sufficient … [I]n trials for rape there is seldom any proof of the fact of violence beyond the statement of the woman, the proof being completed by corroborative circumstances…".

He added that (at para 2042):

> "… where proof consists of circumstantial evidence alone, it is not necessary for each item of it to be established by two witnesses. The mutual interlacing and coincidence of the circumstances themselves form an ample corroboration of the witnesses who depone to them."

[46] In dealing with *de recenti* statements, Dickson explains (at para 95) that:

> "Such expressions being the natural outpourings of feelings aroused by the recent injury, and still unsubsided, are a consequence and continuation of the *res gestae*, and corroborate the party's evidence…".

These passages remained unchanged in the second edition (1864; at paras 95, 2038, 2039 and 2042) and in that which tends to be cited as authority today, *viz*. the third (Grierson) edition (1887; ii, paras 258, 1807, 1808 and 1811).

*Trayner*

[47] In the fourth edition (1894) of his *Latin Maxims and Phrases*, John Trayner (later Lord Trayner) gives a concise explanation of what the Institutional Writers meant by *res gestae*. He says (at 551):

> "This phrase … signifies not only an act performed, but everything said or done at the time bearing upon or having reference to it. Thus it includes all statements made immediately before or immediately after any particular act so nearly connected with it in point of time as to be inseparable parts of the whole transaction, and incapable of omission from any narrative or testimony professing to be an account of it. Statements offered in evidence, which would otherwise be excluded as hearsay, are received when they form part of the *res gesta*."

He cites Hume (ii, 406 fn) in support of this. In due course, this will be analysed along with the contrary *dicta* in *Morton*.

*Macdonald*

[48] Macdonald's *Practical Treatise on the Criminal Law* is, and has been for some time, the leading authority on criminal law in the late 19th and 20th centuries. In the first, second and

third editions, Macdonald's treatment of corroboration is similar to that already seen in Hume, Alison and Dickson, all of whom he cites repeatedly in support of his text. The first edition was published in 1867, some time before Macdonald became Lord Justice Clerk in 1888. The first edition was issued after his first term as Lord Advocate. He prefaces (at 565 - 566) his description of sufficiency of evidence as consisting of only a few words:

> "The evidence of one witness is not sufficient to convict. But if a witness be corroborated by circumstances … this is sufficient …
>
> Circumstantial proof alone may be sufficient. It is not necessary that there should be two witnesses to prove *any* fact…" (emphasis added).

This is repeated in the second edition (1877; at 515-516) and the third (1894; at 495-496); being the last without editorial intervention.

[49] It is only in the fourth (MacGregor Mitchell) edition (1929) that Macdonald goes on to add (at 553) that:

> "… the evidence of one witness is not sufficient to prove a criminal libel, or establish *any fact essential to the commission of the crime*, such as the identity of a vessel charged with illegal trawling, or the accused's knowledge of the falsity of representations in a charge of fraud" (emphasis added).

The editor, later Lord Magregor Mitchell KC, was an advocate, and ultimately chairman of the Scottish Land Court.

[50] In the fifth edition (1948), which was edited by James Walker KC, clerk of justiciary, and DJ Stevenson, depute clerk, this passage is repeated and the following is added (at 335):

> "The essential idea of corroboration is that the testimony of one witness, whether direct to the actual commission of the crime, or indirect to some circumstance implicating the pannel in the commission of the crime, is enforced by the testimony, direct or indirect, of some other witness, so that there are concurrent testimonies, either to the same or different facts, each pointing to the pannel as the person by whom the crime was committed."

[51] In relation to *de recenti* statements, similar developments can be traced through the various editions of Macdonald. The first edition cites (at 546 - 547) Hume, Alison and Dickson in support of the following:

> "Where what is said by any one is part of the *res gestae*, proof in reference to it is competent…
>
> In cases of personal injury, the statements of the injured party after the occurrence may be proved, provided in the ordinary case they were made not later than a few hours after the offence. The greatest latitude is allowed in cases of injury to women, where accounts given one or two days after the occurrence are usually received. The latitude to be allowed is a question of circumstances. In one case a statement extorted a month after the occurrence, following on a partial disclosure made a week after the offence, was admitted."

There is no indication that there is a limit on the purpose to which such evidence, once admitted, can be put. The first edition of Dickson (i, at para 95 and 258) is cited, whereby such statements are to be regarded as a continuation of the *res gestae* and corroborative of the party's evidence (i, at para 258).

[52] Macdonald addresses (at 547 – 548) the corroborative value of *de recenti* statements directly when considering those made by children:

> "Although proof of statements made *de recenti* is generally confined to the case of the injured party, a young child *may be corroborated* by proof of statements made by him a short time after witnessing the offence" (emphasis added).

The second edition is in identical terms (at 479 - 498). A change appears in the third edition (1894) whereby Macdonald says (at 479) that children's *de recenti* statements merely add to the value of the child's evidence. There was no longer any mention of this type of evidence being corroborative. However, Macdonald still cites (at 479, fn 2 and 3) the passage in Dickson where Dickson states (1st ed, at para 95), in unequivocal terms, that such statements are corroborative.

[53] The fourth edition (1929) contains a significant change in relation to *de recenti* statements generally. It adds (at 532):

> "… Such statements should be used not so much as corroborative evidence, but as shewing that the injured party made a complaint at the earliest opportunity in order to obviate the criticism of failure to do so."

Several cases are cited. These will be considered in due course. They include *McLennan* v *HM Advocate* 1928 JC 39, although it supports the alternative view, along with *Anderson* v *McFarlane* (1899) 1 F (J) 36, *Morton* and *Burgh* v *HM Advocate* 1944 JC 77. *McLennan* is not cited in the fifth edition.

*Renton and Brown*

[54] Robert Renton and Henry Brown were very experienced procurators fiscal. Their co-authored text, *Criminal Procedure according to the Law of Scotland*, first published in 1909, is a practical manual of criminal procedure. By the time of the publication of the second edition in 1928, the book had become very popular with practitioners. As with the other works, an examination of its various editions will shed light on how the courts have approached corroboration and the use of *de recenti* statements on a day-to-day basis.

[55] On the matter of corroboration, the first edition explained (at 89) that Dickson's statement (3rd ed, at para 1807), that the testimony of one witness, however credible, was not full proof of any ground of action or defence, was subject to qualifications. Circumstantial evidence spoken to by separate witnesses was sufficient to supply the want of a second witness. Two witnesses were not required to prove any single fact in a case (at 90), or to prove a series of circumstantial links which built up a whole case. One witness could depone to each fact. This was largely unchanged (at 274 – 275) in the second edition, edited by George Thomson, who later became Lord Justice Clerk. The substance remained the

same in the third edition (1956; at 418), which was edited by Francis Watt QC, who was a Sheriff (Principal), assisted by DJ Stevenson (see Macdonald (5th ed)).

[56] The third edition (1956) stated (at 418) that there were limitations on the corroborative value of any statement made by a witness to another person. A witness was not corroborated by his own statements to others, unless those statements were within the *res gestae*. The passage essentially followed *Morton* (at 53; see the section on *Morton* below). This edition contained the first mention (at 419) of the need to corroborate any "essential fact".

[57] The fourth edition (1972), edited by Gerald Gordon QC, was in similar terms. It maintained (at para 18-59) the distinction between essential and other facts; stating that essential facts required to be "separately corroborated". The fifth edition, also edited by Professor Gordon, was a loose-leaf text which was maintained between 1983 – 1995. The treatment of the corroboration of essential facts was more limited (at para18-52) as follows:

> "*Where the evidence is wholly circumstantial*, the [*sic*?] only essential circumstances require to be separately corroborated" (emphasis added).

The sixth, and current, edition (1996 – 2023), reverts (at para 24-69) to a more general treatment whereby:

> "The basic requirement is that the crucial features of an offence, the *facta pro-banda*, (*sic*) i.e. the fact that the offence was committed and that it was committed by the accused, must be established by evidence from at least two sources."

[58] On the corroborative value of distress, Prof Gordon wrote (5th ed, at para 18-53):

> "The distressed state of the complainer shortly after a sexual assault is capable of corroborating her evidence that she was assaulted and was not a consenting party, but not to corroborate her identification of the accused. It is also available in cases of indecent assault to corroborate the complainer's evidence as to the facts of the case, save that it cannot corroborate her evidence of penetration or attempted penetration, or that she was physically injured."

The position is put similarly (at para 24-71) in the sixth edition. The treatment of *res gestae* and *de recenti* statements is largely consistent throughout the various editions. Evidence of statements which formed part of the *res gestae,* that is interwoven or intimately connected with the acts done, although not necessarily contemporaneous with them, would be admitted. Statements made by a complainer would also be admitted, if they were made not more than a few hours after the crime, while feelings on the subject were fresh. A greater latitude was allowed in cases of rape. *De recenti* statements made by child witnesses would be admitted for the purpose of checking the evidence given by the child at trial.

***Early Judicial Analysis***

*Lees v Macdonald*

[59] The search must be to find out what happened between the third and fourth editions of Macdonald. As Lord Justice Clerk, Macdonald chaired the first case of significance. *Lees* v *Macdonald* (1893) 20 R (J) 55, 3 White 468 was a private prosecution by the tenant of certain shootings in Inverness-shire. The offence was one of poaching. By statute, this could be proved by a single witness. It was so proved by the evidence of the local gamekeeper, who also spoke to the sole tenant's title to prosecute. That concluded the evidence, after which the accused ingeniously submitted, on behalf of the poaching crofter, that the prosecutor's title, as the sole person entitled to kill game on the estate, had not been proved by corroborated evidence. The sheriff agreed, but the High Court did not.

[60] The Lord Justice Clerk (Macdonald) said (at 56):

> "Where, in a criminal case, a witness depones that he is the proprietor of certain property, that fact is sufficiently proved unless the opposite party raises the question and impugns the accuracy of the evidence. The rule as to one witness being insufficient to prove a case does not apply. That rule only means that where there is no other evidence, either oral, documentary, or circumstantial, to prove a case than

> the evidence of one witness, the case must be held not proved. In the present case proof having been given by a credible witness that the appellant was in fact the tenant, it lay upon the accused, if he was to dispute the fact, to cross-examine the witness on that point, and if he so desired, to lead evidence to disprove it. As this was not done, it was … not open to the accused to dispute the fact in argument."

The Lord Justice Clerk referred (at 57) to analogous cases in which the official position of persons was "crucial". He continued:

> "… [I]n any case any fact can be proved by one witness although the whole case cannot be so proved. Thus, both on principle and authority … the appellant's title could be proved by one witness unless that witness's evidence was disputed …".

[61] The idea that a failure to cross-examine or to lead contrary evidence results in the matter being proved is not one that would now find favour (*Morton* at 55). Statutory innovations on the need to challenge certain matters, such as a special capacity, and the statement of uncontroversial evidence procedure may have superseded this. In any event, Lords McLaren and Low agreed with the Lord Justice Clerk. Lord McLaren added (at 58):

> "… [I]t is not necessary to call two witnesses to prove each incidental fact in a case. The rule that two witnesses are required to prove the grounds of action … has been … sometimes misunderstood. All that the law demands is that there should be two witnesses to prove a case, and provided that is so, any fact in the case may be proved by the testimony of one credible witness."

[62] The Lord Justice Clerk (Macdonald) also chaired *Anderson* v *McFarlane* (1899) 1 F (J) 36, in which one of the complaints (at 37) was that there had been no "direct corroboration" of a complainer's testimony that she had been assaulted by her employer, "except evidence that she had made statements to her mother, to the same effect as her evidence, three days after the alleged assault". Objection was taken that the statements were not *de recenti*, but it was established that she had spoken to her mother on the first occasion upon which she had seen her. Although the Lord Justice Clerk (with whom Lords Adam and Kincairney agreed)

said (at 37) that this was "not so much leading corroborative evidence", the conviction stood.

*Lockwood v Walker*

[63] At this point, there appears to have been general agreement within the court about the broad principles set out by the Institutional and later Writers. A question arises concerning whether that changed abruptly with the second case of importance: *Lockwood* v *Walker* 1910 SC (J) 3, (1909) 6 Adam 124. This involved a summary complaint of indecent conduct towards a child under puberty. The girl had testified to her age and the magistrate was satisfied from her appearance that she was under the age of puberty. The conviction was quashed. The same Lord Justice Clerk (Macdonald) said (at 5) that:

> "No doubt our law does not require that every fact in a case shall be proved by two witnesses, but it most certainly does require that every crucial fact shall be so proved, or proved where there is only one witness by corroborative facts and circumstances proved, or by corroborative documentary evidence."

The Lord Justice Clerk did not consider the magistrate's own observations of the girl's appearance to be corroborative. This case may signal the first use of the words "crucial fact", and the need to corroborate each one, as distinct from the idea that only one witness was required to speak to any fact which was to be used to corroborate direct testimony. *Lockwood* v *Walker* was followed in *McCourt* v *HM Advocate* 1913 SC (J) 6, where proof of the appellant's age was necessary for a conviction of being a habitual criminal. The Lord Justice Clerk (Macdonald) was again in the chair. He rejected (at 7) the idea that the jury's estimate of the appellant's age could corroborate. Lord Guthrie referred (at 8) to the general rule that an essential element in the case required corroboration.

*Scott v Jameson*

[64] The emerging focus on the proof of crucial facts continued in *Scott* v *Jameson* 1914 SC (J) 187. This requires a mention principally because it was an early precursor to *Gillespie* v *Macmillan*. Policemen were stationed at each of the entry and exit points of a measured distance. They calculated the speed of a car by starting their stopwatches at each point and then stopping them simultaneously to produce a difference which gave the time taken to cover the distance and hence the car's speed. The appellant argued that the testimony of the two policemen was the equivalent of only one witness. The accuracy of each stopwatch timing was "fundamental to the charge". There was a difference between facts which were merely important and those which were fundamental. The Lord Justice General was Alexander Ure, Lord Strathclyde. He identified (at 190) four important facts; "call them fundamental facts if you please". Each was capable of being proved by one witness, if the tribunal of fact regarded the quality of the testimony as reliable. Lords Dundas and Guthrie agreed. The latter explained (at 190) that, if evidence of only one fact were tendered, that fact would have to be proved by two witnesses. If several facts in a chain required proof, and these formed consecutive links leading to one conclusion, each may be proved by one witness.

*McLennan and McCrindle*

[65] Diverting from what requires to be corroborated to what might constitute corroboration, notably a *de recenti* statement, by the time of *McLennan* v *HM Advocate* 1928 JC 39, the Lord Justice General was the first Lord Clyde. In *McLennan*, a six year old boy spoke to having been the victim of lewd practices. When he returned home, soon after the incident, his father and mother spoke to his appearance, which "indicated interference", and

the disarrangement of his clothing. The parents each gave evidence of the boy's account at the time. He had two pennies in his pocket, which the accused admitted he had given to the boy in his house. In response to a submission, that the parents' testimony was simply a repetition of the boy's testimony, the Lord Justice General, with whom Lords Sands and Blackburn agreed, said (at 41) that:

> "… it is a mistake to suppose that the evidence of the parents (if believed) regarding the explanations given by the boy with regard to his condition when he returned home do not provide good corroboration."

The Lord Justice General cited (at 41 - 42) Dickson (3rd ed, at 258) on *de recenti* statements being "a consequence and continuation of the *res gestae* and [corroborative of] the party's evidence". This applied in the case, even if the boy had not made the statements whilst in a particularly distressed state.

[66] Two years later, following publication of the fourth edition of Macdonald, in *McCrindle* v *Macmillan* 1930 JC 56, the charge was one of indecent assault on a 13 year old girl. There was no doubt that such an assault had occurred. The issue was whether the appellant had been proved to be the assailant. The complainer had identified the appellant, who was known to her. He was proved to have been near the *locus* at the relevant time. The complainer's parents testified that, within a few minutes of the assault, she had stated that the accused had been the perpetrator; something which she repeated shortly thereafter when confronted with the accused. She had shown signs of alarm during that meeting. Lord Morison, who delivered the opinion of the court, which included the Lord Justice General (Clyde) and Lord Blackburn, followed (at 60) *McLennan* and its citation of *Dickson*. The advising was on the day before the Full Bench decision in *Moorov* v *HM Advocate* 1930 JC 68

over which the Lord Justice General (Clyde), Lord Justice Clerk (Alness) and Lords Ormidale, Anderson, Sands, Blackburn and Morison presided.

*Strathern* v *Lambie*

[67] Continuing chronologically, but returning to what required to be corroborated, *Strathern* v *Lambie* 1934 JC 137 was a stated case involving a road accident. By this time the Lord Justice Clerk was Craigie Aitchison, who had been a leading defence counsel (see eg *Slater* v *HM Advocate* 1928 JC 94) before becoming Lord Advocate. The respondent in *Strathern* had been identified by only one policeman, who had noted his name and address. His evidence had not been challenged in cross-examination or otherwise. The procurator fiscal successfully appealed the sheriff's verdict of not proven. It was accepted by the Crown (at 139) that a crucial fact required to be corroborated, but it did not follow that every fact, even an important one such as identification, required to be spoken to by two witnesses. One may be enough. Lord Hunter took the view (at 141) that, although "a vital and crucial point in the prosecution must rest on something more than … one witness", what such a point was depended on the circumstances. Although identification was normally a crucial point, it was not in that case; it having been established that the driver had given the policeman his name and address. Even if it had been crucial, there were enough facts and circumstances to provide the necessary corroboration, including apparently a lack of cross-examination. Lord Anderson agreed, adding that the respondent answering to his citation was such a circumstance.

[68] The Lord Justice Clerk agreed with the result. However, in a passage which may not reflect well on either the judges or practitioners of the time, he went on to describe (at 144) "the rule of two witnesses" as "frequently stated but seldom understood". He continued:

> "It does not mean that the requirements of legal evidence are satisfied merely by the deponing of two witnesses to matters relating to the crime. What the rule does mean is that, before one can find a verdict of guilty against the person accused, it is necessary to associate or identify that person with the crime libelled by at least two witnesses. The crime itself may be proved by ever so many witnesses and yet the case fail in point of proof, in respect that the accused was not identified by two witnesses with the commission of the crime. …
>
> It has sometimes been said that this requirement of legal proof is satisfied by the oral testimony of one witness corroborated by facts and circumstances. This is simply another way of stating the same thing. Facts and circumstances do not prove themselves. … It is … altogether illegitimate to take the evidence of one witness who depones directly to the identity of the accused with the commission of the crime, and who also depones to certain facts and circumstances which might be held to associate the accused with the crime, and then to go on to treat these facts as corroboration of the witness's direct testimony. The essence of corroboration is that it is something from an independent source. A witness can never corroborate himself. The testimony of a witness who depones to two matters does not thereby become the testimony of two witnesses."

It must have been the effect of the court's focus on the need to prove crucial facts, in the years after *Lockwood* v *Walker*, which prompted the change in the fourth edition of Macdonald, notwithstanding contrary authority in *Scott* v *Jameson*.

*Morton* v *HM Advocate*

[69] When *Morton* v *HM Advocate* 1938 JC 50 was heard, none of the judges who had been involved in *McClennan* and *McCrindle* v *Macmillan* were on the bench. *Morton* is a seminal case in the annals of the law of evidence. The appellant had been charged with pulling the complainer into a close and indecently assaulting her. She identified the appellant, who was a stranger to her. She was not cross-examined on that. The assault was witnessed by a third party, but that party was unable to identify the assailant. There was therefore only one witness deponing to the appellant as the perpetrator. The complainer's brother spoke to his sister returning home in a distressed condition and telling him what had happened. A Full Bench, which included the Lord Justice General (Normand) and the Lord Justice Clerk

(Aitchison), was convened, presumably because the earlier authorities were going to be called into question. It is interesting to note, in that regard, the Justiciary Cases reporter's summary (at 51) of the appellant's argument and its effect on the bench:

> "Argued for the appellant;- There was only one witness whose evidence implicated the appellant in the commission of the crime libelled. That was not enough. [The Court then called upon counsel for the respondent.]"

[70] The Crown argued that, although a conviction based on the evidence of one witness could not stand, any single item in a series of facts leading to a conviction, including identification, could be proved by one witness. The Crown relied upon *Strathern* v *Lambie*, *Scott* v *Jameson*, *Lees* v *Macdonald* and *McCrindle* v *Macmillan*. The complainer had not been cross-examined on identity and that was a matter to be taken into account on sufficiency. The Lord Justice Clerk delivered the opinion of the court. He focused the issue on whether there was any corroboration of the direct testimony of the complainer that she was assaulted by the appellant. The only issue which was raised in the appeal was lack of corroboration of identity. Founding upon Hume (ii, 383-4), the Lord Justice Clerk said (at 52):

> "It is a firmly established rule of our criminal law that a person cannot be convicted of a crime … on the uncorroborated testimony of one witness however credible…".

*McCrindle* v *Macmillan* and *McLennan* had proceeded upon a misconception of the true character of corroboration.

[71] The Lord Justice Clerk continued (at 53) in relation to the import of the complainer's statement to her brother as potential corroboration in relation to assault, following *McCrindle* v *Macmillan*:

> "A statement made by an injured party *de recenti*, unless it can be brought within the rule of *res gestae*, is ordinarily inadmissible as being hearsay only, but an exception is allowed in the case of sexual assaults upon women and children, including sexual offences against young boys. In cases of that kind the Court will allow the evidence of complaints or statements *de recenti* made by the injured party, for the limited

> purpose of showing that the conduct of the injured party has been consistent and that the story is not an afterthought, and, in the case of assaults upon women, to negative consent. A complaint *de recenti* increases the probability that the complaint is true and not concocted, and the absence of complaint where sexual offences are alleged is always a material point for the defence. But it must be clearly affirmed that the evidence is admissible as bearing upon credibility only, and the statements of an injured party, although made *de recenti* of the commission of a crime, do not in law amount to corroboration. The essential idea of corroboration is that the testimony of one witness, whether direct to the actual commission of the crime, or indirect to some circumstance implicating the panel in the commission of the crime, is enforced by the testimony, direct or indirect, of some other witness, so that there are concurrent testimonies, either to the same or to different facts, each pointing to the panel as the person by whom the crime was committed. It is this conjunction of separate and independent testimonies, each incriminating, that makes corroboration. A statement of the injured party *de recenti* is nothing but the statement of the injured party, and it is not evidence of the fact complained of."

The Lord Justice Clerk was of the view that the error in *Strathern* was in holding that identification of the driver of a car by a policeman could be corroborated by facts and circumstances which were spoken to only by the same policeman. He regarded (at 54) Lord McLaren's *dictum* in *Lees* v *Mcdonald* as not open to question.

***Post Morton***

*O'Hara* v *Central SMT*

[72] At the time of *Morton*, the requirement for corroboration applied in civil cases; both to pursuers and, where the onus was reversed, to defenders. The requirement was abolished in personal injury cases in 1968 (Law Reform (Miscellaneous Provisions) Act 1968, s 9) and in all civil cases in 1988 (Civil Evidence (Scotland) Act 1988, s 1). *O'Hara* v *Central SMT* 1941 SC 363 involved a collision caused by a swerving bus. The driver sought to attribute this to a pedestrian who had run out in front of him. The driver spoke to the pedestrian immediately after the accident. The pedestrian, in the presence of the conductress, admitted fault. He gave the conductress a note of his name and address. This

was spoken to by the conductress. The note was given to a policeman about ten minutes later. The policeman spoke to a person in a nearby cinema, but that person denied being the cause of the swerve. He could not be found at the time of the proof.

[73] The Lord President was Lord Normand, who had chaired the Full Bench in *Morton*. In *O'Hara* v *Central SMT* he said (at 379):

> "Corroboration may be by facts and circumstances proved by other evidence than that of the single witness who is to be corroborated. There is sufficient corroboration if the facts and circumstances proved are not only consistent with the evidence of the single witness, but more consistent with it than with any competing account of the events spoken to by him. Accordingly, if the facts and circumstances proved by other witnesses fit in to his narrative so as to make it the most probable account of the events, the requirements of legal proof are satisfied."

The Lord President regarded what the pedestrian had told the driver, as spoken to by the conductress in the immediate aftermath of the accident (ie after it had happened), as part of the *res gestae* (ie the whole circumstances of the crime; Trayner: *Latin Maxims* 551) and hence corroborative. He explained (at 381):

> "The principle on which evidence of the *res gestae*, including hearsay evidence, is admitted is that words and events may be so closely inter-related that the truth can only be discovered when the words accompanying the events are disclosed. But it is not essential that the words should be absolutely contemporaneous with the events (see eg *AB* v *CD* [(1848) 11 D 289]). What is essential is that there should be close association, and that the words sought to be proved by hearsay should be at least *de recenti* and not after an interval which would allow time for reflection and for concocting a story … In *Longworth* v *Yelverton* [(1862) 24 D 696] Lord Ardmillan … lays down [at 697] the principle that, when any particular statements are so connected with acts or facts given in evidence that the dissociation of the statements from the acts or facts to which they relate would frustrate the ends of justice and impede the discovery of the truth, then that dissociation is prevented, the statements are treated as *partes rei gestae* and … are viewed as within the exception to the rule (against hearsay) and are admitted accordingly…".

Lord Moncrieff (at 390) distinguished between an exclamation "forced out of a witness by the emotion" of an event and a statement made after it had concluded. Such an exclamation was a piece of real evidence.

*Burgh to Dalton*

[74] *Burgh* v *HM Advocate* 1944 JC 77 throws some light on the approach to *de recenti* statements as corroboration both before and after *Morton*. The bench had again changed and the new Lord Justice Clerk (Cooper) was in the chair. Lord Burgh had been charged with lewd practices against two young girls. Mutual corroboration applied. The sheriff directed the jury that evidence of the mother of one of the girls, about what the girls had said to her shortly after the incident, corroborated the girls' evidence. The appeal was refused on the basis that there was no miscarriage of justice, but the Lord Justice Clerk agreed (at 81) that, following *Morton*, the sheriff had misdirected the jury that the mother's evidence could provide corroboration. He continued:

> "As a proposition of strict law addressed to a lawyer the first of these statements has been unsound since the decision in *Morton*, in which it was held that a complaint *de recenti* does not *in law* amount to corroboration but merely increases the probability that the complaint is true and not concocted, (p 53). In many cases this distinction is vital to the legal issue whether or not the case discloses that irreducible minimum of evidence from at least two witnesses implicating the accused, without which a verdict of guilty cannot be returned, or if returned, cannot be supported. … [The mother's] evidence added no new fact or circumstance to the narrative. It afforded added evidence of the fact that the children hurried home and told their story, as they had said they did, and that the story was the same story."

[75] He added that, despite the fact that the mother's evidence did not amount to corroboration, there was no miscarriage of justice because the jury would have been entitled to convict on the basis of the mutual corroboration of each of the girl's stories provided to the other:

> "In the ordinary popular sense of the term, [the mother's] evidence *did* provide 'corroboration,' in the sense that it reinforced the credibility of both the children: and once the credibility of both was established, their joint story automatically provided its own corroboration in the legal sense – both direct, and under the doctrine of *Moorov*. Accepting it, accordingly, that at this point the first version of the Sheriff-substitute's direction was erroneous as a statement of law, I find it quite impossible

> … to hold that a complete and unexceptionable explanation of the modern rule would have made the faintest difference, or that the jury were in any sense misled or diverted from the proper discharge of their function. No reasonable jury, properly directed, would have come to any different conclusion."

Lords Fleming and Jamieson agreed.

[76] Moving back to what requires corroboration, but not moving back in time, in *Bisset* v *Anderson* 1949 JC 106 the appellant was charged with using commercial petrol in a private car. Petrol was rationed at the time. The appellant had disconnected the pipe between the filler cap and the tank so that anyone trying to extract petrol for testing would think that the tank was empty. Once reconnected, the petrol was analysed. The analyst certified the petrol as commercial. The court considered the effect of a regulation that declared the analyst's certificate to be "evidence of the facts therein stated". It was held that the certificate was insufficient proof, in the absence of corroboration. Lord Cooper, who was now the Lord Justice General, and with whom Lords Carmont and Keith agreed, referred (at 110) to *Morton* as meaning:

> "In other words the evidence of a single witness, however credible, is insufficient at common law to establish the truth of any essential fact required for a criminal conviction."

*Callan* v *McFadyean* 1950 JC 82, which concerned a similar statutory provision, was to the same effect; Lord Russell repeating (at 87) the need to corroborate "any essential fact".

[77] *Dalton* v *HM Advocate* (HCJAC, 14 March 1951) is reported (at 1951 JC 76 and SLT 294) on a limited point with which this appeal is not concerned. The unreported opinion of Lord Mackay is of some note. The appellant was convicted of an attempt to pervert the course of justice by persuading a shop assistant, who was a witness to a robbery, not to identify a particular individual. The witness spoke to this event, at which no-one else was present. The appellant admitted going to the shop after the robbery, but explained that

he did so to conduct some business with the shop owner. The issue was whether there was corroboration that the crime had taken place. There was circumstantial evidence that the appellant had wanted to speak to the shop owner because his friends were in trouble. Lord Mackay, who was sitting with the Lord Justice Clerk (Thomson) and Lord Patrick, commented on *Morton*, by making a general point about the undesirability of collecting isolated passages from cases dealing with crimes of a different sort and reading them as if they applied generally. He added (at 5 – 6):

> "… [C]rimes differ in kind in such a way as to affect the amount and even kind of corroboration to be looked for. … [C]rimes which are always found to be done in secret and intentionally of necessity, apart from other people, must receive a more favourable view from the Court in relation to this factual corroboration. Otherwise all these would never be detected and certainly never be proved."

In such cases, "corroboration may often not be required or become very slight".

*Gillespie* v *Macmillan*

[78] It is central to an understanding of the more recent cases on corroboration to grasp what occurred in the wake of the Full Bench in *Gillespie* v *Macmillan* 1957 JC 31. In the months prior to *Gillespie* v *Macmillan*, the court had heard *Farrell* v *Concannon* 1957 JC 12 in which a sheriff had found a drink driving charge not proven on the basis that the Crown had failed to prove by corroborated evidence that the accused had been advised that he did not need to submit to a medical examination. The court held that this fact could be proved by a single witness. The new Lord Justice General was Lord Clyde, who was the son of his namesake in *McCrindle* v *Macmillan* and *McLennan*. He said (at 17), under reference to *Morton* (at 54-55), that:

> "Apart, however, from the question of implication in the crime (and a question of identification falls into this category) there is no hard and fast rule … which requires every fact in the case to be proved by the evidence of two witnesses."

Lord Carmont did not dissent. Lord Sorn agreed, adding (at 19) that it could not be said that the accused's implication in the crime depended upon the evidence of a single witness speaking to the accused being warned of his right not to be medically examined.

[79] *Gillespie* v *Macmillan* was a speeding case. It was very similar to *Scott* v *Jameson*. Two policemen stood on a road 440 yards apart. If the policeman at the start thought that a car was speeding, he started his stopwatch and then got on his bicycle thus signalling to the second policeman to use his stopwatch when the car passed him. The car was stopped by a third policemen. The two stopwatches were only then stopped simultaneously in the presence of all three policemen and the appellant. The difference in the two readings was the time that was taken by the car to travel over the measured distance (17 seconds). That enabled the speed to be calculated at 52 mph in a 30 mph zone. The sheriff accepted the testimony of the two policemen that they had started and stopped their stopwatches when they said they did. The argument for the appellant was that there was insufficient evidence because the exact moments of entry into, and exit from, the measured distance were each spoken to by only one policeman.

[80] The Lord Justice General began his analysis by stating (at 35 - 36) that, following Alison, Hume and Dickson, it was "well settled that no conviction … will stand if it is based upon the evidence of only a single witness" but that "it is equally well settled that two witnesses are not required to prove every fact in a case". He continued (at 36):

> "In between these two extremes there is an infinite variety of possible situations in which the question of sufficiency of evidence can arise, and no single test of sufficiency which will solve every such situation has ever been or can be laid down. The matter must depend in the last resort upon whether the evidence is sufficient to carry the case beyond mere suspicion and into the sphere where it satisfies the tribunal that the case is proved beyond reasonable doubt.

> … [I]n regard to the question of whether or not a crime has been committed, certain principles are now quite settled. Firstly, the evidence of a single witness to the commission of the crime may be sufficiently corroborated by surrounding facts and circumstances, so as to establish the necessary degree of certainty. … Secondly, in a case of circumstantial evidence, two witnesses are not necessary to each circumstance. … [I]n a case of circumstantial evidence it is not a matter of one witness corroborating another, for each may be speaking to a quite separate and independent fact. It is the mutual interlacing and coincidence of these separate facts which can establish the case against the accused."

[81] The Lord Justice General considered *Gillespie* v *Macmillan* to be a circumstantial case. The appellant had not been accused of passing either of the two points at an excessive speed, but of doing so between these points. The times at which he entered and exited the measured distance were separate links in a consecutive chain. The links were "clearly interlaced with one another by the steps taken by the three policemen". There was no need for each link to be corroborated separately. He reasoned (at 36 – 37), following what had been said in the similar circumstances of *Scott* v *Jameson*, that:

> "Any other conclusion would require to be based upon the view that each separate fact in a case must be proved by two witnesses, a proposition which has been negatived over and over again."

[82] The Lord Justice General took note (at 37) of what had been said in *Morton*; observing that the issue in *Morton* had been the identity of the perpetrator. On that matter, two witnesses were essential, but *Morton* did not suggest that two witnesses were required for every link in a chain of circumstantial evidence. Lord McLaren's *dictum* in *Lees* v *Macdonald* had been described in *Morton* as unobjectionable. In *Lockwood* v *Walker* the facts relative to the crime had been adequately proved but "a quite independent, although essential, matter regarding the age of the child was spoken to only in general terms by the child herself". That was "a quite different problem". The Lord Justice General considered (at 38) his

predecessor's observation in *Bisset* v *Anderson* that the evidence of one witness was insufficient to establish any essential fact. He commented that:

> "This observation, so widely stated, … would appear to be directly contradicted by … Lord McLaren's opinion [in *Lees* v *Macdonald*]… quoted with complete approval in *Morton* … Moreover the observation is also irreconcilable with both Hume (ii, 384) and Alison (*Practice* 552) and is … unsound."

The Lord Justice General explained that the question of what evidence was sufficient for identification had always been treated differently from that required to establish the crime. "In questions of incriminating an accused two witnesses at least are necessary".

[83] The opinion of the Lord Justice Clerk (Thomson) in *Gillespie* v *Macmillan* (at 38 *et seq*) deserves extensive quotation:

> "Nothing is better established in our law than that no one shall be convicted on the testimony of a single witness, however credible. Before any question of the evaluation of the evidence arises, there must be proof of facts emanating from at least two separate and independent sources.
>
> The rule is well understood and is applied day and daily to infinitely varying sets of circumstances. Sometimes the problem of legal sufficiency arises on the issue of whether a crime has been committed; sometimes the issue is whether it was the accused who perpetrated the crime; sometimes there may be a separate and independent issue which is a condition precedent to guilt, as in *Lockwood* v *Walker*. But, however the problem of sufficiency arises, the solution depends on the same principles.
>
> The rule and the principles of its application are fully discussed by Hume in a way on which nobody has improved. …
>
> I do not think that the sufficiency of proof of a criminal charge can be any more precisely defined than by saying that there must be facts emanating from at least two separate and independent sources.
>
> No doubt in the vast majority of cases the items of evidence which go towards the making of proof have a certain continuity one with another, and it is the discovery of the nexus between them, giving the aptitude and coherence to the independent sources, which makes it safe not to demand two witnesses to each item. To use the ordinary metaphor of the chain, the fact that there is a chain persuades the mind and makes it unnecessary to have two witnesses to each link. So too in the metaphor of the mosaic or the picture, each piece of the jigsaw gets strength from its neighbours and in turn contributes strength to them. The importance of these considerations cannot be gainsaid, but … they are more strictly relevant to the problem of the

> evaluation of the evidence – particularly circumstantial evidence - than to the problem before us of technical sufficiency. …
>
> If law were an exact science or even a department of logic, there might be something to be said for [the appellant's] argument. By relying on the disparate qualities of space and time the logician can prove that in a race the hare can never overtake the tortoise. But law is a practical affair and has to approach its problems in a mundane common-sense way. We cannot expect always to have a tidy and interrelated picture; in real life a surrealistic element is apt to creep in, and the picture, though untidy and unharmonious, may be a picture all the same. In the picture which this case presents we have certain elements which make for continuity. There are the measured stretch, the synchronised watches. The analytical approach to the problem is over subtle and over-simplifies the problem. When one views the problem as a practical issue, the only risk is that the knob was not pressed at the precise moment; in other words, that the presser was unreliable for some reason or another. The safeguard against this risk is whether the tribunal believes the witness, and that is the safeguard which may operate whenever a link in the chain or a tile in the mosaic or a piece in the jigsaw is spoken to by one witness only. But this just shows that the appellant's argument depends on value rather than sufficiency.
>
> Hume fully realised the distinction between the two questions of legal sufficiency and value and that the ultimate justification for not requiring two witnesses to each separate item was the tribunal's acceptance of the one witness as credible. He also fully appreciated the difficulty and the undesirability of attempting to lay down any precise rules."

The Lord Justice Clerk concluded (at 41) by repeating that:

> "… nobody has improved on Hume's judicious and guardedly general statement of the law. Nobody has added anything to it … The problems arising are so various and so different that each has to be solved on its own merits in a practical way, and the decision in one case rarely throws much light on the solution of another."

Lords Russell, Sorn and Blades agreed.

*Crucial facts – academic work*

[84] In the years which followed, *Gillespie* v *Macmillan* was the subject of considerable criticism. In an anonymous article published in the Scots Law Times (*Corroboration of Evidence in Scottish Criminal Law* 1958 SLT (news) 137), it was argued that the court had departed from Hume and had relied on the testimony of a single witness (at 138); maintaining that the testimony of the policemen was consecutive and not concurrent. It

concluded (at 141) that *Gillespie* v *Macmillan* would result in it being left to juries to consider whether they should rely for a conviction on the uncorroborated testimony of a single witness. This did not happen.

[85] In a more measured and thoughtful piece, Professor Wilson (*The Logic of Corroboration* (1960) 76 SLR 101) argued that a criminal charge could be stated as a proposition of fact which contained a number of ingredients. These were the *facta probanda*; otherwise essential, vital or crucial facts, each of which, until *Gillespie* v *Macmillan*, required proof by two witnesses. *Gillespie* v *Macmillan* was wrong because it regarded the evidence as circumstantial rather than looking at the three facts (time of entry, time of exit and distance) as essential ingredients. In so doing it had introduced a new theory of corroboration, distinct from the old one which was exemplified by *Morton*. This article ended in a somewhat journalistic fashion, suggesting that *Gillespie* v *Macmillan* had returned the justice system to a place beneath the palm tree. This did not occur either.

[86] It was against this background that the first edition of Walker & Walker: *Evidence* was published in 1964. This was a seminal work which would have a major influence on all students and practitioners, including those who became judges, over the next four decades. Alan Walker QC was the Sheriff (Principal) of Lanarkshire and Norman Walker had been an advocate and was a sheriff at Glasgow. Chapter XXX dealt with sufficiency of evidence. It postulated (at para 381), in apparent contradiction of the Institutional Writers, that evidence was concerned with proof: "not of cases, but of facts …". Facts fell into three classes: (1) crucial; (2) evidential; and (3) procedural. The crucial facts (at para 382) were the *facta probanda* which must be averred for the libel to be relevant. Each required to be proved either by the direct evidence of two witnesses, or by two or more evidential facts spoken to

by separate witnesses, from which the crucial fact may be inferred, or by a combination of direct and indirect evidence from different witnesses.

[87] It was the express view of Walkers that Lord McLaren's *dictum* in *Lees* v *Macdonald* was irreconcilable with a number of cases which Walkers subsequently cited, including *Lockwood* v *Walker*. Dealing specifically with crucial facts in criminal cases, Walkers stated (at para 383) that the implication of an accused in the commission of a crime was one such fact. On the commission itself, some crimes, such as assault, consisted of a single act, which was also a crucial fact. Others were compound, in the sense of arising from a coincidence of two or more independent acts, each of which was crucial. Lewd and libidinous practices had two crucial facts, the practices and the age of the complainer.

[88] Evidential or circumstantial facts (para 386) were those from which, in combination, a crucial fact could be inferred. The evidence of a single witness was enough to prove each evidential or circumstantial fact. An evidential fact could be used in combination with, and provide corroboration for, the direct evidence of a single witness. In criminal cases, Walkers referred (at para 387) to the cable and chain analogies. On the latter, Walkers cited *Gillespie* v *Macmillan,* but stated that it decided that there were three essential facts in that case, each of which could be proved by the evidence of a single witness (see also para 9, fn 11). A reference to the two critical articles was added. The basic structure and reasoning in the first edition of Walkers is maintained throughout the second to fifth (2000 - 2020 Ross and Chalmers ed, Chapter 5) editions.

[89] In 1980 the Scottish Law Commission issued their Consultative Memorandum (No 46) on *The Law of Evidence*. Paragraph X.03 is instructive:

> "The facts to be corroborated

> Confusion appears to have arisen from dicta by Lord Justice-Clerk Macdonald and Lord M'Laren in *Lees* v *Macdonald*, which if applied to proof of *facta probanda*, would be destructive of the principle of corroboration. It seems clear that these dicta were not intended to be so applied, the case being concerned with proof of a procedural fact, but they were cited nevertheless by Lord Justice-General Clyde in *Gillespie* v *MacMillan*, which followed *Scott* v *Jameson*. These two cases propound a doctrine that so long as facts proving a criminal charge emanate from two separate and independent sources, not every essential fact requires to be proved by two witnesses. Such a doctrine is not in accordance with the general principle of corroboration. It is thought, however, that *Gillespie* has only been followed in cases where the facts are virtually identical to those with which it dealt, and it seems the police now rarely employ the method of calculating speed which caused the controversy. Accordingly there may be no necessity to legislate on this topic."

[90] The Memorandum proceeded on the basis of a research paper by Sheriff, later Lord, Macphail. A revised version of his paper was subsequently published in 1987. This adopted (at para 23.01) the categorisation of crucial, evidential and procedural facts which Walkers had advanced. It dealt (at para 23.04) with the facts to be corroborated, stating that *Gillespie* v *Macmillan* was inconsistent with what was otherwise generally accepted; that each crucial fact required to be corroborated, while evidential facts did not. Macphail repeated (at para 23.04) that, if the *dicta* of the Lord Justice Clerk and Lord McLaren in *Lees* v *Macdonald* were applied to *facta probanda*, "they would be destructive of the principle of corroboration". Macphail followed Prof Wilson's reference to there being three "ingredients" in *Gillespie* v *Macmillan*, each of which ought to have been corroborated. He maintained that *Gillespie* v *Macmillan* was wrong in principle in so far as it suggested that, so long as the facts proving a criminal charge emanate from two sources, not every fact required to be proved by two witnesses. So thought "a substantial number of experienced practitioners" (para 23.05). If the principle were to be relied on by the Crown in the future, mused Macphail, another Full Bench might have to be convened.

***Distress as corroboration cases***

*Yates and following*

[91] *Yates* v *HM Advocate* 1990 JC 378 (27 May 1976, addendum to *Moore* v *HM Advocate* 1990 JC 371) is said to be the *fons et origo* (source and origin) of the development of distress as corroboration. It involved a charge of rape in which, intercourse having been admitted, the jury were faced with two competing accounts. The complainer testified that she was 16. She was on her way home on a bus. The appellant, who was a stranger, was also on the bus. He followed her when she got off. He produced a knife and, as a result of that and accompanying threats, forced her to go to a secluded spot where he raped her. She went home immediately, in a shocked condition. The appellant maintained that everything had occurred with the complainer's consent. The issue was whether there was corroboration that the intercourse had been forced upon her against her will.

[92] The Lord Justice General was Lord Emslie. In delivering the opinion of the court (including Lords Avonside and Johnston), he identified (at 378) the issue as being whether there was

> "… corroboration of the girl's account of the transaction and of course, fundamentally, whether the jury believed or disbelieved the version of either. On the assumption that the jury accepted the girl as a credible witness and believed all her evidence of what took place, what was left was the search for corroboration of her evidence of intercourse being forced upon her against her will."

He described (at 379) a passage in the judge's directions to the jury as:

> "dealing with the broad and clearly correct proposition that evidence as to the condition of the alleged victim of rape is capable of affording corroboration by credible evidence … that she has been raped."

[93] The Lord Justice General stated that the charge, which libelled the use of a knife, was not one of a series of separate crimes. It did not charge the crime of assault with a knife.

The charge set out the modus of the crime of rape. The Lord Justice General continued (at 379-380):

> "… [O]n the assumption that the complainer gives credible evidence of the various elements of force which she says were applied to induce her to submit to intercourse the search thereafter is simply to see whether there is evidence in general which supports the broad proposition of force, details of which have been given by the girl. In the nature of things it would be very rare to find any specific corroboration of any specific element in the modus of the crime of rape committed in a secret place, and in this case the jury were quite entitled to bring in a verdict of guilty as libelled including a reference to the knife, just as they were entitled to bring in a verdict of guilty as libelled though there was no direct corroboration either of the fact that according to the complainer the applicant seized hold of her from behind, place[d] a hand over her mouth and so on."

[94] The appellant in *Begg* v *Tudhope* 1983 SCCR 32 was a teacher who had been convicted of two charges of indecent assault on pupils. On one charge, the only evidence was that of the complainer. On the other, in addition to the complainer, there was evidence that a few minutes after the incident, which occurred in the appellant's room, she had returned to her classroom. When the bell rang for the end of the class, she complained to her teacher that the appellant had kissed her. She became distressed, but there was no evidence that she had been distressed earlier. Two other teachers spoke to the complainer being in a distressed condition at her home some three hours later. The appeal was refused on the basis that mutual corroboration applied. The Lord Justice Clerk (Wheatley) was of the opinion that the lapse in time between the assault and the distress spoken to by the two teachers who had gone to the complainer's home took it out of the category of being corroborative of the complainer's account. He doubted (at 39) whether the same could be said about the evidence of the earlier distress which had been displayed to the class teacher. Lord Stott, had (at 39) "no doubt that evidence of an offence of the type alleged may be corroborated by

evidence of the girl's condition immediately after". However, the distress had not been sufficiently immediate.

[95] In *Gracey* v *HM Advocate* 1987 JC 45 the court followed *Yates*. Intercourse had been admitted. The only issue was whether the complainer's resistance had been overcome by force. The Crown relied on the complainer's distress as spoken to by a friend, to whose house she had gone immediately after the incident. The Lord Justice Clerk (Ross), delivering the opinion of the court, said (at 46) that "the matter is correctly stated by the Lord Justice General" in *Yates*.

[96] *Stephen* v *HM Advocate* 1987 SCCR 570 is in the same mould, although there was evidence of physical injury in the form of scratches to the appellant's abdomen too. Intercourse was denied, although some intimate conduct was accepted. The Crown had amended the charge to one of attempted rape, on the basis that they could not prove penetration, albeit that the complainer had spoken to a very violent completed rape. She had been walking home on her own, when she met the appellant who took hold of her, carried her to the verge of the road and forcibly raped her. There had been medical evidence pointing to intercourse within a period of six hours of the doctor's examination, but it was not disputed that the complainer had had consensual intercourse with another person within that timescale.

[97] In determining that evidence of, *inter alia*, distress immediately after the incident was sufficient corroboration of the charge as amended, the Lord Justice General (Emslie), delivering the opinion of the court (Lords Grieve and Brand), said (at 574 - 575):

> "The jury must have begun by believing the girl's story and by rejecting the competing story of the appellant, and on that approach the question is: was there sufficient material, setting it against the girl's account, to demonstrate that her account was true? In our judgment there was. One begins not with the distress but

> with the girl's account of having attempted to defend herself by scratching the abdomen of the appellant. Now there was evidence that scratches were found in the very place where the girl said she had attempted to scratch her assailant. In addition to that there was her evident distress when she returned to her friends and in all the circumstances there was sufficient to establish to the jury's satisfaction that the contents of the evidence of a witness they had found to be credible could be regarded as true. In these circumstances there is no reason why the principle in *Yates* does not fall to be applied. There was sufficient material here to provide the necessary corroboration required by law and the appeal against conviction will be refused."

*A change in direction*

[98] A change in the composition of the court was to lead the law on corroboration down a different path. *Moore* v *HM Advocate* 1990 JC 371 involved an allegation of rape in which corroboration was sought by reference to distress, which had been observed by the complainer's aunt at least 12 hours later. During the interval, the complainer had gone from one place to another. Others must have seen her before she reached her aunt's house. Intercourse was admitted. The conviction was quashed. Nevertheless, the new Lord Justice General (Hope) did say simply that (at 375):

> "It is not in doubt that evidence as to the condition of the alleged victim is capable of affording corroboration of her evidence that she had been raped."

Lord Cowie, who had extensive experience of criminal trials both on the Bench and at the Bar, added (at 378):

> "… [A]s a general rule, the question whether distress shown by the victim of an alleged rape, and spoken to by a third party, amounts to corroboration of the victim's evidence is one which should be decided by the jury under proper directions from the trial judge.
>
> The judge should direct the jury that before they can regard the evidence of the victim's distress as corroboration, they must be satisfied beyond reasonable doubt that the distress of the victim was caused by the events of the alleged rape and was not due to some extraneous factor such as shame or remorse."

He explained that, nevertheless, there would be circumstances, such as the lapse of time, in which no reasonable jury could regard the distress as corroboration of her evidence.

[99] In *McLellan* v *HM Advocate* 1992 SCCR 171, the charge was one of lewd practices on a single occasion towards an eight year old girl. This included showing her pornographic images, one of which was recovered from the appellant's house, and more serious allegations of exposing himself to her and kissing her inappropriately. The corroboration which was relied on was principally the girl's distressed state when she returned home "shortly after the incidents" (at 174) and spoke to her mother. In a significant statement of the Crown's position, the Advocate depute (Macdonald QC, later Lord Uist) conceded that distress could not corroborate the specific elements of the lewd behaviour. The Lord Justice General (Hope) disagreed. In delivering the opinion of the court (Lords Allanbridge and Cowie) he said (at 179) that:

> "… [D]istress must be related to the activity which it is said to corroborate. But the question whether or not it can afford corroboration of the complainer's evidence must depend upon the nature of the activity which she has described … If the activity is one which in itself is so distressing that a jury would be entitled to hold that it would be liable to distress the victim, then evidence of the victim's distress will be capable … of corroborating the complainer's evidence without further evidence to corroborate every detail of the crime. As in *Yates*, it will be sufficient for the jury to be satisfied that the distress corroborates the broad proposition that force was used, or something else was done, to provoke that distress. But there may be other cases, and rape may be a good example of this, where further evidence will require to be led to establish the other elements necessary to prove that the particular crime libelled has been committed, because distress in itself is incapable of providing corroboration in regard to those elements."

[100] In *Stobo* v *HM Advocate* 1994 JC 28 the appellant was convicted of an indecent assault on a 60 year old woman in his taxi at between 1.15 and 2.15am by kissing and fondling her and attempting to have her perform oral sex on him. The appellant's defence was alibi. Only the complainer spoke to what had happened in the taxi, but there was testimony from the taxi firm's controller of a call in the early hours of the morning from a "hysterical woman complaining of a sexual assault on her by a taxi driver" (at 31). The complainer's son spoke

to his mother being in a distressed state during a phone call with him at about 9.30am, during which she gave a garbled account of the incident. The appeal against conviction was refused.

[101] The Lord Justice General (Hope) delivered the opinion of the court (Lords Allanbridge and Brand). This contains an extensive, if highly discursive, analysis of where corroboration was to be found, as follows (at 34 - 35):

> "I do not think that it is necessary for it to be shown that circumstantial evidence, such as that provided by physical injuries or torn clothing, is unequivocally referable to the crime libelled before it can be said to corroborate the evidence of an eyewitness. … [C]ircumstantial evidence differs from that of an eyewitness, because unlike the evidence of an eyewitness it is incapable of describing the event. Its significance must be left to inference, and the strength or weakness of the inference to be drawn from it will vary according to the circumstances. … [W]here circumstantial evidence is relied upon in order to corroborate the complainer's evidence … the circumstances do not require in themselves to be incriminatory. What is required of the circumstantial evidence is that it is capable of providing support for her evidence, and it will be sufficient for this purpose if it is consistent with what she has said. …
>
> … [I]t is not possible to lay down any more precise rules of law about the use of distress as circumstantial evidence. Distress is of course a broad concept … [I]n the typical case it is spoken to only by lay witnesses. But these features … raise practical questions of fact and degree, rather than issues of law, as to the weight which can be attached to it.
>
> ... [T]he opinion that the question whether or not distress can afford corroboration of the complainer's evidence must depend upon the nature of the activity she has described. Distress cannot of course corroborate her evidence as to the identity of her assailant. … [W]here corroboration of penetration is needed in rape cases distress will be incapable of providing this, because the other acts involved in the rape to overcome the complainer's resistance will be sufficiently distressing in themselves to explain the distress. Similarly I would find it hard to see how distress alone could corroborate the complainer's account that what had begun as an indecent assault on her was pressed home to the extent necessary for this to be an attempted rape. The check which I favour … is that no reasonable jury, … could hold that distress in itself was capable of corroborating that part of the complainer's account. … It is a common experience that people may suffer emotional injury when they are subject to a violent incident or to an incident which causes extreme revulsion or disgust. If there is some other possible explanation for the distress it may fall to be regarded as neutral and then left out of account … [I]t must … be a question of fact for the jury whether the evidence of distress on its own is of

> sufficient weight to corroborate the complainer's eyewitness account of what occurred."

Two lines of reasoning may be identified from those cases. First, the extent to which the observed distress can corroborate a complainer's account of a particular offence, including rape, is a question of fact and degree. A jury may find the distress corroborative in the whole circumstances. The second, which can be seen from the reduction of the charge to attempted rape in *Stephen* and the opinion in *Stobo*, is that distress cannot corroborate penetration which is regarded as a crucial fact in a rape prosecution.

*Smith* v *Lees*

[102] It is against that background that a Full Bench was, once more, convened in January 1997 to hear a stated case in *Smith* v *Lees* 1997 JC 73. This concerned a conviction for lewd, indecent and libidinous practices towards a 13 year old girl. The purpose in so doing was specifically to reconsider the Lord Justice General's (Hope) opinion in *Stobo* (see page 75). The court was to be chaired by the new Lord Justice General (Rodger).

[103] The appellant and his brother-in-law had taken three girls and two boys to a campsite. The children were all nieces and nephews of the appellant and his brother-in-law. Two tents were pitched; the girls in one and the boys in another. The brother-in-law slept outside, but the appellant elected to sleep in the girls' tent. The appellant lay down next to the complainer and one of her cousins. The complainer testified that she woke up to find the appellant's penis moving up and down in her hand. She was upset. She left the tent. She was crying and upset; too upset to tell the appellant's brother-in-law what had happened. It was he who was to provide the potential corroboration. He saw the complainer coming out of the tent quickly. She had a tear in her eye. She was distressed and gestured towards the

tent. He asked her what the matter was. The appellant came out of the tent and said to her "You can go back in the tent now" (at 75). She went into the boys' tent instead. At the appeal hearing, the Crown relied only on the distress as corroboration. This may have been because the focus of the Full Bench was on that issue. The conviction was quashed despite an apparent sufficiency coming from the brother-in-law's evidence about the appellant entering a tent occupied by teenaged girls, what the appellant said when he came out and the girl's actings in declining to go back into the tent, coupled with the distress.

[104] In rejecting the appellant's argument that after-the-event distress should be equiparated with *de recenti* statements and could not operate as corroboration, the Lord Justice General said (at 78) that it could corroborate "certain aspects of the complainer's account". However, each fundamental, crucial, or essential fact, otherwise *facta probanda*, could only be established by corroborated evidence (at 79). In a rape these facts were fourfold: (i) penetration of the vagina; (ii) by the penis; (iii) forcibly; and (iv) without consent. They also included the identity of the appellant; in that particular case that it was he who had caused the complainer to handle his penis. The Lord Justice General cited the well worn passages in Hume, Burnett and Alison, whereby, if facts and circumstances were to corroborate the testimony of an eye witness, their function was to support or confirm that testimony. He accepted (at 80) that distress could corroborate the complainer's evidence that something distressing had occurred and that force had been used, but not "what exactly the appellant did". He analysed *Yates* and concluded (at 82) that what was attributed to his predecessor, Lord Emslie, could not have been an accurate record of what he had intended to say. In the same passage, he offered a speculative alternative by substituting "by" for

"of" in relation to the "broad … proposition". Nevertheless, he accepted that *Yates* and *Gracey* had been correctly decided.

[105] The Lord Justice General referred to Lord Stott's statement in *Begg* v *Tudhope*, but dismissed it as *obiter* as he had disposed of the appeal on a different basis. He considered that it had not been supported by the Lord Justice Clerk (Wheatley). He rejected the Lord Justice General's (Hope) *dictum* in *McLellan* on the same grounds. He pointed to an apparent contradiction in Lord Hope's analyses in *McLellan* and *Stobo*, whereby distress could not corroborate penetration in a rape case, before concluding (at 90) that:

> "[T]he approach adopted … in *McLellan* and in *Stobo* is unsound. … To be valid, any approach which is applied to evidence of distress must fit into our law of corroboration as a whole. In order to corroborate an eyewitness's evidence on a crucial fact, the corroborating evidence must support or confirm the eyewitness's evidence by showing or tending to show that what the eyewitness said happened did actually happen. … [I]f a complainer says that she did not consent to intercourse but was forced to submit, then evidence of her distress will tend to confirm her evidence … But … evidence of distress cannot support or confirm the complainer's evidence that a particular form of sexual activity occurred because there is no basis upon which the jury can use the evidence of distress to draw the necessary inference that it did. Since … *McLellan* and *Stobo* held that in such cases evidence of distress could by itself provide the necessary corroboration … they were wrongly decided and must be overruled."

[106] The Lord Justice Clerk (Ross), as with the other judges, delivered a separate opinion. The opinions are by no means identical in content, albeit that each judge reached the same result. Each judge must have felt it necessary to express an individual view, rather than concur with any of his colleagues. Having rehearsed the submissions, Lord Ross took as a starting point (at 94) that the *facta probanda* or crucial facts require to be established by corroborated evidence. He continued (at 95):

> "… [W]hat one is looking for is confirmation or support of the evidence which requires to be corroborated … [Burnett at p 518]".

It was the first witness's evidence which required confirmation by proof of circumstances. Under reference to *Lockwood* v *Walker*, it was necessary to determine what the crucial facts were. One was that the appellant caused the complainer to handle his penis. He analysed *Yates, Gracey, Moore* and other cases on distress; distinguishing those in which intercourse had been admitted. He criticised the Lord Justice General (Hope) in *Stobo* as confusing distress as corroboration in itself and as being part of the circumstantial evidence. He agreed that distress could not corroborate penetration in a rape case, but disagreed with Lord Hope where he appeared to say that distress could corroborate an indecent assault but not an attempted rape. Something more than distress was needed to corroborate the crucial fact which he had identified. His reasoning (at 99) was that:

> "Distress cannot yield the inference that the appellant … caused [the complainer] to handle his naked private member."

*Stobo* was therefore wrongly decided. Lord Stott's remarks in *Begg* v *Tudhope* were in error, as were certain passages of the Lord Justice General (Hope) in *McLellan*. The Lord Justice Clerk expressly made no comment on *Gillespie* v *Macmillan.*

[107] Lord McCluskey recognised that it was difficult to reconcile all the cases cited; describing a spectrum across Burnett, *Morton* and Hume on the one hand and *Gillespie* v *Macmillan* on the other. He described the latter with a degree of vehemence (at 103) as "expediency masquerade[ing] as pragmatism" in which lip service was paid to the principles which were then side stepped. That is strong criticism indeed of the senior judiciary of a past generation, all of whom would have been deeply steeped in the workings of corroboration in both the civil and criminal context. Lord McCluskey continued (at 104 - 105):

> "… [W]here the alleged victim is the only eye witness, it is the daily practice of judges to direct juries that they cannot convict unless they find corroborative evidence, namely reliable evidence from an independent source (and therefore not including a *de recenti* statement by the alleged victim) which separately points to the truth of the facts which constitute the essential ingredients of the crime. I consider that this is the correct approach."

Lord McCluskey considered that *Yates* had been correctly decided, but stated (at 106 - 107):

> "… [I]t is abundantly clear that distress of the victim cannot be used as a kind of all-purpose corroboration … In short, the fact of the woman's distress is of value in proving those facts which, as a matter of ordinary human experience, distress is apt to prove. … [T]he distress of the girl immediately after she emerged from the tent would certainly support the inference that *something* had something [*sic*, ? happened] to distress her within the tent. But does it in itself tell us anything about precisely what did happen within the tent? I do not see that it can…".

[108] Lord McCluskey reverted (at 107) to a consideration of Walkers; distinguishing between lewd practices as a *nomen criminis* (the name of the offence) and the *facta probanda* contained in the libel. It was "obviously true" that, if what the complainer had said had happened had occurred:

> "[A] very likely consequence would be that the girl would be distressed; and it follows that proof of such distress would be proof of a fact which was entirely consistent with her evidence that it did happen. But if one had nothing but the evidence that she emerged from the encounter in a distressed condition it would be impossible to guess whether the accused had immediately beforehand deliberately placed her hand upon his naked private member against her will or had physically assaulted her, or that she had had a nightmare or that she had come to regret some consensual conduct some time after it had finished or that some other event had occurred of a nature that might cause distress to a girl of her age."

He continued (at 108) in a more general tone:

> "… [I]t is … always necessary to identify what the *facta probanda* are and to ensure that there is evidence from at least two independent sources pointing to the existence of each of these crucial facts. If that were not to be the rule, then our traditional reliance upon a rule requiring corroboration would be entirely worthless."

Mere consistency could not be enough to provide corroboration. What was needed was evidence which in itself pointed in some way towards the truth of one or more of the *facta*

*probanda*. Different considerations applied where all the evidence was circumstantial. Corroborative evidence must be capable of testing the truth or falsity of the *facta probanda*.

[109] Lord Sutherland differed in certain respects. He said (at 111) that:

> "The fallacy of the appellant's principal approach [that distress could never provide corroboration] is demonstrated by the acceptance of the fact that distress can be used as one of a number of factors in making up a circumstantial case. If it can be so used it must follow that it is a valid and relevant piece of evidence and, if that be so, in appropriate circumstances, there is no reason why it should not be used as the sole corroborative factor…".

Following Burnett's cautionary words, about it not being possible to devise a rule, Lord Sutherland was of the view (at 111) that:

> "Nearly 200 years ago Burnett wrote [at 519]: … 'This only may be noticed, that the circumstances founded on must be *extrinsic* of the witness.' Nothing has happened since [Burnett] to make the formulation of any rule any easier. The only thing that can be said with any degree of certainty about corroboration is that it is such evidence as is necessary to enable the Crown to surmount the hurdle that proof of the commission of a crime and the identity of the perpetrator cannot rest on the evidence of a single witness."

In a rape charge the Crown had to prove penetration, lack of consent and force. Each was an essential element and had to be established by evidence from more than one source. What required to be corroborated was the precise act libelled and this could not be provided by distress alone, since, as distinct from physical injury, it gave no indication of its cause.

[110] Lord Sutherland considered that *Yates* had been correctly decided because intercourse had been admitted and penetration thereby corroborated. He analysed the cases which had followed it. He disagreed with the *obiter dicta* of the Lord Justice Clerk (Wheatley) and Lord Stott in *Begg* v *Tudhope*. He agreed with the Advocate deputes in both *McLellan* and *Stobo*, but not with the opinion of the court. He added (at 117) that if, in terms of *Stobo*, the function of corroboration were simply to be capable of providing support for the complainer's evidence, it would be logical for it to be corroborative not only of

penetration but identification. Lord Sutherland did not accept that. He recognised that the court's view in *Smith* v *Lees* might lead to insuperable difficulties of proof, but the valuable safeguard of corroboration must not be lost.

[111] Finally, Lord Gill accepted (at 118) that distress, as an item of circumstantial evidence, was capable of corroborating "certain facts". He too focused (at 119) on the need to prove the *facta probanda* by corroborated evidence. He disagreed with the *dicta* in *Begg* v *Tudhope*, *McLellan* and *Stobo* and concluded (at 121) that:

> "If we approach this problem from principle, it is apparent that while distress may corroborate the complainer's state of mind where, as in *Yates*, that is one of the *facta probanda*, it cannot by itself provide comprehensive corroboration of the essential facts of the charge …
>
> In principle, whatever the charge, it cannot be said that distress alone, in the absence of any other evidence, points to the accused's having committed each and all of the essential facts in the charge."

*Mackie and Fox*

[112] The conflict between different judges about what constitutes corroboration is well illustrated, first, by *Mackie* v *HM Advocate* 1994 JC 132 (Lord Justice General (Hope), Lords Cowie and Mayfield) and then by the Full Bench in *Fox* v *HM Advocate* 1998 JC 94 (Lord Justice General (Rodger), Lord Justice Clerk (Cullen), Lords Kirkwood, Coulsfield and Gill).

[113] *Mackie* was not a sexual offence case. It involved a quite different crime; insider trading. The allegation was that the appellant, who was an investment analyst with a well-known firm of Edinburgh stockbrokers, had become aware that a profits warning was imminent in relation to a particular company. Its chairman testified that he had told the appellant about this during a private meeting. Almost immediately afterwards, the appellant called in two of his firm's staff and told them that his investment advice in relation to the company's shares had changed. A large number of shares, which were held by the

appellant's firm's clients, were disposed of before the profits warning. This avoided losses, totalling almost £1.5m, which would have been incurred when the share price dropped in the wake of the warning. A no case to answer submission failed. The appellant then testified that he had not been told of the warning; only that there would be minimal share earnings, which was not price-sensitive information and hence its disclosure was not prohibited. The appellant argued that there had been no corroboration of the essential fact that he had been told of the profits warning.

[114] Citing the Lord President (Normand) in *O'Hara* v *Central SMT*, the Lord Justice General (Hope) said (at 141):

> "… [T]he argument for the Crown was that [the chairman's] evidence was corroborated by facts and circumstances. The trial judge [later Lord McEwan] said that it was appropriate to look at the whole context and all the evidence, and to that extent I agree with him. But … the question which then had to be considered was whether the facts and circumstances, when taken together, were more consistent with [the chairman's] evidence than with the appellant's evidence."

If this were correct, it would mean that a sufficiency of evidence, which was present at the no case to answer stage of a trial (ie at the conclusion of the Crown case) could have vanished after all the evidence had been led (ie at the end of the defence case). The Lord Justice General rejected a submission that all that was required was evidence which was capable of supporting the chairman's testimony. Circumstantial evidence which was equally consistent with the appellant's account could not amount to corroboration. It was not sufficient for the evidence to be neutral on this point. Lord Cowie was not convinced of this, since the jury could reject the appellant's account and find corroboration of the chairman's testimony in the surrounding facts and circumstances. However, both he and Lord Mayfield agreed with the Lord Justice General's conclusion. The conviction was quashed; a matter which caused a considerable degree of controversy at the time.

[115] The Full Bench in *Fox* was convened, less than four years later, specifically to reconsider *Mackie* (see page 95). By this time, Lord Rodger had become Lord Justice General. *Fox* involved a conviction of clandestine injury; having intercourse with a woman whilst she was asleep. She had woken to find the appellant having intercourse with her. This would constitute rape under the 2009 Act; but not then. The appellant did not testify, but the Crown led evidence of his interview with the police. The appellant admitted intercourse but claimed that the complainer had been awake and consenting. She had only complained when she discovered that the appellant was not the same man with whom she had had consensual intercourse earlier that evening and who had put her to bed. On discovering this, the complainer became "quite upset". The Crown relied for corroboration on evidence from others about the complainer's distress very soon after the incident. The appeal was based on the *dictum* in *Mackie* that corroboration could only exist if the distress were more consistent with the complainer's account than with that of the appellant.

[116] The Lord Justice General (Rodger) cited Burnett, Hume and Alison; commenting (at 100) that:

> "In essence the picture has not changed since these works were written. Corroborative evidence is still said to be evidence which supports or confirms the direct evidence of a witness: *see Smith* v *Lees* … [T]he starting point is that the jury have accepted the evidence of the direct witness as credible and reliable. The law requires that, … they must still find confirmation of the direct evidence from other independent direct or circumstantial evidence. …
>
> This does not mean to say that the jury can look at the circumstantial evidence only at this final stage of their deliberations. How the jury approach their task of assessing credibility and reliability is, of course, very much a matter for them. When examining the direct evidence to see whether they accept it, the jury may well test it by reference to various matters, including the available circumstantial evidence. Nevertheless, once the jury have accepted the direct evidence, the same circumstantial evidence may come into the picture once more when, … the jury are looking for evidence which confirms the direct testimony.

> While evidence can provide corroboration only if it is independent of the direct evidence which it is to corroborate, the evidence is properly described as being corroborative because of its relation to the direct evidence: it is corroborative because it confirms or supports the direct evidence. The starting point is the direct evidence. So long as the circumstantial evidence is independent and confirms or supports the direct evidence on the crucial facts, it provides corroboration and the requirements of legal proof are met."

In introducing a new element, whereby the corroborative evidence had to be more consistent with the direct evidence than with the accused's account, *Mackie* was in error. If the jury rejected the accused's evidence, they would be entitled to find that the circumstantial evidence "fits with" (at 101) the direct evidence. Since *O'Hara* v *Central SMT* was not a case with competing accounts, it ought not to have been founded upon to justify the conclusion in *Mackie*.

[117] The Lord Justice Clerk (Cullen) agreed. He used (at 108) the terms "essential element" and *factum probandum*. Lord Kirkwood did this too, before revisiting Hume, Burnett and Alison and stating (at 111) that, where the Crown rely on one witness implicating the accused:

> "the necessary corroboration can be found in the evidence of another witness, or evidence of facts and circumstances, which provides concurrent testimony in the sense that the evidence relied on as corroboration confirms or supports the evidence of the direct witness in relation to the *facta probanda*."

[118] Lord Coulsfield also followed the well-trodden route of citing Hume, Burnett and Alison; stressing (at 117) Hume (ii, 383) as the *locus classicus* [the standard], upon which it was difficult to improve. He continued:

> "What the rule requiring corroboration is intended … to direct [the jury] to do is to be certain … that they are not relying on a single source but have at least two independent sources of evidence whose coherence convinces them of the validity of the Crown case."

Lord Coulsfield, like Hume, cautioned against defining any quality which the circumstantial evidence required to have; that being a matter for the jury to assess. He did not consider (at 118) that each source required to be incriminating in itself. He continued:

> "[I]t … seems … to be wrong to try to divide cases into different categories by reference to the nature of the evidence which is relied on, and if there were a rule that each piece of evidence must be incriminating, I would find it difficult to see why that should not apply in every case. I do not … think that it is necessary that each piece of evidence, of whatever kind, should be incriminating in that sense. … [W]hat matters is the concurrence of testimonies. Whether a single piece of evidence, or a number of pieces of evidence, are incriminating or not is a matter which can only be judged in the whole circumstances taking all the evidence together. It is an everyday occurrence that juries are directed that corroboration of a strong piece of evidence may be found in a weaker piece of evidence which, in itself, might not be capable of being described as incriminating. That is not to say that care must not be taken to see that there is evidence which a jury can properly regard as incriminating taken together. … [H]owever, … it is much easier to say that evidence must not be ambiguous or insignificant than it is to describe in any positive terms any quality which any single piece of evidence must possess."

[119] Lord Coulsfield explained that distress is not something which is clear and definite, like a fingerprint. It is always manifested in particular ways and in particular circumstances. It is important that directions to the jury on this have to be given "as simply and briefly as possible". He summarised (at 119):

> "… [W]hat the rule requiring corroboration demands is that there should be evidence which does not depend upon one single witness or one single source, but derives from at least two independent sources which, taken together, display a sufficient concurrence to leave no reasonable doubt in a rational mind: and that, so far as sufficiency is concerned, there should be evidence which a reasonable jury could regard as satisfying that requirement (*cf* Alison, *Practice*, at 551). That … [is] what Hume's statement of the rule requires and I do not think that any further requirement can be justified. … [I]t might be suggested that this view reduces the requirement to a 'two witness' rule, (see Gordon in *Justice and Crime* …), that is, a merely mechanical or formal requirement, but I do not think that such a criticism would be justified. … [T]he rule would not merely be a formal rule but would be a rule requiring a positive conjunction of testimony to a degree which carried conviction."

[120] Lord Gill drew a distinction (at 121) between cases in which circumstantial evidence was incapable, on any view, of supporting the direct evidence of the crucial fact and cases in which it was, even if there might be an innocent explanation. *Smith* v *Lees* was in the former category and the evidence of distress was "neutral". *Yates* was in the latter class. The evidence was not neutral. It was incriminatory. Lord Gill was critical (at 122) of the Lord Justice General's (Hope) approach, which had "no solid foundation in the criminal law". The question was whether the distress was supportive of the complainer's account; that evaluation being for the jury to determine.

[121] Lord Gill continued (at 123 - 124):

> "… [T]he writers give us the correct approach. … [T]he essence of the doctrine of corroboration is that there must be evidence emanating from two independent sources both of which point to the crucial fact. In a case such as this, so long as the evidence of facts and circumstances, taken as a whole, is capable of supporting the direct evidence, it can constitute corroboration. It is then a matter for the jury to decide whether or not to give the circumstantial evidence an incriminatory interpretation.
>
> …
>
> When the court considers the corroborative value of circumstantial evidence, it is not a matter of examining the evidence to see whether it is more supportive of the complainer's account than of any other suggested account. If there is direct evidence … the court simply looks to all of the other evidence to see if within it there is independent evidence capable of supporting the direct evidence."

*Following Fox*

[122] The descriptions in the several opinions in *Fox* on what constitutes corroboration in *Fox* are by no means identical. The use of the words "concurrence of testimonies", which appears in Hume (ii, 383), may have caused some confusion. There remain shades of the idea that, where there is direct testimony, the corroborating circumstances when looked at separately require to point towards the guilt of the accused (eg Lord Kirkwood at 111; Lord Gill at 123). However, the principal thrust in *Fox* is clear. What is needed is independent

testimony of facts which confirm or support the direct evidence (Lord Justice General (Rodger) at 100). The corroboration need not be incriminating in itself (Lord Coulsfield at 118). That has been the approach which has been adopted by the court ever since *Fox*.

[123] Nevertheless, these shades continued to creep into judicial thinking. For example, at first instance, *HM Advocate* v *L* 2008 SCCR 51 involved, as in *Fox*, clandestine injury. Intercourse was admitted. The issue was whether the complainer had been asleep and had woken up with the accused having intercourse with her. The Crown relied on several circumstances as corroboration of the complainer's account, including the quantity of drink taken, distress, lack of protection, relative ages and the lack of any prior history of intimacy. Citing *Fox* and *Smith* v *Lees*, the trial judge (Lord Hodge) observed (at para [12]) that the potentially corroborative circumstantial evidence "must be capable of pointing to the essential fact or facts". The various factors were, in combination, sufficient corroboration. Lord Hodge did not (at para [16]) require to consider whether distress alone might be sufficient. However, he found it difficult (at para [17]) to see how it could support or confirm a complainer's evidence in such a way as to satisfy a jury that she had "expressed her lack of consent in a way that would have given the accused the requisite knowledge for the *mens rea* of rape". *Spendiff* ought to have made it clear that "*mens rea*" was something which was to be inferred from established fact. It did not require corroborated evidence (Lord Penrose, delivering the opinion of the court (Lord Justice General (Gill) and Lord Cameron) at para [33]). Nevertheless, not only was that revisited in *HM Advocate* v *L*, it also featured in *Branney* v *HM Advocate* 2014 SCCR 620. There, when the appellant was confronted with an allegation that he had "molested" (at para [8]) a girl aged between 13 and 19, he had replied "It didn't start until she was 21". This was held (at para [21]) not to be capable of amounting

to an admission of intercourse (ie penetration); the word "molest" being too vague relative to the need to prove penetration in what was a rape charge.

[124] On the specific issue of corroboration of penetration, and returning to what might by now be termed mainstream thinking, the Lord Justice General's (Rodger) *dictum* in *Fox* was followed in *Adamson* v *HM Advocate* 2012 JC 27. There the complainer was the granddaughter of the appellant's partner. Her testimony was adequately corroborated by medical evidence of a condition which might have been caused by intercourse and testimony that the appellant had broken down in tears when he was told that the family were not going to report him to the police. Under express reference to *Fox*, the Lord Justice General (Hamilton), delivering the opinion of the court (Lords Marnoch and Brodie), said (at para [15]) that:

> "Although neither strand of testimony can be said to have been compelling … they could, when taken together … be said to support or confirm the complainer's testimony and thus provide corroboration."

[125] The Lord Justice General's *dictum* in *Fox* was also followed in *Munro* v *HM Advocate* 2015 JC 1. The issue was whether penetration of the complainer's vagina had been adequately corroborated by the finding of the appellant's pubic hair on the inside crotch area of the complainer's pants. The court held that it was. Lord Carloway, delivering the opinion of the court (Lords Bonomy and Malcolm) in 2010, said (at para [7]):

> "A piece of evidence is corroborative of testimony of a fact in issue if it can be said to support or confirm that testimony. That is, in essence, the test set out by the Lord Justice-General (Rodger) and by Lord Gill in *Fox* v *HM Advocate* (at 100 and 124 respectively) (reversing the effect of *Mackie* v *HM Advocate*). Where there is an allegation of rape, which of course involves proof of sexual intercourse in the sense of penetration, the finding of an accused's pubic hair adhering to the inside crotch area of a complainer's pants will support the complainer's testimony that sexual intercourse occurred. … [I]t is not something dependent upon a scientific view of consistency, as a scientist rather than a lawyer would use that term, but whether an appropriate inference of fact can be drawn by a jury."

[126] The same result was reached in *Palmer* v *HM Advocate* 2016 SCCR 71 in which the appellant's semen was found on the complainer's duvet. Citing *Munro* and *Fox*, the Lord Justice Clerk (Carloway), delivering the opinion of the court (Lady Smith and Lord Bracadale), (at para [10]) said:

> "A piece of evidence is corroborative of testimony of a fact in issue if it can be said to support or confirm that testimony … The corroborating piece of evidence does not, of itself, have to point exclusively to the fact in issue. Each case will depend upon its own facts and circumstances."

[127] *Fox* was again followed in *Jamal* v *HM Advocate* 2019 JC 119 in which, once more, the argument was whether penetration had been corroborated. The Lord Justice General (Carloway), delivering the opinion of the court (Lords Menzies and Turnbull), said (at paras [18] – [20]):

> "It is accepted that, in all rape cases, there requires to be proof, by corroborated evidence, that the crime has been committed; that is that sexual intercourse has taken place without the complainer's consent. This has come to be understood as meaning that the two elements ought to be looked at separately, or in isolation. This has led to an assumption that the act of penetration, when spoken to by a complainer, requires corroboration by scientific or medical evidence, such as the finding of semen in, or injuries to, the vagina, by an admission of intercourse, or, very much more rarely … an eye … witness account of the event. In some situations, in which a complainer has given evidence of penetration, it has been held that only a conviction of attempted rape was available. This is both strange and anomalous.
>
> This understanding has been prompted by the former idea that the most serious element in rape was the penile penetration of the vagina and the several consequences which that had in relation to the woman's 'honour and value'. That idea has given way to a much broader concept whereby rape is regarded as serious because it involves a violation of a person's physical and sexual autonomy (Scottish Law Commission, *Report on* R*ape and Other Sexual Offences* (no 2007) paras 3.1 and 3.11). Thus, what may now be characterised as a sexual 'attack' may be committed against both the male and the female and not only by penile penetration of the vagina, but also by anal or oral penetration. It was because of the serious nature of penile penetration, especially vaginal penetration in the context of the risks of pregnancy and the transmission of particular diseases, that the *nomen criminis* was retained.

> There is no sound reason for restricting the availability of corroboration of the act of rape to the type of scientific, medical or other evidence set out above. In relation to penetration, corroboration can be found in facts and circumstances which 'support or confirm' the direct testimony of the commission of the completed crime by the complainer (*Fox* v *HM Advocate*, LJG (Rodger) at 100). In a situation in which rape is alleged, a broad approach should be taken. It has been said that distress may not be capable of corroborating an account of the acts which caused that distress. This was conceded by the Crown in *Smith* v *Lees (*Lord Justice General (Rodger), p 79). Accepting for present purposes that the concession was well made, care must still be taken not to eliminate distress, especially if it is of an extreme nature, as a significant factor which, at least when taken with other circumstances, 'supports or confirms' a complainer's account that she was raped in the manner which she has described. Thus there will be many situations, such as dishevelment or loss of clothing, where direct testimony of rape … can be seen as being corroborated when all the surrounding facts and circumstances are taken into account."

[128] In *Guthrie* v *HM Advocate* 2022 JC 201 evidence of the presence of the appellant's DNA on the inside of a pair of pants, which the complainer had been wearing under her jeans at the time of a sexual assault, was sufficient to corroborate the complainer's testimony of digital, vaginal penetration. Finally, there is *Fisher* v *HM Advocate* 2023 JC 21 in which the appellant had been charged with two sexual assaults which the Crown intended to corroborate by using evidence of other assaults of which the appellant had been acquitted. The Lord Justice General (Carloway), delivering the opinion of the court (Lords Woolman and Matthews), explained (at paras [20]-[21]) the limitations under which the prosecution of criminal cases were carried out, *viz*.: (i) the need for corroboration, which in a sexual offence case would normally consist of testimony from another person about facts and circumstances which confirm or support the direct evidence of the complainer; (ii) that *de recenti* statements may be admitted to bolster credibility only; and (iii) the fact that sexual offences are seldom witnessed by others, which often resulted in a lack of acceptable corroboration, even where a complainer was regarded by the jury as entirely truthful and dependable.

[129] *Fox* and *Munro* have been followed in several other cases in which only a Statement of Reasons rather than an Opinion has been issued. The reason for the distinction is that, in the former, the cases are fact specific. They are not thought to raise a new point of law or other matter which ought to be widely distributed to the legal and wider community by being published on the internet. For example, in *Reid* v *HM Advocate*, 24 November 2021, unreported, penetration was corroborated by testimony that, in advance of the rape, the appellant had been asking the complainer, amongst others, to have intercourse with him (see also *McCabe* v *HM Advocate*, 10 February 2022, unreported, and *Graham* v *HM Advocate*, 5 July 2022, unreported).

***De recenti developments***

*Cinci* v *HM Advocate*

[130] A distinction between statements by witnesses (including complainers) which are made during the commission of a crime (*res gestae*) and those which occur afterwards (*de recenti*), and the evidential effect of that distinction, is apparent from *Morton* (at 53). The practical effect of the distinction and, as will be seen, the injustice which it can promote is well illustrated by *Cinci* v *HM Advocate* 2004 JC 103. The complainer in *Cinci* had no recollection of the incident and nor it seems (although it is unclear from the law report) did the appellant. What happened all came from the testimony of other witnesses. The complainer, her boyfriend, the appellant and others were on an organised backpacking tour of the Highlands. Considerable quantities of alcohol had been consumed. The complainer was extremely drunk. At the hostel in Oban, where the tour group was staying, she had to be put to bed. She was sick. She was assisted to a shower cubicle by the tour guide. The appellant, who was also drunk, tried to join her but was rebuffed. The tour guide told the

appellant, in no uncertain terms, to go away and leave the complainer alone. She already had a boyfriend. The appellant must have returned to the cubicle, which was then locked.

[131] Concerned staff appeared and heard mumbling sounds; prompting them to ask if everything was alright. The appellant said "Yes", but the complainer said "No" and then "No – help me!". The cubicle was opened. The appellant and the complainer were both naked. The complainer immediately said "He raped me". She was "scrunched up" in a corner of the shower "very upset and crying". The appellant was told, in very firm terms, to make himself scarce by locking himself in a toilet. The complainer's boyfriend appeared, having heard the complainer shouting "help me". She said to him "He put his willy into me". She was lying on the floor of the shower, in deep shock, quite incoherent and repeating "Help me. Help me". Forensic scientific evidence discovered the appellant's semen in the complainer's vagina. The police were called. They found the appellant fast asleep in a toilet.

[132] The jury found the appellant guilty, but the High Court quashed the conviction on two bases (at paras [6], [9], [21] and [22]), *viz.:* (1) the trial judge (Lady Smith) had misdirected the jury when she said that the complainer's words "he raped me" were so closely related to the event as to be part of the *res gestae* and thus available as proof of fact; and (2) there was insufficient evidence of "*mens rea*". The Lord Justice Clerk (Gill) doubted the Lord President's (Normand) approach in *O'Hara* v *Central SMT*. Lord McCluskey, following *McKearney* v *HM Advocate* 2004 JC 87, was of the view (at para [22]) that there was no direct evidence of "*mens rea*". The complainer's use of the word "rape" would not do.

[133] According to *Cinci*, the trial judge had either failed to take cognisance of, or had misunderstood, *Morton* in relation to the point at which *res gestae* come to an end. The

content of any statement made thereafter, even if *de recenti*, was not available as proof of fact, and hence as corroboration. The same errors were made by trial judges in *Farooq* v *HM Advocate* 1991 SCCR 889, *M* v *HM Advocate* 2006 SCCR 338 and *DS* v *HM Advocate* 2012 SCCR 319; all of which proceeded on Crown concessions. In *Dyer* v *HM Advocate* 2009 SCCR 194 the conviction of rape was quashed because of what the court regarded as a failure by the trial judge (Lord Dawson) to distinguish adequately between the evidential effects of distress and those of a *de recenti* statement which had been made in the context of that distress. He ought to have said that corroboration could not be found in anything that the complainer may have said when distressed (Lord Justice General (Hamilton), delivering the opinion of the court (Lords Osborne and Mackay), at para [22]; cf *Ahmed* v *HM Advocate* 2010 JC 41, Lord Justice General (Hamilton), delivering the opinion of the Full Bench (Lords Osborne, Nimmo Smith and Bracadale and Lady Paton), at para [20]).

*O'Shea v HM Advocate*

[134] Leaving sexual offences momentarily aside and looking at the interrelationship (or the lack of it) between statements which are part of the *res gestae* and those said only to be *de recenti*, *O'Shea* v *HM Advocate* 2015 JC 201 involved a conviction for murder. The deceased and a friend had been attacked in the street as they walked past a flat. They ran around the corner but were caught and stabbed. A witness, who had been walking past the flat after the chase had been lost from view, spoke to what the occupier of the flat, who turned out to be the appellant's partner, had shouted. This was: "They bastards smashed my window" and "My man's round there" (at para [5]). The appellant came back around the corner and accompanied his partner back into the flat. It was held that these statements were part of the *res gestae* and thus available as proof of identity. In delivering the opinion of the court

(Lords Bracadale and Drummond Young), the Lord Justice Clerk (Carloway) reviewed (at para [20] *et seq*) the authorities in relation to the origins, nature and extent of the *res gestae* principle at some length. He commented that it had been a dissenting opinion in *Greer* v *Stirling County Roads Trs* (1882) 9 R 1069 (at 1076) that had taken root in Walkers (1st ed, para 377), in which it was said that *res gestae* included exclamations which were uttered at the time, but not an account given after a person had gone home (which was what had been nevertheless admitted as evidence of fact in *Greer*).

[135] Having looked at *O'Hara* v *Central SMT*, the Lord Justice Clerk considered (at para [27]) *Teper* v *R* [1952] AC 480 in which Lord Normand, who had been in *Morton* and *O'Hara* and was then in the House of Lords, said (at 486 - 487) that the rules on the admission of evidence of statements as part of the *res gestae* were the same in Scotland as in England. Lord Normand continued:

> "… [H]uman utterance is both fact and a means of communication, and … human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words, and the dissociation of the words from the action would impede discovery of the truth."

Lord Normand identified a *res gestae* statement as being real evidence, clearly following Dickson in that regard, and not "merely a reported statement".

[136] The Lord Justice Clerk referred (at para [29]) to the effect of *Morton* and how the treatment of *de recenti*/*res gestae* statements in Scotland and England had diverged after *Teper*. In *Ratten* v *R* [1972] AC 378, Lord Wilberforce explained (at 389) that *res gestae* covered words "so clearly made in circumstances of spontaneity or involvement in the event that the possibility of concoction can be disregarded". Proof of fact from a *de recenti* statement is permissible in England (see also *R* v *Andrews* [1987] AC 281) but not, following *Morton*, in Scotland.

*Wilson v HM Advocate*

[137] Returning to sexual offences, in *Wilson* v *HM Advocate* 2017 JC 135 the complainer, who was 20, said that the appellant, who was 41, had sexually assaulted her, including by vaginal penetration, when she was asleep in a flat which was shared by the appellant and his partner. The partner was a friend of the complainer. The complainer awoke the following morning at about 10.30 on what was a Saturday. She spoke to her friend, but made no mention of the assault. She texted her boyfriend to come and pick her up, but said nothing of the attack. She explained why she had kept silent at those times. On arriving at her mother's house at 12.00 noon, she had gone straight upstairs, without speaking to her mother, had a shower and gone to bed. Her mother described her as "very inward", tired but sober. She had stayed in bed all Saturday and into the Sunday. On Sunday evening she drove to meet her best friend in a car park. She was described by this friend as crying and "quite upset" (at para [11]), becoming hysterical. The Crown elected to lead little evidence of what the complainer had actually told her friend. The complainer had not gone to work on the Monday. At interview, the appellant admitted consensual sexual contact, including inserting his fingers into the complainer's vagina.

[138] The Lord Justice General (Carloway), in delivering the opinion of the court (Lords Bracadale and Malcolm), considered (at paras [28] and [29]) *Smith* v *Lees*, *Fox* and the relevant case law which had been examined in those two Full Bench decisions. He looked at the rejection of the argument in *Smith* v *Lees* that a *de recenti* statement should be equiparated with *de recenti* distress and so could never amount to corroboration. It was accepted in *Smith* v *Lees* that distress could be used as corroboration but, in what seemed to be a compromise, not of the specific acts charged. The Lord Justice General explained (at para [30]) that,

provided a complainer's distress was caused by the incident, there was no fixed time within which that distress required to manifest itself. There had been no error in the sheriff's directions to that effect. He added (at para [35]):

> "Once it is accepted that the evidence of distress was admissible as potentially corroborative, it would be unrealistic to exclude evidence of what the complainer had said at the time when the distress was observed. It is not clear why the Crown were so circumspect in not leading evidence of what the complainer had said, given that, in due course, the jury had to decide whether the distress had been caused by the incident. Once evidence of what was said had been adduced, as it was without objection, it became advisable, if not a requirement, for the sheriff to direct the jury; that this evidence could not provide corroboration but could be used in the assessment of the complainer's credibility and reliability. That is what the sheriff did; drawing the jury's attention to the lapse of time and lack of detail, as matters for their legitimate consideration."

**The Commonwealth and Irish cases**

[139] Care must, as always, be taken before introducing evidential concepts from other jurisdictions where these have no grounding in domestic jurisprudence. It remains instructive to look at how distress and *de recenti* statements are viewed elsewhere in the Commonwealth. Although there is now no absolute requirement for corroboration in any of these jurisdictions, that has not always been the case. In the past it has been obligatory to require corroboration, or to give the jury a *cum nota* warning should there be no corroboration, in sexual offence cases. How these various common law jurisdictions approach matters now will shed light on what is thought to be appropriate in a modern democratic society. It may put into perspective the effect of *Morton* both on *de recenti* statements and on what is thought to be available as corroboration in comparison to *Smith* v *Lees.* Both parties provided helpful lists and summaries of Commonwealth cases. What follows is a general survey of these cases, with some selective quotation of relevant *dicta*. Not every case cited has been included and this does not represent an in-depth analysis of

each country's jurisprudence on the subject. It is more of a description of the general flavour of approach across some of the larger Commonwealth states.

***England and Wales***

[140] The complainer in *R* v *Redpath* (1962) 46 Cr App R 319 was aged 7. She alleged that she had been playing on a moor with some friends when she was pulled to the ground and indecently assaulted by the appellant, whom she identified. That identification was corroborated *aliunde* (otherwise). A witness described the complainer emerging from the moor in a very distressed condition. He took her home, where her mother said that she was trembling and in a terrible state. The complainer immediately told her mother what had happened. The evidence of the complainer's distress, when emerging from the moor, was regarded by the Court of Appeal (at 321) as "quite clearly capable of amounting to corroboration", although, if the distress had only been spoken to by her mother as distinct from an independent bystander, who was unobserved by the complainer, it would have been weak because, according to the Lord Chief Justice (Parker) (at 321): "The girl making the complaint might well put on an act and simulate distress". Since there was no issue of consent, the corroboration applied to the *corpus delicti* (crime).

[141] In *R* v *Chauhan* (1981) 73 Cr App R 232, the appellant was accused of a sexual assault on a woman when they were alone in an office. The woman ran crying to a bathroom. She was followed by a co-employee who had heard her cries. The direction to the jury stressed the need for supporting evidence, first, that the offence was committed and, secondly, that the appellant committed it. The appellant admitted having been alone in the office, so identity was not an issue. The court held that the distress sufficiently corroborated the assault. The Lord Chief Justice (Lane) referred (at 235) to a previous ruling whereby juries

ought to be warned that, although distress was corroborative, they must be fully satisfied that it was not feigned.

[142] Some years later, in *R* v *Allen* [2003] EWCA Crim 236, the appellant faced charges of indecent assault, including digital penetration of the vagina, on a girl aged between 9 and 12. The complainer first mentioned the assaults to schoolmates some months later. She had burst into tears. The police were called. In between times, her mother had noticed a change in her behaviour; she had become withdrawn and had given up pursuits which she had hitherto enjoyed. On being spoken to by the police, the complainer became very distressed; weeping uncontrollably. Potter LJ cited *Redpath* and *Chauhan*, stating (at para 45) that evidence of distress should carry no weight if it is "only part and parcel of the making of a complaint". He continued:

> "However, it may properly be afforded weight if the complainant is unaware of being observed, and if the distress is exhibited at the time of, or shortly after, the offence itself, in circumstances which appear to implicate the accused."

The court held that the evidence of long term changes of demeanour ought to have been excluded in view of the uncertainties in linking them with the assaults.

[143] In *R* v *Romeo* [2004] 1 Cr App R 30 (at 417) Scott-Baker LJ, delivering the judgment of the court, favoured (at 422) a direction that, rather than warning jurors not to attach much weight to evidence of distress, the judge should alert the jury to "the sometimes very real risk that the distress may have been feigned". In more recent times, in *R* v *Khan* [2021] EWCA Crim 142, the appellants had been convicted of people trafficking and committing serious sexual offences against young girls, some of whom were in care. One of the girls had returned home in the early hours of the morning, shortly after a particular incident. She was in a state of distress and told her father what had happened. *Redpath* and *Chauhan* were

cited (at para 16), as were more recent cases. These included *R* v *AH* [2005] EWCA Crim 3341, where a complainant spoke to a workmate half an hour after she had been raped. In that case the court had considered (at para 35) that there ought to have been a direction that the distress was "part and parcel of the complaint" and should "not be given separate weight". A similar result followed in *R* v *Thompson* [2014] EWCA Crim 743 and in *R* v *JS* [2019] EWCA Crim 2198, in which there was a failure to alert the jury to the possibility of a feigned complaint. In *Khan*, Stuart-Smith LJ said this (at para 18) in relation to the previous cases:

> "It is not always obvious what is captured by the phrase that distress is 'only part and parcel of the making of a complaint'. While we endorse fully the propositions that: (a) demeanour is not necessarily a clue to the truth of an alleged victim's account with much depending on the personality and character of the person concerned, and (b) that the jury needs to be alert to the possibility that distress may be feigned, both of these principles … necessarily … imply that it may be open to a jury in an appropriate case to take the demeanour of the complainant into account. This approach is reflected in … the current Crown Court Compendium, which emphasises the need to avoid making assumptions based upon a witness's demeanour. Specifically, it offers a specimen direction for when a complainant has shown distress when making a disclosure to a witness (as [the complainant] did when she got home and saw her father) and counsel has invited the jury to make unwarranted assumptions. The specimen direction warns against assessments based on preconceived ideas, but it contemplates that the complainant's behaviour <u>may</u> help to decide whether the prosecution has proved its case…".

***Canada***

[144] *Murphy* v *R* [1977] 2 RCS 603 involved an allegation of rape of a 16 year old girl by the two appellants in their apartment. After the incident, one of the appellants had driven her to a bus station from where she phoned a cousin and then the police. Both the cousin and the police said that she was in an "emotionally distraught condition" (at 612). One appellant denied intercourse. The other admitted intercourse, but said that it had been with consent. The Canadian Supreme Court found that the distress was corroboration in the

cases against both appellants; ie it covered all aspects, and not just a lack of consent. In *R* v *AJK* 2022 ONCA 487 Associate Chief Justice Fairburn, delivering the judgment of the Court of Appeal for Ontario, said (at para [43]) that, notwithstanding the possibility of a range of different reactions:

> "a complainant's emotional disintegration after an alleged offence may well be relevant to whether, as a matter of common sense and human experience, the events occurred as described by the complainant … The inference to be taken … was that the complainant was emotionally devastated because something emotionally devastating happened to her."

***New Zealand***

[145] In New Zealand, whether distress is corroborative depends on whether the complainer's state was involuntary, uncontrived and therefore independent of her complaint (*R* v *Moana* (1979) 1 NZLR 181 at 184 - 185). In *R* v *B*, 26 November 2004, unreported, Doogue J, delivering the judgment of the Court of Appeal, expressed (at paras [28] and [29]) the view that apparent distress, which was exhibited two weeks after an incident, was admissible when the occasion provided the first reasonable opportunity on which to complain. In *R* v *Daleszak* [2006] NZCA 499, Robertson J, giving the reasons of the court, said (at para [36]) that evidence of distress on the morning after an event was:

> "routine …. It was part of the narrative and of relevance to the issue of whether the sexual connection had been consensual."

***Australia***

[146] Moving across the Tasman Sea, in *R* v *Flannery* [1969] VicRp 72, it was said (Winneke CJ delivering the judgment of the Supreme Court of Victoria) that:

> "[E]vidence of the distressed condition of a [complainer] may or may not be capable of amounting to corroboration according to the particular facts of each case. In determining whether it is so capable, regard must be had to such factors as the age of the [complainer], the time interval between the alleged assault and when she was observed in distress, her conduct and appearance in the interim, and the

> circumstances existing when she is observed in the distressed condition. Without attempting to enumerate exhaustively the circumstances in which such evidence may amount to corroboration, … if, regard being had to factors of the kind we have mentioned, the reasonable inference from the evidence is that there was a causal connexion between the alleged assault and the distressed condition, evidence of the latter is capable of constituting corroboration. If such inference is not open, the evidence is not, in our opinion, capable of amounting to corroboration. We should add that except in special circumstances such as existed in *Redpath* … evidence of distressed condition will carry little weight and juries should be so warned by the trial judge in the course of his charge."

[147] Thirty years later, in *Papakosmas* v *R* [1999] 196 CLR 297, the appellant and the complainer were co-employees attending a Christmas party. The appellant guided the complainer into a small room and raped her. Intercourse was admitted. After the event, when the appellant had left her, the complainer fell to the floor, vomited and went to a bathroom to wash. She complained "virtually" immediately to workmates who spoke to her extreme distress; that she was crying uncontrollably and saying that she had been raped. In determining the admissibility of what the complainer had said as proof of fact, reference was made to *R* v *Bedingfield* (1879) 14 Cox CC 341. That had been a trial for murder in which the defence was suicide. Evidence that the soon to be deceased had run out of the house with her throat cut and had said "See what Harry has done" was excluded as hearsay. That was, according to Lord Ackner in *R* v *Andrews* [1987] AC 281 (at 300), not a ruling which would find favour in modern times. In *Papakosmas* the evidence of what the complainer had said immediately after the incident was held admissible as proof of fact. As Chief Justice Gleeson and Justice Kirby, sitting in the High Court, said (at para 59):

> "… [T]he statements … were closely contemporaneous with the events alleged and were of a kind that might ordinarily be expected if those events occurred. That being so, they rationally bear on the probability of the occurrence of those events and, thus, were admissible as evidence of the facts asserted in them."

Justice McHugh said (at para 78):

> "A complainant who has been sexually assaulted may, but will not necessarily, display outward signs of distress after the assault. Evidence of distress tends to prove that the complainant had been sexually assaulted … [I]n terms of relevance, it is difficult to see any distinction between the content of these concessions and the content of recent complaint evidence."

A similar result followed in *R* v *Shillingsworth* [2003] NSWCCA 272.

***South Africa***

[148] In *Hammond* v *S* [2004] 4 All SA 5 (SCA) the complainer alleged that she had been raped when, after a drunken afternoon, she had been dragged onto a beach. The appellant said that all activity had been consensual. After the incident, the appellant's car became stuck on the beach. Some fishermen arrived to assist. They spoke to being approached by the complainer who said she had been raped and tried to get into their car. She was crying and had been drinking. Appeal Justice Cloete in the Supreme Court of Appeal reviewed (at paras [13]-[16]) the English, Commonwealth and South African cases; concluding that what a complainer said could be used to demonstrate consistency and as evidence of a lack of consent. Caution had to be exercised in relation to the complainer's emotional state but (at para [22]) it was admissible to show that sexual contact had taken place, where this was denied. Notwithstanding all of this, the conviction was set aside (cf *Fletcher* v *S* [2010] 2 All SA 205 (SCA)).

[149] In *S* v *Gentle* (2005) 1 SACR 420, Cloete JA, again delivering the opinion of the court and with whom the other justices of appeal agreed, said (at para [18]):

> "It must be emphasized immediately that by corroboration is meant other evidence which supports the evidence of the complainant, and which renders the evidence of the accused less probable, *on the issues in dispute* … If the evidence of the complainant differs in significant detail from the evidence of other State witnesses, the court must critically examine the differences with a view to establishing whether the complainant's evidence is reliable. But the fact that the complainant's evidence accords with the evidence of other State witnesses on issues not in dispute does not

> provide corroboration. Thus in the present matter, for example, evidence that the appellant had sexual intercourse with the complainant does not provide corroboration of her version that she was raped, as the fact of sexual intercourse is common cause. What is required is credible evidence which renders the complainant's version more likely that the sexual intercourse took place without her consent, and the appellant's version less likely that it did not."

This was followed in *Kgosiencho* v *S* [2019] ZANCHC 57 (Northern Cape High Court) by Williams ADJP at para [23].

***Ireland***

[150] Moving closer to home, in *DPP* v *Mulvey* [1987] IR 502 intercourse was admitted. The Court of Criminal Appeal held that distress might amount to corroboration in certain circumstances, but the jury should be wary of relying on it. Justice McCarthy carried out an extensive review of the authorities. The trial judge had directed the jury (at 507) that "it is dangerous for the jury to convict even if they believe the evidence of the complainant … unless there is corroboration". He continued (at 508 – 509):

> "… in criminal cases like this it has been known for girls who have been indecently assaulted or who have had sexual intercourse with men to make complaints about the men afterwards which are not true. There are many reasons for this and you use your common sense and experience of life. Some of you I am sure are married and have experience of sex."

On that basis the jury had to be absolutely satisfied of the girl's account and beyond doubt that the defendant knew that she did not consent. Justice McCarthy, with whom the other judges agreed, considered (at 509) that this adequately conveyed to the jury the proper approach to the real issue, and the weakness of distress as corroboration.

[151] Thirty years later, in *DPP* v *MG* [2019] IECCA 241, the President of the Court of Appeal (Birmingham) preferred a view on the need for a *cum nota* warning in Ireland as follows at para [12]:

> "… [T]here is no absolute requirement on a Judge to tell a jury, as a matter of course, that the distressed state of a complainant, if capable of amounting to corroboration, offers only weak corroboration. Whether to do so is a matter for the judgment of the Trial Judge and it is a judgment that will be exercised against the background of the particular facts of the case. There may be cases where it would be regarded as appropriate to so do. Examples that come to mind would be situations where a credible alternative explanation for the distressed state is advanced, or where those giving evidence of having witnessed the distressed state might seem other than independent, and indeed, as having an axe to grind. In this case, the Court does not see the need for such a warning or categorisation emerging from the evidence."

**The Reference**

[152] The Lord Advocate has referred the following two questions to the Court:

> "(1) Did the trial judge err in directing the jury that distress of itself cannot corroborate the direct testimony of a complainer that penetration has occurred?
>
> (2) Is independent evidence of distress sufficient to corroborate a complainer's direct testimony that penetration has taken place?"

**Submissions**

***Crown***

[153] The court was invited to answer both questions in the affirmative. *Smith* v *Lees* had been wrongly decided and should be overruled for four reasons: (1) it erred in finding that distress could not corroborate penetration. The error lay in treating distress differently from other forms of circumstantial evidence which were capable of supporting or confirming a complainer's account; (2) it was inconsistent with the court's approach to circumstantial corroboration since *Fox*; (3) it was at odds with other leading common law jurisdictions, which did not restrict distress to corroborating only a lack of consent; and (4) it was contrary to the court's observations in *Jamal* on the broad approach to corroboration. These observations were consistent with: (1) the traditional approach to corroboration taken by the

Institutional Writers; (2) the modern offence of rape in the Sexual Offences (Scotland) Act 2009; and (3) the approach taken by the other leading common law jurisdictions.

[154] *Smith* v *Lees* said that evidence of distress could not tell a factfinder anything more than that something distressing had occurred. Each of the judges analysed corroboration from the starting point that each of the *facta probanda* of a crime needed to be corroborated. While the emphasis was slightly different for each judge, distress could not corroborate penetration. The error was that distress should be treated in the same way as any other form of circumstantial evidence. The classic statement of when circumstantial evidence may be corroborative was when it confirmed or supported the direct evidence (*Fox* (at 100-101)). So long as the circumstantial evidence was independent and confirmed or supported the direct evidence, it provided corroboration and the requirements of legal proof were met. The essential points to be taken from *Fox* were: (1) the starting point was the direct evidence; and (2) circumstantial evidence did not lose its corroborative value simply because it may be open to more than one interpretation or because there was an alternative explanation. *Smith* v *Lees* could not be read compatibly with *Fox*. While a complainer's distress could not, when looked at on its own, reveal precisely what had happened to her, that should not preclude it from being corroborative. The jury should be permitted to draw an inference from the distress about what had occurred.

[155] Distress was just as corroborative of penetration as it was of lack of consent. Distress permitted the inference that the sexual intercourse was not consensual. To be corroborative, it did not need to compel that inference. There may be other reasons why someone was distressed after sexual intercourse, but the fact that distress permitted an inference was sufficient for it to corroborate lack of consent. If distress did not lose its ability to

corroborate lack of consent, merely because there were alternative explanations, the same should be true for penetration. There was no principled reason for *Smith* v *Lees* to have found that distress could corroborate lack of consent, even though there may be other explanations for it, and then to have found that it could not corroborate penetration because there could be other explanations for the distress.

[156] Evidence corroborating a complainer's account of rape should not lose its corroborative value simply because an accused attempts to blunt its force by accepting some other form of sexual wrongdoing, even if the complainer said that nothing of the kind occurred and the only thing that happened was the rape she described. By finding that a complainer's distress showed only that something distressing had happened, *Smith* v *Lees* deprived what would otherwise be good corroborative evidence of the complainer's account by saying that the distress was no more consistent with rape than with sexual assault. Admitting the latter, the accused deprived the Crown of sufficient evidence of the former. If there were two explanations for why a complainer was distressed, there was no reason why a jury should not be allowed to decide which explanation they preferred.

[157] Since *Fox*, the court had repeatedly emphasised that corroborating evidence requires only to support or confirm a complainer's evidence. In rape cases, it need not point unequivocally to penetration (*Adamson* at para [15]; *Munro* at para [7]; *Palmer* at paras [10] and [11]; *PM* v *HM Advocate* 2018 SCCR 23 at para [29]; *Reid* at para [17]; *McCabe* at para [10]; *Graham*; and *Guthrie* v *HM Advocate* at para [49]). In none of the cases could it be said that the circumstantial evidence pointed unequivocally to penetration. It was sufficient that the circumstantial evidence supported or confirmed the complainer's account of penetration. If a finding of DNA, when compared with the absence of such a finding, was corroborative of

penetration because it made the complainer's account more probable, then so too should distress. The presence of distress, when compared with the absence of distress, made a complainer's account of rape more probable.

[158] It was wrong to assume that corroboration of penetration required any particular or special type of circumstantial evidence, such as forensic or medical evidence. Penetration could be corroborated in the conventional way. That could be by an adminicle of circumstantial evidence that supported or confirmed the complainer's account; for example dishevelment or distress. The same applied to implied or equivocal admissions, where the charge involved penetrative sexual conduct. Such admissions were corroborative, including the penetrative element, even though they could be consistent with an admission that something other than penetration had happened (*Adamson*; and *CR* v *HM Advocate* 2022 JC 235). In both cases, the justification for the admission being capable of corroborating penetration was that, applying *Fox*, it supported or confirmed the principal source of evidence. The relevant principles were re-stated in *Jamal* (at para [21]). If corroboration of a complainer's evidence, including penetration, could be supplied by another complainer speaking to an attack on herself amounting to something less than penetration, there was no principled reason why evidence of an independent witness speaking to distress shortly after the incident should be any less corroborative of that penetration.

[159] Corroboration may not be a formal requirement in the rest of the Commonwealth, but it remained a relevant concept in sexual offence cases. Its roots were in the common law warning of the danger of convicting without corroboration. Although the mandatory need for a warning had been abolished, the courts in those jurisdictions still analysed what evidence could corroborate in sexual offences. That made it instructive to look at how other

Commonwealth jurisdictions approached distress and which elements of the offence of rape it could corroborate. Several Commonwealth jurisdictions regarded distress as corroborative in rape and sexual assault cases. They did not distinguish between distress corroborating penetration and distress corroborating lack of consent. They did not limit the corroborative value of distress only to cases where the defence was consent. Distress was also corroborative when the defence was denial and the prosecution had to prove both penetration and lack of consent. It was a common and ordinary occurrence for distress to be relied on, without any distinction between denial and consent cases (Australia: *Papakosmas* at paras 20 and 78; and *Shillingsworth* at paras 36 and 37; Canada: *Murphy*; *R* v *JAA* [2011] 1 SCR 628 at paras 37-41; *AJK* at para 42; *R* v *Rose* [2021] ONCA 408 at paras 22 and 23; and *R* v *JSS* [2016] BCCA 411 at paras 47-49; England and Wales: *Redpath*; *Chauhan*; *Romeo* at para 13; and *Khan* at paras 16 and 18); Ireland: *Mulvey*; *DPP* v *MK* [2005] IECCA 93; *DPP* v *Boyce* [2005] IECCA 143; *DPP* v *TE* [2015] IECA 218; *MG* at para 12; New Zealand: *Moanu*; *Daleszak*; and *R* v *B*, CA365/13, 18 November 2004 at para 28); Northern Ireland: *R* v *Z* [2017] NICA 2 at para 43; and South Africa: *Hammond* at para 22; *Fletcher* at paras 13 and 15; *S* v *Kruger* 2014 (1) SACR 647 (SCA) at para 9; and *S* v *R* 1965 (2) SA 463 (W)). It was anomalous that Scotland, which was the only jurisdiction to require corroboration, was the only one in which distress was not regarded as corroborative of penetration, but only corroborative of lack of consent. Scotland was out of step with its closest common law neighbours.

[160] Drawing on *Fox*, *Jamal* confirmed that: (i) penetration could be corroborated by facts and circumstances which supported or confirmed the complainer's evidence; and (ii) a broad approach should be taken. Distress should not be eliminated as a significant factor which, at least when taken with other circumstances, supported or confirmed the

complainer's account. This was consistent with both the traditional understanding of the function of corroboration, as a check on a principal witness's testimony, and the modern understanding of rape since the 2009 Act. That understanding rejected the artificiality of an approach which required the concurrent events of penetration and lack of consent to be corroborated separately and, in most cases, by different types of evidence.

[161] The seeds of the modern rule of corroboration may be in religious and Romano-canonical law sources, but the roots of the modern rule are in Hume: *Crimes* (ii, 383). Although Hume identified the two elements of rape, he did not provide a separate commentary on how corroboration of each element was to be achieved. His principal observation was simply that "the credit to be given to [a complainer's] story must depend on its probability, and the collateral evidence in support of it" (i, 308). None of the cases to which he referred disclosed any consideration of corroboration of separate elements in isolation. Alison was to the same effect, but with a much fuller treatment of the mode of proof. Whether the woman's statement was duly corroborated was done "in the most unexceptional way" (*Principles*, at 220); looking into the account of the woman and the support which it received from the other circumstances (*Principles*, at 221). Signs of injury, the remoteness of the *locus*, the accused's flight from it, and similar circumstances were "concurring circumstances" which gave greater probability to the woman's account. Alison contained an extensive examination of the various types of circumstantial evidence which were available in rape cases. Nowhere were the two elements of the crime considered separately or in isolation. The Institutional Writers' approach was the same as that identified in *Jamal*. A woman's direct testimony of rape could be seen as corroborated when all the surrounding facts and circumstances were taken into account.

[162] In *Jamal* the court was correct to observe that the prior understanding, that the two elements of rape ought to be looked at separately, may have arisen from the view that penile penetration was the most serious element in rape (*HM Advocate* v *Robertson* (1836) 1 Swin 93). That appears to have led to the incorrect, but enduring, view that penetration had to be looked at separately from force. This view was swept away by the 2009 Act. *Jamal* was correct that any former views on the dishonour caused by penile penetration had given way to a much broader concept of rape as a violation of sexual autonomy (Scottish Law Commission: *Report on Rape and Other Sexual Offences* at paras 1.25-1.27 and 1.29). The specific wrong of sexual assault was the infringement of sexual autonomy; the use of violence was an additional, not a central part, of the wrongdoing (para 3.5). There was no principled reason for looking at the two elements of rape, as contained in the 2009 Act, in isolation from each other. *Jamal* was consistent with the traditional approach to corroboration of rape in the Institutional Writers, the modern understanding of rape in the 2009 Act and with the approach taken in other Commonwealth jurisdictions.

[163] It was now within judicial knowledge, both here and in the rest of the Commonwealth, that different people will react in different ways to rape. While distress and other aspects of a complainer's emotional state after the incident could corroborate her account, there was no normal reaction to rape or other sexual assault. There was no reason to restrict the corroborative value of distress to extreme distress (cf *Jamal* at para [20]). The only thing that mattered was that the distress, of whatever form, was *de recenti*, unfeigned and caused by what the complainer said was done to her. Particularly in historical cases, distress was not always immediately displayed. There was no strict time within which it had to be exhibited. What mattered was that the distress was caused by the rape (*Ferguson*

v *HM Advocate* 2019 JC 53).

[164] There were currently two uses to which a statement made by a complainer may properly be put. When that statement was given in a state of distress, it was admissible as primary hearsay to show that the reason for the distress was the incident alleged. When the statement was *de recenti*, it was admissible as showing consistency in the complainer's account (that is, as a prior consistent statement). Such evidence was not corroboration, but it was capable of bolstering the complainer's credibility. There was a third situation, in which a *de recenti* statement was made by a complainer while in a state of distress. The distress was an objective feature and therefore a source of circumstantial evidence which was independent of the complainer. The words spoken by the complainer, which described the assault perpetrated upon her, were said not to be corroborative on the basis that a witness could not corroborate herself (*Morton* at 54). While that has been the position since *Morton*, the cases and text books pre-1938 cast doubt on its accuracy.

[165] Burnett stated (at 519) that evidence, which goes merely to support credibility, such as a recent report, is not sufficient proof. However, Burnett later (at 554) allowed evidence of what a child said to her parents or others recently after the assault to corroborate the child complainer's account. Evidence of what the complainer said recently after the event was competent as corroboration (at 602). Hume, in a footnote stated (ii, 407) that, in the case of rape, it was admissible to lead evidence that, recently after the fact, the woman complained of the injury to her mother. Alison said (*Principles,* 217 to 225) that, in cases of rape, it was necessary to look at the accounts of the woman, and the support which they received from the other circumstances of the case. Her statement was duly corroborated by the evidence of her subsequent disclosure. A woman was permitted to give an account of the injury, and

to support that testimony by the accounts which she had previously given to others *de recenti*. *De recenti* statements were capable of corroborating a complainer's evidence (*Practice*, 514-515). Alison's exposition was confirmed by Dickson's *Evidence* (3rd edition, at para 254). There was nothing in Alison or Dickson to suggest that this evidence was admissible only for the purposes of bolstering a complainer's credibility. Evidence of third parties speaking to the complainer's *de recenti* account was capable of providing corroboration of the facts.

[166] This approach was accepted as correct in a series of cases pre-dating *Morton, viz.*: *McLennan* and *McCrindle* v *Macmillan*. *McLennan* and *McCrindle* were expressly disapproved in *Morton* in favour of allowing statements *de recenti* to be admitted for the limited purpose of showing that a complainer had been consistent and, in the case of assaults upon women, to negative consent. It was acknowledged that a complaint *de recenti* increased the probability that a complaint was true. *Morton* relied upon the well-known passages on corroboration from Hume, but the court did not refer to all the relevant passages from Hume or to Burnett, Alison or Dickson. If Alison and Dickson were correct, *Morton* was an inaccurate statement of the law. The law at the time permitted *de recenti* statements made by complainers to be admitted to support or confirm their accounts. These accounts were the "natural outpourings of feeling aroused by the recent injury" (Dickson: i at para 258) and "which are connected, more or less directly, with the *res gesta* of the injury, or which were so recently given after it, as to form, in some sort, a sequel to the actual violence" (Alison *Practice* at 515). The error in *Morton* was a failure to recognise this.

[167] There was a qualitative difference in the evidential value that could be attached to a *de recenti* statement when it was made in the absence of distress, which was a guide only to

credibility, and a *de recenti* statement made while in a state of distress. It should be open to the jury to accept the evidence of a third party, who could speak to the confluence of distress with a *de recenti* statement, as corroborative of the complainer's testimony. Not only would that return the law to the position prior to *Morton*, it would also be consistent with the Institutional Writings. It would avoid the anomaly of *de recenti* distress, coupled with a *de recenti* statement, being capable of corroborating force or a lack of consent, but not the facts spoken to in the statement. If, moments after a rape, a woman were seen in a state of dishevelment, exhibiting distress to passers-by and heard to say, "Help me, I've been raped", it was artificial to separate the dishevelment and distress from what the woman said had caused it. The *de recenti* statement should be capable of being considered, like distress, as being an unfeigned reaction, which arose spontaneously, and therefore as a source of circumstantial evidence independent of the complainer which supported or confirmed her account. Such evidence would have been corroborative in the 19th century. There was no reason why it should be incapable of providing corroboration today.

***Respondent***

[168] The respondent submitted that the court should answer both questions in the Reference in the negative. Corroboration remained an essential part of the criminal law. Its limits may be taken as settled. Developments had proceeded on the basis of that law. The legislature was able to take an holistic view, so as to cater for any undesirable consequences of change by the introduction of concomitant safeguards. There was a danger in tinkering at the edges by way of judicial legislation, in which safeguards were less readily, or not, available.

[169] Since *Smith* v *Lees*, it had been recognised that distress might provide corroboration of two of the *facta probanda* in rape; lack of consent and *mens rea*. Distress cannot corroborate

either of the other two: the identity of the accused; and penetration. That made sense. Distress pointed towards something distressing having happened, but it did not say anything about identity. In trying to place penetration between these two poles, it lay closer to identity than lack of consent. Distress was not more likely to be experienced in the event of a rape than, for example, a simple assault, a non-penetrative sexual assault, or many other crimes. Allowing corroboration of penetration to be found in distress was unprincipled and unwarranted.

[170] Corroboration was an ancient principle (Numbers 35 v 30; Deuteronomy 19 v 15; John 8 v 17; and 2 Corinthians 13 v 1-4). It appeared in the Institutional Writings: (Stair IV, at 43, 2; Mackenzie: *Matters Criminal* (see the Carloway Report at para 7.1.1); Alison: *Practice* at 551; and Hume ii, 383). It was enshrined by the Full Bench in *Gillespie* v *MacMillan*. Crucial facts required corroborated evidence. The *facta probanda* in a charge of rape were: (1) identification; (2) penetration; (3) lack of consent and (4) *mens rea*. Each required corroborated evidence (*Lockwood* v *Walker). Stobo* was overruled in part in *Smith* v *Lees*, but no doubt had ever been cast on the statement in *Stobo* (at 34) that distress could not corroborate the complainer's evidence of identity. Corroboration of penetration by distress went beyond what was appropriate, and was contrary to principle. This had been said by many judges: *McLellan*; *Stobo*; *HM Advocate* v *L* (at para [17]); *Adamson;* and *Branney* (at paras [19]-[20])). Just as distress said nothing about who was the assailant, it said nothing about the mode of assault.

[171] The suggestion that *Smith* v *Lees* involved a compromise (*Wilson* at para [28]) was incorrect. The reason why distress could only corroborate two of the *facta probanda* in rape was not because of any judicial compromise. It was the principled reason that it was only

those crucial facts (lack of consent and *mens rea*) which gained any evidential support from distress. Distress was inconsistent with a consensual act. It was not inconsistent with a non-penetrative act. People became distressed for all sorts of reasons. There was no principled basis upon which it could be said that distress was more consistent with penetration than with anything else.

[172] *Wilson* was the first in a line of cases presided over by the Lord Justice General (Carloway) in which it had been suggested that *Smith* v *Lees* presented too much of a bright line distinction. The next was *Jamal* where it was said that, in some situations in which a complainer said that she had been raped, it had been held that only a conviction of attempted rape was available. This was a reference back to *Stephen*. In *Jamal*, the court described the nature of rape as changing over time. In *McCabe*, it was said that corroborating evidence did not have to point unequivocally towards penetration. It was sufficient if it confirmed or supported the complainer's account. Most recently, there was *Fisher*. In these cases, there was a conflation of two separate and distinct concepts: corroboration of the *facta probanda*, on the one hand; and corroboration of the credit (*sic*) of the complainer, on the other. This elision was not in accordance with the principle whereby corroboration of each of the *facta probanda* was necessary. If it were otherwise, a distressed complainer would provide a sufficiency for all elements of the prosecution. That was a step further even than that understood to be advocated by the Crown in this Reference.

[173] Looking at *Jamal*, and the cases which had followed, the origin of the concept, that support of the complainer's account should be looked at in the round, appeared to be *Fox*. That was not a true reading of *Fox*. It would be remarkable if, when delivering his opinion in *Fox*, the Lord Justice General (Rodger) had forgotten, or departed from, what he had said

less than one year previously in *Smith* v *Lees*. *Fox* had not departed from the requirement to corroborate each *factum probandum*. The approach of the other members of the Bench in *Fox* was consistent with this (Lord Justice Clerk (Cullen) at 108; Lord Kirkwood at 110 and 112; Lord Coulsfield at 116; Lord Gill at 123).

[174] An approach which proceeded on the basis that all that was needed was some sort of independent support for the credibility of the complainer ran counter to Burnett (at 518–519) which was cited with approval in *Fox* (at 99). The correctness of that statement could not be in doubt, standing *Morton*. The statement made by the complainer in *Morton* was held to be *de recenti*; recounting what she said had happened to her. As such it was insufficient to corroborate her testimony, as it was outwith the *res gestae*. Once it was understood that corroboration of the *facta probanda* was required, a shift to a world in which only support of the credibility of the complainer was needed was unwarranted and unprincipled. It made no sense, standing *Morton*.

[175] *Jamal*, itself founding on *Fox*, was the fundamental basis for the argument that *Smith* v *Lees* should be overruled. The far-reaching consequences of this should not be over-looked. If distress could provide corroboration in the manner proposed, then corroboration will have been diluted to the point at which it will no longer be material. The existence of a distressed complainer would, on that basis, provide a sufficiency. This would not be restricted to crimes of rape. Any situation in which being the victim of a crime, whether assault, indecent exposure, robbery or theft, was distressing would mean that corroboration of whatever the complainer said could be found in the fact that they were distressed. This would remove something that has for centuries been seen as a vital safeguard.

[176] Rape myths were now well-understood. The court should not shut its eyes to the fact

that there were cases in which the complainer was not telling the truth. Rape often presented difficulties for prosecutors, because it was a crime that would usually be committed in circumstances where there were no witnesses. The other side of that coin was that an allegation of rape was one which, once made, could be difficult to challenge. For that reason, the courts have held to the line that the *facta probanda*, and not merely the complaint taken as a whole, required to be supported by corroborative evidence. Removing that safeguard raised the real possibility of wrongful convictions.

[177] It was important to understand what *Fox* decided. The submission for the appellant had been that circumstantial evidence could amount to corroboration of direct evidence if the circumstantial evidence was more consistent with the direct evidence than with any competing account. The respondent here did not make that submission. Corroboration should be the same whether at the stage of a no case to answer submission as at the end of the trial. At the first stage, there may be no competing account. If something could provide corroboration at that stage, there was no question of it losing its corroborative value just because a competing account were given.

[178] Before something could provide corroboration *at all*, it needed to corroborate a *factum probandum* by being more consistent with that fact, as opposed to being neutral. There was no support in *Fox* (at 100) for the proposition that all that needed to be looked for was an independent adminicle that was supportive of the credibility of the complainer. What was required was independent evidence that confirmed or supported the direct evidence of the crucial facts.

[179] The same point was made by the Lord Justice Clerk (Cullen) in *Fox*. *Smith* v *Lees* said that distress could corroborate lack of consent. *Adamson* said that distress could

corroborate *mens rea*. In each of those instances, the distress provided independent support of the *factum probandum* (cf the questions of identity and penetration). Distress was neutral on those critical facts. Independently observed distress provided no support for the allegation that the accused was the assailant or for the allegation that there was penetration. This was made clear by Lord Kirkwood (at 112). As Lord Coulsfield noted in *Fox* (at 117-8), this was consistent with *Morton.* The Lord Justice Clerk's opinion in *Morton* remained the test for corroboration. It should not be diluted.

[180] Attempts by the Lord Advocate, founding on *Jamal*, to downplay the importance of penetration should not be heeded. Section 1 of the 2009 Act made it clear that penetration was a *factum probandum,* without proof of which there could be no rape. The statutory changes to the law deliberately maintained rape as a *nomen criminis*. They included the requirement of penetration before that crime could be said to have been committed. It would be inappropriate simply to treat rape as a sexual assault in which, as long as there was independently observed distress, all elements of the crime were proved.

[181] When the Scottish Parliament considered the abolition of corroboration in the original Criminal Justice (Scotland) Bill, before that part was discontinued, the Bill introduced a potential safeguard against miscarriages of justice, by requiring that a two-thirds majority of a jury must be in favour of a guilty verdict (Policy Memorandum for the Bill, paras 172-175). That being so, proper safeguards to balance any relaxation of the requirement must be put in place (see Chalmers and Leverick: *Majority Jury Verdicts* (2013) 17 Edin LR 90-96). *McLay* v *HM Advocate* 1994 JC 159 (at 167) proceeded on the basis that widescale changes to the law of evidence should be left to the legislature. The re-categorisation of distress to corroborate one of the *facta probanda* in the crime of rape was a

matter properly left to the legislature (see *Philipp* v *Barclays Bank UK* [2023] 3 WLR 284, at paras 23 and 24).

[182] As a general rule, evidence of a witness's prior consistent statement was not admissible (*Whorlton* v *HM Advocate* [2020] HCJAC 36 at para [5]). An exception to this was a *de recenti* statement. Such a statement was admitted for a limited purpose; as an evidential tool to gauge credibility and reliability. The only purpose of the *de recenti* exception was to permit proof that the witness had been consistent. It was not evidence of fact (Walker &Walker: *Evidence (*2nd ed) at para 8.3.1). A *de recenti* statement was nothing but a statement by the injured party (*Morton* at 53).

[183] The law on *de recenti* statements and their evidential limits was well settled. There was a distinction between the evidential limits of distress and *de recenti* statements. Where there was a temporal proximity between distress and a *de recenti* statement, the jury required clear directions on the evidential category into which distress and a *de recenti* statement fell. Distress, which was spoken to by another witness, was evidence from a source independent from the complainer and could thus corroborate the complainer's evidence to the extent allowed in *Smith* v *Lees*. The jury required to be directed on the distinction between the fact that something was said and the manner in which it was said. The source of the statement was the complainer. What the complainer said at the time cannot be corroborative of the complainer's testimony to the same effect, since the source was the same. *Farooq* was one example of where the court held that there had been a miscarriage of justice because of the failure of the trial judge to explain the limited purpose for which *de recenti* statements were available (see also *DS; Dyer* at para [13]); and *Cinci* and *M*). The court distinguished between a *res gestae* statement and a *de recenti* statement and made it clear that the latter

could never be admitted as corroborative (see also *Ahmed* at paras [11] and [20]).

[184] The distinction between distress and *de recenti* statements was affirmed in *Wilson* (at paras [28], [34] and [35]). *De recenti* statements could not be part of the *res gestae*. There was a plain tension between what was said in *Jamal* and what had been said by the courts repeatedly since *Morton*. On the clear authority of *Morton,* the fact that a statement increased the probability that the complaint was true did not amount to corroboration. The Reference posed the question of whether *Smith* v *Lees* should be overruled. It was not open to the Crown to overturn *Morton*. It was a decision of seven judges, and could not be overruled other than by a larger Bench. The true reasoning for the decision in *Morton* was that *de recenti* statements were not independent of the complainer. A *de recenti* statement was evidence from the complainer. If anything was sacrosanct, it was that corroborative evidence must be independent of the complainer.

[185] There was a concern on behalf of the legal profession that there could effectively be a self-proving complainer where only a majority verdict was required for conviction. There was no comparable situation in common law jurisdictions. Judge-made law was a blunt tool which did not allow for an holistic view, or concomitant safeguards or public consultation. Change such as this lay with the Scottish Parliament. This approach was supported by the recognition in *O'Shea* (at para [37]) that the law as stated in *Morton* should remain in the absence of legislation.

[186] Since *Smith* v *Lees,* distress has been available as corroboration only on lack of consent and *mens rea.* The Reference sought to extend the purpose for which distress was available; that is to corroborate penetration. *Smith* v *Lees* was binding on the Court in *Jamal*. *Jamal* was about mutual corroboration and not about distress. *Jamal* erred in law when it

said that distress was available as corroboration of the *actus reus* of rape. In so far as *Jamal* proceeded on that basis, it should be overruled.

[187] Little assistance could be gained from Commonwealth cases. The requirement for corroboration in these countries stemmed from a perceived need in relation to witnesses, including women, who were considered inherently unreliable. These ideas had been departed from. These countries had different safeguards in relation to jury verdicts. In all these jurisdictions, safeguards, such as the need for a particular majority for a verdict, were in place.

**Decision**

***Sufficiency in general***

[188] Sufficiency of evidence is a very important aspect of modern criminal practice. It is critical, for the proper working of the criminal justice system, that it is fully understood by both bench and bar. It needs to be clearly and succinctly stated at an authoritative level and then applied in the courts. The Court's statement on when, and to what, the requirement for corroboration applies, and what corroboration consists of, may be legitimately criticised in the public forum. Such comments as may be proffered should not deflect the courts from implementing that statement, as they are bound by the rule of law to do.

[189] Sufficiency does not depend, as in most other jurisdictions in the Commonwealth and Europe, purely on a qualitative assessment of whether the evidence is such as to merit a finding of guilt beyond reasonable doubt, but rather on an initial quantitative assessment of whether there are at least two sources of evidence, that is to say two witnesses in the case; the one corroborating the other. It is only once that assessment has been made that the

quality of the evidence is examined. The initial quantitative assessment is carried out by the judge before another quantitative, and then a qualitative, analysis is made by the jury under the judge's directions.

[190] The basic principle is not in doubt. It is set out clearly in Hume (*Crimes* ii, 383). It is that:

> "… no one shall in any *case* be convicted on the testimony of a single witness" (emphasis added).

This principle is explained by Hume (ii, 384) as meaning, not that there requires to be two or more eye witnesses to a *fact*, but that a want of a second witness can be "supplied by the other circumstances of the *case*" (again emphasis added). In cases which involve circumstantial evidence, either where there is only one eye witness or where there are no eye witnesses and all the evidence is circumstantial, the "aptitude and coherence of the several circumstances" may "confirm the truth of the story".

[191] Thus far there is no problem. In any criminal *case* there requires to be more than the testimony of one witness, but there need not be two eye witnesses speaking to the case against the accused. A sufficiency may be derived either from facts and circumstances, spoken to by another witness, which "confirm the story" given by the one eye witness, or alternatively from a combination of facts and circumstances alone, provided that there are at least two witnesses in the case. Two questions, which arise from these two situations, have continued to perplex judges and practitioners. They can be spelled out relatively simply. First, in a case where there is only one eye witness, as will often be the position in sexual offences, what must the surrounding facts and circumstances, which must be spoken to by one or more witnesses (other than the complainer), actually do? Is it necessary to look at these facts and circumstances in isolation and decide whether they point towards the guilt of

the accused? Alternatively, is it enough that the facts and circumstances, when taken together, support or confirm the eye witness's testimony? Ultimately, as will be seen, it is the alternative that is correct. Secondly, in a wholly circumstantial case, it is clear that the facts, when interlinked, must point to the guilt of the accused, but what is meant by the need to have at least two witnesses to prove the case in that context? This Reference is not about such a case, but the answer is to be found in *Gillespie* v *Macmillan* 1957 JC 51.

[192] Hume was at pains (ii, 385) to caution lawyers against going any further than to state the principles in a general way. His words of restraint have not always been heeded. This caution continued with Burnett (at 515 and 518) and Alison (*Principles*, at 89), who did not depart in any substantial way from Hume. Burnett advised (at 519) against formulating a rule about what circumstances might render complete the *semiplena* (half) proof of one witness. It just depended on the nature and quality of each circumstance "and their joint effect when combined". Alison complained (*Principles* at 73, para 24) about juries being "perpetually misled by erroneous statements of what is really necessary to constitute legal proof" and (*Practice* at 551) about counsel taking the requirement to an "extravagant length … desirous of perplexing juries". His complaints may have some resonance even today with, on occasion, perplexity being augmented from the bench.

[193] In *Gillespie* v *Macmillan*, the Lord Justice Clerk (Thomson) said (at 41) that nobody had improved on Hume's "judicious and guardedly general statement". Nobody had added anything to it. In *Fox* v *HM Advocate* 1998 JC 94, Lord Coulsfield observed (at 117) that Hume's treatment of the subject was difficult upon which to improve. The court agrees with these statements, yet it has had no alternative but to analyse what has occurred over the 180 years or so since the last edition of *Hume* to see if any of the many opinions on the

subject, some irreconcilable with the others, have resulted in any improvement or useful addition. An antecedent question is: what is it that requires corroborated proof? It is to that question that the court first turns.

***Proof of the case or the facts***

[194] Those who advocate a rule, whereby each "ingredient", to use Prof Wilson's terminology, of a crime (eg penetration in a rape case), requires support in the form of two independent sources of evidence, each of which points to the occurrence of that ingredient, often refer to Burnett, and in particular to his use of the term "fundamental facts". It is difficult to understand just what Burnett meant by this. His footnoted reference to *Isobel Williamson*, which has been described above, is of little assistance to the modern reader. What was it that was not proved by corroborated evidence? Was it the cause of death or the accused's involvement in it? From what Burnett went on to write, he was not attempting to depart from what was said by Hume. It is relatively clear from Burnett's citation (at 554 fn) of *Cook*, Dumfries, September 1774, that penetration was not something which required to be corroborated separately from the general allegation of rape.

[195] Walker & Walker's classification of crucial, evidential and procedural facts has little basis in the Institutional Writers. Neither Hume nor Alison talk about crucial or critical facts; nor do they mention "*facta probanda*", a phrase which, circuitously, means nothing more than the facts to be proved. In rape cases, Alison makes it clear (*Practice* at 220) that corroboration can come from physical injuries, the complainer's disclosure and her previous good character. He states specifically (*Practice* at 552) that there is no authority for the proposition that two witnesses are required to prove the fundamental facts, such as the

*corpus delicti* (ie the crime, or *actus reus*). This is a statement which ought to carry significant weight.

[196] In Dickson on *Evidence*, and the first three editions of Macdonald's *Practical Treatise on the Criminal Law of Scotland*, there is no mention of any need to prove separate aspects of a crime by corroborated evidence. The Lord Justice Clerk (Macdonald) and Lord McLaren in *Lees* v *Macdonald* (1893) 20 R (J) 55, 3 White 468, described the effect of the rule as meaning simply that, if only one witness were called and there was no other evidence, an acquittal had to follow. All that was needed was two witnesses to prove the *case*; not the individual facts in it. That being so, and this takes the analysis up to the close of the 19th century, the question is why a requirement to prove essential facts emerged, and gained so much traction, in the 20th century? Put another way, what caused the fourth edition of Macdonald, which was published 10 years after the author's death in 1919, to contain the proposition that "any fact essential to the commission of the crime" required corroborated evidence.

[197] It was mainly after the date of the final edition of Dickson, and the third, and last self-edited, edition of Macdonald, that judicial analysis began, in earnest, to take over the definition of what the requirement for corroboration meant in practice. The first decision of significance is *Lockwood* v *Walker* 1910 SC (J) 3, (1909) 6 Adam 124. This involved lewd practices and thus required proof that the complainer was under the age of puberty. This case may signal the first use of the words "crucial fact" and it took the form of the Lord Justice Clerk (Macdonald) stating (at 5) that the law "most certainly does require that every crucial fact shall" be proved by two witnesses or, where there is only one, "by corroborative facts and circumstances". The Lord Justice Clerk (with whom Lords Low and Ardwall concurred) considered (at 5) that the magistrate's own observations of the complainer, as to

her age being 11, were "clearly… not corroboration in any way whatsoever". Just why the observations of the magistrate could not provide the desired corroboration of the child's evidence is, contrary to the Lord Justice Clerk's assertion, far from clear. It is now remedied by section 46(3) of the Criminal Procedure (Scotland) Act 1995 (1975 Act, ss 171(3) and 368(3)).

[198] It was the Lord Justice Clerk's *dictum* in *Lockwood* v *Walker* that was used as authority for the proposition in Macgregor Mitchell's fourth edition of Macdonald that the evidence of one witness was not sufficient to establish "any fact essential to the commission of the crime". Just what an essential fact might be in relation to a common law crime was not expanded upon, but *Lockwood* v *Walker* regarded the age of the complainer in a lewd practices trial as being one. It is certainly an essential part of the crime, but upon what basis should that mean that the court must break down a common law crime into individual ingredients and require corroboration for each element?

[199] Not surprisingly, the content of the fourth and fifth editions of Macdonald had a major influence on practitioners in the years which followed; all based on the Lord Justice Clerk's *dictum* in *Lockwood* v *Walker*. This is despite what were contrary statements by the same Lord Justice Clerk in the first to third editions of his work on the criminal law, by him and Lord McLaren some 17 years earlier in *Lees* v *Macdonald* and by further conflicting *dicta* later in *Scott* v *Jameson* 1914 SC (J) 187. In *Scott* v *Jameson,* Lord Strathclyde stated in plain terms that important or "fundamental" facts did not require to be corroborated individually. The only exception to this, as Lord Guthrie pointed out, was if there was only one fact requiring proof. *Dicta*, to the effect that each fundamental or crucial fact in a criminal case required to be proved by corroborated evidence, beg the question of what such a fact might

be. The *dicta* came, in the pre-Walkers' era, from *Lockwood* v *Walker* and *Bisset* v *Anderson* 1949 JC 106, but they are contradicted by *Lees* v *Macdonald* and *Gillespie* v *Macmillan*.

[200] Once the fourth edition of Macdonald was published, the analysis in Walkers, which broke facts down into crucial, evidential and procedural categories, becomes understandable. Walkers' categorisation is certainly clear, neat and attractive from a theoretical analyst's point of view. It reads well and may have a certain logic to it. The problem with it, and a great deal of what has flowed from it, is that, somewhat surprisingly, it effectively dismisses the clear *dicta* emanating from a Full Bench of the High Court which was issued only seven years earlier, ie *Gillespie* v *Macmillan*. It also offends against the cautionary words of all the Institutional Writers that no rules of this nature ought to be devised beyond the basic principles set down by Hume. It pays scant attention to what Lord Mackay said in *Dalton* v *HM Advocate*, unreported on this point, about the corroboration of crimes occurring in secret. Hume's approach involved looking at cases holistically and in the round, based on the type of evidence normally available in the category of crime under consideration. He did not advocate any more technical an approach.

[201] The Full Bench decision in *Gillespie* v *Macmillan* has, since its very issue, been the subject of criticism. Some of that criticism has been bordering on the vitriolic, unless it was intended to be purely rhetorical (eg *Smith* v *Lees* 1997 JC 73, Lord McCluskey at 103). None of it is justified and most of it is based on a misunderstanding of how corroboration is applied, when heed is paid to the words of wisdom of the Institutional Writers.

[202] It has been commonplace to summarise *Gillespie* v *Macmillan* in a manner in which there are only two policemen, each at one of two end points of a measured distance. Each, it is argued, spoke only to his own stopwatch reading and therefore neither reading was

corroborated. That is not what the evidence was. There were three policemen. Each of the two at the entry and exit to the measured distance spoke to starting their stopwatches at the point, respectively, of entry and exit of the car. There was no reading at either point. The car was stopped by the third policeman. All three policemen were present when the watches were stopped simultaneously. The readings were then taken and visible to all. All three policemen could speak to there having been a reading; and hence that the stopwatches had been started. The readings were sufficiently similar as to provide a cross check on accuracy. They reflected what had been objectively observed; that the car was speeding, hence the decision to carry out the check. From the appellant's viewpoint, a problem would only arise, and might have been detected at the time, if the first policeman had pressed his stopwatch late and/or the second one had pressed his early. The sheriff accepted that they had not.

[203] *Gillespie* v *Macmillan* is a classic example of the practical application of the principles in Hume and Alison. As the Lord Justice General (Clyde) correctly said (at 36), it was not the speed of the car at the points of exit or entry that was in issue, but its speed between the two points. This was proved by the facts and circumstances in the case; there being no requirement to prove every link in a chain or every piece of a mosaic by corroborated evidence.

[204] The opinion of the Lord Justice Clerk (Thomson) in *Gillespie* v *Macmillan* is a model of practical reasoning. He stated the general requirement. In particular, he emphasised that the law is not an exact science or a department of logic. It is a subject whose problems have to be addressed in a common sense way. An analytical approach is not appropriate, when looking at three policemen measuring speed over a 440 yard distance. The Lord Justice

Clerk readily acknowledged that there was a risk that one of the policemen was not reliable in stating that he pressed the stopwatch button at the exact point of entry or exit. The safeguard there was not corroboration, but whether the tribunal of fact was prepared to accept the witness as reliable; a question of quality and not quantity.

[205] It is clear that Walkers did not agree with *Gillespie* v *Macmillan* (see eg para 9(b); "the Chain Analogy"). Walkers' view has had a very considerable influence. However, the law must, of necessity, proceed according to the tenets of *stare decisis*. If there is a Full Bench decision of the court on a particular subject, that decision is the law until overtaken by legislation or higher precedent. The criticisms of *Gillespie* v *Macmillan* in legal literature do not affect that. Prof Wilson was a greatly respected academic. His views must be taken very seriously. He was nevertheless in error in stating that the times of entry, exit and distance in *Gillespie* v *Macmillan* were essential facts (ingredients). The only such fact, apart from the identity of the driver, was the speed of the car over the measured distance. No fact or circumstance in relation to the occurrence of the crime required individual corroborated proof. Prof Wilson's ingredients theory is unworkable in a properly functioning criminal justice system; ie one which balances the interests of all and is capable of achieving just results in that context.

[206] It is against this background that *Smith* v *Lees* will be examined. All that the Institutional Writers, Dickson and the first three editions of Macdonald required was corroboration of, that is at least two witnesses in, the case. That view was supported by the Lord Justice Clerk (Macdonald) and Lord McLaren in *Lees* v *Macdonald* and by *Scott* v *Jameson*. The outliers, *ex facie*, are *Lockwood* v *Walker* and *Bisset* v *Anderson*, and these stand in contrast to *Gillespie* v *Macmillan*.

***Sufficiency in sexual offences***

[207] It is accepted by both parties that the identity of the perpetrator of a crime requires corroborated evidence. That is the decision of the Full Bench in *Morton* v *HM Advocate* 1938 JC 50. This is not challenged; nor is it contended that *de recenti* distress or statements about the facts of the crime can provide corroboration of identity. The court assumes for present purposes that these propositions are correct. The Lord Justice Clerk's (Aitchison) *dictum* in *Morton,* that there must be "concurrent testimonies, either to the same or to different facts, each pointing to the panel as the person by whom the crime was committed", is not the subject of challenge in the Reference. What he said, about the identification of the driver by a policeman in *Strathern* v *Lambie* 1934 JC 137 not being capable of being corroborated by evidence of facts and circumstances spoken to by the same policeman, is, on that hypothesis, correct. Corroboration is about the number of witnesses, not the number of facts. There is only one matter, other than the identity of the perpetrator, that needs such proof in sexual offences; that is that the complainer was subjected to the crime libelled.

[208] If that is rape, that is the matter requiring corroborative proof. This is made clear by the Lord Justice General (Emslie) in *Yates* v *HM Advocate* 1990 JC 378. He said in plain terms (at 379) that "evidence as to the condition of the alleged victim is capable of affording corroboration by credible evidence … that she has been raped". That is correct. There is no basis for the contention of the Lord Justice General (Rodger) in *Smith* v *Lees* (at 82) that Lord Emslie meant to say something different. Mistakes can occur, but the Opinions of judges are normally subject to careful revisal by their authors. The fact that intercourse was admitted in *Yates* does not detract from the clear meaning of the Lord Justice General's words. The charge was not a series of separate events; what was libelled was rape.

[209] The Lord Justice General repeated what he had said in *Yates* in *Stephen* v *HM Advocate* 1987 SCCR 570 (at 574). If the complainer were believed, the question became: "was there sufficient material, setting it against the girl's account, to demonstrate that her account was true?" That approach follows from what Hume and Alison said in cases where there was already a single source of direct testimony. The same consideration applies in lewd behaviour or indecent assault cases.

[210] The *dictum* of Lord Stott in *Begg* v *Tudhope* 1983 SCCR 32 (at 39) to the effect that a complainer's testimony can be corroborated by "her condition immediately after" is equally correct as is that of the Lord Justice Clerk (Ross) in *Gracey* v *HM Advocate* 1987 SCCR 260, where he said (at 263) that "the matter was correctly stated in *Yates*". By 1990 the picture appeared clear, with the Lord Justice General and the Lord Justice Clerk at one along with Lords Avonside, Johnston, Dunpark and Wylie.

[211] The permanent chairs of the appellate court changed over time. In *Moore* v *HM Advocate* 1990 JC 371, the new Lord Justice General (Hope) cited *Yates*, *Stephen*, *Gracey* and *Begg* v *Tudhope* in support of his statement (at 375) that there was no doubt that evidence of the condition of the victim could corroborate "her evidence that she has been raped". Lord Cowie's addendum (at 378) was to the same effect. However, a change in tack can be seen in *McLellan* v *HM Advocate* 1992 SCCR 171. This time, less than 18 months after *Moore* and sitting with a bench which included Lord Cowie, the Lord Justice General (Hope) went on to say (at 179) that, although distress could corroborate distressing activities, it could not, on its own, corroborate the "other elements" of a crime. The passage is difficult to follow. It starts with an obvious statement that the distress must be related to the "activity" described by the complainer. In some cases this can be left to the jury, if the activity is so distressing

that the jury could hold that "it would be liable to distress the victim". In that event the distress could corroborate the complainer's evidence "without further evidence to corroborate every detail of the crime". This confuses the two different concepts of: (i) corroborating testimony, on the whole case, which is, and will be seen to be, correct; and (ii) corroborating facts, which is wrong. The Lord Justice General (Hope) continued (at 179) by saying, without reference to authority and in direct conflict to his reference to *Yates* in the same paragraph, that there may be other cases, and rape may be a good example, where further evidence will have to be led to establish "the other elements necessary to prove the crime", because distress could not corroborate those elements. This appears to have been prompted by a submission by the Advocate depute that the Sheriff had misdirected the jury to the effect that distress could corroborate the complainer's evidence of the particular lewd practices.

[212] The commentary on *McLellan*, which is within the Scottish Criminal Case Report (Sheriff Gordon QC at 179 - 180), is critical of the idea that distress can corroborate a complainer's account, whether of a sexual or other offence. With remarkable prescience, it goes on to say (at 180) that the Lord Justice General's observations would "no doubt lead to a reconsideration of the whole question of distress as corroboration" (see also the reference to distress as corroboration of robbery in *Bennett* v *HM Advocate* 1989 SCCR 608 and *Mongan* v *HM Advocate* 1989 SCCR 25).

[213] The Lord Justice General's discussion in *Stobo* v *HM Advocate* 1994 JC 28 is in a similar vein. He commenced correctly by saying (at 34) that, where circumstantial evidence is relied on to corroborate the complainer's account, the circumstances "do not require to themselves be incriminatory". What they required to do was to support her testimony. The

Lord Justice General was again right to say that it is not possible to lay down any more precise rule. However, he did this by saying (at 34) that distress cannot corroborate penetration "because the other acts involved in the rape … will be sufficiently distressing in themselves to explain the distress". He added, in direct contradiction to *Stephen*, that distress could not corroborate attempted rape. Ultimately, the notion that distress can corroborate a complainer's testimony, but not if the crime libelled goes beyond a sexual assault, is incorrect. It is the testimony of the complainer that requires to be corroborated, not facts, ingredients or elements. That was the law, at least until *Smith* v *Lees*, to which the court now turns.

***Smith v Lees***

[214] The opinions of the Full Bench in *Smith* v *Lees* require to be accorded the utmost respect. The judges include the foremost judicial figures of their generation. Much of what several of them say about corroboration in their differing opinions is entirely correct. For example, the Lord Justice General (Rodger) had no difficulty in rejecting (at 77) the appellant's argument that distress could not provide corroboration because it came from the same source as the complainer's testimony. It could corroborate the complainer's testimony that something distressing had occurred and force had been used (at 80). The Lord Justice General was correct in identifying the anomaly in *McLellan* and *Stobo.* He was initially correct to say (at 90) that "corroborating evidence must support or confirm the eye witness's evidence". The Lord Justice Clerk (Ross) correctly observed (at 95, following Burnett at 518) that the corroborative evidence had to confirm the first witness's testimony.

[215] Lord Sutherland was right to say (at 111) that, if distress can be used as one of a number of factors which make up a circumstantial case, it must follow that it is a valid and

relevant piece of evidence. "[I]f that be so, … there is no reason why it should not be used as the sole corroborative factor". He was right to say (at 111) that the only thing that can be said about corroboration is that it is evidence that "is necessary … to surmount the hurdle that proof of the commission of the crime and the identity of the perpetrator cannot rest on the evidence of a single witness". With these starting points, the question becomes: where is the error in the conclusion that distress can corroborate lack of consent and the use of force but not the central part of the complainer's testimony that she had been raped? It is the conclusion which the judges in *Smith* v *Lees* arrive at, or perhaps the leap of faith which they took, that is in error.

[216] There are three fundamental problems with the reasoning in *Smith* v *Lees*. First, the judges do not analyse the underlying basis for their effective starting point; that each separate element in a criminal offence requires to be individually corroborated. In a rape case, each judge considers that either three or four of these elements require corroborated evidence. This idea, at the time of *Smith* v *Lees*, was not supported by the Institutional Writers, upon whom the judges relied. It was not supported by the preponderance of authority. Traditionally, the familiar direction to juries was that two matters required corroboration; that the crime happened and that the accused committed it. The latter has always been regarded as a separate matter; something the Lord Justice General (Clyde) mentioned in *Gillespie* v *Macmillan* (at 38) and which is not challenged in this Reference. That leaves proof of the crime where, in a rape case, there is seldom any direct evidence beyond the complainer's testimony (Dickson: *Evidence* (3rd ed) ii, para 2039). At the risk of unnecessary repetition, neither Dickson nor the first three editions of Macdonald mention any need to corroborate different elements of a crime and, if they had, such a proposition

would have run contrary to both the Lord Justice Clerk (Macdonald) and Lord McLaren in *Lees* v *Macdonald*.

[217] It is only with *Lockwood* v *Walker* that the crucial fact emerges as a concept; but it does so without reference to authority. That is not surprising, because there was no such authority. It may be necessary to libel certain elements of a charge in an indictment in order to meet the test of relevancy. It is quite another thing to say that each requires corroboration. The latter idea is dispelled when regard is had to the Lord Justice General's (Emslie) opinions in both *Yates* and *Stephen* and in the Lord Justice Clerk's (Ross) opinion in *Gracey*. It had already been made clear in *Gillespie* v *Macmillan* (eg Lord Justice General (Clyde) at 36, citing Hume ii, 384; and Lord Justice Clerk (Thomson) at 39). The judges in *Smith* v *Lees* do not attempt to critique the reasoning of the judges in *Gillespie* v *Macmillan* other than, in Lord McCluskey's opinion (at 103), to dismiss it in disparaging tones.

[218] The second fundamental problem with *Smith* v *Lees* is that it falls foul of all the cautionary remarks in the Institutional Writers, Dickson and, in particular, those of the Lord Justice Clerk (Thomson) in *Gillespie* v *Macmillan* (at 40). The law is a practical affair. "The analytical approach to the problem is over subtle and over-simplifies the problem". In a rape case, leaving aside identity, the complainer's account of having been raped is the only matter upon which there requires to be two witnesses. In *McLellan* and *Stobo*, the Lord Justice General (Hope) effectively said this in relation to sexual assaults, but drew back from the logical consequence of this view when it came to rape. This inconsistency was identified in *Smith* v *Lees*. The Lord Justice General (Rodger) said that, if the complainer's testimony, of being forced to touch the appellant's penis, could be corroborated by evidence of her distress, it was "hard to see why the same should not apply to evidence of penetration".

That is correct, but he went on to reason that, because the Crown had conceded that distress could not do so, the Crown's argument as a whole was unsound. That is a *non sequitur*.

[219] A concession by the Crown, or the defence, is not a good basis for avoiding the obvious consequences of a proposition. The Lord Justice General (Rodger) in *Smith* v *Lees* accepted the soundness of *Yates*, but only after revising Lord Emslie's opinion. He rejected Lord Stott's opinion in *Begg* v *Tudhope* on the basis, in part, that it was contradicted by the other judges (Lord Justice Clerk (Wheatley) and Lord Grieve), yet Lord Wheatley's view was not inconsistent with that of Lord Stott. On the contrary it supported it in relation to what the complainer had said to her teacher (see Lord Sutherland in *Smith* v *Lees* at 112-113).

[220] The third fundamental problem with *Smith* v *Lees* is that, notwithstanding their proximity in time, it cannot survive the analysis of the meaning of corroboration by the Full Bench in *Fox;* notably that of the Lord Justice General (Rodger), which has been followed repeatedly in recent years. In *Fox*, the court decided that, contrary to *Mackie* v *HM Advocate* 1994 JC 132, circumstantial evidence is corroborative of direct testimony if it "strengthens, or confirms, or supports" that testimony (Lord Justice General (Rodger) at 99, see also 100). Of critical importance, the corroborating circumstances do not require to be incriminating in themselves (see Lord Justice Clerk (Cullen) at 109, Lord Coulsfield at 118).

[221] In *Smith* v *Lees*, the judges recognised that, as in *Fox*, there was direct testimony. The question then was: what could corroborate that testimony? This seems to have been lost sight of in *Smith* v *Lees* when the search became, as if it were a wholly circumstantial case, one of seeing whether the circumstances, albeit when taken together, were in themselves incriminating. Lord McCluskey in particular referred (at 108) to distress on its own being incapable of pointing to the cause of the distress, which he suggests might have been

because the complainer had had a bad dream. This misses the point that there was already direct evidence from the complainer that she had been sexually assaulted. It was her testimony that required to be corroborated. That could be provided by evidence, from another witness or witnesses, speaking to a fact or facts which supported or confirmed the complainer's account that she had been sexually assaulted. The fact that the complainer in *Smith* v *Lees* was observed to be distressed immediately after the event did that.

[222] It was accepted in *Smith* v *Lees* that being subject to a sexual assault was likely to cause distress. When that distress manifests itself to independent witnesses it is, as Lord Sutherland put it (at 118), difficult to see why it should not be regarded as a separate source of evidence which confirms or supports the complainer's account. It is impossible to see why it should not be so regarded.

***De Recenti statements***

[223] Ever since *Morton*, generations of lawyers have been taught that a *de recenti* statement cannot provide corroboration of a complainer's account because it is, as the Lord Justice Clerk (Aitchison) put it (at 53) in *Morton,* "nothing but the statement of the injured party, and it is not evidence of the fact complained of". It was only admissible in "cases of sexual assaults upon women and children" to show that the complainer had been consistent rather than her complaint being an afterthought. It was also admissible "in the case of assaults on women, to negative consent" (at 53). There may be a slight anomaly in this, since, if a statement could "negative consent", it must be evidence of that fact. The Lord Justice Clerk accepted that such a statement "increases the probability that the complaint is true". It is difficult to find that to be so and, at the same time, to dismiss it as incapable in any

circumstances of being corroborative at least when it is coupled with independently-observed distress.

[224] It is tolerably clear from the remarks in *Burgh* v *HM Advocate* 1944 JC 77 (Lord Justice Clerk (Cooper) at 81) that the bright line distinction in *Morton* between a statement which was deemed to be part of the *res gestae* and one which was *de recenti* was a departure from the previous understanding that the latter was, contrary to *Morton*, normally part of the *res gestae*; hence the reference to "the modern rule". As the Lord Justice Clerk (Cooper) said, this accorded with "the ordinary popular sense of the term [complaint *de recenti*] … [that it] *did* provide 'corroboration' in the sense that it reinforced the credibility" of the complainers.

[225] The statement of the general law applicable to *de recenti* statements in *Morton* is *obiter dicta*, given that there was a sufficiency of evidence of the criminal act but not of the identity of the perpetrator, whom the corroborating witness could not identify. It is nevertheless a statement of high authority, coming as it does from the Lord Justice Clerk and the other members of the Full Bench (Lord Justice General (Normand), Lords Fleming, Moncrieff, Pitman, Wark and Carmont). It must be afforded due respect. Nevertheless, it cannot withstand, at least when the *de recenti* statement is accompanied by distress, the effect of the opinions in *Fox* on how corroboration operates, when there is already one source of direct evidence. *Fox* disapproved of the *dicta* in *Mackie*, which, although not a sexual offences case, concerned the corroboration of the testimony of a single witness (the chairman) about what was regarded as the essential piece of evidence against the accused. The purpose of a trial is, subject to questions of fairness in relation to the accused, to ascertain what happened. It is impossible to view the complainer's statements in the present case, on securing her exit from the respondent's flat, that she had been raped as other than so closely related to what

occurred in that flat that the truth can only be discovered by admitting evidence of what she said, alongside evidence of the distress which she exhibited, as part of the *res gestae* (*O'Hara* v *Central SMT* 1941 SC 363, Lord President (Normand) at 381). What was said was so connected with what was done that "dissociation" of the words from the facts to which they relate would frustrate the ends of justice and impede the discovery of the truth (*O'Hara* citing *Longworth* v *Yelverton* (1862) 24 D 696, Lord Ardmillan at 697). This reflects the observations of the Lord Justice Clerk (Carloway) in *O'Shea* v *HMA* 2015 JC 201 (at para [27]).

[226] Hume was at pains to stress (ii, 15) that, with cases where the crime was "secret" in nature, all the circumstances had to be considered in order to evaluate the probability of the complainer's account. Alison was keen (*Principles* at 220) to use not only real evidence as corroborative, but that concerning the complainer's disclosure to her relatives or the authorities. There is no suggestion in Hume or Alison that a *de recenti* statement could not be regarded by a jury as confirming or supporting the complainer's evidence and hence as corroboration. Only Burnett refers to such a statement as part of a complainer's "single testimony", and in this he is contradicted by Alison and Dickson. There is thus a body of authority which suggests that, where the jury is satisfied that a true *de recenti* statement which is intimately bound up with the alleged events has been made, they would be entitled to treat it as corroborative, even in the absence of distress. However, this is an issue which was not raised in the Reference. Although raised by the court, any argument on that matter was not sufficiently developed for the court to reach a concluded view.

[227] Despite being ingrained into the consciousness of every law student and practitioner in the second half of the 20th century, the idea that a *de recenti* statement cannot, when

coupled with distress, provide corroboration, does not accord with common sense. The fallacy is the legal construct whereby what a complainer says shortly after the event is treated in exactly the same way as her later testimony because it comes from the same "source". That might hold water if what was being considered was the complainer's own account of the distress which she felt and exhibited privately, or an account given by a complainer at a time remote from the event and after a period of reflection. Evidence of that latter type of statement might be excluded as inadmissible hearsay unless it could be brought within the statutory exceptions (Criminal Procedure (Scotland) Act 1995, ss 259-260) or *Jamieson* v *HM Advocate (No. 2)* 1994 JC 251. That is where the further exception of the *de recenti* statement, when coupled with distress, comes into play. It is testimony from a third party who is speaking to what Dickson describes as a natural outpouring of feeling aroused by recent injury and "still unsubsided". As such, and following the approach of the Lord President (Normand) in *O'Hara* v *Central SMT*, at least when accompanied by distress to any degree, a *de recenti* statement should be regarded as a consequence and continuation of the *res gestae* and thus as proof of fact and hence corroboration. It is real evidence.

[228] This approach found favour in *McLennan* v *HM Advocate* 1928 JC 39 and *McCrindle* v *Macmillan* 1930 JC 56, both following Dickson who, in turn, found support in Alison. These two cases were overruled in *Morton* but, upon reflection, this should not have occurred. The use of a *de recenti* statement, in the context of distress (the natural and unsubsided outpouring), should be seen as corroborative material in terms of *Fox*. If, as the Lord Justice General (Rodger) said, evidence is properly described as being corroborative because of its relation to the direct evidence, then it is corroborative because it "confirms or supports the

direct evidence". A *de recenti* statement which is made in the context of distress, and narrates what the complainer has experienced, does precisely that.

[229] The distinction which has been made between evidence which is corroborative (supports and confirms the direct evidence) and testimony which only goes to credibility and reliability (supports and confirms the direct evidence) is a fine distinction without any discernible difference. In the context of evidence of facts and circumstances, which are adduced to support or to confirm direct testimony, there is no difference. The person who speaks to a *de recenti* statement is not the same as the maker of the statement but an independent reporter of what was said *in extremis* after the event.

[230] If it were necessary to test the issue of how to assess the probative value of a *de recenti* statement when accompanied by distress, and why *Morton* is wrong in suggesting that a *de recenti* statement can never have corroborative value, it is not necessary to look further than *Cinci* v *HM Advocate* 2004 JC 103. In *Cinci* the evidence might reasonably be described as overwhelming. With due respect to the eminent judges in that case, finding that a statement of a naked woman, who was "scrunched up" in the corner of a shower in which the appellant was still present and also naked, that "he raped me" was not evidence of the fact of rape defies common sense as did, at that time, the idea in *Cinci* that the "*mens rea*" of the appellant was not proved. The trial judge's (Lady Smith) directions on treating the complainer's statements as an extension of the *res gestae* were correct and followed the approach in *O'Hara* v *Central SMT* (Lord President (Normand) at 381).

[231] Assimilating the evidential effect of a *de recenti* statement into the distress will make it much easier for a jury to understand and follow a judge's directions that either distress on its own or in combination with a *de recenti* statement can operate as corroboration. It will

also assist in the jury's assessment of credibility and reliability by allowing them to take all the evidence into account or, as it is sometimes put, to consider it in the round. The notion that evidence which supports or confirms a complainer's account cannot operate as corroboration should be dispelled as erroneous. The *dicta* to that effect in *Morton* must be disapproved. Otherwise, the decision in *Morton* remains sound; being that there was an insufficiency of evidence because there was no secondary source identifying the appellant as the perpetrator.

[232] In the present case, the next question would have been: what did the complainer's *de recenti* statement, in the midst of her distress, that she had been raped, corroborate? The answer is straightforward; that she had been raped in the manner later described in her testimony. The court understands why the trial judge felt obliged to give the jury his somewhat complex directions. It is to be hoped that, in the future, this will be a much simpler exercise; one in which the directions will accord with the realities of the situation.

[233] It is clear that, in the Commonwealth generally, distress can provide corroboration of a sexual assault, including rape, without any need to corroborate penetration separately. It is also evident that a spontaneous statement which is made after the event, whether it be regarded as part of the *res gestae* or as *de recenti*, can be used as proof of fact and hence as potentially corroborative. Scots law is out of step with the rest of the Commonwealth, principally because of *Morton*. Although there is no compulsitor to follow the rules of evidence from these jurisdictions, the *dicta* in the Commonwealth and Irish cases are persuasive in pointing to the errors in *Morton* and towards a more sensible and simpler approach to testimony. Some of those *dicta* are now outdated, in so far as they seem to be based on the false notion that child or female complainers (and hence presumably any

witnesses in those categories) are likely to be less credible or reliable than their adult, male counterparts. Nevertheless the fundamentals of using distress to corroborate the occurrence of the crime generally and the use of spontaneous statements as real evidence, which can be used as proof of fact when occurring in that context, are sound.

**Conclusion**

[234] The common thread running through the authorities and writings which have been disapproved in this Opinion is the tendency to categorise, sub-categorise, over-analyse, and generally complicate the issue of the use to which evidence may be put. The admissibility of evidence should be a relatively simple concept, rather than something which is over-technical and theoretical. The court is not dealing with theory, abstraction or hypothesis. The law of evidence is a highly practical matter. It is a tool designed to set the parameters within which evidence may be led to ensure that the court focuses on the issues truly in dispute, and to achieve a fair trial, not only for the accused but also in the public interest. The rules must be clear and simple and capable of being applied in a myriad of different factual situations. The more that complexity is built into the rules, or the more layers added, the more perplexing matters will be for jurors. An overly technical approach: makes it difficult for the judge adequately to direct the jury; increases the risk of confusion in the jury; and raises the prospect of a miscarriage of justice. It may make it more difficult to recognise a jury's verdict as a properly reasoned one.

[235] The basic rule is that no-one can be convicted on the testimony of one witness alone. Where there is direct (eye witness) evidence of the crime, that evidence can be corroborated by another eye witness or by facts and circumstances spoken to by at least one other witness.

None of these individual facts and circumstances needs to be spoken to by more than one witness, and the offence to which the witness speaks need not be divided into several constituent parts. That applies equally in a wholly circumstantial case. Where there is one eye witness, the facts and circumstances spoken to by one or more other witnesses are corroborative if they confirm or support the eye witness evidence of the crime. They do not themselves, looked at in isolation, require to point towards the commission of the crime as if they were the equivalent of a second eye witness. If they did that, they would, without the existence of the direct testimony, be sufficient as a wholly circumstantial case, provided that there was more than one witness in the case. What requires to be proved by corroborated evidence is the case against the accused. That is, first, that the crime, which is libelled, was committed and secondly, that it was the accused who committed it. There is no requirement to prove the separate elements in a crime by corroborated evidence.

[236] Distress, which is observed by a third party *de recenti* is capable of corroborating a complainer's account that she has been raped; that she was penetrated by the accused's penis without her consent. That penetration does not require to be corroborated separately.

[237] A statement which is made by a complainer some time after the relevant incident is normally hearsay and cannot be used as proof of fact. An exception to this is where that statement is made *de recenti*, when the complainer is in a distressed state. Both the statement and the distress, in combination, are available as proof of fact and as corroboration. They constitute real evidence, when spoken to by another witness. Neither is from the same source as the complainer's testimony.

[238] *Smith* v *Lees* and *Cinci* are overruled. The *obiter dicta* on *de recenti* statements in *Morton*, in so far as bearing on proof of the crime charged, are disapproved.

[239] It follows that juries should be directed: (a) that the case against the accused must be established by corroborated evidence. This means that both the commission of the offence and the fact that the accused committed it must be corroborated; (b) where the primary evidence comes from a complainer or other eye witness who speaks to the events libelled, corroboration of the commission of the offence may be found in any evidence which supports or confirms the evidence which the complainer or eye witness has given. It is not necessary for each separate element of the alleged offence to be the subject of separate corroborated proof; (c) the evidence of a complainer given in support of the libel may be corroborated by distress shown by the complainer shortly after an alleged incident, where the jury are satisfied that the distress arose spontaneously due to the nature of the incident and that the distress was genuine; (d) the value of a *de recenti* statement depends on the context in which it occurs. Where it occurs in the context of observed distress, the statement has corroborative value in enhancing and strengthening the corroborative effect of the distress; and (e) in any event, a *de recenti* statement alone is evidence which reflects favourably on the reliability and credibility of the complainer as showing consistency of approach from a moment close to the events in question.

[240] The answer to the questions in the Reference is that a witness testifying to the *de recenti* distress of a complainer is capable of corroborating direct evidence from a complainer that she has been raped.