Justice Committee

Criminal Justice (Scotland) Bill

Letter from Lord McCluskey to the Convener

CORROBORATION

Introduction

This is a completely rewritten version of notes that were originally prepared by Lord McCluskey in anticipation of his giving evidence to the Justice Committee. The Committee decided that it was too late to hear his evidence in the Stage 1 process but announced that the Committee might entertain additional evidence at the next stage on the Bill.

The original version of the notes was in two parts.

Part 1 Misleading material before the Justice Committee

1.1 The first part of the original version dealt with misleading statements about the legal character of "corroboration" in Scottish Criminal Law that were made to the Committee by the Lord Advocate and the Justice Secretary. A full copy of the notes detailing the errors in the misleading statements was sent to the Lord Advocate and to the Justice Secretary. Neither has responded in any way whatsoever to defend what they told the Committee or to criticise my critique of their representations to the Committee. I do not propose to repeat those criticisms in the main text of this document. Instead, I append them in Appendix 1. They are nonetheless important.

1.2 One continued important aspect of the failures by ministers to understand or express the law on corroboration is that it is reflected in what appears to be the practical everyday failure of the police to understand the law or apply it properly in practice. Thus, for example, the Justice Secretary repeated on many occasions the nonsensical view (presumably obtained from the police) that the law of corroboration required that two policemen had to go to London to collect a CD Rom (discussed fully later). Against that background of police misunderstanding, it is hardly surprising that assaulted women are mis-informed – by the police - as to the alleged reason why their cases are not going to be taken to court (*viz "No corroboration")* and are thus led to support the false notion that abolishing the rule requiring corroboration is going to increase the prospects of justice for women. Because the diagnosis of the causes of the problem is mistaken, the wrong remedy (abolition of corroboration) has been chosen and the real causes are neglected. One has only to look at England – where corroboration is not required[1] – to see that the problem of poor conviction rates in sexual assault cases there is as bad as, or even worse than, it is in Scotland. So ministers should have sought examples of jurisdictions where such cases are more satisfactorily dealt with than in Scotland and asked themselves if there were lessons to be learned from those countries.

[1] As in much of the USA

Meaning of corroboration

1.3 The nature of corroboration was simply expressed by Lord Justice General Rodger in Smith v Lees[2]: "*In order to corroborate an eye witness's evidence on a* crucial *fact, the corroborating evidence must support or confirm that what the eye witness said happened did actually happen. So if a complainer says that she did not consent to intercourse …then evidence of her distress will tend to confirm her evidence because a jury will be entitled to infer that the complainer was distressed* because *she was forced to submit and did not agree to it"*[3] *In* Fox v H.M. Advocate *Lord Rodger added "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."*

These highly authoritative and plain words, explaining what corroboration is, will have to be kept clearly in mind when the Justice Committee comes to examine any proposed amendments to give effect to what ministers have said, namely that corroboration will be replaced by a requirement for "supporting evidence: at present it is really impossible to understand the distinction between corroboration as traditionally understood and "supporting evidence" of the kind that ministers have said will take its place. I simply do not believe that ministers have thought this through. If they had done so, the necessary provisions to give substance to the concept of "supporting evidence" would have been in the Bill as drafted and presented 27 February 2014 to Parliament for the vote on.

1.4 **Imperfect understanding of the role of judges in 'defining' corroboration or assisting juries to apply it in cases**

It is quite incorrect to suppose, as the ministerial witnesses before the Justice Committee implied, that judges have to ***define*** corroboration[4]. The Justice Secretary said, *"It is quite clear that the judiciary find it difficult to agree what corroboration is…academics and the judiciary have difficulty with announcing what corroboration is"*. The truth is this: when trial judges come to 'direct' the jury, they have to apply their well-honed understanding of the concept – because it is the judge, not the jury, to decide in the first place if evidence CAN be properly characterized as "corroborative"[5]. So the trial judge does not go into a long lecture on the nature of corroboration in every possible case. He/she does not *define* corroboration; the judge looks at the context and facts of the case before the jury and at the evidence that is said by the Crown to be corroborative; and then decides if any piece of evidence founded upon by the Crown as corroborative can, as a matter of law, be treated as such. The trial judge may get submissions from the lawyers on that issue – which is first a question of law. He/she then decides that question of law in the jurors' absence; and (if he/she agrees with the Crown submission) says to the Jury: "*the Crown/PF has suggested that you should treat XX as a piece of evidence that*

[2] 1997

[3] It is no longer necessary to prove that force was used.

[4] Appeal Courts may have to do so.

[5] In appeal cases, judges have to analyse and re-examine the essence of rape in unusual cases (e.g. sleeping woman penetrated). But the complexities of their analyses are elementary compared with the verbal jungle seen in the Sexual Offences (Scotland) Act 2009

corroborates the evidence of NN (the "complainer") to the effect that XYZ….. I direct you that that evidence is capable of being corroborative in character and, if you accept that it is reliable, can be used by you to corroborate the evidence of NN to the effect that….".

1.5 Corroboration, like many other everyday legal terms, is difficult to define for ALL purposes – but, in a trial, it is quite unnecessary to attempt to do so. Appeal Courts may have to discuss the application of the law in unusual cases – as do Academics writing about the development of the law. The same applies to other vocabulary/terms of art used in courts every day: for example, familiar terms like: 'reasonable doubt', 'satisfied', 'reliable', 'sufficient', 'consent'/'no consent', 'dangerous (driving), 'special reasons', 'cruelty', 'private','family' etc. These terms are necessarily somewhat flexible and incapable of precise "definition". The judge's task is to recognize the concept when he/she sees it in the context of the trial evidence. In my experience, juries appear to have no difficulty in applying the law relating to corroboration when it is presented in this way. Jurors do not need, and do not get, a lecture on "The law applicable to corroboration in Scotland". So the alleged concern about problems arising from alleged difficulties in "defining" corroboration is a red herring. Juries decide issues of fact not issues of legal definition. As I said in my judgment in *Smith v Lees* (1997), "*In relation to common law crimes where the alleged victim is the only eyewitness, 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… which separately points to the truth of the facts which constitute the essential ingredients of the crime".* Difficulties can arise when a novel set of circumstances comes before the court. That happens in all legal systems when they have to grapple with new and unforeseen circumstances. The genius of the Common Law countries has been the capacity of experienced and impartial judges (and Academics), when faced with unforeseen situations or new perceptions of injustice, to take a principled approach and reason their way to a solution that achieves justice. The *Moorov* decision is a good example of that. So is the gradual development of the law of corroboration by distress in the law of rape. New developments in the law governing fraud have followed new electronic and online methods of deceiving citizens. There are countless examples of that outstanding tradition. I thought that we all understand that: sadly it is not apparent that the Justice Secretary does.

1.6 The second part of the previous notes[6] outlined some steps that I suggested should be considered in order to improve both the conviction rate in rape and other sexual crime cases, and indeed the ability of the prosecution authorities to bring such cases to court, without abolishing the centuries-old law governing corroboration. More sensible amendments to the law deserve consideration before the revolutionary step of abolishing the requirement for corroboration. I sent a note of these suggestions to Lord Bonomy as they may be considered relevant to the deliberations of the group that he is to chair. Others will no doubt suggest others. Matters of this kind might also be considered as suitable material for proposed amendments to the Bill.

[6] Copies were sent to members of the Justice Committee in February.

Meantime, I have made some revisals to the original discussion of such measures, particularly in the light of recent reported developments that again demonstrate clearly that the retention of corroboration in the Scots law of criminal evidence is essential to avoid the relatively infrequent – but nevertheless real – risk that errors and worse by the Police, and even by prosecutors and Judges, can result in cruel injustices. The frequent and egregious errors by the police that have come to light, especially in the wake of the Jimmy Savile scandal, highlight this point. The Scottish Police claim that they are somehow immune to the canteen culture that has characterized so many of these scandals in England, Wales and Northern Ireland: those who believe that are living in cloud-cuckoo land.

1.7 **Policing failures – examples**

It is clear that there are serious and continuing problems, especially with the police, in investigating and preparing cases where "domestic" violence, sexual or otherwise, is reported to the police. And police failures in other fields of activity are also blatant and alarming. The response of the police in Scotland has been to claim that notorious police failures in England, Wales and Northern Ireland (mirrored in the Republic of Ireland also) are not happening in Scotland and are anyway out of date. So, instead of facing up to the problems, their answer has been to spend £100,000 on videos to show what a splendid job the police do[7]. Clips of those videos shown on TV seem to emphasize the problems faced by uniformed police constables on the street. The real problem that arises in the context of the present Bill is not a problem of uniformed constables dealing with street hooliganism: it is more a problem of unsatisfactory investigation, after a "domestic" case has been reported, and also of investigative and prosecutorial judgments made by others, not necessarily by officers on the beat, as to disposal of the cases.

1.8 I have mentioned elsewhere some of the most notorious police failures in so many fields that have come to light elsewhere in the UK. In short, I list some of them:

- The Report by HMIC (Tom Winsor) on failures in the policing of domestic violence: 27 March 2014
- The continuing Hillsborough cover-up: proceedings pending
- The 'plebgate' saga – continuing
- The Jimmy Savile and Sir Cyril Smith cases
- The 'monstering' of Christopher Jeffries
- The "Cardiff Three" fabrication of evidence (Wales)
- The Stephen Lawrence case
- Numerous cases in Northern Ireland
- "119 Scottish police officers accused of crime' (6/1/2014)
- "Innocent 91-year-old handcuffed, & held for 6 hours": 23/3/14
- There are Scottish cases – though the fact that they do not always come to light is perhaps a reflection of the relatively impoverished nature of investigative journalism in Scotland.

Almost every day brings news of fresh discoveries of failures followed by attempts by police forces in the UK to cover up the wrongdoing. The common element in the reluctance to admit failure is the powerful sense that loyalty outweighs admitting the

[7] The Scotsman 28/3/14

truth, a feature of the most recent police scandals in the Irish Republic, and apparently in the Hillsborough case. In Scotland, the Lord Advocate has power to give directions to the police. The Committee should consider how effectively that power is being used, especially in relation to "domestics".

1.9 It is not my intention to criticize the police. They have a difficult task and generally perform it well. However, it is clearly unwise to discard the slow, considered judgment of centuries of judges and others and instead place our faith in the competence and reliability of what we know from ongoing experience to be flawed police practices. All our history – like that of other countries - shows that, in the administration of justice, it is infinitely preferable to rely on an independent, skilled judiciary, conducting its work transparently and with reasoned judgments and appeal reviews, rather than to put our faith in the competence and reliability of police forces that are significantly less transparent and accountable and have put shown to put other considerations before the pure interests of justice. The Justice Secretary has not been successful in demonstrating that his judgment is to be preferred to that of generations of judges.

The original paper concluded with more general notes: they too have been re-written here.[8].

2.0 **Some suggestions for improving the conviction rate in rape and other sexual crimes without abolishing the centuries-old rules on corroboration.**

(This is a revised version of the original Part 2)

*(**NOTE:** References to **s.18** or **s. 270**, or the like, are references to sections of the Criminal Procedure (Scotland) Act 1995, as amended.)*

2.1 **Previous convictions**

We should consider allowing proof of analogous previous convictions if they point to the propensity of the accused person to engage in similar criminal sexual conduct: this would be a development – a real extension – of the thinking that led to *Moorov*. It needs careful assessment and thorough preparation and drafting (not least in the Human Rights Act context – as do all suggestions about altering rules of evidence) – but it is well worth thinking about. The right to admit such evidence could, and should, be made **subject to Judicial Decision** in any particular case – as is the case now when **s. 270** (*allowing proof of previous convictions)* or s**.274,** is invoked. The Judge would have to decide if such evidence was likely to risk prejudicing a fair trial and also if it was *capable* of providing corroboration; then the jury (if the evidence was admitted by the judge) would decide if it was reliable, persuasive etc. and if it was corroborative in the circumstances. The jury would also be free (and specifically directed to this effect) that they were perfectly entitled to ignore the evidence of previous misconduct/convictions etc. if they thought that it unfairly prejudiced the accused or had no corroborative value. The test both for the judge in

[8] This paper uses the statutory term "complainer" rather than "victim" when personal assault (including Rape) cases are being discussed, for the reason previously mentioned by the Convener.

deciding the "admissibility" question and the Jury in deciding the reliability questions would – as always in such matters of admissibility – be the test of fairness. We have in Scotland the excellent technique of serving a "narrative indictment" on the accused: that means that the essential facts of the *actus reus* must be clearly narrated[9], plus notice of the evidence that the Crown intends to lead. Amending the law, to allow the possibility of revealing a relevant course of previous analogous criminal conduct, would require the Lord Advocate to think carefully about the form and content of the Indictment so as to show the relevance of any earlier conviction. In due course, this form of Indictment could become routine in appropriate cases and the framing of the Indictment would follow a fairly standard model, as in a *Moorov*-type case.

I understand that English legal procedure allows proof previous convictions in some cases[10]. That appears be true in at least some Continental jurisdictions. I am not very familiar with practice in Continental countries but it should be examined (preferably by the Scottish Law Commission rather than by civil servants seeking to do their ministers' bidding). The law of the European Convention on Human Rights does not appear to prevent such a course: but that obviously requires careful study[11]. It is not clear that the proposed change to our centuries-old law on Corroboration has had any such study.

2.2 **The Right of Silence (*Self-incrimination not compellable*)**

We should consider some departure from the near-absolute right of silence.

Given the modern –effective - controls against abuse of interrogation (behind closed doors) by police, why should the accused in a rape case have the right to remain silent from start to finish? I give some examples of relatively recent changes in this once necessary right.[12] There are many Human Rights cases on this topic[13]

- I suggest that we could properly undertake a reconsideration of the whole **Judicial Examination** procedure (**ss.35 *et seq***). At present, post *Cadder*, the Lord Advocate says that suspects are advised by their lawyers to say nothing at JE - thus frustrating the hopes of the PF at the JE – and that this may well rob the Crown of possible corroboration of sexual penetration in a suspected Rape case[14].

- Accordingly, why should we not introduce a rule that the judge who presides at the JE should have a discretion, at the JE or any adjournment thereof, to require the accused to answer a very limited number of well-defined questions, provided the questioning itself is fair and completely under judicial control? The PF would present a written application to the presiding judge, intimated to the defence, that the Crown is seeking

[9] I have never seen the contents of a CR Rom narrated as an essential fact.
[10] as does the 1995 Act.
[11] See Lord Reed's book, supra
[12] until 1898 the accused was not even allowed to give evidence in court.
[13] see A Guide to Human Rights Law in Scotland, by Lord Reed, Article 6
[14] That is no doubt true: but experience shows that, Cadder or no Cadder, experienced criminals have never needed advice from a lawyer to keep their mouths shut until they saw how the land lay: they don't need to be told by a lawyer how to play the system.

answers[15] (possibly just YES or NO answers) to **"the following questions, being matters clearly within the personal knowledge of the accused"** (*e.g. Did YOU have sexual intercourse with X on/at DATE/ PLACE?)* After hearing submissions from the PF and the defence lawyer, the judge, if the PF's submission was accepted, would say to the accused: "*The question that you are about to be asked appears to be a question that is within your personal knowledge…" (*This would obviously apply to a question about whether or not the accused had sexual intercourse with the named 'complainer' on the occasion in question)…"*If you refuse to answer, any court before which you appear to answer the charge in the Petition may treat your refusal as evidence indicating that you did have sexual intercourse with the "complainer" on that occasion"*[16]*.* (The wording of this would, of course, depend on how the law had been amended) The answer to the question, if YES, might justify the obvious follow-up question: "Did she (the complainer) consent to that intercourse?" The answers to these questions would make it clear to all what were to be the real issues of fact at the trial: this could result in considerable savings as well as removing what is seen as an obstacle to justice. Cross-examination of the accused would not be allowed at the JE: it could even be prescribed by law that such questions would be asked by the judge, not by the prosecutor, so as to provide an additional, important protection against unfairness.

- This procedure would be said to amount to "corroboration by silence": but is it not worth a careful re-examination in the light of modern conditions? It would be a big step, but not as big as enacting section 57. The interests of justice are not served by the silence of a material witness on an essential fact that the judge rules must be within his knowledge. The rule against self-incrimination (which is not absolute) derives from a time when prisoners were subjected to torture, deception and cruel threats to get them to confess. That danger would not exist in a reformed JE procedure if great care were taken to avoid anything that would run counter to the developing jurisprudence of the ECtHR.

- The current law is that if the accused chooses to go into the witness box he voluntary forgoes that 'right': he will be open to questions directly asserting his guilt and that his evidence on particular matters consists of deliberate lies Yet in recent years the courts have concluded that if the accused chooses, *before the trial begins*, to make a voluntary statement that exculpates him or in any way contradicts the Crown evidence, the jury must be allowed to accept that evidence as evidence of ***fact***, even although the accused cannot be cross-examined on it, because he declines to go into the witness box. Thus the current law allows the accused to give exculpatory evidence on vital facts without any risk of being challenged in court [17]. The contrast with the position of the

[15] Just as the accused must do now if he proposes to introduce evidence of the complainer's sexual history.
[16] OR "If you refuse to answer, you will be barred in court from challenging any evidence from the complainer that you did."
[17] As with the U.S. President: "I did not have sexual relations with that woman".

complainer is stark: she can be cross-examined harshly and at length[18]. The law has become quite unbalanced in this important respect – against the complainer, and indeed against the interests of justice. One less dramatic reform would be to compel the accused to enter the witness box to allow him to be cross-examined in court on the contents of any exculpatory extra-judicial statement made by him.

- The right to silence, which is not mentioned in the European Convention on Human Rights, is not an absolute right. It has been derived by Judges as ancillary to the right to a fair trial (Article 6). The reasoning of the European Court of Human Rights rests upon the principle that evidence obtained from an accused person by means of coercion and oppression, or other unfair means, in defiance of the will of the accused should not be admitted. This was a clear principle of Scots Law long before the Convention was written[19]. The traditional, absolute right arose, not least in the Common Law countries, out of the practice of police, security forces etc. of using improper methods to obtain answers – methods such as threats, physical abuse, coercion, deception and the like –commonly behind closed doors and with no access to lawyers or judges. But if a person is brought before an independent judge, having had prior access to legal advice, and is asked questions (of which he and his lawyer have been given written notice) on matters of fact that are bound to be within his personal knowledge, then what is "unfair" about that in the whole context of a Scottish trial? If the JE proceedings are all properly recorded (with video cameras)– so that a jury may make a final judgment about whether or not the process was fair, then why should that not be allowed in any jurisdiction where all the safeguards against abuse are very strong and written into law? The use of the replies by the accused at such a JE could properly be regulated by the legislature of the jurisdiction that established such a system. The JE would be properly seen as "judicial" – similar in broad character to the kind of thing that happens on the Continent with examining magistrates. Incidentally, the Justice Secretary referred to how "fair" European systems of justice were: there is no sign that he has given any thought to examining how these systems can obtain admissible evidence from the accused person?

- It is also at least anomalous, and at worst absurd, that, while a self-incriminating statement, allegedly made by an accused person to the police when apprehended, (even if the accused subsequently denies the making of the alleged statement) is admissible as evidence of guilt if the Court judges that it was fairly obtained, the accused is allowed a right of silence even in open court, with his lawyers and an impartial judge present to ensure that any questioning is "fair". In the former situation, the question becomes simply, "Do you believe his denial or the assertions by the police?" and the court has no independent and reliable means of testing fairness; in the latter situation, everything is open for the Court to make a fully informed judgment.

[18] Legislation in recent years has restricted the cross-examination to some extent.
[19] Cf. the powerful Opinion of Lord Cooper in HMA v Rigg 1946 JC 1.

- Note also **s.18**, which allows samples of saliva, fingerprints etc to be taken from a person arrested and in custody for the purpose of criminal proceedings. The statute *obliges* the arrestee to comply. That procedure is obviously an invasion of the absolute right of a suspect not to provide evidence against himself. *Reed* discusses these and other cases that depart from any absolute rule.

- Note also the terms of the English caution: *"{State name}, I am arresting you on suspicion of {State offence}, You do not have to say anything, But it may harm your defence if you do not mention, when questioned something which you later rely on in court. Anything you do say may be given in evidence".* This goes some way to attaching weight to an unjustified refusal to answer a question the answer to which lies clearly within the knowledge of the arrested person.

- The suggestion that we should re-visit the law governing self-incrimination would be opposed by those who believe that the so-called right of silence is prescribed by some legal deity: but it is not. It is a product of a history that we have left far behind. So it is surely worth careful re-consideration in the light of modern developments before throwing away the carefully developed rules governing corroboration that Scotland has had for centuries. It really is time that the rules about self-incrimination and the so-called right of silence were re-considered in the light of the totally changed circumstances that now prevail in relation to the investigation of crime and the rights of a suspect. However, no such change should be made just because some elected politician in a unicameral legislature gets a fixed idea into his head: such important changes should be the subject of extremely careful study and widespread consultation and consensus.

2.3 Hearsay evidence

Is it not time to look again at the rules about hearsay evidence in criminal proceedings[20]? There are already rules permitting hearsay evidence to be admitted in some circumstances: **see s.259.** Instead of an (near) absolute ban on hearsay evidence[21], it could be made effectively a matter of reliability[22], with particular attention paid to recency and spontaneity – as happens with evidence of "distress", which is currently founded upon as supplying corroboration. Distress, if recent, is relevant AND can be treated by the jury as CORROBORATIVE, despite the undeniable fact that the distress originates from the 'complainer' (and is thus not truly 'independent'): the observation of the signs of distress will be from an independent source, but it is the complainer who exhibits those signs, such as sobbing, hysteria, incoherence. They *can* be feigned, fabricated, exaggerated: so, in traditional terms, they barely pass the test of being independent. But the jury are free to accept that they do: so why shouldn't the same tests, of spontaneity, reliability, be applied to *de*

[20] Hearsay evidence is admissible in civil cases.
[21] Unless the witness is dead
[22] The late Lord Hunter, sometime Chairman of the Scottish Law Commission and a very experienced criminal lawyer, was particularly supportive of admitting hearsay evidence. I believe he wrote about this; but I have not yet traced any such writing.)

recenti statements by the complainer, particularly if they are able to be seen by the jury as contemporary with, and as manifestations of, the same phenomenon as the distress itself? Evidence of a *de recenti* statement may be *admissible* under the current law governing evidence, but may be used by the jury only for a limited purpose, i.e. to test the credibility of the person making the statement; yet it may well be possible even under ECtHR jurisprudence to allow the jury to treat it as "supporting" the evidence of the person making the statement, viz the complainer. Corroboration is NOT such a strictly defined and pure concept that it cannot be adjusted - provided we retain the over-riding tests of fairness, reliability and reasonable doubt. Hearsay evidence is not prohibited under convention law: the test is fairness. The use of "distress" for corroborative purposes in sexual assault cases is a clear example of the capacity and the willingness of the Scottish Judiciary to use reason and commonsense to adjust the application of principles to the needs of Justice[23].

2.4 **Further encouragement of early complaints and investigation**

Many of the problems encountered in practice derive from a failure to investigate the complaint at once and thoroughly – often because the complainer does not report it at once[24]. Forensic evidence (esp. semen/pubic hair), and injuries disappear; clothing is destroyed or lost or cleaned; potential witnesses cannot be traced; doubt is cast upon the complainer's evidence because she remained silent for so long. We need to campaign actively to change the culture, of the police *and of complainers*: the two are inter-related. And it is not only the complainer who may suffer from delay. If there is no complaint to the police for a couple of weeks, valuable forensic and medical evidence (blood, age and character of alleged injuries, absence of the accused's DNA, recollection of genuine alibi etc.) may be lost, to the detriment of justice.

A good deal has already been done in this respect, especially by the Law Officers, Elish Angiolini and Frank Mulholland, and police practice also improved during my career (1949 – 2004) and since. The changes introduced have improved markedly the treatment of complainers and increased greatly the chances of a conviction in sexual assault cases. (Indeed my impression is that we are now doing better than England & Wales in relation to that conviction rate: the up-to-date statistics should be made available to Parliament.) The poisonous legacy of Jimmy Savile has done one good thing: it has encouraged victims to complain and assured them of more understanding treatment. Our efforts should be concentrated on building on these changes in practice and 'culture', rather than just attempting to satisfy some complainers by granting their "wish for the opportunity to be heard in court" [3733].

It is also to be noted, however, that police forces in many countries, including our own, do not enjoy a good reputation for investigating such cases thoroughly[25]. One

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[23] Yates v HM Advocate 1977 SLT (n) 42; Smith v Lees 1997 JC 73.

[24] This situation is likely to get worse as more police stations close.

[25] cf. "False Allegations of Rape". Rumney, Cambridge Law Journal, **65(1)**, pp.128-158, discussing inter alia the police practice of misusing the "no-crime" designation in complaints of Rape or other sexual assault. The rape reporting rate varies alarmingly across England: "thejournal.co.uk", reported by the Rape Monitoring Group, 1 February 2014."Thousands of rape cases thrown out as *charges fail*

suspects that some complainers have been fobbed off with the bland excuse that the inability to pursue the case is down to the law requiring corroboration; it is too easy to pass the buck in this way[26]. The police/prosecution practice of blaming "absence of corroboration" is compounded by the apparent misconception – referred to earlier in the Introduction – as to the character and quantity of what is required by the law governing corroboration, properly understood.

OTHER MATTERS *(originally in Part 3)*

3.1 Most attention has been focused on sexual assault cases

Relatively little attention has been paid to the fact that Section 57 applies to ***all*** cases, including murder, assaults, fraud, theft, and countless Statutory Offences, including drugs cases with severe penalties. **This is a revolution[27]**. Its far-reaching consequences have simply not been explored. It is a huge change based on the view of one judge, the police and the public prosecutor, with support from lobbyist groups mostly concerned with sexual crimes, (and whose members have often relied on police-based assertions that such cases have had to be dropped for "*lack of corroboration*"). There has been no examination of the likely effect on non-sexual cases. In areas of policing other than domestic violence there have been too many cases in which credible allegations have been made, and accepted by juries, that the police have planted evidence, not least in drugs cases. There has been no Royal Commission or the equivalent to try to assess the consequences, financial and in terms of the administration of justice. The revolutionary proposal overturns the wisdom and practice of centuries during which the outstanding Scottish Judiciary, and the Institutional writers developed pragmatically a system of justice that owed almost nothing to interventions by Parliament. It has been given very little attention in public discussion or elsewhere. And all of a sudden our whole system of justice is to be dramatically altered. There has been no calculation of the likely effect on the capacity of the Courts, the prosecution service or the cash-strapped, largely Legal-Aided, defence branch of the legal profession. The debate in the Scottish Parliament on 27 February 2014 was woefully inadequate in this respect. Even the Justice Committee paid relatively little attention to the extent and consequences of the change beyond the sexual assault cases. This is simply no way to make sweeping and massive changes to a mature legal system. That legal system recognizes that judges also make mistakes: but if one judge makes a decision it can be appealed to a higher court. If Lord Carloway's judgment on this issue were to be referred to a higher court of appeal, it would be overturned by a vote of 33 to 1.

3.2 Continental Jurisdictions

The Justice Secretary's assertion [4096] that the other continental countries have no requirement for corroboration, but have fair and balanced systems for administering the criminal law, is astonishing. Are Russia, Italy, Bulgaria, Greece and Turkey (all

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following new CPS guidelines": The Independent, 4 February 2014: it is suggested there that the drop " may be linked to cutbacks in police and CPS resources".

[26] *NOTE the call of the Police & Crime Commissioner for Greater Manchester for a re-think about approaches to such cases: The Guardian, 6 February 2014.*

[27] *At present, the only exceptions to the need for corroboration are found in relation to offences such as poaching, fishing and hunting, plus some Road Traffic Offences.*

Council of Europe members) included in this generalization? What, if anything does the Justice Secretary claim to know about the administration of justice in such countries (some of which are in the EU)? Does his knowledge of the notorious case in Perugia, Italy (murder of Meredith Kercher), or the rich forensic history of Snr. Berlusconi not cause him to doubt if our system of investigation and trial is inferior to the system there? This former Prime Minister claims that the Italian State Legal Service is dominated by politically-motivated left-wingers? Do the claims by former Presidents Sarcozy and Chirac that the French state prosecution service are conducting political witch hunts not give him pause to qualify his desire to emulate the practices of other jurisdictions? My experience as a member for many years of the International Bar Association, and Vice-Chair (for 7 years) of its Human Rights Institute is also quite different from that asserted by the Justice Secretary. Our legal system is widely admired and envied round the world. Even when referring to the English law of evidence, it is far from clear that the Justice Secretary has made any in-depth study of the pluses and minuses of that system, especially in relation to sexual assault cases. The Jimmy Savile scandal again should give us pause for thought: the English system allowed Savile to get away with a lifetime of serious abuse without so much as a caution. Nor does our system of criminal justice owe anything to the continental traditions that developed following the Napoleonic reforms 200 years ago. We do not have examining magistrates or single-career judges. Our jury system is unique. Our trials proceed *de die in diem* NOT in the desultory fashion common on the Continent. Our judiciary is recruited from experienced independent and highly respected practitioners: by contrast, in much of Europe, recruits to the judiciary join as young professionals and make their whole career as judges. The high standing of judges in this country is entirely different from that of judges elsewhere, in, for example, Italy, Russia, Spain, even in Scandinavia. Some of our insights into Jurisprudence were indeed gained in Holland but that was some four centuries ago when that country followed Roman-Dutch law; and the law in question was civil.

3.3 **Police resources**

It may be - though I have yet to be persuaded of it – that, despite the abolition of the requirement for corroboration, the police would still look exhaustively for corroboration in sexual assault cases. But in more routine cases, especially where there is little media publicity, the temptation will be to cut the corners: the thinking is bound to be, “*Why not effect some savings in the boring, resource-consuming search for corroboration when we don’t need it?”* That approach will pose an additional threat to justice and will also put more cases before the court that depend on the word of one person against that of another. This point should be considered against the current background in Scotland of reducing police resources and drastically cutting Legal Aid. Even the reduction in the number of police stations is bound to make it more difficult for victims to complain.

3.4 **“Domestic” cases**

It is fully appreciated that the principal drive for this change comes from a genuine wish not to deprive the victims of private sexual and ‘domestic’ abuse of the right to have their abusers brought to justice. No one can properly deny that that concern is real and worthy of respect. But huge advances have been made, and are still being

made, in dealing with this problem. Indeed Scotland has already had real success in effecting great improvements. We should continue to evolve improvements by methods such as those suggested here (and there are surely others); and should not sweep aside the long-standing law of corroboration across the whole field of criminal justice. Of course, there is injustice if a person who commits a crime is not brought to justice; but that already happens in a very great number of crimes and offences that go unsolved, for reasons that have nothing to do with the need for corroboration.

A pragmatic approach

The Scottish system of criminal justice has developed and evolved in a pragmatic way based on a case-by-case approach. To effect a revolution in our system of criminal justice, one that is opposed by almost all who practise in the courts of Scotland, is to risk an even greater injustice, that of convicting the innocent.

3.5 The announcement[28] that **Lord Bonomy** has been appointed to lead an independent reference group in considering other areas of criminal law where reforms may be recommended in light of the proposed abolition of the corroboration requirement has no bearing on the real issue as to the “scrapping” of the long-standing law. The Justice Secretary has repeatedly stated his firm resolve to “scrap” the rule. It is clear that what the Minister now seeks is to find a few sweeteners to placate those who have sought to protect this vital aspect of the Rule of Law in Scotland. In an adversarial system, the interests of justice are not served by awarding token sops to one side or the other: the administration of justice is not a game in which free kicks are given to one side as compensation for the perpetration of fouls that advantage the other.

3.6 The proposal to abolish corroboration is an ill-considered and widely condemned proposal supported by arguments that betray an imperfect understanding of what the law requires; and promoted on the bizarre basis that we can learn lessons from the “fair and reasonable” imperfect foreign legal systems about how to administer criminal justice. If the proposal to enact section 57 is a model of how the Scottish legal system would be run after Independence then we have reason to be fearful for the future of Scots Law.

John McCluskey
31 March 2014

[28] *On 4th February 2014*

APPENDIX I

INACCURACIES IN EVIDENCE SUBMITTED

A 1.1 Corroboration of *mens rea*

On 20/11/13, the Lord Advocate, in evidence to the Justice Committee, stated (at col.3734):

"….in a charge of rape there are three crucial facts: first, we need to corroborate penetration; secondly, we need to corroborate lack of consent; **and thirdly, we need to corroborate mens rea, which is the accused's intention.** Those are the three crucial facts that we must corroborate".

The Lord Advocate repeated this at Col 3755 where he said:

"Recent distress is obviously a piece of evidence. In a non-forcible rape, it only corroborates the lack of consent; it does not corroborate penetration **and it does not corroborate mens rea.** It will only take you some distance regarding the three crucial facts that you must consider or corroborate in a charge of rape".

A 1.2 The highlighted statements do not, in my view, reflect the current law accurately, and might therefore mislead the Committee. ***Mens rea*** is the "guilty mind" element of common law crimes: (statutes tend to use the word "intention" in some form). In a common law rape case, *mens rea* was not corroborated by evidence from witnesses saying they saw, heard or otherwise perceived ***mens rea***: *indeed it could hardly be*, because evidence is led from witnesses about things/events/happenings that they have perceived with their senses. Witnesses are asked what they saw, heard, touched or smelled. ***Mens rea***, being a state of mind, is not a matter of observable fact that a witness can say he saw, heard, touched or smelled. Although suitably qualified experts are allowed to give Opinion evidence, no witness is allowed to express an opinion as to the accused's guilt or innocence of the charge that he faces in Court. Subject to the special *Exception*[29] noted below, evidence from witnesses describing or "corroborating" ***mens rea*** is not adduced at a criminal trial.

A 1.3 In a criminal trial of the common law crime of rape, the Crown had to prove the ***actus reus*** (the accumulation of the essential facts that constitute the crime)[30]. In a rape case that meant that the Crown had to lead evidence that the accused sexually penetrated the female's vagina and did so without her consent. The primary evidence on each strand of that evidence came (usually) from the complainer[31].

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[29] Exceptions: If there was reason to believe that the accused was insane at the time when he committed the criminal acts, and thus incapable of forming the necessary evil intention, then opinion evidence could be led (e.g. from psychiatrists) in support of a plea of "insanity in bar of trial"[29]. (Similarly, if the accused in a case pleads compulsion or sonambulism that made him act without mens rea). The **absence** of mens rea might thus be established by evidence, which did not need to be corroborated.

[30] When the offence is one that is created/defined by statute, then "intention" has to be established – but not by witnesses saying, "I saw his intention: it looked evil to me".

[31] Not, of course, if she had been murdered.

Each strand of her evidence on these two matters had to be corroborated. The jury was then invited to draw the obvious and natural *inference* that the accused, when he performed the acts that constituted the *actus reus*, did so with *mens rea*: that is a matter of inference, not of sensory perception. So the Crown did not lead evidence from witnesses to the effect that they had 'observed' the accused's intention to commit a crime (though witness evidence of observed motive, or of words uttered at the time, might assist the court to draw the inference that he possessed evil intention: but such evidence was not necessary). Thus the accused's intention had to be implied/inferred from what he did, in performing the acts that constituted the *actus reus.* It follows that no evidence at all (and certainly no corroborative evidence) was led to show that the accused possessed evil intention (*mens rea)* when performing the acts that constitute the *actus reus.*

A 1.4 This field of law has been the subject of much legislation. In particular, the *Sexual Offences (Scotland) Act 2009* defined rape differently and more widely (*mens rea* was not mentioned*)*. Absence of consent (plus absence of reasonable belief that there was consent) and penetration (also freshly defined) were made the essential elements of the crime – the crucial facts[32] - to which there was added that the penetration had to be by a person who was *intending* the penetration or *reckless* in effecting it [S. 1(1)]. So the elements of *intention* or *recklessness* (replacing *mens rea)* can be seen as *facta probanda* after the 2009 Act. However, because intention (like *mens rea*) is a state of mind, and recklessness is a judgment, what is required, in each case, is evidence - in the ordinary sense of reliable observations by witnesses – from which the intention or the recklessness may be *inferred*. The material from which the intention can properly be inferred would be the observational, factual evidence that the accused *penetrated* the complainer *without her consent*: that evidence would have to be corroborated in both particulars. From that evidence the jury can legitimately **infer** the intention or the recklessness. If the jury makes the necessary inference, then conviction should follow. It is not necessary to have additional, far less corroborative, evidence from eyewitnesses or experts saying that the accused *intended* to penetrate (or did so *recklessly*). Of course, direct evidence that the accused uttered words or expressions at the time that plainly inferred an intention to penetrate (or his recklessness) would be relevant and helpful; but such separate evidence is not necessary. So it is difficult to see what is meant by saying that ***mens rea*** needs to be corroborated, as if it were a separate, distinct element in the constitution of the crime *needing to be separately proved by evidence in addition to the evidence that establishes the actus reus*: if the defined elements of penetration and no consent are corroborated, no further corroborative evidence is needed. Obviously the necessary inference, or judgment (of intention or recklessness), cannot be made except on the basis of corroborated evidence that establishes those two crucial facts (*facta probanda)*; but that is all. The corroborated proof of the crucial facts is enough, without more, to warrant the inference of intention or recklessness required by S. 1(1). What the Lord Advocate calls *mens rea* does not erect a third evidential hurdle and does not require additional evidence to corroborate it.

As the standard text book (Walkers on Evidence, 2008 edn.) says:

[32] the facta probanda

"**7.15 GUILTY KNOWLEDGE AND INTENTION** *Mens rea, dole or intention is a necessary element in crimes at common law….In all crimes requiring such proof, mens rea may be inferred from proof of the crime itself, and does not need to be separately established."* So to say that *mens rea* needs to be "corroborated" misleadingly suggests that evidence beyond that establishing the crucial facts (the facts constituting the *actus reus*) is necessary. To give a simple, relevant and classic, example (to which I return later), if the complainer states that the accused sexually penetrated her vagina, her *evidence of penetration* can be corroborated by forensic evidence that her vagina was found, shortly after the event, to contain sperm of the accused (demonstrated by the presence of his DNA). If she gives evidence that she *refused consent* to the intercourse, that refusal can be corroborated by evidence, e.g. of assault injuries judged to be contemporaneous with the intercourse. In each instance, the evidence from the independent witness consists of observable fact: the corroborating witness is not an eyewitness. But that evidence is properly described as corroborative. Nothing more is necessary to entitle the jury to hold, by legitimate inference, that the necessary intention is established. *The corroborating witness does not need to be corroborated.*

A 1.5 Errors as to what the law of corroboration requires

Both the Lord Advocate and the Justice Secretary made a similar error in relation to what the law governing Corroboration requires in everyday practice: the Justice Secretary repeated it several times.

The Lord Advocate said:

"Can I tell you what effect corroboration has? **We have to corroborate the taking of buccal swabs from alleged offenders, so two police officers are required for that**. We have to corroborate **the taking of intimate swabs from a complainer in a rape case**. That may involve a child and injuries to the sexual parts… .We have to corroborate **forensic analysis**, so two forensic scientists have to speak to **the results of forensic examination**, and **transmission of samples** is required to be corroborated. That seems completely unnecessary. That is where I am coming from."

The Justice Secretary said more than once:

"*At present, two forensic scientists have to speak to a sample and two police officers have to speak to the collection of a CD-ROM from London. All that has to be done because such evidence is part of the integral thread of the case".*

Leaving aside the meaningless phrase "*the integral thread of the case*", these assertions are misleading: the law requires corroboration only of 'the essential facts', the facts that constitute the crime. The presence of the accused's semen on a swab is not an essential fact in a rape case: ejaculation of semen in the course of intercourse is not an element of rape.

I seek to demonstrate the difference between evidential facts and essential facts with reference to the common alleged rape case in which the complainer says that she

was sexually penetrated by the Accused, and that he ejaculated[33]. In such a case, the Crown will inevitably ask for an intimate (usually vaginal) swab, to see if there is semen there, and a buccal (mouth) swab from the accused to obtain his DNA for comparison. The evidence to be corroborated is the complainer's statement that she was penetrated[34]. The corroboration consists of the evidence that the accused's semen/DNA was found in the swab. If that corroborative evidence is accepted, the essential fact of penetration is proved. **One** witness can provide that corroborative evidence. That would happen e.g. if one forensic scientist, acting alone, obtained the vaginal swab, then obtained the buccal swab and finally examined both, finding that the accused's DNA was in the semen. His/her evidence to that effect would be clear evidence corroborating the primary evidence, of the complainer, that she was sexually penetrated by the accused. It would clear, independent evidence of the *factum probandum*, *viz* penetration. **There is no need in law to corroborate the corroboration**: corroborative evidence does not need to be corroborated.

Exactly the same applies even if ***A*** takes the intimate swab, **B** takes the buccal swab and **C** discovers the accused's DNA therein: none of those three involved *corroborates* either of the others; and the evidence of no one of them is itself incriminating, but the combined evidence of all of the three, provides a continuous, coherent, linked chain of 'adminicles' (= pieces or scraps) of evidence which, if accepted by the court, amount to one single piece of corroboration, viz that the accused's penis penetrated the complainer's vagina: which is the *factum probandum*.

I repeat, because it is fundamental and elementary: evidence from someone - other than the complainer - that is corroborative of (clearly supportive of) the complainer's evidence of a crucial fact does not need to be corroborated.

A 1.6 I believe that I may understand why the practice of duplicating witnesses (whether policemen or forensic scientists) has grown up: if only one witness witnessed each of the three links in the chain and one of the three single witnesses died or went missing, the chain would be broken and vital evidence might be lost. But that has nothing to do with corroboration. So, having two witnesses to each link may be prudent to guard against losing evidence. But, quite apart from corroboration, *even that precaution is unnecessary*. For it is standard practice for each such witness to sign a police label, narrating where the sample came from, whose person it was taken from, when it was taken and so on. That whole process could be filmed; and the film, plus the signed labels, would be usable to complete the 'chain' of evidence if any of the three was not available for the trial. There are also certain statutory provisions in the Act that given valuable evidential status to a document etc. that is signed by two witnesses: but these provisions are nothing to do with the common law about corroboration: the statute could be amended to require one only: a whole host of such evidential innovations have been introduced by statute since 1981. There is no reason not to rationalise and improve them further.

[33] Clearly, if that statement is true, corroboration should be easy to find. If the complainer says there was no ejaculation, swab evidence is less likely to corroborate her evidence – so corroboration of the (negative) swab evidence does not help to prove the crime.
[34] Ejaculation itself is not a necessary element in proof of rape

The other reason why two witnesses are used is to anticipate and meet a possible challenge to the reliability of one witness, e.g. en expert scientist. But that is to do with reliability, not with corroboration.

A 1.7 Finally, to put the matter another way: clearly it is not criminal for a man to insert his penis into a woman's vagina and to ejaculate semen there: so proof that that happened does not prove a crime. All that it demonstrates is that the man sexually penetrated the woman. Other evidence (of no consent) is required to make it criminal. Having several witnesses to each swab obviously sheds no light on the absence of consent. But the evidence obtained from the swabs is sufficiently corroborative of the direct evidence of sexual penetration.

A. 2.1 The Justice Secretary (*col. 4098*) repeated several times his assertion and belief that if a CD Rom had to be brought from London it had to be collected and brought by two Police Officers, for corroboration purposes – and spoke of a "*duplication of resources*" [4101]. For the reasons already explained this is simply wrong. Such duplication is entirely unnecessary. It is difficult to conceive of a common law crime in which the contents of a CD or DVD constitute the essential facts constituting the *actus reus,* though they may provide evidence. The Justice Secretary did not explain what he meant or what kind of statute-based case could require the contents of a CD or DVD to be proved by the evidence to two witnesses.

If, of course, the offence (statutory) itself were to be in possession of a particular disc, then two witnesses could be required to prove and corroborate possession. But it becomes very difficult to relate that to the idea of two policemen having to go to London to collect the disc. If the disc was in London, then it is not explained how that would constitute an offence in Scotland. This example by the Justice Secretary betrays the same error discussed in the earlier paragraphs. Whatever the reason why the police have adopted this practice, the law does not require it; it is very costly in terms of manpower and other resources; and there are various ways of achieving the safeguard of having a substitute witness if one falls by the wayside. The notion that abolition of corroboration would save "resources" is absurd: the government says the number of prosecutions, and therefore trials, will increase significantly; the calls upon the legal aid fund will increase correspondingly[35]. The cost of the administration of criminal justice is bound to rise as a result. As it is, the police cannot keep up with the demands imposed by the recent laws "stalking" law: only 32% of stalking cases have resulted in conviction.[36]

JMC 31/3/14

[35] The Crown Office recruited 60 extra legal staff last year: The Scotsman 10/2/14 p 10.

[36] National Prosecutor for Domestic abuse: The Scotsman 10/2/14: Criminal Justice and Licensing Act 2009.