*Smith v Lees* (1997)

The appellant was tried for lewd, indecent and libidinous practices and behaviour towards a 13 year old year old girl. He and his brother in law took five children (two girls and three boys) camping overnight. The complainer gave evidence that she woke up to find the appellant’s penis in her hand, to his putting his hand on top of her hand and to him moving his penis up and down against her hand. She stated that she left the tent crying and upset, but was too upset to tell her uncle, but the uncle saw her coming out of the tent, was concerned about what may have happened in the tent and took the complainer to see his sister-in-law the next day. The complainer told her what had happened, and the incident was reported to the police. The complainer was found to be a credible witness by the sheriff, who was satisfied that there was sufficient corroboration of her evidence. However on appeal to a full bench of 5 male judges, it was held that a complainer’s distress can only show that she was subject to distressing conduct, but cannot confirm the *nature* of the distressing conduct. Distress could not therefore corroborate the crucial fact that the precise crime libelled (lewd, indecent and libidinous practices) was committed. Because the crucial facts in a case need to be proven by corroborated evidence, the conviction was overturned.

The feminist judgement will provide missing context to the problem of sexual assault and the issues at stake in the case e.g. the difficulties with proving sexual offences generally; the impact of the corroboration requirement in sexual offence cases; the long history of disbelieving complainers in sexual offence cases. In the original judgement, the focus is very much on the legal points, meaning that the wider consequences of the decision (i.e. how it would impact on the proof of sexual offences in Scotland) were obscured. The judgment will also draw attention to the unintended consequences of allowing distress to corroborate and the precise way in which the doctrine operates in potentially reinforcing rape myths, such as a truthful claim will always be accompanied by distress. The court’s focus on the victim (rather than the accused) means that a woman’s behaviour following a sexual offence is subject to scrutiny. In short, the judgement will illuminate how important it is to be realistic about the extent to which a different result for the individual complainer in *Smith v Lees* would make a meaningful difference in terms of proving sexual offences, and thus improving conviction rates in this area.