Corroboration: evidence of distress

Law

1. A full bench in *Lord Advocate's Reference No 1 of 2023* [2023] HCJAC 40; 2024 JC 140 determined that evidence of distress, either on its own, or in combination with a de recenti statement, can provide corroboration of the commission of a sexual offence.

2. The court made it clear that evidence from an independent witness about the complainer's distress is to be regarded as an independent source of evidence, separate from the complainer, and capable of confirming or supporting the complainer's account. An independent witness's account of a de recenti statement made by the complainer in the context of her distress is also to be regarded as an independent source of evidence. Accordingly, evidence of distress either on its own, or in combination with a de recenti statement, can be corroborative of a complainer's account.

3. The previous decision by a full bench in *Smith v Lees* 1997 JC 73 that distress could only corroborate a complainer's lack of consent/use of force has been overruled. That follows from the court's decision in *Lord Advocate's Reference No 1 of 2023* that it is the complainer's account that must be corroborated and not individual elements or components of a crime. Previous authorities suggesting that de recenti statements could never have corroborative value has also been overruled and in the case of obiter dicta to this effect, in *Morton v HM Advocate* 1938 JC 50, disapproved.

4. *Lord Advocate's Reference Nos 2 & 3 of 2023* [2024] HCJAC 43, 2024 SLT 1207, a nine judge bench determined that a de recenti statement spoken to by a witness other than the complainer can corroborate the complainer's evidence of commission of the crime and identification of the perpetrator.

5. Distress is an objective condition observable in the complainer and is therefore an independent source of evidence that may point to the truth of the material allegation. Whether or not distress provides such corroboration depends in every case on the circumstances. The jury must be satisfied that the distress was genuine and arose spontaneously due to the nature of the incident (*Lord Advocate's Reference No 1 of 2023*) and not wholly to some other cause.

6. In circumstances in which there is no evidence of the distress being attributable to any other cause and the offence involves both violence and non-consensual intercourse it may be highly artificial to separate what was attributable to violence and what to the non-consensual intercourse (*Dalton v HM Advocate* [2015] HCJAC 24, 2015 SCCR 125, at paragraph [41]). The fact that the distress might have been caused in whole or in part by some other incident, including a physical assault, is irrelevant to this pure issue of sufficiency (*Drummond v HM Advocate* [2015] HCJAC 30; 2015 SCCR 180).

7. There is no prescribed interval of time after which a complainer's distress cannot constitute corroboration. The jury in every case has to consider the intervening occasions on which the complainer might have exhibited signs of distress or complained of rape, but did not do so; the persons to whom she might have been expected to display distress, but did not do so; and the nature and extent of such distress as she did show (*McCrann v HM Advocate* 2003 SCCR 722, at paragraph [12]. In *CJN v HM Advocate* [2012] HCJAC 149; 2013 SCCR 124 it was suggested that in normal circumstances distress exhibited after three weeks or so had elapsed would have little or no corroborative effect). Whilst there are cases where the circumstances were said to be such that no reasonable jury properly instructed could find corroboration in the complainer's distress (*Cannon v HM Advocate* 1992 JC 138), the crucial issue is whether the shocked condition or the distress of the complainer was caused by the nature of the incident. Accordingly failure to disclose events or show distress until the expiry of approximately 36 hours, although the complainer is in the company of parents and boyfriend, may still provide corroboration when other evidence is taken into account (*Ferguson* v *HM Advocate* [2019] HCJAC 1; 2019 JC 53).

Whilst there is no definitive cut off, in *Peter McGuiness v HM Advocate* [2025] HCJAC 13; 2025 SLT 261 the appeal court decided that, as a matter of law, distress exhibited nine years after the offence was not capable of corroborating the complainer's evidence. The court noted that in *Lord Advocate's References No 2 and 3*, the Lord Justice General Carloway, at paragraph [52], held that de recenti means "recent, literally of recency". In reviewing the caselaw, the court noted that in situations where distress is exhibited within a few days, particularly where there is an explanation for delay in distress being observed by another person, it will be a question for the jury to determine if there is corroboration under direction by the judge (paragraph [30]).

At paragraph [31] the court stated:

> "In order to be corroborative of a complainer's evidence that she was sexually assaulted, distress must be observed relatively shortly after the incident said to give rise to it. There is no hard and fast rule determining when observed distress ceases to be available as corroboration; everything will depend on the particular circumstances of the case. It will often be a question of fact for the jury….There will be cases where the interval between an incident and observation of distress will be such that, as a matter of law, it is not open to a jury to find corroboration from distress. This is such a case. An interval of 9 years cannot be viewed as shortly afterwards/de recenti".

Reaction

8. It is possible to consider evidence of the reaction of a witness to a piece of information or a situation occurring as an adminicle of evidence independent of the witnesses' own testimony (*Fulton v HM Advocate* 2000 JC 62). This analysis is in keeping with the treatment of distress, de recenti and res gestae as items of real evidence in the *Lord Advocate's References 1 and 2/3 of 2023*.

Possible form of direction on evidence of distress

General

"In this case there has been evidence from others that [*insert name of complainer*] was distressed following on the incident.

Such evidence of her distress is evidence that you can accept or reject. If you do accept it, it could corroborate the complainer's evidence about what happened during the incident. It can also support the credibility of his/her/their evidence.

Before you could regard that evidence of distress as a source of corroboration, you would need to be satisfied that:

1. The distress was genuine, and
2. It arose at least in part due to the nature of the incident and not wholly due to some other reason. In deciding that you can take into account what the complainer said, as well as other circumstantial evidence (eg damaged clothing, injuries)."

Where competing source is alleged

"The Crown says you can infer the cause of the distress was the nature of the incident. The defence says you cannot, and it could be due to [*specify*].

You will have to look at the evidence about distress carefully and decide what was responsible for it.

If you thought the cause was only for the reason(s) the defence suggests, then the distress could not provide corroboration of the complainer's account. But if you thought the distress was at least in part due to the nature of the incident, that evidence could provide corroboration of her/his/their account."

Where there is evidence of a de recenti statement in the context of distress

"When a complainer gives an account to a witness shortly after the event when exhibiting such distress, it is not hearsay. That account enhances and strengthens the corroborative effect of evidence of distress.

Moreover, if you find it to be a continuing reaction to what happened, the statement spoken to by [*the witness*] is itself corroboration of the complainer's account [*of eg being raped*] [*by the accused*]."

[For judges to consider - if more seems necessary, see chapter on de recenti statements for the law and a suggested direction for cases where there is no obvious distress, which could be adapted.]