

De recenti statements

Law

1. An exception to the rule excluding hearsay evidence is allowed by admitting evidence of de recenti statements. This commonly occurs in the case of assaults, and in particular, sexual assaults upon women and children. This exception operated widely and could arise in the case of any type of crime (*Stair Encyclopaedia*, Vol 10, paragraph 707; *Walkers on Evidence*, 2nd ed, paragraph 8.3.1; *Renton & Brown, Criminal Procedure*, paragraph 24-136. In [*HM Advocate v Stewart \(1855\) 2 Irvine 166*](#), 179, the statement of a child eye-witness to a murder, made within 48 hours of the event, was admitted).

It should be noted that in [*Lord Advocate's References Nos 2 & 3 of 2023 \[2024\] HCJAC 43, 2024 SLT 1207*](#) the Lord Justice General at paragraph [54] specified statements of complainers in sexual offence cases and those of children being afforded greater latitude in terms of time and circumstance.

Between 1938 and 2023 the purpose of eliciting a statement de recenti was to support the credibility and reliability of a complainer's evidence. It did not go to prove fact and was not corroborative and practice was to direct juries accordingly. That was modified [*Lord Advocate's Reference No 1 of 2023 \[2023\] HCJAC 40, 2024 JC 140*](#) where it was determined that a de recenti statement was real evidence and, when accompanied by distress, could strengthen the corroborative effect of distress but the court did not determine its effect in the absence of distress.

2. There was no logic in excluding as inadmissible a hearer's evidence about the making of a de recenti statement merely because its maker has not spoken to it. It is the fact that the statement was made which is evidentially significant ([*Ahmed v HM Advocate \[2009\] HCJAC 73, 2010 JC 41*](#) paragraph [16]). Either the maker or the hearer of the statement must give evidence of it having been made, and of its terms (in so far as [*MacDonald v HM Advocate 2004 SCCR 100*](#) at paras [9] and [10] suggested that the complainer must give evidence that such a statement had been made, it is disapproved by *Ahmed*, at paras [16] and [17]).

It can only be corroborative where it is spoken to by a witness other than a complainer or is recorded on audio or video.

The law now

3. The full bench of 9 judges in [*Lord Advocate's References Nos 2 & 3 of 2023* \[2024\] HCJAC 43, 2024 SLT 1207](#) restored the law on such statements to where it stood prior to [*Morton v HM Advocate* 1938 JC 50](#), in particular that [*McCrindle v MacMillan* 1930 JC 56](#) was correctly decided, and disapproved certain dicta in *Morton*.

A witness speaking to a complainer's *de recenti* statement provides a second source of evidence available to corroborate the complainer's evidence of the commission of the crime and the identity of the perpetrator.

It provides a source of corroboration even in the absence of distress although the presence of distress may assist in demonstrating that the statement is *de recenti*; *Lord Advocate's References Nos 2 & 3 of 2023* at paras [102]-[105]. A style direction is provided.

- Both for reports *de recenti* and as part of the *res gestae*, the majority viewed the report by a witness of the complainer's utterance as a source separate from the complainer's own testimony.
- A *de recenti* statement being "the natural outpouring of feelings aroused by the recent injury and still unsubsided" is a helpful general description of what will be regarded as admissible. (para [105])
- The whole court determined that a statement ceases to be *de recenti* when it ceases to be recent following upon the commission of the crime or is not provided to the first natural confidante as described in the Lord Justice General's opinion. He illustrated what this means at paras [102] – [105]. The discussion in these paras refers back to certain decisions examined earlier in his opinion.
- The effect of those decisions is therefore important in determining the scope of *de recenti*. In essence, its scope will depend on the facts and circumstances of each case but a greater latitude in terms of time and circumstance is allowed with the *de recenti* statements of complainers in sexual offence cases and with those of children.

The court's reasoning on the scope of *de recenti* statements

4. It is useful to identify how the Lord Justice General defined a *de recenti* statement and its scope in context:

The Lord Justice General explained:

"[54] A *de recenti* statement is an account given by a complainer, that is the injured party, after, but as a reaction to, the event. It too, can provide the same corroboration, but care is required in defining when a post event statement ceases to be *de recenti* as a matter of law. A *de recenti* statement may be classified as part of the *res gestae*, but it need not form such a part in order to be capable of proving fact; that is to be corroborative. **Greater latitude in terms of time and circumstance is allowed with the *de recenti* statements of complainers in sexual offence cases and with those of children. [Emphasis added]**

[87] A *de recenti* statement may reasonably be described as a "natural outpouring of feelings aroused by the recent injury, and still unsubsidied" (Dickson 1st and 2nd eds at paragraph 95, 3rd ed at paragraph 258). It is a "consequence and continuation of the *res gestae*" but it is not (or need not be) the same as, or part of, the *res gestae*. The view in *Lord Advocate's Reference No. 1 of 2023* (at paragraph [224]) that a *de recenti* statement was formerly regarded as part of the *res gestae* may not be accurate. **The important matter is that both statements are treated in the same way for evidential purposes; both are proof of fact and corroborative.**" [Emphasis added]

NB At paragraph [102] the Lord Justice General explained:

"...This opinion is not intended to narrow the scope of the test for *de recenti* statements as described in relatively recent cases."

At paragraph [103], the court approved what was stated in [*Wilson v HM Advocate* \[2017\] HCJAC 3, 2017 JC 135](#), from paragraph [24] and with particular reference to paragraph [30], concluded:

"[103] ...although the interval between the event and the observed distress was a factor, the important point was whether the distress was caused by the offence. Intervening occasions on which the complainer had exhibited distress

may be of some significance, but there was no fixed interval after which distress could not constitute corroboration

[104] There are undoubted parallels between the admissibility of *de recenti* distress and a *de recenti* statement. The two will often go together, as in *Wilson* (see paragraph [35]). Where they do not, the rule of thumb, which has been applied over the years, is whether the statement or, better still, utterance has occurred on the first reasonable opportunity to speak to a natural confidante (*Wilson* at paragraph [34], following [Anderson v McFarlane \(1899\) 1 F \(J\) 36](#), Lord Justice Clerk (Macdonald) at 37; see Walker & Walker: Evidence (1st ed) at paragraph 376). Just what the outer limits of this may be will depend on the facts and circumstances of each case, but a considerable latitude is allowed in cases of sexual offending (*Wilson* at paragraph [34] under reference to *Dickson* at paragraph 261). [Emphasis added]

[105] [Robert Henderson \(1836\) 1 Swin 316](#) is a useful illustration of the correct approach. *Dickson's* reference (at paragraph 95) to a *de recenti* statement being "the natural outpouring of feelings aroused by the recent injury and still unsubsidied" is a helpful general description of what will be regarded as admissible. Where there has been a lapse of time, which has raised a substantial risk of concoction, the statement may be regarded as inadmissible ([Gilmour v Hanson 1920 SC 598](#), LP (Clyde) at 603). Despite its later overruling in the wake of *Morton v HM Advocate*, [Ovenstone v Ovenstone 1920 2 SLT 83](#) was correctly decided, at least if the maid's instant report after dinner were classified as *de recenti* rather than *res gestae*." [Emphasis added]

The decision of *Robert Henderson* was examined at paragraph [65]. The complainer spoke to being raped by her employer on a Wednesday evening, but everyone was asleep when she got home to her uncle's house and it was not until Friday evening when, bursting into tears, she told a friend. She explained why she had not reported matters to her uncle, bed-ridden aunt or somewhat unintelligent cousin. Lord Justice Clerk Boyle told the jury that the interval before she told her friend because great allowance must be made in this kind of case for the delicacy which prevents a full disclosure to a male relative. Evidence of what she had later told other friends and acquaintances was also admitted. The Lord Justice Clerk directed the jury that the complainer's statements formed part of the material available to corroborate her evidence.

Further illustrations are referred to at paragraph [105]:

- The reference to a lapse of time raising a substantial risk of concoction rendering a complainer's utterance inadmissible as illustrated in [Gilmour v Hanson 1920 SC 598](#), LP (Clyde) at 603 was to a comment at the birth of a child following an alleged rape, presumably around 9 months later.
- [Ovenstone v Ovenstone 1920 2 SLT 83](#) was correctly decided by Lord Sands at first instance, at least if the maid's instant report of a sexual encounter which occurred before dinner, and about which she told her sister after dinner when her co-defender begged her not to report it, were classified as *de recenti* rather than *res gestae*. In that case it could corroborate an eye witness.

Whilst certain *dicta* forming the reasoning in *Morton* were disapproved, the court concluded that the final decision was correct as there was no corroboration of identification by any means because the complainer's statement *de recenti* contained nothing apt to identify the appellant.

5. In [Lord Advocate's Reference No 1 of 2023 \[2023\] HCJAC 40, 2024 JC 140](#), the court noted at paragraph [228] that if a recent statement could provide support for a complainer's account, it can provide corroboration for it.

In [Lord Advocate's References Nos 2 & 3 of 2023 \[2024\] HCJAC 43, 2024 SLT 1207](#), the third question asked was: at what point does a statement cease to be *de recenti*, and hence corroborative, and become instead inadmissible hearsay. The court provided an answer at paragraph [110] of the Lord Justice General's opinion:

"(3) A statement ceases to be *de recenti* when it ceases to be "recent" following upon the commission of the crime or is not provided to the first natural confidante as described in this opinion.

If a statement comes too late to be *de recenti* and corroborative, does the former concept of a *de recenti* statement as apt only to support credibility and reliability still have a place in Scots law?

Given the terms of the question and its answer, it appears that it does not. Once it loses its recent status, it would appear to be inadmissible hearsay. Generally, consistent statements of a witness are not permitted to be elicited for the purpose of supporting credibility and reliability unless part of the *res gestae* or *de recenti*; [Coyle v HM Advocate 1994 JC 239](#) at 1335."

6. However, whereas in *Coyle* inconsistencies had been put for the purpose of undermining the complainer's testimony, the trial judge had been correct to hold that fairness permitted a relaxation so that the prosecutor could explore other parts of the statement in re-examination. As Lord Justice General Hope put it at page 136:

"The whole statement then becomes admissible, for the purpose of showing the context in which it was made and to demonstrate, if this can be done, that taken as a whole and in context there is no inconsistency between the statement and the witness's evidence. That was the basis on which the re-examination was allowed to proceed by the trial judge, and we consider that he reached a sound decision on this point and that there was no miscarriage of justice."

In [*Whorlton v HM Advocate* \[2020\] HCJAC 36](#), a complainer in a rape case was cross-examined to the effect that she had only told the police about it many years after the event and it was proposed that this suggested that her evidence was false. In these circumstances, the trial judge allowed hearsay to be admitted from another witness about what the complainer had told her of an incident which amounted to rape, not soon after the crime but some years before the police became involved. The appeal court determined that the trial judge did not err in directing that the witnesses' evidence, if accepted, might tend to negate any notion that the complainer first made an allegation when speaking to the police in 2018, but it could not go towards proof of the events spoken to by the complainer. In these circumstances, since the evidence was led to show that the complainer had made an earlier report of the rape, not that the report was true, it was admissible primary hearsay.

What was decided in *Coyle* and *Whorlton* was not before the court in the 2023 references and remains sound law. It follows that it may be necessary to direct a jury in that situation. A style is suggested below.

Any such direction may need to repeat or reference a rape myth direction on delayed reporting.

7. Following [*Lord Advocate's Reference Nos 2 and 3 of 2023*](#), it seems doubtful that an old style *de recenti* direction will often be given, if given at all. If the statement is recent, it is corroborative. If it is not recent, then it would generally be regarded as inadmissible hearsay. Accordingly, no style is provided. A style is provided where the statement is not corroborative but is lead as primary hearsay eg to show when the

complainer first reported what had happened, or to rebut an attack based on inconsistency.

Possible form of direction on de recenti statements

"You have heard evidence from [witness X] of what the complainer [insert name] said shortly after the {specify crime}. This is an exception to the normal exclusion of hearsay. If you accept the complainer said that:

shortly after the {specify crime}, and

as a continuing reaction to it,

it is evidence to prove facts. What the witness reported the complainer saying can corroborate the complainer's evidence.

[specify as appropriate – eg that the complainer was raped by the accused/that the complainer was raped.]"

Direction for a statement which is not corroborative but admissible as primary hearsay

[Some introduction using or referencing the rape myth direction may be necessary. The direction is undernoted for convenience but it may not be necessary to repeat all of this if it has already been given in the charge:

You heard evidence suggesting that the complainer did not tell, or delayed in telling, anyone/a particular person about an offence, or did not report, or delayed in reporting it to the police. You [also] heard questions being asked or statements made with a view to bringing out, or drawing attention to, evidence of that nature.

*The defence have suggested that a delay in reporting suggests the complaint is untrue
....*

[Where appropriate - You heard the complainer explain...]

When you come to consider your verdict, you will have to consider why a report was not made earlier but you must not assume that because it was delayed it is untrue. The fact that a complaint is made late does not necessarily make it untrue. Experience shows that it is very common for a person who has been sexually assaulted/abused not to tell anyone about it for a long time and some sexual crimes are never reported.

You will need to bear in mind that there can be good reasons why a person against whom a sexual offence is committed may not tell anyone about it, may not report it or may delay in doing so.

You should look at all the circumstances. Experience shows that different people react to situations in different ways. Some people may tell someone about it straight away. But others do not feel able to do so. This can be out of shame, shock, confusion or fear of getting into trouble, not being believed, or causing problems for other people.]

“You heard evidence from [witness X] of what the complainer said. This came at a time such that it is not available as corroboration for the complainer’s evidence. You can still take account of the fact that the complainer said these words at this time. They do not go to prove facts, but can be used to show when the complainer first told someone what had happened.

You should consider all of the evidence and I remind you that it is for you the jury to decide what to make of the evidence and what inferences should be drawn from it.

[If appropriate]

Evidence from X of what the complainer said shows that the report to the police on [date] was not the first time the complainer told someone.”