Judicial College of Victoria

Developments in distress.

Latest developments in distress[1].

The common law doctrine of distress continues to evolve and present challenges for judges, juries, practitioners and complainants of sexual violence. In this paper, I'll provide a brief reminder of the history of the doctrine before moving to consider legislative developments and cases since 2020 which continue to present conundrums for participants in the criminal trial process.

Within this paper, there are two classes of distress which I will examine. The first is pre-trial distress, which includes both distress observed immediately after the alleged offending and distress observed while the complainant is disclosing the alleged offending. The second is at-trial distress, which has historically been treated as part of the province of the jury to assess the demeanour of a witness, but which has attracted the attention of law reform bodies and Parliaments within the past 5 years.

History of distress.

The law of distress is routinely traced back to *R v Redpath* ('*Redpath*'), a 1962 decision of the English Court of Criminal Appeal by Parker LCJ, Winn and Brabin JJ.[2] The complainant was a 7 year old girl, playing outdoors with friends. After the alleged sexual assault, a witness, Hall, saw the complainant, describing her as 'terribly white, her eyes were very round, she appeared to be on the brink of tears, she burst into tears'.[3] The complainant reported the alleged offending to her mother, who later gave evidence that the complainant was 'trembling and in a terrible state'.[4] At the time, the common law corroboration rules were in force, as the complainant was both a child, and a sexual offence complainant. While some corroboration was provided by Hall that the accused was in the vicinity, corroboration of the sexual offending was said to lie in the complainant's distress. Parker LCJ accepted that the distressed condition of a complainant can amount to corroboration, but that much depends on the circumstances. In particular, while distress observed while making a complaint may be usable as corroboration, the jury should be told to give it little weight 'because it is all part and parcel of the complaint'.[5] But here, Hall's evidence of distress was in a different category, which was capable of being given very strong weight, as the complainant was not aware that she was being observed at the relevant time.[6]

Four years later, in *R v Knight* ('*Knight*'), Parker LCJ (Sachs and Nield JJ concurring) was again confronted with a case where distress had been left to the jury to provide corroboration. In this case, the accused lured the complainant to a public toilet and allegedly assaulted her.[7] The complainant then walked with the accused a short distance until she saw her father, at which point she became visibly frightened and was shaking. The complainant's evidence included a concession that, until she saw her father, she had not felt scared. His Honour warned that distress should not be over-emphasised, that *Redpath* was an exceptional case and that juries should,

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All views expressed in this paper are those of the author, and not the Judicial College of Victoria.

Conflict of interest declaration: The author of this paper is the principal researcher for the Victorian Criminal Charge Book, which was found to be erroneous on this issue in a series of cases starting with Paull v The Queen [2021] VSCA 339.

[2] 46 Cr App R 319.

[3] Ibid 321.

[4] Ibid 320.

[5] Ibid 322.

[6] Ibid 322.

[7] [1966] 1 WLR 230.

except in special circumstances, be warned that they should give distress evidence little weight.[8]

Redpath and *Knight* were soon picked up in Australia. In *R v Richards* ('*Richards*'), the Queensland Court of Appeal (Lucas J, Mansfield CJ and Hanger J concurring) considered a set of appeals by various people accused of sequentially raping the same complainant.[9] Later that evening, the complainant went to the house of an acquaintance, T, and a hospital, where she was examined by doctors H and K, and a police officer, B. T and B gave evidence that the complainant was 'hysterical'. The Court quoted *Redpath*, and observed that it did not create a rule that distress is always capable of providing corroboration. Instead, the value of such evidence depends on the circumstances of the case. Here, the Court concluded the evidence had no weight as corroboration, as it was not capable of implicating any particular accused, given the allegation was of a 'gang rape', and the evidence was 'equivocal' as it could have been caused by regret at consensual sexual acts, or by 'rough handling' during the consensual acts.[10]

A similar approach was observed in *R v Flannery* ('*Flannery*'), a decision of the Full Court of the Supreme Court of Victoria.[11] Winneke CJ (Pape and Starke JJ concurring) examined *Redpath* and *Knight* and affirmed that distress may be capable of providing corroboration, depending on the facts of the case. Here, the complainant, D, alleged that the accused and a friend of the accused both raped her in the accused's car, after having offered to drive D home. The accused then drove D home. On arrival, D gave her parents a false account of why she was arriving home late. Half an hour later, D met a friend, G, in the street, to whom she reported the alleged offences. G gave evidence that D had a worried expression, was upset and cried during the most of the conversation. D reported the offending to the police later that evening. Further distress evidence was called from the police officer who interviewed D approximately 3 hours after the alleged offending, and the police surgeon who examined D, approximately 5 hours after the alleged offending.

Winneke CJ held that whether distress can provide corroboration depends on the age of the complainant, the interval between the alleged assault and the observed distress, the complainant's conduct and appearance during the interval and the circumstances in which the complainant's distress is observed.[12] The Court also affirmed that, except in the special circumstances that existed in *Redpath*, distress will carry little weight and juries should be directed accordingly. The Court held that none of the suggested distress evidence was capable of providing corroboration. While the position was strongest in relation to G's evidence, the court was influenced by the time delay, D's lack of distress when speaking to her parents and that distress while making a complaint is weaker, as the making of the complaint could not be treated as corroboration.[13]

Since *Richards* and *Flannery*, courts have intermittently considered the capacity of distress to provide corroboration, and the appropriate jury directions which should accompany such evidence. Frequently, the message has been one of caution, because of the possibility that distress is feigned, due to an alternate cause, a product of the same imagination that gave rise to the complaint or unable to be linked to the alleged offending without reliance on the complainant's own evidence. In such circumstances, courts warned that allowing the jury to use questionable evidence of distress as corroboration would undermine the rule which requires

[8] Ibid 232–3. See also *R v Okoye* [1964] Crim LR 416; *R v Luisi* [1964] Crim LR 605; *R v Wilson* (1974) 58 Cr App R 304.

[9] [1965] Qd R 354.

[10] Ibid [16]–[19]. Cf *Berrill v The Queen* [1982] Qd R 508, 511–513 (Andrews SPJ), 523–5 (McPherson J), where the Court held that the fact that the alleged offending involved a 'gang rape' did not exclude the possibility of distress being corroborative, even if it could not implicate any particular accused.

[11] [1969] VR 586.

[12] Ibid 590–1.

[13] Ibid 591–2.

corroboration in sexual cases.[14]

Legislative developments.

In September 2020, the New South Wales Law Reform Commission published Report No 148, *Consent in Relation to Sexual Offences*. Recommendation 8.6 of that report states:

> The *Criminal Procedure Act* should include a direction stating that:
>
> (a) trauma may affect people differently, which means that some people may show obvious signs of emotion or distress when giving evidence in court about an alleged sexual offence, but others may not, and
>
> (b) the presence or absence of emotion or distress does not necessarily mean that a person is not telling the truth about an alleged sexual offence.[15]

In support for this direction, the Commission cited research on the varied responses of complainants giving evidence, and that emotional demeanour is not a reliable indicator of honesty.[16]

The New South Wales Parliament acted on this recommendation in 2021, adding s 292D to the *Criminal Procedure Act 1986* (NSW), in the terms recommended by the Commission, by the *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW).

In Victoria, the September 2021 report by the Victorian Law Reform Commission ('VLRC') recommended following the New South Wales lead,[17] and introducing an equivalent provision to s 292D. Specifically, recommendation 78 called for new jury directions to address misconceptions about sexual violence on an absence or presence of emotion or distress when reporting or giving evidence. This recommendation was implemented through the *Justice Legislation Amendment (Sexual Offences and Other Matters) Act 2022* (Vic), which introduced *Jury Directions Act 2015* (Vic) ss 54I–54K, with the operative direction contained in s 54K(5):

> In giving a direction under this section, the trial judge must inform the jury that experience shows that—
>
> (a) because trauma affects people differently, some people may show obvious signs of emotion or distress when giving evidence about a sexual offence, while others may not; and
>
> (b) both truthful and untruthful accounts of a sexual offence may be given with or without obvious signs of emotion or distress.

[14] See, eg, *R v Schlaefer* (1984) 37 SASR 207, 215–218 (King CJ); *R v Yates* [1970] SASR 302, 307–9 (Bray CJ, Zelling and Wells JJ); *R v Byczko* (No 2) (1977) 17 SASR 460, 462–4 (Bray CJ); *R v Wilson* (1973) 58 Cr App R 304; *Peterson v The Queen* (1979) 27 ALR 641, 651–4 (Connor, Franki and Northrop JJ); *R v Roach* [1988] VR 665, 668 (King J); *R v Sailor* [1994] 2 Qd R 342, 346–7 (McPherson JA); *R v Roissetter* [1984] 1 Qd R 477, 481–2 (McPherson J).

[15] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (Report No 148, September 2020) 173.

[16] Ibid [8.112]–[8.114].

[17] Victorian Law Reform Commission, *Improving the Justice System Response to Sexual Offences* (Report, September 2021) [20.33].

In March 2021 the Queensland government established the Women's Safety and Justice Taskforce. Stage 2 of the Taskforce's work was to examine 'women and girls' experiences across the criminal justice system'.[18] As part of that stage of work, the Taskforce examined whether reforms to jury directions were necessary to improve the operation of the criminal justice system. They examined the views of relevant stakeholders and the recommendations of the recent New South Wales and Victorian Law Reform Commissions before supporting the introduction of statutory jury directions to address jury misconceptions in terms similar to recommendation 78 of the VLRC report.[19] The Taskforce recommended that the government should release a consultation draft of the proposed legislative amendments before they are introduced to Parliament, which should be modelled on the New South Wales *Crimes Legislation Amendment (Sexual Consent Reforms) Act 2021* (NSW).[20] While the Queensland government has expressed support for the Taskforce's recommendation,[21] at the time of writing, this draft legislation has not been publicly released.

In Western Australia, the Sexual Offences discussion paper recorded that 'research has found that emotional demeanour is not a reliable indicator of honesty',[22] and noted the availability of statutory directions on distress in New South Wales and Victoria, and the recommendation noted above in relation to Queensland. At the time of writing, the law reform process has only produced a discussion paper, and so it is not known whether the eventual report will recommend that Western Australia follow the practice of New South Wales and Victoria.

Current jury directions.

Throughout Australia, publicly available bench books in New South Wales,[23] Queensland,[24] South Australia[25] and Victoria[26] provide model jury directions which judicial officers regularly use when instructing juries.[27]

The Australian bench books provide the following directions for pre-trial and in-trial distress.

[18] Women's Safety and Justice Taskforce, *Hear her Voice* (Report No 2, July 2022) vol 1, 3.

[19] Ibid recommendation 77, 347.

[20] Ibid 348.

[21] Queensland Government, *Response to the Report of the Queensland Women's Safety and Justice Taskforce, Hear her Voice: Report Two Women and Girls' Experiences across the Criminal Justice System* (Government Response, November 2022) 26

[22] The Law Reform Commission of Western Australia, *Sexual Offences Discussion Paper Volume 1: Objectives, Consent and Mistake of Fact* (Project No 113, December 2022) vol 1, [6.120], citing Faye T Nitschke, Blake M McKimmie and Eric J Vanman, 'A Meta-Analysis of the Emotional Victim Effect for Female Adult Rape Complainants: Does Complainant Distress Influence Credibility?' (2019) 145(10) *Psychological Bulletin* 953, 955–6.

[23] 'Criminal Trial Courts Bench Book', Judicial Commission of *New South Wales* (Bench Book, 24 April 2022) <https://www.judcom.nsw.gov.au/criminal/> ('Criminal Trial Courts Bench Book').

[24] 'Supreme and District Courts Criminal Directions Bench Book', *Queensland Courts* (Bench Book) <https://www.courts.qld.gov.au/court-users/practitioners/benchbooks/supreme-and-district-courts-benchbook> ('Supreme and District Courts Criminal Directions Bench Book').

[25] Courts Administration Authority of South Australia, South Australian Criminal Trials Bench Book (Bench Book, July 2021) <https://www.courts.sa.gov.au/wp-content/uploads/wp-download-manager-files/documents/bench%20books/South%20Australian%20Criminal%20Trials%20Bench%20Book%20(July-2021).pdf> ('South Australian Criminal Trials Bench Book').

[26] 'Criminal Charge Book', *Judicial College of Victoria*, (Bench Book) <https://www.judicialcollege.vic.edu.au/eManuals/CCB/index.htm#19193.htm> ('Criminal Charge Book').

[27] Appellate courts have endorsed the appropriate adaptation of directions from such bench books, while noting that use of a bench book direction does not make a judge's directions immune from criticism and that departure from a bench book is not itself indicative of error. See, eg, *Rassi v The Queen* [2023] NSWCCA 119, [108] (Hamill J); *AL v The Queen* [2017] NSWCCA 34, [114] (Leeming JA, Schmidt and Wilson JJ); *Smith v The Queen* (2008) 37 WAR 297, [270] (Miller JA); *Milkins v The Queen* [2011] VSCA 93, [50] (Weinberg JA); *LQ v The Queen* [2011] VSCA 135, [20] (Maxwell P, Weinberg and Harper JJ).

Queensland.

The Queensland bench book contains two possible directions on pre-trial distress. The first is a direction for use when the jury can use pre-trial distress as probative of guilt:

> Evidence has been placed before you of the distressed condition of the complainant (describe evidence, including time etc). The prosecutor submits that you can use this evidence in support of the evidence that the complainant was raped/assaulted by the defendant. It is a matter for you as the sole judges of the facts whether you accept the evidence relating to the complainant's distressed condition. If you do, then you have to ask yourself: was the distressed condition genuine or was the complainant pretending? Was he or she putting on the condition of distress? Was there any other explanation for the distressed condition at the time? If you find that the distress was genuine then it may be used by you as evidence that supports the complainant's account.[28]

The second direction is for use where evidence of pre-trial distress is led as part of the narrative, but is not relied on as probative:

> Evidence has been placed before you of the distressed condition of the complainant (here describe evidence, including time etc.). The prosecution have led that evidence as part of the narrative of events which it alleges surrounds the act of rape/assault. It is not led in support of the complainant's evidence that he or she was raped/assaulted and must not be used by you for that purpose. It has no relevance to the defendant's guilt. There may be many innocent reasons for the condition at that time, such as: regret after consensual intercourse or sexual contact, or concern about some other issue entirely unrelated to the alleged sexual activity. The complainant's condition may be feigned or exaggerated, and as a matter of common sense and human experience you may think of other reasons based on the evidence. You should therefore disregard the evidence of distressed condition except to the extent that it is part of the narrative of events of that particular day.[29]

New South Wales.

In relation to in-trial distress, the New South Wales bench book states:

> [*Summarise the submissions about the conclusions that might be drawn from the manner in which the evidence was given.*] You must bear in mind that trauma may affect people differently, which means some people may show obvious signs of emotion or distress when giving evidence about an alleged sexual offence, but others may not. The absence of emotion or distress does not necessarily mean a person is not telling the truth about an alleged sexual offence, any more than the presence of emotion or distress means they are telling the truth about it.[30]

The bench book does not contain directions on pre-trial distress.

[28] Supreme and District Courts Criminal Directions Bench Book (n 24) ch 67.

[29] Ibid.

[30] Criminal Trial Courts Bench Book (n 23) [5-230].

Victoria.

The Victorian bench book contains two directions: one on pre-trial distress and one on in-trial distress.

The pre-trial distress direction states:

> You have heard evidence about NOC's[31] apparent distress [identify circumstances of distress and elaborate if necessary on the details of the distress].
>
> If you find that NOC was distressed immediately after the alleged offence, the prosecution invites you to use this as indirect evidence that supports its case that [describe the issue the evidence may support (e.g. "s/he did not consent to the penetration")]. In other words, the prosecution says that the distress supports a conclusion that NOC suffered a traumatic event. Given the timing of the distress, the prosecution say that the only possible traumatic event was the alleged [identify relevant offence].
>
> [Insert relevant prosecution arguments]. The defence dispute this, and say [insert relevant defence arguments].
>
> I must give you the following directions of law about this piece of evidence. First, you can use the evidence in the way the prosecution suggests. But you may only do so if you are satisfied there is no other reason why NOC could have appeared distressed at that time. Second, the experience of the law is that evidence of observed distress is a weak type of evidence and you should not give this evidence much weight.[32]

The in-trial distress direction states:

> One of the witnesses you will hear from is NOC, who is the person who says [s/he] was the subject of NOA's[33] offences. When you are hearing his/her evidence, you must bear in mind the following direction of law. Experience shows that some people may show obvious signs of distress when giving evidence about an alleged sexual offence, while others may not. This is because trauma affects people differently. Both truthful and untruthful accounts of a sexual offence may be given with or without obvious signs of emotion. To that direction, I add the following comment, which you may accept or reject. You should be slow to put any weight on whether NOC displays emotion when giving evidence. There are too many factors which can influence whether NOC displays emotion for that to be a safe tool for judging [his/her] evidence.
>
> The purpose of this direction is to warn you that you must decide the case on the evidence before you and not on the basis of assumptions that might be made about how a person may or may not behave or act if they have experienced a sexual assault.[34]

[31] Name of complainant.

[32] Criminal Charge Book (n 26) 7.3.1.7.1.

[33] Name of accused.

[34] Criminal Charge Book (n 26) 7.3.1.7.2.

South Australia.

The South Australian bench book contains two directions on pre-trial distress. The first is where the evidence is relevant to credibility:

> You heard evidence that [describe relevant evidence of distress]. I must give you the following direction about how you can and cannot use this evidence. Evidence that [complainant] was distressed when [describe relevant time] is only relevant to help you decide whether [he/she] has acted in a consistent manner, and so decide whether [complainant] is a truthful witness. It is not evidence that independently supports [his/her] statement that [accused] [describe relevant offending conduct]. [Refer to prosecution and defence submissions about distress.][35]

The second direction is where distress can be used as supporting evidence:

> You heard evidence that [describe relevant evidence of distress]. The prosecution says that you can use this as indirect evidence to show that [describe the issue the evidence may support (e.g. "[accused] sexually penetrated [complainant] [without his/her consent]")]. In other words, the prosecution says that the distress supports a conclusion that [complainant] suffered a traumatic event. Given the timing of the distress, the prosecution say that the traumatic event was the alleged [identify relevant offence]. When you are assessing this evidence, you should consider whether the distress was feigned, or whether it arose from some other cause, such as [identify any competing hypotheses consistent with innocence based on the defence case]. These matters may affect the weight you give this evidence. [Refer to prosecution and defence submissions about distress.][36]

Recent cases on distress.

In this section, I will examine 14 appellate cases since 2020 where an issue has arisen concerning the admissibility, use, or jury directions about, evidence of pre-trial or in-trial distress.

Lynch v The Queen [2020] NTCCA 6.

In this case, the complainant was a sex worker who alleged that she had been assaulted by a client, who failed to comply with her requirement that he use a condom. She contacted police immediately after the incident, and the officer who interviewed her noted her distressed state. During the trial, defence counsel sought a direction that distress is easy to feign, should be scrutinised carefully,[37] will rarely amount to corroboration and little weight should be given to it except in exceptional circumstances.[38] Rejecting the appeal, Grant CJ, Blokland and Hilley JJ concluded that the essential elements of a distress direction are that the jury must be satisfied:

> (a) that the complainant was in a distressed state;
>
> (b) that her distress was genuine; and
>
> (c) that her distress was as a result of being sexually assaulted by the accused rather than some other cause.[39]

[35] South Australian Criminal Trials Bench Book (n 25) 2.3.4A.

[36] Ibid 2.3.4B.

[37] *Lynch v The Queen* [2020] NTCCA 6, [74] (Grant CJ, Blokland and Hiley JJ) ('Lynch').

[38] Ibid.

[39] Ibid [77] (Grant CJ, Blokland and Hiley JJ).

The court noted that a warning that distress may be feigned is a common part of Australian bench books, citing the Queensland and South Australian bench books, but that when measured against the essential requirements they had identified and in the circumstances of the case, there was no need to explicitly refer to the possibility of distress being feigned, identify other possible causes, or make any comment about the weight of the evidence.[40]

Uddin v The Queen [2020] NSWCCA 115.

The complainant, aged between 2 and 5, attended a small day care facility run at the accused's home. In the last weeks of December 2017, the complainant developed a reluctance to attend the day care centre. Ultimately, the accused was charged with offending alleged to have been committed between 1 January 2015 and 30 December 2017. One issue on the appeal was the use of the complainant's reluctance to attend the day care centre. Unlike most forms of pre-trial distress evidence which attract appellate scrutiny (but like the distress considered in *R v Link*[41]), this was not distress that accompanied a complaint or the alleged offending. Instead, it preceded the making of the complaint, and so was purely behavioural. Fullerton and Wilson JJ were critical of the prosecutor and the judge grouping the behavioural evidence with the complaint evidence as 'evidence of the truth of what the complainant alleged'.[42] While accepting that the behavioural evidence was capable of being probative of guilt, the court concluded that a miscarriage of justice occurred due to the judge's failure to instruct the jury about the cautious approach it needed to adopt before drawing inferences from the complainant's behaviour, and the need for the jury to 'infer that the conduct occurred as a consequence of the abuse alleged, and that there was no reasonable or innocent explanation for it'.[43] The judge was also required to draw the jury's attention to the width of the timeframe of the charges alleged, as that could undermine the potential relevance of the complainant's behavioural changes in the last weeks of December 2017.[44] Meagher J would have rejected this ground of appeal, finding that although the prosecutor mischaracterised the evidence as complaint, the arguments about the use of the evidence were adequately put by trial counsel, and as a piece of circumstantial evidence to support the rest of the prosecution case, no further directions were required.[45]

SPC v The Queen [2020] SASCFC 43.

The accused was charged with both physical and sexual offences he committed against his wife, including four offences alleged to have been committed the night before and the morning she reported to police. On the appeal, one issue was that the trial judge had not given the jury any directions about the fact that the complainant was distressed when reporting the offending. The appellant argued the judge should either have directed the jury that too much time had passed and so the distress was not relevant, or that the jury could not use the distress as circumstantial evidence of the offending unless satisfied that the distress was not an emotional reaction to her decision to leave the accused. This argument failed for four reasons. First, neither the prosecutor nor the judge had left the distress to the jury as corroboration. Second, the court accepted there was a strong temporal connection between the distress and the offences within the past 12 hours. Third, the alternative causes proposed by the appellant were unrealistic. Fourth, trial counsel had consented to the course taken by the judge.[46]

[40] Ibid [82]–[87] (Grant CJ, Blokland and Hiley JJ).

[41] (1992) 60 A Crim R 264.

[42] *Uddin v The Queen* [2020] NSWCCA 115, [127].

[43] Ibid [139] (Fullerton and Wilson JJ).

[44] Ibid [140] (Fullerton and Wilson JJ).

[45] Ibid [72]–[88].

[46] *SPC v The Queen* [2020] SASCFC 43, [36]–[48] (Kourakis CJ).

Bristow v The Queen [2020] SASCFC 91.

In this case, the complainant was a backpacking tourist from Belgium, looking for work. After seeing a Gumtree ad the accused had posted, the complainant contacted the accused and ultimately travelled to his farm near Murray Bridge. Soon after arriving, the accused allegedly overpowered the complainant, bound her with cable ties and chains, and sexually assaulted her several times over the next 24 hours. The complainant ultimately escaped, and sent emails and Facebook messages to the police and friends, saying she had been kidnapped. One issue which arose on the appeal was the admissibility of those emails and messages. The South Australian Court of Appeal (Kourakis CJ, Nicholson and BlebyJ concurring) noted that the material was not admissible as distress evidence, as a jury could not reason back from the reports to infer a state of distress, and then use that distress to evaluate the whole of the complainant's evidence.[47] The communications were, however, admissible as res gestae.[48]

R v Iongi [2021] QCA 43.

The complainant, a 12 year old girl, alleged that she had been sexually touched by the accused while staying at the accused's house for a sleepover with the accused's step-daughter, TC. Distress evidence was led from TC, who was asked during the police interview how the complainant appeared soon after one of the alleged instances of offending. TC described the complainant as appearing shocked and scared. Additional distress evidence was led from the complainant's mother who stated that while the complainant was reporting the alleged offending, the complainant 'burst into tears and … was struggling to tell her what'd happened'.[49] At the request of the prosecutor, the judge gave the jury a direction about the distress observed by TC in accordance with the then-standard Queensland directions.[50] On the appeal, the issue was whether TC's evidence could be used to corroborate the complainant's evidence. The Queensland Court of Appeal held that, given the close connection in time and place between the alleged offending and the observed distress, it was open for the jury to use the evidence as corroboration.[51]

Clark v Neff [2021] WASCA 209.

The accused was a driving instructor, and the complainant was a student. The complainant alleged that during a driving lesson, the instructor frequently touched her upper thigh. After finishing the lesson, the complainant's mother went to work. At an unidentified later time, the complainant burst into tears when her mother asked how the driving lesson was, and the complainant reported the offending when her mother came home from work. The accused was convicted, and appealed to the Western Australian Supreme Court and then the Court of Appeal. In the Court of Appeal, one issue concerned the use of the evidence that the complainant was distressed after the driving lesson. The Court (Buss P, Mithcell and Beach JJA) recalled the distinction from *Di Stefano v Western Australia* between using distress as corroboration – independent evidence tending to confirm that the events described occurred – and using it to support the complainant's credibility.[52] The Court then concluded that the Magistrate did not use the evidence as corroboration, but as a valid part of assessing the recent

[47] *Bristow v The Queen* [2020] SASCFC 91, [82].

[48] Ibid [190]–[196].

[49] *R v Iongi* [2021] QCA 43, [9] (Burns J).

[50] Ibid [15] (Burns J).

[51] Ibid [21] (Burns J).

[52] *See Di Stefano v Western Australia* [2017] WASCA 187, [20] (Buss P, Mazza and beach JJA).

complaint evidence as showing 'consistency of conduct which was supportive of the complainant's credibility'.[53]

Paull v The Queen [2021] VSCA 339 ('*Paull*').

In this case, the complainant alleged that he had been sexually assaulted by a local Scout leader approximately 40 years earlier. During the police interview (which was tendered as part of the complainant's evidence-in-chief), the complainant had become distressed when recounting the alleged offending. The trial judge used the then-current Victorian directions, which did not distinguish between pre-trial and in-trial distress. The directions reminded the jury of the complainant's distress, and said that the prosecution invited the jury to use that 'as indirect evidence that supports the complainant's account. In other words, the prosecution says that this distress was indirect evidence that supports a conclusion that [the complainant] was remembering and recounting a traumatic event' and that, in the circumstances, the relevant traumatic event was the alleged offence.[54] The Court of Appeal (Priest, Kaye and Niall JJA) held that distress in those circumstances 'could not be characterised as circumstantial evidence capable of independently supporting his account'.[55] The Court observed that distress proximate to the alleged offending could be used to support a complainant's account, but that distress when recounting the alleged offence four decades later could not. Instead, use of the evidence in that way would be to engage in bootstraps reasoning.[56] The Court criticised the standard directions, which provided that distress when recounting the alleged offence could be used to support a conclusion that the complainant was remembering and recounting a traumatic event.[57]

Davis v The King [2022] SASCA 116.

Here, the complainant was a 16 year old girl with a mild intellectual disability. A family friend took her to a motel room and allegedly sexually assaulted her on a bed and in a spa. A few weeks later, she reported the alleged offending to her school teacher and school counsellor. Those reports were made in a state of distress. The trial judge invited the jury to decide whether the distress was genuine and to consider alternate causes or explanations of the distress. Critically, the trial judge said:

> However, if you find that there was genuine distress and that it was consistent only with her allegation that the alleged offending took place, it can be an aid to assessing her credibility. Dependent on the view which you take, it may indicate to you that [the complainant's] behaviour at the time was consistent with the events now related by her and assist you in assessing the reliability of her evidence.[58]

On the appeal, one criticism related to the use of the word 'reliability' in the second sentence. The appeal judges (Doyle, Bleby and David JJA) examined other cases where the distinction between reliability and credibility had been blurred, before concluding that while the trial judge should not have spoken of reliability rather than credibility, the direction as a whole only invited the jury to consider the use of distress as supporting the complainant's credibility, and not as evidence for the truth of the complaint.[59] A second criticism was that the directions did not sufficiently relate the law to the evidence, by failing to highlight that the complainant was an emotionally labile person, and that this was relevant to assessing the relevance of the distress evidence. The appellate court held that the jury were sufficiently directed about the complainant's emotional fragility at other

[53] *Clark v Neff* [2021] WASCA 209, [53] (Buss P, Mitchell and Beach JJA).

[54] *Paull v The Queen* [2021] VSCA 339, [39] (Prist, Kaye and Niall JJA) ('Paull').

[55] Ibid [41].

[56] Ibid [44].

[57] Ibid [48]–[49].

[58] *Davis v The King* [2022] SASCA 116, [111] ('Davis').

[59] Ibid [120].

parts of the judge's directions, and that the directions on distress did invite the jury to consider other possible causes of distress.[60]

Charles v The Queen [2022] VSCA 166.

Here, the accused was an instructor at a karate club and the complainant was a student. The alleged offending occurred while the accused drove the complainant home. The distress arose between 2 and 3 years after the alleged offending. First, while at a training camp, the complainant went to her boyfriend's room crying and stating that she could not explain what was wrong, as someone would kill her. Later, her boyfriend questioned her about the statement and she again became distressed and reported the alleged offending. The prosecutor invited the jury to use the reporting of the offending as complaint evidence, and the distress as 'the way in which you might expect her to react when she was recalling those events'.[61] The trial judge gave the same direction as that given in *Paull*. The Court of Appeal (Emerton P, Kyrou and T Forrest JJA) noted what had been said in *Paull* about the impugned passages, and that, 'in a perfect world, the judge would have avoided using the sentences subsequently deprecated in *Paull*, and would have also directed the jury as to the weight evidence of distress generally carries, particularly in circumstances of substantial delay between alleged offending and exhibited distress'.[62] But in this case, the distress exhibited was reasonably capable of being causally connected to the offending 2–3 years earlier. The Court observed that the prosecutor's argument that the evidence could be used to assess consistency of conduct was permissible, and that the judge correctly directed the jury that it could use the distress as circumstantial evidence capable of supporting the complainant's account if they were satisfied there was a causal connection between the distress and the alleged offending.[63]

R v SDQ [2022] QCA 91.

In this case, the distress evidence was given by a social worker at a hospital, where the complainant went for treatment after allegedly being sexually and physically assaulted by her boyfriend. Sofronoff P (Morrison JA and Boddice J concurring) noted that distress may, depending on the circumstances, constitute corroboration and, like all circumstantial evidence, a jury must consider whether there are rational hypotheses that might explain it. His Honour also noted that corroboration must be independent. While a complainant's own evidence of distress may be relevant and admissible as tending to prove an element of the offence because 'the absence of this expected distress would tend to prove that none of the offences were committed', it would not be corroborative but would just be part of the complainant's account.[64]

The trial judge gave directions in accordance with the then-current Queensland directions, which included a remark that '[i]t is customary for judges to warn juries that you ought to attach little weight to distressed condition because it can be easily pretended'.[65] Sofronoff P criticised the inclusion of that part of the direction on the basis that it had been explicitly rejected in *R v Roisseter* in 1984.[66]

[60] Ibid [123]–[126].

[61] *Charles v The Queen* [2022] VSCA 166, [82].

[62] Ibid [89].

[63] Ibid.

[64] *R v SDQ* [2022] QCA 91, [23]–[26] ('SDQ').

[65] Ibid [28].

[66] [1984] 1 Qd R 477, 482 (McPherson J).

Ultimately, the appeal was allowed because the directions on distress covered both the distress observed by the social worker, and distress reported by the complainant when speaking to a sexual assault helpline. In a case that was dependent on the complainant's credibility, the Court held it could not exclude the possibility that the jury was influenced by wrongly treating the complainant's self-reported distress as corroborative. In the circumstances, which included the fact that the complainant had ended her 'fraught relationship' with the accused at the same time, the Court concluded that the evidence of distress, including from the social worker, was equivocal and could not have assisted in the resolution of the case, other than to show consistency of conduct.[67]

R v Panagaris [2022] QCA 192.

The complainant in this case went to the emergency room of a hospital with her boyfriend so he could to be treated for cardiac symptoms which developed after he consumed MDMA. While she was waiting for him to be treated, she went outside on three occasions with the accused. She soon complained to a nurse that the accused had groped her, and later called her father. The father, when giving evidence, reported that the complainant was 'sounded petrified, she was very scared, very emotional, cried extensively'.[68] The trial judge gave the then-current Queensland directions about distress evidence in relation to the complainant's interaction with her father, including the passage about weight disapproved in *R v SDQ*.[69] On the appeal, the court rejected an argument that the trial judge erroneously left other interactions as distress evidence. The appellate court also noted that there are times when evidence of distress is admitted, even though it is logically incapable of being used as corroboration. In such cases, the trial judge will tell the jury about the limited use of the evidence.[70] A final, unsuccessful, line of argument on the appeal was that the distress direction was inadequate, as it did not address the lapse of time or the absence of support from the hospital's CCTV footage. The appellate court considered that those matters had been well-covered by the parties, and by the judge in the general summary of the defence arguments, and did not need to be explicitly articulated in the distress direction.[71]

Seccull v The King [2022] VSCA 219.

Over the course of five years, the accused allegedly engaged in a series of physical and sexual assaults against his then-wife, the complainant. The complainant gave evidence that she was distressed after some of the alleged offending. Evidence was also led of the process of the complainant disclosing the alleged offending to TW, a friend, gradually over the course of 6 months, and the complainant's distress on several of those disclosure occasions. The judge directed the jury that they could use both forms of distress as indirect evidence supporting the complainant's account, in accordance with the then-current Victorian directions.[72] Niall JA and Kidd AJA, in a joint judgment, accepted that the distress evidence was admissible, but held the directions were flawed. They found that the directions wrongly: invited the jury to use the complainant's own evidence of distress as independent evidence; allowed the jury to use the distress observed by TW as supporting evidence when it was not temporally proximate to the alleged offending or related to the complainant reporting a *sexual* offence; asserted that the prosecution advanced a line of argument about the distress evidence which the prosecution did not advance; failed to instruct the jury that they could only use the evidence if satisfied of a causal link with the alleged offending, with the existence of a causal link to be assessed by reference to temporal proximity and the

[67] SDQ (n 64) [75].

[68] *R v Panagaris* [2022] QCA 192, [35] (Dalton JA).

[69] SDQ (n 64); *R v Panagaris* [2022] QCA 192, [66] (Dalton JA).

[70] *R v Panagaris* [2022] QCA 192, [70] (Dalton JA).

[71] *R v Panagaris* [2022] QCA 192, [72]-[76] (Dalton JA).

[72] *Seccull v The King* [2022] VSCA 219, [19] (Priest AP) ('Seccull').

possible existence of explanations for the distress.[73] In a separate judgment, Priest AP held that the distress evidence was not admissible at all, as it was not open for the jury to find any causal connection between the distress and the alleged offending. According to Priest AP, the one hour gap between the offending and the observation was too long, and the complainant's self-reported distress could never be left as supporting her evidence of non-consent.[74]

Taig v The King [2022] VSCA 235.

The complainant and accused were second cousins, who often stayed at each other's house. At the relevant time, the complainant was aged between 8 and 9, and the accused was aged approximately 15. Over the course of a year, the accused allegedly engaged in sexual activity with the complainant on multiple occasions. At the trial, the complainant was a difficult witness to question, prone to giving unresponsive answers and angry outbursts. Under the *Jury Directions Act 2015* (Vic) Part 3 request process, defence counsel sought a direction that the jury could not use those outbursts to corroborate the witness' claims, but could use it for a credibility purpose. The judge, acting under *Jury Directions Act 2015* (Vic) s 14, declined to give the direction sought, finding 'good reasons' for not doing so. While not making a final decision on the issue, the Court of Appeal (Priest PA, Niall and T Forrest JJA) held that it appeared open to the trial judge to decline the direction for the reasons given, including that it might unfairly undermine the believability of the complainant's evidence.[75]

Nimely v The King [2023] VSCA 20.

In this case the complainant was the younger sister of the accused's girlfriend. The offending took place over the course of 18 months, when the complainant visited her older sister's house. During a conversation with her father about changes in her behaviour, the complainant became upset and disclosed the alleged offending. In final addresses, the prosecutor raised an argument that the complainant's change of behaviour was due to the alleged offending. Then, in final directions, the trial judge instructed the jury in accordance with the then-current Victorian directions. The Court of Appeal (Priest, Taylor and Kaye JJA) observed that no party had requested judicial directions, and so they should not have been given due to *Jury Directions Act 2015* (Vic) s 16. Then, the court concluded the distress did not have the necessary causal connection with the alleged offending. Further, the court noted that if a direction were to be given, it needed to instruct the jury that it could not use the evidence unless they were satisfied the complainant's distress was caused by the alleged offending and not some other cause, and that evidence of distress carries little weight.[76]

[73] Ibid [81]–[101].

[74] Ibid [29]–[45].

[75] This trial was held before the commencement of *Jury Directions Act 2015* (Vic) s 54K, and such requests would now seem to be governed by the obligations in that section.

[76] *Nimely v The King* [2023] VSCA 20, [26]–[27] ('Nimely').

Current status.

In 1977, Bray CJ remarked that:

> The vicissitudes of the status of distress on the part of the prosecutrix, as potentially corroborative of her account of an alleged sexual offence committed upon her, would make an instructive footnote to legal history. It is an example of a doctrine comparatively recently introduced and speedily repented, or at least substantially qualified.[77]

46 years later, distress clearly has not been relegated to the footnote to legal history that Bray CJ predicted.

This survey of cases and law reform activity regarding distress since 2020 reveals three points of note.

First, there is currently a conflict between Queensland and Northern Territory on the one hand, and Victorian authorities on the other, about the need for jury directions to warn that distress generally carries little weight. As discussed above, the Queensland Court of Appeal in *R v SDQ* found that giving a warning about weight was contrary to authority.[78] Further, the Northern Territory in *Lynch v The Queen* had found that a direction about weight was not necessary.[79] In contrast, in *Nimely v The King*, the Victorian Court of Appeal held that a warning about weight was mandatory.[80]

Second, it appears that further judicial exposition is needed on the distinction between using distress as corroboration and using distress for credibility purposes. While the distinction between corroboration and credibility is easy to state, its practical application becomes elusive in the context of sexual assault trials, where proof of the offending is often dependent on the credibility of the complainant. As seen in *Davis v The King*, the distinction between credibility and reliability may not be critical.[81] In contrast, the Victorian cases of *Paull v The Queen*, *Seccull v The King* and *Nimely v The King* demonstrate that directions will invite improper use of distress as independent reliability enhancement where the directions suggest that the evidence supports the complainant's account by showing the complainant had experienced a distressing or traumatic event.[82] However, in *Taig v The King*, the Victorian Court of Appeal affirmed that, prior to the commencement of *Jury Directions Act 2015* (Vic) s 54K, in-trial distress was a valid factor to consider when assessing a complainant's credibility.[83] Subject to the resolution of the third point below, trial judges and bench book writers may need to consider how to direct the jury about permissible credibility enhancement without erroneously suggesting the evidence is independently supportive.

[77] *R v Byczko* (No 2) (1977) 17 SASR 460, 462.
[78] SDQ (n 64).
[79] Lynch (n 37).
[80] Nimely (n 77).
[81] Davis (n 58).
[82] Paull (n 54); Seccull (n 73); Nimely (n 77).
[83] [2022] VSCA 235.

Third, the ongoing relevance of pre-trial distress must contend with statutory amendments to at-trial distress. As Horan and Goodman-Delahunty summarised in 2020, 'a common misconception is that genuine child rape victims are visibly distressed when they report the abuse and when giving their evidence in court'.[84] Parliaments, acting on the advice of law-reform bodies, have acted to address that misconception in relation to at-trial distress by requiring trial judges to warn that presence or absence of emotion or distress does not necessarily mean a person is not telling the truth about an alleged sexual offence.[85] Such directions would seem to invite the jury to give little weight to either the presence or absence of at-trial distress. By neutralising the misconception whereby at-trial distress is expected, Parliaments seem to have endorsed a view that a jury should not treat evidence as enhanced by a presence of emotion. However, social science evidence about the diversity of victim responses in response to the trauma of sexual assault does not seem to draw a distinction between distress immediately following an offence, distress while complaining and distress while giving evidence in court.[86] Indeed, the logic of that evidence seems to be that everyone reacts to trauma differently, and it is dangerous to approach the issue on the basis that there is some normal or expected pattern of behaviour. The obvious question then becomes whether it is appropriate to tell juries that distress soon after an alleged offence may be conduct that is consistent with the complainant's account, on the basis 'distress is a natural consequence of a person having been raped', and so it is how the jury might reasonably expect the complainant to behave.[87]

Do such directions risk perpetuating a kind of 'model victim' myth?[88] Or can a difference be justifiably drawn between credibility enhancing and credibility neutral behaviours? In other words, would it be right for courts to adopt a principle that an absence of distress is neutral, as there are many reactions to a sexual offence, but the presence of distress may be a factor that enhances the credibility of a complainant as a 'natural consequence' of the alleged offending? As Lord Hope of Craighead observed in 2009, approaches to the probative value of distress often contend with conflicting principles, including views about the nature and purpose of corroboration and the need to ensure that serious offending is not beyond the reach of the criminal law.[89]

If I can offer one prediction stemming from this review of law reform and cases, it is this. With the introduction of provisions like *Criminal Procedure Act 1986* s 292D (NSW) and *Jury Directions Act 2015* (Vic) s 54K, it is likely that a similar approach will, in time, be taken in relation to pre-trial distress that accompanies complaint. A balanced, neutralising direction that trauma affects people differently, and so both truthful and untruthful allegations of sexual offending may be made with or without emotion. If that occurs, then the law would return to the original *Redpath* approach, confining probative distress to very special circumstances where it is observed almost immediately after the alleged offending.

[84] Jacqueline Horan and Jane Goodman-Delahunty, 'Expert Evidence to Counteract Jury Misconceptions about Consent in Sexual Assault Cases: Failures and Lessons Learned' (2020) 43(2) university of New South Wales Law Journal 707, 720. See also Australian Institute of Family Studies and Victoria Police, *Challenging Misconceptions about Sexual Offending: Creating an Evidence-based Resource for Police and Legal Practitioners*, (Report, 2017) 13 <https://aifs.gov.au/sites/default/files/2022-12/vicpol-sxa-fact-finder_July2017-updated%20Dec2022.pdf> ('*Challenging Misconceptions about Sexual Offending*').

[85] See *Criminal Procedure Act 1986* (NSW) s 292D; *Jury Directions Act 2015* (Vic) s 54K.

[86] See Marc A Klippenstine and Regina Schuller, 'Perceptions of Sexual Assault: Expectancies Regarding the Emotional Response of a Rape Victim over Time' (2012) 18(1) *Psychology, Crime & Law*, 79, which discusses past studies into assessments of emotional reactions, which contain no suggestions that different approaches should be adopted for assessment of pre-trial and at-trial distress, and which observed that mock jurors considered the complainant more credible when her emotional state was consistent between the police interview and the trial.

[87] See, eg, SDQ (n 64) [25]–[26], [75].

[88] A similar issue exists in relation to treatment of recent or proximate complaint. The New South Wales bench book invites the jury to consider 'whether the complainant's conduct was consistent with the allegation', which is explained as being whether the complainant acted in the way the jury would expect them to act if they had been assaulted in the way claimed: Criminal Trial Courts Bench Book (n 23) [5-020]. The direction then notes that people are different and do not all behave the same way. In contrast, the Victorian and Queensland bench books only invite the jury to look at whether the initial complaint was consistent with the evidence the complainant ultimately gave to the jury. An expectation of proximate complainant has been identified as a misconception about sexual offending (see *Challenging Misconceptions about Sexual Offending* (n 85)), and so the Victorian and Queensland bench books avoid promoting that misconception.

[89] Lord Hope of Craighead, 'Corroboration and Distress: A Lecture in Honour of Sir Gerald Gordon' (Speech, Edinburgh, 12 June 2009) <https://www.supremecourt.uk/docs/speech_090612.pdf>.