

**SHERIFFDOM OF SOUTH STRATHCYLDE, DUMFRIES AND GALLOWAY AT  
HAMILTON**

[2025] SC HAM 26

HAM-PD146-22

JUDGMENT OF SHERIFF J SPEIR

in the cause

K

Pursuer

against

P

Defender

**Pursuer: Drysdale KC; Thompson Family Law Solicitors**

**Defender: Melvin-Farr, Advocate; Cartys, Solicitors**

Hamilton 21 February 2025

The sheriff, having resumed consideration of the cause, finds as follows:

**Findings in fact**

1. The pursuer and the defender were married in 2010. They had been in a relationship for approximately 10 years prior to marriage. They separated on 23 September 2015 when they ceased to live together as husband and wife.
2. The immediate and direct cause of the parties' separation was the defender's arrest and charge for possessing child pornography. The defender received a criminal conviction for that offence in July 2016.

3. The parties both continued to reside within the matrimonial home notwithstanding their separation until the defender left in November 2016.
4. On an occasion between February 2015 and September 2015 in the parties' bedroom within the former matrimonial home the defender penetrated the vagina of the pursuer with his penis.
5. Prior to said vaginal penetration taking place the parties had spent the evening together consuming wine and watching television. It had been either a Friday or Saturday evening.
6. The pursuer went to bed at around 11.30pm. The parties' bedroom was located upstairs in their said home. The pursuer went to bed alone with the defender remaining downstairs.
7. The pursuer got ready for bed. She changed into a nightie and kept her underpants on. She closed the bedroom curtains and blinds to exclude streetlight so that the room was very dark. She fell asleep quickly.
8. The pursuer was subsequently awakened at around 1.15am because of the sensation of her vagina being penetrated by the defender's penis.
9. On being awakened the pursuer saw that the defender had positioned himself in such a way to avoid or minimise contact between the parties' respective torsos while he was penetrating her vagina with his penis. She was able to see him because he must have opened the blinds to allow streetlight to come into the room.
10. The defender had moved the pursuer's underpants to the side in order to penetrate her vagina with his penis.
11. The pursuer told the defender that she needed to urinate. He withdrew his penis from her vagina and sat back at the end of the bed. The pursuer then got out of bed and sat

in the en suite bathroom in the dark with the door locked for about 15 minutes. She was confused, worried and concerned as to what had just taken place.

12. When she returned to bed the defender was on his side of the bed with his back to her. She was scared to confront him about what had taken place for fear of his reaction. No discussion between the parties took place as to what had happened. From the wristwatch on her bedside table she noted the time to be 1.30am. The pursuer fell back asleep. When she awoke in the morning she had forgotten what had taken place.

13. The pursuer suppressed the memory of said incident until around November 2016 and very shortly after the defender had left the former family home. Thereafter she began to experience flashbacks of said incident.

14. At or about the end of December 2016 or the beginning of January 2017 the pursuer confronted the defender in relation to the incident, specifically him having sex with her while she slept. The defender made contradictory responses and then denied it had happened. The parties had been travelling together in the pursuer's car at the time returning from dealing with certain financial matters arising from their separation.

15. Following said car journey the pursuer restricted communications between her and the defender to WhatsApp messaging. In a WhatsApp message dated 12 September 2017 the defender set out his recollection of the incident including an admission that the pursuer had been asleep when he had had sexual intercourse with her.

16. The pursuer made disclosures of said flashbacks to her counsellor in or about November 2016, to social workers sometime in 2017 and to her aunt in September 2021. She also made a report of what had happened to the police. She provided the police with a statement dated 22 August 2018. She also provided the police with WhatsApp messages between her and the defender between 27 August 2016 and 15 December 2017. Those

messages included that from the defender dated 12 September 2017. No criminal investigation or prosecution against the defender took place following said report to the police.

17. The pursuer was found *inter alia* to have symptoms of post-traumatic stress disorder on medical examination by Dr Mala Singh, Consultant General Adult Psychiatrist, on 28 December 2020. That condition was primarily attributable to her being raped by the defender.

18. The rape and development of PTSD impaired the pursuer's capacity for work and study resulting in a loss of income.

### **Findings in Fact and Law**

1. The pursuer did not consent to sexual intercourse with the defender on an occasion between February and September 2015 because she was asleep at the time.
2. The defender was aware that she was asleep and accordingly did rape her.
3. That rape caused the pursuer to suffer loss, injury and damage

### **Finding in Law**

The pursuer's first crave for damages should be granted in respect of the agreed sums for solatium and wage loss, totalling £138,053.

### **Interlocutor**

THEREFORE grants decree for payment by the defender to the pursuer of the sum of

ONE HUNDRED AND THIRTY EIGHT THOUSAND AND FIFTY

THREE POUNDS (£138,053) sterling with interest on from the date hereof until payment at

the rate of 8 per cent per annum; reserves meantime the question of expenses meantime and appoints parties to be heard thereon at Hamilton Sheriff Court on a date to be afterwards fixed.

## NOTE

### Introduction

[1] In this action the pursuer seeks an award of damages from the defender, her former husband, as recompense for having been raped by him. This is the second action between the same parties. In the first action (reported *sub nom* as *M v G* [2022] 9 WLUK 389) the pursuer was successful in obtaining leave to bring this action notwithstanding the expiry of the triennium.

[2] After sundry procedure, the case proceeded to proof. At the proof the pursuer was represented by Ms Drysdale KC and the defender by Mr Melvin-Farr, Advocate.

### Issue and quantum

[3] The issue in the case is a narrow one: was the pursuer was asleep when the defender commenced having sexual intercourse with her on an occasion between February and September 2015? If she was it is accepted that she could not have consented to such sexual intercourse and accordingly it constituted rape which is an actionable civil wrong.

[4] In the event that this question is answered in the affirmative the quantum of damages has been agreed.

## **Evidence**

[5] The proof was a short one. The only witnesses were the parties, Dr Mala B Singh, Consultant Psychiatrist and the pursuer's aunt ("M"). In addition counsel were able to agree certain matters in terms of two joint minutes of admissions thus reducing the need for evidence thereon.

### ***The joint minutes of admission***

[6] For the purposes of the present action it was agreed *inter alia* that:

- (1) On occasion between February 2015 and September 2015 within the former matrimonial home the defender penetrated the vagina of the pursuer with his penis
- (2) The defender sent the pursuer a Whatsapp message at 1712 hours on 12 September 2017
- (3) Solatium should be assessed at £100,000 with interest thereon of £26,091, totalling £126,091
- (4) Loss of earnings was quantified as £10,427 with interest thereon of £1,535, totalling £11,962.

### ***The Whatsapp message***

[7] As noted it is a matter of admission that the defender sent the pursuer a WhatsApp message at 1712 hours on 12 September 2017. The message comprises a relatively long continuous statement from the defender. It covers other matters beyond the incident with which this action is concerned. For present purposes it is sufficient to set out the following part of the message which does relate to the incident and the accusation of rape as follows:

"I am truly sorry if I have made you feel threatened in any way. I would never lay a finger on you, and all our troubles have never resulted in anything resembling physical violence...You said that you wanted things to be amicable between us, but within 4 weeks of me leaving the house you accused me of sexually assaulting you. This is the cause of my anger – it simply is not true. This accusation, more than anything that has happened between us, floored me, and left me in a terrible place. Your spite and obvious hurt when delivering this news didn't really allow me to respond in any way, and I'd like to now – there can be no degree of amicability between us as long as you think this. I understand I have hurt you badly, but that's no reason to throw such an awful accusation, when it has little substance.... Your recollection of the events of that particular evening are fairly accurate, but you missed 2 small details, both of which you obviously cannot recall (given that you were drunk – I was too, but I remember), but I feel they change everything.

- (1) You said you woke up when we were having sex, and you stopped, to go to the toilet. Yes, completely true. However, you don't seem to recall the previous 10 minutes, where I was nodding off, and you initiated things. At this point, I remember thinking that this wouldn't go anywhere, as we were both drunk, but it did, and I went along with it, happily. I did not initiate this – if you think otherwise then ask yourself how often I initiated things in the last 4 years of our relationship – the answer is never – you simply don't respond to any type of pressure, including the pressure you put yourself under whenever you promised sex later – this never, ever subsequently happened, and I used to consider such a promise to be the death of any hopes for that evening. I accepted this pattern ages ago, and you didn't seem to notice. On that night (and every other drunken encounter going back many years) you initiated things, asked me to stop, and I complied. How is this a sexual assault?
- (2) You said when you came out of the toilet, I had turned my back on you, and was angry. What you don't seem to recall is that you were in the toilet for more than 10 minutes, closer to 15. After about 5 minutes, I began to wonder, and after 10, I resigned myself to that being another occasion where you changed your mind. You asked me if I was in a huff with you, and I said I was annoyed at myself and left it at that.

I like a bit of drunken sex, as it can be fun and uninhibited, but I've never wanted to do it without your knowledge and participation. Your accusation is the worst thing you have ever said to me, and it won't go away. I ask you to have a really good think about that evening, your recollection, and your perception. I can learn not to be upset, but not as long as you think this, and I think the opposite. Perhaps we could clear this up somehow...I'm sure you don't want any kind of cosy-up with me now, but if you can see your way to withdrawing your accusation, it might pave the way for a lessening of tensions, and on a personal level, bring me a level of respite."

*Pursuer*

[8] The pursuer is 47 and is employed as a health visitor. She continues to reside in what was the former matrimonial home. At the time of the incident with which this action is concerned she resided there with the defender and their two children. In December 2014 she had had a total hysterectomy. The timing of this procedure enabled her to identify the date range within which the alleged rape took place. It had happened sometime after her hysterectomy but before the defender's arrest in September 2015. She recalled that it was a Friday or a Saturday evening. She had gone to bed at around 11.30pm which was earlier than usual for a weekend night. Before going to bed she and the defender had shared a bottle of wine while watching tv in the sunroom which was downstairs in the house. They had had about half the bottle each. Neither of them was drunk. She felt tired which she attributed to having been out running earlier that day. She put her hand on the defender's knee and told him she was going to bed but then quickly took it away again in case he mistook it for a signal that she was initiating sex. The defender had previously told her that it was not fair for her to show him affection if she was not going to have sex with him. She then went upstairs and got ready for bed. She changed into a nightie but kept her underpants on. She got into bed on her usual side which was the right hand side and the one nearest to the en suite bathroom. The bedroom was very dark. She had closed the bedroom windows curtains and binds. The pursuer preferred to sleep in a very dark room. The defender did not go to bed at the same time as her. Before falling asleep she remembered hearing him in the downstairs toilet. She fell asleep easily. At some point after that she started to wake up which she attributed to a feeling of pressure on her bladder. Her initial thought was that she needed to go to the toilet but then drifted back to sleep. She was roused from sleep a second time again with a feeling of pressure in her bladder. She also felt



movement in her genital area. She opened her eyes and saw the defender positioned as such that his penis was inside her but with his body pulled back. When she opened her eyes he shrunk back and looked at her like he had been caught doing something he should not have been doing. She was able to see his face and body from the streetlight coming through the window blinds. She inferred that he must have opened the blinds that had previously been closed so that he could see. She had not consented to any sexual intercourse taking place as she had been unconscious. She told him she needed the toilet. He withdrew his penis and was positioned in a sort of sitting position at the end of the bed. She went straight into the en suite bathroom without putting the light on. She felt really confused and disorientated about what she had just experienced. She still thought that she needed to pee but when she sat down on the toilet seat she realised that she was still wearing her underpants. She assumed that the defender must have moved these to the side to penetrate her. She stayed in the bathroom for 15 minutes behind a closed and locked door. As she sat in the bathroom she remembers now having wondered about telling someone what had happened and possibly reporting it to the police but was worried about being believed. Unusually she did not have her phone with her as she had left it downstairs charging. When she came out of the bathroom she entered back into the bed quietly. No words were exchanged with the defender. He was on his side of the bed with his back to her. She was scared of challenging him because of the confrontational way he had behaved in the past when she had done so. She was able to see the time from a wristwatch left at her bedside as light was still coming in. The time was 1.30am. When she woke the following morning she had no recollection of what had happened. Her first recollection was not until the end of 2016 approximately a couple of weeks after the defender had left the former matrimonial home in November 2016. At that time she was in counselling and disclosed what had happened to her counsellor. She

was unhappy the lack of empathy shown from her counsellor in response. She was not given any advice by her counsellor. Shortly after that, in December 2016 or January 2017 she did however challenge the defender directly as to what had happened. She and the defender had been travelling in her car to attend at a branch of Santander bank in order to close a joint bank account. The account had been operated in respect of two rental properties the parties had owned. On the way home the defender had sought to persuade the pursuer to continue with the management of one of the properties. When she declined he suggested it was because it was too much work for her to which she told him it was due to her not wanting anything to do with him and went on to say “because I remember what you’ve done to me, I remember that you were having sex with me while I was sleeping”. He made contradictory responses and then denied it had happened. At or about this time she had become concerned that his communications around the separation and children were abusive and she decided to contact the defender’s criminal justice social work team. Thereafter she made a disclosure to a member of that team who then referred the matter to the police. At the initial police interview she declined to make a full statement because she did not feel comfortable doing so because one of the officers was a man. Some months later on 22 August 2017 the pursuer gave a statement to two female officers. No prosecution of the defender took place. The pursuer subsequently paid for and underwent Eye Movement Desensitising and Reprocessing (EMDR) therapy. She also began taking antidepressant medication.

[9] In 2008 the pursuer qualified as a midwife but gave up her registration around 2011/2012 because of difficulties obtaining employment and the care demands of her children. In September 2015 she started a return to practice course at a local university with the intention of requalifying as a health visitor. She was not able to get back on the Nursing

and Midwifery Council register until several months later. She began a post-graduate full-time one year health visitor course in August 2016. She required extensions to complete the course. She was struggling emotionally and practically. She found several aspects of her course “triggering” in that they related to child protection and domestic abuse. She did not complete the course until around March 2018 and began full-time work as a health visitor in May 2018. While she had been able to work from the date that she should have graduated, being August 2017, she was on restricted and less well paid duties from then until May 2018.

[10] In cross-examination the pursuer rejected the suggestion that her evidence was motivated by regret of having had sex with the defender that evening. She denied asking him if he was in a huff after she came out of the bathroom. On being pressed she explained her decision to stay in the bedroom was to avoid a confrontation. She rejected the suggestion that she had made up a story of being raped by the defender because she was angry and upset with him because of the circumstances leading to him being monitored by the criminal justice social work department namely his conviction for possession of child pornography. She confirmed that only communication only by way of WhatsApp had been at her insistence. On being asked as to the terms of the lengthy WhatsApp message sent by the defender on 12 September 2017 she denied the suggestion therein that she had “initiated things”. She was asleep and unconscious. She did not accept that the defender had not attempted to initiate sex in the last 4 years of their relationship. She thought she possibly might have responded to that WhatsApp message.

[11] In re-examination she confirmed her that she had responded confirmed to the defender’s WhatsApp message of 12 September 2017 with her own message on 23 September 2017. That message *inter alia* contained the statement “Never mention the

evening you sexually assaulted me again. I have no intention of discussing my abuse with the abuser”

*The pursuer's aunt ("M")*

[12] M is a registered mental health nurse. She spoke to her close and confiding relationship with the pursuer. She spoke to a disclosure made by the pursuer in September 2021 concerning her waking up to discover the defender having sex with her. While making the disclosure she was visibly distraught and upset. M had concerns for the pursuer's mental health. She was not cross-examined.

*Dr Mala Singh, Consultant General Adult Psychiatrist*

[13] Dr Mala Singh spoke to and adopted her report dated 31 December 2020. That report sets out her qualifications and experience. Her report was based on a virtual interview she had with the pursuer on 28 December 2020. In the course of that interview the pursuer disclosed that her husband had had non-consensual sex with her. During the interview she displayed signs of severe distress. In her opinion the memory suppression described by the pursuer was explainable as a form of self-defence mechanism to combat the onset of such distress by recalling the index event. Once she began to experience flashbacks of the incident there were also other factors at play which would have acted as disincentives to report it namely trying to keep her life together in particular her home, finances, career and children. In her opinion, at the time of interview, the pursuer displayed the clinical features of post-traumatic stress disorder (ICD-10 43.1) with co-morbid depressive disorder of mild (ICD10 F33), and Generalised Anxiety Disorder (ICD 10 F41.1). The symptoms of PTSD developed after the incident of rape. On a balance of probabilities Dr Singh attributed

70/60 per cent of the pursuer's PTSD symptoms to the sexual assault. Her pre-existing anxiety and depression had been aggravated by the onset of PTSD. Her capacity for work and studying would have been impaired in the aftermath of an assault as she described.

[14] In cross-examination Dr Singh confirmed that the symptoms of PTSD were the repeated reliving of events. It could not be caused by long term anxiety. Anxiety and depression are not uncommon in persons suffering from PTSD but do not cause it. Neither could the lifestyle pressures she referred to as being the disincentives to reporting the rape.

### *Defender*

[15] The defender gave a brief account of the parties' relationship, marriage and subsequent separation. The reason for their separation was his being charged with possession of child sexual abuse material. His recollection of the incident in question was that it had been a typical Friday whereby they both got drunk on the sofa together while watching television. He described himself as being "very drunk just short of the point of being sick". While he thought he was drunker than normal he maintained that he still had a clear recollection. The pursuer had probably drunk more than he had, which was usually the case. He recalls they went to bed together and they fell asleep together. After 5 minutes he was wakened up because the pursuer was fondling his genitals. That led to sex probably after some foreplay though he could not remember the detail of that. He penetrated her with his penis. She was naked. He did not ejaculate because after a few minutes she had pushed him away and although she pulled him back again she said she had to go to the toilet at which point he withdrew his penis. He had been on top of her and he rolled from her side on to his side of the bed. She was in the toilet for "three, four or five minutes maybe" and wondered why she was taking so long. He rolled onto the side facing away

from her side of the bed and en suite bathroom, She came out and asked him he was in a huff with her. He told her he was angry and qualified it by saying he was angry with himself because what had just happened had been a repeat of what had taken place in the past whereby the pursuer had started having sex with him when they were both very drunk. After that nothing further was said. There was no discussion the following morning nor at all until late 2016 or early 2017. He was absolutely sure the pursuer had consented to sex with him that evening. He had never had sex with her without her consent. He remembered the incident clearly “despite the fact that I was drunk”. He recalled the pursuer accusing him of having raped her that night when they were driving back from attending a bank together. It had been in the course of a heated discussion probably an argument. He had been “gobsmacked, hurt and upset”. He could not formulate a response at the time beyond a firm denial. After that car journey the pursuer had restricted their communications to WhatsApp messaging. He recalled a message from her saying that she was no longer prepared to discuss his sexual assault. It was in response to that that he sent the lengthy message on 12 September 2017. He confirmed he had written that message. He explained the reference to the apology for having made her “feel threatened in any way” to a reference to one of the many arguments they had had following his arrest and the pursuer’s claim that he had moved towards her in a threatening way. He could not remember what that particular argument had been about. He confirmed that part of the message denying he had ever become physical towards the pursuer. He confirmed that he was angry about the accusation of rape as stated in the message but he was not “in an angry state”. He was angry because the accusation was false. The statement that he had “hurt her badly” was a reference his arrest and the consequences following on from that. On being asked to comment on the truth of that part of his message which begins “You said you woke

up when we were having sex, and you stopped to go to the toilet. Yes, completely true...". He said he had "misphrased" it but what he meant was "yes, she stopped me. But what I didn't mean was, yes, she woke up, it was too dark for me to have noticed anyway". It was completely true that they had stopped having sex and she went to the toilet. The message was correct in that the pursuer had initiated sex that evening. He considered that he entire piece was a denial and read like that. When the pursuer had come out of the bathroom she had asked if he was in a huff with her. He had already turned his back to face his side of the bed to avoid the light and lie on his good ear so he could fall asleep more quickly. In response to her question he said that he was angry and which he then qualified by explaining that he was angry with himself under reference to this being a repeated incident of the pursuer initiating but not following through with completed sexual intercourse. The reference in the message to "mistakes" was intended to refer to his conviction and certain financial issues surrounding their separation. He confirmed that the pursuer had responded his WhatsApp message with her own dated 23 September 2017.

[16] In cross-examination he confirmed recalling the pursuer had had a hysterectomy in December 2014. On the night in question he had drunk between two thirds and a bottle of wine. He confirmed it had been either a Friday or Saturday night. He was drunk. Typically they would share two bottles of wine: he would have two thirds and the pursuer a bottle and a third. He was unable to remember whether there were other drinks consumed but he could remember that they both went to bed very drunk. The pursuer was lying when she said he had had sex with her when she was asleep. He confirmed that there had probably been foreplay prior to sex but he could not specifically remember. He remembered that she was naked but could not remember at what point she had removed her underwear. She would have done that herself. He denied that she had gone to bed before him and had

made it clear that she did not want sex to happen. She had not touched his knee and then withdrawn her hand. He had not remained downstairs. They had gone to bed together. He agreed that sex took place around 1.30 am. It was unlikely the pursuer would have worn a nightie. It was more likely she wore pyjama bottoms and a top but he could not remember what she wore to bed that night. The pursuer had initiated the sex so he “would assume she was awake when she did it”. The statement in his WhatsApp message “yes completely true”, following reference to the pursuer waking up when they were having sex, had been “misphrased”. When he had written “completely true” he had intended it only to refer to the sex stopping because the pursuer need to go to the toilet. He accepted that he had taken a great deal of care in typing the long WhatsApp message but explained the mistake because he had done it on his phone.

### **Submissions**

[17] I am grateful to counsel for both parties for their detailed written submissions which were mostly adhered to and developed at the hearing thereon. I do not propose to rehearse these at length but rather summarise them as follows.

### ***Pursuer***

[18] For the pursuer it was submitted that the act of rape was an actionable civil wrong. While it had the same definition in civil law as in criminal law the standard of proof was on the balance of probabilities. A person who was asleep was incapable of consenting to sexual intercourse. There could be no prior consent or consent in general to sexual intercourse that took place when the complainer was asleep. Reference was made to sections 1, 12, 14 and 15 of the Sexual Offences (Scotland) Act 2009, *DC v DG and DR* 2018 SC 47 (Outer House), 2018



SC 171 (Inner House); *GW v HM Advocate* 2019 JC 109; *LW v HM Advocate* 2023 JC 184; *KT v Procurator Fiscal Falkirk* 2019 SCCR 11 and *R v Cooper* [2009] UKHL 42.

[19] To succeed in the present case the pursuer required to prove on the balance of probabilities that she was asleep at the time the admitted act of sexual intercourse had taken place. She had discharged that burden based on her own evidence along with the supporting evidence led by her or agreed in terms of the joint minutes in particular the terms of the defender's WhatsApp message. That message contained an admission from the defender that he had sex with her while she was asleep and incapable of giving consent. The pursuer was a credible and reliable witness as were her aunt and Dr Singh. In contrast the defender was neither credible nor reliable. His explanation of that the WhatsApp message was contained a typo was not credible when viewed against the content and length of the message and the context in which the admission was made. The rape and the aftermath, namely it being the primary cause of her diagnosed of PTSD was the cause of her loss, injury and damage the quantum of which had been agreed.

### ***Defender***

[20] For the defender it was submitted that the issue in the case was a narrow one: did the pursuer consent to the sexual intercourse which the defender admits took place? No issue was taken with the authorities referred to by counsel for the pursuer as far as the expression of general principles were concerned but they were distinguishable on their facts. It was accepted that the pursuer was incapable of consenting if she had been asleep. It was also accepted that the parties' prior sexual conduct was irrelevant. The evidence of the defender as to the pursuer being awake and indeed having initiated sex should be accepted. The evidence of the pursuer on the other hand should be treated with caution. The parties

were in an established relationship with the defender. Reference was made to the Scottish Law Commission report on Rape and Other Sexual offences (No. 209, December 2007) at paragraph 2.7 where it was observed that some situations, for example in a long-standing relationship in which there is regular engagement in sexual activity, sexual conduct may proceed “without there being a discussion or negotiation about consent”. It was submitted that the pursuer’s evidence that she had had been asleep was lacking in credibility and reliability. In this regard reliance was placed on the account which she gave in her police statement. The court could still have regard to this inconsistency in assessing credibility and reliability even if not specifically put to the pursuer in evidence. (For completeness I should also record that a suggestion in the defender’s written submission that there was a further inconsistency between the pursuer’s evidence, her police statement and the averment on record, in relation to the pursuer feeling pain during sexual intercourse in the period following her hysterectomy, was not insisted upon.) It was suggested that the pursuer had been motivated to make a false allegation of rape against the defender as a consequence of being angry, hurt and humiliated following upon his arrest and conviction for possessing child pornography. The onus of proof was on the pursuer. She had not met the threshold. In determining the central issue the evidence of M was of little value. At its highest it was evidence of distress sometime after the incident. Even then her memory may not be reliable. Reference was made to some general dicta as to the approach a commercial court might take to evidence of recollections of events some years in the past by Leggatt J in the case of *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anr* [2020] 1 CLC. I indicated to counsel for the defender that I struggled to see the relevance of this first instance English decision in the context of the present case and he was content to withdraw any reliance on it. As far as the evidence of Dr Singh was concerned it was accepted that this had not been rebutted and

accordingly required to be accepted. It was accepted that if liability was established then causation followed. Damages had been agreed.

[21] In response to these submissions senior counsel for the pursuer pointed out that the pursuer's police statement had not been put to her on the basis that it was inconsistent with her evidence. Accordingly no regard should be had to it failing which little weight should be attached to any suggested inconsistency with her oral evidence. The court should also disregard any evidence as to parties' prior sexual conduct or who initiated sexual relations. Such evidence was collateral and should be excluded from consideration on the same basis it was under the criminal law. The Scottish Law Commission report on Rape and Other Sexual offences (No. 209, December 2007) was of no assistance in determining the issue in the present case. In any event the report had been superseded by the 2009 Act and the case law thereon. In determining the total sum sought by way damages the pursuer sought decree in terms of the amended crave , being £138,053 with interest thereon from the date of decree. This crave was the sum of the agreed damages in terms of the two joint minutes. No additional interest was sought save that due from the date of decree until payment. No deduction was required in respect of recoverable benefits as was demonstrated in terms of the usual certificate from the Department of Work and Pensions

### **Decision and reasons**

[22] There was no issue that the appropriate standard of proof in this case is that on the balance of probabilities. It was suggested by senior counsel for the pursuer that, under reference to the first instance decision in *DC v DG and DR, supra*, the evidence should be carefully examined and scrutinised ( (para [274]). As a generality I accept that that is the proper approach to the assessment of all evidence in a case but not to the extent that there is

any rule that the seriousness of an allegation or of the consequences of upholding an allegation justifies a requirement of more cogent evidence where the civil standard is applied; there is no such thing as a heightened civil standard: *Birmingham City Council v Jones* (SC (E)) [2024] AC 168 per Lord Lloyd-Jones JSC at paragraphs 51 & 60.

[23] As I have noted parties' respective counsel were as one in characterising the issue for determination as a sharp one: was the pursuer asleep at the time of the admitted act of sexual intercourse? I have set out both parties' accounts of the evening. It will be seen, however, from the findings in fact and findings in fact and law that I have made that I have determined the issue in favour of the pursuer. I did so on an assessment of all the evidence in the case. I accepted the account given by the pursuer as credible, reliable, and internally consistent with all the other evidence in the case, including certain aspects of the defender's evidence which I shall return to shortly. Before that, however, I will deal with the main point advanced by counsel for the defender that was submitted as impugning her credibility, namely the pursuer's description of the incident in her police statement. In that statement she is recorded as stating "I opened my eyes and saw (P) at the end of the bed, he was leaning over me penetrating my vagina". This part or indeed any of the pursuer's police statement was not put to her for the purposes of testing her credibility and reliability. I do not agree with senior counsel for the pursuer's principal submission that this precludes it being taken account in an assessment of credibility and reliability, not least because it was admitted being her statement in the first joint minute of admissions. But the failure to cross-examine the pursuer on it could potentially significantly affect the extent to which weight might be attached to any inconsistency disclosed. As it is I do not read the sentence in the police statement relied on as being inconsistent with the pursuer's evidence. I do not accept counsel for the defender's suggestion that what was described in the former was the

defender being positioned somehow incongruously literally at the end of the bed while the sex act was being carried out. Rather I read it as according with pursuer's evidence of the defender penetrating her vagina with his penis while attempting to avoid contact between their upper bodies and on her waking to discover this him withdrawing and sitting back on the bed.

[24] The pursuer's description of the defender's positioning in my view also leads to a strong inference that he did this to reduce the possibility of waking the pursuer up while he was having sex with her. Accordingly in this respect it is internally consistent with the rest of the pursuer's account of what took place earlier that evening from going to bed to the sensation that caused her to wake up to discover the defender having sexual intercourse with her. Her account of what happened and the relative timings of events was entirely straightforward and credible. There is also significant support for her being raped in the way she described by the subsequent development of PTSD, as spoken to by Dr Singh, and there being no other identifiable cause of that.

[25] In contrast I consider that the defender's account of the evening leading up to the act of penetration and the immediate aftermath to be vague and contradictory. I agree with the criticisms made of his evidence by senior counsel for the pursuer. The defender's assertion of being very drunk just short of being sick but retaining a clear recollection seems inherently unbelievable. Despite claiming to have that quality of recollection there was no detail as to what if any foreplay there was prior to sex taking place and how as he would have it the pursuer goes from being dressed in night clothes to being naked. In my view a telling and possibly unguarded admission was the disclosure made during questioning on the WhatsApp message that it was too dark for him to have noticed the pursuer waking up. One interpretation of that admission is that he was indifferent as to whether or not the

pursuer was asleep when he began penetrative sex. While I do not discount this as a possibility, and which on its own belies the notion of consensual activity, it also chimes with the pursuer's evidence of the room being very dark when she went to bed. I accept the pursuer's unchallenged evidence that by the time she wakes up the blinds have been opened to allow in streetlight. The inference that could be drawn from these strands of evidence is the defender has come into the bedroom finding it as dark as the pursuer described. It is so dark he does not know whether the pursuer is asleep or not. Thereafter he opens the blinds as the pursuer surmised he had done to allow street light in which would have shown that she was asleep. But he then proceeds to have sex with her anyway adopting the somewhat disengaged physical position described by the pursuer.

[26] That the pursuer did indeed wake up while the defender was having sex with her was in any event admitted by him in the WhatsApp message. I agree with senior counsel for the pursuer's submission that the defender's explanation that this was due to some sort of error or typo as being incredible. It is a lengthy message, with the section reproduced at paragraph 7 of this Note alone extending to just under 600 words. It bears to be a carefully composed piece of prose and indeed the defender accepted as much. It is grammatically correct and well punctuated. The only error I have detected in the entire section is the omission of the letter "r" at the end of the first word where it appears in second sentence of the final paragraph beginning "You accusation is". This is clearly a typo but not one changing the meaning the sentence in which it appears. I do not accept that the admission made can be put into the same category as such a typo or otherwise was "misphrased". In my view it was not intended to convey anything other than the plain meaning of the words "You said you woke up when we were having sex, and you stopped, to go to the toilet. Yes, completely true" as they appear in the WhatsApp message.

[27] For completeness, I should mention that lodged as a production for the defender was a document entitled “Statement of the Defender”. The defender was briefly cross-examined on part of its contents in relation to the WhatsApp message but nothing of significance arose from those questions. The provenance of the document remains unclear, that is whether it is truly a statement of the defender as prepared by or adopted by him or rather a document more in the nature of a precognition. Both parties’ counsel were content I could leave it out of account in determining the issues in the case.

### **Expenses**

[28] Both parties were agreed that whatever the outcome expenses should be reserved pending a hearing thereon. I shall direct that Agents for both parties liaise with the sheriff clerk to identify a suitable date for that hearing.