**SHERIFFDOM OF LOTHIAN AND BORDERS**

**IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT**

**[2018] SC EDIN 53**

**PN1880/16**

JUDGMENT OF SHERIFF R B WEIR QC

in the cause

AR

Pursuer

against

STEPHEN DANIEL COXEN

Defender

**Pursuer: Di Rollo, QC; JustRight Scotland LLP**
**Defender: O'Rourke, QC; Thorley Stephenson SSC**

EDINBURGH, 2 October 2018

The Sheriff, having resumed consideration of the cause:-

FINDS IN FACT:

[1] That the pursuer is a graduate in psychology of the University of St Andrews.

[2] The pursuer commenced her undergraduate degree course in 2012. In September 2013 she was entering her second year.

[3] At the start of second year the pursuer moved into a flat at 15a St Mary Street, St Andrews. She had two flatmates.

[4] The property at 15a St Mary Street is accessed from the street via a gate and alleyway, leading to a further door to the left which allows entry to the property.

[5] The 2013 academic session commenced on Monday 16 September 2013 on the conclusion of Freshers' Week.

[6] During the course of Friday 13 September 2013 the defender travelled north from his home in England in order to spend the weekend with his friend, Dominic Hurst, at his accommodation in Queens Gardens, St Andrews.

[7] Mr Hurst was, at that time, also starting his second year as an undergraduate at St Andrews University.

[8] The pursuer's plans for the night of Friday 13 September involved attending a house warming party to celebrate the purchase, by a friend called Josh Myers, of a house in Lade Braes, St Andrews.

[9] Before attending the house warming party, the pursuer travelled on foot to the house occupied by Stephanie Uhlmann at 31 Kinnessburn Road, St Andrews, picking up a friend, Amy Chambers, on the way.

[10] The pursuer brought with her to 31 Kinnessburn Road four standard strength cans of cider and a 75cl bottle of rosé wine. She also had in her handbag a miniature of Jagermeister, given to her by Amy Chambers.

[11] The pursuer and Amy Chambers arrived at 31 Kinnessburn Road some time after 8.00pm.

[12] While at 31 Kinnessburn Road the pursuer consumed at least one of the cans of cider.

[13] At some point between 10.00 and 10.30pm, Amy Chambers, Stephanie Uhlmann and the pursuer made the short walk to the celebrations at Lade Braes. On the way, the pursuer was drinking from a second can of cider.

[14] During the party the pursuer drank the remaining cider and the entire bottle of rosé wine. She also consumed the equivalent of a bottle of champagne, three measures of vodka, of uncertain size, and a shot of a spirit like Tequila.

[15] At some point between 11.00 and 11.30pm Amy Chambers, Stephanie Uhlmann and the pursuer left the party. As they did so, the pursuer was visibly affected by drink and fell on the gravel path outside Josh Myers' house.

[16] The defender and Mr Hurst (along with two of his male friends) made their own way from Queens Gardens to the Lizard Lounge nightclub in the town centre, arriving shortly before midnight.

[17] Stephanie Uhlmann, Amy Chambers and the pursuer initially made their way, on foot, to the Students' Union building.

[18] The pursuer had difficulty, at security, trying to find her student ID, and was seen carelessly to discard items from her purse in her attempt to do so.

[19] Stephanie Uhlmann took custody of the pursuer's purse for safekeeping.

[20] The security staff at the Students' Union asked Stephanie Uhlmann not to let the pursuer drink any more alcohol.

[21] Stephanie Uhlmann, Amy Chambers and the pursuer remained in the Students' Union for between 15 and 20 minutes before making their way to the Lizard Lounge.

[22] By this time the effect of the alcohol she had consumed was causing the pursuer to stumble around. She required assistance because she was unable to walk in a straight line.

[23] In spite of these difficulties, at about midnight, the party of three gained entry to the Lizard Lounge.

[24] At some point after her arrival, the pursuer was in the company of the defender in the smoking area of the Lizard Lounge, and they were kissing and cuddling.

[25] The defender became involved in an altercation with some other patrons of the nightclub resulting in his ejection from the premises at some point prior to closing time at 2.00am.

[26] After his ejection the pursuer joined the defender on the pavement outside.

[27] Mr Hurst left the Lizard Lounge with a friend at closing time, that being 2.00am.

[28] The defender returned to the pursuer's flat at 15a St Mary Street with the pursuer.

[29] At the outside gate the pursuer used the external buzzer to try, without success, to rouse her flatmates.

[30] The pursuer dropped her keys. When she attempted to pick them up the defender pushed her hand out of the way and retrieved the keys.

[31] The defender unlocked the external gate, manoeuvred the pursuer into the alleyway outside 15a St Mary Street, and used the keys to allow them entry to the property.

[32] The defender penetrated the pursuer's vagina with his penis on the bed in the pursuer's bedroom.

[33] After he did so, the defender forced the pursuer to her knees, grabbed her face, forced her head towards his erect penis and penetrated her mouth with his penis.

[34] As a result of the act of oral penetration the pursuer suffered an injury to her tongue, which was caused when, as result of the act of penile penetration, the pursuer's tongue was forced against her teeth.

[35] While the defender was penetrating her vagina, the pursuer was upset and crying. The defender was aware of this but persisted with his conduct.

[36] Immediately before the defender penetrated her mouth with his penis the pursuer tried to push the defender away. He removed her hand from his chest and penetrated her

mouth with his penis. As he did so the pursuer was crying and choking. The defender was aware of this but persisted with his conduct.

[37] After the defender had penetrated the pursuer's mouth with his penis both the pursuer and the defender became aware of the presence of blood. The defender used words which included "that's disgusting; I thought you were alright", whereupon he dressed, dropping his small change on the floor as he did so, and abruptly left the property.

[38] The blood just referred to was caused by a hymenal tear which occurred when the defender penetrated the pursuer with his penis.

[39] Blood was subsequently found on the side of the pursuer's bed nearest the door, the headboard above the bed, and the window sill. It also covered a large section of the mattress.

[40] The effusion of blood from the pursuer was in excess of the typical bleeding experienced with a hymenal tear at a first episode of penetrative vaginal intercourse.

[41] When he left the property the defender had in his possession the pursuer's mobile phone.

[42] The sexual acts just described occurred at some point between 2.00 and 2.30am on Saturday 14 September 2013.

[43] At the time of the sexual acts just described the pursuer's blood alcohol concentration was not less than 250mg/100ml of blood. She would have been observably intoxicated.

[44] The defender arrived back at Dominic Hurst's accommodation in Queens Gardens at some point between 2.30 and 3.00am.

[45] The defender did not tell Mr Hurst that he had had sexual intercourse with the pursuer.

[46] During the morning of 14 September 2013 the pursuer, accompanied by Stephanie Uhlmann, attended at a pharmacy in St Andrews to obtain a prescription for contraception. Before obtaining the appropriate medication the pursuer made an unsuccessful visit to the Lizard Lounge in order to see if her missing mobile phone had been handed in.

[47] After obtaining contraception medication from the pharmacy the pursuer attended the Sports Fayre. She had been due to assist at the golf stand at 11.00am but had missed her allotted slot. She was observably distressed, red-faced from crying, and, at times, unable to speak.

[48] In the afternoon of Saturday 14 September 2013 the defender and Dominic Hurst attended at 31 Kinnessburn Road, St Andrews, in order to return the pursuer's mobile phone. The defender wished to avoid contact with the pursuer and did not approach the door to the property. Mr Hurst handed over the mobile phone to the pursuer.

[49] On about 20 September 2013 Dr Maggie Ellis, a lecturer in psychology at St Andrews University, gave a tutorial at which the pursuer was present. She noticed that the pursuer was not engaging with the tutorial group. She took the pursuer aside for a chat and asked if there was anything wrong. The pursuer said that there was, and alluded in general terms to something in the nature of an assault having occurred during Freshers' Week.

[50] On about 6 November 2013 the pursuer moved out of the property at 15a St Mary Street, St Andrews. Since the night of 13/14 September 2013 she had been unable to sleep in her own bedroom and had resorted to sleeping on a sofa in the living room.

[51] In January 2014 the pursuer reported the incident to the police, and, on 24 January, provided a statement which, in due course, led to the prosecution of the defender. After a High Court trial in late 2015 a jury returned a verdict of "not proven" on the statutory charge of sexual assault and rape which the defender had faced.

[52] The emotional effects of the incident were such that the pursuer was unable to engage fully in her undergraduate coursework. She finally completed her second year over two academic sessions.

[53] Between 2014 and 2016 the pursuer received regular counselling and support from Support Advice Student Services. She was provided with help and assistance by Dr Victoria Johnson and Joanna McCulloch. During telephone conversations with Ms McCulloch the pursuer was often distraught, tearful and upset.

[54] On 2 May 2014, during a discussion with Dr Johnson, the pursuer explained that the subject matter of her course material was causing her extreme stress because it concerned the psychology of students who had undergone a similar experience to the pursuer.

[55] The pursuer has suffered, and continues to suffer from, symptoms of post-traumatic stress disorder. The trauma giving rise to those symptoms occurred in the early hours of 14 September 2013 when the pursuer was raped by the defender.

FINDS IN FACT AND LAW:

[56] That at the time when the defender penetrated the pursuer's vagina with his penis the pursuer lacked the ability to give meaningful consent to sexual intercourse with the defender.

[57] At the time when the defender penetrated the pursuer's mouth with his penis the pursuer lacked the ability to give meaningful consent to sexual intercourse with the defender.

[58] At the time when he penetrated the pursuer's vagina, and her mouth, with his penis, the defender can have had no reasonable belief that the pursuer consented to what he did.

[59] In the early hours of Saturday 14 September 2013, accordingly, the defender took advantage of the pursuer when she was in an intoxicated state by reason of the amount of alcohol she had consumed, resulting in a lack of capacity to make free agreement, that he continued to do so even after she manifested distress and a measure of physical resistance, and that he raped her.

THEREFORE:

(i) Finds the defender liable to the pursuer in the agreed sum of £80,000 with interest at the rate of 8 per cent a year from 21 September 2018 until payment;

(ii) Reserves meantime the question of expenses, and appoints parties to be heard thereon at Edinburgh Sheriff Court on a date to be afterwards fixed.

**NOTE:**

***Introduction***

[1] The pursuer is now aged 23. In September 2013 she was a second year undergraduate at the University of St Andrews. She claims damages from the defender on the basis that, in the early hours of Saturday 14 September 2013, he subjected her to a sexual assault, comprising both vaginal and oral penetration with his penis, in circumstances where she had taken so much alcohol that she was incapable of giving free agreement to sexual intercourse, and did not consent to sexual intercourse. The defender admits vaginal penetration only and says that this occurred with the pursuer's consent. Following a police investigation the defender was prosecuted on indictment for a contravention of sections 1

and 3 of the Sexual Offences (Scotland) Act 2009 (rape and sexual assault). In late 2015 he stood trial at the High Court in Livingston. The jury returned a verdict of not proven.

[2] In advance of the proof the court granted an order, in terms of section 11 of the Contempt of Court Act 1981, anonymising the pursuer in the instant proceedings, on the rolls of court, and in any reported judgment in relation to these proceedings. That order remains in effect. Evidence was led over a period of eight days between 12 and 22 June 2018 in the personal injury court. During the pursuer's proof I heard evidence from (i) the pursuer herself, (ii) Mr Sean Laverick, a consultant physician, (iii) Joanna McCulloch, (iv) Dominic Hurst, (v) the pursuer's brother, (vi) Stephanie Ulhmann (by video link), (vii) Dr Christopher Hardwick, a consultant gynaecologist, (viii) Dr Mairead Tagg, a registered clinical psychologist, (ix) Mr Janusz Knepil, a consultant toxicologist, (x) Dr Maggie Ellis, (xi) Victoria Johnson, and (xii) Alan Swanston. During the defender's proof I heard evidence from (i) the defender, (ii) Dr Michael Taylor, a consultant psychiatrist, (iii) Dr Stephanie Sharp, a forensic toxicologist, and (iv) Cara Reid.

[3] In addition to the witness evidence I was provided with a joint minute of agreement. It is unnecessary to repeat its terms here. However, it should be noted that paragraph 1 of the joint minute recorded the parties' agreement that the production number 5/3/39 of process comprised transcripts of the evidence of a number of witnesses who gave evidence at the defender's criminal trial, and that, in terms of paragraph 2, it was also agreed that the evidence of the trial witnesses, as recorded in the transcripts, was to be evidence in the present case. During submissions I raised with parties whether the scope of their agreement meant that I could, and should, scrutinise the whole of the transcripts, and treat, as evidence, material which had not been touched on by either party during the proof or submissions. In the result, the parties' agreement was refined such that I should only treat as evidence those

parts of the transcripts to which reference had been made during the proof. I have approached the trial evidence on that basis.

[4] Quantum of damages was agreed, and the issues before the court were (i) what sexual acts the defender performed (the defender denying oral penetration), (ii) whether the pursuer had been incapable of giving consent by reason of excessive alcohol consumption consenting to what did take place, and (iii) whether she did in fact consent.

**The evidence**

*AR (the pursuer)*

[5] The pursuer graduated with a degree in psychology from the University of St Andrews in June 2017. Back in September 2013 she was starting her second undergraduate year. Having lived in student accommodation during her first year, the pursuer moved into a private flat at 15a St Mary Street which she shared with two female flatmates, Nicole Stafford and Nitika Bubna. The pursuer had her own bedroom.

[6] The flat at 15a St Mary Street is accessed from the street initially through a gate, and then via a passageway which leads to the front door of the property. It is possible to buzz the house from the external gate at St Mary Street. That would require any occupant to leave the flat and proceed up the passageway to the gate. The pursuer said that the door and gate were always kept locked.

[7] Term was due to start on Monday 16 September 2013. The pursuer returned to St Andrews about four days into Freshers' Week. On the morning of Saturday 14 September she had an appointment to keep, at 11.00am, at the Sports Fayre. There were, however, plans for the Friday night. A friend of the pursuer, Josh Myers, had come into the ownership of a flat in Lade Braes over the summer. Its acquisition was, it seems, a cause for

celebration. Mr Myers had organised a flat-warming party. The pursuer intended to go with a friend, Amy Chambers. The pursuer thought that she had stopped by Miss Chambers' accommodation on the way to the home of another of her friends, Stephanie Uhlmann, at 31 Kinnessburn Road. She estimated that she would have arrived at that address at about 8.00pm but could not be certain. There she stayed for between 30 and 40 minutes before Miss Uhlmann, Miss Chambers and the pursuer made the short walk to the party at Lade Braes. (Miss Uhlmann's later evidence was that they did not leave for the party until 10-10.30pm; my impression was that Miss Uhlmann's recollection in this respect was probably more accurate than that of the pursuer, in so far as it fitted more comfortably with other information about timings later in the evening).

[8] The pursuer was asked about alcohol consumption that night. She said that she had not had anything before leaving home. By the time she reached Miss Chambers' accommodation the pursuer had acquired four normal sized cans of cider and a bottle of rosé wine (her habitual wine of choice). Miss Chambers gave the pursuer a miniature of Jagermeister which she placed in her handbag. At Kinnessburn Road she drank at least one of the cans of cider. She said that she was drinking from a second can on her way to Lade Braes.

[9] According to the pursuer's evidence the party was well supplied with alcohol. Mr Myers appears to have been a generous host, for he had provided champagne, *Grey Goose* vodka and mixers for his guests. While at the party the pursuer said that she drank her remaining two cans of cider and the bottle of rosé (which she did not share). Thereafter she and a friend called Madeleine Bambridge sourced a bottle of champagne each. They poured each other glasses of champagne and the pursuer said that she had consumed the equivalent of at least one of the bottles. She also recalled having at least one shot of something like

Tequila, and mixing at least three vodkas with champagne or Prosecco. That was all that the pursuer could actually recall drinking. She did not know what she may have gone on to drink apart from some Jagermeister outside her flat.

[10] The last thing the pursuer recalled about the party was smoking outside Mr Myers' house. Her next recollection was being in the smoking room of a nightclub called the Lizard Lounge. She did not know when that was. Her memory was limited to sitting down on one of the benches there, looking across at a girl whom she recognised as someone called Louise, and sitting beside a male with a dark jacket. She had no recollection of leaving the nightclub, and her next memory was of standing facing the outside door at 15a St Mary Street.

[11] The pursuer described turning to find that she was with someone. That person was a male and spoke with an English (possibly Mancunian) accent. She felt quite panicked because she did not know who the person was. She realised that, whoever it was, the male was not Mr Myers. She rang the buzzer, hoping that her flatmates would answer. She rang again. The strange male was getting frustrated that they could not get in. The pursuer recalled searching in her bag for the house keys. She did not want to hand them over and played for time by getting out the miniature of Jagermeister, which she passed to the stranger. He took a sip and handed it back and twice said for her to have it. She did, all the while ringing the buzzer in the hope that someone would come out.

[12] The pursuer then described how the male was getting angry and annoyed. She decided to get out her keys. She dropped them. In trying to pick them up the male pushed her hand out of the way. He retrieved the keys and must have opened the gate because the pursuer recalled feeling a hand or arm on her back and she presumed that they were then in the alleyway. The pursuer had no recollection of then going into the kitchen area (through

the inner door to the property), but she later discovered that neither of her flatmates had come to the door. So the male must have been responsible for letting her in.

[13] Next, the pursuer recalled coming round and finding that she was lying on her bed in her own bedroom. She was lying on her back and covered by a sheet. She was naked. There was then a second realisation. Another person, whom she did not know, was on the bed. She did not know whether, but presumed, it was the same person as the one outside. He was on top of her and having sex with her, penetrating her vagina with his penis. She described being upset and crying while this was going on. She remembered feeling sick. She also recalled at one point unsuccessfully trying to get up by her elbow, and being unable to breathe properly. She was panicking and upset but did not say anything. When she looked up she saw the other person. She recalled something like a grin or smirk on his face. She was still crying. She remembered the male having an arm above her on the headboard.

[14] The pursuer then related that she felt a hand behind her head lifting her up. Her next recollection was being on her knees. She did not know how this came about but the other male was on his knees too. She still recalled being upset at this point. She tried to push the male away but he removed her hand from his chest. She remembered that he placed one hand on her shoulder then grabbed or squeezed her face. She was crying and scared. She went on to describe how he said something like "you know what to do", released her face, took her by a hand and said "put it on him" (meaning his penis), put his hand on the back of her head, and forced her head towards his erect penis. The male was kneeling in front of her and he forced her to have oral sex with her. She was crying and described choking while this happened. It was at that point that the pursuer said that she saw blood "everywhere" on the bed and, managing to turn, the window sill. The pursuer

subsequently described seeing blood on the side of her bed nearest the door, the headboard above the bed, and also covering a large section of the mattress.

[15] When the pursuer saw the blood she heard the male say something like "What the fuck, that's disgusting". He also said "I thought you were alright". The male got straight up, and the pursuer recalled him looking for his trousers, and coins scattering on the floor. She heard the door shut and remained sitting on the bed in what she described as a trance.

[16] The pursuer described an injury to her tongue for which she subsequently received medical treatment. She explained that, in the morning after the incident just described, the pursuer's tongue was swollen and painful. She noticed that there was blood in her mouth and that, for a while, she felt a stinging sensation in her mouth. She could not, however, say what had caused this injury. When she felt it subsequently, however, it served as a reminder of what had happened in her bedroom that night.

[17] In the immediate aftermath of the incident the pursuer described how she realised that the blood in her bedroom must have been from her. She was feeling some discomfort in the vaginal area. She also confirmed in evidence that she had never previously had penetrative sexual intercourse. She could not say at what time the incident occurred. She tried to clean up her room. Having then fallen asleep she awoke to the sense of something awful having happened. She saw the soiled bedding and began to recall certain parts of the night's events. She wanted to speak to someone but was unable to find her mobile phone, and could not recall when last she had had it.

[18] The pursuer then described how on the following morning she decided to confide in one of Stephanie's flatmates, Iona Scott, to the extent of saying that she had had unprotected sex the night before. This was done in a Facebook message (number 5/2/21 of process), and was, with other Facebook messages, the catalyst for arrangements being made for the

pursuer to attend the local pharmacy in order to secure contraception. She went first to Miss Uhlmann's flat, where she was reunited with her purse (which Miss Uhlmann had taken off the pursuer for safekeeping outside the Students' Union the night before). At the pharmacy the pursuer was initially told to return later in the morning. She looked in at the Lizard Lounge in an unsuccessful attempt to find her missing mobile phone.

[19] After obtaining her contraceptive medication, the pursuer attended the Sports Fayre and apologised for not having attended her slot on the golf stand at 11am. She described becoming tearful and upset. Having attended the Sports Fayre the pursuer returned to Miss Uhlmann's flat. It was there that the computer disclosed a trace for the pursuer's iphone. It meant that a notification could be sent which included her name and Miss Uhlmann's phone number. Such were the circumstances in which Dominic Hurst entered the scene. He messaged the pursuer on Facebook. In the result, the iphone was returned by Mr Hurst that afternoon. The pursuer asked him where it had been found. She recalled that he replied that his friend from Manchester had given it to him. She thought he had said that his friend had found it in the street. She did not see Mr Hurst's friend.

[20] The pursuer initially did not want to report the incident to the police. On the return of her mobile phone she spoke to her mother but, again, did not feel able to confide in her (or anyone else) about what had happened. On one occasion she was kept back after a tutorial by her academic supervisor, Dr Maggie Ellis, who was concerned about the pursuer's lack of participation. I noted the pursuer as saying that she made a disclosure to her supervisor. She then attended her GP on 24 October 2013. The note of that attendance is in *inter alia* the following terms:

> "Sexually assaulted 13/9/13. Was very drunk and can't recall events well. Can remember he had a Manchester accent but little else…"

[21] It is unnecessary to dwell on the precise circumstances in which her family became aware, at Christmas 2013, of the pursuer's allegation of having been assaulted. By then she had moved out of 15a St Mary Street with its associations. She could not sleep in her old bedroom and had resorted to using the sofa in the living room. In January 2014 the pursuer reported the incident to the police and provided them with a statement which led, in due course, to the prosecution of the defender.

[22] The pursuer gave evidence about the emotional and psychological consequences of the incident, and the impact it had on her academic studies. She had initially thought that she would be able to move on. However, that did not prove to be the case. Over the ensuing months and years she was prescribed a number of different types of medication to deal with depression, panic attacks, and sleep disturbance. She described how the emotional consequences of the incident had so interfered with her studies that she ended up taking her second undergraduate year over a period of two years. She had used drink to try and deal with the consequences of what had happened, and had only gradually come to realise, with the assistance of Joanna McCulloch (a welfare advisor at the university), that drinking to forget about what happened was not the way ahead. It is of significance that, in February 2017, the pursuer was diagnosed by Dr Mairead Tagg, a registered clinical psychologist, as suffering from a chronic form of post-traumatic stress disorder and major depressive disorder at a clinically significant level. It was in the context of discussing in her evidence the contents of Dr Tagg's report to the court (number 5/4/40 of process) that the pursuer said that, in reference to her feelings at the time of the incident, she thought she was going to die. In evidence she continued to describe disturbed sleep patterns and feelings of panic when memories of the incident were triggered.

[23] In cross examination the pursuer was pressed on the amount of alcohol which she had consumed on the night of the 13/14 September. She agreed that she had never before consumed so much. She arrived at Mr Myers' home at about 10.00 pm and accepted that she must have been at the door of the Lizard Lounge by about 11.30 pm. She was, however, unclear as to the timings generally. She did not accept that there would have been insufficient time to have consumed the quantity of drink described by her in her evidence in the time that she must have been at the party. She did not have a recollection of leaving that party, and could not disagree with what Stephanie Uhlmann told the police in her statement (number 6/6/34 of process) to the effect that they left the party at about 11.00 pm.

[24] The pursuer was referred to a number of police statements by other individuals who were out socialising on the evening of 13 September 2013. The purpose of this exercise appeared to be to demonstrate that the pursuer had overestimated the amount of alcohol she consumed. The pursuer, however, adhered to the position that she had accurately recounted to the court the amount which she had had to drink.

[25] The pursuer was pressed on her recollection of what happened on her way to, and within, the Lizard Lounge. Two passages from a statement given by one Noelle Martin, dated 5 February 2014 (number 5/4/35 of process) were put to her for comment, the accuracy of which she did not dispute. The first of those passages included the following:

> "AR was also quite drunk when we left for the town from Josh's house, she was unsteady on her feet and she was fall (sic) about everywhere. Me and Steph helped her walk up the road by grabbing her or she would have fallen over".

The second passage included the following:

> "I saw AR… in the smoking room inside the Lizard. There was other people in the room at the time, and I saw AR and a male talking, I also saw AR kissing the male, cuddling with him, and hugging the male. I saw her in this room for a good 10-15 minutes. I only saw AR once during that time. I remember speaking briefly to AR and walking away, she seemed drunk but happy".

The identity of the male referred to in that passage was not explored in the evidence.

[26] The pursuer rejected the proposition, put to her by Mr O'Rourke, that she and the defender went together from the Lizard Lounge to 15a St Mary Place, that there were issues around gaining entry, that they went in together, undressed and had consensual sexual intercourse. She did not feel able to comment on an apparent distinction between her evidence that the defender had moved her hand away when she reached for her keys outside the property, and what she apparently told Dr Tagg to the effect that the defender stood on her hand at that point. She accepted that, at some point after sexual intercourse must have taken place, the defender said something like "you said you weren't on your period". She accepted as accurate the account which she gave to the police in her statement dated 26 January 2014, which was in the following terms:

> "I still couldn't say anything, he got off the bed searching for his trousers. He said something like "for fuck sake, my trousers, I can't find them". I couldn't move I was still lying down. He found his trousers and I remember everything falling out of his pockets. He seemed rushed. He got dressed, got angry and said "I thought you were alright" whilst looking at the blood on the bed and again said "that's disgusting". He left the flat, I heard the door slam".

Before the defender got up and left the pursuer did not see him do anything with her phone. In fact she had no idea what happened to the phone that night.

[27] As to the events of Saturday 14 September, the pursuer confirmed, under reference to an emergency hormonal contraception pro forma, completed by the pharmacist at Boots that day, the box for "sexual assault?" had been ticked in the negative. The pursuer explained that she had been very upset at the pharmacy when the form was filled out. The pharmacist had made clear that she could return if there were matters she wished to discuss. Her friend, Iona Scott, had wanted the pursuer to go to the pharmacy and the form said something which she could pretend had not happened. Her priority had been to obtain the prescription. The pursuer accepted, under reference to Facebook messages dating from 14

September (number 5/2/21 of process), she had admitted to having done "something stupid". The context, however, was the need to get to the pharmacy. The pursuer needed to give a reason for why that was necessary.

[28] The pursuer accepted that she did not mention any injury to her tongue in the immediate aftermath of the incident, and did not do so until there was police involvement in the matter. She did not, however, think that she could have sustained this injury on a different occasion. The only time she had experienced pain and bleeding in the tongue was immediately after the incident.

[29] The pursuer was referred to a file note of a conversation between her and a member of the Student Support Services of the university, Maggie Neilson, dated 4 October 2013. In that note it is recorded that the pursuer said that she thought that, on the evening in question, her drink had been spiked. Asked to explain why there was no record of any such suggestion in the GP note of her attendance on 24 October 2013, the pursuer explained that her doctor was very approachable. The pursuer had attended her surgery many times and felt able to discuss matters as disclosed in the record for that date. She continued to deny the proposition that she had overstated the amount of alcohol she had consumed. She strongly denied that she had consensual intercourse with the defender. She retorted forcefully that, had that been the position, she would not have been alarmed or upset. She would not have been ringing for her flatmates at the outside gate. It would not have been necessary for her to pretend that she had no keys. She would not have feared for her life, and she would not have required surgery on her tongue.

[30] Equally, the pursuer rejected the proposition put to her that what caused the circumstances of the night to be traumatic was the fact that she had bled, and that it was the bleeding that had caused the defender to leave abruptly.

*Dominic Hurst*

[31] Although he appeared on the defender's list of witnesses, Mr Hurst gave evidence during the pursuer's proof. Currently unemployed, and aged 24, Mr Hurst was an undergraduate at St Andrews University between 2012 and 2016. He grew up in Lancashire and was a school friend of the defender.

[32] Having spent his first year in Halls of Residence, Mr Hurst moved into a flat in Queens Gardens at the start of second year. He thought that the defender had visited on one occasion prior to September 2013. His memory of that occasion was hazy. He did, however, confirm that the defender came up to stay for the weekend, arriving on Friday 13 September 2013, and returning on (possibly) the following Monday. He may also have visited on one further occasion after the police had come to Mr Hurst's home in February 2014.

[33] Mr Hurst confirmed that he and the defender went out on the night of 13 September. He thought they were accompanied by two other male friends. They went straight to the Lizard Lounge at about 10 or 11pm, possibly later. The nightclub was almost full when they arrived. By then Mr Hurst had had about half a bottle of vodka. The bottle would probably have been shared with the defender. It was likely that they continued drinking vodka in the Lizard Lounge. There came a time when he and the defender split up. Mr Hurst thought that they were in the smoking area at the time. Mr Hurst recalled meeting a friend there. He believed that the defender was speaking to the pursuer. He could remember that they were just speaking. He then stated that he believed they were kissing. It was put to Mr Hurst that, when giving evidence at the defender's trial, he had said that he could not remember them kissing. He appeared to retreat from the position that he could picture them kissing and, ultimately, said that he could not remember.

[34] Mr Hurst said that he left the Lizard Lounge at 2am, which was closing time. The defender had already left. Mr Hurst did not recall seeing him do so. He now knew, from speaking to him, that the defender had been removed from the premises. He understood that to have been as a result of an altercation in the club but he did not know when it had happened. The defender did not have a key to Mr Hurst's flat. However, according to Mr Hurst, the defender knew that the door was normally open – or, at least, he might have seen that the door was on the latch when they left that evening.

[35] Mr Hurst next saw the defender at about 2.30 or 3.00am. He (Mr Hurst) had walked back to Queens Gardens with a female friend. The defender arrived about 30 minutes later, just after Mr Hurst had walked his friend home. He did not recall the defender saying anything in particular. He accepted that he must have asked the defender where he had been but said that he could not "remember anything of that meeting or encounter". Mr Hurst explained that he would have been drunk so it was hard to remember. He could not recall the fine details anyway. They shared Mr Hurst's double bed.

[36] Mr Hurst explained that he was woken the next morning by an alarm which, in evidence, he volunteered was the pursuer trying to contact her phone. The phone was probably in the defender's trousers. Mr Hurst did remember the defender telling him that it was the pursuer's phone from the night before, and thought that he had said that she didn't have jeans pockets so that was why he had it. They ignored the alarm and went back to sleep. Later on in the day they made arrangements to return the phone.

[37] Mr Hurst was asked whether, at this point, the defender had told him anything about the evening before. Mr Hurst said that he could not remember. He did not ask. He thought he would have asked the defender where he had been later in the day but did not do so at that point. Mr Hurst had no recollection of when the phone alarm went off, for how

long he went back to sleep, or when he woke up. He estimated that the alarm may have gone off again at about 1-2.00pm. That was when arrangements were made for the phone's return. Mr Hurst could not remember by what technological means that was achieved. Mr Hurst was again asked whether, at that time, the defender had volunteered anything about the night before. He replied "I am not withholding information. I just can't remember". He believed the defender had said why he had the phone. He said that he "imagined" that they would have discussed that the defender had been to the pursuer's house. He could not, however, remember specifics. He did not think that the defender had mentioned sexual activity, and Mr Hurst had not asked.

[38] Mr Hurst described the circumstances of the return of the phone to the address at Kinnessburn Road. Mr Hurst went to the front door. The property was up a drive or pathway. The defender remained at the bottom of the drive. Mr Hurst took the phone because he presumed it would be awkward. Asked why that might be so, Mr Hurst replied that "I've had one night stands before". When reminded that he had said that he didn't know about what had happened the night before Mr Hurst's response was that, based on his own previous experience, it was more likely than not that that was what had happened. It was a fair assumption. The pursuer seemed happy that the phone was being returned. Mr Hurst believed that he told the pursuer that his friend had had it. At the time he wouldn't be thinking that anything bad had happened. He would not have referred to it being found in the street and could not explain how that might have come up as a possibility.

[39] Finally, in examination-in-chief, Mr Hurst agreed that the impression conveyed by the text message exchange between him and the defender on 9 March 2014, set out in the Joint Forensic Report (number 6/2/13 of process, pp. 6-7), was that he (Mr Hurst) did not know much about what had happened to the defender on the night of 13 September 2013.

He accepted that, before that exchange, the defender had not mentioned anything about bleeding, nor had he given that as a reason for having left the pursuer abruptly on that occasion.

[40] In cross-examination, Mr Hurst recalled that he and the defender had started by sharing a 70cl bottle of vodka in his flat at Queen's Gardens. The plan was to go out later to the Lizard Lounge. It was a five minute walk away. He thought that they would have arrived at about 11-11.30pm. Two of Mr Hurst's friends, Lewis and Eustace, went too. It was busy. Mr Hurst recalled seeing the defender with the pursuer in the smoking area. His memory of events was generally poor but he acknowledged that he may have given evidence at the defender's trial to the effect that they may have kissed each other (number 5/4/39 of process, p. 320). Mr Hurst was then referred to a statement which he gave to the police on 5 February 2014 (number 6/4/25(viii) of process), in which he is recorded as having told the police that "Stephen and the girl were kissing and were getting on well…". He could not remember that happening but accepted that he had told the police the truth. In relation to his second police statement, given on 7 March 2014 (number 6/4/25(ix) of process), Mr Hurst accepted that he was telling the truth when he said that the defender and the pursuer "were kissing and being affectionate".

*The pursuer's brother*

[41] The pursuer's brother recalled the pursuer getting in touch with him, by Facebook messenger, on the morning of Saturday 14 September 2013. The pursuer was anxious to speak to their mother. He thought he had been asked to get her to call the pursuer. From the way in which the pursuer was behaving, and the messages sent, the witness thought that

there was something wrong. He did not, however, find out what that was until Christmas time.

[42] The pursuer told her brother then about what had happened back in September, that she had been receiving counselling, and that it was important that family were told. He described the circumstances in which the pursuer disclosed what had happened. He was asked about how the pursuer was before September 2013. He replied that, before then, he had always regarded his sister as a kid. She had now changed completely. She did, however, have a good support network in St Andrews while she completed her studies, and he had not been involved in that respect.

*Stephanie Victoria Uhlmann*

[43] Miss Uhlmann and the pursuer met in first year. For her second year she moved into accommodation at Kinnessburn Road in St Andrews with five other female flatmates. On the night of 13 September 2013 she confirmed that there were plans to go to Josh Myers' party a short distance away. The pursuer arrived at Kinnessburn Road with a friend, Amy Chambers, before the party. Some drink was taken before Miss Uhlmann, the pursuer and her friend all left for the party. They departed at about 10-10.30pm.

[44] Miss Uhlmann thought that the pursuer had been drinking cider at the party. They had probably had a glass of champagne together. She was not, however, keeping an eye on what the pursuer was drinking but commented that the pursuer was "a bit faster than me". There was, however, plenty of drink available at the party, including vodka, champagne, and cider. It was possible that vodka was being mixed with champagne. Miss Uhlmann thought that they had stayed at the party for about one hour. She was "pretty certain" that they had left by about 11.30pm, at which point Miss Uhlmann, the pursuer and Amy

Chambers went to the Students' Union. As they left Mr Myers' house Miss Uhlmann recalled that they were giggly and affected by drink. The pursuer fell on the gravel path and pulled her down too.

[45] Moreover, Miss Uhlmann noticed that, when they had to go through security at the Union, the pursuer was quite visibly drunk. She was seen to be throwing things out of her purse in order to find her ID. Miss Uhlmann decided to take custody of the pursuer's purse for safekeeping. The security staff asked Miss Uhlmann not to let the pursuer drink any more. They remained inside the Union building for about 15-20 minutes. Arrangements were made, by text message, to meet up with other friends at the Lizard Lounge. The Lizard Lounge was only about 5 minutes' walk away. However, it took a little longer to get there because the pursuer was, as Miss Uhlmann put it, "stumbling around". She required assistance because she could not walk in a straight line. They did, however, manage to gain access to the Lizard Lounge. Miss Uhlmann confirmed that, when she was asked at the defender's trial whether the pursuer would have had the same ability as her to be in control and make choices, she replied:

> "I would say no because she was falling to the ground, could barely stand and couldn't even find her student ID in her purse".

She adhered to that answer.

[46] At some point Miss Uhlmann met with a friend and they left the Lizard Lounge together. The next time she saw the pursuer was at about 10-10.30am on the following day. She had lost her purse and her phone. She had no recollection of Miss Uhlmann having taken her purse the night before. Miss Uhlmann described how she used its tracking system to trace the pursuer's phone, the upshot of which was that it was traced to Queen's Gardens in St Andrews. She believed that the person in possession of the phone called her to ask how it could be returned, and she provided the address at 31 Kinnessburn Road.

Miss Uhlmann was not present when the phone was returned that day but she was in the house. She heard the pursuer ask where it had been found and how the person at the door had come by it. She did not hear the reply.

[47] Miss Uhlmann accompanied the pursuer to the pharmacy on Saturday morning and to the Sports Fayre. While at the Sports Fayre Miss Uhlmann noticed, all of a sudden, that the pursuer had started to cry while speaking to the Golf Captain. She went over to check on her. The pursuer was very upset, red-faced, and unable to speak. All of this occurred before the phone was returned in the afternoon. The pursuer did not give the witness any details about what had happened the night before other than that she had gone home with someone. She did not want to talk about it but Miss Uhlmann could tell that something was wrong. It was a few months before Miss Uhlmann became aware of the nature of what had happened. She saw the pursuer in the period after 13/14 September 2013, and was aware that the pursuer had moved out of the flat at 15a St Mary Street because she was unhappy there.

[48] Miss Uhlmann noticed a marked difference in the pursuer before and after September 2013. Where formerly she was talkative, bubbly and energetic, the pursuer became more "closed off". Talking about the night really broke her down and she couldn't continue with her studies.

[49] In cross-examination, Miss Uhlmann confirmed that, if she had told the police in a statement that she had spent one hour at Josh Myers' party, and left with the pursuer and Amy at about 11.00pm, then that would be accurate. Guests at the party were chatting as well as drinking. Miss Uhlmann spent the whole time in the pursuer's company there. She thought that the pursuer would have had more to drink than her because the pursuer generally drank faster. Miss Uhlmann's evidence was that she had three to four vodkas, and

possibly a small amount of champagne. The pursuer had a cider and drank vodka, and might have had other mixtures as well. She thought that the pursuer had brought a four-pack of cider to Kinnessburn Road, and consumed them there, because none had been taken to Josh's house. She could not remember if they had taken any wine to the party, and did not recall seeing the pursuer with a bottle of rosé wine.

[50] Miss Uhlmann confirmed that she had told the pursuer at the Union that she was taking her purse. The pursuer was not happy but understood that Miss Uhlmann would be keeping it in her bag. She remembered getting through security at the Lizard Lounge and interacting with other people there. After initially dancing, she was unsure whether she saw the pursuer again before leaving with her friend at about 1.30am, possibly earlier. She did not remember seeing the pursuer drinking there.

[51] Miss Uhlmann thought that, by the time she and the pursuer were returning from the Sports Fayre, she knew that the pursuer had had a sexual encounter the night before. She was now unclear how she had come by that information. Finally, she confirmed that she knew that the pursuer moved from 15a St Mary Street and that the reason for doing so was that, along with a negative relationship with her flatmates, she did not feel comfortable staying there.

*Dr Maggie Ellis*

[52] Dr Ellis is a lecturer in psychology at the University of St Andrews. She has held that position for five years. Back in September 2013 the pursuer was one of her early students.

[53] Dr Ellis was asked whether, in September 2013, she had noticed anything wrong with the pursuer. She found that the pursuer was not engaging with her tutorial group. When spoken to, she was not making eye contact. She seemed to be in another place, not

wishing to be there. It was clear to Dr Ellis that there was something wrong with her. She started to observe this at about the time of the second tutorial (which would have been around 20 September).

[54] At the end of that tutorial Dr Ellis took the pursuer aside and asked if she was alright, and if she wanted to come to the office for a private chat. They did so. Dr Ellis mentioned that the pursuer was not engaging in class and asked if there was something wrong. The pursuer said that there was. She alluded to something having happened during Freshers' Week, involving some kind of an assault. Dr Ellis discussed the situation with the pursuer, and whether she was going to take matters further. The witness said it was not up to her to report anything if the pursuer did not wish her to do so. Dr Ellis and the pursuer chatted for a while and Dr Ellis offered to be an ear to listen to the pursuer. The pursuer came back very soon afterwards, and then regularly, to speak to her for anything up to an hour at a time. Asked how matters progressed, Dr Ellis said that the pursuer reported what had happened. Dr Ellis was then involved in providing pastoral care.

[55] Dr Ellis explained that it became impossible for the pursuer to carry on with her studies because she was so ill. She took a whole year out before returning to her studies. In the way that she was the pursuer would not have been able to carry on studying as normal. Later on the pursuer became one of Dr Ellis's project students and she was able to complete her degree.

[56] Dr Ellis was around for the pursuer until, and after, the defender's trial. The pursuer was very unwell at the time. To have gone on to graduate was, Dr Ellis said, amazing. The pursuer was a very intelligent young woman but the situation had had a huge impact on her.

*Victoria Johnson*

[57] Dr Johnson is a university lecturer in early modern English drama at Birmingham University. She gave evidence about her involvement with the pursuer in 2014, at which time she was a support advisor with Support Advice Student Services at St Andrews University. They first met in early 2014 after the pursuer had decided to go to the police.

[58] Dr Johnson was referred to the detailed records of the Advice Service relative to the pursuer (number 5/2/8 of process). She spoke to entries in the records which covered meetings which she had with the pursuer. Her role was to be a supportive point of contact for the pursuer in relation to anything which came up arising from the pursuer's decision to report matters to the police, and her life generally. It was a long term process because the investigation took so long, and involved the giving of support to the pursuer in her management of everyday life. Dr Johnson's involvement with the pursuer was far more frequent than would be considered average for the Advice Service.

[59] Dr Johnson was referred to a meeting note from 2 May 2014 which accurately recorded a discussion with the pursuer about the extreme stress which the pursuer was experiencing as a result of the subject matter of her psychology course, and how it touched on her personal experience. During their discussions together Dr Johnson said that the pursuer had reported to her that she had consulted a doctor about an injury which she said had occurred during the incident, and that the recommendation was that she should have surgery. At a later consultation, to which the witness was referred, the pursuer was reporting that she was struggling to keep up with her coursework.

[60] Dr Johnson continued to see, and support, the pursuer through to 2016. She was able to offer a view on the serious impact of the incident, and subsequent trial, on the pursuer

and her studies, and how difficult it was for her, as a very private person, to share information with third parties connected with, and outside, the investigation.

*Joanna Mary McCulloch*

[61] Ms McCulloch is employed by St Andrews University as a life and wellbeing advisor. Her role involves offering support, advice and guidance to students on a range of issues. It was in that capacity that she first met with the pursuer in October 2014. Ms McCulloch identified a file note (number 5/2/8 of process, p. 27) as recording the timing of, and discussion which took place at, their first meeting.

[62] Ms McCulloch described her role as providing to the pursuer practical support. She was available to discuss anything that cropped up and assisted the pursuer during the period when the criminal proceedings were ongoing. They had many conversations both before and after the trial. Ms McCulloch described it as a very distressing time for the pursuer. On the telephone she was often distraught, tearful and upset. It had a big impact on the pursuer's academic studies. The pursuer was devastated by the outcome of the trial.

[63] Ms McCulloch remained involved with the pursuer right up until her graduation the following year. She was referred to other file notes which recorded (i) on 6 April 2015, the pursuer reporting that she was using alcohol to cope with her feelings of having no control; (ii) on 27 April 2015, after attending a meeting with the PF Dundee, the pursuer explaining that she felt that she was not coping with the stress and the impact the process was having on her studies, and (iii) on 29 April 2015, the pursuer's distress after attending a VIPER procedure at which she identified the person responsible for assaulting her.

*D/S Alan Swanston*

[64] D/S Swanston confirmed that on 5 February 2014 he had visited Dominic Hurst for the purpose of taking a statement from him in connection with the criminal case against the defender. He had taken a second statement from Mr Hurst on 7 March 2014. He also confirmed that the process would have involved him reading the statements over to Mr Hurst, and Mr Hurst, by signing them (which he did), would have confirmed the accuracy of what had been read over to him.

[65] D/S Swanston also confirmed that, as part of the criminal investigation, the defender's iphone was seized and examined. The results of that examination were to be found in the Joint Report of the Cybercrime Unit East of Police Scotland (number 6/2/13 of process). D/S Swanston was able to confirm that the investigation disclosed a number of text messages passing between Mr Hurst and the defender on 9 March 2014, being a date after the witness had twice spoken to, and taken a statement from, Mr Hurst.

[66] D/S Swanston subsequently took part in an interview of the defender under caution on 27 March 2014, during which the defender made no comment.

*Dr Sean Laverick*

[67] Dr Laverick is a consultant maxillofacial surgeon based at Ninewells Hospital, Dundee. He received a referral from the pursuer's GP, and examined the pursuer at Ninewells Hospital on 2 October 2015.

[68] Dr Laverick was referred to the medical notes of Ninewells Hospital (number 5/5/42 of process), from which he was able to confirm that the pursuer's complaint was one of a lesion on the left hand side of her tongue, which had been present for approximately two years. No trauma was reported initially, but the pursuer was recorded as having become

upset and disclosed that she had been assaulted. On the day following the alleged assault she had noticed something on her tongue. Examination revealed a blue coloured vascular lesion which was subsequently excised. Histology revealed an area of scarring consistent with previous trauma.

[69] Dr Laverick was referred to a report which he had prepared for the purposes of the instant case (number 5/5/41 of process) following an interview and examination of the pursuer in January and February 2018. Having recorded the above history, Dr Laverick expressed the view that the pursuer's history of an alleged assault was consistent with the type of trauma described in the medical notes and that the area of scarring disclosed by pathology was also consistent with previous trauma of some kind. During his oral evidence Dr Laverick said that the cause of such trauma was more likely to be a crush, rather than an incisional, injury. He also accepted that such an injury could arise where there had been any forcing of the tongue into the teeth, and explained that anything which caused the tongue to be forced into the teeth could have produced the injury.

*Dr Christopher C R Hardwick*

[70] Dr Hardwick, a consultant gynaecologist, gave evidence by reference to a report (number 5/6/46 of process) prepared by him following a meeting with the pursuer on 22 May 2018, and a consideration of relevant medical records. Since his evidence was essentially undisputed I can summarise the witness's evidence in short compass.

[71] In his report Dr Hardwick gave consideration to the possible causes for the bleeding which the pursuer described as having occurred on the night of 13/14 September 2013. The commonest reason for bleeding after a first episode of vaginal intercourse would be trauma to the hymen and bleeding due to this. Other possible causes of such bleeding included

sexually transmitted infection, trauma to the vagina or cervix caused by intercourse or prior childbirth, polyps of the vagina or cervix and cervical ectropion. In the pursuer's case the most likely cause of the bleeding described by her was hymenal tearing.

[72] Dr Hardwick expressed the view that it was not common for bleeding at a first episode of intercourse to bleed through sheets and mattress protectors (as described to him by the pursuer). The volume of blood described by the pursuer was in excess of the typical bleeding experienced with a hymenal tear at a first episode of penetrative vaginal intercourse, it being likely, during consensual intercourse, that bleeding would lead to cessation, and the avoidance of further trauma. It was therefore possible that, during non-consensual vaginal rape, where intercourse did not cease with the onset of bleeding at the time of a tear to the hymen, the associated bleeding could be more excessive than would otherwise have been the case.

[73] However, there was no scientific evidence to quote an average blood loss for a hymenal tear. It was not unusual to see a small hymenal tear resulting in more bleeding than might be expected. So, the volume of bleeding did not mean that that the intercourse in this case was definitely non-consensual.

*Dr Mairead Tagg*

[74] Dr Tagg is a registered clinical psychologist specialising in the field of gender-based violence. Dr Tagg regularly provides psychological assessments in both criminal and civil cases where gender-based violence has been an issue, both on behalf of individual families and also for local authorities. She has provided training on the impact of abuse for a wide range of professionals and has delivered training on domestic abuse to police officers over many years. She is clinical supervisor for the Paladin Project in London which provides

support to high risk stalking victims, and also the senior psychologist at the EVA Project and for workers at Shetland Women's Aid. She is an associate lecturer at Glasgow Caledonian University, and a visiting lecturer at Glasgow University.

[75] Dr Tagg prepared two reports for the present proceedings. The principal purpose of her involvement was to provide a diagnosis of any psychological condition(s) from which the pursuer was suffering together with a description of how any diagnosis had been reached.

[76] Dr Tagg was first referred to her report dated 6 February 2017 (number 5/4/40 of process). That report was prepared following an assessment of the pursuer on 22 November 2016. The report contained a detailed narrative of the alleged events of the night of 13 September 2013 as described by the pursuer. It is unnecessary to rehearse that narrative. The pursuer was referred to it during her evidence in chief. She confirmed that it was accurate. It was, in any event, substantially consistent with her account in evidence to the court. At paragraph 45 of her report Dr Tagg rehearsed the various ways in which, according to her, the pursuer had been affected by the events of that night. Thus there was reference to ruminations of the event, nightmares, problems with sleep, feelings of anxiety, getting very upset at reminders of the event, getting upset and/or avoiding anything that reminded her of what had happened to her, outbursts of irritation and emotional numbing.

[77] Following their initial meeting, Dr Tagg met the pursuer again on 15 December 2016 for the purpose of completing her assessment, and also to carry out the psychological assessment measures necessary to assess the level and type of psychological difficulties which the pursuer was experiencing, and to assess for the reliability and validity of her description of her psychological state.

[78] Dr Tagg concluded that the most palpable aspect of the pursuer's presentation was her physical stress and emotional numbing during the interview when she had been asked to speak about what had happened. It was apparent, according to Dr Tagg, that the pursuer was becoming psychologically overwhelmed and dissociative at times when her distress became too intense for her to manage. Dr Tagg reviewed the pursuer's account of her current difficulties against standard and specialist criteria, and it was evident that she was affected by a chronic form of post-traumatic stress disorder and major depressive disorder at a clinically significant level. Dr Tagg was of the opinion that, while a significant period of time had elapsed since the events described by her, the pursuer's PTSD symptoms remained florid and largely unabated. The pursuer remained in a distressed state. Dr Tagg's opinion was that the pursuer's narrative of the event showed the typical paucity of detail and language that was typical of a trauma survivor. Her memory of irrelevant detail (she cited as an example the pursuer's brother ranting about their mother being unreachable on the telephone) was typical of the intense recall of certain features but a lack of memory of much of the worst aspects of the alleged assault. The disrupted and distracted format of the pursuer's disclosure to Dr Tagg, which occurred a significant period of time after the index event, and after a criminal trial, was indicative of the fact that her memories were still triggering and still psychologically overwhelming to her. This was due to a dissociative reaction which was typical of victims during, and in the aftermath of, sexual assault.

[79] Dr Tagg found that the pursuer's psychological profile was consistent with her account of her experiences. The mental health issues affecting her were similar to those of women who have suffered inescapable abuse and violence, including rape and sexual assault. Significantly, Dr Tagg found nothing in the pursuer's medical notes to account for her intense psychological distress. Having assessed the pursuer's account against a series of

psychological measures designed to address plausibility, Dr Tagg concluded that the pursuer's presentation, and her self-report and psychometric performance, were both reliable and valid from a psychological perspective.

[80] Dr Tagg's diagnosis of a PTSD was made under reference to the diagnostic criteria contained in DSM V, published in May 2013. Thus PTSD may be diagnosed if a person has a history of exposure to a traumatic event or events that meet specific stipulations and symptoms from each of four symptom clusters: intrusion, avoidance, negative alterations in cognitions and mood, and alterations in arousal and reactivity. Indeed, Dr Tagg described the pursuer as a significantly traumatised young woman who was currently suffering from clinically significant levels of dissociative disorder, depression and a complex form of PTSD. Dr Tagg also described how the pursuer referenced frequent nightmares and sleep disturbance. She considered that the pursuer's hyper-arousal and distress, when confronted with the necessity of speaking about traumatic events, was unmistakable and profound.

[81] It was Dr Tagg's opinion that pursuer was at an ongoing risk of recurrence of her PTSD symptoms, particularly if she encountered stressful and/or traumatic life events. Dr Tagg agreed that the pursuer required significant treatment in order to recover from the PTSD from which she was suffering at the time of assessment, to learn to manage dissociative symptoms effectively, and to know how to prevent relapse in the future.

[82] Dr Tagg carried out a further assessment of the pursuer on 19 May 2018 for the purposes of gauging her current psychological state and investigating whether her symptoms of PTSD had changed to any significant extent. Dr Tagg related her findings in a further report dated 5 June 2018 (number 5/6/48 of process). Dr Tagg reported that her general conclusions were similar to those reached in her earlier report with one significant difference. She believed that the marked deterioration in the pursuer's mental state

indicated that treatment may require between two and three years of therapy to address. Dr Tagg thought that the pursuer would always be prone to periods of relapse during which her symptoms may worsen. The pursuer continued to suffer from PTSD which was exerting a significant negative impact on her life, and was preventing her from living her life with spontaneity or joy. Her mental health was not improving and she was in urgent need of psychological intervention in order to alleviate her symptoms and her distress.

[83] In cross-examination it was suggested, under reference to paragraph 55 of her initial report, that Dr Tagg may have over stated the clinical significance of the pursuer's symptoms. Dr Tagg disagreed with that proposition, expressing the view that the lack of improvement in her mental health was borne out by Dr Tagg's subsequent report on, and assessment of, the pursuer. Her diagnosis of PTSD was not challenged. Nor was her evidence that the pursuer's narrative and presentation were typical of a trauma survivor (or her qualifications to make that statement).

*Mr Janusz Knepil*

[84] Mr Knepil gave evidence as a clinical scientist and consultant toxicologist. He is principal toxicologist for the North Glasgow University Hospitals Biochemistry Department of NHS Greater Glasgow and Clyde Health Board, an honorary senior lecturer in cardiovascular and metabolic medicine at the Glasgow University School of Medicine, and occasional consultant for Glasgow Expert Witness Services.

[85] Mr Knepil was referred to a toxicology report dated 21 January 2018 prepared by him for the purposes of the present action (number 5/3/31 of process). He had been asked to consider the effects of alcohol on the pursuer, and her judgment and appearance, on the night of 13/14 September 2013. For that purpose he had been provided with a variety of

materials which included, but were not limited to (i) police statements given by the pursuer, and (ii) forensic and toxicology reports from the defender's criminal proceedings.

[86] Mr Knepil explained that, in calculating the likely blood/alcohol concentration, he had taken account of a number of variables which were relevant to the circumstances of the pursuer. Thus, he proceeded on information that the pursuer had a genetically derived liver illness which may have impaired her ability to eliminate alcohol (cf. number 5/4/44 of process). (In other words the actual concentration of alcohol would have the same effect but that effect would last for longer). The pursuer was very young at the time which suggested that she might not have been able to develop tolerance to alcohol to the same degree as someone of many years' drinking experience. The pursuer's youth also meant that the decision making parts of her brain would not have been developed fully and would be affected by alcohol to a greater extent than the same amount of alcohol taken by a female over the age of 25. But the most important variable was the amount of alcohol taken in a relatively short period of time.

[87] Mr Knepil set out in his report a table containing advice from the National Poisons Information Service (UK), which linked blood/alcohol concentration to physiological effects in the following terms:

> "20-50mg/100ml: Disinhibition, excitation, emotional lability, sociable, talkative, euphoria.
> 50-100mg/100ml: Decreased reaction time, diminished judgment, fine motor incoordination, dysarthria, nausea.
> 100-200mg/100ml: Diplopia, violence, disorientation, confusion, ataxia, vasodilation, stupor, vomiting and sweating.
> 200-400mg/100ml: Respiratory depression, hypotension, loss of protective airway reflexes, hypothermia, incontinence, coma, hypoglycaemia that can lead to seizures."

[88] In order to calculate a blood/alcohol concentration Mr Knepil prepared a timeline of events on 13-14 September 2013, and applied certain assumptions and qualifications relative to the pursuer's account of what she had to drink, and the likely strength of the drinks

consumed. His calculations and assumptions are set out in detail in the Appendix to his report, from which it will be seen that Mr Knepil left out of account the vodka and shots reported to have been taken between 10.00pm and 11.30pm, and the small amount of Jagermeister taken shortly before the alleged assault. Mr Knepil also assumed that the last drink consumed by the pursuer was 11.30pm, with the maximum blood/alcohol concentration being achieved one hour later. He also proceeded on the assumption that the alleged assault occurred at about 1.30am on 14 September.

[89] Applying his various assumptions, Mr Knepil calculated that, at that time, the pursuer's presumed alcohol concentration would have been at 300mg/100ml blood, within a range of 290mg/100ml to 310mg/100ml.

[90] If one were to assume that the alleged assault occurred at 2.30am then those figures fell to be adjusted, giving a midpoint calculation of 281mg/100ml, within a similar range. Either way, the concentration would fall within the 200-400mg/100ml range in the advice from the National Poisons Information Service. At these sorts of levels the pursuer would have been unable to manage her bodily functions even to the point where functions supporting life may have been diminished to the point of danger to life. Her ability to reason would have been greatly impaired. Her state of disability due to her blood alcohol concentration would have been very obvious to any observer – even to one who had consumed similarly large amounts of alcohol.

[91] Mr Knepil was also referred to his supplementary report dated 31 May 2018 (number 5/6/47 of process), for which he had been asked to consider further material. That material included police statements from Charlotte Claxton and Madeleine Bambridge, from which Mr Knepil inferred that the pursuer had a marked intolerance to alcohol due to her underlying disease. It should be noted that neither of these witnesses gave evidence. Mr

Knepil included a recalculation of the pursuer's blood/alcohol concentration based on the hypothesis that she had consumed Cava (11.5% ABV) as opposed to Champagne (12.5% ABV). This produced a calculation of 291mg/100ml, in a range of 281mg/100ml to 301mg/100ml, assuming the index event occurred at 1.30am.

[92] Mr Knepil was referred to, and commented in his supplementary report on, a joint report by Dr Stephanie Sharp and Dr Paul Skett, forensic pharmacologists, dated 28 January 2018 (number 6/3/18 of process). He noted that they had offered comment and opinion on short term/long term memory and working memory. Mr Knepil did not care to comment on the accuracy of those comments which, he considered, would require to be spoken to by either a psychologist or a psychiatrist. He did not believe that any of them should be commenting, as experts, on the psychological workings of the human mind. Mr Knepil did not approve of the "Generalised Dose Specific Effects" set out, in nine separate bands, in the joint report as being far too precise. He also expressed reservations about their origin and purpose (as a means of dissuading students from taking alcohol or other substances).

[93] Mr Knepil disagreed with the conclusion in the Sharp/Skett report that the alcohol consumed by the pursuer between 7.00pm and 8.00pm may have been substantially cleared before 10.00pm, his own calculation (of 3.1 hours for elimination) having taken into account that the pursuer may have been a slow alcohol eliminator. Mr Knepil's blood/alcohol concentration was arrived at by the application of the industry standard approach recommended by the United Kingdom and Ireland Association of Forensic Toxicologists, approved by the Forensic Science Regulator (UK). Even allowing for the clearance of the cider, Mr Knepil calculated that the pursuer's blood alcohol concentration would have been 243mg/100ml (within a range of 233mg/100ml and 253mg/100ml).

[94] Mr Knepil was asked to comment on the Sharp/Skett calculation of a blood/alcohol concentration of 184mg/100ml (within a range of 115mg/100ml and 265mg/100ml). He replied that, firstly, he could not comment on the validity of the result because it was nowhere set out how the figure had been calculated. He considered the figure to be very considerably underestimated. However, even on the Sharp/Skett midline figure, one would be looking at the top of the 100-200mg/100ml range in the National Poisons Information Service advice. Then, allowing for the slow elimination of alcohol, one would require to place the pursuer's alcohol concentration towards the higher end of the range (i.e. nearer 265mg/100ml), which was a very significant level of alcohol.

[95] In cross-examination Mr Knepil agreed that, statistically, the median rate of elimination of alcohol from the body was of the order of 19mg/100ml per hour, within a range of 9 and 29. In the case of the pursuer three factors, (i) her hereditary disease, (ii) her youth, and (iii) her relative inexperience of alcohol, would place her elimination somewhere between 9 and 19mg/100ml per hour. He acknowledged that, in the instant case, there were no blood or urine samples available for analysis. The calculations undertaken (both by him and Drs Sharp and Skett) were dependent on what was contained in witness statements about what the pursuer had to drink. He also acknowledged that his calculation of the pursuer's alcohol concentration was in the middle of the top range of physiological descriptions in the National Poisons Information Service advice.

[96] Mr Knepil said that, in a clinical setting in A&E, he had seen a large number of patients presenting with a blood/alcohol concentration which was found to be in the 300-310mg/100ml range. They were very obviously inebriated, frequently vomiting, and some may have been unconscious. Asked whether someone in that state could leave hospital themselves, Mr Knepil replied that a reasonable number had signed discharges after

sobering up a bit, and some would be able to leave. It would be surprising for such a person to get up and walk out, but it was not impossible and, in fact, happened fairly frequently.

[97] Mr Knepil was then asked to re-calculate the pursuer's blood/alcohol concentration as at 1.30am, based on the consumption of (i) three cans of cider before 10.00pm, and (ii) six double vodkas and 62.5cl of a bottle of champagne, all between 10.00pm and 11.00pm. As I understood it, these measures, and the timings, were derived from the contents of Stephanie Uhlmann's police statement. Doing his best in the witness box, Mr Knepil (whose working calculations were subsequently lodged by the defender as number 6/7/35 of process) brought forth a very approximate calculation of 196mg/100ml, or, roughly, two thirds of the calculation brought out in Mr Knepil's first report, and, therefore, in the 100-200mg/100ml bracket in the National Poisons Information Service advice (without allowing for any margin for error).

[98] Mr Knepil described his understanding of what is meant by "unconsciousness" and "stupor". The former he related to the Glasgow Coma Scale of which there were three aspects, namely (i) response to verbal stimulus, (ii) touch stimulus, and (iii) look and visual signs. Unconsciousness lay at the extreme end of "stupor", at the other end of which was muddled thinking. It involved a lack of critical thinking and lowering of conscious levels. Mr Knepil's understanding of "black-out" – a term he disliked – was that it concerned cardiovascular effects. Asked whether he was familiar with the concept of a person functioning under the influence of alcohol, but laying down no memory, Mr Knepil was clear that he was not qualified to comment.

[99] Mr Knepil commented, under reference to the letter (number 5/4/44 of process) that, by the age of 18, the progress of the pursuer's hereditary liver disease would have been

fairly marked. He acknowledged that there was no precise information about the level of damage back in 2013.

[100] Finally, in re-examination, Mr Knepil confirmed that a blood/alcohol concentration of 200mg/100ml represented significant intoxication, the effects of which would have been visible to anyone having dealings with the pursuer, and which would have compromised significantly her ability to make decisions.

**The case for the defender**

*Stephen Daniel Coxen*

[101] The defender is 23 years of age. He was brought up, and attended school, in the Bury area. In September 2013 he was aged 18 and undertaking an apprenticeship in his father's ventilation installation business.

[102] The defender first became aware that an allegation of rape had been made against him when he was contacted by his friend Dominic Hurst by text message. Mr Hurst told him that he had been contacted by the police about a phone. He had suspicions that it was about something more serious. The defender thought that this occurred in January 2014, or, at any rate, a few months after September 2013. Mr Hurst having supplied the police with a contact number, the police then rang the defender. Asked about his first impressions on hearing the true nature of the allegation the defender said that he was "surprised". He had been shocked to receive Mr Hurst's text but was expecting the call from the police. He denied raping the pursuer.

[103] On Friday 13 September 2013, the defender travelled north to stay for the weekend with Mr Hurst. His memory of arriving was not clear. He presumed that he would have travelled from Leuchars to St Andrews by bus, and it would be normal for him to have

stopped off at a local Tesco for alcohol in anticipation of drinking this before going out afterwards. The defender's first clear recollection of the evening of 13 September was, however, being in the smoking room of the Lizard Lounge. He thought that he would have been there by about midnight but, although he could remember buying a drink, he could not remember what he was drinking. Indeed, he could not remember going there beforehand. I infer, although it was not clear at this point in his evidence, that the defender was in the Lizard Lounge with Dominic Hurst and other friends of his.

[104] The defender was having an enjoyable time. It was only the second time he had visited Dominic Hurst. Mr Hurst had moved into a new flat, and it was the first time that the defender had properly met Mr Hurst's friends. The defender remembered being with someone in the smoking room but he was unsure who that was. In answer to a leading question, he agreed that he could recall the pursuer being there at the time. Asked about their first encounter, the defender said that he remembered standing in the smoking area and being tapped on the right shoulder by the pursuer who began to kiss him. The defender said that he was quite surprised but "went along with it". Asked about how much he had had to drink, the defender said that he was drunk, but could not remember how drunk. He did not give any thought to the pursuer's state of sobriety, but, in the circumstances, assumed that she was drunk. She appeared to be enjoying herself.

[105] The defender was not concerned about the turn of events, and described how they were "snogging" for a reasonably long time and had their arms around each other. At one point, however, they bumped into a group of males. This engendered an aggressive response during which words were exchanged, the defender was (or may have been, he was unsure) pushed, and the security staff became involved. The defender was escorted from the premises. He was concerned because he was locked out and his friends were inside. He

made an unsuccessful attempt to call Dominic Hurst on his mobile phone. He remembered the pursuer coming up and meeting him on the pavement outside, and they began to talk.

[106] The defender said that they started walking together. He was happy to walk her home. The pursuer seemed to be enjoying his company. The defender was asked whether he had any sense of what might happen that night. In a response which was, at times, difficult to follow, the defender replied that he thought that there might be some intimacy at the house but did not know if that had been discussed between them. The defender estimated the walk to the pursuer's flat to have lasted about fifteen minutes, and he had no particular recollection of the pursuer having any difficulty walking.

[107] At the front gate (i.e. the street gate) to the pursuer's flat the defender recalled that they spent some time together while they buzzed to get in. The pursuer had her phone at that point and tried to phone inside. After about fifteen minutes the defender vaguely recalled that someone came out and let them into the property.

[108] The defender could not recall how they got there but he next recalled being in the pursuer's bedroom. He said that they both got undressed. They began kissing and touching each other intimately. At some point he thought that the pursuer had got onto her bed. They started having sexual intercourse. He then recalled the pursuer pushing him in a hip movement. He interpreted that as an indication that she was not enjoying what was happening. He asked if she was alright and the pursuer nodded. The defender looked down and saw blood on his penis. He said that he got off the pursuer, ceased intercourse, and said something to the effect "that's disgusting; I thought you were alright". The defender said that he then got dressed and left the property "quite quickly".

[109] The defender admitted to having penetrative vaginal intercourse with the pursuer. At no point did the pursuer show any signs of pain or react in any other way. He was

unaware that the pursuer had never previously experienced intercourse and, in his naivety, the defender assumed that the blood was the result of the pursuer having engaged in intercourse on her period. The defender described feeling "kind of grossed out" by what he had seen. He described his action in leaving, in the way he did, as immature, stupid and rude. It was something he regretted, and for which he apologised.

[110] The defender denied that oral sex had taken place. He accepted that he had left with the pursuer's phone but had no recollection of how it came to be in his possession. He agreed that he became aware of an alarm sounding on it the next day, and that Dominic Hurst and he had taken steps to return it the next day. The defender accepted that he did not hand over the phone personally. He was embarrassed about what had happened the night before and didn't really want to see the pursuer. He confirmed that he did not alter his return travel arrangements to Bury after the phone had been returned to the pursuer. He returned home from St Andrews on either the Sunday or the Monday (15 or 16 September).

[111] The defender was asked whether, for the rest of 2013, he had any concerns about that weekend in St Andrews. He replied that had pushed it out of his mind because it had not been a pleasant experience. He confirmed that he became aware of a serious allegation concerning the weekend in early 2014. He was detained by police in Bury and taken to Scotland. Following his acquittal after trial (at which he had given evidence) the defender felt relieved because he was not going to prison. He thought that it was all over and that there was nothing that "she" could do. "I was free, basically".

[112] In cross-examination the defender was asked to account for why the pursuer should have been upset by what happened. He ascribed her upset to the things he had said after intercourse – in particular the use of the words "that's fucking disgusting; I thought you were alright" rang a bell. He also referred to this having been the pursuer's first sexual

experience which was "obviously not ideal". The defender said that he could not recall asking the pursuer her name. He said that he could not recall exactly what they were talking about on the night.

[113] The defender remembered returning to Mr Hurst's flat that night and being let in by Mr Hurst. He heard the alarm on the pursuer's iphone in the late morning or early afternoon. He could not explain why the "Lost Mode" on it was only enabled at 3.36pm (number 5/2/28 of process). He thought the iphone had been in his jeans pocket. On Mr Hurst's enquiry, the defender said that the phone had come from the girl he had been with the night before.

[114] Pressed on what he had been drinking at the outset of the evening, the defender was unable to relate anything other than by reference to what he had done before, and subsequently, meaning that he and Dominic and friends would have something to drink before heading out, and that this would usually be vodka and beer. Ultimately, however, the defender could not say how much he had had to drink.

[115] The defender thought that he and Mr Hurst were in the Lizard Lounge with two of Mr Hurst's friends. He rehearsed again the circumstances in which he was ejected from the Lizard Lounge. He said that he felt hard done by; the altercation in the smoking room had not been his fault. He remembered the pursuer being on the pavement outside. He could not remember what they had said to each other. They must, however, have concluded that the defender should walk the pursuer home because he remembered walking her the whole way. During the walk they were still being affectionate towards each other although he had no recollection of whether they kissed or what they talked about.

[116] The defender did not recall being offered a drink outside 15a St Mary Street. He did not think that he had subsequently told Dominic Hurst that he had taken the pursuer's

phone because she did not have any pockets, although he accepted that it was possible. He acknowledged that, if (as it was suggested to him) the pursuer's trousers did have pockets, then what Dominic Hurst reported him as having said would have amounted to a lie.

[117] It was put to the defender that one reason for him having her phone was that the pursuer was drunk and dropping it. If she was drunk and dropping her phone, the pursuer could not consent to sexual intercourse. The defender replied that he was unsure whether dropping a phone meant that someone could not have sex. He was unsure one way or the other. His only recollection was of seeing the phone when the pursuer tried to phone her friends from outside so that they could be let in.

[118] The defender stuck to his recollection that someone had let them into the flat. Other than to say that she was a female, the defender was unable to recall what the person looked like. He did not accept that he had picked up the pursuer's keys, when she dropped them, and used them to access the flat. That was after they had been outside the flat for about fifteen minutes. The defender thought that the pursuer must be lying about having had her keys outside the flat.

[119] Asked about her condition on the way from the Lizard Lounge, the defender said that the pursuer was perhaps a bit unsteady on her feet. He was pressed again on the amount he had consumed; it was suggested that he was not very drunk and that that was what he had told the jury at his trial (number 5/4/39 of process, p. 576). The defender responded that he was drunk but he was unsure of the quantity of alcohol he had taken. He could not recall much of the conversation he had had with Dominic Hurst on the Saturday about why he had the pursuer's phone and accepted that one explanation was that he did not want to talk about it. He was unsure if he had said anything to Mr Hurst about being "grossed out".

[120] The defender was referred to a series of text messages exchanged between him and Mr Hurst in March 2014 (number 6/2/13, pp. 6-7), in which the defender appeared to be describing to Mr Hurst what had happened on the night of 13 September 2013. The defender appeared to accept that he cannot have told Mr Hurst much of what had happened at the time.

[121] Returning to the matter of the return of the iphone, the defender agreed that he was keen that Mr Hurst should hand it over. Mr Hurst had asked if the defender wanted him to do so, and the defender had agreed because he did not want to see the pursuer.

[122] On the central allegations made by the pursuer, namely that the defender had engaged in vaginal and oral penetration without her consent, the defender said that the pursuer was lying. He agreed that the pursuer must, therefore, have lied at the trial in December 2015. There was no scope for any misunderstanding. The pursuer must also have lied to her friends and medical professionals, including Dr Tagg and Dr Taylor. He had no idea how the pursuer could have come by an injury to her tongue. When it was put to him that it occurred when he held the pursuer's face and inserted his penis in her mouth, the defender replied that he did not know whether an injury could be induced in that way or not.

[123] Finally, it was put to the defender that it was odd for him to have wanted to leave the pursuer's flat so quickly. He attributed his decision to a naïve mindset and a bad reaction to seeing the blood when he was not, at the time, sexually experienced. He denied raping the pursuer.

*Dr Michael Taylor*

[124] Dr Taylor is a consultant psychiatrist. He has over 25 years of continuous clinical experience in the specialty of psychiatry. He has been a member of the Royal College of Psychiatrists since 1996 and has been recognised as a specialist in both General Adult Psychiatry and Forensic Psychiatry by the General Medical Council since 2000. He gave evidence in the defender's proof. He also prepared a report following upon an interview and examination of the pursuer on 14 April 2018 (number 6/4/23 of process).

[125] Dr Taylor recounted in his report a background and personal history of the pursuer. He also rehearsed a past medical history, alcohol and illicit drug history, and past psychiatric history. In the course of the latter history Dr Taylor recorded being told that the pursuer had never consulted her GP for any mental health problems until October 2013. It is further recorded that a few weeks after the alleged sexual assault the pursuer consulted her GP. She was unable to sleep, and was having flashbacks and nightmares.

[126] Asked to explain her anxiety symptoms in more detail the pursuer is recorded as having told Dr Taylor that she had suffered from anxiety virtually immediately following the alleged assault. She had since experienced difficulty in sleeping, punctuated with nightmares and sweats at night, and, more recently, sleep walking. She had been experiencing frequent flashbacks and also panic attacks, and that continued to be the position at the time of examination in 2018. The pursuer found that she startled easily, and was excessively vigilant and avoided going out alone on social occasions. The pursuer's medical case notes revealed a variety of entries recording stress and anxiety symptoms and the prescription of associated medication as well as anti-depressants.

[127] Dr Taylor's opinion was that the pursuer's history and presentation were consistent with a diagnosis of PTSD. In reaching that conclusion Dr Taylor noted that Dr Tagg had

conducted an assessment which had considered the veracity of the pursuer's account, which assessment had found no concerns in that regard. Dr Taylor noted that the pursuer's account was consistent with the documentation found in her GP notes from 2013 onwards.

[128] Dr Taylor considered the pursuer's condition to be of moderate severity. He expected that she would make a very good recovery. Her background history was one of a well-adjusted individual who had been motivated to pursue studies and career choices throughout her life and "through the current ordeal". Dr Taylor anticipated that the pursuer's recovery would become more rapid once the current legal issues were concluded. Even in the absence of those stresses, however, he thought that her condition may continue to be debilitating in terms of her social and occupational functioning for a further two years. Beyond that period of time it was not possible to say with any certainty how her condition would affect her.

[129] Dr Taylor was asked whether there was any point of disagreement between him and Dr Tagg. It is important to observe that both experts were at one on the diagnosis of PTSD. The only distinction Dr Taylor sought to draw was that he was a bit more optimistic about the extent to which the pursuer might recover, and how quickly a recovery might come about. While Dr Tagg had seen a worsening in the pursuer's symptoms of late, Dr Taylor thought that that should be understood in the context of stress brought about by the current legal process. Once concluded, the pursuer's symptoms could be expected to improve again.

[130] Dr Taylor also did not agree with Dr Tagg's conclusion that the pursuer's presentation met the criteria for a major depressive disorder (cf. Dr Tagg's report dated 6 February 2017, paragraph 55). He thought that there were symptoms of depression, but

those symptoms were part of the PTSD rather than being independent of it. Dr Taylor did, however, consider that the pursuer's PTSD was a chronic condition of moderate severity.

[131] In cross-examination, Dr Taylor confirmed that he had discussed with the pursuer the efficacy of another anti-anxiety medication but was unsure if it had been prescribed. His diagnosis of PTSD proceeded on the application of criteria contained in the ICD 10 classification of diseases, which was similar to DSM V. Common to both systems of classification was the requirement that a person must have experienced, witnessed or been confronted by an event or events involving death, threatened or actual, or serious injury. The stressor was, therefore, external in nature.

*Cara Janet Reid*

[132] Miss Reid gave evidence during the defender's proof. She is a pharmacist. In September 2013 she was working at the pharmacy in Boots, Market Street, St Andrews. She was on duty on Saturday 14 September 2013. She had a memory of the pursuer coming to the pharmacy that day. She was looking for the morning after pill. That required a process to be followed in which a pro forma required to be completed. The pursuer was, however, asked to come back because the pharmacy was short-staffed and one of the pharmacists was on lunch.

[133] Miss Reid thought that when she first attended the pursuer seemed to be quite normal. The witness had no reason to think that it would be anything other than a normal consultation. When she returned, the witness sensed in the pursuer a bit more anxiety. Miss Reid went through, and completed, the pro forma with the pursuer (number 6/2/15 of process). She was asked why the "NO" box had been ticked beside the entry "sexual assault?". The witness could not remember how she would have phrased the question

which gave rise to that response. What she did remember was that the pursuer had told her she could not remember, or was unsure, what had happened the night before. The tick in the box did not indicate that there had been no assault; rather that there was an absence of information to inform whether there had been an assault or not.

[134] In cross-examination Miss Reid confirmed that she and the pursuer had had a conversation to the effect that if the pursuer wished to come back "and discuss" she could do so, and that Miss Reid had been sufficiently concerned about her to make that offer. She also confirmed that the pursuer's demeanour was such as to give her cause for concern.

*Dr Stephanie Sharp*

[135] Dr Sharp gave evidence as a forensic pharmacologist with experience in the interpretation of blood analyses with a view to determining the likely degree of impairment in individuals, whether through drink or drugs. She holds a Masters degree in Pharmacology from Glasgow University, a PhD in pharmacokinetics from Dundee University, and has undertaken work as a research scientist both in the United Kingdom and abroad. She has prepared many reports for court purposes and has given evidence regularly across the United Kingdom and Ireland, and is the co-director of the Glasgow Expert Witness Service Ltd.

[136] In the instant case Dr Sharp and her colleague, Dr Paul Skett, were responsible for producing a joint report (number 6/3/18 of process), the purpose of which was to provide an opinion on the pursuer's likely blood/alcohol concentration on the night when she alleged that she had been raped by the defender, and the potential effects of her alcohol consumption on that occasion. She explained the process by which they arrived at that concentration. Dr Skett and colleagues from Glasgow University had developed a computer

programme which generated results based on inputted information about (i) the volume of alcohol consumed; (ii) the time when the alcohol was consumed; (iii) the height and weight of the individual most nearly concerned; (iv) known clearance rates in the population as a whole (taking, as an average, 15 mg/100ml per hour, within a range of 9 and 27, for a normal drinker), and (v) a timeframe (of roughly 20 minutes) for absorption of the alcohol into the bloodstream. Dr Sharp explained that, as she understood it, the computer programme relied on data (gathered in a study by Jones *et al*) from some 3,000 individuals.

[137] Dr Sharp was referred to her joint report dated 28 January 2018. She described, by reference to case studies, the effects of alcohol and how it interferes with the ability of humans to lay down new long-term memories while leaving intact previously formed long-term memories which were formed prior to the consumption of alcohol. Large amounts of alcohol, particularly if consumed rapidly, may result in partial or complete blackouts, which are characterised by memory loss during the drinking period. According to a 2003 study, alcohol inhibits firing of the pyramidal cells in the CA1 region of the hippocampus and causes severe short-term memory impairment in human and animal models.

[138] Dr Sharp drew a distinction between unconsciousness (where the subject is unresponsive and unaware of their surroundings) and alcoholic blackout (where the subject is functionally awake and conscious but not laying down memories and, thus, may not remember their actions whilst in this state). One 2004 study showed that average blood alcohol concentration in individuals when they reached the stage of alcoholic blackout was around 260mg/100ml, albeit with a large margin of error. The effects of alcohol at increasing levels of concentration had been described in a series of nine different brackets by the McDonald Centre for Student Wellbeing of the University of Notre Dame. She

acknowledged that Mr Knepil had employed a different table, quoted above, but considered that the information contained in either table was broadly similar.

[139] Dr Sharp then addressed the issue of "alcohol and consent". She said that, overall, it could not be stated with any certainty that alcohol affects working memory – and, therefore, consent. It was well recognised, according to Dr Sharp's interpretation of the published research, that alcohol inhibits short/long term memory, and the ability to lay down memories, but does not appear to have any significant effect on working memory, with the consequent ability to reason and make conscious decisions at the time (and, therefore, give consent). So, the giving of consent – or other specific details of a night out – may not be remembered (or remembered only in fragments) due to the inhibition of short/long term memory.

[140] Dr Sharp's alcohol calculations proceeded on the same information about alcohol consumption, and the physical characteristics of the pursuer, as was used by Mr Knepil (in his report of 21 January 2018, paragraphs 7.1, 7.3(v)). With that data inputted into the computer programme, a resulting blood/alcohol concentration of 184mg/100ml was brought out, within a range of 115 and 265mg/100ml (as against Mr Knepil's calculation of a range of between 290 and 310 mg/100ml). Dr Sharp's calculation would place the pursuer in the following categories of intoxication (according to the McDonald Centre for Student Wellbeing):

> "0.160-0.199% (160-199 milligrammes of alcohol in 100 millilitres of blood): Dysphoria predominates, nausea may appear. The drinker has the appearance of a sloppy drunk.
>
> 0.200-0.249% (200-249 milligrammes of alcohol in 100 millilitres of blood): Needs assistance in walking; total mental confusion. Dysphoria with nausea and vomiting; possible blackout."

[141] Dr Sharp explained the marked difference in result between her report and that of Mr Knepil by reference to three factors. Firstly, the calculations in the joint report indicated that the alcohol consumed between 1900 and 2100 hours may have been cleared before 2200 hours; therefore, the full amount of the alcohol consumed may not be able to be taken as the assumed "bolus" or dose. Secondly, the extended period over which alcohol was consumed meant that the peak alcohol concentration would not have been at 0030 hours (which would only be the case if the vast majority of the alcohol was consumed just prior to 2330 hours). Finally, the Sharp/Skett report, using scientific and clinical data, used an elimination rate of 15 (not 19) mg/100ml per hour.

[142] Dr Sharp and Dr Skett were responsible for producing a supplementary report dated 13 May 2018 (number 6/4/22 of process) containing recalculations of the pursuer's blood/alcohol concentration based on certain revised criteria. Thus, if the pursuer had consumed one half of that which Mr Knepil assumed she had taken, the figure then brought out was 38mg/100ml (within a range of 0 and 73). Dr Sharp then assumed consumption by the pursuer of one half of the alcohol assumed by Mr Knepil to have been consumed by the pursuer between 2200 hours and 2330 hours. The resulting concentration was 39mg/100ml (within a range of 0 and 101). Dr Sharp was then invited to embark on a calculation based on the following assumptions, namely (i) 3 cans of cider, ABV 4.5%, at 2145 hours; (ii) six 25ml shots of vodka (ABV 40%) at 2230 hours, and (iii) five sixths of a 75cl bottle of champagne (ABV 12.5%), also at 2230 hours. Applying an elimination rate of 19mg/100ml per hour, and assuming full dispersal of the cider at 2245 hours, and the vodka and champagne at 2330 hours, would produce a concentration, at 0130 hours, of about 200mg/ml. Adjustment of the vodka measures to 70ml each would result in a figure of about 295mg/ml, within a range of 175 and 390.

[143] Dr Sharp concluded that a blood alcohol concentration of 200mg/ml could place an individual in a situation of blackout, with consequent implications for long/short memory input, and thus consent.

[144] In cross-examination, Dr Sharp acknowledged that a concentration of 184mg/100ml was likely to be an underestimate because it did not take account of the vodka and shots reportedly consumed by the pursuer. That being so the pursuer's concentration would place her at least in the category of intoxication involving dysphoria and total mental confusion (where, according to the witness's understanding, the individual is unable to understand instructions, unable to form sensible opinions which they would normally be capable of forming, and, therefore, impaired decision making).

[145] Dr Sharp also accepted that there was a slight discrepancy (of the order of 6%) between the percentage concentrations in the table in the Sharp/Skett report and the figures for blood alcohol concentration in parenthesis. She agreed that her calculation of 184mg/100ml was computer generated so there were no working calculations to show how it had been reached, but the computer programme did assume a different rate of elimination. The joint report did not contain a specific time for when it was assumed that the blood alcohol concentration would have reached its peak.

[146] Dr Sharp was challenged on whether she had the qualifications and expertise to express any opinion on short/long term memory and working memory. She appeared to accept that she was not qualified to express an opinion on the brain's reasoning process and that a psychologist or psychiatrist could give "greater insight". She did, however, consider that, as a pharmacologist with knowledge of the scientific literature relevant to that discipline, she could express an opinion on the capacity of an individual to give consent

even although the giving of this consent may not be remembered due to the inhibition, by alcohol, of short/long term alcohol consumption.

[147] In re-examination Dr Sharp said that the computer programme which generated the result in the present case was created by experts in the field. She did not, herself, profess that expertise. She was, however, aware that the programme was based on clinical information from the scientific study by Jones *et al*, and it had the advantage of being able to factor in such matters as the time when the liver began to process alcohol. Mr Knepil's calculations proceeded on a time for peak concentration later than when the alcohol stopped being consumed. In reality alcohol started to clear the instant it hit the liver, and the computer programme would factor that in. So Mr Knepil's time for peak concentration was inaccurate. She commented that the descriptive brackets for the effects of alcohol at different concentrations were not to be regarded as scientific, and there were relatively wide tolerances as between different individuals.

**Discussion**

[148] The issue in this case is a narrow one and turns principally on the issue of consent. The pursuer alleges that she was sexually assaulted by the defender by vaginal and oral penetration with his penis. The defender admits vaginal penile penetration only, and maintains that this occurred with the pursuer's consent.

[149] I was invited by Mr Di Rollo to prefer the evidence of the pursuer as being credible and reliable on the central issue of consent. He submitted that there were ample facts and circumstances to support the pursuer's account of what transpired, that the evidence of the defender was inherently unsatisfactory, and that the court should have little difficulty in finding liability established.

[150] Mr O'Rourke submitted that the pursuer had not succeeded on the evidence in discharging the onus of proving that the sexual intercourse which admittedly took place in the early hours of 14 September 2013 was non-consensual, or that the defender would have had no reasonable belief that the pursuer was consenting to sexual intercourse. Alternatively, Mr O'Rourke invited the court to hold that, on a balance of probabilities, the parties engaged in consensual sexual intercourse with the free agreement of the pursuer, at a time when the pursuer was intoxicated to the extent of having lost inhibition but not her capacity to make free agreement. She was capable of consenting to sexual intercourse, and did.

[151] The parties tendered written submissions at the conclusion of the proof which I have taken fully into account in reaching the conclusion which I have done.

**The Law**

[152] It was a matter of agreement between the parties that the act of rape is an actionable civil wrong (cf. *C v G* 2017 SLT 79, at paragraph [267]). It was also agreed that the act of rape in Scots civil law equates to the criminal law of rape as now defined in section 1 of the Sexual Offences (Scotland) Act 2009, and that the features constituting the modern law of rape, namely consent, the circumstances in which conduct which takes place without free agreement, and reasonable belief should be approached with the definitions in, respectively, sections 12, 13, and 16 of the 2009 Act in mind.

[153] In the present case Mr Di Rollo drew a distinction between the circumstances of *C v G* and the instant case on the basis, as I understood him, that although the pursuer's condition met the level of intoxication such as would satisfy the requirement for loss of capacity to make free agreement, the evidence disclosed that the pursuer, on becoming

aware of the defender engaging in sexual intercourse, did display behaviour (in the form of crying and, at the point of oral penetration, attempting to push the defender away) which would have made clear to the defender her lack of consent. In that situation the issue of intoxication, while important, was not ultimately critical. Either way, what is meant by consent is of the first importance. In that respect, section 12 of the 2009 Act defines consent as meaning free agreement. Free agreement is often defined, in the context of a criminal charge of rape, as meaning willing, freely chosen, active, co-operative, participation by both parties. Consent takes on no different a character just because the proceedings are civil rather than criminal. Section 13 of the 2009 Act provides that free agreement is absent where conduct occurs when the other person is incapable, because of the effects of alcohol, from consenting to it.

[154] It was common ground that the onus of proof rested with the pursuer to prove the constituent elements of rape, including, at least where it had been put in issue, the absence of reasonable belief. Mr Di Rollo submitted that the court need not be troubled by the issue of reasonable belief because it had not been raised in the defences or the evidence. The defender's position on record, and in evidence, was that the pursuer had consented. If I were to prefer the pursuer's position that there was neither consent nor the capacity to make free agreement at the time when sexual activity took place then there could be no reasonable belief on the part of the defender.

[155] The standard of proof to be satisfied by the pursuer was that of the balance of probabilities. Mr O'Rourke submitted that the gravity of the allegation called for evidence of quality and weight, and for that evidence to be carefully examined and scrutinised (*C v G*, *supra.*, at paragraphs [272] – [274]; *B v Scottish Ministers* 2010 SC 472, at paragraph [42]). I doubt whether there is anything controversial in the proposition that evidence should be

scrutinised with care. For the avoidance of doubt, however, the standard of proof is not elevated by the nature of the allegation concerned (*Scottish Ministers v Stirton and Anderson* 2014 SC 218, at paragraphs [118] – [119]).

[156] A considerable amount of time was devoted, during the proof, to the evidence of Mr Knepil and Dr Sharp on the likely level of the pursuer's blood alcohol concentration at the time when the alleged rape took place, and the effect of that level of concentration on the pursuer's capacity to consent. In that respect, I respectfully adopt the approach adopted by Lord Armstrong (*C v G, supra.*, at paragraph [270]) when he opined as follows:

> "The matter must be determined having regard to the prevailing facts and circumstances, but the essential distinction to be drawn is that between intoxication which, on the one hand, results in a lack of capacity to make free agreement, and that, on the other, which results merely in loss of inhibition such as to alter the choices which a person might otherwise make when sober, but being insufficient to deprive that person of the capacity to consent (citing *R v Bree (Benjamin)* [2008] Q.B. 131, paragraphs 25-26; Scottish Law Commission: Report on Rape and Other Sexual Offences (December 2007), paragraphs 2.62-2.63)".

**The pursuer**

[157] I found the pursuer to be a credible and reliable witness. She gave her evidence in a way which I found convincing on all of the material points. At times in her evidence the pursuer became emotional. I found it impossible to conclude that this manifestation of emotion was anything other than a genuine response to the recounting of traumatic events from her recent past, and in particular the night of 13/14 September 2013. Her distress was evident and, so far as these things can be judged, seemed to me to be entirely genuine.

[158] The pursuer clearly had difficulty recalling many of the events after a certain point in the evening of 13 September 2013 and was up front about the reasons for that. There was independent evidence of her intoxication, to which I will return, but I accepted her account of what she had consumed and when she did so. I noted that the pursuer was willing to

concede such points as the reference in Noelle Martin's statement to the pursuer kissing and cuddling someone (whom I accepted was probably the defender) in the Lizard Lounge, in circumstances where she had no memory of that having occurred. That seemed to me to support her basic credibility as a witness. What I was also prepared to accept from the pursuer's evidence, and the manner in which she gave it, was that the pursuer's lack of recollection of significant events in the evening was genuinely attributable to the alcohol consumed, and its effects upon her. I was quite satisfied that her lack of recollection was not the product of any reluctance to divulge information which might be construed as unhelpful to her position. The distinction is an important one to which I will return when addressing what I made of the defender's account of the night.

[159] Accordingly, I accepted as genuine the pursuer's evidence that she was heavily intoxicated as a result of the amount she had had to drink on the night of 13 September 2013. I also accepted that she had some memory of the events which took place both outside, and within, 15a St Mary Street after she had left the Lizard Lounge, and that those included becoming aware that the defender had begun to engage in sexual intercourse with her in her bedroom. Indeed, the pursuer's description of becoming conscious of the defender already engaged in the act of sexual intercourse, her distress, her attempt to manoeuvre off her elbow, and to push him away prior to oral penetration of her mouth, was the very antithesis of the kind of willing, freely chosen, active, co-operative, participation which consent is supposed to connote.

**How intoxicated was the pursuer?**

[160] It was submitted on behalf of the defender that the pursuer had exaggerated the amount she had had to drink. Indeed, Mr O'Rourke invited me to conclude that the pursuer

had had no more than five or six small shots of vodka at the party, and several drinks of champagne. I should also find that the pursuer consumed no cider at the party, nor any rosé wine. I considered it significant that the pursuer described the bottle of rosé and the cans of cider as representing what she would habitually consume on a night out. Mr O'Rourke's submission appeared to proceed on the basis of Stephanie Uhlmann's evidence of what she had observed the pursuer to drink. However, the evidence of the pursuer was that she was drinking champagne in the company of someone else. Moreover, Stephanie Uhlmann made it clear in her evidence that she was not keeping an eye on what the pursuer was drinking, but made the further observation that the pursuer was "a bit faster than me". Since, generally, I found the pursuer to be a credible and reliable witness I was inclined to believe her account of what she said she had consumed. I did not find in Stephanie Uhlmann's evidence a basis for so substantially undermining the pursuer's account of what she consumed.

*Eye-witness evidence of the pursuer's intoxication*

[161] Quite apart from any description of what she had to drink there is clear and unchallenged evidence that the pursuer was displaying the effects of alcohol by the time she left the party at Lade Braes. It appeared to me that the evidence of the pursuer and Miss Uhlmann pointed to a departure from the party between 11.00 and 11.30pm. At that point in the night Miss Uhlmann described the pursuer falling on the gravel path outside Josh Myers' house. She went on to describe how, at the entrance to the Students' Union, the pursuer kept dropping things out of her purse in an attempt to find her student ID. Her state of intoxication was clearly observed by security because Miss Uhlmann's evidence, which I accepted, was that they asked her to ensure that the pursuer had no more alcohol.

In what I considered to be a very significant adminicle of evidence, Miss Uhlmann described how she had taken the pursuer's purse for safekeeping. By the time that they were heading in the direction of the Lizard Lounge the pursuer was unable to walk in a straight line and required assistance.

[162] I considered Stephanie Uhlmann to be an honest and straightforward witness. I was prepared to accept her evidence of what she observed about the behaviour of the pursuer. That evidence led me to conclude that, by the time she reached the Lizard Lounge, which I concluded was probably shortly before midnight, the pursuer was very drunk, and observably so to third parties.

**Blood/alcohol concentration**

[163] At this point it is necessary to give consideration to the toxicological or pharmacological evidence of Mr Knepil and Dr Sharp. I do so with the proviso that the calculations which were presented to me could, on no view, be regarded as providing results to any level of scientific certainty. This was not a case in which the pursuer submitted to a forensic medical examination shortly after the event. There was, for example, no report available with an analysis of blood or urine for alcohol concentration as might have been the case if such an examination had taken place. Accordingly, I was presented with competing expert testimony which was not linked to any specific sample taken and analysed near in time to the alleged assault. Whether one applied Mr Knepil's arithmetical approach or the computer-generated figure for blood/alcohol concentration produced in the Sharp/Skett report, both calculations required to make basic assumptions about the amount of drink consumed, and the time when that drink was consumed.

[164] It appeared to me that the evidence of Mr Knepil and Dr Sharp gave rise to two issues. First, there was the issue of what the pursuer's likely blood/alcohol concentration was at the time of the alleged assault, and its probable effect on the pursuer. Secondly, there was the issue, raised in the Sharp/Skett report, about the effect of alcohol on working memory.

[165] Dealing with first of those issues, it is apparent that there was, at first blush, a significant difference between Mr Knepil and Dr Sharp on the pursuer's likely blood alcohol concentration, whatever the precise time of the alleged assault. The figures were, respectively, 300mg/100ml and 184mg/100ml of blood. The first point worth making is that even the lower result was indicative of a very significant level of alcohol. However, it has also to be recognised that the figures mooted by both experts fell within necessarily broad ranges having regard to recognised variations, including, of course, the individual's rate of elimination of alcohol. In the case of the pursuer, Mr Knepil's evidence was that three factors would affect that rate of elimination, namely (i) her hereditary liver disease, (ii) her youth, and (iii) her relative inexperience of alcohol. So, while his calculation of 300mg/100ml represented a median calculation, it could be nearer the upper figure in the range, of 310mg/100ml, if one were to assume a lower rate of elimination as a result of the factors just mentioned.

[166] The time of the alleged assault is relevant but necessarily uncertain. However, in spite of having reservations about just how forthcoming he was in his evidence, I was inclined to accept Mr Hurst's evidence that he left the Lizard Lounge at 2.00am, tied as it was to closing time at those premises, and then walked a friend home via Queens Gardens before encountering the defender. That would tend to indicate that his estimate that the defender returned between 2.30 and 3.00am was realistic. There was no evidence about the

defender's journey from 15a St Mary Street to Queens Gardens, how long it took, or even how the defender knew which route to take. That means that any estimate of the time of the alleged assault is uncertain. But, allowing time for him to make the journey, and recognising that none of the distances involved are great, it seems probable that it occurred sometime between 2.00 and 2.30am.

[167] There seemed to me to be cogent reasons for preferring the calculations produced by Mr Knepil over those in the Sharp/Skett report. In the first place, the appendix to Mr Knepil's principal report contained the calculations by which he arrived at his figure of 300mg/100ml. These demonstrated that he had taken into account, as a possible variable, the rate of elimination of alcohol because of the personal characteristics of the pursuer. Conversely, there were no working calculations in the Sharp/Skett report to show how the figure of 184mg/100ml was arrived at. It was computer generated and the material inputted into the calculation could not be checked. That seemed to me to be an important consideration when the variation between the two experts was apparently so wide. It was said by Dr Sharp that the calculation proceeded on the same information about alcohol consumption, and the physical characteristics of the pursuer, as was used by Mr Knepil. However, it was unclear whether that included the three factors which could affect the elimination rate outlined above.

[168] There were, in turn, three factors which Dr Sharp thought provided an explanation for such a marked difference between the Sharp/Skett calculation and the Knepil calculation. The first of these was that the alcohol consumed between 7.00 and 9.00pm (two cans of cider) may have been cleared before 10.00pm. Mr Knepil's response, as I understood it, was that the quantity of alcohol taken subsequently would have affected the rate of elimination, and the pursuer was likely to be a slow eliminator (for reasons already discussed), so he did

not accept the Sharp/Skett proposition. However, even allowing for the clearance of the cider, Mr Knepil calculated that the pursuer's blood alcohol concentration would have been 243mg/100ml (within a range of 233mg/100ml and 253mg/100ml). I accepted that allowing for the elimination of the cider could not account for the difference between the experts.

[169] The second factor was Dr Sharp's view that the extended period over which the alcohol was consumed meant that the peak concentration of alcohol would not have been at 12.30am. That would only have been the case if the vast majority of the alcohol had been consumed shortly before 11.30pm. However, it seemed to me that the evidence was to the effect the pursuer was drinking heavily and constantly from about 10.00pm while she was at Josh Myers' party. It was Mr Knepil's evidence that, given such a continuous pattern of alcohol consumption, it would still be necessary to allow for about an hour for complete absorption of alcohol from the gut to the blood. I was also troubled by the absence in the Sharp/Skett report of any specific time for when the computer assumed that the pursuer's blood alcohol concentration would have reached its peak. Moreover, although there was lodged by the defender a further commentary by Dr Sharp and Dr Skett on Mr Knepil's findings (number 6/5/27 of process), which contained a recalculation of Mr Knepil's figures based on a starting point for alcohol clearance of 10.00pm, I was not furnished with any explanation for how the alternative figure of 195mg/100ml was arrived at. It certainly did not make clear what time lapse was built into the calculation to allow for the ingested alcohol to hit the liver. In any event, both Mr Knepil and Dr Sharp appeared to recognise that their respective figures were likely to be underestimated because they did not take account of any vodka consumed at the party. In the final analysis, I was not persuaded that I could safely rely on any recalculation of the pursuer's blood/alcohol concentration based on a different time for peak concentration.

[170] The third and final factor put forward by Dr Sharp for the difference between her blood alcohol concentration of 184mg/100ml and Mr Knepil's figure of 300mg/100ml was the rate of elimination employed by her. I did not regard this factor as carrying any weight. It was clear from paragraph 7.3(vi) of Mr Knepil's report of 21 January 2018 that he had used a midline rate of elimination in his calculation (namely 19mg/100ml/hour). He had, however, also provided calculations based on a higher and a lower rate of elimination. These demonstrated that a lower rate of elimination would actually produce a higher, rather than a lower, blood/alcohol concentration. It would seem to follow that application of an elimination rate of 15 rather than 19mg/100ml would inevitably have that effect too.

[171] I thought it instructive when Dr Sharp was asked to undertake the calculations set out in paragraph [142] above. It served to illustrate the inherently imprecise nature of the exercise both scientists were being asked to undertake. That calculation (apparently based on the contents of Stephanie Uhlmann's statement) varied dramatically depending on the size of the vodka shots consumed by the pursuer (from 200mg/100ml based on six 25ml shots, to 295mg/100ml based on the same number of 70ml shots). In the absence of a forensic result based on a sample taken at, or shortly after, the time it is impossible to do more than ascribe to the pursuer a probable approximation of her blood concentration. In doing so it is also important to bear in mind that the experts proceeded on the basis of an incident occurring at 1.30am. I think it was probably between 2.00 and 2.30am.

[172] Drawing all of these complicated strings together I have concluded that the probable blood/alcohol concentration of the pursuer was closer to the calculation produced by Mr Knepil than that of Dr Sharp. It seemed to me that his calculation had the benefit of being both transparent (in the sense that its workings were set out clearly in his report) and closely accorded with the pursuer's evidence of what she had had to drink. I acknowledge that his

approach assumed a peak concentration at about 12.30am which, in the view of Dr Sharp, was unjustified. I have also factored in (i) the likely time of the alleged assault, and (ii) the possibility, which Mr Knepil addressed in his supplementary report, that some if not all of the initial two cans of cider cleared earlier than he allowed. Against these factors it is necessary to consider the pursuer's evidence that she consumed vodka at the party, the possibility for which was allowed by Stephanie Uhlmann but which neither expert took into account in their original calculations, and those additional features of the pursuer, cited earlier, which would point to her being a slow eliminator of alcohol.

[173] Recognising the inherently imprecise nature of this exercise, I have concluded that the pursuer's blood alcohol concentration at or shortly after 2.00am was probably not less than 250mg/100ml blood. That figure proceeds conservatively on Mr Knepil's recalculation to take account of the exclusion of the earlier cider consumption (set out at paragraph [93] above), and the slightly later time of the alleged assault, balanced against the evidence, which I accepted, that the pursuer drank vodka at the party, and the recognition by both experts that their figures would be underestimated if the vodka was not taken into account. I do not find it possible to be any more precise than that.

[174] Such a blood alcohol concentration would place the pursuer in or near the following categories of intoxication in the Sharp/Skett report:

> "0.200-0.249% (200-249 milligrammes of alcohol in 100 millilitres of blood) Needs assistance in walking; total mental confusion. Dysphoria with nausea and vomiting; possible black out.
>
> "0.250-0.399% (250-399 milligrammes of alcohol in 100 millilitres of blood) Alcohol poisoning. Loss of consciousness."

The relevant band in Mr Knepil's report says this:

> "200-400mg/100ml: Respiratory depression, hypotension, loss of protective airway reflexes, hypothermia, incontinence, coma, hypoglycaemia that can lead to seizures."

[175] Mr Di Rollo trailed a cloak of criticism over Dr Sharp's use of the McDonald Centre categories. I found no particular reason to reject their use. (I note that, in *C v G, supra.*, at paragraph [302], bands from the same source were reported to have accorded with the clinical experience of the consultant psychiatrist who gave evidence for the pursuer). Indeed, the description for the 200-249mg/100ml band in the Sharp/Skett report, in as much as it makes reference to the need for assistance in walking and total mental confusion, seems to me to be consistent with the evidence I heard from Stephanie Uhlmann about the condition of the pursuer from the time when she left the party at Lade Braes. It was not suggested that Stephanie Uhlmann was anything other than a reliable historian and I accepted her evidence of the pursuer stumbling around and being unable to walk without assistance on the way to the Lizard Lounge, carelessly discarding things while trying to find her student ID, and attracting the attention of security at the Students' Union by reason of her level of intoxication. That same category would also seem to me to be consistent with the pursuer's lack of memory of substantial parts of the evening, and her description of coming to while the defender was engaged in the act of penetrating her.

[176] The second issue which arises for consideration in this chapter of the evidence concerns Dr Sharp's evidence about the effect of alcohol on working memory. It will be recalled that Dr Sharp gave evidence that, according to her analysis of the published research, alcohol inhibited short/long term memory, and the ability to lay down memories, but did not appear to have any significant effect on working memory, with the consequent ability to reason, make conscious decisions at the time, and give consent. That was so even if the giving of consent may not be remembered due to the inhibition of short/long term memory.

[177] Mr Knepil was clear that he did not have the expertise to comment on the concept of a person functioning under the influence of alcohol but laying down no memory. Without a thorough exploration of the published research referred to by Dr Sharp I was not prepared to accept at face value her opinion on the matter of working memory. In approaching this matter I have endeavoured not to be influenced by the fact that, in *C v G, supra.*, at paragraph [133] the consultant psychiatrist who gave evidence for the pursuer is reported to have disagreed with the assertion in the Sharp/Skett report (in that case) about the effect of alcohol on working memory which appears to have been in identical terms to the relevant section of their report in this case (number 6/3/18 pf process, p. 8, paragraph 2). However, Dr Sharp appeared to me to concede that matters which concerned the brain's reasoning process were probably best dealt with by a psychiatrist or psychologist. Besides, in a matter of such importance, I did not feel able to rely on Dr Sharp's interpretation of published research in circumstances where it was not apparent that she had either engaged in any such research herself or was otherwise qualified to do so.

**Supporting Evidence of a traumatic event**

[178] I move on to consider evidence from a variety of sources which appeared to me to support the pursuer's account of a traumatic event having occurred on the night of 13/14 September 2013, and seemed to me to be significantly at odds with the notion of the parties having engaged in consensual sexual intercourse.

*Dr Tagg/Dr Taylor*

[179] I begin with what I considered was the highly important evidence of both Dr Tagg and Dr Taylor. Both were impressively qualified witnesses. It is a notable feature of the

medical evidence in this case that both Dr Tagg, an experienced psychologist with expertise in the field of gender-based violence, and Dr Taylor, a professional with many years' clinical experience in psychiatry, both diagnosed the pursuer as suffering from post-traumatic stress disorder. The only differences between the two witnesses arose from Dr Taylor's view that (i) the pursuer's symptoms of depression were not indicative of a separate depressive disorder, but rather a part of the PTSD which he was prepared to diagnose, and (ii) the prognosis for a recovery from the pursuer's condition was rather more optimistic than that expressed by Dr Tagg. It was, in my view, significant that Dr Taylor, in the course of examining the pursuer, appears himself to have given some advice on appropriate medication. Whatever view one takes of the two experts' evidence there was consensus that the pursuer had developed, and continues to suffer from, PTSD.

[180] It was brought out in evidence that Dr Tagg's diagnosis of PTSD was based on the application of the criteria contained in DSM V. By contrast, Dr Taylor's diagnosis was reached by application of the criteria in the ICD classification of diseases. Common to both systems of classification, however, was the requirement that a person must have experienced, witnessed, or been confronted by an event or events involving death, threatened or actual, or serious injury. The stressor was, accordingly, external in nature. It was not suggested to either expert that the mere occurrence of bleeding after a first episode of intercourse (never mind an ungallant departure from the scene of the male party most nearly concerned) could constitute the kind of trauma which could have given rise to the pursuer's current condition and need for treatment (however optimistic the prognosis in that respect may actually be). Neither witness described any other traumatic event in the pursuer's life which could have given rise to their common diagnosis.

[181] Dr Tagg described the pursuer's presentation as typical of that of a trauma survivor, and that her PTSD symptoms remained florid and unabated. Her symptoms included ruminations about the event, nightmares, sleep difficulties, anxiety, emotional numbing and dissociation. Dr Tagg had no difficulty ascribing those symptoms to the account which the pursuer had given to her about what happened on the night of 13/14 September 2013. In the final analysis, nor do I. Dr Tagg had scrutinised the pursuer's medical history, without success, for any other event which might have been capable of affording an explanation for the cluster of symptoms which the pursuer now displayed. Her evidence as to the cause of the pursuer's PTSD symptoms was not challenged. Given the terms of Dr Taylor's report, it is difficult to see upon what basis it could have been.

*The experience of other witnesses who dealt with the pursuer*

[182] I heard evidence from a number of witnesses about their impressions of, and concern for, the pursuer after the alleged assault.

[183] In the first place, I wish to record my impression of the pharmacist Cara Reid. She was led during the defender's proof. There were understandable grounds for doing so because she completed the pro forma (number 6/2/15 of process) which disclosed that, to the query whether there had been a sexual assault, the response had been ticked in the negative. However, the witness qualified that response when she explained that the entry in the pro forma was not intended to indicate that there had been no assault. Rather, standing the pursuer's position that she could not remember, or was unsure about, what had happened the night before, there was an absence of information better to inform an answer to that question. It was, however, clear from her completely independent evidence that Cara Reid had concerns about the presentation of the pursuer to such an extent that she had extended

an invitation to the pursuer to return and discuss the situation should she have wished to do so.

[184] Other witnesses spoke to their concerns about the pursuer on the morning of Saturday 14 September 2013, and thereafter. In particular, Stephanie Uhlmann observed the pursuer suddenly begin to cry while talking to the golf captain at the Sports Fayre. The pursuer had been reluctant to talk about the night before but it was clear to the witness that the pursuer did not want to talk about what had happened, other than that she had gone home with someone. Miss Uhlmann also spoke to observing a marked change in the pursuer before and after September 2013. Beforehand she recollected a talkative, bubbly and energetic individual. Subsequently, the witness described an individual who was "closed off". She recollected, accurately, that the pursuer's studies had had to be interrupted.

[185] The pursuer's brother recalled speaking to the pursuer on the same date. He recalled that the pursuer was anxious to speak to her mother and, by the way she was speaking, he felt that there was something wrong. He also spoke to observing a complete change in the pursuer subsequent to September 2013, before which he had regarded her as "a sister and a kid".

[186] Moreover, it appears that it was not long before a member of the University staff became concerned that all was not well with the pursuer. Dr Maggie Ellis was one of the pursuer's tutors. She recalled speaking to the pursuer about her lack of engagement after a tutorial which she dated around 20 September 2013. On raising the matter, the pursuer alluded to something having happened during Freshers' Week, involving some kind of assault. Eventually, it appears that the pursuer opened up to Dr Ellis, who became involved in providing pastoral care to the pursuer. Dr Ellis's evidence was that the pursuer was unable to continue with her second year studies because of the effect the incident had had

upon her. Indeed, Dr Ellis reported that, in the state that she was, the pursuer would not have been able successfully to complete her second year.

[187] Dr Victoria Johnson was referred to what I considered a highly significant file note which recorded a counselling session between her and the pursuer through the student support service on 2 May 2014. This was a service which the pursuer accessed frequently from October 2013 right through until 2016. What Dr Johnson noted was the extreme stress which the pursuer was experiencing as a result of having to study for an upcoming psychology exam. In her oral evidence Dr Johnson related her recollection that the course material concerned the psychology of students who had undergone a similar experience to the pursuer. It is also instructive that Dr Johnson recollected the pursuer reporting at that time that she had consulted a doctor about an injury which the pursuer was relating to the occasion of the alleged assault.

[188] Joanna McCulloch was another member of the university staff who, in her capacity as a life and wellbeing advisor, provided support to the pursuer. Her involvement with the pursuer dated from October 2014. Ms McCulloch was also able to speak directly to her involvement with the pursuer before and after the defender's trial and the devastating impact of its outcome on the pursuer. I recognise that her involvement, and the distress to which the witness spoke, considerably post-dated the actual incident. However, it was, in my view, of significance that she was able to relate how the pursuer would often be distraught, upset and tearful with her on the telephone. The defender's position in cross-examination was that the pursuer had lied about the incident, and that the lie had been perpetuated in discussions with friends and medical professionals. If that was the position, the pursuer would also have had to lie to each of the counsellors to whom she spoke, including Ms McCulloch. But Ms McCulloch expressed no reservations about the

authenticity of the pursuer's presentation, nor was it suggested to her that she should have done. I was given no reason to suppose that the distress described by Ms McCulloch was other than genuine and I was prepared to connect it to the events of 13/14 September 2013.

[189] Indeed each of the witnesses, to whom I have just referred, was honest and careful in giving their evidence. Some were, of course, involved in providing pastoral care to the pursuer and clearly cared for her and her welfare. I did not consider that to undermine the credibility and reliability of those witnesses. Rather, there was a body of evidence which I considered supported the pursuer's account of having been subjected to a profoundly traumatic event with lasting consequences for her, both emotionally and academically.

*The House Move*

[190] The pursuer herself explained that she moved out of the flat at 15a St Mary Street because of its associations with the assault on her by the defender. There is support for her explanation from Stephanie Uhlmann and I accepted that, while there may have been issues with her flatmates (the detail of which was, unsurprisingly, not explored in evidence), the occurrence of the assault would have provided a cogent reason for why the pursuer may have wished to move. I believed her explanation for why she did so.

*Other medical evidence*

[191] The pursuer's evidence of having become aware of her tongue being swollen and painful in the morning of 14 September 2013 was supported by the evidence given by Dr Laverick. It will be recalled that he accepted that the lesion he observed, albeit in October 2015, could have been the result of any forcing of the tongue into the teeth. He said that anything which caused the tongue to be forced into the teeth could have produced the

injury. Standing this evidence, and my generally favourable impression of the pursuer, I saw no reason not to link the injury to the episode of oral penetration described by the pursuer. I did not believe the defender's denial that there had been any oral penetration in an otherwise consensual sexual experience.

[192] As far as Dr Hardwick's gynaecological evidence was concerned, I accepted that the volume of bleeding described by the pursuer did not lead to a definite conclusion that the vaginal penetration which admittedly occurred on this occasion was non-consensual. It was, however, instructive that the witness's view was that the volume of blood described by the pursuer was in excess of the typical bleeding experienced with a hymenal tear at a first episode of penetrative vaginal intercourse because of the likelihood that bleeding would lead to cessation and the avoidance of further trauma. His evidence was essentially advised by what one would expect to happen in a consensual environment. Since, again, I took a favourable view of the pursuer as a witness, Dr Hardwick's evidence provided at least a measure of support for the view that what occurred was non-consensual in nature.

**The defender**

[193] I regret that I had real reservations about the extent to which the defender was forthcoming in his answers to questions about the night of 13/14 September 2013. The paucity of detail in his description of the night actually extended to the circumstances of his arrival in St Andrews, and what he was doing before reaching the Lizard Lounge late on that Friday night. His lack of recollection extended to what he was drinking in the Lizard Lounge, how much he had had to drink during the evening and night, whether the pursuer had any difficulty walking from the Lizard Lounge to her flat, what he and the pursuer had been talking about after they met, precisely how they had gained access to 15a St Mary

Street, whether he had even asked the pursuer her name, how he came to have the pursuer's mobile phone in his possession after he left, and what he had told Mr Hurst about where he had been before returning to Queen's Gardens that night.

[194] His lack of recollection was, in certain important respects, inconsistent. While, in examination in chief, he related that he had no particular recollection of the pursuer having difficulty walking back from the Lizard Lounge, when pressed in cross-examination he eventually said that she was "a bit unsteady on her feet". His lack of recollection about how much he had had to drink seemed to be at odds with evidence he gave at his trial, to the effect that he was not very drunk. Although his recollection was that someone had let them into the pursuer's flat, he could remember essentially nothing about that person other than that she was a female. By contrast, on matters relating to what transpired inside the flat, the defender appeared to have no difficulty in stating his position that the admitted sexual intercourse was consensual.

[195] Other aspects of his evidence reflected badly on the defender's credibility. He seemed to be unable to offer any explanation for what he may have told Dominic Hurst about what he had been doing before his return to Queens Gardens in the early hours of the Saturday morning. But, when referred to the terms of the text messages between him and Mr Hurst in March 2014, the defender appeared to accept that he cannot have disclosed much to his friend at the time at all. In circumstances in which he was on a weekend visit to a childhood friend at university such a lack of explanation I considered to be, at the very least, curious.

[196] Moreover, the defender said that he was unsure if he had told Mr Hurst about feeling "grossed out" – that response to the appearance of blood having been the defender's explanation for his precipitate departure from the pursuer's flat. Even if that explanation

was true I again found it troubling that the defender seemed unable to offer any account of what he may or may not have volunteered to his friend on such a singular matter. I should add that it certainly did not help my assessment of the defender's evidence that Mr Hurst himself seemed unable, or unwilling, to volunteer any information about what the defender may have told him about his encounter with the pursuer. Although he could remember that he had walked a female friend home just before the defender's return to Queens Gardens, Mr Hurst said that he could not remember anything of his meeting with the defender at the house immediately thereafter.

[197] Furthermore the defender was unable to offer any coherent explanation for why he had possession of the pursuer's mobile phone on the Saturday morning. Whatever explanation there may have been for that, it is clear that, when the time to came for it to be reunited with its owner, the defender was reluctant even to approach the pursuer and to hand it over. It fell to Mr Hurst to undertake that commission.

[198] In the final analysis, and having studied carefully the manner in which he gave his evidence, I found that the defender's apparent lack of recollection of many of the events of the night of 13/14 September 2013 could not simply be ascribed to the effects of alcohol. There was no independent evidence (as there was in relation to the pursuer) supporting the view that he was in any way incapacitated through drink, and the contrary was suggested by what he appears to have told the criminal trial. In that situation I found the defender's lack of memory of so much of a night which must have been exhaustively examined at the criminal trial (not to say played over in his mind while those proceedings ran their course) to be unconvincing. Ultimately, it came across to me as the product of an unwillingness to be candid about what really happened that night.

[199] Indeed, having accepted the pursuer as a credible and reliable witness, and considered all of the other evidence which goes to support her account, the defender's precipitate departure from 15a St Mary Street, lack of explanation for what he had been doing on his return to Queens Gardens, and unwillingness even to see the pursuer the following day when the phone he had somehow retained came to be returned, become open to a less than sympathetic interpretation.

**Consent**

[200] I have already explained how I came to the view that the probable blood alcohol concentration of the pursuer at, or shortly after, 2.00am was likely to be not less than 250mg/100ml. I have deliberately not attempted to be any more precise in what is an inherently imprecise exercise. The figure I have ascribed to the pursuer recognises (i) Dr Sharp's point that the first of the alcohol consumed by the pursuer would have been cleared by about 10.00pm; (ii) that the best evidence of what she had to drink was that of the pursuer herself rather than any witness who did not have her under constant observation; (iii) that set against Dr Sharp's argument that peak concentration of alcohol was likely to have been before 12.30am was the exclusion of any vodka from Mr Knepil's calculations, and (iv) the factors relied on by Mr Knepil which pointed to the pursuer being a slow eliminator of alcohol.

[201] At such a level of concentration the pursuer would fall into the category, in the Sharp/Skett report, which involved (at least) total mental confusion, assistance in walking, and blackout. Such independent evidence of the pursuer's actual condition as there is supports the view that she was displaying some of these characteristics immediately before entering the Lizard Lounge. That her first understanding of anything untoward happening

was when she came to while the defender was in the act of penetrating her is also consistent with what is contained in that same category. In the circumstances I considered it probable that the pursuer would have been observably intoxicated at the time of the alleged assault, and in a condition which was not consistent with her ability to consent to sexual intercourse.

[202] For completeness I did not consider it to be significant that Mr Hurst made reference, in his police statement of 7 March 2014, to the pursuer and the defender kissing and being affectionate. I was not favourably impressed by Mr Hurst who came across as a reluctant historian. But, even if one were to accept that what he told the police was true (and, of course, the pursuer was prepared to acknowledge the possibility), it does not preclude the occurrence of a rape in circumstances where, as here, I have concluded that the pursuer was so intoxicated as to be unable to give free agreement to sexual intercourse.

[203] Finally, I was given no reason to think that the circumstance of the pursuer coming to, evincing distress and offering a measure of resistance (particularly at the time of oral penetration), was inconsistent with her state of intoxication. Since I found the pursuer to be a cogent and compelling witness, I believed her evidence in that respect. I accepted that it showed her lack of consent to the defender's conduct, and that whatever else went before, the defender engaged in sexual acts of penetration at a time when the pursuer's lack of consent, in the form of crying and a measure of physical resistance, would have been apparent to the defender.

**Reasonable belief**

[204] The issue of reasonable belief was not touched on in either the pleadings or the evidence. The defender's position, which I have rejected, is that the pursuer was a willing participant in vaginal intercourse. Mr Di Rollo submitted that, since reasonable belief had

not been put in issue, it need not trouble the court. If the pursuer's account was preferred, and the defender's account rejected, then there would be no basis for holding that the defender held a reasonable belief as to the pursuer's consent.

[205] Strictly speaking that is correct. For completeness, however, I should record that I did not accept the defender as credible and reliable on what happened either outside 15a St Mary Street or in the bedroom thereafter. I regarded as untruthful his evidence that he did not engage in oral intercourse with the pursuer. He said that at no point did the pursuer show any signs of pain or react in any other way other than a pushing movement with her hip which he misinterpreted as an indication that she was not enjoying herself (the pursuer having confirmed by nodding that she was alright). That evidence was entirely at odds with that of the pursuer. I preferred the pursuer's account of what occurred for all the reasons I have already outlined and which apply with equal force to the issue of reasonable belief. I consider that it has been established on the balance of probabilities that the defender ignored what would have been obvious signs of the pursuer's intoxication, took advantage of her in that state, and continued to do so even when she began to evince distress and attempted to resist him.

**Decision**

[206] Mr Di Rollo invited me to conclude that the evidence for the pursuer was cogent, compelling and persuasive. I agree with that characterisation of the evidence. I therefore determine that at some time between 2.00 and 2.30am on Saturday 14 September 2013, at 15a St Mary Street, St Andrews, the defender took advantage of the pursuer when she was incapable of giving meaningful consent because of the effects of alcohol, that he continued

to do so even after she manifested distress and a measure of physical resistance, and that he raped her.

[207] Accordingly, I shall grant decree against the defender in the agreed sum of £80,000 with judicial interest to run from 21 September 2018 until payment.