

**SHERIFFDOM OF LOTHAN AND BORDERS AT EDINBURGH  
IN THE ALL SCOTLAND SHERIFF PERSONAL INJURIES COURT**

[2022] SC EDIN 4

PIC-PN315/21

JUDGMENT OF SHERIFF K J CAMPBELL QC

in the cause

AB

Pursuer

against

SEAN DIAMOND

Defender

**Pursuer: Skinner, Advocate; JHS Law, Dumfries  
Defender: M Jackson QC, Macpherson, Advocate; Lefevres, Edinburgh**

Edinburgh, 15 December 2021

**Findings in fact**

1. In July 2015, the pursuer lived in Perth. She managed a cosmetics counter within the John Lewis store in Edinburgh.
2. On the evening of 14 July 2015, the pursuer travelled to Dundee and met up with a friend, Stacey Robertson, with the intention of having a night out in Dundee. They met in Dundee and arrived at Ms Robertson's flat there at around 19.30.
3. At the flat, the pursuer and Ms Robertson put a 70cl bottle of vodka into a pitcher and added fruit juices. The pursuer had five or six tumblers of this mixture in the course of about two or two and a half hours.

4. The pursuer and Ms Robertson went to The Underground, a nightclub in Dundee, between 22.30-22.45.
5. The pursuer was at the bar of The Underground buying drinks for herself and Ms Robertson. The defender approached her. He invited the pursuer and Ms Robertson to join him and two friends, Ashley Higgs and Sean Grant, at their table. They did so.
6. The party spent the rest of the evening together. They consumed a number of rounds of drinks. At some point before the rest of the party left The Underground, Sean Grant left the club and returned to barracks at Leuchars.
7. The pursuer danced with the defender. She kissed him a number of times.
8. The party left The Underground around 02.30 on the morning of 15 July 2015. The party walked to a nearby take-away food shop called Istanbul, where they purchased takeaway food.
9. The defender and Mr Higgs were invited back to Ms Robertson's flat. The party took a taxi to Ms Robertson's flat. They arrived sometime between 02.30-03.00.
10. The party sat together and ate takeaway food and drank water in the living room of the flat.
11. Ms Robertson and Mr Higgs went to bed together in Ms Robertson's bedroom. The pursuer and defender remained in the livingroom together. The pursuer slept on the sofa in the dress she had worn that evening.
12. At no point while they were in the living room did the pursuer and defender discuss having sexual intercourse.
13. At some time between 03.30-04.00, the pursuer awoke. She was on her front. She was still in her dress, which was above her waist. She was being sexually penetrated from behind by the defender. She was prevented from getting up. The pursuer did not initiate

that activity. The pursuer told the defender to stop and get off her. The defender did not stop. The pursuer lost consciousness.

14. The pursuer regained consciousness around 04.00. She was lying on her front on the sofa, and had pain in her vagina and anus. The pursuer went to Ms Robertson's bedroom. Her hair was over her face. She was visibly upset.

15. Ms Robertson asked the men to leave. She asked the pursuer what had happened. She asked the pursuer if the defender had forced himself on her. The pursuer nodded.

16. Ms Robertson called the police, who arrived within 5 minutes. They arrived at 04.20. The pursuer was visibly extremely distressed when seen by police

17. In March 2016, the pursuer attempted suicide by taking an overdose of prescribed medication. She was admitted to Perth Royal Infirmary.

18. The pursuer was found to have symptoms of post-traumatic stress disorder on medical examination by her GP on 8 January 2016.

19. The defender stood trial at the High Court in Edinburgh in the autumn of 2017. He was acquitted by the verdict of the jury.

20. The pursuer had returned to work in the summer of 2015. She was unable to work at the level she did previously. In August 2016, she was transferred to Dundee, and then to a "single girl" account working on her own.

21. In 2018, the pursuer applied to join the Police Service of Scotland. She had passed the initial stages. She underwent a medical examination, but was not signed off as mentally fit. The pursuer returned for further examination after 6 months to 1 year, but was again not signed off as fit. She withdrew her application.

22. The pursuer took several holidays in Morocco in the period since 2018. She relocated permanently to Morocco in August 2020. The pursuer married a Moroccan citizen in July 2021.

23. The pursuer was initially employed as a teaching assistant at a Montessori school in Morocco. Her salary was 6000 Dirham. The pursuer has recently secured a management position with her current employer, though her rate of pay remains the same.

### **Findings in fact and law**

1. The pursuer did not give express consent to sexual intercourse with the defender.
2. At the time he penetrated the pursuer's vagina and her anus with his penis, the defender can have had no reasonable belief that the pursuer consented to that.
3. In the period between 03.00-04.00 on 15 July 2015, the defender raped the pursuer.

### **Sheriff's Note**

#### **Introduction**

[1] The pursuer in this case claims damages from the defender on the basis that in the early hours of 15 July 2015, she was raped by the defender, whom she had met on a night out. The defender admits that sexual intercourse occurred, and says that it took place with the pursuer's consent. Following a police investigation, the defender was prosecuted and stood trial at the High Court in Edinburgh in the autumn of 2017, at the end of which he was acquitted by the jury.

[2] It being accepted by the defender that sexual intercourse took place, the issues for decision by the court are whether the pursuer consented to sexual intercourse, whether the

defender reasonably believed that she did so, and, in the event that the answer to both these questions is in the negative, what is the proper measure of damages for the pursuer's losses.

[3] I heard proof partly in person and partly by webex videoconference between 14-16 September 2021. The pursuer gave evidence, and led evidence from her mother CB, Stacey Robertson, Dr Mairead Tagg, PC Graham McKenna, and PC Martin Falconer. The defender gave evidence, and led evidence from Ashley Higgs. Having heard all the evidence, I granted a joint motion allowing parties 14 days to exchange written submissions in draft and a further 7 days to finalise and lodge their submissions with the court. Having reviewed parties' written submissions, I determined that it would not be necessary to fix a further hearing and I made avizandum on 11 October 2021.

[4] Parties entered into two Joint Minutes (36 & 43 of process). These agree the provenance of a number of documents, including witness statements given to the police in the course of their enquiries. Affidavits provided by Ronald Lowe, forensic medical examiner, Fariha Abidi, forensic scientist, Barry Mitchell, forensic scientist, Yvonne Peebles, psychological therapist, and James Clery, forensic scientist, were all agreed and taken to stand as their oral evidence, although in the event, no reference was made to these affidavits. Although parties provided electronic versions of the productions, and had these sequentially paginated, these were not organised into a single bundle, and there was no master index paper or electronic. That is less than ideal and not what the court would expect from experienced agents in a case of this kind. Documents are referred to by page reference (JB) or process number.

**Evidence for the pursuer**

[5] Given the nature of the issues in this case, it is necessary to summarise the evidence of the witnesses at greater length than might perhaps be usual.

*The pursuer*

[6] The pursuer is now aged 30. In July 2015, she lived in Perth; she now lives in Morocco, and gave evidence by webex videoconference. In July 2015, she managed a cosmetics counter within the John Lewis store in Edinburgh. She described herself as sociable and not a worrier at that time. Her job was to be confident and to build relationships with customers. She described a busy social life.

[7] On 14 July 2015, the pursuer had met up with a friend, Stacey Robertson with the intention of having a night out in Dundee, where Stacey Robertson then lived. The plan was that the pursuer would stay over in Ms Robertson's flat afterwards, something she had done previously. The pursuer met Ms Robertson in Dundee and they arrived at her flat at around 7.30pm. There they had put a 70cl bottle of vodka into a pitcher and added fruit juices. The pursuer had five or six tumblers of this mixture in the course of about two or two and a half hours. From the flat, the pursuer and Ms Robertson went to The Underground, a nightclub in Dundee, between 10.30-10.45pm. At that point, the pursuer said she was not drunk, but happy and giddy and looking forward to a night out.

[8] The pursuer was at the bar of The Underground buying drinks for herself and Ms Robertson. The defender approached her. He invited the pursuer and Ms Robertson to join him and two friends at their table. The pursuer spoke to Ms Robertson, and they went to the defender's table. The pursuer had not previously met the defender or his friends. There was general chitchat. The pursuer danced with the defender, she said briefly. She

kissed him. She said she did not know why; she was tipsy and it just happened. She gave him her phone number. She was a single girl on a night out and did not think anything of it. The pursuer thought she had four or five vodkas with blackcurrant and lemonade, and one Jaegerbomb shot while she was at the club.

[9] The pursuer thought the party left The Underground around 01.30. She described herself as tipsy and tired. She wanted to go home, get some food and go to sleep. The pursuer was in the toilet; Ms Robertson came and said "shall we go?". The defender and Ashley Higgs were at the bar, which was opposite the toilets. The third male had left earlier. The pursuer and Ms Robertson linked arms and left to go to a take-away food shop called Istanbul. The defender and Mr Higgs came with them; the pursuer said they followed her and Ms Robertson.

[10] The party took a taxi to Ms Robertson's flat. Mr Higgs had asked if the flat was in walking distance; Ms Robertson had said it was not and they were taking a taxi. The pursuer had looked at Ms Robertson as if to say "why?" They saw a taxi and all four people got in. The pursuer was not happy that the men were coming back to the flat. At the flat, the defender sat next to the pursuer on the sofa, and the party ate food. The pursuer went to the toilet. She went fetch her pyjamas, said she was going to sleep. She did not find her pyjamas and went back to the living room. Someone passed her a blanket, and she lay down on the sofa facing the kitchen area. The others were in the hallway outside the living room in the area next to Ms Robertson's bedroom, and there was conversation but the pursuer was not listening. This was about 2-2.30am, certainly within 45 minutes of leaving the club. There was no-one else in the living room when the pursuer went to lie down.

[11] The pursuer went to sleep wearing her dress, with a blanket covering her to the waist. She had turned the light off. The next thing she recalled was being on her front with

pressure holding her down and a sharp pain in her anus. She tried to roll over and was held down. The light was on in the room. She was being held by a male with dark hair. She said "What the fuck are you doing? Get the fuck off of me." She recognised the man's shirt as that the defender had been wearing. She struggled to try to turn. The man pushed her to stop. She knocked her head on the armrest of the sofa. She scratched his arm. She then lost consciousness, but her recollection was clear up to that point.

[12] The pursuer regained consciousness around 4am, perhaps 3.40 or 3.45. She was lying on her front on the sofa, and had pain in her vagina and anus. She had previously had medical problems causing pain after sex and recognised that sensation. The defender was asleep on a beanbag. He was fully dressed, and the belt on his jeans was undone. The pursuer was not wearing pants at that point, but had been when she went to sleep. She assumed the defender had removed them. The pursuer went to Ms Robertson's bedroom. She described herself as hysterical and in floods of tears. Ms Robertson and Mr Higgs were asleep in bed. She flung open the door and turned on the light. Ms Robertson asked the men to leave

[13] After the men left, Ms Robertson asked the pursuer if she wanted to call anyone. The pursuer asked her to call a family friend who is a solicitor. She said she needed a safe person because she knew something happened that was not ok. There was no reply, because it was 4am. Ms Robertson then asked if the pursuer wanted to call the police, and she nodded. The police arrived within about five minutes. When they asked questions, the pursuer was still very emotional and gave monosyllabic answers. The CID arrived, and the pursuer was taken to the police station, where she gave a statement at about 7.05am (JB603-606). The pursuer had then been examined by a police medical examiner, and intimate bodily samples taken.

[14] The pursuer was asked about the months following. In November 2015, she had experienced a panic attack at work. She perceived that all the people around her had the defender's face. She ran from the shopfloor to a spa area. Her colleagues did not know what had happened. The pursuer saw her doctor, explained the background and was prescribed citalopram on a low dose. In March 2016, after four or five months feeling she had nothing to keep going for, the pursuer attempted suicide, taking an overdose of prescribed medication. The pursuer was in her mother's house, and her mother called an ambulance. The pursuer was admitted to Perth Royal Infirmary for observation. She was seen by a psychiatrist and referred for cognitive behavioural therapy. The pursuer was diagnosed as having post-traumatic stress disorder.

[15] The defender stood trial at the High Court in Edinburgh in the autumn of 2017. The pursuer was on a lot of medication in the period ahead of the trial. She started smoking. She tried to work as much as possible. She did not find the experience of giving evidence at the trial helpful in processing her experience. When the defender was acquitted after trial, the pursuer felt completely let down and emotionally broken. She felt he was being protected because he was a soldier. After the trial she felt like a zombie. She was signed off work, and did not want to see people despite the efforts of friends.

[16] The pursuer had returned to work in the summer of 2015. She would be unable to manage, and would be signed off for three or four weeks. She would then return to work, before being signed off again after a short time. In August 2016, She was transferred to a less pressured counter in Dundee, and then to a "single girl" account working on her own. In May 2016, she saw the defender in the cosmetics area in John Lewis in Edinburgh. He was walking towards her counter. He smirked and she froze. She contacted the police,

who, she said, later gathered CCTV. Because the defender had not approached her, there was nothing the police were able to do.

[17] In 2018, the pursuer applied to join the police. She had passed the initial stages. She underwent a medical examination, but was not signed off as mentally fit. The pursuer returned for further examination after 6 months to 1 year, but was again not signed off as fit. She withdrew her application.

[18] The pursuer took several holidays in Morocco in the period since 2018. She relocated permanently to Morocco in August 2020. She feels there are no reminders of the events of July 2015 there. The pursuer was initially employed as a teaching assistant at a Montessori school in Morocco. JB735 is an offer of employment. Her salary was 6000 Dirham, which is approximately £480-500 per month. That is significantly less than she was earning in 2015. The cost of living in Morocco is lower. The pursuer has recently secured a management position with her current employer, though her rate of pay remains the same. The pursuer married a Moroccan citizen in July 2021.

[19] In cross-examination by senior counsel, who did not appear for the defender in the High Court trial, the pursuer agreed that she danced with and kissed the defender. She had drunk alcohol before and at the club. She described herself as happy or tipsy, not drunk but in high spirits; she did not have difficulty walking. The defender also seemed ok from what she could remember. The pursuer said she and Ms Robertson had not discussed the possibility of the two men going back to Ms Robertson's flat, nor had they discussed getting food and going back with them. Ms Robertson had said "shall we leave" and the pursuer took "we" to be Ms Robertson and herself. The pursuer and Ms Robertson were walking from the club to the takeaway shop when the men just appeared. The pursuer said she was the first person to get into the taxi at the takeaway shop. The first thing she knew about the

men coming back was when the defender got into the taxi. She was not happy; she had nothing against them, but she wanted to get some sleep. Asked if Ms Robertson was not cross about the men getting into the taxi, the pursuer said she could not comment on who Ms Robertson invited to come to her flat.

[20] When the party was in the flat eating, the pursuer was sitting on the sofa, and the defender was sitting next to her. There was no discussion of who was going to sleep where. The pursuer said she was going to sleep, leaving it to Ms Robertson to decide. She was sure the men were standing by the door to Ms Robertson's bedroom. She did not agree that there was an arrangement by words or deeds that Mr Higgs was sharing Ms Robertson's bed and that she would share the living room with the defender. The pursuer maintained she went to the living room, said good night to the others and closed the door. She said at that point she was the only person in the living room. She did not accept she was a party to any discussion about where the men were sleeping. She did not recall any conversation about an alarm being set for 7am so that the men could return to barracks at Leuchars.

[21] The pursuer denied she sat in the living room with the defender and that they kissed each other. She did not agree they lay down and touched each other in their private parts. She did not agree the defender took off his jeans or that they giggled at the difficulty he experienced doing so. She did not take off her pants. The pursuer did not agree that she and the defender performed oral sex on each other. She denied that happened while she was awake or that she had indicated consent. It was put to the pursuer that she and the defender had sexual intercourse in a variety of positions; she said no consensual sex took place. It was put to the pursuer that the defender may have touched her anus but did not penetrate her anus sexually. She said that she was woken by an attempt to penetrate her

anus; the pain she felt was not caused by an accident. She had not consented because she was asleep.

[22] The pursuer was asked why she said nothing in her police statement about scratching the defender. She said she showed the police medical examiner a broken acrylic nail. She could not recall whether that was the subject of evidence at the High Court trial. The pursuer was asked why she had not mentioned to the police or the court feeling a hand pressing on her neck, something referred to by Dr Tagg. The pursuer said she had delved into memories more deeply when undergoing cognitive behavioural therapy. She could not recall whether Dr Tagg had her police statement.

[23] The pursuer exercises to relieve stress and keep fit. There was a time when she gained weight, and she went to a gym in Perth to address that. She did boxing and weightlifting. She sometimes runs, but the climate in Morocco is too hot. While the cost of living in Morocco is lower than Scotland, here earnings are at the lower end of the local pay scale.

### ***Stacey Robertson***

[24] Stacey Robertson is a sports coach. In 2015, she was a friend of the pursuer. She confirmed that JB594-7 is a statement she gave to the police on 15 July 2015. That formed the basis of an affidavit sworn on 13 August 2020 in this action (JB75-8). She adopted that as her evidence.

[25] In her affidavit, Ms Robertson confirmed she and the pursuer were in The Underground and were invited to join the defender and Ashley Higgs. She described the party chatting and drinking. She thought they had "4 or 5 vodkas during the time we were at the club." When the club closed the party all decided to get some food. The decided to go

to Ms Robertson's flat to eat it. In her affidavit, Ms Robertson said that was "like a mutual thing ... I didn't invite them." She estimated they got to her flat around 03.00.

[26] After they had eaten, it was decided she would sleep in her bed with Mr Higgs, and the pursuer and defender would sleep in the living room. When she left the living room to go the bedroom, the pursuer and defender were in the living room, awake and with their clothes on. Ms Robertson went to bed with Mr Higgs, they kissed and went to sleep. The next thing she remembered was the pursuer waking her. The pursuer was "kind of crying but trying not to and hold (sic) it in" She knew something was wrong, and asked the two men to leave. As soon as they did, the pursuer began crying uncontrollably. She was very upset and Ms Robertson could not make out what she was saying. Ms Robertson asked the pursuer if the defender "did he force himself on you?" and the pursuer nodded. After some further questions, Ms Robertson called the police.

[27] In cross-examination, Ms Robertson said that she and the pursuer had a couple of drinks before they went to the nightclub. They had some drinks there. She had danced with and kissed one of the men they met there. With prompting, she recalled his name was Ashley Higgs. The pursuer kissed the other man, and had done so more than Ms Robertson kissed Ashley Higgs. She sensed the pursuer liked the man she was dancing with. There had been discussion amongst all four about going back to Ms Robertson's flat. She could not say who had got the taxi from the takeaway shop.

[28] She confirmed that the two men were invited back to her flat. They had been with the pursuer and her for most of the evening. All four were in the living room of her flat eating. She was unable to say if the pursuer left the living room and went to her bedroom. She did not recall the pursuer saying she was going to bed, but she had got bedding for the pursuer. The pursuer was going to sleep in the living room. The defender was going to

sleep there too. That was a result of discussion in the group. Ashley Higgs slept in Ms Robertson's bed. They kissed before going to sleep. They did not have sex. When Ms Robertson left the living room, the pursuer and the defender were still sitting on the sofa. They were comfortable with each other.

[29] The bedroom was a short distance from the living room; Ms Robertson thought just over 3 metres (approximately 10 feet). She did not hear anything untoward until the pursuer came to the bedroom. She woke up when the pursuer came into her bedroom. She asked the men to leave. She did not recall the defender's expression at that point.

[30] The pursuer was very tearful. Ms Robertson asked the pursuer if something had gone on. She asked the pursuer if the defender had forced himself on her, and the pursuer said he had. The pursuer did not ask her to phone someone called Alan. Ms Robertson called the police. The pursuer was able to speak to the police when they arrived.

### *Dr Mairead Tagg*

[31] Dr Tagg is a clinical psychologist who has extensive experience dealing with people who may have experienced gender-based violence. She adopted her reports dated 24 May 2019 (5/13 JB436-456) and 17 January 2021 (5/19 JB731-3) prepared for this action. She also adopted an affidavit based on her first report. In her report and affidavit, Dr Tagg listed documents provided to her. She also records that she met with the pursuer at her clinic on 27 February 2019. The pursuer was "stressed and anxious, but remained co-operative and answered [her] questions to the best of her ability."

[32] In preparing her report, Dr Tagg had been asked whether the pursuer's presentation was consistent with her allegations. In her opinion, it was. She was careful not to offer a view about the pursuer's truthfulness. She had used a number of psychological

assessments. These included the TSI2 test, which comprises 183 questions to be answered on a numerical scale, and included questions which it would be unusual for a traumatised person not to answer in an identifiable way. This test has been refined by its creator, Dr John Brier on the basis of experience over 20 years. In Dr Tagg's opinion, the pursuer's answer to the test were consistent with her having experienced gender-based violence.

[33] In the opinion section of her first report (para 68ff), Dr Tagg observed the pursuer was becoming psychologically overwhelmed and dissociative at times when recounting her experiences (para 69). In Dr Tagg's opinion, the pursuer was exhibiting clinically significant signs and symptoms of psychological trauma (para 70). In her opinion, the pursuer's symptoms indicated the pursuer was affected by a clinically significant form of post-traumatic stress disorder, as well as a depressive illness at clinically significant levels (para 71).

[34] Dr Tagg said that the pursuer's account of having fallen asleep after initially waking with a feeling of being held down while being penetrated anally was a form of dissociation. Dissociation in this context means the brain is overwhelmed: by fear, by stress or by experiences. The vagal nerve could be triggered. The body becomes limp and the heart rate drops. This is, Dr Tagg said, a form of autonomic protection against the full realisation of a traumatic event. This is especially found in women and children. The person concerned is likely to have no memory of what happened, most especially when under attack. Dr Tagg suggested an individual would describe this as falling asleep because the brain is designed to make sense of the world, and if one experiences something we do not understand, we use language we do understand to explain it. Thus in her opinion, the simplest way for the pursuer to explain her experience was to say she must have fallen asleep.

[35] In her report, Dr Tagg described effects on the pursuer some three and a half years after the events. She had changed the way she lives her life. Her sense of safety was changed, as was the way she socialised and how she felt about herself. Her weight had increased, which Dr Tagg said was not uncommon as a result of comfort eating in response to an assault. In her second report (5/19) of January 2021, Dr Tagg considered the pursuer as still suffering PTSD and was still likely to suffer depression. In her opinion, the pursuer's condition would gradually improve. The PTSD would become less troublesome, but depression could come from nowhere. Moving to Morocco had been a positive experience. Women are expected to be more careful there – the pursuer likes that. She also paradoxically feels more free because there is no chance she will bump into the defender.

[36] In cross-examination, Dr Tagg said she had been provided with a copy of the pursuer's statement to the police, but not the defender's police interview. In her view, her task was to conduct a psychological assessment, and to assess whether the allegation was consistent with the pursuer's psychological state.

[37] Dr Tagg accepted the pursuer's police statement made no reference to the pursuer scratching the arm of her assailant, nor did it mention a hand pressing on the pursuer's neck. However when people have been badly traumatised, in her experience, they will remember some things on some occasions, and some different things on other occasions. She did not agree this was consistent with a person not telling the truth. In her view, people lying about this sort of matter tell the same story over and over again, so that it is in effect rehearsed.

[38] In Dr Tagg's view, the fact the pursuer gave evidence at the High Court, and by her own account struggled, while in this case she gave evidence that appeared coherent and cogent, indicated she was recovering. Dr Tagg saw signs of significant improvement. If

triggered enough she would have a dissociative reaction. PTSD typically reduces over time, and Dr Tagg's view was that if she carried out the TSI2 test now it would not produce the same strength of result. The pursuer is less psychologically overwhelmed. Dr Tagg agreed that the pursuer had moved on somewhat from the significant level of dissociation that she noted in January 2019 and recorded at para 97 of her report.

[39] Dr Tagg said she commented at paragraph 101 that asking the pursuer to recall details of her experiences would act as a psychological trigger, making full recall extremely problematic, because PTSD affects how memories are laid down and recalled. She accepted that compared to January 2019, the pursuer was not showing difficulties with recall, and she suggested that was because the pursuer was giving evidence from Morocco, and felt safe because she was not having to face her assailant. Dr Tagg thought the pursuer would not now meet the full diagnostic criteria for PTSD, though she was not 100% recovered.

[40] At paragraph 105 of her report, Dr Tagg had said the pursuer was psychologically absent and would be unable to follow court proceedings. It was put to her that did not appear to be so in this proof. There was a continuum, and in the past, the pursuer did experience difficulties. She now feels safer, and happier having rebuilt a life. At the time of her initial interview, the pursuer had lost her job and her social life, and had put on 5 stones [32Kg] in weight. She is continuing to recover.

[41] At paragraph 107 of her report, Dr Tagg had said the pursuer would likely agree with propositions put to her. She accepted that might not now be the case. She had spoken to the pursuer a few days prior to the proof and there was a reasonable recovery. That was not a spontaneous result, but was because the pursuer has changed her circumstances.

[42] Dr Tagg distinguished between reactive depression, which does not last for ever, and endogenous depression, which will return. People with PTSD are more prone to become

depressed than the general population. The pursuer is now in a sunnier climate, married and in a job that plays to her strengths. In Dr Tagg's view, if the pursuer had remained in Scotland, she would still be experiencing significant depression and dissociation.

*PC Graham McKenna*

[43] PC had 18 years' police service at the time of the proof. He confirmed that JB573-4 was his police statement, and that formed the basis for an affidavit in connection with this action (JB66-7). Around 04.15 on 15 July 2021, he had received a radio call to attend a flat in connection with an alleged rape. He and his colleague PC Falconer arrived about two or three minutes after the call because they were very close by. On arrival, he saw the pursuer very upset and being comforted by a friend. He recalled that clearly because of her level of distress.

[44] The pursuer was trying to speak but could not catch her breath. Stacey Robertson was trying to explain to PC McKenna and PC Falconer what the pursuer had told her, and was also comforting the pursuer. PC McKenna had not separated the pursuer and Ms Robertson to take statements at that stage because Ms Robertson was providing support to the pursuer. He had been at the flat for 15-20 minutes. He asked CID to attend.

[45] In cross-examination, PC McKenna agreed he had read his police statement in connection with the preparation of his affidavit in August 2020, and he had also done so prior to giving evidence in the High Court in 2017 and for this case. That helped him recall little things such as dates. He maintained he recalled the pursuer's distress without reference to his statement.

*PC Martin Falconer*

[46] PC Falconer had 20 years' police service at the time of the proof. He confirmed that JB575 was his police statement, and that formed the basis for an affidavit in connection with this action (JB65-66). He had attended Ms Robertson's flat a short time after being sent in response to a 999 call. On arrival, the pursuer was very upset and crying. PC Falconer and his colleague thought a sexual assault had taken place because of what they were told and the pursuer's presentation. The CID had arrived shortly after and took over the investigation.

*The pursuer's mother*

[47] The pursuer's mother, whom I shall refer to as CB, said she was first aware something was wrong when the pursuer returned home. She was pale, and looked withdrawn and unwell. CB said she is very close to the pursuer, who lived with her for 30 years. She did not think anything other than the alleged rape caused the changes she had seen in the pursuer. CB gave a signed witness statement on 7 October 2020 (JB63-66). She said it was true and accurate. In paragraph 3, she described the pursuer experiencing loss of self-esteem and self-confidence, of her gaining weight and avoiding large groups of people. The pursuer had left her job and withdrawn from social life. CB had been there to support her. The pursuer had managed a team of 10 at Clarins in Edinburgh, but had developed crippling anxiety. She had moved to a single girl account, and had suffered loss of confidence and boredom. She had gone with the pursuer to Morocco to help her heal, and had stayed with her there till June 2021. She felt that moving to Morocco was very good for the pursuer, and that feels safe there.

[48] In cross-examination, CB, was taken to paragraph 13 of her sworn statement (JB64), where she stated:

“she [the pursuer] presents to the outside world that she is o.k. but inwardly I believe she is broken. In photographs, she is always smiling but that is how she wants the outside world to see her. She puts on a brave face.”

It was put to her that the pursuer is able to pretend; CB said the pursuer is a positive person, but CB knows she is not completely well, but this is how she likes to be perceived.

### **Evidence for the defender**

#### *The defender*

[49] The defender is now 28. He is a serving soldier in the British Army, and was such in July 2015. At that time, he was based at Leuchars. On 14 July 2015, after work he attended a drinks reception for an officer leaving the base. He had then had three or four beers in the accommodation block before going to Dundee with two colleagues, Ashley Higgs and Sean Grant. They went to The Underground club, which was empty when they first arrived, and they went to a pub across the road instead. They returned around 11pm.

[50] The defender was at the bar buying drinks for himself, Ashley Higgs and Sean Grant. He saw the pursuer, and asked her if she wanted to join their table. She spoke to her friend and they joined the men. At that point the defender said he said he was not in a bad state with drink. The same was true of pursuer and Ms Robertson, and also the defender's friends. They were merry. At some point, Mr Grant had left to return to the base. The pursuer and defender had danced and kissed. The defender found the pursuer attractive. Mr Higgs and Ms Robertson were also kissing and dancing. The defender thought he bought four drinks for the women while they were in the club.

[51] The party left the club about 02.30. Ms Robertson invited the men back to her flat. The defender did not know where her flat was. They wanted to get some food and did so. The defender had no sense at that stage the men were unwelcome. While the party was in the takeaway, the defender went across the street to get a taxi. The defender said it was not correct that the pursuer got the taxi.

[52] When the party reached Ms Robertson's flat, they went to the living room. The defender sat on the sofa, as did the pursuer. Mr Higgs sat on a beanbag. Ms Robertson sat on a barstool. The defender was on the sofa chatting with the pursuer. At that point, although there had been no discussion, the defender thought he and the pursuer were going to sleep together, because of the way they were together. The defender got a duvet from Ms Robertson's bedroom. He did not recall the pursuer trying to find her pyjamas. At no point was the pursuer alone lying on the sofa in the livingroom while the defender, Ms Robertson and Mr Higgs were in the hallway.

[53] The defender said he and the pursuer lay down on the sofa. She was wearing her dress and he was fully clothed. They were cuddling and kissing. They touched each other's privates, her vagina, his penis, over their clothes. The pursuer took off her pants. The defender started taking off his jeans. They were giggling because they were struggling to take these off. There was no discussion about sex, but the defender felt the vibes were fine, and the pursuer was not saying no. The pursuer did not take her dress off. The pursuer and defender performed oral sex on each other. They had sexual intercourse in several positions. The sex was vaginal. The defender accepted he may have touched her anus accidentally when his penis came out during intercourse. There was no time at which the pursuer appeared unconscious; she was moving and moaning. The defender sensed the pursuer was fine from the vibes between them. She was not saying no. The defender was

satisfied the pursuer was consenting. The defender ejaculated in the pursuer's vagina. After that, the parties lay down on the sofa. After a brief conversation, they went to sleep, the pursuer on the sofa, the defender on the beanbag.

[54] The next thing the defender remembered was being woken by Ashley Higgs, who said "we need to go". The defender had no idea what time that was. At that time, the defender had no marks or injuries on him, in particular he had no scratch marks. The defender saw the pursuer sitting on the bed in Ms Robertson's bedroom. She was crying, and the defender asked what the matter was. Ms Robertson said it was best if he and Mr Higgs went. At the time, the defender did not know why the pursuer was crying. As far as he was concerned, there was no reason for her to be crying.

[55] The defender and Ashley Higgs returned to Leuchars by taxi. Mr Higgs asked him if he had sex with the pursuer, and he said he did. He had asked Mr Higgs if he had had sex. The defender had gone to bed and to sleep when he got back to base. He had gone to work in the morning feeling hungover. The police had come to the base later that day, and the defender was interviewed by CID officers. He had spoken to a lawyer, and was advised to say exactly what happened. JB477-514 is a transcript of the defender's police interview, and the defender adopted it as part of his evidence.

[56] The defender confirmed he had stood trial at the High Court in Edinburgh in the autumn of 2017. He did not give evidence, and that was on the basis of legal advice. His police interview was played to the jury. He would have given evidence had that been the legal advice. The defender was relieved to have been acquitted. He was not able to comment on why the pursuer had given the account she had in evidence in this case.

[57] In cross-examination, the defender said the passage in Ms Robertson's police statement (at JB595) where she said "it was like a mutual thing that they came with us to the

flat. I did not invite them" was wrong. They had been invited to the flat. The defender said he thought he and the pursuer were going to have sex. He agreed that he was attracted to her, and she was attracted to him. There had been no discussion before sex, about protection or anything else. He agreed that he had not mentioned oral sex until asked about that by counsel; that was because he had not been asked about it. He thought the point of the case was about sexual intercourse.

[58] The defender's police interview at JB493-4 was put to him, where the defender had said that the pursuer was not crying when he went to the bedroom. The defender said that Mr Higgs told him the pursuer was crying, and he had gone to the bedroom. The pursuer was crying and being comforted when he went to the bedroom; Ms Robertson had said it was best if he and Mr Higgs left. The defender said he did not know what was going on. He agreed that there must have been something amiss, but he and Mr Higgs did not speculate on the trip back to base. He could not remember exactly what was said. At that time, the defender did not think the pursuer being upset was something to do with him. The defender did not agree with Mr Higgs's recollection at paragraph 15 of his affidavit that nothing about what happened in the flat had been discussed in the taxi, though it could have been that was while they were waiting in the taxi at the base for Sean Grant because they did not have enough to pay the taxi. He thought Mr Higgs was wrong in saying in his police statement at JB601, that he had not spoken to the defender about the pursuer bursting into Ms Robertson's room.

[59] The defender had not mentioned "doggy" sex when first describing what had happened to the police. At JB506 the police had asked about anal sex, and at JB507, the defender had mentioned "doggy" sex. He had mentioned that because he was asked by the police about anal penetration and then about anal injury. The defender thought his penis

might have slipped out of the pursuer's vagina and touched her anal area while they were having "doggy" sex.

[60] The defender said that the pursuer's account in evidence was untrue. He could not answer why she might have done that. He agreed that mental illness might be one explanation. On the point being put directly, the defender said he did not rape the pursuer. The defender denied going to John Lewis in Edinburgh some time after being charged with rape with the intention of intimidating the pursuer.

### *Ashley Higgs*

[61] Ashley Higgs is 25. He is a civilian vehicle maintenance contractor for the US Army in Germany. In 2015 he was a soldier in the same regiment of the British Army as the defender, based at Leuchars. In July 2015, he had known the defender for 2-3 months. He confirmed that on 14 July 2015 he went to The Underground club with the defender and another soldier, Sean Grant. At the point they met the two women, Mr Higgs described the men as not drunk but joyful, maybe a bit tipsy. He had gone to the toilet and when he returned, the pursuer and Ms Robertson were sitting in the booth. They had then had a few more drinks and some single shots. Sean Grant had left. The pursuer, the defender, Ms Robertson and Mr Higgs had continued drinking and eventually left the club.

[62] Mr Higgs agreed that he had been dancing with and kissing Ms Robertson. The pursuer and the defender were also dancing and kissing. What was happening after the club was not set in stone. He could not remember whether there was discussion about going back to Ms Robertson's flat, but said it was possible this was discussed at the takeaway shop or when they got into the taxi. Paragraph 9 of his affidavit (JB765), which is in the following terms, was put to Mr Higgs in an effort to refresh his memory:

“Whilst Sean and I had been sitting in the booth in The Underground with the girls they had asked us if we had wanted to go back to Stacey’s flat. I can’t remember if it was one of the girls that asked, or both of them, but I remember the suggestion coming from them. It was on the basis of getting the take away and going back to eat something. I had no preconceived ideas of anything that might happen in the flat. I didn’t order food from the takeaway, but some of the others did and then we got a taxi to go back to Stacey’s flat. Sean and I paid half the fare each.”

He said that he would now be guessing, but if it was noted there, that was what happened.

He agreed that was also contained in his police statement of 15 July 2015 (JB600).

[63] When they got to the flat, the party was in the living room eating. Mr Higgs was on a beanbag, Ms Robertson was on a chair, and the pursuer and defender were sitting on the sofa. After they had eaten, Ms Robertson gave the defender a blanket. It was possible the pursuer was in the living room and the men were in the hallway chatting with Ms Robertson at that point. Ms Robertson and Mr Higgs went into the bedroom. They had spoken about sex. Ms Robertson did not want to have sex, so they cuddled up and went to sleep. Before Mr Higgs and Ms Robertson went to bed, the pursuer and defender were in the living room. Mr Higgs saw them cuddled up on the sofa. He thought there might be some chemistry between them.

[64] The next thing Mr Higgs recalled was the bedroom door opening and the pursuer being there with her hair in front of her face. The defender was on the floor next to the beanbag. Mr Higgs had not heard any noise coming from the living room, which was not far from the bedroom. In re-examination, Mr Higgs agreed that as Ms Robertson was in bed, so that for the pursuer to speak to her, it would make sense for the pursuer to be on her knees beside the bed. Mr Higgs had not seen the pursuer come in on her knees, but saw her on her knees beside Ms Robertson. Mr Higgs agreed he was drunk on that night, and that affected his ability to recall the events.

[65] Mr Higgs and the defender left by taxi back to the barracks. The defender was on his phone to Sean Grant to get payment for the taxi. Mr Higgs and the defender had spoken about the night before on the walk from the taxi to their accommodation block. He had asked the defender if he had sex with the pursuer, and he said he had. The defender asked if Mr Higgs had sex with Ms Robertson. There was nothing different in the defender's manner, though it was early in the morning and Mr Higgs wanted to be in his bed.

[66] In cross-examination, agreed that his police statement (JB598-602) was given within a few hours and was true and accurate. His affidavit (JB763-8) had been given from his recollection. He agreed his police statement was more likely to be accurate having been given a few hours after the events. Initially, Mr Higgs said he did not think anything was amiss when the pursuer came into the bedroom. He was referred to his statement JB601 second paragraph to jog his memory. There he said: "I helped the female up. I don't know if she was crying. It was dark and her hair was over her face." He thought he said that he helped her up because she was on her knees. He did not, now, recall helping her up. In his statement he went on to say "I got the feeling something was wrong." He said he may have thought that, which was why he said that to the police. He agreed the pursuer must have been upset.

[67] Mr Higgs woke the defender and told him it was time to go. He could not recall exactly what he had said to the defender. Mr Higgs was asked whether it was possible the reason he and the defender were being asked to leave was because of the way the pursuer was behaving coming into the bedroom. He agreed that it could, explaining he had been asked to leave places before. It was possible the pursuer being upset was the reason they were asked to leave. The plan had been to leave around 07.00, and he and the defender left at 04.00 or 04.30. Mr Higgs confirmed the only other person in the living room with the

pursuer at the time she was upset was the defender. Mr Higgs did not recall discussing the events with the defender in the taxi back to the barracks because he was feeling the effects of the alcohol and wanted to get to bed. He did recall that there had been some conversation when they were walking from the taxi to the accommodation block.

[68] Mr Higgs did not know of police involvement until shortly before he was asked to provide a statement. It did not immediately occur to him that the police might be calling about the pursuer; at that point he had full scale hangover. It came as a shock when he learned the defender had been charged with rape. The defender had not confessed to him. Mr Higgs said that if the defender had done so, he would have acted in accordance with the Army integrity procedure and reported the matter.

## **Analysis and decision**

### ***Liability***

#### *Parties' submissions*

[69] As I have indicated above, parties exchanged and lodged written submissions. Since these were standing in place of oral argument, they are appropriately detailed in their treatment of the issues. I have taken full account of those submissions, which are in process, in the discussion which follows and I mean no disrespect by not setting them out at length.

#### *The applicable law*

[70] Parties' submissions did not dwell on the applicable law because both relied on the cases of *DC v DG* [2017] CSOH 5; 2018 SC 47 and *AR v Coxen* 2018 SLT (ShCt) 335. It was common ground in those cases that the act of rape is an actionable civil wrong, and that whether the act was to be viewed as criminal or delictual, no material distinction arose in

relation to the constituent elements (*DC* p88 para 267; *AR* p360 para 152). I agree. I also agree that, as it was put by Sheriff Weir QC (as he then was) in *AR*,

“the act of rape in Scots civil law equates to the criminal law of rape as now defined in s1 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 places without free agreement, and reasonable belief should be approached with the definitions in, respectively, ss12, 13, and 16 of the 2009 Act in mind.”  
(*AR* para 152)

I have considered the evidence in this case following that approach.

[71] It was accepted by both parties that the onus of proof of the constituents of rape rested with the pursuer. Reasonable belief of consent being a live issue, that onus extends to proof of the absence of reasonable belief. The defender’s case is that the pursuer by her conduct and actions indicated to the defender her consent to sexual intercourse, and in any event, from that conduct and those actions, the defender had a reasonable belief in the pursuer’s consent.

*Objection to admissibility of part of defender’s evidence*

[72] In the course of re-examination, the defender said he answered the questions the police put to him, in the same way as he had answered questions as they were put to him in court. As to the suggestion he had visited the pursuer’s place of work in May 2016, the defender said that he was on army duty in Sennelager in Germany at that time. That was the subject of objection by Mr Skinner, on the basis it was not put to the pursuer. Mr Jackson argued it was a matter for submission. I was not asked to rule on the point because the evidence was out at the point of objection. In any event, there was no notice on record of the alleged visit by the defender in May 2016, but the point having been raised in the pursuer’s own evidence, in my view, the defender was entitled to respond to it, and I would have

repelled any objection. I have accordingly had regard to that chapter of the defender's evidence.

*Assessment of key witnesses*

[73] None of the four main witnesses in this case is wholly reliable. That is not surprising, as they were recalling events which took place six years ago, in a setting where all had been drinking alcohol over a period of several hours. Nonetheless, I formed the impression that the pursuer, Stacey Robertson and Ashley Higgs were generally doing their best to tell the truth, so far as they could recall events. Recollection of some matters was clearly affected by alcohol, but there is consistency about a number of key elements of events at the nightclub, outside the nightclub and at Ms Robertson's flat.

[74] Ms Robertson was candid in her admission that her recollection of events at the time of giving statements to the police was clearer than at the time of the proof. Counsel for the pursuer sought to suggest that Ashley Higgs's account of the absence of discussion with the defender about events until they returned to the barracks was incredible, and by extension, that he was at best an unreliable witness. It seems to me that Mr Higgs's reply in cross-examination is more likely, namely that he was feeling the effects of alcohol and wanted to get to bed. It was, after all, between 04.00 and 05.00 at that point. I formed the same impression about other questions on which Mr Higgs's recall was incomplete. He too accepted his account to the police was given closer in time to events, and thus likely to be more accurate.

*The pursuer*

[75] Overall, I found the pursuer to be a credible and, in most respects, reliable witness. I did not accept the totality of her evidence for reasons I shall explain, but on the central issue of what occurred when she and the defender were alone in the living room, I found her to be credible. She was emotional at a number of points in her evidence and almost strident at others, which appeared to me to be a response to recounting traumatic events and the lasting effects of those. While the pursuer has plainly reflected a great deal on her experience, and the insights she has taken from conversation with examining clinicians, I was satisfied her description of the central events was reliable.

[76] Nonetheless, there are a number of elements of her account I do not accept in whole or in part. First, I consider the pursuer downplayed the extent of her interaction with the defender in the nightclub. I reach that view because the other witnesses present all speak of her kissing and dancing with the defender a good deal. They also speak of the pursuer appearing to like the defender's company. I conclude that the pursuer's evidence about this was coloured by events later in the evening.

[77] I prefer the evidence of Ms Robertson, the defender and Mr Higgs (in his statement to the police, adopted in his evidence) that there was some discussion of whether the men should come back to Ms Robertson's flat, and that they were explicitly invited. I prefer the evidence of Ms Robertson, the defender and Mr Higgs that the pursuer did not go to bed before the others, so that she was alone in the living room while the others were in the hallway around Ms Robertson's bedroom door. I am satisfied she and the defender were in the living room together when Ms Robertson went to bed with Mr Higgs.

[78] I do not accept the chapter of the pursuer's evidence that on an occasion in May 2016 the defender came to her place of work in an effort, so it was said, to intimidate her. That

emerged in evidence without a foundation on record. That is not formalism; the point of written pleadings is to give fair notice of a party's case to the court and to the opposing side. Nor was any CCTV produced, evidence which the pursuer suggested might have existed in her oral evidence. These are matters which the defender's agents might well have wished to have done more to address than simply canvassing it in the defender's oral evidence. Be that as it may, I accept the defender's oral evidence on this point, because it appears the defender had a good reason why that could not be correct because of where he was then based with the Army.

[79] I have given weight to all of these points. I consider they are outweighed in the balancing of evidence, first by the quality and consistency of the pursuer's account of the central events in the living room. Further, I considered her account of vaginal and anal pain, and the circumstance in which she came to be aware of it, persuasive. I also note that the pursuer had a particular, medical, reason to be alive to vaginal discomfort. It is the cogency of that evidence, which leads me to prefer the pursuer's account of what happened in the living room when she and the defender were the only people present. These strands are supported by the consistent evidence of the pursuer's distress in the early hours of 15 July 2015. The other occupants of the flat spoke in varying degrees of the pursuer being distressed, or of something being amiss. Ms Robertson spoke of her being very tearful, and on her pressing the pursuer, the pursuer saying that the defender had forced himself on her. PC McKenna had a clear recollection of the intensity of the pursuer's distress. These are all significant passages of evidence. They are supportive of the pursuer's account. They are difficult to reconcile with the defender's account of consensual sexual activity.

*The defender*

[80] The defender's evidence corroborates some of the events too. However, I have not found him to be credible in his account of the event which is at the heart of this case, namely sexual intercourse between him and the pursuer.

[81] I do not accept the defender's version of what happened in the living room. It is a radically different account of events from that given by the pursuer. It does not account for the pursuer's evidence of apparent loss of consciousness, now attributed to a dissociative state, which is something which the pursuer led evidence from Dr Tagg to explain in clinical terms. It does not account for the pursuer going to Ms Robertson's bedroom at around 04.00, nor does it account for her state at the time. While Ms Robertson and Mr Higgs described her state in different ways, the essence was the same, namely she was distressed, or very distressed, and her hair was in disarray. Nor does the defender's version provide a satisfactory answer to why Ms Robertson asked the defender and Mr Higgs to leave, no more than an hour and a half or so after they had all been eating takeaway food in harmonious circumstances in the living room. Nor does the defender's version provide a satisfactory answer to the compelling evidence of PC McKenna about the level of distress he described seeing in the pursuer at around 04.20, and which he clearly recalled in the witness box.

*The question of consent*

[82] There was no evidence that the pursuer indicated express consent in any way. The defender accepted there was no discussion between him and the pursuer about having sex. The defender's case is that he had a reasonable belief that she consented to sexual intercourse. He said in evidence he thought they were going to sleep together because of the

way they were together. I infer that to be a reference to their interactions in the club earlier in the evening. I do not accept that is sufficient to indicate consent to sexual intercourse. Nor do I accept his evidence that all was well because of “the vibes” and the absence of vocal objection by the pursuer. For reasons I have already given, I do not accept the defender’s account of events in the living room, but if I had accepted that account, I would have held that did amount to conduct from which it could be inferred the defender had a reasonable belief as to the pursuer’s consent.

[83] As I have indicated above, I do not accept the defender’s account of what happened when he and the pursuer were alone. There was no other evidence which might amount to an indication of consent by the pursuer. Accordingly, I am satisfied on the balance of probabilities that the defender raped the pursuer.

[84] That is sufficient to establish liability.

### *Damages*

#### *Remedies in a claim of this kind*

[85] In the course of her evidence the pursuer asserted that she wanted justice and to redress what she believed was her being let down by the criminal court. It is important to emphasise that this action is of course not an appeal against the decision of a jury in properly constituted criminal proceedings, but it is a separate vindication of civil rights, in a different court, operating a different standard of proof. That is the nature of the finding of liability in an action such as this one. The remedy the court has available in a claim for personal harm of this kind is damages. Damages in an action about personal injuries can only ever be an approximation in money’s worth for harm suffered.

[86] It was clear from what the pursuer said in her oral evidence that her primary focus in this action was not damages. While that may be understandable, damages is the remedy this court can offer, and in contrast to the position in *DC v DG* and *AR v Coxen*, there was no agreement in this case about the measure of damages in the event liability was established. It is accordingly necessary for me to consider questions of damages at length.

*Pursuer's submissions*

Solatum

[87] It was accepted that damages are not the primary focus of this case. Nonetheless the pursuer's claim has substantial value. The events had a profound and wholly life changing effect upon the pursuer. It was submitted the traumatic effect on her life was spoken to by the pursuer, her mother, and Dr Tagg.

[88] So far as the quantification of solatium is concerned, there are only two recent Scottish cases on the subject.

*AR v Coxen* 2018 SLT (Sh Ct) 335 (£80,000) and *C v G* 2018 SC 47 (£100,000) – in both cases the quantum of damages was agreed, but, it was submitted, they give a clear indication of an appropriate level.

[89] There are a few reported cases in England. There is a discussion of the topic in *Kemp & Kemp – The Quantum of Damages* 3-073. The authors highlight that in *Griffiths v Williams* [1995] 11 WLUK 307, Times, November 24, 1995, [1995] C.L.Y. 1830 the Court of Appeal in England upheld a jury award of £50,000.00 damages to the claimant who had been raped by the defendant (2021 value £101,000.00). The Court held that the jury's award was not so excessive as to justify the Court's interference.

[90] In *Parrington v Marriott*, 1997 (unreported) a case in Leicester County Court tried before Judge Hall, the sums of £25,000.00 general damages and £30,000.00 aggravated damages were awarded to a woman aged 43 for two serious rapes and further sexual harassment. The total award, with special damages for loss of earnings due to Post-Traumatic Stress Disorder caused by the rapes was £73,778.00 (total 2020 value – £135,013.00).

[91] The pursuer therefore moved the Court to award the sum of £100,000.00 in respect of solatium. Two thirds of this sum might be attributable to the past on which interest should run at 4% per annum from 15 July 2015.

#### Wage loss/Loss of employability

[92] The pursuer submitted that whilst this head of claim does not admit of a certain or exact computation, nonetheless the Court must do its best and should assess this claim on a broad-brush basis. This might be dealt with to reflect her loss of employment prospects and diminished earning capacity.

[93] The Pursuer spoke to her difficulties at work and her moving to a less pressurised job. She said she could not manage her team at the cosmetics counter and was moved to a smaller team. She said that she knew her career was over as she couldn't cope with her mental issues. Her application to join the Police was refused at the final hurdle because of her mental condition. In August 2020 she left the UK to go and live abroad permanently where she feels safer.

*Defender's submissions*

Solatium

[94] The defender acknowledged that, irrespective of the extent of any psychological consequences, the delict of rape will attract damages in the form of solatium on its own. Like the pursuer, the defender referred to *AR v Coxen* and *C v G*. The defender noted that the reports of those cases did not disclose the heads of claim, nor how the figure was arrived at.

[95] The defender also referred to

*BXB v Watch Tower and Bible Tract Society of Pennsylvania* 2020 4 WLR 42

A woman who had been raped on one occasion was awarded general damages of £62,000. The damages were assessed at that level primarily because of the significant psychiatric consequences that were proved. The claimant in that case was at the time of the trial suffering anxiety and panic attacks on a daily basis (see para 197ff).

[96] It was submitted that unreported cases from some years ago are not of great assistance. The decision of the Court of Appeal in *Griffiths v Williams* cited in *Kemp and Kemp* and relied on by the pursuer is a decision that the award made was not excessive, but not an assessment of an appropriate award in itself.

[97] It was submitted that it may be more helpful to consider the *Judicial College Guidelines* in relation to psychiatric injury and post-traumatic stress disorder. In the “moderately severe” range for PTSD, where there is a prognosis for recovery with some professional help, but where the effects are still likely to cause significant disability for the foreseeable future, the range is quite wide, from about £21,000 to about £51,000. The Guidelines note however that awards are rarely at the extremes of the bracket, and that the majority lie

between about £25,000 and about £31,600. For “moderate” PTSD, where the injured person has largely recovered and any continuing effects are not grossly disabling, the range is said to be between about £7,000 pounds and about £20,000.

[98] Allowing for damages for the assault itself and the immediate aftermath, and for a psychological injury from which there has been substantial but not complete recovery, the defender submits that, if the court holds that he raped the pursuer, an appropriate award of solatium would be no more than £40,000. Interest on that would fall to be assessed at one half of the amount at 4% to the present date ( $£40,000 \times 1/2 \times 6.21 \text{ years at } 4\% = £4,695$ ).

#### Loss of earnings

[99] It is noted that in her submissions, the pursuer argues for an award of past loss of earnings. However, the pursuer did not include a claim for past loss of earnings in her statement of valuation, which is supposed to represent and to give notice of a complete assessment of her claim. Further, in personal injuries actions it is usual to enumerate the discrete heads of claim in the pleadings. The pursuer makes no reference to a claim for past loss of earnings on record. Only a claim for loss of employability is made. It is submitted that no award for past loss of earnings should be made on the basis that it is not claimed.

[100] In relation to loss of earnings or loss of employability in general, the only evidence in relation to the pursuer’s employment came from her and, insofar as she was able to speak to it, the pursuer’s mother. No evidence was led from her employers at John Lewis as to the reasons for the pursuer moving from one job to another. No documents were produced apart from P60s, which show that the pursuer in fact earned slightly more in 2020 than in the tax year from 2015 to 2016 (5/21 process). The pursuer gave evidence about applying to be a police officer and having passed several stages of the application process. No witnesses

from Police Scotland were led as to the reasons for the pursuer's application being unsuccessful. No documents were placed before the court.

### **Analysis**

[101] On record, the pursuer claims damages for solatium, and disadvantage in the labour market. There are tentative averments about loss of earnings, but it is far from clear whether that is intended to be a separate head of claim. While her averments about solatium are clear and detailed, it is fair to say that, even within the abbreviated model of pleading adopted in personal injuries claims, the pursuer's averments about the other heads are not fully developed. That was reflected in the pursuer's submissions, which are painted with the broadest of brushes.

### ***Solatium***

[102] Dr Tagg's evidence was that the pursuer experienced moderately severe post-traumatic stress disorder, and also symptoms of depressive illness. Dr Tagg was not challenged on that diagnosis. Dr Tagg accepted the pursuer has made significant progress since 2015, and indicated she might well not meet the diagnostic criteria for PTSD now. She does not experience depressive symptoms all the time, but they do recur. In assessing this aspect of damages, I also have regard to the circumstances giving rise to the diagnosis, namely a serious sexual assault.

[103] As solatium was not agreed, I will have to follow the usual approach of assessing a figure for solatium then making appropriate provision for interest on past loss. I have found the older English cases to be of little assistance, given there are two recent Scottish cases which are more directly analogous, namely *C v G* and *AR*. In line with those, I will assess

solatium at £100,000, of which 75% is attributable to the past. Interest will run on the past element (£75,000) at 4% per annum from 15 July 2015 to date. That brings out a figure of £19,250 for interest to date.

*Loss of earnings/disadvantage in the employment market*

[104] There are averments about the pursuer applying to join the Police Service of Scotland, and having a provisional appointment withdrawn. That is framed in a way to imply that is in some way a consequence of the events on 15 July 2015. That is not spelled out. Instead it is followed by an averment that she is at a disadvantage in the employment market. It is averred the pursuer left her job at the cosmetics counter and “moved permanently to Morocco where she feels safer and where she works as an English teacher at a substantially reduced wage.” Again the implication is that is a consequence of events on 15 July 2015, and on this issue, the pursuer elaborated on that in her oral evidence. As the defender observed in his written submissions, the pursuer’s Statement of Valuation of Claim contains heads of loss for solatium, loss of employability/disadvantage in the employment market, and special damages (sic) for the cost of CBT treatment. No conventional loss of earnings claim is there stated.

[105] This is less than satisfactory. While it is accepted in personal injuries actions that the longer form of pleadings usually not appropriate, there remains a requirement of fair notice. That is both for the benefit of the opponent and the court, which should not be left to infer the basis on which a party claims damages, nor its causal nexus. That is not mere formalism, rather it is a reflection on the difficulty occasioned by inspecific formulation of a party’s case. That may have the result that the court is unable to form a concluded view.

[106] At 5/21 of process (JB736-741), the pursuer has produced her P60 forms for the tax years 2014-15 to 2019-20. I have considered these. They disclose a pattern of variable earnings, but within a fairly small margin:

2014-15	£14,979.51
2015-16	£19,302.24
2016-17	£15,928.90
2017-18	£17,529.61
2018-19	£18,974.66
2019-20	£20,225.12

[107] The figures disclose that earnings for the tax year in which the assault occurred, the pursuer earned more than the previous tax year, and the assault occurred four months into the tax year. Even in the next year, earnings were higher than 2014-15, and in 2018-19 and 2019-20 earnings were close to or above those for the year of the assault. No evidence was led from the pursuer's employer about her capacity for work or about her employer's view about her capacity nor future prospects. In all of those circumstances, I consider it is not possible to conclude that the pursuer suffered loss of earnings up to the point she gave up her job in cosmetics, and even if she did, that this was attributable to the events of 15 July 2015.

[108] Further, I agree with the defender's submission that on the evidence, the pursuer's relocation to Morocco and her employment at a lower rate of pay were changes in her life that the pursuer made of her own volition. It appears they have been of benefit to her feeling of well-being, but in terms of loss of earnings, I consider no future loss of earnings arising directly from the events of 15 July 2015 has been established.

**Anonymisation**

[109] I invited parties to make submissions about anonymization of the identity of parties in this judgment, and of the making of an order under section 11 of the Contempt of Court Act 1981, prohibiting publication of the name(s) of parties. When I made avizandum, I made an interim order under section 11 in respect of each party. It was common ground that, having regard to the subject matter of the action, it was appropriate to grant anonymity to the pursuer. In my view, that is undoubtedly correct, and in accordance with the ordinary practice of the Scots courts where the essence of the proceedings is a complaint of sexual assault. I have therefore referred to the pursuer as AB. As the pursuer's mother gave evidence, I will also anonymise her name, and I have referred to her as CB.

[110] Parties were not in agreement about whether the same approach should be followed in relation to the defender. In the small number of cognate cases, practice has varied as regards identifying the defender. While the defender in this action was acquitted in prior criminal proceedings, at the outset of these proceedings, he was identified and was the subject of press coverage as a consequence of the passing of undefended decree, from which the defender was subsequently reponed. I therefore consider it appropriate to revoke the order under section 11 of the 1981 Act in relation to the defender.

**Conclusion**

[111] In the result, I shall grant decree in favour of the pursuer for the amount of £119,250.

[112] Parties were agreed that expenses should follow success. I will therefore award the expenses of the action to the pursuer. I note both parties have legal aid. I have no hesitation certifying the cause as suitable for the instruction of counsel, given the nature of the issues

and the importance of the case to both parties. As I have found for the pursuer, I will grant sanction for junior counsel. I will certify Dr Tagg as a skilled person.