Neutral Citation Number: [2023] EWHC 882 (KB)

Case No: QB-2020-003856

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 April 2023

Before :

THE HONOURABLE MRS JUSTICE HEATHER WILLIAMS DBE

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Between :

MR WILLIAM HAY	**Claimant**
- and –	
MS NINA CRESSWELL	**Defendant**

- -
- -

Mr B Coulter (instructed by **TT Law Ltd**) for the **Claimant**
Mr J Price (instructed by **Bindmans LLP**) for the **Defendant**

Hearing dates: 20 – 24 February 2023

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Approved Judgment

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This judgment was handed down remotely at 10.30am on Wednesday, 26 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE HEATHER WILLIAMS

Mrs Justice Heather Williams:

Introduction

1. Mr Hay brings a claim for libel against Ms Cresswell in relation to her June and July 2020 publication of allegations that he had sexually assaulted her on the night of 27 – 28 May 2010 after the two had met in a nightclub in Sunderland.

2. Whilst there is some dispute about the precise meaning of the defendant's publications, it is accepted that she alleged a violent sexual assault on the part of the claimant and that these words bore a defamatory meaning. It is also admitted that the claimant sustained serious harm. However, Ms Cresswell relies upon defences of truth and/or that the publications were on a matter of public interest. To a more limited extent she also relies upon a defence of qualified privilege.

3. The claimant is a tattoo artist. He says that the publications caused him great embarrassment, distress and damage to his reputation. He seeks general damages and also injunctive relief. A claim for aggravated damages is not pursued and no claim is made for financial loss.

4. The publications that form part of the claim are as follows:

    i) On 4 June 2020 the defendant published a blog on the telegra.ph website ("the telegra.ph publication");

    ii) On 29 June 2020 the defendant contacted the claimant's girlfriend and business partner, Emma Sweeney, by way of a Facebook message, attaching the telegra.ph publication ("the FB message publication");

    iii) On 3 July 2020 the defendant emailed Ms Sweeney ("the email publication")

    iv) On 22 July 2020 the defendant published two posts on Facebook ("the FB posts publications");

    v) On 22 July 2020 the defendant published a post on Instagram and shared the post to an Instagram story ("the Instagram publications").

5. The Amended Particulars of Claim also relied upon the defendant's Twitter post of 22 July 2020. However, this post did not name the claimant and the pleading did not rely upon extraneous material from which it was said that the claimant would have been identified as its subject. During the course of the trial, Mr Coulter indicated that he did not pursue the claim in relation to this post.

6. The defendant says that her primary intention in publishing these materials was to alert women who could otherwise become victims of sexual assault at the hands of the claimant, in particular in the context of his work as a tattooist. In summary, she says that in May 2010, when she was a 20 year old student, she met the claimant in 'Passion' nightclub, via a mutual friend, Richard Beston, and that he seriously sexually assaulted her as he was walking her home.

7. Further or alternatively, the defendant relies upon the defence in section 4 of the Defamation Act 2013 ("the 2013 Act") that the publications complained of were or

formed part of statements on a matter of public interest and she reasonably believed that publishing them was in the public interest, given that she reasonably believed the claimant had assaulted her and given the prevalence of sexual abuse within the tattoo industry and the need to protect women from this.

8. In relation to the FB message publication and the email publication only, the defendant also avers that the publications are protected by qualified privilege as she had a duty to communicate these matters to Ms Sweeney as the claimant's employer or business partner, and Ms Sweeney had a duty to receive them, given the claimant would routinely come into intimate contact with unaccompanied female clients in the course of his tattooing work.

9. The claimant does not admit that the defendant was sexually assaulted on her way home from the nightclub and he maintains that if such an assault occurred, he was not the perpetrator and the defendant's allegation in this regard is a deliberate fabrication on her part. Accordingly, he says that her truth defence and her public interest defence must fail. Furthermore, that the publications to Ms Sweeney were not on occasions of qualified privilege and, in any event the defence fails as the defendant acted maliciously in publishing knowingly false allegations.

10. Accordingly, the disputed issues for the court to resolve are:

Defamatory meaning:

i) The natural and ordinary meaning of the words used;

Truth defence:

ii) Whether the defamatory sting of the publications complained of was substantially true;

Publication in the public interest defence:

iii) Whether each of the publications complained of were statements on a matter of public interest or formed part of such statements;

iv) If so, whether the defendant believed that publishing them was in the public interest; and

v) If so, whether that belief was reasonable;

Qualified privilege defence (FB message publication and email publication only):

vi) Whether the defendant had a duty to communicate those statements to Ms Sweeney;

vii) Whether Ms Sweeney had a corresponding interest in receiving them;

viii) If so, whether the publications were made maliciously

If liability is established:

ix) What compensation should be awarded by way of general damages;

x) Whether the court should grant an injunction to prevent the defendant from repeating the defamatory allegations complained of and/or requiring her to remove publications that can still be accessed.

11. Mr Price accepted that if the truth and the publication in the public interest defences succeeded, then there was no utility in the court determining the qualified privilege defence.

12. The parties agree that the central question for the court is whether or not the defendant has proved the sting of her allegation that she was violently sexually assaulted by the claimant in 2010. In this regard the court is faced with the parties' starkly opposing accounts, which, on the way they put their respective cases, leaves little room for the possibility of mistake or misunderstanding as the explanation for this divergence.

13. Unsurprisingly in the circumstances, the claimant and the defendant were the central witnesses that I heard from during the trial. In addition, the claimant called Richard Beston and Joe Jackson, who were friends and fellow tattooists who he was with at Passion nightclub on 27 – 28 May 2010. The claimant also relies upon statements from Ms Sweeney, Marcus Maguire and Daniel Kelly. These statements primarily address the effect that the publications had upon Mr Hay. The defendant called Gillian Cresswell, her mother; Michael Cormack, who was one of her flatmates in May 2010; and Marie Casey, who was at Passion nightclub on the evening in question and exchanged messages with her in the aftermath.

14. The structure of this judgment is as follows:

- The legal framework: paras 15 – 57;
- The publications: paras 58 – 69;
- The pleadings and the course of the proceedings: paras 70 – 91;
- The trial: paras 92 – 97;
- The natural and ordinary meaning of the words used: paras 98 – 100;
- The undisputed facts and circumstances: paras 101 – 153;
- The truth defence: discussion and conclusions: paras 154 – 198;
- The public interest defence: discussion and conclusions: paras 199 – 214;
- Overall conclusions and outcome: paras 215 -217.

The legal framework

15. Apart from the application of the presumption of regularity (paras 47 – 57 below), the parties are agreed on the applicable legal principles.

16. In relation to each of the publications relied upon, it is necessary for the claimant to establish that the defendant was responsible for their publication, that the statements referred to him and that they were defamatory. The first two of these propositions are not in issue in this case. Whilst there is some dispute as to the meaning of the words used, the defendant accepts that either meaning is defamatory.

Defamatory meaning

17. A statement will be defamatory at common law if, in its natural and ordinary meaning, it substantially affects in an adverse manner the attitude of other people towards the claimant or has a tendency to do so: *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB), [2011] 1 WLR 1985, para 95.

18. The judgment of Nicklin J in *Koutsogiannis v The Random House Group Ltd* [2020] 4 WLR 25, paras 11 – 12, summarises how the court determines the meaning of allegedly defamatory words. I will summarise the key points for present purposes. The court's task is to determine the single natural and ordinary meaning of the words complained of, which is the meaning that the hypothetical reasonable reader would understand the words to bear. This hypothetical reasonable reader is not naïve but nor is he unduly suspicious. The publication must be read as a whole and the context may give words a more (or less) serious defamatory meaning. No evidence beyond the publication complained of is admissible in determining the natural and ordinary meaning of the words.

19. Section 1 of the 2013 Act provides that: "A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant". Serious harm is not in issue in this instance.

Truth

20. The statutory defence of truth under section 2(1) of the 2013 Act is made out if the defendant can show that the imputation conveyed by the statement complained of is "substantially true". Whilst the common law defence of justification is abolished by section 2(4), the established common law principles continue to apply to the new statutory defence: *Bokova v Associated Newspapers Ltd* [2019] QB 861, Nicklin J, para 28, citing Jay J in *Serafin v Malkiewicz* [2017] EWHC 2992 (QB), para 103.

21. The pertinent principles are:

    i) In order to satisfy the statutory test of showing that the defamatory imputation is "substantially true", the defendant has to establish the 'essential' or 'substantial' truth of the sting of the libel. To prove the truth of some lesser defamatory meaning does not provide a complete defence: *Bokova* para 28, citing *Chase v News Group Newspapers Ltd* [2003] EMLR 11, para 34;

    ii) The court should not be too literal in its approach. Proof of every detail is not required where the relevant fact is not essential to the sting of the publication; the task is "to isolate the essential core of the libel and not be distracted by inaccuracies around the edge – however extensive": *Bokova* para 28, citing *Rothschild v Associated Newspapers Ltd* [2013] EMLR 18, para 17 and *Turcu v News Group Newspapers Ltd* [2005] EWHC 799 (QB), para 105; and

iii) The court will have well in mind the requirement to allow for exaggeration at the margins, and also will have regard to proportionality. The question is: "Having regard to its overall gravity and the relative significance of any elements of inaccuracy or exaggeration, has the substantial sting been proved?": *Riley v Murray* [2022] EMLR 267, para 51, citing *Turcu*, paras 105 and 111.

Publication on a matter of public interest

22. As material, section 4 of the 2013 Act provides:

> "(1) It is a defence to an action for defamation for a defendant to show that –
>
> (a) the statement complained of was, or formed part of, a statement on a matter of public interest; and
>
> (b) the defendant reasonably believed that publishing the statement complained of was in the public interest.
>
> (2) … in determining whether the defendant has shown the matters mentioned in subsection (1), the court must have regard to all the circumstances of the case.
>
> (5) for the avoidance of doubt, the defence under this section may be relied upon irrespective of whether the statement complained of is a statement of fact or a statement of opinion.
>
> (6) The common law defence known as the Reynolds defence is abolished."

23. Accordingly, as identified by Nicklin J in *Turley v Unite the Union* [2019] EWHC 3547 (QB), para 138(ii), when considering whether the defendant has established this defence, there are three questions to be addressed:

i) Was the statement complained of, or did it form part of, a statement on a matter of public interest;

ii) If so, did the defendant believe that publishing the statement complained of was in the public interest; and

iii) Was that belief reasonable?

24. It is significant to note at the outset that the section 4 defence is not confined to the media; it is available to anyone who publishes material of public interest in any medium: *Economou v De Freitas* [2018] EWCA Civ 2591, [2019] EMLR 128, paras 80 and 110. Giving the leading judgment, Sharp LJ observed: "The question in each case was whether the defendant behaved fairly and responsibly in gathering and publishing the information" (para 80). I return to this point when I summarise the correct approach to the third element of the test from para 31 below).

25. In deciding whether the statement in question is on a matter of public interest, it is necessary to consider the article as a whole and not isolate the defamatory statement:

Economou at para 83, citing Lord Hoffman in *Reynolds v Times Newspapers* [2001] 2 AC 127, paras 48, 49 and 51.

26. In *Serafin v Malkiewicz* [2020] UKSC 23, [2020] 1 WLR 2455, Lord Wilson emphasised that the question is whether the statement is "on a matter of public interest", not whether it is "in the public interest" (para 75).

27. Whether a statement is on a matter of public interest is an objective question. As Warby J (as he then was) observed in *Doyle v Smith* [2018] EWHC 2935 (AB), [2019] EMLR 15: "It must … be possible to look at the statement and identify and describe quite shortly something the words are about – one or more topics or subjects – which is or are of public interest" (para 64).

28. Public interest in this context is a broad concept, *Turley* para 138 (vi).

29. The *Economou* litigation concerned a defamation claim brought against the father of Eleanor de Freitas. His daughter had killed herself shortly after the Crown Prosecution Service ("CPS") had taken over a private prosecution for perverting the course of justice which the claimant had begun against her following her earlier complaint to police that he had raped her. Her father had given extensive statements to the media and had authored articles. The Court of Appeal was primarily concerned with the third question I have identified, as it was accepted that the statements complained of were or formed part of a matter of public interest. During her analysis Sharp LJ referred to "the strength of the public interest considerations" identified by the trial judge, including whether the CPS had gone wrong in deciding to prosecute the defendant's daughter and "more generally, a strong public interest in ensuring that victims of rape come forward and an obvious risk that they may be deterred from doing so by the risk of prosecution for perverting the course of justice" (paras 89 – 91).

30. The second element of this defence concerns the defendant's subjective belief. It is to be assessed at the time when the statement was published: *Turley*, para 138(viii). Section 4(1)(b) requires a belief that publication of "the statement complained of" is in the public interest, that is to say the words complained of, rather than the defamatory imputation which those words convey: *Economou*, paras 92 – 93.

31. The defendant must have addressed their mind to the issue. This element is not established by showing that a notional reasonable person could have believed that the publication was in the public interest, but rather by establishing that the defendant did believe that it was: *Turley*, para 138(vii).

32. As regards the third element, a belief will be reasonable if it is arrived at after conducting such enquiries and checks as it is reasonable to expect of the particular defendant in all the circumstances of the case: *Economou*, para 101; *Serafin*, para 67.

33. Lord Nicholls identified ten non-exhaustive factors as relevant to the applicability of the previous common law defence in *Reynolds* at 204 – 205C. In *Economou*, the Court of Appeal confirmed that these remained of relevance to the interpretation of the section 4 defence (para 76). In *Serafin* Lord Wilson emphasised that the *Reynolds* factors were not to be used as a checklist, but that one or more of them might be relevant to whether the defendant's belief was reasonable within the meaning of section 4(1)(b) (para 69).

34. Lord Nicholls had said:

> "The elasticity of the common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case. The elasticity enables the court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern. 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. 2. The nature of the information, and the extent to which the subject-matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axe to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The allegation may already have been the subject of an investigation which commands respect. 7. Whether comment was sought from the plaintiff. 8. Whether the article contained the gist of the plaintiff's side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10. The circumstances of the publication, including the timing."

35. In *Economou* the first instance judge had held that it would not be appropriate to hold the defendant to the standard that would be required of a journalist; his role was closer to that of a source or a contributor. Dismissing the claimant's appeal, Sharp LJ observed that that the judge had been right not to treat the *Reynolds* factors as "key to the determination of reasonableness in this case" (para 102). At para 110 she said:

> "Section 4 requires the court to have regard to all the circumstances of the case when determining the all-important question arising under s.4(1)(b): it says the court must have regard to all the circumstances of the case in determining whether the defendant has shown that he or she reasonably believed that publishing the statement complained of was in the public interest. In my judgment, all the circumstances of the case must include the sort of factors carefully identified by the judge, including, importantly, the particular role of the defendant in question. The statute could have made reference to the *Reynolds* factors in this connection, but it did not do so. That is not to say however, that the matters identified in the non-exhaustive checklist may not be relevant to the outcome of a public interest defence, or that, on the facts of the individual case, the failure to comply with one or some of the factors, may not tell decisively against a defendant. However, even under the *Reynolds* regime, as Lord Nicholls made clear, the weight to be given to those factors, and any other relevant factors, would vary from case to case. As with *Reynolds* therefore, with its emphasis on practicality and flexibility, all will depend on the facts."

36. Lord Wilson cited this passage in *Serafin*, albeit emphasising that the *Reynolds* factors were not a checklist and that Parliament had made its intention clear in that regard (para 69). He observed that a failure to invite comment from the claimant prior to publication would always be the subject of consideration under subsection (1)(b), but that it was too strong to describe a prior invitation to comment as a "requirement" (para 76). In *Economou*, the Court of Appeal decided that on the particular facts of the case, the first instance judge had been entitled to conclude that incorporating the "claimant's side of the story" would have made little sense (para 112).

37. The authors of *Gatley on Libel and Slander* (13th ed) discuss the inter-relationship between a defendant knowing that what they publish is untrue and the section 4 defence at 18-021 as follows:

> "… Can it ever be consistent with responsible journalistic standards or a reasonable belief that publication is in the public interest to publish what you know or believe to be untrue? There must be some cases where it is, as for example where a newspaper, as it may be required to do if it is to rely on a defence of privilege or other public interest defence, publishes a version of events by the claimant which its editor and journalists find unconvincing or even believe to be false. Or where it is a case of reportage in which accusations and counter-accusations are being reported. The newspaper's attitude may often be 'a plague on both your houses'; but its opinions may favour one side and it is submitted that it should not be at risk of losing protection on that ground so long as it reports the matter in a neutral manner. However, outside example of this kind the answer must surely be no. In the memorable words of Lord Hobhouse in *Reynolds*, '[n]o public interest is served by publishing or communicating misinformation', especially where the publisher knows or believes what he is disseminating is untrue." (Emphasis added.)

The standard of proof

38. The burden of proof rests on the defendant in relation to the defences that I have discussed. The applicable standard of proof is the balance of probabilities. The correct approach was summarised by Nicol J in *Depp v News Group Newspapers Ltd & Wootton* [2020] EWHC 2911 (QB) in the context of a truth defence as follows:

> "41. As for the standard of proof, the starting point is that these are civil proceedings and in civil proceedings the standard of proof is the balance of probabilities i.e. is it more probable than not that the article was substantially true in the meaning that it bore? In this case, is it more likely than not that the claimant did what the articles alleged? The common law knows only two standards of proof: beyond reasonable doubt … which applies in criminal cases and certain other immaterial situations and the balance of probabilities (which applies in civil cases) – see *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, 586. The 'balance of probabilities' simply means as Lord Nichols aid in *Re H*, that,

> "a court is satisfied an event occurred if the court considers, on the evidence, the occurrence of the event was more likely than not."

42. Although there is a single and unvarying standard of proof in civil proceedings, the evidence which is required to satisfy it may vary according to the circumstances. *In Re D* [2008] 1 WLR 1499 at [27] Lord Carswell approved what had been said by Richards LJ in *R (N) v Mental Health Review Tribunal (Northern Region)* [2006] QB 468 at [62] who had said,

> "Although there is a single *standard* of proof on the balance of probabilities, it is flexible in its *application*. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities." [emphasis in the original]

43. Simon J. also quoted the same comments by Richards LJ when considering the defence of justification in the course of his judgment on a libel claim – see *Hunt v Times Newspapers Ltd* [2013] EWHC 1868 (QB). He said at [76],

> "Where the allegation is one of serious criminality (as here) clear evidence is required."

Fallibility of memory

39. Although the decisions I have to make in this case largely concern an assessment of who is telling the truth, Mr Coulter emphasised the line of authorities where the fallibility of memory has been discussed. He did so because of the emphasis that is given in these judgments to the importance of contemporaneous documentation. In this case the claimant puts a great deal of store on the Northumbria Police incident log completed on 28 May 2010 and what is said to be an absence of contemporaneous documentation supportive of the defendant's account.

40. In *Gestmin SGPS SA v Credit Suisse (UK) Limited* [2013] EWHC 3560 (Comm), Leggatt J (as he then was) noted that memory was fallible and that research had demonstrated that memories were fluid, malleable and constantly being rewritten whenever they are retrieved, even in relation to particularly traumatic or shocking events (paras 16 – 17). He also explained how the process of civil litigation itself subjects the memories of witnesses to powerful biases (paras 19 – 20). He continued:

> "22. In light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view,

> to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings of inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose … But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

41. In *Prescott v The University of St Andrews* [2016] SCOH 3, Lord Petland referred to Leggatt J's observations in *Gestmin*, adding:

> "42. The process of attempting to remember events in the distant past is an inherently fallible one; it is a process that is highly susceptible to error and inaccuracy. Our efforts to think back many years to recollect the details of past events are liable to be affected by numerous external influences; involvement in civil litigation can in itself operate as a significant influence… Having seen and heard the pursuer give evidence, I have come to the view that I must evaluate the reliability of his claimed recollections with caution. I have wherever possible, tested his evidence against the other evidence in the case and I have considered objectively where the probabilities lie."

42. In *Sloper v Lloyds Bank Plc* [2016] EWHC 483 (QB) Spencer J referred to Leggatt J's analysis in *Gestmin*, observing that it was "all the more important to test the recollection of the witnesses against contemporaneous documentation" (para 64). Mr Coulter also referred to similar passages in two mesothelioma cases: *Bannister v Freemans Plc* [2020] EWHC 1256 (QB) (paras 73 – 79) and *Jackman v Harold Firth and Son Ltd* [2021] EWHC 1461 (QB) (paras 12 – 16).

Inferences to be drawn from absent witnesses

43. In certain circumstances a court may be justified in drawing an adverse inference from the absence of a witness who might have been called, and who might be expected to have material evidence to give.

44. The burden is on the party who invites the court to draw the inference to identify the nature of the evidence which the court is invited to infer and to explain why the absence of evidence on that point from that witness is material to that issue: *Ahuja Investments Limited v Victorygame Limited* [2021] EWHC 2382 (Ch), para 23.

45. The key principles were distilled by Brooke LJ following his review of the authorities in *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, as follows:

> "(1) In certain circumstances, a court may be entitled to draw adverse inferences from the absence, or the silence, of a witness who might be expected to have material evidence to give on an issue in that action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issues by the other party, or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witnesses.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his or her absence or silence may be reduced or nullified."

46. In *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) Cockerill J observed that "the tendency to rely on this principle in increasing numbers of cases is to be deprecated. It is one which is likely to genuinely arise in relatively small numbers of cases; and even within those cases the nature of times when it will be appropriate to exercise the discretion is likely to be still smaller" (para 150). She also made the point that even if the circumstances for drawing an inference are met, the court has a discretion which it will exercise by reference to the overriding objective (para 154).

The presumption of regularity

47. As I set out at paras 108 – 115 below, on 28 May 2010 Northumbria Police officers decided not to treat the defendant's complaint of sexual assault as a crime, setting out their reasoning on the incident log. The claimant places significant reliance upon this document, whereas the defendant criticises what she says was the paucity of the investigation prior to this decision being made. She also disputes some of the document's contents.

48. In this context Mr Coulter seeks to rely upon the presumption of regularity. It is described in para 6-30 of *Phipson on Evidence* (20th edn), as follows:

> "On the proof that a public or official act has been performed, it is presumed that the act has been regularly and properly performed. Persons acting in public capacities are presumed to have been regularly and properly appointed. It has been used in connection with the conduct of machines as well as men. Its application in criminal cases has in general been more patchy."

49. A number of both civil and criminal cases are cited at footnote 151 in support of the propositions contained in the first two sentences of this passage. At the end of this list,

the authors say: "Most recently, see *TC Coombs & Co v IRC* [1991] 2 AC 283". Mr Coulter relies upon *Coombs*, which I therefore discuss below.

50. Mr Coulter submits that the presumption of regularity applies to the 28 May 2010 police investigation log and that, absent evidence sufficient to rebut it, the court should presume that the police officers involved compiled the log conscientiously and accurately. He says that this is a presumption of law, or in the alternative, a presumption of fact.

51. I do not accept that the presumption of regularity has the reach that Mr Coulter suggests.

52. In *Coombs* the House of Lords decided that as an Inland Revenue Commissioner acting under section 20(7) of the Taxes Management Act 1970 was an officer designated by Parliament to supervise the issue of notices under section 20(3) of the Act, there was a presumption that his consent had been given on the basis that he was satisfied that the inspector seeking the notice reasonably held the belief prescribed by the statute (300C-E and 302E-F). The issue arose in judicial review proceedings in which the applicants sought the quashing of a section 20(3) notice requiring them to deliver up or make available certain documents for inspection. The Inland Revenue's position was that the information that led to the making of the notice could not be disclosed on grounds of confidentiality, but that all such information had been before the Commissioner when he gave consent under section 20(7). Lord Lowry noted that on a judicial review the court was not entitled to look at the evidence and form its own view as to the conclusions to draw from it (297C). At 298B-D, he said that the burden faced by the applicants was as defined by Lord Diplock in *R v Inland Revenue Commissioners, ex parte Rossminister Ltd* [1980] AC 952, namely:

> "Where Parliament has designated a public officer as decision-maker for a particular class of decisions the High Court, acting as a reviewing court under Order 53, is not a court of appeal. It must proceed on the presumption omnia praesumuntur rite esse acta until that presumption can be displaced by the applicant for review – upon whom the onus lies of doing so. Since no reasons have been given by the decision-maker and no unfavourable inference can be drawn [from] this fact because there is obvious justification for his failure to do so, the presumption that he acted intra vires can only be displaced by evidence of facts which cannot be reconciled with there having been reasonable cause for his belief…"

53. I consider that a judicial review vires challenge concerning the exercise of a particular statutory power by a public official, such as arose in *Coombs*, is far removed from the present circumstances, which concern a private law action in tort in relation to which the court hears evidence and makes findings of fact as to what occurred. Every year many claims are brought in negligence and in intentional torts where the accuracy of records made by police officers and/or other public officials, and the care which they took in making those records, are in issue. However, Mr Coulter was unable to identify any previous case where the presumption had been applied in a civil tort action. Nor was he able to identify a case where the presumption had been applied to a dispute over the accuracy of the contents of a document prepared by a person acting in an

official capacity or over the degree of care they had taken in preparing the document (as opposed to an issue as to whether statutory pre-conditions had been fulfilled). Mr Coulter acknowledged that he was seeking to extend the use of the presumption in a way that did not have a precedent. In my judgment, the extension would be a substantial one and one that is not supported by past authority or warranted by the circumstances.

54. Mr Coulter also drew my attention to two criminal cases, *Kynaston v Director of Public Prosecution*s (1988) 87 Cr App R 200 and *Edwards v Director of Public Prosecutions* (1993) 97 Cr App R 301. I do not consider that they assist his argument.

55. *Kynaston* concerned a prosecution for obstructing a police constable in the execution of his duty, contrary to section 51(3) of the Police Act 1964 and whether the court had to be satisfied that the constable was authorised by section 24(5)(b) of the Police and Criminal Evidence Act 1984 to make the arrest. Lord Justice Parker made reference to: "the presumption which arises of public officers acting in accordance with the law, unless and until the contrary is proved" (205). However, the court proceeded to conclude that the evidence before the justices raised the inference that there were reasonable grounds for suspecting the arrestee of robbery, so that section 24(5)(b) was met (206). Accordingly, the Divisional Court's decision was concerned with a statutory pre-condition to the exercise of a power of arrest (where this was a necessary ingredient of the offence prosecuted) and in any event was based on there being sufficient evidence to support an inference that the necessary pre-condition existed.

56. In *Edwards*, the arresting officer told the arrestee that he was being arrested for an offence that was non-arrestable. Whilst brief reference was made to the presumption, Evans LJ concluded that this finding of fact meant that it was impossible for the court to conclude that the arrest had been valid.

57. Whilst I do not consider that reliance on the presumption of regularity is well founded, I stress the limited practical impact of this upon my decision-making process. Mr Coulter accepted that if the presumption applied, it would be a rebuttable one. In any event, absent the application of any presumption, the burden of proof lies on the defendant to establish the substantial truth of the defamatory imputations to the civil standard. Furthermore, I have very much kept in mind Mr Coulter's point that the defendant's criticisms of the incident log are to be approached with particular caution in circumstances where the court has not heard from the police officers involved.

The publications

58. I will set out the text of the publications about which complaint is made. I will include the words that are relied upon as defamatory and the additional wording that the defendant relies upon in support of her public interest defence. Parts of the text are also relied upon by Mr Coulter as containing inconsistencies.

The telegra.ph publication

59. The telegra.ph website is not connected to the national newspaper that bears a similar name. It is a website where user-generated blogs may be uploaded, but which are not responsive to search engines and so such posts are not readily accessible save by sharing their URL.

60. This publication was the most detailed of the defendant's accounts. It bore the following heading in bold: "**Glasgow tattoo artist pinned me to wall and assaulted me: he should not be tattooing women**". The opening two sentences in italicised text said: "*Before I begin, I want to give a wholehearted thank you to every survivor shining light on predators in the tattoo industry right now. It inspires courage in other women to tell theirs – and this one has been kept locked up for 11 years*".

61. The account that followed said:

> "This story is about yet another male predator in the tattoo industry.
>
> His name is Billy Hay (of Bath Street Tattoos) and he sexually assaulted me when I was 19.
>
> He had a guest spot at a well-known tattoo artist's shop in the North East, where I had recently been tattooed.
>
> I met Billy Hay on a night out. He was with my tattooist, who introduced us. Billy started asking about my tattoo. We had a brief chat and that was that. I went off with my friends.
>
> It got to a point in the night when I decided I wanted to go home.
>
> When I was leaving the club, he was standing at the exit. I said bye and he offered to walk with me. Didn't want me walking alone – the irony.
>
> My house at the time was about 15 mins from the club. Along the way, I had to cut through a tunnel. When we were in the tunnel, he pushed me into the wall in an attempt to kiss me.
>
> I avoided his face and asked him to stop.
>
> He asked 'why I'd been flirting' with him and 'leading him on' if I wasn't going to put out. I insisted I was just being friendly and certainly had no intentions, but he wouldn't take no as an answer.
>
> He pushed me in a corner and pinned both of my arms either side of me. I crouched down to get my face away from his which was a bad move, because he then pulled down his trousers and took out his penis. He then asked me to 'suck it'.
>
> I was in tears by this point and all I could do was beg. I kept saying 'please let me go home' 'I just want to go home'.
>
> I stood up again to avoid his penis he was trying to shove in my face. So, he pulled down my shorts. I knew things were going to get really bad now, I continued to beg and he continued his assault. I had tights on, so I was protected by one last layer. I

stepped out of my shorts. And as I did, I ducked under his arm and ran faster than I've ever ran before.

He didn't attempt to chase me. I left my bag, keys, phone, shorts, purse, everything in that cut and ran home in just a pair of tights.

I couldn't get into my house because I didn't have my keys. I couldn't call anyone as I didn't have my phone. Luckily, a homeless woman spotted my distress and, after an hour or so, I got the courage to walk back to the scene of the crime with her. I don't know who she was but I see her as a real-life angel to this day.

He was gone by the time we went back to the scene of the crime – he'd left all my stuff where it was and I got back into my house. I told my housemate what had happened and called the police.

When the police looked into the CCTV footage, they said they had 'calmly seen me walking away from the scene of the crime with a man, and with all my stuff'. I tried to explain this wasn't a man, this was the homeless woman who helped me (she was wearing a beanie hat covering her hair, hoodie and tracksuit bottoms, so I can see why she may have appeared to be male on grainy CCTV footage). The cut where the sexual assault happened was a CCTV blind spot – they couldn't have seen any of it on camera.

The police reminded me that I was drunk and that I'd given a confusing description (I described his beard as blond at one point, then described it as ginger.) In club lighted and street lighting, it's hard to tell … never mind during a trauma).

Despite me telling them exactly who he was and describing physical details (such as his septum ring) they said it would be hard to take to court without direct evidence – and that the fact I'd consumed alcohol and given two different beard colours would go against my statement.

They kept reminding me 'you do realise how hard this kind of thing is to prove' and kept asking if I 'definitely wanted to go ahead and press charges'

I was scared, in shock, and 19-years-old. I just wanted to it all to go away and I wanted to go to bed. I told them to forget it.

The next day, I rang the tattoo artist Billy Hay was working with for the guest spot.

The tattooist said he 'didn't want to get involved'. So I told other tattooists. It was met with lukewarm responses.

> One tattooist truly betrayed my trust and shouted, 'HEARD YOU NEARLY GOT RAPED?!' across a packed beer garden while I was working.
>
> I also told a mutual friend at the time, who approached Billy about the incident at a tattoo convention. They told me he said he was drunk and can't remember. Played it all down.
>
> For me, telling my story to those in and involved in the tattoo industry – people I thought I could trust – did nothing. As much as it angers me, I don't blame the silent ones. I know people still find it hard to call out rapists and sexual abusers, or even just have nothing to do with them, especially if said abusers are popular. Some tattooists are maybe frightened it could jeopardise their careers, or they just want an easy life.
>
> I'm not angry with them. But I cannot have anything to do with these people.
>
> I can't sit with this any longer and I won't be made to feel like my story doesn't matter.
>
> It's been 11 years and I still regret not speaking out about Billy Hay.
>
> I feel cloaked in guilt at the thought of another woman going through the terror I went through. The fact he's worked with women, many undressed, for more than decade since then, haunts me. But the shame of being drunk, wearing really short shorts, not being believed by tattoo artists and not feeling any form of justice when contacting the police, has kept me quiet.
>
> This kind of passive silence will not stop abuse in the tattoo industry.
>
> Who wins if we stay silent? Not us.
>
> I'm relieved women can finally talk about these predators and be believed. I'm relived action is staring to happen.
>
> The industry will be a safer placed when every single one of these tattoo artists are removed from it." (Emphasis in original.)

The FB message publication

62. The FB message publication to Ms Sweeney included a link to the telegra.ph publication. It also contained the following text:

> "Hi Ema. I'm really sorry to message out of the blue but I want to approach you about one of your employees at Bath Street Tattoo. With the Tattoo MeToo movement that's happening, it's brought up a lot of trauma from my past, which includes an

> incident where your employee Billy Hay attempted to rape me. But it's also given me a lot of courage to put my story out there and heal, after 11 years with PTSD and therapy. I've written this anonymous statement that isn't public so you can read the details. He has not been held accountable for his actions or shown to have any remorse. He has made light of the assault in the past to a mutual friend. I don't Want your business boycotted but I have felt a heavy guilt for 11 years at the thought of someone who could do that to me, having that much power over other women's bodies. I'm sorry if this upsets you but I thought it was best to come to you first."

The email publication

63. The email that the defendant subsequently sent to Ms Sweeney at 15:25 hours on 3 July 2020 said:

> "Hi Ema, I'm sorry to message out of the blue but I want to approach you about one of your employees at the Bath Street Tattoo.
>
> With the Tattoo MeToo movement that's happening, it's brought up a lot of trauma from my past, which includes an incident where your employee Billy Hay sexually assaulted me.
>
> But it's algo given me a lot more courage to put my story out these and heal, after 11 years dealing with PTSD and therapy.
>
> He has made light of the assault in the past to a mutual friend. He blocked me into an alleyway, I was begging him to let me go and he kept asking 'why I'd led him on' (all I'd done was chat friendly with him about my tattoo another artist had done, where he was guest-spotting at the time).
>
> He exposed his penis and asked me to suck it. He didn't manage to get it in my mouth.
>
> He pulled my shorts down and I begged and cried but he wouldn't stop. I still have nightmares and flashbacks about it to this day.
>
> The only reason Billy didn't rape me is because I was quick, I got under his arm and ran for my life – left my phone, keys, purse, shorts in that alleyway. Ran through town in a pair of tights.
>
> I reported it to the police but they said it's hard to get this stuff to court because, evidence. I'm sure as a woman you'll know how it usually goes with CPS and sexual assault charges. I was a teenager, I just wanted it to all go away so I shut up and buried it. That attack changed me for life.

> I'm sorry if this upsets you but I thought it was best to come to you to discuss how to protect women, without your business having to be involved if I decided to go public with my story.
>
> I have friends in the tattoo industry and they say this is known but unspoken of. Two of my friends have called him out to his face and he denies it all obviously. Says he was drunk and it was a misunderstanding. I can't begin to explain how outraging it is to know men in the industry cover for Billy. Even worse, that he has access to women's bodies, in a position of power. I can't being to explain the hurt he's caused me, and the guilt I have for never saying anything to protect women, even 11 years later.
>
> Like I've said, the reason I message is because I don't want your business boycotted. But obviously, people will look to see where he works. And too right, no one wants to be tattooed by a sex offender.
>
> I believe in restorative justice, but I have heard too much over the years to believe he holds any remorse for his crimes. It takes a sick person to force themselves on someone when they're crying and begging 'please let me go, I just want to go home'.
>
> This was no 'misunderstanding'.
>
> Please let me assure you that my hands have violently shaken with every word I've composed to you. That's how hard this is – that's how much this has hurt mentally over the years.
>
> I won't let abusers and sexual predators think they can get away with this, and use their positions of power to hurt other young women.
>
> Times have changed and, for the safety of women, Billy's crimes are in the public interest.
>
> Again, I empathise that this a difficult pill to swallow. But it is 10000% the truth.
>
> I hope we can work out the next septs in making your studio a safe space for women.
>
> Thanks,
>
> Nina"

The Instagram publications

64. At the relevant time the defendant had around 600 – 800 followers on Instagram. Her 22 July 2020 post included the following:

> "After 11 years of guilt & worry for other women, I emailed a Glasgow tattoo studio to inform the owner that one of their male tattooists violently sexually assault me.
>
> (Well I thought I might as well get them all out the way!)
>
> The studio owner ignored me & blocked me on multiple accounts.
>
> The abuser even looked on my LinkedIn (cut these people & they bleed audacity).
>
> This tattooist still works there.
>
> He's conspired with other tattooists to get his story straight (he says it was a 'misunderstanding' … I don't know which part of me crying & saying please let me go home when he'd corned me into a wall was a misunderstanding but HEYHO).
>
> I rang one tattooist the morning after the attempted rape, traumatised. He's lied for him from the start.
>
> The reason I emailed was because I didn't want to drag the studio's name into it. They didn't even just reply to say they were looking into it?
>
> Nothing. Blocked.
>
> Like all the other tattooists I've told, it's easier to ignore me & make me disappear.
>
> Women's safety is not a priority.
>
> Holding abusers accountable is not a priority.
>
> Money & egos rule all.
>
> #me too #tattoometoo"

65. Later the same day the defendant added the claimant's name in an edit to her post. She said:

> "I've named the studio and tattooist in question now after hearing more stories / info from others! Billy Hay of Bath Street Tattoo! Thank you so much for your support everyone. After a decade of being silenced and shamed this one was really hard to do. Full story on Facebook."

66. Ms Cresswell shared this Instagram post to an Instagram story adding: "I didn't share the name of this scumbag to protect the woman who owns the studio, but fuck it, she isn't protecting any other women". She then set out in bigger bolded font: "**BILLY HAY**" and "**BATH STREET TATTOO**".

The FB posts publications

67. The defendant's first Facebook publication on 22 July 2020 was in the same terms as the first Instagram publication. She had approximately 600 – 700 followers on Facebook.

68. Later the same day the defendant published a further post on Facebook, in the following terms:

> "An amazingly brave human informed me of what Bath Street Tattoo are saying. They're telling anyone sharing the truth about what Billy Hay did to me that I'm lying & 'they've now put their name forward to the police'.
>
> I WAS THERE. I was the one he pushed against a wall and tried to rape. I was the one who ran home in a pair of tights because he managed to remove my shorts. The one who had to beg him to let me go, while he undid his trousers, masturbated and told me to 'suck it'. And that he 'wouldn't let me go home until I'd taken my shorts off and bent over'.
>
> Don't you dare say these are false accusations. I don't even know the fucking bloke. I don't want to jeopardise anyone's career, I have no personal vengeance, all I'm doing is reporting someone for sexual assault & protecting others.
>
> Why would I put myself through this then, and now … 11 years later? It's horrific.
>
> Here's the full details, which I spared before because it's grim: [a link was then posted to the telegra.ph publication]."

69. A subsequent edit said that Bath Street was "a collective made up of Billy, Ema and two other tattooists. She does not have sole ownership therefore these msgs are no doubt from Billy himself".

The pleadings and the course of the proceedings

The letter of claim

70. By a letter of claim dated 27 July 2020 the claimant threatened to bring proceedings against the defendant. The letter primarily addressed the telegra.ph publication and included the following:

> "As you are very well aware your whole account of the events said to justify the allegations is completely false and a work of fiction. Our client has met you once in his life. You danced and chatted in groups but that was all that happened between you. Your account of what supposedly happened on your way home is neither credible nor true. Even taken at face value your story is riddled with inconsistency and improbability."

The particulars of claim

71. The claim form was issued on 3 November 2020. The claim form and particulars of claim were served on 22 January 2021. I have already identified the publications that were the subject of the action. The claimant alleged that the natural and ordinary meaning of the words relied upon was that the claimant: "is a sexual deviant who tried to rape the defendant and force her to have non-consensual oral sex".

72. The particulars of serious harm contended that the allegations were self-evidently very serious and that their publication had damaged the claimant's reputation as a tattoo artist, an employment which required customers and prospective customers to be able to trust him. It was alleged that there had been extensive republication by readers and that the defendant's claims were widely known within the "tattoo community". It was alleged that in consequence the Bath Street Tattoo Collective ("Bath Street"), where the claimant worked as a self-employed tattooist, had lost bookings and various people had been in contact to express support for the defendant and/or condemnation of Bath Street's perceived support for the claimant. The pleading went on to state that the claimant had been caused great embarrassment and distress and that he had not returned to work at Bath Street since the publications as he did not feel comfortable thinking that customers in the studio could be aware of the allegations. Reference was also made to the claimant having received abusive messages via social media, to being unable to sleep and having suffering from mood swings and anxiety.

The original defence

73. Ms Cresswell prepared her original defence document which was filed on 10 February 2021. She did not have legal representation at the time. She denied that her words were defamatory "because I strongly believe them". She set out her account of events at some length and she averred that it was her honest belief that it was the claimant who had sexually assaulted her and that it was important for prospective clients of Mr Hay to be made aware of this.

74. Because it arose in cross-examination, I note at this stage, that in para 17.8 of the defence, Ms Cresswell said: "I have been diagnosed with PTSD, anxiety and depression following the sexual assault I strongly believe the claimant committed. The sexual assault served as a catalyst for mental health problems in my final year of university and to this day…". She also referred to being prescribed anti-depressants in October 2019, following several months of counselling and to having described the sexual assault to her counsellor.

Amended pleadings and exchanged witness statements

75. The defendant's legal team became involved from around October 2021. On 30 March 2022 disclosure took place by exchange of lists. The defendant's legal team considered that the defence required substantial revision and a timetable was agreed between the parties. On 30 May 2022 the claimant filed an amended particulars of claim. The amendments included an update that the claimant was no longer working at Bath Street, which had discontinued trading.

76. An amended defence was then filed, to stand in substitution of the original defence. At this stage the pleaded defences that were relied upon were publication on a matter of public interest and qualified privilege.

77. A reply was filed on 27 June 2022. I will refer to the contents of this when I come to the current iteration of that document below.

78. Witness statements were exchanged on 20 July 2022. In his statement dated 19 July 2022, Mr Hay said that he did now recall being outside of the nightclub with Ms Cresswell. He said that this had come to him in the months of sleepless nights that he had experienced following the publications, when he had repeatedly gone over the night of 27 – 28 May 20210 in his head. In para 25 of the statement he said:

> "…I remembered that we had a moment where we almost kissed, but Ms Cresswell pushed away at which point I said something along the lines of 'oh I've read this wrong' or something like that. I remember it was slightly awkward and embarrassing and Ms Cresswell had gone round the corner to the right and to my right and I remember saying 'woah' as I got a surprise. I turned the corner and I'm not 100% sure if we walked for a bit and then Ms Cresswell took a seat on some stairs or if this was directly around the corner. But I remember Ms Cresswell sitting on stairs above my eye level and I was stood on the pavement down from her and we chatted for a few minutes. I didn't go up the steps but stood and talked to her for a short time before returning to the night club. I can't now remember what we discussed but I probably apologised if I had misjudged the situation. We said bye, I left her sitting on the stairs and I turned back and went into the nightclub."

79. The defendant places considerable emphasis upon this apparent change of account by Mr Hay from denying that anything had occurred between them other than dancing and chatting in the nightclub, to accepting that they had been outside the nightclub together and that there had almost been a kiss which Ms Cresswell had pulled away from. In terms of the defendant's case, the significance was not simply the emergence of a potentially substantial inconsistency in Mr Hay's account, but confirmation that Mr Hay was indeed the person who she had left the nightclub with and that there had been some kind of sexual encounter between them. Following this, the defendant sought permission to further amend her defence to rely upon a plea of truth. Permission was granted by Nicklin J on 19 October 2022 and a re-amended defence was filed and served on 20 October 2022. On 8 November 2022 the claimant filed and served an amended reply. A re re-amended defence was served with the claimant's agreement on 2 February 2023.

The re re-amended defence

80. This version of the pleading accepted that the defendant had shared the URL of the telegra.ph post with four friends and the founder of a sexual assault survivor's group for those in the tattoo industry (in addition to including the link in her message to Ms Sweeney). The pleading admitted that the FB posts publications and the Instagram publications were published to a substantial number of people, although it was denied

that the number was "very large". It was accepted that the defendant knew and intended that the posts would be republished within the tattoo community to a limited extent and that her "primary intention was for the Posts to be read by women who may otherwise become victims of sexual assault in that community, including at the hands of the claimant, in order to warn women of the danger".

81. The natural and ordinary meaning of the publications was said to be that the claimant "had violently sexually assaulted the defendant".

82. The following was set out at para 10A in support of the plea that the pleaded defamatory meaning was true:

> "a. In May 2010 the Defendant was 20 years old and was studying Magazine Journalism at the University of Sunderland.
>
> b. On the night of 27-28 May 2010 the Defendant was celebrating the end of her second year of university at the 'Passion' nightclub in Sunderland. During the evening the Defendant was introduced to the Claimant by their mutual friend Richard 'Bez' Beston.
>
> c. During the Defendant's walk home from the nightclub she was very seriously sexually assaulted by the Claimant as follows.
>
> i. As the Defendant went to leave the nightclub the Claimant, who was near the exit offered to walk her home. The two then walked together through the city via Blandford Street and The Bridges Shopping Centre, until they reached a tunnel attached to Crowtree Leisure Centre, leading to Bishopwearmouth Green, less than 5 minutes walk from the nightclub.
>
> ii. At the tunnel, the Defendant because uneasy and told the Claimant she would continue home by herself. The Claimant tried to kiss the Defendant and she stepped back. The Claimant became aggressive, asking why the Defendant had led him on during the evening if she was not willing to take things further.
>
> iii. The Claimant backed the Defendant into the wall of the tunnel, pinned her arms to the wall, then undid the button of the Defendant's shorts. In seeking to escape, the Defendant crouched. The Claimant undid his own trousers, removed his penis and began masturbating, telling the Defendant, 'suck it'. The Defendant stood up. The Claimant placed his arms either side of her, preventing her escape. He pulled down her shorts, which fell around her ankles making it impossible for her to run.

> iv. The Defendant asked to be allowed to go home. The Claimant responded, 'bend over and I'll let you go home then'. The Defendant, who was still wearing tights and underwear, tricked the Claimant into thinking she would remove them if he loosened his grip and stepped back. He did so and the Defendant was able to free her ankles from her shorts, duck under the Claimant's arm and run away, leaving the shorts and her belongings including her keys, money and phone at the scene."

83. In the earlier amended defence these particulars had been set out in support of the section 4 defence save that they did not identify the Claimant as the man who had assaulted the Defendant.

84. The basis for the qualified privilege pleas was set out at para 12 as follows:

> "The Defendant had a duty to communicate, and Ms Sweeney as the Claimant's employer or business partner had a corresponding interest in receiving, the statements complained of given that the Claimant would routinely come into intimate contact with unaccompanied female clients at the business co-owned by Ms Sweeney, which clients Ms Sweeney and her business had a duty to protect from sexual assault."

85. In relation to the section 4 defence, the pleaded matters of public interest at para 14 were:

> "a. The prevalence of sexual abuse committed in the tattoo industry which at the time of publication was a matter of significant public concern (with the issue becoming known by the epithet, 'Tattoo MeToo');
>
> b. The need to protect women from sexual abuse in any setting; and
>
> c. The failure to prosecute cases of sexual abuse."

86. The pleading went on to aver that the defendant believed that publishing the statements was a in the public interest and that her belief was reasonable having regard to the circumstances that were then identified. In summary, those pleaded circumstances were:

i) The facts and matters relied upon in support of the truth defence;

ii) She had relayed the details of the assault to the homeless woman who had assisted her (as set out in the telegra.ph post, I have reproduced above) and to her flatmates Daniel Pharoah and Michael Cormack when she entered her flat at about 06.00 hours;

iii) At around 06.33 hours she had reported the sexual assault to the police by telephone, telling them that she was drunk and could not be certain of the

identity of the man who had assaulted her, but she believed it to be the claimant. She was then interviewed by officers, to whom she gave an account;

iv) At 14.13 hours the same day the police decided not to treat her allegation as a crime;

v) Her treatment by the police was deficient. The incident was not recorded as a crime; she was interviewed when she was still drunk and not spoken to when she was sober; her words that it was 'like a nightmare' were misconstrued as an assertion that she had dreams of being raped; and steps taken by police in relation to CCTV footage were inadequate;

vi) As a result of the police's decision not to treat the allegation as a crime, the claimant was never properly investigated as the man who had sexually assaulted her;

vii) She had attempted to make inquiries of Mr Beston during 28 May 2010 but he did not assist (I refer to this below when setting out the relevant messages sent and received in the aftermath of the alleged assault);

viii) Following the police decision not to treat her complaint as a crime, she did not speak about the incident publicly for about 10 years but remained sure that the Claimant was her attacker. She "felt increasingly uncomfortable about not warning other women about his behaviour and she remained upset that the Claimant had never been held accountable for what he had done to her and how it had affected her life since";

ix) The issue of sexual abuse in the tattoo industry had come to prominence around the first half of 2020 after women had been emboldened to report such cases as a result of the MeToo movement. The subsequent campaign Tattoo MeToo was to ensure that the prevalence of such sexual abuse was exposed;

x) In the context of the Tattoo MeToo campaign, she because aware of several cases of male tattooists sexually assaulting women. She was concerned that the claimant could have assaulted other women since May 2010 and she: "felt she had a duty to speak up about her experience with the Claimant in order to protect other women";

xi) Between 20 May 2019 and 1 July 2020 she had posted a blog post, Instagram post and Facebook post describing prolong emotional abuse inflicted upon her by a different man while they were in a relationship and a description of how he had raped her after the end of that relationship. She had identified the man by name and she had been contacted: "by many women thanking her. As a result four women disclosed that they had also experienced abuse from the same man". She felt that she had protected other women from his behaviour;

xii) On 31 May 2020 she had written a statement about the sexual assault and sent it privately to the founder of a sexual assault survivors' support page for those in the tattoo industry;

xiii) Ms Sweeney did not respond to either the FB message publication or to the email publication and that on a date between 3 and 14 July 2020 she had blocked the defendant from interacting with her via social media;

xiv) On 1 July 2020 the defendant had spoken to Fiona Duncan, who was employed as a secretary at Mr Beston's tattoo parlour in Sunderland in 2010 and who also knew Mr Hay as a family friend. Ms Duncan had said that she had confronted the claimant about the allegation and he had admitted that something had happened between him and Ms Cresswell. Based on this conversation with Ms Duncan, she believed that the claimant had made a partial admission to elements of the assault to his friends;

xv) After her initial publications on 22 July 2020 did not name Mr Hay, she received requests to name her assailant from women who said they would not feel safe until she did so. Accordingly, in light of this and the responses she had received to her earlier posts about the abusive relationship she had been in, she decided to name the claimant and she edited the Instagram and Facebook posts accordingly;

xvi) She had published the statements complained of: "because no action had ever been taken against the claimant nor any proper investigation conducted into him"; she believed publishing the statements: "was the only way to safeguard other women who may come into contact with the Claimant, including through his work as a tattoo artist";

xvii) She believed at the time of the publications and still believed that it was the clamant who had sexually assaulted her. Her belief was reasonable because: "she was seriously sexually assaulted in May 2010 by a man who walked her home from a nightclub and tried to kiss her, she was sure that this man was the Claimant who bears the same distinctive features as the man who assaulted her";

xviii) Ms Sweeney had refused to discuss the issues she had raised with her. The claimant must have become aware of those communications because he had checked her LinkedIn profile, but he had not sought to explain himself to her;

xix) The defendant did not know the claimant prior to the assault and had no personal animus against him; and

xx) Shortly after the 22 July 2020 publications, on 23 July 2020 the defendant had reported the rape to the police for a second time.

The amended reply

87. The amended reply noted that a link for the URL for the telegra.ph publication had been included in the FB posts publications and that as at 8 November 2022 it had been viewed 1167 times.

88. The defence of truth was denied on the basis that the allegation that the claimant had seriously sexually assaulted the defendant was false. As regards the particulars given at para 10A of the re re-amended defence (para 82 above), the claimant said:

i) Sub-paragraph (a) and the first sentence of (b) were not within his knowledge. He admitted that Mr Beston was his friend;

ii) He neither admitted nor denied whether the defendant was very seriously sexually assaulted on her walk home from the nightclub, but denied that he was the perpetrator, if a sexual assault had occurred;

iii) He admitted that he and the defendant had "walked a short way from the nightclub". He said he was reliant on the defendant's knowledge and did not know the route; and

iv) He admitted that he went to kiss the defendant and that she had either stepped back or otherwise made it clear that she did not want to kiss him. He was surprised at her reaction but he did not become aggressive. After this incident he recalled that the defendant had gone round a corner and he had followed her. She was sitting up on some stairs and he was down on the roadside. They chatted for a few minutes and then the claimant returned to the club leaving the defendant sitting on the stairs.

89. It was also denied that the FB message publication and the email publication were protected by qualified privilege as there was no reciprocal relationship of duty and interest between the defendant and Ms Sweeney. There was no duty on the defendant to publish untrue statements and no interest on Ms Sweeney's part in receiving such statements. Furthermore, the defendant had acted maliciously: "in that she did not believe the words to be true or was reckless as to their falsity". A number of matters were relied upon in support of this proposition, namely:

i) That the allegations were false;

ii) The defendant had put forward markedly different versions of the events at different times;

iii) The claimant had never been charged with any offence;

iv) The defendant had told Kerry Roberts in a Facebook message on 29 May 2010 that the police had said to her that she was lying and that she had made up the woman over the road who was a witness (The full message is at para 121 below);

v) The contents of the Northumbria Police incident log.

90. The claimant also denied that the publications were or formed part of a statement on a matter of public interest. The allegations made against the claimant were false and related to a complaint that the police had dismissed without the claimant even being questioned. Furthermore, any consideration of the public interest by the defendant should have weighed in the balance the fact that the allegations were baseless, that the claimant's reputation was being traduced and the enormous distress and damage that the publications would cause; but it appeared these matters had not been taken into account at all. If a "proper consideration and balancing of rights and interests" had been undertaken "including taking into account the rights of, and potential damage to, the claimant, no responsible person could have reached the conclusion that the public interest militated in favour of the publications".

91. The claimant further denied that the defendant reasonably believed that the publications complained of were in the public interest. If the defendant did hold such a belief, which was denied, then it was irrational, as there was no reasonable or credible basis for such a belief. In summary, the following supporting points were relied upon:

    i) The falsity of the allegations, as set out earlier;

    ii) The publications did not include criticisms of the police or the CPS, but were focused solely on the claimant;

    iii) The tone of the publications was neither reasonable, measured, fair or accurate;

    iv) There was no counterbalance to the allegations made by way of acknowledging doubt or referring to the dismissal of the complaint by the police;

    v) It had been open to the defendant to approach the police again before publishing the material if she genuinely held the alleged concerns, but she had not done so;

    vi) Inconsistencies in the defendant's account recorded in the Northumbria Police incident log and the fact that she was not recorded as identifying Mr Hay as her attacker at that stage;

    vii) The defendant did not have any experience with the claimant that gave rise to a duty on her part to speak up to protect other women;

    viii) It was denied that the claimant had made any admissions to Ms Duncan;

    ix) There was no justifiable basis for the defendant to believe that making the publications was the only way to safeguard other women who may come into contact with the claimant;

    x) That there had never been any action taken against the claimant, nor any investigation into him, strongly militated against publication, as there was no evidence to justify any action or investigation; and

    xi) It was accepted that Ms Sweeney had not discussed the allegations with the defendant, but the defendant had not requested that she do so. The claimant had no reason or need to explain himself to the defendant, he was incredulous about the allegations, knowing them to be entirely false. The defendant did not make them aware that she intended to publish the allegations widely if they did not engage with her.

The trial

92. I have already listed the witnesses who gave evidence (para 13 above). Day 1 was partly a reading day and then I heard opening submissions. On Day 2 the claimant and his witnesses, Mr Beston and Mr Jackson gave evidence. On Day 3 the defendant and her witnesses gave evidence. By order dated 16 February 2023, I had granted the defendant's unopposed application for Ms Casey to give her evidence remotely. On Day 4 I heard oral closing submissions. Both counsel helpfully provided written closing submissions in advance as well.

Special measures

93. Pursuant to the order of Griffiths J dated 1 December 2022, the defendant was screened from the view of the claimant and the public galleries when she gave her evidence. The directions he made also permitted the defendant to attend the trial remotely when she was not giving her evidence and for the parties to enter and leave the court by different routes and at staggered times, so as to avoid them coming into contact with each other. The order also indicated that the trial judge would determine whether the defendant should be given short breaks during her evidence. I canvassed this with Mr Price before the evidence began. He was content with an arrangement whereby Ms Cresswell would indicate if she felt she needed a break. In the event she did not do so and the court simply took the usual breaks.

Cross-examination of the defendant

94. During Mr Coulter's cross-examination of the defendant I refused to allow him to question her about the fact that police had decided that there was insufficient evidence to prosecute a former boyfriend of hers in relation to her allegation of rape (para 141 below). Mr Coulter suggested that this bolstered the proposition that the defendant had made a false accusation of sexual assault in relation to the claimant. As I indicated at the time, I did not see how this line of questioning assisted me in deciding the truth or falsity of the sexual assault allegation that I had to resolve. I had none of the documentary material in relation to this other allegation, nor details of the police investigation; and thus I was not in a position to make any evaluation in respect of it. In addition, the letter from the North Yorkshire Police to Ms Cresswell indicating the outcome said in terms that whilst there was insufficient evidence to refer the matter to the CPS, this did not mean that the police did not believe her allegation.

95. As well as the questioning being irrelevant, it had the potential for causing unnecessary distress and discomfort; Mr Coulter chose to home in on a particularly personal aspect of the account that the defendant had given. I was also aware that by letter dated 16 December 2022 the defendant's solicitors had objected to any questioning about the allegations she made against her ex-partner and requested that advanced notice should be given of the proposed ambit of any intended cross-examination on this topic, so that consideration could be given to her position. It was not suggested to me that any such notice had in fact been given (or other substantive reply given to this communication).

The evidence of Gillian Cresswell

96. On the afternoon of Day 3, Gillian Cresswell, the defendant's mother, gave evidence. In her witness statement dated 15 July 2022, Gillian Cresswell had indicated that her daughter had never told her that there was a group of men present during the sexual assault and that the police officers who spoke to her must have misunderstood her account in this respect. This was a reference to an entry in the Northumbria Police incident log (para 114 below). However, when she was cross-examined by Mr Coulter and taken to the incident log, Gillian Cresswell agreed that she had told the police what was recorded there about her account.

97. When Mr Price sought to re-examine Gillian Cresswell on this point, Mr Coulter objected on the basis that such questioning was not permitted, as he had not challenged

what Gillian Cresswell had told him in cross-examination. When I suggested to Mr Coulter that a topic was a legitimate one for re-examination if it arose from something asked in cross-examination, he did not renew his objection on this ground. However, he maintained an objection to the way that Mr Price had asked the question, which was indeed impermissibly leading, as I indicated. He then objected to Mr Price's re-formulation of the question. Mr Price next asked Gillian Cresswell whether what was in the log was all that she had told the police. Arguably this was still an objectionable way of framing the question. However, in the interests of moving things on from what was in danger of becoming an entrenched dispute, I permitted Gillian Cresswell to answer that version of the question, which she did by reverting to the account in her witness statement. I could see no prejudice in allowing this, as by then I had already formed the view that I could not safely place reliance upon her evidence on this particular topic. I should add that I have no doubt that Gillian Cresswell was doing her best to assist the court, but she did appear to be rather confused in her recollections.

The natural and ordinary meaning of the words used

98. I address the natural and ordinary meaning of the words complained of before I come to the relevant facts and circumstances, as this must be determined by reference to the contents of the publications and without regard to extraneous matters. I have directed myself in accordance with the principles summarised at para 18 above. Neither party has distinguished between the five publications for these purposes and I agree that it is unnecessary to do so.

99. I conclude that the meaning in relation to each publication is that:

The claimant had violently sexually assaulted the defendant.

As I have already indicated, the defendant accepts that this meaning is defamatory at common law and that the statutory "serious harm" test is met.

100. I do not see any basis for the additional imputation that the claimant was a "sexual deviant" in the words used in the publications; it appears to be by way of additional comment. In oral submissions Mr Coulter did not press this point, accepting that it did not add anything.

The undisputed facts and circumstances

101. Before addressing the issues that lie at the heart of this case, I will set out the facts and circumstances that are not in dispute.

The background and the night of 27 – 28 May 2010

102. In May 2010 the defendant was a university student, living and studying in Sunderland. She lived with friends in rented accommodation on Hylton Road. She was 20 years old. On the night of 27 May 2010 she had just finished her second year exams. She went to Passion nightclub with a group of friends including her housemates, Michael Cormack (who is also referred to as Mikhail Cormack in some of the documents), Daniel Pharoah and Georgia Howe and another friend, Maria

Casey. Passion was situated on Holmeside, a busy street that was about a 10 – 15 walk from her accommodation.

103. A walking route from the nightclub to the defendant's flat involved turning left along Holmeside after exiting the club; then turning right into Crowtree Road and continuing in the same direction alongside part of the Bridges Shopping Centre; and then turning left towards Hylton Road. Ms Cresswell describes a tunnel that ran alongside Crowtree Leisure Centre that she would take as a shortcut after making the latter left turn. When giving evidence she clarified that the "tunnel" was enclosed initially, but where she described the assault as occurring, the pathway was open with a recess in the wall. A slight variation on this route would be to turn right from Holmeside before the junction with Crowtree Road onto a smaller road which led into Maritime Terrace, which, in turn, led to Crowtree Road.

104. Whilst she was in the nightclub on the evening of 27 May 2010, the defendant spoke to Richard Beston, who she knew as "Bez". He was not part of her group, but she knew him as a local tattooist who had been working on a tattoo on her arm. When they greeted each other, Mr Beston introduced Ms Cresswell to a man who was with him. She did not register his name at the time, but there is no dispute that this was Mr Hay.

105. At this time the claimant was working as a tattooist in Glasgow for a well-respected studio. He subsequently founded Bath Street with Emma Sweeney, Daniel Kelly and Marcus Maguire in 2014. In 2010 he was 27 years old. During 2010 he began a relationship with Ms Sweeney. On 27 May 2010 he was in Sunderland for a few days at the invitation of Mr Beston as a guest artist at his tattoo studio. This was his first time in Sunderland. On 27 May 2010 he had gone out with Mr Beston, Damian Mills and a number of Mr Beston's friends who he did not really know.

106. Both Mr Hay and Ms Cresswell agree that they chatted together at the nightclub and that they danced. Both were drinking alcohol. Ms Cresswell says that she was drunk. Mr Hay says that he was not drunk and that the level of his recall was not affected by the alcohol he had consumed.

107. At some point during the night of 27 May / early morning of 28 May, the defendant's housemates left the nightclub, as one of them thought their drink had been spiked and they wanted to get home. Ms Cresswell knew other people at the nightclub and decided to stay for longer. She is not sure of the time she decided to leave, but believes that it was about 04.00 hours (an estimate that was not challenged). She inadvertently left her leather jacket behind in the nightclub and her friend Marie Casey later took it home with her and contacted her about it the following day. Ms Cresswell was wearing a t-shirt, shorts and tights.

The police incident log

108. The Northumbria Police incident log indicates that Ms Cresswell telephoned the police at 06.33 hours. The contents of her call as recorded on the log are as follows:

> "ATTEMPTED RAPE MALE WALKED CLLR HOME FROM PASSION NIGHT CLUB & HE PINNED HER DOWN & TRIED TO HAVE SEX WITH HER. CLLR STS SHE HAD TO RUN AWAY FROM HIM. DESC MALE; 5FT10,

> MEDIUM BUILD, POSS WEARING DARK CLOTHING, BLONDE FACIAL HAIR, WM [white male] AGED APPX 22/23 YRS.
>
> CLLR STS SHE WAS QUITE DRUNK & STS THAT THE NIGHT IS HAZY.
>
> CLLR ALSO STS THAT SHE HAD TO RETURN TO THE SCENE OF TEH [sic] CRIME TO RETRIEVE HER SHORTS & BAG."

109. The noted location was the Bridges Shopping Centre and the defendant's name, address and telephone number were recorded. A comment added at 06.47 hours indicates that a solo trained officer was to speak to Ms Cresswell.

110. Ms Cresswell describes two female police officers attending her address a bit later that morning and asking her questions about what had occurred. When giving evidence she said that she thought this was at about 07.00 or 07.30 hours. The incident log is the only police record that is available and it does not record the time when this occurred.

111. In addition to speaking to her flatmates, Ms Cresswell telephoned her mother, Gillian Cresswell, who lived fairly nearby. She came to the defendant's flat.

112. It appears that the police officers attended the address on a second occasion. In her evidence, the defendant said she thought that this was at about midday. The officers spoke to Gillian Cresswell, as well as speaking further with the defendant.

113. The police incident log records that at 13.22 hours the defendant called police asking for an update regarding her clothes.

114. The log then records a decision made the same day that the complaint was "not to be crimed" and that Ms Cresswell had been informed of this. A record was made over the period 14.13 – 14.40 hours, setting out the reasons why this decision had been made. It therefore appears that the decision itself had been made a little before that. The log said:

> "THERE ARE A LOT OF INCONSISTENCIES WITH THE IP'S ACCOUNT, IT WILL NOT BE CRIMED DUE TO THE FOLLOWING: THE IP STATES SHE HAS DREAMS ABOUT BEING RAPED, SHE HAS LEFT PASSION NIGHT CLUB AND GONE WITH AN U/K MALE UP HOMESIDE AND TURNED RIGHT ONTO MARATINE TERRACE ENTERING THE REAR LANE, IP STATES HE TRIED TO KISS HER AND THEN CHANGED HER STOREY [sic] LATER TO THAT SHE DID KISS HIM IN THE REAR LANE. SHE HAS THEN LEFT THE REAR LANE I/C OF THE MALE TURNING LEFT BACK ONTO HOLMESIDE, TURNING RIGHT ONTO GREEN TERRACE HEADING TOWARD THE LEISURE CENTRE, WHERE THE ALLEGED ASSAULT OCCURRED. THE IP THEN STATED HE HAD PUSHED HER TO THE GROUND AND PINNED HER DOWN,

> SHE THEN CHANGED HER STOREY STATING HE HAD NOT PINNED HER DOWN AND WAS NOT ON THE GROUND AT ANYTIME AND THAT HE WAS JUST STOOD IN FRONT OF WHILE HE MASTURBATED, HE HAS ASKED HER TO TOUCH HIS PENIS AND SHE REFUSED, HE HAS THEN CARRIED ON MASTURBATING AND AT THE SAME TIME WHEN SHE HAS STEPPED FORWARD HE HAS TOOK HOLD OF BOTH HER UPPER ARMS AND MOVED HER BACK. SHE HAS THEN RAN AWAY FROM HIM MAKING HER WAY DOWN TO LOW ROW, RUNNING PAST REVOLUTION AND UP PAST FEL FEL, ONTO HYLTON ROAD, WHERE SHE HAS SAT ON HER STEP AS SHE STATES SHE LEFT HER BAG AT SCENE ALSO HER SHORTS WHICH SHE CAN NOT REMEMBER IF SHE TOOK THEM OFF OR HE DID, THERE IS NO DAMAGE TO THE IP'S CLOTHING. SHE HAS THEN BEEN APPROACHED BY A NEIGHBOUR ACROSS THE STREET WHO TOOK HER BACK TO THE SCENE WHERE SHE RECOVERED HER BAG.
>
> CCTV HAS BEEN RECOVERED FROM REVOLUTION BAR IT SHOWS THE IP WALKING PAST AT THE ALLEGED TIME OF THE INCIDENT. SHE IS FULLY CLOTHED, CARRYING HER BAG AND I/C OF A MALE, SHE LOOKS AT NO POINT DISTRESSED. THE BEDSITS ACROSS THE ROAD HAS BEEN CHECKED AND [REDACTED] IP THEN STATED SHE MET THIS FEMALE FURTHER DOWN [REDACTED] THE ROAD AND NOT OUTSIDE HER FRONT DOOR. WHEN ASKED ABOUT THE CCTV SHE STATES SHE CANT REMEMBER WALKING HOME WITH A MALE AND THAT SHE MUST NOT HAVE LEFT HER CLOTHES AT THE SCENE. WHEN QUESTIONED ABOUT THE FEMALE SHE STATES SHE HAS WALKED BACK TO THE SCENE WITH, SHE CHANGED HER STOREY [sic] SAYING SHE NOW COULD NOT REMEMBER IF SHE DID OR NOT.
> IP COULD GIVE NO EXPLANATION AS TO WHY THE FOOTAGE SHOWS HER WALKING PAST FULLY CLOTHED.
>
> WHEN ATTENDING THE ADDRESS FOR THE SECOND TIME THE IP'S MOTHER WAS PRESENT SHE HAD GIVEN HER MOTHER A DIFFERENT ACCOUNT, STATING THERE WAS A GROUP OF MALES AND THAT ONE HAD MASTURBATED IN FRONT OF HER AND SHE HAD THEN RAN AWAY FROM THEM. SHE CAN GIVE NO DESCRIPTION OF ANY PERSONS."

115. Revolution was a bar on Hylton Road near to the defendant's accommodation. She would have passed it to get to her flat.

116. The claimant and Mr Beston say that they left the nightclub when it was almost daylight. They bought some takeaway food and then walked home, or in Mr Hay's case to the accommodation where he was staying.

Messages sent in the period 28 May – 1 June 2010

117. Messages passed between Ms Casey and Ms Cresswell on the morning and early afternoon of 28 May 2010. Marie Casey wrote a public Facebook post on the defendant's wall: "*Ninaaa! Im just checking you haven't been abducted by the pervy old man who wouldn't leave you alone haha x*". Ms Cresswell replied at 12:57 hours: "*Hiya, who was that bloke and what was he doing? Someone tried to attack me on the way home and the police don't believe me xx*". Ms Casey responded: "*Oh my god seriously :O what the hell happened? Are you ok??? I can't really remember, but he was proper all over you, think he was an older guy :S xx"*. At 13:35 hours the defendant responded: "*Marie give me a ring if ya can! It's insane!* [telephone number] *xx*".

118. On the evening of 28 May 2010 Ms Cresswell sent a Facebook message to Mr Beston: *hiya bez, do you know that billy hay who was in passion with you last night? Did he stay at your place? And did you leave with him? Or did he disappear for a while? It's really important as I left passion with someone and need to know who it was… cheers*". Mr Beston replied: "*Ha ha What you mean left with some body?? What happened … Billy left with me think he'd rather have left with you tho ☺*". The defendant replied at 00:07 hours on 29 May 2010: "*I let [sic] with someone before passion closed and they were being weird and I don't know if it was him cos I was mortal! X*."

119. Mr Beston said in his evidence that the claimant had worked in his studio on 28 May 2010. Mr Hay said he thought that this was the case, but he was not sure.

120. Ms Cresswell also exchanged Facebook messages with her friend Stuart Dee. He messaged her at 20:21 hours on 28 May 2010: "*where you out last night? X*". She replied at 00.03 hours the next morning: "*Yeah I spoke to ya in the smoking bit of passion ya div! I was fucking mort like! X*". Mr Dee said at 02:02 hours: "*same like I remember but I wasn't sure good night?*". Their messages between 11:08 hours and 22:53 hours on 29 May 2010 included a discussion about whether Passion would have CCTV footage of the previous evening that Ms Cresswell could obtain. The messages were as follows:

> "(Defendant): not really some weird cunt tried to rape iz when I was walking home, luckily I got out from where he'd cornered iz and ran, I think I know who he is but I was so drunk I cannit be 100% and the police didn't believe me they thought it was all "just a dream" and were gonna arrest iz, even though I had a witness. She was a "figment of me imagination" as well. I fucking hate the police man.
>
> (Mr Dee): fucking hell bad crack like they are just a bunch of cunts like do anything to get out of doing abit paper work
>
> (Defendant): yup..you don't know anyone who works in passion who would be able to get ahold of cctv from that night do ya?
>
> (Mr Dee): I'm sure if you ask the bouncers they will beable to get it,do you now racka?

> (Defendant): the police took some footage but they were like "you left passion with your jacket on" and theres no way I did cos I left it at the bar and me mate marie has it. So they've looked at the wrong person.. no I don't is he a bouncer like, is he on here?
>
> (Mr Dee): aye he is good mates with the owners son he should be able to help"
>
> (Defendant): neil racka rackstraw
>
> (Mr Dee): aye that's him im sure he will be able to help ya out
>
> (Mr Dee): nee probs pet,where do you live? Not in a weird way just if ya live near fulwell roker way ya can jump in a taxi with us next time so ya get home safe x
>
> (Defendant): I live in hylton road, I usually go home with people but me housemate was spiked and everyone went with him and didn't think, thanks like! I've sent that lad a message I really hope he can get the footage.. I know theres loadsa rule ive looked it up and its shit like you need to apply for it pay money for each part you look at and you have to prove ya identification and shit right faff on!! X
>
> (Mr Dee): nah I rekon with something like this he will beable to help ya x"

121. At 10:56 hours on 29 May 2010 the defendant sent a Facebook message to her friend Kerry Roberts as follows:

> "some bloke tried to rape me on Thursday night
> Fucking sick cunt
> But I was so drunk I couldn't prove a thing, who he was or anything
> And the police said I was lying and "it was all a dream" and were going to arrest me for wasting police hours
> Really long story but they even said I made this woman over the road up who was a witness, was a "figment of my imagination"
> the I spoke to her in the street and she relayed everything that had happened to me, she said he'd pinned me against the wall and got his dick out and started wanking himself off and wouldn't let me go until I'd "took me shorts down and bent over"
> it was fucking horrific, he was a fat cunt so I managed to get out from under his arm and run left my bag there with my phone everything in and my shorts which he'd got off me but apparently I'm making it up, so that that. can't do anything at all
> I think I know who did it though he's called billy hays
> xxx"

122. Further messages between Ms Cresswell and Ms Roberts later that day said:

> "(Ms Roberts): "OMG are you ok that's sick fucking police man bunch of cunts

> could you remember what he looked like or too drunk I hope you're ok are you home now???? Ergh i can't believe it im really in shock at least you got away i hope he dies sick bastard!!!!!!!
> im pretty much finished so will have to have a catch up somtime hope yo're ok really cant imagine what you are going through. is there no way you can get evidence?? really hope he gets […] he deserves
> xxxxxx"
>
> (Defendant): "I think I can but I don't know, they looked at all the wrong cctv footage cos I was like you will see me running away from him and they were like nina you were fine you were walking fully clothed, with a man in a beanie hat and tracksuit that "man" was the scruffy pissy tamp woman from hylton road who helped me out, obviously they couldn't' tell on cctv, so they only looked at the footage from half 6 AFTER I'd gone back to the scene and picked up my bag and shorts. But if I told them anything else I'm worried I'll get arrested cos theye already warned me, plus they won't do a thing anyway. I'm writing to the IPCC about it but as long as I'm not 100% certain its that bloke what can a do!?They have all my clothes like they could easily see who I left with and take swabs but they wouldn't do anymore cos they were convinced I was lying and said "there wasn't a crime here"
> I fucking hate them man, just trying to get out of doing more paper work the cunts
> xxxx"

123. On the morning of 29 May 2010 the defendant also messaged another friend, Laura Campbell, saying:

> "hiya am alright, finished my second year so went out on Thursday night to celebrate and some bloke tried to rape me on me way home police said I was making it up even though I have a witness but she wasn't in when they came so she was a "figment of me imagination" too and they were gunna arrest me for wasting police time I was like why the fuck would I make up this shit and stay awake all night doing fucking statements
>
> I fucking hate the police like no wonder no one reports rapes and shit tehsedays cos there is no justice whatsoever thank god I got out from under his arm and ran tho the horrible fat ginger cunt I think I know who it was he's called billy hay but I cant be 100% sure cos I was so drunk but all I know is when I saw a picture of him I felt sick to me stomach and felt like crying and remember his piercing but what if it wasn't him I cant go round throwing accusations about but someone pinned me against a wall cornered me got his dick out was trying to make iz wank him off and I was like please let me go I wanna go home and he goes "as soon as you take off your shorts and bend over I will" and he also said "you've led me on all night why ae you being like this" which makes me think its defo him cos I was talking to him in passion

> I got out from under his arm, ran for me fucking life!
>
> It's a really long story anyway but its done with now I can do anything cos the police were gunna arrest me. Fucking hate them man xx"

124. On 1 June 2010 Mr Beston contacted the defendant asking: "*So did you find put* [sic] *who it was*". She replied the same day: "*Nope, pretty sure it was billy. Was between 4, 5 o'clock. But can't get CCTV, can't prove a thing*". Mr Beston then responded on 2 June: "*Sunderland is full of CCTV .. Go see the police don't let it go .. But I do know billy left with me lousie and her sad goth boyfriend at closing time (it's been a long time since I've been out they used to close at two!!) how drunk where you. Hope your ok*."

125. In addition to the various Facebook messages which I have reproduced, the defendant says that she telephoned Mr Beston on 28 May 2010. This is denied, or at least not recalled, by Mr Beston. I return to this at para 191 below. Ms Cresswell also describes calling another friend, Sam Brown, on 28 May 2010. She explained that this was because she had checked Mr Hay's Facebook page and she had come up as a mutual friend. Ms Brown's then boyfriend, John Anderson was a tattooist who had worked with Mr Jackson and Mr Beston. The defendant says that she told Ms Brown what had happened and Ms Brown indicated that she would see Mr Hay at a forthcoming tattoo convention and would ask him about it.

The convention in 2011

126. Messages passing between Ms Brown and Mr Hay in June 2011 refer to them both planning to attend "*tattoo jam*". It is agreed that this was a tattoo convention that took place that year in Liverpool. When he gave evidence, the claimant accepted that he was confronted by Sam Brown who raised the defendant's allegation with him. He said that this occurred during a convention after party. He agreed with the description in his 2020 message (para 137 below) that he was "super upset" by this and that he had cried.

Messages in 2017

127. In messages between Ms Cresswell and one of her friends, Sam Nixon, in 2017 she said of the alleged assault and Mr Hay: "*apparently someone mentioned it to him and he went fucking silent*". In her evidence the defendant said that this was a reference to what Sam Brown had told her about her conversation with the claimant at the tattooist convention in 2011. The claimant notes that in this series of messages, the defendant refers to wearing a skirt, rather than shorts.

Events in 2019

128. In 2019 the defendant wrote publicly about sexual assault, harassment and abuse by a previous boyfriend, who was a musician in a band. This attracted some publicity. In a Facebook message she commented that it felt: "*absolutely empowering to see it out there and one woman has (unfortunately) already also come forward about him*".

129. In Facebook messages to Sam Nixon in November 2019 the defendant referred to the claimant's Facebook page and said she had: "*Been thinking of outing him for a while, so looked to see if he was on Facebook. Literally shaking seeing his face*." In the same series of messages she referred to Sam Brown as: "*STILL friends with him*" and Bez: "*who said he didn't want to know about it*".

January 2020 events

130. On 27 January 2020 Sam Brown messaged the defendant asking if she had done something to upset her. Ms Cresswell replied: "*I was recently thinking about exposing Billy Hay for trying to rape me when I was 19. I did it with my ex last year and three other lasses came out about him. It still makes me sick to this day what Billy did to me. And the fact he's still tattooing. Anyway, i found his Facebook profile and had three mutual friends. You were one of them. You were also the first person I ever told about it and – while it's a decade later – that night and what he did is still raw in my memory, as is the guilt of letting him get away with it and potentially raping others*".

131. On 28 January 2020 the defendant made a diary entry as follows:

> "…Turns out, Sam is still friends with the blubbery ginger sicko that is Billy Hays – a tattooist who tried to rape me when I was 19. He followed me out of the club, pushed me into an alley and got his rank little orange nob out and told me to suck it. I did not so then he pinned me against the wall and undid my shorts. All while I was crying and begging him to let me go home.
>
> "But you've led me on all night …" he says, angrily…"Why lead me on if you didn't want to fuck?" By this point my shorts were round my ankles - But luckily I had a secret weapon – opaque fucking tights. And I am nimble and he is fat. I am smart and he is neanderthal. I was drunk … but I've never sobered up so quickly in my life.
>
> Carefully, I stepped out of my shorts, ducked under his flabby arm and RAN. I ran faster and harder than I've ever ran before. I ran like I ran away from monsters in my nightmares. I left my bag, phone, shorts … and I ran. Like Peter Fucking Pan, because I was literally only wearing tights."

132. The diary entry then made brief reference to the police not believing her and to conversations with Mr Beston and with Ms Brown in the aftermath. She said that Ms Brown's then boyfriend, John Anderton had shouted across a pub she was working in at the time: "Heard you nearly got RAPED, Nina!". She then described a conversation with Ms Brown in which she had expressed upset that she was still friends with the claimant.

May – June 2020 events

133. On 31 May 2020 the defendant contacted the Tattoo Sexual Abuse Survivor Support group. She said she was wondering where she could share her story "*about another*

predator in the industry. I've kept it to myself for 11 years and felt incredible guilt at the thought of my silence meaning other women were assaulted or abused".

134. On 16 June 2020, his friend Joe Jackson messaged the claimant on Whatsapp alerting him to the telegra.ph publication and providing a link to it. Mr Jackson commented: "*I remember someone telling me about this years ago and I actually tattoo an[d] old friend of hers and she said the girl in question is crazy*". In his evidence, Mr Jackson clarified that "the old friend" he was referring to was Sam Nixon. Mr Hay replied to Mr Jackson that Sam (Brown) had told him: "*the girl said I was a bit rapey and I actually started crying at the afterparty at Liverpool convention*". He asked Mr Jackson for Sam's surname, if he knew where the article had come from and the name of the person who had written it. Mr Hay said he needed to find out her name: "*and go to the police man. I'm shaking*". Shortly after this, Mr Jackson provided Mr Hay with Ms Cresswell's name.

135. Mr Jackson also sent the claimant screen shots of an exchange of messages he had been having with a friend, Lauren Stephens, who was the person who had alerted him to the telegra.ph publication. Observations made by Mr Jackson about the author of the blog during the course of this conversation included: "*Apparently she is a compulsive liar. Didn't think it would be long before this story got dragged up again*"; and "*I take the word of people surrounded by her who said she's a compulsive liar and an attention seeker. I've known billy for about 15 years. I trust his word over hers*".

136. When he gave evidence Mr Jackson indicated that he also recalled having a short telephone call with Mr Hay after he had sent him the link to the telegra.ph publication. He said that the claimant sounded like he was in a state of shock. Mr Hay also recalled that there was a telephone call between them; he said that it was during this call that he started to make the connection with the conversation he had had with Ms Brown at the 2011 convention.

137. The same day Mr Hay contacted Ms Brown via Facebook, saying:

> "So sorry to message you out the blue but I've just been sent a very distressing article written by Nina Cresswell.
>
> The reason I'm messaging is, do you remember you said to me at Liverpool convention, that your friend said I was a bit rapey in the club and I got super upset and started crying? Well she mentioned that a friend asked me about it and I brushed it off.
>
> I'm going to go to Police about this, she has named me and my shop and it's all lies. She's written a full article basically saying I tried to rape her.
>
> Again, sorry to message out the blue but you are the only person that's said anything like that to me and the only person since so I didn't really know where to turn other than the police."

138. Ms Brown replied saying that: "*It was such aong* [sic] *time ago I can't really remember much about what was said or what had happened at the time*", but that

recently Ms Cresswell had blocked her on social media. In a further message Ms Brown said that she was happy to talk to the police if they needed to speak to her.

139. Later the same day the claimant messaged Mr Jackson on Whatsapp saying that he had contacted Ms Brown seeing: "*as she's the only person that's ever mentioned this situation*". The claimant told Mr Jackson that he was devastated and they discussed him going to the police. He also said that he had spoken to "Bez", who remembered: "*me him and Damo went for chicken when the club closed and walked home together. He reckons the lassie was trying it on with me in the club. He said she was over dancing a bit and that was about it*". (Mr Beston indicated in his evidence that he did not remember this call and he did not suggest that this was his perception.) Mr Jackson then made some negative remarks about the "*300 girls*" he believed were in the support group, including: "*This super supportive culture is good for nobody. There is no reasoning. I feel like we (men) are trying to reduced to below women (not equal rights) and this is just one of the steps to do it*". Mr Hay said that he was: "*absolutely gutted … still shaking*". Mr Jackson suggested that abuse allegations were being raised because those involved with the support group had offered free tattoos.

140. Further messages were exchanged between Mr Jackson and the claimant on 17 June 2020. In one message Mr Jackson said: "*I'd try not get too het up about it all man. I know it's hard but you just need to get the police involved and try get that girl prosecuted for Libal* [sic]. *Fucking bullshit man*." Mr Hay told Mr Jackson that he could not stop trembling and that he was constantly thinking about it. Later that day he messaged that a police officer had telephoned him and had indicated that they would call him the following day to take a proper statement and then pass the matter to the Northumbria Police.

141. In June 2020 the defendant posted some Facebook articles describing alleged rape, harassment and abuse by the former boyfriend that she had written about the previous year (para 128 above). She included a screen shot of a letter from North Yorkshire Police indicating that it had been decided that there was insufficient evidence for a realistic prospect of conviction. She received various supportive messages in response to her posts.

July 2020 events

142. A National Standard Statement completed by Police Scotland indicates that officers had spoken to the claimant on 7 July 2020. The statement that he gave included the following:

> "About 21.25 hours on 16 June 2020, I was made aware of a blog type post that had been posted anonymously on the internet. This post was mentioning a night out I had in Sunderland about 11 years ago and stated that I had pinned a girl against a wall and assaulted her. The post was horrendous and was saying I had done something horrible which I hadn't done. I remember parts of that night, but definitely nothing like that happened.
>
> I don't remember the woman who was supposedly involved, but I am worried that this is an attempt to discredit me and my work."

143. On 15 July 2020 the defendant posted an Instagram story referring to the fact that the claimant had been looking at her LinkedIn profile. She speculated as to what his motives for doing so might be.

144. On 22 July 2020 after the FB posts publications and the Instagram publications, Bath Street posted on Instagram that these were: "*false accusations and as of which Nina Cresswell is currently being investigated by the police*". It was said that anyone who shared the false information would be sued for libel.

145. Police Scotland obtained a further statement from Mr Hay on 23 July 2022. He referred to the recent publications, saying: "*I do not know why [redacted] is saying these things about me but I am very alarmed by the things she is saying. I am scared that there is going to be a reaction and that myself or [redacted] are going to get hurt as a result of these lies that are being told*". The claimant forwarded screenshots of the posts to the police.

146. On 23 July 2020 the defendant contacted Northumbria Police. The incident log commenced at 12:06 hours indicates:

> "CALLER REPORTED AN ATTEMPTED RAPE 1OYRS AGO WHICH WAS NOT CRIMED AT THE TIME. CALLER WISHES FOR THIS TO BE RE-LOOKED INTO AS FEELS IT WAS NOT INVESTIGATED FULLY. SHE STATES SHE WAS MADE TO FEEL BAD BECAUSE SHE WAS DRUNK, AND WHEN SHE TOLD OFFICERS 'THIS FEELS LIKE A BAD DREAM' AT THE TIME, THE OFFICERS TOLD HER THAT SHE TOLD THEM SHE DREAMED ABOUT BEING RAPED, WHICH WAS NOT THE CASE."

147. The log then sets out a description that the defendant had provided of the alleged sexual assault. It then included the following:

> "IT CAME TO LIGHT THAT NEXT DAY THAT THE MALE IS KNOWN AS BILLY HAY FROM SCOTLAND…
>
> THERE HAVE BEEN OCCASIONS OVER THE YEARS AT TATTOO CONVENTIONS WHERE BILLLY HAY HAS BEEN APPROACHED ABOUT THE ALLEGATION. HE TOLD TWO SEPARATE PEOPLE THAT THIS HAD BEEN A 'MISUNDERSTANDING', BUT THEN CHANGED THIS TO STATE HE HAD BEEN WITH A MALE THE WHOLE NIGHT AND NOT WALKED HER HOME.
>
> CALLER IS INVOLVED IN THE TATTOO AND BODY PIERCING INDUSTRY, AND STATES THERE IS A MOVEMENT CURRENTLY CALLED 'TATTOOMETOO' WHICH AIMS TO OUT POTENTIAL SEXUAL PREDATORS FROM WORKING IN THE INDUSTRY.
>
> CALLER HAS CONTACTED THE BUSINESS PARTNER OF BILLY HAY TO MAKE HER AWARE OF WHAT

> HAPPENED 10YRS AGO. SHE WAS UNAWARE THAT THE BUSINESS PARTNER IS ALSO IN A RELATIONSHIP WITH HIM. THE FEMALE BLOCKED THE CALLER"

148. The log indicates that officers visited the defendant's home address on 24 July 2020. A summary of the account that she gave to the officers is then set out. The log also says that on 18 September 2020 officers showed the defendant three images from around 2010 and she was unsure if one of these was the woman who had assisted her on the night of the incident. The log then records an account which the defendant gave when she attended for interview on 22 September 2020.

149. On 25 July 2020 the defendant contacted Ms Casey via Facebook, telling her that she was re-opening the case against the man who had assaulted her and she wondered if she remembered anything about the man who Ms Casey had mentioned in her 28 May 2010 message. She replied that she did not remember anything about him and: "… *all I remember is that you left before me and left your leather jacket at passion and I took it home, and when I rang you the next day you were saying someone had followed you and pinned you down and you had to run off and you were really shook up about it*". In a subsequent message she said: "*I do very vaguely remember some guy you didn't know very well keep trying to dance with you and I have a flash of memory in my head of you laughing and finding it funny…However I do very much remember how shook up you were the next day on the phone and I had no doubt in my mind you were telling the truth…*".

Subsequent events

150. On or before 19 April 2021, Northumbria Police decided that the defendant's allegation did not have a realistic prospect of conviction. The stated reasoning entered on the log by D/Insp Dunning was that:

> "THE STRENGTHS AND WEAKNESSES OF THE EVIDENCE ARE APPROPRIATELY OUTLINED AND IT IS CLEAR THAT THE WEAKNESSES FAR OUTWEIGH THE STRENGTHS. THIS INCLUDES INCONSISTENCY IN NINA'S ACCOUNT, RANGING FROM HER BEING PINNED DOWN AND RAPED, TO SUSPECT MASTURBATING HIMSELF IN FRONT OF HER, THEN CHANGED TO A GROUP OF MALES MASTURBATED IN FRONT OF HER. CCTY ENQUIRIES AT THE TIME REVEAL CONFLICTING INFORMATION TO THAT PROVIDED BY NINA.
>
> THERE IS NO FORENSIC EVIDENCE. TO ADD FURTHER CONJECTURE, IT IS ENTIRELY POSSIBLE THAT SOMEONE OTHER THAN [redacted] INTERACTED WITH NINA ON HER WAY HOME; HOWEVER NO EVIDENCE OF THIS WAS PROFFERED AT THE TIME.
>
> … IT APPEARS SUFFICIENT ENQUIRIES WERE MADE AT THE TIME TO ESTABLISH THERE WERE SIGNIFICANTLY UNDERMINING INCONSISTENCIES IN

> NINA'S ACCOUNT, WHICH WASN'T AT ALL DISMISSED AS LIES. RELEVANT ENQUIRIES WERE CAIRRED OUT AT THE TIME, AND RECORDED ON THE POLICE INCIDENT LOG…
>
> IT IS WORTH NOTING THAT IF THIS REPORT WAS MADE IN 2021, NINA WOULD BE SPOKEN TO WHEN SOBER, AN SSAIB BOOKLET COMPLETED, THEN PERHAPS A FORENSIC MEDICAL OFFERED … IN THE ABSENCE OF CLARITY FROM NINA, THIS WOULD BE THE ONLY WAY TO DETERMINE WHETHER PENILE PENETRATION (OR OTHER SEXUAL CONTACT) TOOK PLACE…
>
> THIS MATTER WAS REOPENED IN 2020 AND CORRECTLY RECORDED AS A CRIME. FURTHER ENQUIRIES WERE CARRIED OUT TO TODAY'S INVESTIGATIVE STANDARD … I NOTE THE STRENGTHS OF THE INVESTIGATION AND I AM NOW SATISFIED THAT THIS REPORT IS THOROUGHLY EXPLORED.
>
> …IT SHOULD BE NOTED THAT, WHILST THIS IS RECORDED AS AN ATTEMPTED RAPE, THERE IS NOTHING IN NINA'S ACCOUNT THAT SUGGESTS AN ATTEMPT RAPE OCCURRED."

151. The incident log also indicates that the defendant was interviewed in respect of the claimant's allegations on 21 September 2021. She admitted that she had posted the publications referred to by Mr Hay, other than a post from TattooMeToo who, she said, must have picked up on her posts and added a photograph of Mr Hay. The summary continues:

> "CRESSWELL STATES THAT SHE PUBLISHED THE INFORMATION ON HER SOCIAL MEDIA PAGES IN ORDER TO SAFEGUARD OTHER WOMAN [sic]. SHE STATES THAT TATTOO ARTISTS ARE SOMETIMES IN A POSITION WHERE THEY ARE WORKING ON NAKED / SEMI NAKED FEMALES AND THAT SHE WAS TRYING TO SAFEGUARD THESE WOMEN.
>
> …SHE BELIEVES THAT THE INFORMATION SHE POSTED WAS ACCURATE AND TRUE…"

152. On 28 April 2021 the defendant told Ms Casey via a Facebook message that she had been to the police station that day and had learnt that the claimant had now: "*changed his story from 'never leaving the club with me' and admitted he left with me. Admitted it was him in that alleyway with me. Admitted he tried to kiss me and I didn't want to*…". She said that as a result: "*I'm now absolutely confident about all of it*".

153. The claimant was informed by DC Gillibrand in an email sent on 11 November 2021 that no further action would be taken by Northumbria Police in relation to his allegation of malicious communication.

Truth defence: discussion and conclusions

154. In arriving at my conclusions I have applied the principles that I identified at paras 20 – 21 above. I have assessed whether the defendant has established on a balance of probabilities that the imputation that the claimant violently sexually assaulted her is substantially true; and I have done so by reference to her pleaded particulars set out at para 82 above. There is no dispute over the accuracy of the particulars at subparagraphs (a) and (b) of para 10A of the re re-amended defence; the question is whether the defendant has proved the account at subparagraph (c). I have taken into account all of the evidence I heard and all of the points made by counsel in their written and oral submissions. It would be impracticable to refer to each of these contentions in setting out my analysis and conclusions, but I have borne them all in mind. I will refer to those which I regard as significant and to others which the parties particularly urged upon me.

155. Given the lengthy period of time that has elapsed since May 2010, I have given close consideration to the contemporaneous documentation. However, the weight that is to be accorded to such a document inevitably depends upon the circumstances and the extent to which it appears to be accurate and reliable; the judicial observations that I have cited at paras 40 – 41 above concerned the desirability of checking potentially fallible memories against ostensibly reliable contemporaneous documents, they do not suggest that disputed contemporaneous documentation should be accorded some special weight in determining the truth of what occurred.

156. It is logical to first consider whether the defendant was sexually assaulted at all on the night of 28 May 2010 and, if I find that she has established this, to then consider whether she has proved that her assailant was the claimant. As I have noted earlier, both parties presented their cases on the basis that the other party was being untruthful, rather than mistaken. Indeed, it is hard to see how mistake could arise as a likely explanation, given the diametrically opposed accounts (and see also paras 175 and 187 below).

Matters I do not regard as significant

157. Before I turn to those questions, it is convenient to dispose of a number of matters that were emphasised by the parties but which I do not consider significantly assisted me in resolving them.

Minor inconsistencies

158. I do not attach any significance to minor variations in descriptions of the alleged events given by the defendant, the claimant or other witnesses. This was particularly, although not exclusively, raised in relation to the defendant's various accounts. Given that she was drunk at the time and, if the alleged incident occurred, she was the victim of a traumatic sexual assault, which occurred rapidly and unexpectedly, I do not consider that a lack of complete consistency in the versions she has given assists me in deciding whether or not she has given an essentially honest account. This applies

with all the more force where the discrepancy in question exists between two accounts that were given years apart from each other. As the authorities I have referred to at paras 40 – 42 above underscore, memories are fallible however honest the witness may be. Accordingly, in general, I have accorded greater weight to internal inconsistencies or inherent improbabilities in a party's account, than to an absence of complete consistency in their various narratives. However, it is, of course, a question of degree; where a discrepancy is central to an individual's account and it is not adequately explained, then it may well have a greater significance.

159. I have also borne in mind the context in which the words were said or written; the more informal the setting, the less likely it was that the individual was careful or precise in the expressions used. By way of example, I do not attach significance to the defendant's indication in her Facebook message to Kerry Roberts that the homeless woman was a "witness" to the assault (para 121 above); or to her reference to wearing a skirt, rather than shorts, in her 2017 social media messages with Sam Nixon (para 127 above). Whilst Mr Coulter also placed emphasis upon discrepancies in the defendant's 2020 diary entry; this was an informal and personal document ostensibly written in a context where Ms Cresswell was venting the anger she felt upon discovering that Sam Brown had remained friends with the claimant despite what she had told her (paras 130 – 132 above).

160. Some factual errors in an individual's account reveal nothing significant about whether it was given honestly or not. An example is the defendant saying in the telegra.ph publication that she was 19 years old (rather than 20) in May 2010. Plainly this was incorrect, but in my judgment it does not provide any indication as to the truth or otherwise of the sexual assault allegation.

The claimant's reaction

161. I do not consider that the claimant's reaction upon learning of the defendant's publications assists me one way or the other. His distress and concern over the publications would be expected to arise whether or not their contents were truthful. For the avoidance of doubt, I also do not attach any adverse significance to the claimant looking at the defendant's LinkedIn profile (para 143 above).

Action not taken by the defendant before 2020

162. Mr Coulter attached significance to the defendant not having made her allegation public at an earlier stage. He said in his oral closing submissions that if her allegation were true there was "*no good reason why she would not have wanted to tell the world about it*". I do not accept that proposition. There are all sorts of reasons why a victim of sexual assault might not want to air that publicly. They include: a fear of being disbelieved; a disinclination to re-visit a traumatic event; internalised shame; and concern about a negative backlash and/or being sued by the alleged assailant. These are simply examples that may or may not apply in any given situation. There are a broad range of emotions that a person could feel in that situation and no two people will react in exactly the same way. Accordingly, I do not consider that the period of time before the defendant published these allegations in the way that she did in 2020 assists me one way or the other in terms of deciding upon the honesty of her account.

163. I also note that if this point could have any force at all – for example in a situation where there was a lengthy, wholly unexplained lapse of time – that is not this instance. Firstly, because the defendant did report the sexual assault allegation to the police at the time, tried to investigate matters with Mr Beston and ventilated the allegation with various of her friends, as I have described. Secondly, because, she has explained how she felt dismissed and disheartened for years after reporting the matter to the police in 2010; and why she published the allegations at the time that she did, including the reaction she had received the previous year to publicly airing her allegations about a former boyfriend (para 128 above) and the emergence of the Tattoo MeToo campaign.

Non-disclosure of medical records

164. Mr Coulter submitted that I should draw an adverse inference from the fact that the defendant had not disclosed her medical records. He said I should conclude that there had been a deliberate hiding of relevant documents and that the only possible reason for this was to prevent the claimant and the court seeing material that undermined her case. In this regard, when he cross-examined the defendant, Mr Coulter focused upon the passages in the original defence which I have referred to at para 74 above. In summary he contended that as Ms Cresswell alleged she had suffered from PTSD, anxiety and depression in consequence of the assault and she referred to counselling that she had received in this respect, her medical records would either have supported or contradicted this.

165. I do not accept that a basis has been shown for drawing the suggested adverse inference. The amended defence replaced and superseded the original defence and neither the amended defence nor the subsequent iterations of this pleading averred that the defendant suffered consequential ill-health. Accordingly, it does not appear to me that the defendant's medical records came within the obligation to give standard disclosure, as provided for by CPR 31.6. Furthermore, if the claimant disagreed and took the view that aspects of the defendant's medical records should have been disclosed, the proper course would have been to request their disclosure and, if this was not forthcoming, to make an application for specific disclosure pursuant to CPR 31.12, which could then have been assessed on its merits. No such request or application was made and I was informed that the first time this issue was raised by the claimant was during Mr Coulter's opening on Day 1 of the trial.

166. In short, neither party has disclosed their medical records, despite making some generalised references to consequential anxiety, stress and effects such as poor sleep in their respective witness statements. Neither party brings a claim for consequential ill-health and neither party has applied for disclosure of the other party's medical records. In all the circumstances, I do not draw any adverse inferences against either party in relation to the absence of medical records in the materials before me.

Inferences from the absence of potential witnesses

167. In his closing submissions Mr Coulter invited me to draw an adverse inference from the defendant's failure to call Fiona Duncan as a witness. He said that I should infer that the failure to call her was because Ms Cresswell had no confidence that she would support the defendant's account concerning what Ms Duncan had told her was said by Mr Beston in the aftermath of 28 May 2010 and what was said to her by the claimant

when she subsequently confronted him with the sexual assault allegation (para 86(xiv) above).

168. I have set out the applicable principles at paras 43 – 46 above. I have little information as to why Ms Duncan has not given a witness statement. However, given the nature of the highly contentious issues raised in these proceedings and the fact that Ms Duncan knows both parties and also Mr Beston; and given the period of time that has elapsed, I do not consider that I can safely or fairly draw the inference that is sought in the circumstances. I conclude that either the conditions for drawing such an inference are not fully met or, in any event, in the exercise of my discretion it would not be just to do so.

169. However, I emphasise that I accept that it would be unfair and unsafe for me to place any weight on statements attributed to Ms Duncan in circumstances where I have not heard from her and I make clear that I have not done so, save to the extent that such matters are not in dispute (see para 190 below).

170. From his cross-examination of the defendant, it appeared that Mr Coulter would also invite me to draw an inference from the fact that the defendant had not called either Sam Brown or Sam Nixon as witnesses. However, the submission he made in closing was confined to Ms Duncan. It may be because an equivalent point could be made in relation to the claimant not calling either of these women as witnesses, in light of the matters I have referred to at paras 134 and 138 above.

171. In any event, and for the avoidance of doubt, I have taken a similar approach in relation to both Ms Brown and Ms Nixon, who like Ms Duncan knew both parties. I have not drawn any positive adverse inferences from the fact that they were not called as witnesses by one or other party, but equally in making my findings I have placed no weight on statements attributed to them, save where they appear in contemporaneous messages and/or are part of the agreed events.

Whether the defendant has proved that she was violently sexually assaulted

172. I turn then to the central issues before me. I am satisfied that the defendant has proved on a balance of probabilities that she was violently sexually assaulted in substantially the terms set out at paragraph 10A of the re re-amended defence. As I have earlier indicated, I address this issue before coming on to consider whether she has proved that the perpetrator was the claimant.

Material supporting the defendant's account

173. It is not in dispute that the defendant left Passion nightclub at some point after 04.00 hours on 28 May 2010 (para 107 above). There is no suggestion that she was distressed at this stage. It is a matter of record that she called the police a relatively short time later at 6.33 hours reporting that she had been sexually assaulted when she walked home from the nightclub (para 108 above). During the early morning of 28 May 2010 she told her flatmates that she had been sexually assaulted and it appeared that she was very upset; for example, Mr Cormack's account to that effect was not challenged. She also called her mother in a state of distress telling her that she had been sexually assaulted and this led to her mother coming to her address to comfort her (neither the defendant nor Gillian Cresswell were challenged on this part of their accounts).

174. During the course of 28 and 29 May 2010 the defendant also told a number of her other friends that she had been sexually assaulted on her way home from the nightclub, as is confirmed by her Facebook messages to Ms Casey (para 117 above), to Mr Dee (para 120 above), to Ms Roberts (para 121 above) and to Ms Campbell (para 123 above).

175. No reason was put to Ms Cresswell in cross-examination as to why she would have gone to such elaborate lengths to initiate and propound a deliberately false complaint of sexual assault and I am unable to identify any such reason. Given this and given the circumstances that I have just summarised, I regard such a scenario as very unlikely. The defendant's actions and reactions appear to be consistent with an entirely genuine belief that she had been subjected to a serious sexual assault. In turn, the events she described were not things that she could have been mistaken about in terms of the essence of what had occurred (as opposed to particular details).

176. All of this, taken with Ms Cresswell's own evidence of what occurred, which I listened to very carefully, points strongly in favour of the conclusion that she was sexually assaulted, at least broadly as she describes, in the early hours of 28 May 2010.

The Northumbria Police incident log

177. The main material that the claimant relies upon as indicating to the contrary is the entry in the Northumbria Police incident log (para 114 above) and the officers' decision that the allegation was "not to be crimed". I will make further reference to this document when I come on to consider the evidence relating to the identity of her assailant, but for present purposes I focus on whether this document undermines the conclusion that I would otherwise draw that the defendant has proved that she was sexually assaulted in the early hours of 28 May 2010.

178. I understand why the claimant places considerable emphasis upon this material; however, I conclude that it does not significantly undermine the evidence I have identified which strongly points to the defendant having been sexually assaulted. This is for the following reasons:

    i) On any view the officers' conclusion not to treat the reported sexual assault as a crime and to terminate the investigation was one that was arrived at very rapidly, only a matter of hours after the defendant's first report to the police at 6.33 hours and in circumstances where the only conversations that the officers had held with her occurred in circumstances where she had been awake all night and would still have been affected by the considerable amount of alcohol that she had drunk (paras 108 – 115 above). The 2021 re-investigation noted that a complainant would now be interviewed when she was sober and it was acknowledged that the matter should be recorded as a crime (para 150 above);

    ii) One of the central factors identified by the officers was discrepancies in the complainant's account. However, the references to discrepancies must be viewed in a context where not only was the defendant still affected by drink and evidently distressed, but also the officers never got to the stage of preparing a draft statement for Ms Cresswell to review, amend and sign, nor is there any suggestion that a record was made of the account she gave to the officers who visited her, for example in one of the officer's notebooks, which she was then

asked to check and confirm. The opportunities for genuine misunderstandings having arisen in the circumstances are evident. By way of example, the route which the defendant is said to have provided makes no sense. Firstly, turning right from Holmeside (misspelt as "Homeside" in the log) does not lead "onto" Maritime Terrace (misspelt as "Maratine" in the log). Secondly, the officers then refer to an unidentified "rear lane", which may well represent confusion with the area by the leisure centre where the defendant says the sexual assault occurred. Thirdly, then turning "left back onto Holmeside" would mean that the defendant was now walking back towards Passion rather than in the direction of the leisure centre and her home. In short, either the defendant gave a thoroughly confused account of the route she took, which the officers did not seek to clarify with her or the officers misunderstood what she was saying or failed to note it accurately. Each of these possible scenarios suggests a superficial approach in which an apparent or perceived discrepancy is the product of unresolved confusion rather than indicative of a lack of truthfulness on the defendant's part. An apparent discrepancy over whether the defendant was alleging that her assailant had pinned her down on the ground or that he had pinned her against a wall may well be explained by a similar kind of confusion. This also applies to the alleged discrepancy between whether the defendant was saying that her assailant had tried to kiss her or that he had kissed her;

iii) The officers' stated reliance upon what are said to be the defendant's dreams of being raped was quite frankly bizarre. Again this was not something that was clarified with the defendant when she was sober and rested and the opportunities for misunderstanding are evident. Ms Cresswell says that she told police that the incident felt like a nightmare. On a balance of probabilities I accept that this was the case; it is much more consistent with her evident distress that morning, than a suggestion that she was revealing some kind of fantasy that she harboured to the officers. Furthermore, it is very difficult to see how this bore on the question of whether she had been sexually assaulted in any event; even if she did have the kinds of dreams that the officers thought she was referring to, it was simply irrelevant to the question at that stage of whether a potential crime had been committed, as it clearly did not in any way preclude that she had been sexually assaulted as she alleged;

iv) The entry is internally inconsistent in relying on the proposition that the defendant could "give no description of any persons"; the log shows that Ms Cresswell had given a description of her alleged assailant when she contacted police at 06.33 hours;

v) The reference in the log to discrepancies between the complainant and her mother's account must be viewed in a context where no formal statement was taken from the defendant's mother and there is nothing to indicate that she was asked to check an officer's record of the account she was thought to have given;

vi) The reference to the CCTV recovered from the Revolution Bar needs to be treated with considerable caution. Surprisingly, there is no record in the incident log of the time at which the defendant said the sexual assault had occurred. In addition to this being a further indication of a cursory approach by the officers, it deprives the described CCTV footage of the significance which the officers attributed to it. The incident log entry appears to have been written in a

chronological sequence in terms of the steps that the officers' undertook. Accordingly, it follows that the defendant told police about the neighbour who assisted her by going back to the scene with her and recovering her bag *before* the officers returned to confront her with their description of what they had seen on the CCTV. This negates the suggestion that the homeless women was a fiction invented by the defendant when faced with inconvenient footage, which was said to show her walking by Revolution fully clothed, with her bag and accompanied by someone who appeared to be male. As there is no indication of the time period which the viewed footage covered, the images that the officers saw *could* have captured a single occasion on which the defendant walked towards her address (thereby undermining her account of sexual assault) or they could have only reflected a second occasion on which she went in that direction, post-assault and assisted by the homeless women (thereby supporting her account of the sequence of events). I also note that no documented version of events from anyone involved accounts for the identity of the second person who the officers saw in the video, if it was not the homeless women. Of greater significance, as it appears to me, is that the officers' reaction to this CCTV footage played a central part in their summary decision to "no crime" the allegation without conducting a fuller investigation. Finally, the assertion in the incident log that the defendant "looks at no point distressed" in the CCTV footage, is further suggestive of a mindset of finding reasons to bring the investigation to an end, given the limited extent to which facial expressions and the like are usually visible in this kind of footage; and

vii) In all the circumstances, and not least because it is consistent with the approach displayed in the incident log that I have just discussed, I accept the defendant's account that from the outset of their attendance at her address, the officers appeared to be unsympathetic and conveyed the view that an allegation of this kind would be very difficult to prove. By the time of their attendance, the officers would have been aware of the initial entry on the police log that the defendant was "quite drunk" and that her recollection was hazy. It appears to me likely that their approach was influenced by an early perception that this was not an incident that was going to lead to a charge or a successful prosecution.

179. Accordingly, although I have carefully weighed this material in the balance, I do not consider that the contents of the Northumbria Police Incident Log nor the decision that police made on 28 May 2010 not to treat the allegation of sexual assault as a crime significantly undermines the positive supporting evidence that a sexual assault took place (which I have already identified). In making this assessment it does not follow that I accept all of the criticisms of the police investigation that are made by the defendant. In arriving at these conclusions I have also borne in mind the 2021 police re-investigation. However, I do not consider that this alters the position, as the 2021 investigation was severely limited by the failure to undertake a fuller investigation back in 2010.

180. A further point relied upon by the claimant is that the defendant did not undertake her own additional investigations and revert to the police in 2010; it is said that she would have done this if she knew that the officers had wrongly dismissed her account. By way of example, it is said that she could have tracked down the homeless woman and given police her details and/or she could have obtained CCTV footage from Passion.

Whilst I accept that the defendant could have done these things, I do not consider that a failure to do so is indicative of her having made a false allegation to police. It is at least equally consistent with the explanation that Ms Cresswell gave in her evidence, namely that she felt angry and despondent after the police had rapidly determined that they did not believe her genuine account. She pointed out that she was only 20 years old at the time, that she had gone to those in authority in the belief that they would assist in finding the perpetrator and bringing them to justice, only to find that she was disbelieved. If these were the circumstances, it is not at all surprising that she did not pursue matters further with police at the time and that she felt that to do so would achieve nothing and would simply increase her level of distress.

181. Furthermore, I accept that this was indeed the defendant's state of mind at the time. It is a credible explanation and I note that such sentiments are consistent with the contemporaneous Facebook messages that she sent to her friends (paras 117 and 120 – 123 above), which contain expressions of her hurt, frustration, anger and resignation. It is also right to note in this context that Ms Cresswell did attempt to follow up matters with Mr Beston (para 118 above and para 191 below) and made some inquiry about accessing the CCTV from Passion (paras 120 above).

Whether the defendant has proved that her assailant was the claimant

182. I turn next to whether the defendant has proved on a balance of probabilities that her assailant was the claimant. In making that assessment I have also taken into account the evidence that I have already discussed, but for the purposes of exposition I will focus on the evidence that relates more directly to the identity of her assailant.

183. In summary, I am satisfied that the defendant has shown on the balance of probabilities that the perpetrator of the violent sexual assault upon her was the claimant.

Material supporting the defendant's account

184. The defendant has never identified or suggested that her assailant was anyone other than the claimant. Whilst she expressed some uncertainty over whether she could be sure that he was the perpetrator, I accept that this was in keeping with her acknowledged drunkenness at the time and a proper sense of not wanting to overstate the level of confidence that she had in the identity of her attacker. Nonetheless, her contemporaneous messages are consistent with the proposition that she believed from an early stage that the claimant was responsible. On 28 May 2010 she messaged Mr Beston to find out if she had left Passion with Mr Hay (para 118 above). I accept that this was because she believed that he was the person who had sexually assaulted her. On 29 May 2010 she told her friend Laura Campbell that she believed that her assailant was Mr Hay but she could not be 100% sure (para 123 above). On 1 June 2010 she told Mr Beston that she was "pretty sure" it was the claimant (para 124 above). She also made her allegation about the claimant to Sam Brown (para 125 above), as is confirmed by the fact that Mr Hay accepts she confronted him about this at the convention in 2011 (para 126 above).

185. I also note the events of early 2020 that I have described at para 130 – 132 above. This sequence has the credible ring of the defendant being genuinely hurt (as she expressed in her personal diary) when she discovered that Ms Brown had remained friends with

the claimant despite knowing of his alleged behaviour towards Ms Cresswell. The seemingly heartfelt anger she privately expressed in relation to Ms Brown appears much more likely to stem from her having a genuine belief that Mr Hay was her assailant than from a situation where she had deliberately concocted a false allegation to that effect.

186. Furthermore, when he cross-examined the defendant, Mr Coulter did not identify any reason why she would deliberately make a serious false allegation against the claimant. This is not a situation where, for example, it is said that aside from the assault Ms Cresswell bore some kind of ill-feeling or grudge towards Mr Hay or that she had some malignant reason for wanting to cause him disruption and distress. I accept that in the circumstances it is inherently unlikely that she fabricated the involvement of the claimant, as he alleges.

187. I discuss the impact on the claimant's credibility of his change of account in relation to his leaving the nightclub with the defendant at para 188 below. However, it also has a significance beyond that. The claimant now accepts that he left the nightclub in the company of the defendant, walked at least a short distance with her and then tried to kiss her (para 88(iii) and (iv) above). Whilst it is not an impossible scenario, it would be relatively unlikely for the defendant to have then experienced just a few minutes later during the same journey home a sexual assault by a different, unidentified man. Furthermore, her recollection of the incident, which I have accepted as essentially honest, includes her assailant referring to the fact that she had "led him on during the evening" (para 82 above), a remark that would only be made by someone who she had been with her earlier on. Mr Hay and Ms Cresswell had danced together at Passion (para 106 above) and Mr Beston noticed that the claimant had shown an interest in her (para 118 above). These features link the claimant to the sexual assault and also render it all the more unlikely that the defendant has simply made an honest mistake over the identity of her assailant.

The evidence of the claimant and his witnesses

188. I also consider that there were a number of significantly unsatisfactory aspects of the claimant's evidence, which bear on his credibility:

i) There was a substantial change in the claimant's account between positively asserting that "all that happened between" him and the defendant was that they had danced and chatted in groups at the nightclub (para 70 above); and his later acceptance that he left the nightclub at the same time as her, that they had walked at least a short distance together and then he had tried to kiss her, but she had pulled away (paras 78 and 88(iii) and (iv) above). Both of these accounts were given after a period of reflection, rather than in circumstances equivalent to the defendant's condition on the morning of 28 May 2010; and in a situation where he knew that part of the defendant's account in the telegra.ph publication was that he had tried to kiss her. The claimant's explanation for this acknowledged change in his account was unsatisfactory. On the one hand he said that when he learnt of Ms Cresswell's allegation on 16 June 2020, he repeatedly went over the events and "all possible scenarios" in his mind and spoke about the events with (at least) Mr Jackson, Mr Beston, Ms Brown, Ms Sweeney and the police, but he only recalled the further elements after the letter of claim was sent on 27 July 2020. When asked about this process by Mr Price, he said that it had "not

really" occurred to him any earlier that he might have tried to kiss Ms Cresswell, despite her allegation to that effect; and that although he had been "wracking my brains, I didn't ask myself whether I had tried to kiss her. I don't know why";

ii) The claimant gave a less than credible account of why he chose to accompany the defendant when she left the nightclub. He agreed that he did not know the geography of Sunderland and that he was dependent upon her for the route that they took. He agreed that his friends were still in the nightclub and that he did not tell them that he was leaving. When asked why he left with the defendant, the claimant denied that there was any sexual motivation, he said that he was not sure of the reason and that it may have been to continue their conversation (at which point his answer tailed off and he shrugged his shoulders). I did not find this to be at all convincing. The two of them had been dancing together in the nightclub, Mr Beston had apparently formed the view that his friend was attracted to Ms Cresswell (para 118 above) and Mr Hay admittedly tried to kiss her a few minutes after leaving Passion. The evidence points strongly to the conclusion that the claimant left the club with the defendant in the hope of having some sexual contact with her. Of course, in and of itself this does not mean that he translated that interest into a sexual assault; but the fact that he was notably evasive about his real intentions did impact upon my assessment of his truthfulness;

iii) The claimant also gave less than credible evidence about the extent to which he had discussed the defendant's allegation with Mr Beston and with Mr Jackson in the aftermath of their evening at the nightclub and over the ensuing years. On the evening of 28 May 2010 Ms Cresswell had messaged Mr Beston saying that it was "really important" that she clarified whether it was Mr Hay that she had left the nightclub with as the person was "being weird" (para 119 above). However, despite the terms of this request, both Mr Hay and Mr Beston said in their evidence that Mr Beston did not raise this topic with the claimant at any stage. They also said that there was no discussion between them of this subject in subsequent years, for example after the 2011 convention in Liverpool where Ms Brown confronted the claimant with the defendant's allegation and he was "super upset" (para 126 above). The claimant said that after the night in Liverpool he never thought about the allegation again until the defendant's publications came to his attention in June 2020 and he did not make any inquiries about the allegation or discuss it with those who were with him that night. I do not accept that this is likely given how upset he was at the time and given the serious nature of the allegation that was relayed. Furthermore, as I discuss when I come on to consider the evidence of Mr Jackson, the contents of some of the later messages are not consistent with this proposition. In the circumstances, I consider that either the events were discussed but in terms that the claimant would not wish to reveal at this stage; or, if there genuinely was such little discussion of these matters it was because of a shared sense, initially conveyed by the claimant, that something amiss had occurred and, as such, it was a topic to be avoided, with the least said the better; and

iv) The claimant's evidence about the incident with Sam Brown at the convention in 2011 was itself unsatisfactory and less than straightforward. Mr Hay initially said in his evidence (as he had indicated in his 16 June 2020 messages to Mr

> Jackson and to Ms Brown), that he was very upset and that he had cried in response to Ms Brown telling him about the defendant's allegation. However, seemingly as he then appreciated that he was about to be asked why he became so upset if nothing of consequence had occurred between him and Ms Cresswell, he then mentioned for the first time that he was upset because he had been going through a difficult period involving the death of a friend and had been depressed and prone to crying at this point. Additionally, the claimant unconvincingly tried to downplay the allegation that was conveyed to him of being "a bit rapey", saying that this suggested no more to him than he had been "overfriendly" and had been "hanging around" the defendant.

189. In addition, I do not consider that the claimant was assisted by the less than credible evidence of either Mr Beston or Mr Jackson, which tended to underscore the unsatisfactory element that I have already discussed at para 188(iii) above.

190. I have already referred to Mr Beston's evidence that he did not discuss the contents of Ms Cresswell's 28 May 2010 message with Mr Hay (para 188(iii) above). When asked about this by Mr Price, he said that he had not done so because it "didn't seem like an issue". This was an inadequate explanation given that the defendant's message was clearly raising what she described as an important issue (para 118 above). Mr Beston also said that he had not discussed Ms Cresswell at all with Mr Hay during their walk back to his address (after Mr Hay had returned to the nightclub) or during the course of the next day when he thought they both worked at his tattoo parlour. This is surprising given that Mr Beston also knew the defendant and thought that Mr Hay had shown an interest in her (para 118 above). Mr Beston further maintained that he had not discussed the defendant's allegation with the claimant at any time over the ensuing years prior to the publication in June 2020, despite accepting in cross-examination that his colleague Fiona Duncan had told him a few days after 28 May 2010 that the defendant was accusing the claimant of having sexually assaulted her on the night of 27 – 28 May 2010.

191. I also accept the defendant's evidence that she spoke to Mr Beston by telephone on 28 May 2010 and that he told her during the call that he did not want to get involved. I do so because it is consistent with the position that he appears to have chosen to take and because I did not find other aspects of his account credible (as I have just described). The subsequent messages passing between the defendant and Mr Beston on 1 June 2010 (para 124 above) suggest that there had been some further discussion between them beyond the relatively brief messages that they sent to each other on 28 May 2010 (para 118 above); and I also note that in 2019 Ms Cresswell told Ms Nixon that Mr Beston had said "he didn't want to know about it" (para 129 above).

192. As regards Mr Jackson, he sought to maintain under cross-examination that he had not discussed the defendant's allegations with Mr Hay prior to the telegra.ph publication coming to his attention on 16 June 2020, whilst struggling to explain how, if this was the case, he was able to inform the claimant on 16 May 2020 that someone had told him "the girl in question is crazy" (para 134 above) and to make the statements that he did in his messages to Ms Stephens on the same day (para 135 above). It will suffice to say that Mr Jackson was unable to square that particular circle.

193. In light of the cumulative effect of these concerns I am unable to attach significant weight to the claimant's denial that he was the perpetrator of the sexual assault and indeed the unsatisfactory evidence that I have highlighted affords further support for the contrary proposition.

Material that could undermine the defendant's account

194. I emphasise that in evaluating the evidence I have not lost sight of the points that were made in Mr Hay's favour. I note in particular and have taken into account that there is no evidence that any other woman has accused him of sexual impropriety and that this is in circumstances where he has worked for many years in a field (tattooing) where he will have been in close proximity to a large number of women, some of whom will have been partially undressed at the time. However, whilst this is certainly relevant to my assessment, it does not follow from this that he could not have assaulted the defendant as she alleges.

195. I have also borne in mind that there were some unsatisfactory aspects of the defendant's evidence. I highlight the following in particular:

    i) I do not accept her evidence that when she spoke to the Northumbria Police officers on the morning of 28 May 2010 she positively told them that she believed her assailant had been Mr Hay or that she made reference to her assailant having tattoos or a septum ring. Whilst I consider that the police investigation was superficial and inadequate and that the officers were likely to have misunderstood aspects of the defendant's account (as I have earlier discussed), I do not consider it likely that their approach was so slipshod that they would have overlooked and omitted to include these kinds of details if they had been provided at the time; and

    ii) I was troubled by her account that the police officers told her on 28 May 2010 that they had also viewed CCTV of her leaving Passion nightclub, which showed her to be alone and wearing a leather jacket. She raised this by way of drawing attention to what she said was a further respect in which the police investigation was deficient, namely in apparently confusing her with someone else, given that she had left her jacket inside the nightclub (para 107 above). However, there is no reference in the police incident log to them having attended Passion. If they had done so and discovered further footage which they believed undermined Ms Cresswell's account, it is likely that reference to it would have been included in the reasoning that is set out on the log. It is also relatively unlikely in the limited time frame that would have been available to them that morning that the officers also had the opportunity to attend Passion, isolate this footage (without having a time for when she had left the nightclub) and identify the defendant on it. On balance, I did not find this aspect of the defendant's account credible; it appeared to me to be aimed at bolstering her criticism of the police's response to her.

196. Whilst I have carefully reflected upon these matters, ultimately they do not lead me to doubt the honesty of the defendant's account in its essential respects (which is well supported by the features I have discussed earlier). It is well accepted that a generally honest witness may be tempted to embellish or bolster their case, particularly in

relation to an aspect where they feel vulnerable and I conclude that is what has occurred in this instance.

Conclusion

197. Weighing all these matters together and mindful of the issue for me to address as identified at para 21 above, I conclude that the substantial truth of the imputation that I have identified has been proved. Whilst I consider that there is a degree of exaggeration in the defendant's account in particular in relation to her dealings with the police in the aftermath of the incident, I am satisfied that she has established on a balance of probabilities that she was subjected to a violent sexual assault by the claimant in the early hours of 28 May 2010 as the account at para 10A(c) of the re re-amended defence is honest and accurate in all its essential respects and specifically in the narrative of the assault.

198. In the circumstances the defendant has established a defence to the proceedings and it is strictly unnecessary to consider the other defences upon which she has relied. However, the parties proposed that if this situation arose I should consider the section 4 defence and I will take this course. (The parties accepted that it was unnecessary for me to also address the qualified privilege defence).

The public interest defence: discussion and conclusions

199. Whilst my finding that the truth defence is established is relevant to the section 4 publication on a matter of public interest defence, it does not of itself resolve this further defence, as the criteria which the defendant has to establish are different. The three questions to be addressed in relation to each of the defendant's publications are those set out at para 23 above. In determining those issues I have applied the provisions and principles which I summarised at paras 22 – 37 above.

200. For the avoidance of doubt, I indicate that if I had concluded that the defendant's allegation was a deliberately false one (contrary to my primary finding above), I would not have found that she believed that publishing the statements in question was in the public interest or that such a belief, if it existed, was reasonably held. In relation to the latter point I refer to the discussion in *Gatley on Libel and Slander* (para 37 above).

Statements on a matter of public interest

201. As I have earlier identified, this is an objective question which is to be answered by considering the publication as a whole. Public interest has been broadly interpreted in this context. The defendant relies upon three respects in which she says that her statements were on matters of public interest, namely:

i) The prevalence of sexual abuse committed in the tattoo industry, which at the time was a matter of significant public concern (with the issue becoming known as "Tattoo MeToo");

ii) The need to protect women from sexual abuse; and

iii) The failure to prosecute sexual abuse cases.

I accept that each of these topics is clearly a matter of public interest. The next question therefore is whether the statements made by the defendant were on such matters.

202. The defendant's account of the 28 May 2010 events in the telegra.ph publication was explicitly placed in the context of recent revelations of sexual abuse within the tattoo industry and of this post being a further revelation of such behaviour. In addition, the text referred to the defendant's concern and sense of guilt that the tattooist in question (Mr Hay) may have engaged in predatory behaviour towards other women and the need to make the industry a safer place for women by the removal of such men. She also referred to her experience of reporting the matter to the police and of being discouraged by the officers from proceeding with her allegation (paras 60 - 61 above). In the circumstances, I accept that the statements in the telegra.ph publication were on a matter of public interest, namely each of the three topics listed in para 201 above.

203. The FB message publication to Ms Sweeney provided a link to the telepgra.ph publication. Accordingly, I arrive at the same conclusion in relation to this. In addition the email itself referred to the defendant's concern as to the power that the claimant had as a tattooist over women's bodies.

204. The subsequent email publication referred in terms to the defendant's concern that the claimant, as a tattooist, had access to women's bodies whilst in a position of power, to her guilt in not speaking up to protect women earlier and to her desire not to let abusers and predators think they could use their positions to hurt young women and get away with it. In the circumstances, I am satisfied that the statements in this publication were on a matter of public interest, namely the first and/or second of the topics listed in para 201 above.

205. Both the Instagram publications and the FB posts publications referred to women's safety in the tattooing industry, to holding abusers to account and to the Tattoo MeToo campaign. Both named the defendant as having sexually assaulted the defendant in the context of her seeking to protect other women. In the circumstances, I am satisfied that the statements in these two publications were also on a matter of public interest, namely the first and/or second of the topics listed in para 201 above.

Belief that publishing the statements complained of was in the public interest

206. As I have earlier explained, this is a subjective question. In accordance with the conclusion that I have already reached, I proceed on the basis that the defendant was violently sexually assaulted by the claimant in May 2010. In explaining the basis of her belief, the defendant relies upon the pleaded matters which I have set out in more detail at para 86 above and which I address in more detail at para 210 below. However, in summary the key steps that led up to her decision to publish the publications were as follows:

i) She reported the sexual assault to the police shortly after it happened;

ii) After speaking to her whilst she was still under the influence of alcohol and when the investigation was still at a preliminary stage, the police wrongly decided within a matter of hours that no crime had been committed;

iii) She made some attempts herself to establish that the claimant was the man she had left the nightclub with, as she believed him to be her assailant, but Mr Beston was unwilling to assist her. She had also told various friends in the aftermath of the incident and one at least had confronted the claimant with her allegation, but nothing had ultimately come of this;

iv) She was disillusioned and disheartened by the police response and she felt that there was no point in her trying to take matters further at that time;

v) She did not then speak publicly about the sexual assault for 10 years, but remained very upset about it and increasingly felt guilty that in not speaking out about the claimant's conduct she may have failed to protect other women. She was aware that he continued to work as a tattooist at a prominent tattooing parlour;

vi) In the first half of 2020 she became aware that the issue of sexual abuse in the tattoo industry had come to prominence, that other women had reported such cases and that the Tattoo MeToo campaign was underway, aimed at exposing the prevalence of such abuse; and

vii) In 2019 and 2020 she had made public allegations of abuse by a former boyfriend and as a result she had been contacted by other women who indicated that they had also experienced abuse by this same man.

207. In light of this sequence of events, which I accept as an accurate description of the defendant's experiences and state of mind, I am satisfied that she did believe that publishing the statements complained of was in the public interest. I find that this was her belief at the time of each of the publications. It is also reflected in the words that she used at the time in the publications, which I have already set out. After the email publication, the defendant's view that she should speak out was reinforced by the fact that she received no response from Ms Sweeney who blocked her on multiple social media accounts.

208. In arriving at this conclusion, I also note that the defendant was not cross-examined on this issue and nor was it suggested to her that she had any other motivation for publishing the statements or that she had not in fact addressed her mind to these matters at the time.

Reasonableness of this belief

209. As I explained when setting out the legal principles, resolution of this question involves considering all of the circumstances of the case. For the reasons that I go on to identify, I am satisfied that the defendant has shown that her belief in relation to each of her statements that it was on a matter of public interest was a reasonable belief in all the circumstances.

210. I have summarised the claimant's and defendant's respective cases at para 86 and para 91 above. I regard the following circumstances as being of particular significance in leading me to conclude that the defendant's belief was a reasonable one:

i) The statements that she made were each on important matters of public interest, as I have already identified;

ii) She was violently sexually assaulted by the claimant in the early hours of 28 May 2010. The defendant was well aware that she had been sexually assaulted and she believed that her assailant was the claimant; by the 1 June 2010 she was "pretty sure" that it was him (para 124 above);

iii) She promptly reported the crime to the police, believing that they would investigate the matter and bring the perpetrator to justice;

iv) However, her treatment by the police was deficient and their investigation superficial (para 178 above). She was interviewed whilst she was still affected by alcohol and had not slept. She was not given the chance to check any record that officers had made of what they believed she had said. A number of misunderstandings likely arose and her words that the assault was 'like a nightmare' were misconstrued and accorded undue significance. The officers also placed too much weight on CCTV footage from Revolution Bar, failed to undertake the fuller investigation that was warranted and prematurely assessed and rejected her credibility, deciding not to treat the defendant's allegation as a crime within hours of her first report to police;

v) In consequence the defendant's belief that the claimant was her assailant (which she voiced to friends over the ensuing days) was not conveyed to police nor investigated by them at the time;

vi) She attempted to make her own inquiries of Mr Beston because of her belief that the claimant was the likely perpetrator, but he declined to assist (paras 118 and 191 above). She also made inquiries of Ms Casey but this did not take matters further (para 117);

vii) These matters left the defendant feeling understandably angry and disheartened. She told friends that she believed that the claimant was her assailant and at least one of them raised this with him but nothing appeared to come of this (paras 123 - 126 above);

viii) Over the ensuing years she remained upset about the incident and she felt increasingly uncomfortable about not having warned other women about his behaviour and frustrated that he had not been held accountable for his conduct. It is plain that the defendant pondered "outing" the claimant for a significant period of time before she did so; see for example her message to Ms Nixon in 2019 (para 129 above);

ix) In 2019 and 2020 she had made public allegations of abuse by a former boyfriend and as a result she had been contacted by other women who indicated that they had also experienced abuse by this man (paras 128 and 141 above);

x) In the first half of 2020 the defendant became aware that the issue of sexual abuse in the tattoo industry had come to prominence and that other women had reported such cases. She was aware that the Tattoo MeToo campaign, aimed at exposing the prevalence of such abuse, was gaining momentum;

xi) The claimant had continued to work as a tattooist at a prominent tattoo parlour and the defendant increasing felt that she should speak out about his sexual assault in order to protect other women who could come into contact with him;

xii) The defendant wrote a statement about the sexual assault which she initially sent privately to the founder of a sexual assault survivors' support group page for those in the tattoo industry (para 133 above);

xiii) She published the statements because she believed in light of the history of the matter that this was the only way to safeguard women who might come into contact with the claimant, including through his work as a tattoo artist;

xiv) Her view was reinforced after Ms Sweeney did not respond to the publications to her;

xv) Whilst she did not initially name the claimant in the Instagram publications and the FB posts publications she received requests from women to name her assailant and duly did so. I accept that naming the claimant at this stage was consistent with her aim of protecting other women. At this stage she was confident that the claimant was her assailant;

xvi) The defendant knew that only limited and inadequate investigations were carried out by the police in 2010 and it was reasonable for her to believe that this would, in turn, impact upon the efficacy of any police investigation undertaken in 2020;

xvii) The defendant did re-report the matter to the police in 2020, albeit after the 22 July 2020 publications. Given the limitations of the earlier investigation and the conclusion reached at that stage, she had real reason to doubt that this step would achieve accountability for the claimant or protection for other women; and

xviii) The defendant was writing from her own first-hand knowledge and experience. There were no other checks or inquiries that standards of reasonableness required her to conduct to verify the information that she proposed to publish before she did so.

211. I have borne in mind, as the claimant emphasises, that the defendant did not include any denial of the allegation from him or counterbalancing material, such as a reference to the conclusion arrived at by Northumbria Police in May 2010. However, given that the defendant was writing from her own knowledge of the sexual assault upon her, it would be unreasonable to expect her to seek out and include a comment from the claimant (in particular in circumstances where she had tried to initiate investigations into his involvement both via the police and her associates back in 2010). Furthermore, given that she reasonably disagreed with and held legitimate concerns about the approach taken by the police in 2010, I do not consider that a failure to reference the officers' earlier conclusion adversely impacts upon the reasonableness of her belief that publication was in the public interest. The authorities I have cited earlier make clear that a fact sensitive evaluation is required that takes into account the particular role of the defendant in question. The claimant also refers to the tone of the publications being less than measured. Given the subject matter and the fact that the defendant was writing about her own experience of a frightening and violent

sexual assault, this is hardly surprising and does not in my view in these particular circumstances detract from the factors that point to her belief being reasonably held.

212. To address another point made by Mr Coulter, I accept that publishing these statements was not the *only* way that the defendant could have taken steps to try and afford protection to other women. She *could* have gone back to the police prior to publication, but the question for me is whether her belief that publishing the statements was in the public interest was a *reasonable* one to hold. In assessing that question, I have considered the other options open to her and drawn the conclusions that I have set out in para 210 above. In short I consider that the defendant did conduct such enquiries and checks as was reasonable to expect of her in all the circumstances.

213. The claimant's central ground of resistance to this defence was the proposition that the defendant's allegation that he had sexually assaulted her was a knowingly false one. At para 6 of his Opening Skeleton, Mr Coulter went so far as to say that: "all the defences stand or fall on the finding of the court as to the truth or otherwise of the allegations made in the various publications". Whilst, I have already noted that a finding that the allegations were true does not necessarily resolve the section 4 defence in the defendant's favour and I have conducted my own evaluation of each of the statutory elements, this observation does underscore the relative weakness of the claimant's position following the court's acceptance of the truth defence.

214. Accordingly, I also find that the defendant has established each of the requisite elements of the section 4 defence.

Overall conclusion and outcome

215. For the reasons that I have identified above I conclude that:

i) The natural and ordinary meaning of the defendant's publications in relation to the claimant is that the claimant had violently sexually assaulted her;

ii) This imputation was substantially true; the defendant has proved that the claimant sexually assaulted her in that manner in the early hours of 28 May 2010 in the circumstances that I have described. Accordingly, the statutory defence of truth provided for by section 2(1) of the Defamation Act 2013 is established;

iii) Additionally, the defendant has established the defence in section 4 of the 2013 Act as she has shown that: the statements complained of were on a matter of public interest; that she believed this to be the case at the time of publishing them; and that her belief was reasonable in all the circumstances that I have discussed.

216. In light of these conclusions the claim fails and it is unnecessary for me to determine the further defence of qualified privilege. The question of remedy does not arise.

217. The parties will have the opportunity to address consequential matters by way of written submissions.