Neutral Citation Number: [2023] EWHC 332 (KB)

QB-2021-001142

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17th February 2023

Before:

MR JUSTICE RITCHIE

- -

BETWEEN

GKE

Claimant

- and –

BRETT NIGEL TRAVERS GUNNING

Defendant

APPROVED JUDGMENT

Iain O'Donnell (instructed by **Enable Law LLP**) for the **Claimant**
The Defendant appeared in person

Hearing dates: 6-9th February 2023

Mr Justice Ritchie:

The Parties

1. The Claimant received work/life coaching sessions from the Defendant through her work and then paid privately for counselling/therapy for her mental health and lifestyle issues.

2. The Defendant was a member of the British Association of Counselling and Psychotherapy (BACP) and a qualified counsellor and provided the well-being coaching and later private counselling to the Claimant.

Summary

3. The Claimant brings this claim for personal injuries asserting that the Defendant caused her psychiatric injuries by abusing his position of trust in relation to her during and between coaching/counselling/therapy sessions by making sexual comments and communications and specifically by asking her to undress and to masturbate in front of him in a therapy session or sessions.

The Issues

4. The main factual issues relate to what happened in 3 therapy sessions in April 2018. The claim is for damages for verbal sexual abuse, not physical sexual abuse. The Claimant also seeks aggravated damages for intentional infliction of harm by the Defendant.

5. The issues to be determined, once the facts are decided are as follows:

   5.1 The existence of a duty of care.
   5.2 The nature and extent of the duty of care and the standard of care.
   5.3 Whether the Defendant breached any duty of care to the Claimant.
   5.4 Whether any breach of duty gave rise to a foreseeable risk of personal injury being suffered by the Claimant.
   5.5 Whether an intentional tort has been committed and aggravated damages should be awarded.
   5.6 The nature and extent of any personal injuries and losses caused by the alleged breaches.
   5.7 Quantification.

Bundles

6. For the trial I was provided with 3 lever arch bundles and a digital bundle of authorities. Certain other documents and statements were produced during the trial some of which were admitted into evidence and some of which were not.

The applications

7. During the course of the trial various applications were made on which I gave ex-tempore judgments. For instance, the Defendant served his own witness statement in the week before the trial and that of his lay witness during the trial. Those were admitted in evidence. The Claimant sought permission to admit a BACP panel finding relating to a different complainant during re-examination but that was refused. I will also deal below with part of a medical report from Doctor de Taranto setting out the same evidence. The Defendant sought permission, after closing his case, to admit in evidence some internet articles about pornographic sites, that was refused. During closing submissions the Defendant sought permission to admit in evidence articles written by a solicitors firm criticising the BACP conduct procedure generally. I refuse that application here. It was far too late for it to be admitted and the Claimant did not have the opportunity to answer the evidence as a result. In any event it was not really relevant to the main issues I had to decide.

Anonymity

8. On 30th March 2021 an anonymity order was made by Master Sullivan requiring that the identity, address and location of the Claimant and her family should not be disclosed or published without permission of the Court. Hence the Claimant has her name anonymised by the initials GKE. To ensure that protection I will refer in this judgment to the Claimant's employer as "ER" and to the Claimant's manager as "M" and to the Claimant's friend, who later became her assistant manager, as "AM".

Pleadings and chronology of the action

9. By a pre action protocol letter of claim dated July 2019, sent to the Defendant at his home address in Watford, the Claimant set out her allegations. The Claimant asserted that she had left her job at ER and that her sexual relationship had broken down as a result of the Defendant's torts. The Claimant had obtained a new job in the prison service but claimed that she was likely to suffer lost earnings and deterioration in her symptoms. The Claimant alleged exacerbation of her pre-existing symptoms and claimed general damages, aggravated damages, costs from the conduct panel hearing, future treatment costs and loss of earnings.

10. I have not been provided with a pre action protocol letter of response however the correspondence does disclose that the Defendant's insurers, Holistic Insurance Services, withdrew his insurance after the BACP findings. The Defendant complained to the insurance regulator who took a substantial period of time to determine the complaint. The Claimant's solicitors informed the Defendant that they had discovered that he had transferred his interest in his matrimonial home to his wife and threatened to issue proceedings. The Defendant responded disclosing that he had suffered an emotional breakdown because of the Claimant's complaint and his rustication from the BACP. He was suffering from clinical depression and anxiety, had lost everything of value to him including his family, his business and his income and that he was living on benefits. He did not have the emotional capacity to deal with the correspondence. On the 30th of July 2020 the Claimant wrote back through her

solicitors stating: *"unfortunately she has no sympathy for your situation particularly in circumstances where you have not afforded her any understanding or sympathy by virtue of your conduct during the BACP tribunal and in this litigation."* however the Claimant agreed to delay the litigation further pending resolution of the Defendant's Ombudsman complaint.

11. The claim form was issued on the 29th of March 2021. It was served on the 28th of April 2021 with the particulars of claim, a schedule of loss, a report dated April 2021 from a psychiatrist and the anonymity order.

12. In the particulars of claim the Claimant asserted (in contradiction to the pre-action protocol letter) that the Defendant arranged the initial therapy session and the Claimant did not ask for it. The Claimant then attended weekly therapy sessions for several months before reducing to monthly sessions. The sessions were to consider the Claimant's desire to become more healthy and fit, enhance her self-esteem and, as the sessions progressed, the issue of the Claimant's psycho-sexual problems was explored. It was asserted that in or around October 2017 the Defendant started to send text messages to the Claimant and contact her out of hours, often very late at night. The texts queried the state of her relationship with her boyfriend and the Claimant was caused to feel a considerable degree of anxiety. It was asserted that by February 2018 the Defendant started adding "x" to multiple text messages which the Claimant took to be a reference to a kiss. From April 2016 (a typographical error for 2018) the Claimant asserted that the Defendant provided the Claimant with further therapy sessions on a private basis. The Claimant discussed her desire to address her dysmorphic opinion of her own body and informed the Defendant that her relationship with her partner had recently ended. The Claimant asserted that she became increasingly concerned at the Defendant's inappropriate conduct during the sessions paid for by ER and confided in a work colleague that she had been repeatedly hugged, told by the Defendant he was proud of her and told that the Defendant would give her the support and encouragement her father never gave. The Claimant was advised by her work colleague to make a formal complaint to the management team. The pleading then went on to assert that after the Claimant's last session with the Defendant she lodged a formal complaint with ER and with the "BASP" (this is not a typing error in the judgment). On the 27th of April 2018 the chief executive of ER contacted the Defendant to inform him of their investigation about his behaviour. In May 2018 the Defendant sent a text message to the Claimant attempting to justify his conduct. The breaches alleged were set out at paragraphs 3.3.2 (a) – (h). Those were (a) asking the Claimant undress during two therapy sessions; (b) asking the Claimant to masturbate during a therapy session; (c) using inappropriate language including asking whether the Claimant liked to give *"blow jobs"*, suggesting the Claimant experiment sexually with other women and telling the Claimant that it was one thing for the Defendant to say that he was proud of her but that he wanted her to say *"I'm pretty fucking proud of myself*"; (d) viewing and commenting upon multiple images of the Claimant in her underwear; (e) asking the Claimant what she wore at home; (f)

offering to buy sexual lubricant for the Claimant; (h) asking the Claimant what she wears in bed; (i) during the final therapy session offering to help the Claimant when discussing masturbation which the Claimant took to mean offering to masturbate her; when the Claimant refused, his asking that she record the sounds of her masturbating at home; finally informing the Claimant that she should not discuss with anyone what they had discussed in their therapy sessions. In para. 3.3.3 the Claimant also asserted that the Defendant exploited her emotionally by repeatedly text messaging the Claimant at night in a manner which was outside professional boundaries including sending a message containing a winking emoji with the phrase *"I'll be gentle with you*"; sending the Claimant pornographic website addresses and attaching "x" to his messages; engaging in text message exchanges that involved the Claimant sending the Defendant multiple images of herself wearing underwear in relation to which the Defendant commented that she looked "stunning"; offering to buy the Claimant sexual lubricant and asking the Claimant what type of pornography she had watched with her boyfriend. The Claimant also pleaded out the *"BASP*" (sic) conduct panel proceedings and relied upon them. The Claimant's asserted losses were pleaded out together with aggravated damages based on the abuse being deliberate and contumelious causing the Claimant to be humiliated in the presence of other members of staff to whom she complained together with a loss of pride, feelings of confusion and resentment which it was pleaded were a separate basis for compensation. The Claimant pleaded that she was entitled to aggravated damages because of the Defendant's denial during the disciplinary proceedings.

13. In his defence, which was dated June 2021 and was drafted by counsel, the Defendant averred that the particulars of claim failed to disclose a recognised cause of action, pleading assault, trespass to the person, breach of statutory duty as well as breach of a common law duty of care and intentional infliction of harm. The defence complained that no assault or breach of statutory duty was particularised. Without prejudice to that the Defendant complained that the Claimant had failed to particularise the relevant standard of care and asserted that the Defendant is and was at all material times a therapist and an accredited member of the BACP not the BASP. The Defendant pleaded that whilst working for ER he was providing occupational health and well-being consultancy services to ER's workforce. During the private engagement the Defendant admitted he acted as a private therapist. The Defendant denied that he provided therapy sessions to the Claimant between August 2016 and March 2018. The Defendant denied that he approached the Claimant before the therapy sessions started. The Defendant asserted that the sessions for ER were well-being sessions. The Defendant accepted that the Claimant introduced, during the well-being sessions, issues of a sexual nature which were discussed and that the Claimant disclosed details of an intimate nature relating to her boyfriend, personal health issues and use of pornography. The Defendant admitted exchanging text messages some of which were at night but denied unilaterally doing so and asserted that the Claimant was an active participant. The Defendant asserted he was required to provide well-being services outside normal working hours because ER staff worked 24 hours running homeless

persons centres. The Defendant denied the messages caused anxiety to the Claimant and recited in his pleading various messages which made clear that the Claimant was requesting counselling in response to which the Defendant made arrangements. The Defendant admitted calling the colour photographs of the Claimant dancing around a pole "stunning" and stated that he was super proud of the Claimant to which the Claimant responded *"thanks Brett that means a lot*". The Defendant asserted that none of the Claimant's text disclosed any distress or anxiety in relation to those photographs or other matters. The Defendant admitted exchanging texts relating to photographs the Claimant had provided to him of changes in her body during which he praised her for her work improving her body image. The Defendant denied any of those matters led to anxiety. He pleaded that the Claimant engaged him privately for the final three sessions and pointed out the contradiction between that engagement and her assertion that she was becoming increasingly concerned about his allegedly inappropriate behaviour. The Defendant admitted he periodically hugged the Claimant and provided encouragement to her and told her he was proud of her. The Defendant admitted sending a text message in May 2018 but did not understand the relevance of it to the civil proceedings. In relation to each allegation of negligence the Defendant denied any tort had been committed and asserted that the text messages were taken out of context. The Defendant denied asking the Claimant to undress and denied asking the Claimant to masturbate in front of him.

14. In a reply the Claimant expanded the explanation of the legal nature of the claim. These are matters which should have been put in an amended particulars of claim not in a reply. The Claimant also accepted there had been no physical assault or battery by the Defendant.

Documentation

15. Before I come to consider the witness evidence it is instructive to look at the undisputed records of the communications between the Claimant and the Defendant by text message and by WhatsApp message which were helpfully put together in a chronological bundle between pages 655 and 677 of bundle 3. I intertwine the therapy notes, BACP documents and other documents into this document chronology.

August 2016-January 2017

16. In an email from the Defendant to a manager at ER, dated 13.7.2016, the Defendant raised having met the Claimant in ER's premises and indicated the potential for a keeping an eye out for her issues.

17. The Defendant made no clinical notes of the well-being coaching that he provided between August 2016 and March 2018.

18. The first text message or WhatsApp message to be sent between the parties was sent by the Claimant in August 2016. She wrote *"hi Brett it's GKE, I am meeting with you today?"* he responded. Later the Claimant texted "*hi Brett its GKE, I think I'm outside*

the charity shop but not sure where to go". In the next month, September 2016, there were multiple texts exchanged between the Claimant and the Defendant during which, for instance, the Claimant thanked the Defendant generally and the Claimant thanked the Defendant in relation to a job interview because the Defendant had given her support for the interview and was encouraging. The Defendant texted more support with an emoji. The Claimant informed the Defendant she had a second interview and the Defendant praised her. The Claimant sought a further session and there were communications about the timing of that. The Claimant texted *"fuck! Completely forgot!!!!"* the Defendant responded in relation to the date of the next session. Next the Claimant stated "*I want to come and meet you as there are a few things bothering me this morning".* The Defendant agreed and various texts were exchanged about the details.

19. In October 2016 and up to January 2017 multiple texts were exchanged between the Claimant and the Defendant mainly about the times for sessions and where the sessions might be held. There were some reports from the Claimant about her talking to her mum to resolve issues and the Defendant provided encouragement for the Claimant to be honest with her mum. The Claimant described her feeling of being "*on edge*" going to work. Later the Claimant asked whether the Defendant had a few minutes to be able to talk because her father had turned up at home and she could not stop her anxiety and conflicted feelings. There were difficulties arranging an emergency session and so the Defendant apologised for not being able to fit it in and asked how the Claimant was. The Claimant described how she let her mother and father talk and did not herself get involved herself which she described as good. In a later text the Claimant described how her father had gone to a hotel in Gatwick, an emotional event where both were crying until 2:00 am. She felt drained. The Defendant provided encouragement and support to her by a short text had advised her to get sleep. Thereafter there were further texts through November and December about arranging sessions, all anodyne and procedural. The same applies to various texts in January 2017.

20. **In February 2017** There are to texts from the Claimant and the Defendant trying to catch up and arrange a session. They are anodyne.

March 2017-March 2018 texts/Whatsapp messages

21. The texts in March and April 2017 relate to the Defendant providing details of an organisation called "Wealth Matters" to the Claimant during which it is clear from her texts that she and her boyfriend were buying a property and sorting out a mortgage which she found stressful, however they became homeowners and the Defendant texted to give support and encouragement stating home ownership is a significant thing and that it was awesome news and congratulating her on her success. There were a few texts in May, June and July 2017. In May the Claimant sought a session because she was "*going back into meltdown with stuff that had been going on".* There were a few anodyne texts about arranging sessions. In August 2017 there were two or

three texts between the Claimant and the Defendant arranging for another session. In September 2017 there were texts relating to holidays and sessions and in particular one text in September 2017 is of note. After arranging a session the Defendant agreed to re-arrange the session and advised the Claimant not to miss a work meeting. The Claimant responded "*noooo!!! Please no*" and the Defendant then sent an emoji with a wink. I consider this to be important because one of the complaints made about the Defendant was that in one later text he used an emoji with a wink. These texts related to the Claimant impliedly finding such meetings boring. The Claimant's response was to send two happy emojis. Then the correspondence returned to procedural matters about the dates and times of sessions.

22. In October 2017 the parties started exchanging WhatsApp messages instead of texts. The Claimant started the exchange by sending photographs of the tiles that she was shopping for and the Defendant responded that it was "great" with a wink emoji. A holiday was discussed and the Claimant going to a university open day and the Defendant responded stating he was glad the holiday did the Claimant good and supporting her thoughts of university and stating she was bright and she could do it and asking what she might study and whether there was a session the next week. The Claimant responded she was thinking of social work and stated she was back at work but had not seen "*him*" (meaning a man at work) and stated it might be weird for a while about that she felt in a better place which was good. The Defendant responded by asking about her feelings and thoughts about "*him*" and advising that the Claimant needed to be honest with "*him*" and close the door once and for all so that they could both move on and maintain a positive working relationship. The Defendant advised that as long as they knew where they stood they could get closure and move on.

23. On the 8th of November 2017 the Defendant sent an anodyne WhatsApp message asking whether he was seeing the Claimant next in session. Then on a date I cannot determine in November 2017 nine photographs were sent by the Claimant to the Defendant of the Claimant doing pole fitness. Two of these photographs were provided in printed format because the trial bundle versions were too small to be visible. The two provided show the Claimant had been to a professional photography shoot and was wearing either a bathing suit or revealing clothing. The clothing tightly covered her breasts and genitalia but otherwise the Claimant had bare arms, bare legs, bare midriff, bare back and in one of the poses the Claimant was sticking her posterior out at the camera and wearing high heels. The Defendant's response to these photographs by WhatsApp was "*these really are stunning, I'm super proud of you.*" The Claimant's response was "*Aw thanks Brett, means a lot*". The Defendant then asked whether the Claimant had any before pictures and advised the Claimant should not worry it was not an expectation for them to be sent but he was interested whether the Claimant could observe any difference between herself now and herself then and how that made her feel. The Claimant then responded that she did not have many but she had a few underwear shots, using the word "*haha*" but she could see a small difference and that made her happy. The Defendant then responded "*well there you*

go. It's one thing for me to say I'm proud of you. I want you to be able to say (or even whisper) "I'm pretty fucking proud of myself!". The Claimant responded *"haha I don't no (sic) if I can go that far but proud I did the photo shoot and pleasantly surprised with some of the photos."*

24. There was no further communication until the back end of December 2017 when the Defendant asked how the Claimant was doing. Then in January 2018 there was a series of texts between the Claimant and the Defendant on procedural matters for arranging sessions.

February – March 2018

25. In February 2018 the first text is sent which contains a kiss at the end of it. It is sent by the Claimant to the Defendant and states *"morning, is there any chance we can rearrange my well-being? Having a bit of a shit week and processing some stuff and not really in the mood for talking and stuff today X*". The response from the Defendant is purely procedural on dates for sessions but he did add an "x". The next response from the Claimant also contained a kiss (I use that word because the Claimant descried her use of "x" as a kiss in evidence) and described how she was feeling a bit numb and shutdown and suggested a session date. The Defendant's response, which also has an "x" at the end, accepted the session date. The two texts after that agree the relevant date. Alongside these texts are various WhatsApp messages.

26. In one message dated 5th February the Defendant stated "*hey. How are you? Sorry, slipped by mind to send you these sites. Search for "Abby Winters" and for "Beautiful Agony". Let me know how you get on."* the Claimant responded *"Hey. Yay not too bad thank you. Haha it's fine, I'll have a look when I have some chill time. Hope you have a good week!"* and the Claimant put a smiling emoji at the end. 10 days later, on the 15th of February the Defendant asked the Claimant how she was by WhatsApp message and added an "x". The Claimant responded that she was not good, she had left work early because her head was all over the place and she was going to stay with her mum for a bit. She added a kiss. The Defendant responded asking whether things were coming to a head and added an "x". The Claimant responded in the affirmative stating it was really bad and that she could not go through "*this"* anymore. She was at home and trying to pull herself together and start packing, she added a kiss. The next message from the Defendant, some four days later, asked how the Claimant was, adding an "x". The next message from the Claimant stated she was not feeling great that she had moved out but that she had been in a bit of contact and added a kiss. The Defendant responded saying "*so it happened. That is so tough. Very brave too. Does it feel like it was the right thing to do all be it difficult, or do you regret it?"*. He added an "x". The Claimant responded that she had moved out on Thursday, that she felt that she had failed but that she had gone to collect her dog Millie, and had spoken to her then ex-boyfriend who needed to deal with his anger. The Claimant explained that it was hard when they were in contact daily (which suggests that they worked

together). The Defendant provided a supportive message. Very few messages were exchanged in March and most related to arranging a session.

27. It is agreed that the Claimant contracted with the Defendant in early April verbally for the Defendant to provide her with privately paid counselling services. The contract was not signed until the 17th of April but the first private session took place on the 10th April.

April 2018

28. Text and WhatsApp messages were exchanged between the Claimant and the Defendant in April 2018 and it is almost impossible for me to put them in proper chronological order because the messages are not visibly day, date and time stamped. However, doing the best I can, in very early April, it looks like the 2nd of April, the Claimant wrote to the Defendant as follows: *"hey, I think you said you are away this week but can we discuss me starting the counselling when you are back. I'm really not in a good place and it's been getting worse so need to start dealing with it. Spoken to mum and I'll work around my finances."* This is an important text and I will refer to it again later in this judgment.

29. The Defendant responded, despite the fact he was on holiday, that he could help and provided a date and asked what symptoms she was feeling. In a WhatsApp message dated the 6th of April the Defendant asked how the Claimant was doing and added an "x". The Claimant responded she had been driving back from Peterborough to see her aunt and that her manager had sent her home from work recently because she had been struggling. She described how she had experienced a peaceful and calm time with her aunt in Peterborough. None of these WhatsApp messages contained "x" at the end. Another text message from the Claimant which appears to be dated the 6th of April states *"that's a good question.. I'm going to bed crying every night because I feel so low. Steve looked through my phone without asking me and that felt like a final straw with my trust in people and I was out on Saturday night with a friend and saw that the guy who did it to me and Charlotte who I go to pole with were in the same place I was and that shook me up. I feel like I'm pretty much falling apart and felt like self harming last night which is not good. I've told my mum most of this and cut contact with Steve and going to change my pole class but I don't want to carry on feeling this way anymore. Yeah that's okay with me I'll just Have to let him no.*" (sic). The Defendant responded "*that's pretty rough. Sorry to hear that. Good to get those boundaries in place. If you're ever about to self harm just think about me, that will put you off*" and put a smiley emoji then wrote*: "See you on the 10th take care."* The Claimant responded "*thanks let's hope it's a start. See you soon".* On Monday the 9th of April WhatsApp messages were exchanged just before the 1st private therapy session. The Defendant checked that the Claimant was still attending. The Claimant responded that "*it's already making me feel anxious but it's all good."* The Defendant asked what she was anxious about and the Claimant responded: work, tomorrow and job interview on Wednesday. Having received the explanation that the job interview

was for assistant manager at her employer the Defendant then asked what about tomorrow was making the Claimant feel anxious? The Claimant responded she was anxious because the therapy was going to be more "in depth". The Defendant asked whether the Claimant wanted to do it nonetheless and whether he should start really slowly and the Claimant responded *"yeah it's fine I start dealing with this crap and I don't like the way I'm feeling, I just know it's going to be tough. So yes start semi slowly please haha*" to which the Defendant responded *"don't worry, I'll be gentle*" and put an emoji with a wink. He also said "*you're being brave and I am proud of you*" to which the Claimant responded *"thank you! I don't feel very brave, I'm just nervous about all the stuff that's going to come up and how I'm going to deal with it all but thank you".* The Defendant asked what she was most afraid of coming up or whether she was not sure and afraid of the unknown. The Claimant responded she was afraid of the unknown. She stated "*that's why I found hypnotherapy so hard because I had no idea what to expect and it just kept getting harder and more emotional."* The Defendant went on to say that he promised as much as possible to prepare the Claimant for what was to come and would safely and gently navigate her through it. The Claimant responded thanking him but stating it was going to be really tough and asking whether that was so. The Defendant responded that it was not necessarily but possibly would be tough and that tough did not mean it had to be traumatic. He said the session was about avoiding trauma and re scripting her experiences in a positive way. He said it would be vulnerable and require trust but he thought that the Claimant knew him well enough to know that the Defendant had got the Claimant's "back" and the Defendant put an "x" at the end of that WhatsApp message. The Claimant responded that she knew that and put an emoji at the end of her message. The Defendant signed off suggesting the Claimant get an early night, rest and self-care and added an "x". The WhatsApp message trail ended at about 9:30 in the evening.

First private session 10th April 2018

30. The Defendant's' counselling notes for the private session on 10 April 2018 were as follows:

> "10/04/18
> First session – discussed ethical and professional safety and contract, process and goals.
> Nervous. Prone to nervousness and anxiety.
> Job interview tomorrow (assistant Manager at ER)
> Ex-boyfriend had visited and gone through phone and found and trawled through 'Tinder'
> Made her upset and angry because of nature of activity and also felt violated.
> He was angry because she was actively dating/connecting through online apps.
> All contributing to hyper anxiety.
> Still smoking cannabis but says she's trying to cut down. Concerned about sleep & life balance.

Low body image. Main goals around self-image sex and sexuality. Covers herself with tattoos and dark clothing to hide/distract.
Discussed images to start a self-image diary."

31. On the evening of the 10th of April 2016 some photos were sent by WhatsApp by the Claimant to the Defendant of the Claimant sitting on a couch with her legs crossed. The Defendant responded after 10:00 o'clock providing his bank details and asking how the Claimant was and signed off with an "x". The Claimant responded "*I'm OK, felt better after but think that's because I felt so anxious before. Glad we made a start though. Okay will send over now. Thank you*." Later she wrote "*all sorted*". I work on the basis that the message confirmed that she had paid the Defendant for the session. The Defendant responded congratulating the Claimant on the session that day and for paying quickly and added "*don't forget to send those pics whenever you get round to it. And try to have a relaxing and early night. B."* The Claimant responded *"I'll try! Just nervous about tomorrow, hopefully I'll start to relax slightly when it's out of the way. Did you want the ones I don't like or the ones I don't mind?"*. The Defendant responded "*both. Will be thinking about you tomorrow. Please let me know how it goes."* The Claimant agreed to get it sorted the next day once the interview was out of the way and the Defendant responded *"no problem. Now, long hot bubble bath and sleep!*"

32. On Wednesday the 11th of April, so the next day, the Claimant Whatsapped the Defendant to tell him that she had got the job. He congratulated her. She responded saying it would be a good thing to have time away from the office that she worked in for ER and "*stuff"*. She said she was okay but nervous and pleased considering everything that had been going on. The Defendant responded that he was "*super proud"* of the Claimant. That he knew she could do it and that she would be great and the change would be good for her and signed off with an "x". The Claimant thanked the Defendant and signed her WhatsApp with a kiss. There was then a five day gap. On Monday the 16th of April, the day before the next counselling session, the Defendant contacted the Claimant and asked how she was and how the weekend had been. He put an "x" at the end of his message. The Claimant responded that she was doing OK and put an emoji and a kiss at the end of her WhatsApp message. Then the Defendant confirmed the session for the next day.

2nd Private session. 17th April 2018

33. The Defendant's clinical notes follow:

"17/04/18
Got the job offer. Discussed how that will feel and work and how it fits into greater plans around Uni and future.
Revised main goal from therapy:- to get comfortable talking about sex, understanding the physical & emotional aspects better & have healthier more natural relationship with it. Aim to better establish conditions for healthier relationships based on a

healthier view of self & comfortable, natural relationship with sex and sexuality without pain & engaging & enjoying the act better.
Very self-critical albeit that this has much improved with experience & progress in pole dancing.
Discussed images to use to kick off **self-image diary** and showed me images that she would like to include to illustrate negative body image. Will send to me because doesn't have ability to do so herself?" (my emboldening).

34. Also on the 17th of April 2018 the Claimant and the Defendant signed a counselling agreement which was in evidence. In summary that set out that counselling sessions would be provided for the Claimant which were a chance for her to explore her own particular difficulties and their impact on her life with a view to facilitating change. Under the heading "confidentiality" the Defendant had a term that stated that he kept the work confidential to himself and his professional supervisor unless the client was felt to be a danger to themselves or of breaking the law. Another term under the heading "code of ethics" stated that the Defendant abided by the code of ethics of the BACP and that "as a therapist" he would take notes or record the successions. Any written information would be securely stored and destroyed three years after the cessation of counselling. The fees were set out and the terms also invited the Claimant to inform the Defendant if at any stage she was engaging in counselling with any other professional.

35. The first WhatsApp message sent after this session was from the Claimant and she stated "*hey, thanks for this morning. I've transferred your money and forgot to change the reference date! Sorry"*. The Defendant responded *"no problem thanks GKE chat soon x"*. Three days later, on the 20th of April, the Claimant sent to the Defendant by WhatsApp photographs of her on a beach in a bikini. She stated they were from last year and she hated them both. The Defendant responded *"those are different to the ones you showed me? You were also going to send ones you quite like...."*. The Claimant responded "*yeah I forgot I had these ones but was looking through last night, these were just after I started pole"*. The Defendant responded "*cool. Send other ones too and I'll print them all out to annotate*." The Claimant then sent to the Defendant three photographs. These were blown up and printed out for the Court because they were difficult to see in the WhatsApp trail in the trial bundle. The blown up photographs quite clearly show the Claimant in one photograph wearing a Calvin Klein bra top and a boxer short bottoms and in the other photograph photographing herself in a mirror with a black crop top and black underwear knickers. The comment made by the Claimant with the photographs was "*this one is okay cause I can see a difference in my body"*. The Defendant responded "*cool, well done. How are you*?" The Claimant responded *"I'm OK, out in the sunshine today so that's making me feel better."* The next set of WhatsApp messages are on a date that I cannot discern. They relate to the time of the next meeting and are anodyne save for a wink emoji that is sent by the Defendant at the end of the WhatsApp trail.

Third private session 24 April 2016

36. The Defendant's notes of this session are set out below:

> "24/4/18
> Been meeting ex for walks with dog. 'Civil but not comfortable' Contrasted his lack of personal/emotional progress (& in fact her sense that he's regressed) with her journey and sense of progress.
> I'm interested in how she variably engages with and withdraws from various relationships that she claims to be unhelpful/hurtful and apparently seeks encouragement from one when another seems unnavigable for her (boyfriend/work colleague/father).
> These appear to interchange between villain & rescuer depending on circumstance – which for me has been demonstrated in the contrasting accounts of the relationship with her colleague – by him and her separately.
> Something feels contradictory/confused/disingenuous? Also confused by how she says she's not comfortable with her body yet has a library of fairly exposing images to volunteer from when discussing self-image diary. Possibly used when interacting with males? Does this support or contradict low self-esteem?
> Does it suggest game playing? **Will take to supervision**." (My emboldening)

37. After the 24th of April session there was no text or WhatsApp communication. No evidence was provided that the Defendant ever took these issues to his supervisor, Mr Williams.

38. M, the Claimant's manager, signed an undated witness statement which she provided to the BACP disciplinary panel. It did not have a statement of truth attached to it. In that statement, M, who was not called in evidence in support of the Claimant's claim, M asserted that: *"at some point I began to notice a significant change in GKE's mood and demeanor just before her well-being, she became quiet and withdrawn. I was so concerned as this went on that I mentioned it to Brett who said he would address it."* M went on to assert that in March 2018 she became aware that the Claimant was seeing the Defendant for private counselling. She said that after the Claimant's last counselling session in April the Claimant was more distracted and withdrawn than before. The Claimant mentioned she had not been sleeping well for a few weeks because she had things on her mind. The Claimant left the building at the same time as AM. When AM returned he explained to M that the Claimant had become upset outside the building and said she was worried about things she had been asked to do in counselling and had asked AM if it sounded right. M made an arrangement to meet with the Claimant the next day. I assume that would have been the 25th of April 2018. M went on to explain that she asked the Claimant if she was comfortable to tell her what had happened. The Claimant sat with her feet and knees drawn up to her chest with tears in her eyes. The Claimant said due to her problems stemming from sexual trauma she believed the Defendant when he said these things had to be discussed so

she could get over her anxiety. However she had become increasingly anxious and worried about the things he was saying and asking her to do. The Claimant went on to assert the Defendant had asked if she wore underwear in these sessions and of what sort. That the Defendant had proposed the idea of a scrapbook of photos to help her feel better about the way she looked and that the Defendant had these in his possession. The Claimant said it contained photographs of her in her underwear and pole dancing. The Claimant spoke about the last session stating the Defendant had suggested or encouraged her to touch herself (masturbate) in the office and claimed she was shocked but the Defendant had told the Claimant that it was mindfulness practice and a lot of people did it. The Defendant then told the Claimant he had bought lubrication if she needed it and offered to give her a hand and winked at her. The Claimant asserted that she panicked, felt sick and went to the toilet. When she returned she told the Defendant she did not want to do this and felt uncomfortable and the Defendant then suggested she should masturbate herself and make an audio recording to share in the next session. M then explained that she would need to report this to head office as the Claimant's manager and the Claimant accompanied her to the head office where WhatsApp and text messages between the Claimant and the Defendant were shown. The manager noted that the Defendant sent messages late at night some of which had an "x" on them. The Claimant expressed shame about being manipulated and felt fear that she was overreacting to what might have been normal counselling practise.

39. On the 27th of April 2018 MH a manager at ER emailed the Defendant and stated that over the past 24 hours concerns had been brought to his attention about the Defendant's work with an employee. To enable the manager to investigate the issue in more detail he invited the Defendant to head office to meet with himself and the HR manager on Tuesday the 1st of May at 11 am. Given the nature of the concerns the manager suspended all activity by the Defendant with ER forthwith including face to face meetings with ER employees whether contracted to the Defendant or under contract in a private capacity, all visits to ER premises, meetings with staff in any other locations or any electronic or non electronic communications. The Defendant was asked only to respond about whether he would attend the meeting.

40. I consider that this email set an important boundary. Three days later, on the 30th of April the Defendant responded stating that rules of confidentiality prevented him from discussing any individual with ER. Confidentiality also covered the well-being service he provided to ER employees. The Defendant stated that if any individual wanted to take issue with any element of his practice he hoped the individual would discuss it with him first or make a complaint to the BACP. He offered to attend the meeting if the concerns related to non confidential matters.

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41. It is clear that the meeting on the 1st of May did take place but no witness was called to give evidence about it. The Claimant and the Defendant all ignored that meeting in the evidence set out before this Court.

42. Taking into account that the Defendant's contract had been suspended and that he had been specifically barred from communicating with any ER staff, it is in my judgment remarkable that on the 1st of May the Defendant wrote to the Claimant as follows: "*Hi GKE. Just had a thought after last week's confusion over times to confirm we are meeting at the usual time of 8:30 am is that what you had in mind? B.*" The Claimant did not respond.

43. On the 18th of May 2018 the Defendant wrote to MH the manager at ER giving his "without prejudice" view of the recent events. The Defendant summarised that the concerns raised in the meeting were several statements which were read to him relating to one individual in a context that "*if true would fall well outside the boundaries of my professional relationship*" with ER. Defendant complained he was asked repeatedly to comment on the statements which had been drawn from what he said was a private client situation. The Defendant asserted the process made him feel uncomfortable and intimidated because he was expected to breach his professional ethical framework. He set out his professionalism, his reputation and the eight years he had worked for ER. He set out that he had only had positive feed back before. He reserved the right to seek legal redress in the event of financial or reputational damage if ER broke what he described as the confidentiality clause in the contract that he had with ER.

44. On the same day, and in breach of the specific ban put upon him by ER from contacting ER employees, the Defendant again Whatsapped the Claimant directly. By this time there can have been no doubt in the Defendant's mind that the Claimant was the complainant. In the long message he suggested he wanted to end their counselling relationship "properly" and that all he ever wanted was for the Claimant to know herself and to love herself. He had always tried to care for the Claimant in a paternal way in the sense of being nurturing and encouraging. He explained that the Claimant had wished to have difficult conversations and that he thought that they were on the cusp of a turn around and that it would all have made more sense within one or two more sessions. He suggested she had allowed herself to be treated as an object by others in relationships which had been unhealthy. He encouraged her to continue with the journey he had started and asserted that he had not breached his confidentiality duty to her or shared the information with anybody else. He explained that at the time he was providing private sessions he was dealing with the unexpected death of somebody that meant a lot to him. This, he asserted had thrown him "*off his game*". He said that perhaps he had been distracted or inarticulate.

45. Not only was this a breach of the ban on communication imposed on him by ER management but in my judgment it exemplified the Defendant's wholesale disregard

for the Claimant's complaint, her emotional state and of proper boundaries at that time.

The Claimant's BACP complaint

46. On the 6th of June 2018 the Claimant signed her BACP complaint form. She asserted that the Defendant approached her at work to offer sessions with himself. She complained that around October 2017 the Defendant started messaging her outside hours asking how she was and about her relationship with her boyfriend. It will be apparent from the summary above that part of that was factually inaccurate and untrue. In fact messaging had been going on since August 2016 at the Claimant's instigation. She went on to assert that in February 2018 the messaging increased and that the Defendant started putting an "x" at the end of messages. That assertion was being made out of context because the first person to add an x to a message was the Claimant not the Defendant. By looking at the volume and content of messages, as I have done above, there was no substantial increase in February of 2018. The Claimant asserted that during the messages the Defendant sent her the names of two pornographic websites. What the Claimant did not do is to put that in the context of the therapy sessions she was having with the Defendant at the time, which on her own evidence (which I shall summarise later) concerned her psychosexual problems with sex which had led her and her boyfriend to smoke cannabis and watch pornography rather than have penetrative sex. That omission was directly relevant because it would have provided crucial context to that part of her complaint.

47. The Claimant stated that she did not feel overly concerned at that time because the support the Defendant was giving her was around sexual trauma however she asserted she started having anxiety attacks before her sessions and would feel uncomfortable when sexual conversations arose. I shall return to that assertion later but record here but there was nothing in her GP notes about increased anxiety due to counselling in February of 2018. What the Claimant did not mention in her complaint was that it was that month that things had got so bad with her boyfriend, Steve, that she left their jointly owned house and moved in with her mother and she reported to the Defendant in her text messages how anxious and upset she was over that separation. In addition in March she complained of her historic rape to the police. None of this was disclosed to the BACP in her complaint.

48. In the complaint the Claimant went on to state that she found her sexual trauma and issues difficult to talk about in session but was aware they needed to be discussed. She did ask the Defendant to continue to push through these with her and for him to ask difficult questions each week. She then asserted that over the next few months, which must mean March and April 2018, she started to get very anxious and on edge throughout the sessions and would have anxiety attacks in the sessions. She also asserted that other staff members noticed the change in her behaviour before she went to the sessions with the Defendant. This appears to be a reference to the evidence in the undated witness statement from her manager, M. The Claimant asserted that

between February and through to April the Defendant asked her what pornography she watched at home and offered a number of times to buy lubrication to use at home. However she did not give the context for those assertions. Certainly in relation to the assertion about pornography that context was set out in her evidence to this Court as I will explain it below.

49. Expressly during the April sessions, the Claimant asserted that the Defendant bought lubrication for her, asked her what underwear she wore at home with her boyfriend and in bed, and in one of the sessions asked whether she was wearing any underwear. The Defendant suggested "a number of times" that the Claimant should get undressed in session to help her negative image. She refused. The Defendant asked if she enjoyed "*giving blow jobs*" whilst discussing her sexual issues and asked about her sexual preferences and what sexual activity she had with her boyfriend. She complained that the Defendant told her not to discuss her sessions with others. She complained but she was advised to experiment with females due to her fear of penetration. She complained that she was advised that her boyfriend was not sexually compatible with her and she should try to have intercourse with somebody else and that the Defendant said he would get her in contact with somebody to arrange this experiment. The Claimant asserted that after this suggestion she went home and had this conversation with her boyfriend and that the boyfriend was very concerned about the conversation. Taking into account the chronology set out above and the evidence which the Claimant gave me in Court this cannot have been correct because she and her boyfriend had separated in February 2018. So by April 2018 the Claimant was no longer living with him.

50. Finally the Claimant asserted in her complaint that in the last session the Defendant asked her to touch her genitalia and masturbate in front of him, offered to help and then, when she refused, advised her to go home and record herself masturbating and send him the recording.

The BACP procedure

51. In October 2018 the BACP pre hearing assessment panel chaired by Heather Dale sat with two other adjudicators and generated a report in which it put forward some of the Claimant's allegations for which it was satisfied there was sufficient evidence to suggest there was a case to answer.

52. Allegations 1, a, b and c, were potential breaches of paragraph 21 of the Ethical Framework for the Counselling Professions (EF). Paragraph 21 states:

> "*we will respect our clients privacy and dignity.*"

The paragraph then sets out 7 factors which variously related to be quality, diversity, discrimination, vulnerability, identity, adjustments, knowledge and open mindedness. The asserted breaches were using inappropriate language in a message in which

between January and April 2018 the Defendant said the Claimant that he was proud of the Claimant. The next allegation was that the Defendant asked the Claimant to undress during a therapy session and the third was that the Defendant asked the Claimant to masturbate during a therapy session.

53. Allegation 2 was an alleged breach of 33 (a) of the EF which states:

> "*we will establish and maintain appropriate professional and personal boundaries in our relationships with clients by ensuring that: a. these boundaries are consistent with the aims of working together and beneficial to the client …".*

The breaches included that the Defendant messaged the Claimant late at night with increased frequency between January and April 2018 thereby failing to establish and maintain appropriate professional and personal boundaries.

Allegation 3 was a breach of paragraph 34 of the EF which states:

> *"we will not have sexual relationships with or behave sexually towards our clients, supervisees or trainees."*

The allegations were that between January and April 2018 the Defendant behaved sexually towards the Claimant by viewing pictures of the Claimant in underwear; asking the Claimant to undress during a therapy session; sending the Claimant pornographic websites addresses; asking the Claimant what underwear she wore at home and in bed; purchasing sexual lubricant for the Claimant against her wishes; asking the Claimant what she wore in bed and at home; asking the Claimant about her sexual preferences and asking the Claimant to masturbate and offering to help during a therapy session when discussing masturbation.

54. The fourth allegation was an alleged breach of paragraph 36 of the EF which states:

> "*we will not exploit or abuse our clients in any way: financially, emotionally, physically, sexually or spiritually."*

The factual assertions to make out that allegation consisted of the previous factual assertions together with the assertion that the Defendant told the Claimant she could not discuss what they had talked about in therapy sessions with anybody else. This last factual assertion was also alleged to be a breach of paragraph 39 of the EF which states:

> *"we will maintain high standards of honesty and probity in all aspects of our work".*

There was also a catch all allegation, numbered 6, which was an asserted breach of paragraph 47 (c) of the EF which states:

> *"we will ensure candour by promptly informing our clients of anything important that has gone wrong in our work together and:... c, offer an apology when this is appropriate."*

55. There was a further catch all in the report alleging that overall the Defendant's behaviour suggested a contravention of the principles in the EF of being trustworthy beneficent and non-maleficent and showed a lack of the personal moral qualities of care, humility, integrity, respect and wisdom to which members and registrants were strongly encouraged to aspire and uphold.

56. Not in the Report, but in the EF itself, there is guidance on the supervision required of BACP members at paragraphs 52-61. Supervision was stated to be essential to sustain good practice and was to provide practitioners with regular and ongoing opportunities to reflect in depth about all aspects of their practice in order to work as effectively safely and ethically as possible. Good supervision was described as more than case management but included working in depth on the relationship between the practitioner and client in order to work towards desired outcomes. Supervisors were required to maintain high levels of good practice particularly for the management of personal boundaries, dual relationships, conflicts of interest and avoiding exploitation.

57. I comment here that no inquiry is mentioned into the supervision of the Defendant. Christopher Williams was the Claimant's supervisor. He was not called at the BACP final hearing despite being present and his offer to give character evidence for the Defendant was refused by the chair of the panel. I find this omission surprising. I consider that supervision was obviously relevant. The need for it was mentioned in the last session's therapy notes.

58. The BACP provided the Defendant and the Claimant with documentation setting out the format of the professional conduct hearing. This stated that the panel would decide on the basis of the information in front of it on the day whether the complaint was proved or not. Each party was entitled to a support person. The parties would be provided with copies of all of the submissions to the panel and the decision of the panel would be based on written documentation and verbal contributions delivered on the day. The panel had the power, having read the papers, to invite a witness to attend to clarify evidence. Hearings were audio recorded. The recordings would be made available to both parties upon written request. Some of the questions at the hearing had to be put through the chair. The chair would invite the Claimant to present a short verbal summary of no more than 10 minutes duration of the complaint. The chair would invite the member to present a short verbal summary of no more than 10 minutes of the response. Both the Claimant and the member would then be cross questioned through the chair for up to 60 minutes. The chair had discretion to extend

the period of questioning if necessary. Witnesses may be called by the panel. Witnesses may be questioned through the chair. Both the Claimant and the member would then be permitted 10 minutes for submissions each. The chair had power to extend the one day hearing into a second day.

59. The Claimant's witness statement to the panel, which was unsigned, undated and had no statement of truth attached to it, is in the trial bundle. She said she felt scared leaving her house and was constantly looking over her shoulder and doubting herself. She said that she trusted the Defendant and out of all the counsellors and therapists she had seen, she felt the most at ease with the Defendant. She felt he understood her completely. She stated he was the first person she really felt able to be honest with and he passed no judgment on her. She stated he understood her triggers and her anxieties and really knew her and the intimate details of her life. Particularly the very ugly emotional parts of her life that she battled every day: the guilt she carried around and hatred of herself. She stated the Defendant made her feel like she mattered, that she was worthy and that she deserved to be happy. The Defendant made her feel at ease and that she was a good person and likeable and encouraged her so many times and said he was proud of her. The things they spoke about were difficult and traumatic. She disclosed that she had been raped and the trauma and impact of that pretty much consumed her. She said this distorted her views on sexual relationships with men and she asserted that the long term relationship she was in during well-being coaching made her feel worthless. She disclosed her turbulent and destructive relationship with her father which impacted on her confidence and self worth. She disclosed she had battled with depression since the age of 14, self-harmed many times and thought about ending her life. She asserted her anxiety got worse when her dad left and moved abroad. She disclosed she would have anxiety attacks most days.

60. The Claimant went on to assert that she had received previous CBT therapy when she was younger for post-traumatic stress disorder and had also tried hypnotherapy and engaged with Rape Crisis but she struggled to connect with the therapists. She only felt "listened to" by the Defendant. Descending into the allegations, there were times when she felt he was too friendly by hugging her. The Defendant would message her at night and comment on her appearance, telling her she looked beautiful. She asserted that she had anxiety attacks leading up to her sessions and during her sessions. She described those as occurring when walking over to his loft.

61. Stopping there, the sessions that the Claimant had in the Defendant's private consulting rooms were in April 2018. Those sessions were specifically designed to dig deeper into her personal difficulties and so it is perhaps not surprising that the Claimant was more anxious about them and she disclosed that to the Defendant in her text messages summarised above.

62. The Claimant went on to allege that the Defendant had manipulated her. She asserted that her anxiety was crippling and she felt unsafe being in Watford for fear of seeing

him. She asserted she did not feel safe going out on her own. She suffered panic attacks and withdrawal from her friends. She asserted being signed off work for over a month. She asserted recalling the last therapy session where he asked her to masturbate and then, when she refused, advised her to go home and record herself masturbating. The Claimant asserted the Defendant manipulated her into sending pictures of herself in her underwear which was engaging with her sexually. She asserted he was pushing her boundaries. He texted late at night for her to "check in" with him. She was angry at herself for being vulnerable and chosen by him to be manipulated, and about finding out that she was not the only one he had abused and that the Defendant had gone a lot further with others than he had with her.

63. The Defendant did not put in a witness statement before the BACP, but Irwin Mitchell, his solicitors, put in an 18 page formal written response dated December 2018. This set out his degree in marketing from the university of Natal, South Africa in 1994; his Msc from the university of Hertfordshire in 2000; the Defendant's diploma at Middlesex University in counselling obtained in 2011 and his private practice since 2012. He set out his history with ER where he started doing voluntary work and then in 2013 was contracted as an organisational well-being consultant to deliver well-being services to staff. He asserted that typically this started by referral from the development manager at ER. The document ran through the chronology of the sessions provided by the Defendant and explained that he provided sessions to many ER staff. He would check in with many of them out of hours by text messaging and WhatsApp. That was all part of the service the Defendant offered ER. During the employer funded sessions the Defendant identified the Claimant's primary presenting problems as: severe anxiety, periods of depression and self-harm, long term cannabis use and poor diet. The Defendant offered the Claimant advice on cutting out stimulants, improving her nutrition and lifestyle. The Defendant identified areas of the Claimant's life which were contributing towards her anxiety and depression as: her volatile and dysfunctional relationship with her father; her frustrating relationship with her mother; her unhealthy relationship with her partner; her low self-esteem and body image. The sessions centred around those topics. The Claimant wished to get fitter and healthier and to improve her self-image. The Claimant expressed a desire to start pole fitness and the Defendant encouraged her to do so. During the following months the Claimant remarked on the positive effect this was having on her well-being and self-esteem. The Claimant obtained professional pole fitness photographs which she shared voluntarily with the Defendant on the 8th of November 2017. She also shared them with other colleagues at ER. The Defendant had not asked the Claimant to send those photographs, she chose to share them voluntarily. The Defendant admitted writing on the 8th of November that the photographs were really stunning and that he was proud of her. The Defendant explained that his messaging was to support her progress with her self-esteem and body image. (This assertion was later denied by the Defendant in evidence).

64. The Defendant asserted that as the sessions developed sex and identity featured as issues that the Claimant wished to explore. On a number of occasions the Claimant contacted the Defendant out of hours for support by text and WhatsApp. The Defendant would make himself available as part of the service to all staff at ER. The Defendant admitted that he would “check in” with the Claimant and other staff by text and WhatsApp. The well-being sessions ended in March 2018 when the employer’s funding for the Claimant’s sessions exhausted. The Claimant then contacted the Defendant on the 2nd of April to request private counselling and an e-mail of that date evidenced that request. The private counselling modality used involved the Internal Family Systems form of therapy. This the Defendant wrote separated out an undamaged core and resourceful self and sought to facilitate the emergence of that self. At the first private session the Claimant wished to address her behaviours in relation to sex, relationships and body image. Her relationship with her partner had recently broken down and she was concerned she would relapse into uninhibited sexual relationships. The Claimant wished to gain control over her behaviours and gain a healthier sex life. The Defendant described the first session as centering on body dysmorphia, her body tattoos and piercings and dark clothing. The Defendant recommended a self-image journal as a tool to document the journey towards a healthier self-image. The Claimant was to provide photographs for a journal which the Claimant would then annotate with narrative. The Claimant agreed to this self-image journal exercise during the session the Defendant took a photograph of the Claimant on his sofa in the therapy room using the Claimant’s phone. This the Claimant then sent to the Defendant via WhatsApp at past 11:00 o'clock at night that evening. The Defendant had agreed to print off the photographs because the Claimant had no printing facilities. In WhatsApp messages at 5:00 o'clock that afternoon the Claimant pointed out that she was feeling OK and felt better because she had been anxious before the session.

65. In relation to the second therapy session the Defendant’s lawyer’s letter recorded that the Claimant was concerned about regressing into promiscuous behaviour having separated from her partner and the Defendant advised on the process of moving to more evenly matched, healthier relationships and away from volatile relationships. The Defendant asserted this session ended well. The Defendant pointed to a follow up WhatsApp message from the Claimant thanking the Defendant for the second session three days later. The Defendant pointed out that the Claimant sent five photographs via WhatsApp of herself, some of which she liked and some of which she disliked. The Defendant asserted these photographs were to be part of the body image journal they had agreed to construct. Further messages were identified by the Defendant as showing that the Claimant was feeling better out in the sunshine. The Defendant asserted there was no suggestion by the Claimant that she felt anxious or uncomfortable with the second session.

66. In relation to the third session, on the 24th of April, the Defendant gave evidence through his written response that the session focused on sex and sexuality. The

Claimant told the Defendant that her previous long term relationship did not involve penetrative sex, that her partner reminded her of the man who had raped her and therefore she found her long term partner *repulsive*. (None of this is in his counselling notes). The Claimant restated that her long term partner had used alcohol, cannabis and pornography to facilitate sexual intercourse between them. The Claimant and the Defendant discussed the role of masturbation and the Claimant disclosed that she found it difficult without lubrication. (None of this was in his counselling notes). The discussion continued in relation to the possibility of purchasing off the shelf lubricants but the Claimant was too embarrassed to purchase such products herself. The Defendant asserted she should ask a friend to do so for her. The discussion touched upon awareness of sensuality and clothing and the effect of clothing on one's self-image and the role of underwear. A part of the discussion was about a walk which the Claimant had taken with her ex-partner from which she considered that she had moved on with therapy and he had not. This appeared to the Defendant to be the Claimant admitting that the therapy had been beneficial for her. (This is in the counselling notes). The Defendant asserted that the session ended with a positive review and the next session was arranged for the 1st of May.

67. The BACP hearing took place on the 12th of March 2019. It took one day and the Defendant complained that the chair did not call his supervisor and character witness, Christopher Williams. Having read the witness statement provided by Mr. Williams for the panel, which was signed and dated 28th January 2019, it is clear that this was a character reference, it was not evidence from the supervisor of an in depth analysis of the Defendant's therapy with employees of ER or in particular with the Claimant. I do not understand why Mr. Williams was not prepared to assist the Defendant by giving evidence to the tribunal and explaining what he had done by way of supervision with the Defendant. This, it appears to me, is a substantial hole in the Defendant's case and the panel's process. In any event 17 days later, on the 29th of March, the panel published its findings. The Claimant's assertions are set out in the findings document and the allegations are set out numbered 1 to 6. The panel indicated on page 5 that they used the balance of probabilities test. They corrected errors in the pre hearing assessment panel's decision in relation to dates. It is noteworthy that before they came to making decisions on each of the allegations they made no reference whatsoever to the Defendant's clinical notes or the Defendant's evidence or his written response. Instead, they summarised the Claimant's evidence and the allegations. The panel then dealt with each of the numbered allegations. The panel found that the Claimant was the Defendant's client during the well-being support services (a finding which the Defendant denied to this Court). The panel noted the Claimant in evidence denied swearing in her in messages, but during cross examination accepted that some of her messages did use swear words. The panel accepted that mirroring was a recognised technique used by therapists but ruled that it was only appropriate during therapy sessions. Mirroring was the Defendant's defence to using swear words and the sign off "x" at the end of messages because the Claimant used these in messages and in conversation and initiated that sign off. The panel found that the Defendant's

language in a message on the 8th of November relating to the use of the word "stunning" was inappropriate outside the context of a therapy session. The panel preferred the Claimant's evidence on the allegation that the Defendant had asked her to undress and to masturbate in session. The requests to undress were found to have occurred in the second and third private sessions and the request to masturbate was in the third private session.

68. The panel took into account the written evidence from the manager, M. The panel did not hear evidence from M. No opportunity was given to the Defendant to cross examine M. I also note, as will be set out below, long before the hearing M had told the Claimant that M had been sleeping with the Defendant regularly during her counselling sessions with him. None of this information was put before the panel by the Claimant and M did not mention that in her unsigned witness statement to the panel. It seems to me that this substantially undermines the credibility of any evidence M gave to the panel. She was purporting to be independent, but was not.

69. Taking those matters into account the panel found the Claimant's evidence more compelling than the Defendant's evidence and criticised the Defendant for being unclear in his explanation of why the Claimant was saying what she was saying. The Defendant was not prepared to say whether the Claimant was confused or lying. Stopping there I do not understand why it should fall on the Defendant shoulders to explain that. The Defendant did not have any duty to explain the motivation of the Claimant in relation to the allegations that she made against him and which he denied. I will not go through the rest of the panel's findings save to say that they upheld allegations 1 to 5 but rejected allegations 6 in relation to the message of the 21st of May 2018.

70. The panel then considered the mitigation put forward for the Defendant but made absolutely no reference to Mr. Williams' witness statement in support of the Defendant's previous good character. The panel found that the Defendant had shown very limited insight and a lack of understanding of his misconduct and the panel did not accept that his apology carried weight. The panel terminated the Defendant's membership of the BACP and ordered that the finding be published.

The witness evidence

71. I heard evidence from the following witnesses:
  - 71.1 The Claimant.
  - 71.2 The Defendant.
  - 71.3 Christopher Williams.
  - 71.4 Doctor Watts.
  - 71.5 Doctor de Taranto.

The Claimant

72. The Claimant confirmed the truth of her witness statement dated April 2022. She asserted that she raised the topic of her past sexual trauma during her well-being counselling sessions and these were difficult conversations, but through these conversations she felt that she trusted the Defendant more and more. Interestingly in her witness statement she put the start of the private sessions neutrally just saying she started private sessions, whereas in fact the Claimant instigated these by requesting them by message on the 2nd of April. She asserted she had already started to feel uncomfortable before she requested the private sessions. I find that assertion incongruous on all of the evidence that I have heard.

73. The Claimant asserted that the Defendant asked to see pictures of her pole dancing and yet did not put in her witness statement that it was she who raised her desire to do pole dancing and the Defendant who supported her in that desire as a good method of improving her fitness and body image. She asserted that the private therapy sessions made her feel more and more uncomfortable and that she felt like they were just focused on sex. She made no reference in her witness statement to the detail or contents of the counselling notes made by the Defendant which were disclosed long before the date of her witness statement. She entirely ignored them. The Claimant asserted that she realised she was becoming increasingly anxious before going to sessions and her heart was racing. She repeated her allegations made to the BACP hearing.

74. In the witness statement the Claimant asserted that from October 2017 the Defendant *started* to message the Claimant outside work hours. However that was a factual untruth because texting had been going on since August 2016, mainly in relation to appointments but also in relation to how she was feeling. The Claimant asserted that in November 2017 the Defendant asked her to send him photographs of pole dancing and the Claimant complained that he said she looked "stunning". Having heard her give evidence I reject the Claimant's assertion that the Defendant asked her to send him photographs of her pole dancing. I found it unconvincing. I find that the Claimant sent to the Defendant the photographs of her pole dancing as a sign of her pride in her improved physique and her improved self-confidence.

75. In the witness statement the Claimant asserted that from February 2018 the Defendant messaged her more frequently and signed off his messages with "X". However she failed to mention in her witness statement that she was the first to use that sign off. The Claimant complained that the Defendant sent her details of two pornography websites in her witness statement yet the Claimant omitted to put that allegation in context. I fully understand that if that had occurred out of the blue it would be the subject of a valid complaint. However, it did not occur out of the blue and the Claimant failed to set out in her witness statement the context of the recommendation of better and less damaging pornography sites made by the Defendant to assist her and her then boyfriend to improve their relations by avoiding mainstream objectifying

pornography. I find that omission troubling. The Claimant asserted that she did not recognise how inappropriate it was for the Defendant to send these websites.

76. In her witness statement the Claimant asserted that she started to suffer anxiety attacks before the sessions. She was aware that sexual trauma needed to be discussed and she recognised that she did ask the Defendant to push through with her and for him to ask difficult questions. The Claimant asserted that between February and April 2018 the Defendant asked what pornography she watched and offered to buy her lubrication. Taking all of the evidence into account, some of which I will summarise below, I reject the context in which those allegations from the Claimant were put. I consider that she is intermingling events which more probably occurred in April with those in February and March.

77. In her witness statement the Claimant then went on to say that the Defendant asked her what underwear she wore at home and in bed. Again that assertion was made completely out of context and without reference to the private session therapy notes and the agreement therein to focus on improving her psychosexual issues and self-image.

78. In relation to the two key allegations of being asked to undress during the private therapy sessions and to masturbate the Claimant gave that evidence in the statement.

79. The Claimant also set out her other assertions: of discussions of her sexual preferences; the Defendant suggesting that she have sex with a more compatible person; and to consider sex with a female to see whether the Claimant's fear of penetration was boyfriend specific. Objectively it is difficult to see why these (limited) discussions are the subject of complaint in the context of the Claimant wishing and asking the Defendant to discuss her psycho-sexual issues including her fear of penetration and her inability to enjoy penetrative sex. Particularly set against the background of the Claimant's own evidence that for a period after the age of 19 she *"went wild"* and had sex with a large number of men, and her abusive relationship with her boyfriend. But without expert evidence from a psycho-sexual counsellor or just an expert counsellor I can draw no conclusion on the appropriateness of those matters being raised.

80. In her witness statement the Claimant described the events and the chronology after the final session and the BACP hearings. She described the hearing as the worst experience of her life. She suffered insomnia and panic attacks leading up to it. And that included the October 2018 pre-hearing assessment process. She asserted that she became isolated in her house and moved jobs because too many staff at ER knew her personal details. She also moved out of Watford. She felt validated by the BACP findings and started on antidepressants after the hearing. The Claimant felt that the Defendant had misused her and she was extremely depressed and upset by his conduct.

81. The Claimant set out that between November 2020 and July 2021 she received treatment from K Rodgers (a therapist) and thereafter she stopped taking medication. In relation to her work, although she was offered the assistant manager job at ER in April 2018, as is set out in the text and therapy records relating to the first two therapy sessions in April, and took it, she later resigned. She then applied to the police force for a job, worked in the prison service and then returned to be a homeless prevention officer for a local authority.

The vulnerable witness order

82. Cross examination of the Claimant was procedurally different from cross examination of the Defendant. A few weeks before the trial the Claimant applied, based on the psychiatric evidence of Doctor de Taranto in her second report, for a vulnerable witness order. That order was made by another Judge on the 18th of January 2023 and required the Defendant to serve and file a list of questions by the 31st of January 2023. The order specifically permitted the Claimant to raise any objections to the cross examination questions at the start of the trial. The Claimant was permitted to attend the trial by video link and the Defendant was barred from cross examining the Claimant directly. The trial judge was required to verbalise the Defendant's questions from the list. In the event the Defendant drafted 86 questions which were sent to the Court and to the Claimant. I found out halfway through re-examination of the Claimant, that not only had the Claimant's lawyers seen the questions, but the Claimant herself had been shown the questions before the trial and so had (potentially) been through them with her lawyers.

83. The CPR practice direction 1A is a relatively new addition to the Civil Procedure Rules and springs in all likelihood from the protection of vulnerable witnesses provided in criminal cases. It was introduced on the 6th of April 2021. The purpose, set out in the notes to the Civil Procedure rules, was to enable vulnerable parties and witnesses to participate to the fullest extent in proceedings. The rule change was the product of the *Civil Justice Council* (CJC) report on vulnerable witnesses. In paragraph 203 of that report the CJC considered but dismissed the idea of providing a service of trained lawyers to ask the litigant in person's questions of the victim of alleged sex abuse and suggested, if necessary, the questioning could be undertaken by the judge at trial. I have not found anywhere in the CJC report the suggestion that the Claimant, who was not a child and did not have learning difficulties, should herself be permitted to read the written cross examination questions in advance of cross examination taking place.

84. Whilst I make no criticism of the Claimant's lawyers for interpreting the wording of the vulnerable witness order made in this case as permitting them to take instructions on the written questions. It is my view that giving the questions to the Claimant in advance created was not fair to the Defendant and created an unlevel playing field and degraded her evidence. The Defendant was not provided with the cross examination

questions from the Claimant's counsel in advance. When this issue arose and during his closing submissions the Defendant expressed his astonishment and disbelief that this could have occurred and submitted in the strongest terms that it was unfair. I have sympathy with that submission. As a result I have taken great care to approach the Claimant's cross examination answers with the unlevel playing field in mind.

The Claimant's video evidence

85. The Claimant gave evidence by video link. She was in counsel's chambers accompanied by her solicitor. In the notes to CPR Part 32.3, which permits evidence by video link, the VCF Guidance notes are summarised and it is specifically pointed out that the Court does not have the same degree of control over a witness at a remote site compared to one in court. In addition an extract from the judgment of Andrew Baker J in *Navigator Equities v Deripaska* [2020] EHC 1798 (Comm) is set out. A witness was giving evidence from counsel's chambers in that case. The judge commented as follows:

> "9. I do not suggest there is any reason to think anything inappropriate occurred or was likely to occur in this case, but nonetheless I do not regard what happened as entirely satisfactory. If a witness is to give evidence remotely, where he or she will be and who (if anyone) will be with them, and why, should be discussed between the parties in advance. That is always so, in my view, but especially it is so if the arrangement may be such that there could be interaction with the witness during their evidence that will not be visible to the court. Any arrangement other than that the witness will be on their own during their evidence should be approved by the court, in advance if possible, and parties should not assume that an arrangement will be approved just because (if it is) it is agreed between them. Sensible arrangements discussed and agreed in advance are likely to meet with approval if the court does not identify any difficulty of possible substance that the parties may have overlooked. But it must be for the court, not the parties, to control how it receives the evidence of witnesses called before it. I acknowledge that the parties were not asked by the court in advance to specify the witness arrangements here. They should have been, and that they were not is my responsibility, but equally parties should not wait to be asked."

86. I am not aware of whether any such arrangements were put before the interlocutory judge when the vulnerable witness order was made.

87. Initially the Claimant was off screen because this had been arranged by her lawyers. However the vulnerable witness order did not permit the Claimant to give evidence screened. After discussion with counsel for the Claimant and the Defendant an arrangement was made whereby the Defendant could not see the Claimant on screen

but I could see her and so could counsel. The Claimant gave evidence within my view. I then proceeded to read each of the 86 questions drafted by the Defendant in cross examination. I should say that the Claimant 's lawyers only objected to one of the questions and only as to the wording of four words. Those words were changed.

The Claimant's evidence in cross examination

88. The Claimant said that she did not know the difference between coaching and counselling. The Claimant accepted that ER had staff who worked 24 hours a day providing their services. She did not know the nature of the Defendant's contract with ER but accepted the Defendant was around a lot and provided well-being support for many staff in ER around the clock. The Claimant accepted that she did swear quite a lot but did not expect her managers or the professionals who treated her to swear. She did not find swearing made her uncomfortable, she considered she had a good working relationship with the Defendant. She accepted she felt comfortable enough with his therapy that she could message him out of sessions. The Claimant asserted that she would not expect the Defendant to mirror her swearing or language when communicating with her by text. She did not take offence at his language. She asserted that when the Defendant praised her for her successes out of session that that was "inappropriate". Her answer took that style one by one. She accepted she had a good friend at work, AM, and they had a close relationship but she denied ever contemplating having sex with him. AM was also having therapy sessions with the Defendant. She accepted that AM went on dog walks with her and once came round to the house she owned with her boyfriend and her boyfriend was not particularly pleased at the visit. The Claimant asserted that she was "honest" with AM discussing that she was in a long term relationship and although she was not happy or settled she was committed to working through it. The Claimant did not apply for the 2017 assistant manager's job to avoid competing with AM who did apply. AM got the job. The Claimant found it difficult when her friend, AM, became her superior and found it awkward. Questioned on her relationship with M, the Claimant said that she had only found out that M was sleeping with the Defendant after the final therapy session. M had responded *"I know what you are going through".* (It appeared to me that the Claimant was inferring that M's comment related to M disclosing to the Claimant at the time when the Claimant disclosed her concern about the last April counselling session to her employer, that M had concerns about the Defendant as well). The Claimant accepted the dynamic with AM was challenging but denied the dynamic with M was challenging. She accepted they were "very close" at work. She stated that all three of them were seeing the Defendant for counselling and discussing intimate things with him. The Claimant then decided to get a distance away from it all. She rejected the assertion that she had a toxic relationship with her manager. She complained that the Defendant told her not to discuss the contents of the therapy sessions with others.

89. When questioned about quoting text messages selectively and out of context and that the first text was from the Claimant to the Defendant in August 2016 the Claimant accepted that she had presented her evidence out of context.

90. In relation to the out of session communications on the 6th of April and the 9th of April, the Claimant accepted she thought they were crossing boundaries in retrospect but not at the time. In relation to the photographs of pole dancing the Claimant stated that she and the Defendant looked at the photographs together in session. She complained that he zoomed in on parts of her body. She accepted that she had disclosed the pole dancing images to some of her work colleagues and posted them on social media, however her media accounts were private. She said in relation to the messaging comment that the photographs were "stunning" that it clearly related to her body looking stunning. She complained that in retrospect that was an inappropriate comment. She denied that the Defendant was talking about the quality of the photographs. She accepted in cross examination that the photographs showed her wearing "*next to nothing*".

91. In relation to signing off messages with "x" the Claimant said she would put that as a sign off to a lot of people. However she criticised the Defendant for responding in a mirrored fashion. She stated *"it's not my responsibility to set boundaries. I was vulnerable."* She also asserted "*I never had any boundaries".* She initially denied but later accepted that she initiated the use of "x", which she interpreted as a kiss.

92. In relation to questioning on her psycho-sexual issues she accepted that she could not have penetrative sex with her boyfriend although they were sexually active. She had chronic insomnia and stated that smoking cannabis helped her to sleep.

93. The Claimant denied ever saying that her boyfriend repulsed her. Stopping there that denial was in direct contradiction to other evidence she gave recorded in the documentation that her boyfriend did repulse her. She said that she had not had penetrative sex for four years and then she watched pornography for sexual purposes. She accepted the Defendant advised her not to watch mainstream pornography and suggested two sites which were different. She accepted the Defendant suggested these were more natural sites but denied that this was therapeutic help. It was put to the Claimant that the way she had given her evidence to the Court and the BACP in relation to his suggestion of visiting these two pornography sites was providing a wholly inaccurate impression. At this stage the Claimant began to cry and the Court arranged a break for her comfort. On resumption of evidence she denied that she had given an inaccurate impression.

94. I did not find the Claimant's evidence in relation to the way she made the pornography sites allegation against the Defendant was credible or honest. In my judgment, from the way the allegation about the recommendation of two pornographic

sites was put before the BACP and in her witness statement before this Court, the Claimant was painting it out of context.

95. In relation to the start of the Claimant's anxiety caused by the Defendant's alleged behaviour, in evidence she asserted that she was anxious before many of the sessions, from early 2018 and that M, her boss, had noticed this. I reject that evidence. The reasons why I reject it are firstly that none of the texts or WhatsApp messages supported this connection. Quite the opposite. Secondly, that the Claimant sought out the Defendant for further private counselling at the start of April which would not be consistent with increasing or growing anxiety before during or after counselling sessions as a result of improper behaviour. Thirdly the manager, M, was never called to give evidence before me and did not put in a witness statement to support the Claimant in the Civil trial. Therefore M has not been cross examined. M's hearsay evidence carries very little weight in the light of the Claimant's own disclosure that M told the Claimant that she had been having sex with the Defendant during her own therapy sessions. In addition the Claimant's depression and anxiety was clearly exacerbated by splitting up with her boy friend at that time and as we shall see, later, by reporting the historic rape to the police in March 2018. The Claimant's GP notes did not support the assertion either.

96. The Claimant went on to say in cross examination that she accepted that she had a quite relaxed relationship with the Defendant and that she did text him but also asserted that she did not expect a response. She stated that other therapists did not respond to her texts. She complained that he should have been setting boundaries for her. Although she accepted that at the time it did not feel inappropriate to her because she needed help and she had asked for it.

97. In cross examination on the photographs that she sent to the Defendant, the Claimant asserted that she would not have sent pictures of herself in her underwear unless he had asked for them.

98. The Claimant asserted that she had nothing to gain from the litigation (which rather overlooked the claim for damages which she was making).

99. The Claimant asserted that she felt she had had a really good relationship with and trusted the Defendant and he had breached that trust. It was suggested to the Claimant that she was lying to Doctor de Taranto in 2019 about having no sex for four years, namely since 2014. The Claimant denied that was a lie. It was put to the Claimant that she had manipulated the truth.

100. It was put to the Claimant that she had asserted to Doctor de Taranto that her boyfriend had tried to kill her but in fact on further questioning admitted that he had not tried to kill her but had threatened to kill her. The Claimant accepted that her first statement was not true.

101. The Claimant accepted in cross examination that she had an unhealthy relationship with men who generally exhibited abusive and controlling behaviour to her. That she had bad patterns of behaviour in her relationships and that she was trying to change those. It was put to the Claimant that her psychiatric problems were rooted in her prior life experiences not in the therapy that she had received from the Defendant. The Claimant responded that she had been desperate for support but had been manipulated by her therapist which exacerbated her problems.

102. In re-examination the Claimant clarified that the "*stuff"* mentioned in various texts between the Defendant and the Claimant related to a relationship between M and the Defendant which she discovered after April 2018. She stated "*when I disclosed to AM what was going on he spoke to M, she took my hand and said I believe you. I moved to a different service. Later in the smoking area she asked how I was doing talking about the complaints and the Defendant. She said to me are you sleeping with him in sessions?*" M then disclosed that the Defendant had been sending inappropriate pictures of his body parts to M. The Claimant asserted that AM, M and the Claimant were all seeing the Defendant at the same time. She said that she did not discuss anything with her manager, M, until June or July 2018. Later in re-examination the Claimant stated that M had told her that she (M) had sex with the Defendant during counselling sessions. This disclosure occurred after the Claimant raised her BACP complaint in June 2018 after the Claimant had asked M whether M was sleeping with the Defendant during sessions, M showed the Claimant messages and video images. M told the Claimant that after having sex with M the Defendant would pat her on the head. M asserted that she had been sexually abused as a child and the patting was as if she had behaved like a "good girl". The Claimant asserted that M had also made a complaint to the BACP which had been upheld but no further sanction had been imposed on the Defendant.

103. At this stage in her evidence the Claimant, through her counsel, sought to introduce in evidence a document from the BACP evidencing their findings on the complaint by M against the Defendant a disciplinary hearing. After hearing argument on admissibility I excluded that document from being admitted in evidence. I gave the reasons in an extempore judgment. In short the Defendant felt he was being ambushed by this document being produced in re-examination. It had been generated as a result of what the Claimant said when she was reading through his cross examination questions before the trial. In his submissions the Defendant denied that M had ever been a client of his and asserted that it was unfair this document had not been produced on disclosure and that there was no mention of it in the pleadings or in the Claimant's witness statement or the BACP proceedings during the Claimant's complaint. He had no time to respond or deal with it.

The Defendant's evidence

104. In his witness statement, which he confirmed as true, the Defendant asserted that after his appeal from the BACP panel findings had failed, his professional liability insurance was terminated and so the Defendant was left without legal representation to defend this civil claim. The Defendant set out the catastrophic consequences of the publication of the BACP findings on his work and his personal life. He lost his business, his marriage and all of his income. He suffered a mental breakdown and lost his friendships and social relationships. The Defendant asserted that his father has dementia, he has a daughter with special educational needs and he has no prospect of working or pursuing his chosen career.

105. The Defendant put no medical evidence before the court in support of his asserted mental health conditions and put no GP or other medical notes or letters in evidence either.

106. Procedurally these adverse life events had led to the Defendant failing to comply with the case management directions of Master Sullivan and hence failing to provide a witness statement of his own evidence or statements from any supporting witness. In addition he was unable to fund expert reports in relation to breach or the quantification of the Claimant's claim.

107. On the 2nd of February 2023 the Defendant finally did sign a witness statement and served it on the Claimant. He applied for permission to rely upon his own witness statement on the first day of the trial and for the reasons given in an ex-tempore judgment I granted permission. At a later stage (during the trial) a witness statement was drafted by Christopher Williams, his supervisor and I permitted the Claimant to rely on Mr. Williams evidence as well, for the reasons given in an extempore judgment.

108. The Defendant accepted that in July 2016 he introduced himself to the Claimant at ER and followed the introduction up with an e-mail to her line manager. The Claimant was then referred to him by the manager for sessions and the Defendant started well-being coaching with the Claimant alongside his many other staff coaching sessions. He worked for ER for one day per week. The Defendant asserted that his role was not to counsel the Claimant but he offered personal and professional development tools and signposted the Claimant to external services for therapeutic support. The Claimant took advantage of that sign posting by receiving therapy from a female sexual therapy counsellor and hypnotherapy. The Defendant commented that neither of those worked out for the Claimant. The Defendant explained how he advised the Claimant to reduce her consumption of caffeine, sweets and junk food and reduce her use of cannabis. He counselled her to take up healthy activities to improve her well-being and she suggested pole fitness. He described his relationship with the Claimant as "familial", "collegial", coaching and advisory but categorically not therapeutic. He asserted that the Claimant showed signs of progress and improvement in her functioning as a result of the coaching and support he provided. At the end of the 18

months of well-being coaching he was reluctant to accept her for private therapy because "*I was not willing or qualified to do trauma therapy with her and I had already sign posted her to a few services that I believed more appropriate for her.*" This is a remarkable comment in the light of the in depth psycho-sexual therapy he then provided, on his own admission, to the Claimant.

109. The Defendant asserted that the Claimant knew that *one* of his areas of specialism was *"personal identity, gender and sex identity and relational dynamics including self esteem, sex and communication."* The Defendant asserted that the Claimant knew that he was providing sessions to "*a couple of her colleagues*" and he discussed this with her and warned her of the pitfalls and that they would need boundaries. He explained that his warnings to her to keep their sessions confidential related to the circumstances in which he was providing therapy to those colleagues.

110. In his witness statement the Defendant went through the content of the three private counselling sessions in April 2018 in accordance with his therapeutic notes which I have set out above. He described how he suggested a journal of photographs of the Claimant which she would annotate once printed off, as a standard way of addressing low self-esteem and body image. He asserted the Claimant entered the private counselling angry with her then ex-partner who had recently visited her and, without consent, accessed her mobile phone and trawled through her messages including her use of Tinder, a mobile dating app. She felt this was a violation of her privacy and had triggered hyper anxiety. He also counselled her in relation to a job application for assistant manager and, as the messaging shows, the Claimant obtained that job and so was buoyant during the second therapy session on the 17th of April. She was grateful for the coaching and encouragement he had given her for that job. However she wished to revise her goals in therapy to develop improvement in her sexual issues. She wished to get over merely having to endure intercourse but instead feel equal in a sexual relationship and enjoy the physical and emotional aspects thereof. The Defendant considered the second session went well. Afterwards the Claimant paid for it and there were no post session texts or communications indicating otherwise.

111. In relation to the third session the Defendant asserted the Claimant was reflecting on her improvement compared to the lack of improvement in her ex-partner which they had discussed when walking their dog. The Defendant then explored her psycho-sexual problems and her relationship problems using the "parts theory". He explained this as a triumvirate between rescuer / villain and victim and how she saw the people in her life in those three roles. The Defendant considered the Claimant was triggered by this discussion and so decided to let it lie until the following week and take things a little slower. The Claimant left saying she was anxious but fine. Three days later the Defendant received the e-mail from the CEO of ER terminating or suspending his work with the organisation. He found this devastating. Then the BACP complaint followed.

112. The Defendant was intensely critical of the BACP accusing them of carrying out a well documented practice of shaming and shunning their members through the disciplinary process and asserted that most therapists that have been through the complaints process felt discriminated against. The Defendant asserted that the PSA, the ICO and Charities Commission were investigating the BACP because of their inadequate complaints process. The Defendant asserted that he did not recognise the authority of the BACP or their findings because the process was not fit for purpose. He asserted that the process had been changed since his hearing. He asserted that in his BACP hearing his testimony was curtailed through poor time keeping and his ability to call on his professional supervisor, who had "*good knowledge*" of his modality "*and caseload*" was barred. He said that he relied on a book published by Doctor Sachs in 2023 about professional complaints against psychotherapist but did not provide copies of any paragraphs or chapters in that book in disclosure or exhibited to his witness statement.

113. I do not accept the Defendant's interpretation in relation to the BACP failing to permit the Defendant to call a vital witness. Despite the BACP rules requiring supervision to be in depth, Mr. Williams provided no evidence of a substantive nature about the Defendant's counselling of the Claimant or indeed of any other ER employee in his witness statement to the BACP. There was no mention of whether the Defendant was counselling M or AM and the Claimant at the same time. It was a character witness statement which focused really on mitigation. I find this telling in the context of the Defendant having legal advice from solicitors and counsel for the BACP hearing.

114. Despite not having served a witness statement from Mr. Williams for the civil proceedings, one was produced during the trial and that contained exactly the same omissions. Mr. Williams provided no evidence of any in depth analysis of the Defendant's therapy methods or approaches involving the Claimant or any other ER employee. It lacked any evidence related to the substance of the claim or the Defendant's defence. It was, once again, a character witness statement. I judge that the Defendant is an intelligent man and was perfectly capable of understanding the need to call supportive evidence on the substance of his case from his supervisor but chose not to do so.

115. The Defendant asserted in his witness statement that none of the Claimant's evidence had any evidential weight or foundation in truth or fact. He asserted the Claimant manipulated the evidence to show that he was predatory and premeditated. He relied in support on the psychiatric report of Doctor de Taranto which he asserted showed that the Claimant had pathological concerns going back into her youth. He asserted he was unaware of the true extent of the Claimant's previous therapy and previous trauma. He asserted he would not have taken the Claimant on as a client had he known of the full extent. He asserted the Claimant was and is skilled at playing the victim role and gathers rescuers around her and that the Defendant had fallen into this trap.

116. The Defendant also denied approaching the Claimant in her workplace offering one to one therapy. I reject this factual assertion. It is contradicted by the e-mail which he sent to the Claimant's manager suggesting that they had spoken at work and flagging up that she might need assistance.

117. Remarkably, the Defendant denied providing therapy to the Claimant. He asserted that when he started sessions with the Claimant the context was not therapy but instead "*to discuss and actively address the aspects of her life that were impacting her well-being an effectiveness at work".* As I shall explain below, Doctor Watts considered that the Defendant was providing therapy and I reject the Defendant's assertion that he was not providing counselling-therapy either during the well-being sessions.

118. In my judgment the Defendant's evidence showed that he was unable to understand his responsibilities properly or refused to do so. He accepted that he advised the Claimant on methods of improving her nutrition, methods of improving her body shape, methods of improving her relationship with her boyfriend, methods of improving her relationship with sex and on what pornography to watch and yet denied that any of these suggestions, recommendations or pieces of advice could be described as therapy. That assertion was not only illogical but in my judgment was manipulative.

119. The Defendant asserted that the Claimant initiated many of the text message threads and that he mirrored her language and her use of the "x" at the end of texts. He defended his activities in encouraging her and praising her as therapeutic. He denied that he caused her anxiety in any inappropriate way and prayed in aid the fact that she sought his private counselling in April 2018. He summarised that a total of 335 messages had been sent between himself and the Claimant, 37 of which were sent by the Claimant after 5:00 pm and 36 of which had been sent by him after 5:00 pm. He asserted that mirroring and photo journaling both were commonly used techniques which were potentially successful. He stressed that he had set out for the Claimant what he planned to do with body photo journaling and that she had agreed to it. That was, he asserted, the Claimant's choice. The images were the Claimant's choice. In his witness statement the Defendant denied that he sent the Claimant pornographic website links but admitted suggesting the sites themselves. He set out the context of the Claimant disclosing that she and her boyfriend smoked cannabis and viewed pornography to facilitate sex. He advised that the Claimant felt she was being compared to the actresses in the pornography. He strongly advised her not to use main stream pornography because of its objectification and cheapening of women as sexual objects for consumption. In his witness statement he stated he had heard of two sites that other therapists advised clients to visit, one of which he asserted was not pornographic but more sensual and promoted a better perception of what normal couples do. He had reminded himself of the names of the sites and advised the

Claimant to Google those names. This evidence was clearly correct because the messaging he sent to her did name the sites not, send the links. However, in cross examination the Defendant admitted that he had never visited either website and changed his evidence as to the source of these websites. He asserted that he had found them in an article. I gave the Defendant the time to find the article but he was unable to do so and instead sought to put in five different articles about the use of pornography in sex. For the reasons given in an extempore judgment I refused permission for those articles to go in after the close of the Defendant's case.

120. It is telling, in my judgment, that throughout the whole of the 91 paragraphs of the Defendant's witness statement there is not one sentence in which he deals expressly with the allegations at the core of this civil claim: that he advised her to masturbate in session in front of him and that he advised her to undress in the last two private sessions. The closest he came was a general denial in paragraph 83. I tie that in with the list of questions that the Defendant drafted to put in cross examination of the Claimant. None of those questions contained an assertion to the Claimant that the Defendant never asked her to masturbate in session and did not ask her to undress in session. I take into account, of course, that the Defendant was representing himself but it was not a legal matter for Defendant to realise what the most serious allegations were and to deny them and to put questions to the Claimant stating that she was lying or had misunderstood what he said and to put what he did say. To put his case.

121. **In cross examination** the Defendant denied that he offered the Claimant one to one sessions at the start, and yet he accepted that he emailed the manager inferring that the Claimant had issues and after that a manager arranged well-being one to one sessions. I am not sure that I really understood why he was denying the assertion. It was put to the Defendant that he was providing therapy sessions to M and to AM on a one to one basis. The Defendant denied that he ever provided sessions of well-being counselling or therapy to M. He said he provided no professional services to M. He later accepted however that he provided group well-being sessions in which M attended because she was a manager and he provided such sessions to the management groups. Later still he accepted he did walk and talk with M one to one from time to time. However he asserted that there were no "formal" one to one sessions. Later still in his answers he remembered that M did have some family issues and he admitted that he did meet and provide her with one to one sessions. I found this turn around in his evidence from blank denial to partial admission to full admission unimpressive.

122. In relation to his role, in cross examination he again denied that he was the Claimant's therapist and said he was her counsellor which he asserted was quite different. However, a little later he accepted that counselling is therapy because it incorporates therapy. The Defendant tried to explain that he was a well-being consultant within organisational health which incorporated all well-being elements macro and micro. He then repeated that he was not a counsellor but he was a part of organisational well-being and he did mentoring and coaching. He was not delivering therapy with the

"deep unpacking" which that involved. His work was aimed at improving productivity at work. He was then asked by Claimant's counsel how discussing the Claimant's psychosexual problems with her boyfriend would improve her productivity at work. He accepted that that had nothing to do with her work but then said that that never happened. When the Claimant had raised the topic of previous sexual abuse in session he had referred her to a sexual therapist. He also signposted her to Rape Crisis. When asked why he had made no notes of 18 months of the 1:1 sessions paid for by ER with the Claimant he explained this by saying the sessions were not therapeutic. When asked what his relationship with the Claimant was, he rejected the assertion he was providing counselling. He said that ER was his client not the Claimant. He stated the Claimant was not a patient but was "a resource". He sought again to try to distinguish between coaching, in which the Claimant could disclose anything and would be advised on how to become more effective, and counselling in which the objective was to bring about long lasting change. He stated that during the well-being sessions, despite the Claimant raising her self-esteem and body image issues he "*stayed far away from them"*.

123. Having carefully listened to the evidence of the Claimant and Defendant about the 18 months of well-being sessions and read the texts arising peripherally thereto I do not accept the Defendant's assertion that he stayed well away from issues of the Claimant's self-esteem or body image during those sessions. This assertion was untrue in my judgment.

124. The Defendant accepted that from April 2018 he was providing counselling or therapy in the private sessions.

125. In relation to what duty of care he owed to the Claimant the Defendant accepted he owed a duty of care to "any human" being of confidentiality and efficiency and if they had an issue, and he was to help them be more effective and productive. For instance if they had large periods off work. He accepted he was helping the Claimant to manage her conditions so that she could be present and effective at work. He asserted that the counselling agreement governed his therapy from April 2018 in his private rooms and that the Claimant had been his client from then on.

126. In relation to the pole fitness photos the Defendant asserted he did not ask the Claimant to send them. He did not accept it was inappropriate to call the photographs "stunning" and explained that he was only talking about the quality of the photography not the quality or shape of the Claimant's body. I found that evidence to be manipulative and untrue. When asked whether he was comparing the quality of the pole dancing photograph with the quality of other photographs from a photographic perspective the Defendant disseminated.

127. The Defendant asserted that his relationship with the Claimant during well-being was not counselling it was "collegial". When asked to explain what that meant, he asserted

that it meant that he was a colleague of the Claimant and working alongside her as a colleague.

128. In relation to the private sessions in April the Defendant read his handwritten notes. He relied on the contents of those notes for what happened during those sessions. He denied asking the Claimant to undress or to masturbate or offering to help her to masturbate. He accepted that if he had said those things he would have acted in an unconscionable way. He qualified that by saying that there were sex therapists who do sexual therapy involving masturbation in session but from his perspective that should never happen. He accepted that he and the Claimant talked about masturbation in the third session in relation to her psycho-sexual problems with her boyfriend. When asked why he had made no note of discussing masturbation he explained that the primary goal of the therapy sessions was body image not sexual issues. Stopping there the notes of the 17th of April made it clear that he had noted that the Claimant wished to focus specifically on her psycho-sexual issues and that he had agreed to do so, therefore this piece of evidence was untrue and contradicted his own notes.

129. The Defendant explained the rationale behind the Claimant's complaint as it being her habitual behaviour in relation to difficult situations: she just terminates the therapy relationship and blames other people.

130. In relation to the allegation the Claimant made about the Defendant sleeping with her manager, M, the Defendant asserted that, M and AM had personal relationships from the start and there was an ongoing dynamic which was unhealthy. He accepted that M had put in a complaint against him but asserted that she had a vested interest and had influenced what had happened with the Claimant. The Defendant accepted that he had a counsellor relationship with the assistant manager, AM. He refused to talk about it due to client confidentiality. When challenged, the Defendant refused to give evidence in answer to the allegation that he was sleeping with M in therapy sessions. The Defendant believed that a smear campaign had been started as a result of the Claimant's reaction to the third therapy session which was being orchestrated by M.

131. The Defendant denied asking the Claimant what underwear she wore at home or in bed. Although he accepted that they had spoken about underwear. When challenged that his defence letter to the BACP proceedings included an admission that the Defendant had asked the Claimant what underwear she wore in bed the Defendant said he did not recall that. Strangely when shown the expanded photographs of the Claimant which she had sent to him, the Defendant denied that the Claimant was wearing underwear and asserted she was clothed. In my judgment some of them objectively and clearly showed that the Claimant was wearing underwear. Eventually when pressed the Defendant accepted that one of the pieces of clothing worn by the Claimant in one of the three photographs was underwear on her groin. I found both of the above sets of answers unimpressive.

132. In relation to lubrication the Defendant accepted that he suggested to the Claimant that she should use lubrication to assist with her difficulty with penetrative sex but he denied that he had bought lubrication for her.

133. In relation to the appeal from the BACP finding the Defendant asserted that the appeal was chaired by the same chairman as the original panel: Amanda Larcombe, so she was "*checking her own homework*". However, strangely, the Defendant stated that despite being represented by solicitors he did not receive advice on the obvious procedural defect of the same person chairing the appeal who also chaired the hearing.

134. At the end of cross examination the Defendant asserted that the Claimant's experts were not expert. He pointed out that Doctor Watts was not an expert in counselling and stated that Doctor de Taranto could not contribute anything to the evidence at this civil hearing at all.

135. In re-examination (which was really a further opportunity to give evidence on the questions asked in cross) the Defendant asserted that he recognised that there are things that he could learn from the events but he asserted he would never consciously do harm. He stated that in relation to the photographs and his other admitted behaviour that he never intended to cause the Claimant discomfort, it was the opposite, he wished to increase her self-esteem. He ended his evidence saying that it was the responsibility of the client to carry out their own journey and that the client is the agent of their own change and that his job was to facilitate that change.

136. The Defendant called Chris Williams, his BACP counselling supervisor. His witness statement does not assist on the substantive elements of the claim. However he did provide very supportive character evidence of the Defendant's history of successful counselling but he accepted in cross examination that the only source of the information when he was supervising the Defendant would be the Defendant himself.

Doctor Watts

137. Doctor Michael Watts is a consultant neuro-psychologist who provided a report on breach of duty dated the 15th of July 2022. His qualifications were not set out in any CV attached to his report. In my judgment it is always necessary for experts to provide a CV of their qualifications to prove their expertise in the relevant field. One paragraph in the report provided a short summary. He works as an NHS consultant in the North London forensic service at a medium secure psychiatric hospital and in addition at the Stalking Threat Assessment Centre dedicated to dealing with stalking. He has a degree in psychology, a doctorate in clinical psychology and a postgraduate diploma in clinical neuro-psychology. He is a member of the Health and Care Professionals Council and the British Psychological Society. His research interests include brain disorders and fitness to plead. His NHS duties include the provision of evidence based therapeutic treatments to address presenting medical conditions such as mood disorders, psychosis, personality dysfunction, trauma and substance abuse.

His report does not suggest that he is a trained counsellor and he is not a member of the BACP. In evidence he accepted that whilst he has 20 years of therapeutic experience working with other therapists he is not an expert on counsellors or the code of conduct of counsellors or regulation of counsellors and accepted that there were experts in those fields. Doctor Watts did not advise in his report that the Claimant should take advice from an expert in the Defendant's field of practice.

138. I must therefore approach Doctor Watt's evidence with a good measure of care because he is not the correct expert to advise on the appropriate methods of therapy or standard of care for a counsellor. His expertise is in clinical neuro-psychology. There is a substantive difference between a clinical neuro-psychologist and a counsellor not only by way of qualification and training but also by way of experience and practice.

139. Doctor Watts did not interview the Claimant and was not asked to comment on anything other than breach of duty and duty of care. He was not specifically asked to advise on causation.

140. Doctor Watts recorded that the Claimant had suffered anxiety and stress in late 2018 and early 2019 due to the complaints made against the Defendant. She suffered low mood and depression in 2019 and that the Claimant came off antidepressants in May 2021 and by June 2021 felt her mood was stable.

141. Doctor Watts summarised the Claimant's GP records. In March 2018 the Claimant provided a statement to the police asserting she had been sexually assaulted in the summer of 2011 and authorising the GP to provide her medical records in support of her complaint. Doctor Watts provided the opinion that the Claimant had a long history of mood instability and self-harm in her teens and taking medication for depression and anxiety. She had received multiple episodes of counselling including for PTSD in 2015 due to being raped at age 19 (in 2011). She also underwent a series of therapy sessions with a focus on trauma at her local well-being services. She was referred in March 2016 by her GP to a specialist psycho-sexual counsellor but dis-engaged by 2017.

142. In relation to the services offered by the Defendant he described them as low level and light touch to manage patient's recovery from common mental health problems principally anxiety and depressive disorders. Light touch therapy, he said, typically focused on minimising residual symptoms and enhancing well-being. He recognised that IFS was a psycho-therapeutic approach assuming subpersonalities or parts and aiming to help individuals reconnect with their core undamaged true self. In Doctor Watts' opinion the initial goals and process set out by the Defendant were reasonable and appropriate and he was content that sexual and body dysmorphic issues could appropriately be dealt with in a relatively light way within the broader work on emotional adjustment and well-being. However he was concerned that the sessions became increasingly sexualised by the time of the privately funded therapy. He

advised that the Defendant should have made it clear that he was not offering specialist treatment for sexual problems or body dysmorphia. Doctor Watts advised that those issues should have been referred onto a more specialist service or to a therapist with the appropriate level of training and experience. In his review of the records he made no reference to the counselling notes of the Defendant for the three private sessions.

143. Doctor Watts was unclear whether the Defendant had any substantial clinical experience or training in the treatment of sexual problems or body dysmorphia. Doctor Watts advised that if the Defendant denied providing sex therapy this did not in his view sit well with the level of sexualised content of the therapy he was providing. He advised that the Defendant should have encouraged the Claimant to reconsider being referred to specialist counselling services. He advised that there is a significant, material difference between the well-being services and the privately funded services the Defendant was offering but they were both models of therapy aimed at improving emotional well-being and adjustment.

144. Doctor Watts advised that as far as he knew in the field of counselling there was more variability in practice in relation to contact between formal sessions. He explained that the reason why the BACP information sheet at S.4 on professional boundaries recommended limiting intersessional contact was because such can interfere with boundaries and create serious issues around dependency.

145. Doctor Watts considered that the electronic communications were inappropriate in frequency and content and breached the BACP EF. He described the content and style as "highly improper." Specifically the use of the words "hey", "X" and wink emojis, asserting they were not professional. He was concerned they suggested friendship and were sexually suggestive. He queried whether the Defendant had been properly supervised and whether the Defendant had brought key therapeutic issues up with his supervisor in relation to the Claimant. He queried whether the supervisor had been informed of the uncontested details about the therapy, for instance viewing images of the patient in her underwear.

146. Doctor Watts opined that well-being coaching is a form of therapy. He did not criticise the model of counselling provided by the Defendant. He did criticise the method of delivering the counselling. He considered there were no circumstances in which it would have been justified for the Defendant to have asked the Claimant to undress during two therapy sessions or to touch herself sexually on her genitals in the last session. He advised that it was inappropriate to ask whether she liked to give blow jobs or suggest she experimented sexually with women or to suggest he was proud of her and that she should be "fucking proud" of herself.

147. In giving that opinion Doctor Watts did not descend into the context or the circumstances in which some of those comments were made and took no account in

the relevant part of his report of the defence explanation for those. He made no reference whatsoever to the counselling notes in his report. I do not consider that the way he provided his views on the texts or the comments about underwear was properly contextualised, reasoned out or justified in his report. I separate out the main two allegations from the other allegations and will deal with those later.

148. Doctor Watts also criticised the Defendant for viewing multiple images of the Claimant in her underwear. He suggested there was no therapeutic rationale for this. He suggested that a therapist should not need to look at the patient's self-image journal. Instead the therapist should encourage a third party to view, he suggested that what was needed was for the Claimant to approach a trusted female friend.

149. In view of the fact that Doctor Watts is not a counsellor and does not profess to be an expert in counselling, or psycho-sexual counselling, I do not find his opinion in relation to viewing images of the Claimant which were sent by the Claimant to the Defendant satisfied the necessary burden of proof. He is not an expert in the correct field. The same applies to the Defendant asking what underwear the Claimant wore at home. If I had heard evidence from an expert on psycho-sexual therapy or an expert on counselling with sexual therapy experience, that would have been a completely different matter. However, this is a neuro-psychologist giving evidence on what is and is not proper in relation to counselling for self-image difficulties and psycho-sexual difficulties who does not profess expertise in those fields.

150. In relation to the assertion that the Defendant offered to buy lubricant for the Claimant this again appears to me to be a matter outside the expertise of a neuro-psychologist and in particular of Doctor Watts. In addition Doctor Watts did not set out the circumstances in which the offer is alleged to have been made. He did not consider the Claimant's presenting complaint of being "too dry" to accept penetration, or the discussion the Claimant and the Defendant agreed that they had about using lubrication to facilitate that. He did not refer to the Defendant's evidence to the BACP or the session notes or the GP notes which set out that she had used lubrication before. I do not find that this part of his opinion has been properly contextualised, reasoned or analysed.

151. For the same reasons I am not prepared to accept Doctor Watts' criticism of the Defendant asking the Claiming what she wore in bed. The Defendant's explanation for the discussion about her clothing centred on the Claimant's poor body image and her serious sexual problems with her boyfriend. In that context discussing whether the Claimant has tried to improve her self-image and her sexual relations with her boyfriend by considering wearing different undergarments needs to be carefully considered by an expert in the field of psycho-sexual therapy. The evidence from Doctor Watts does not, in my judgment, amount either to expert evidence on this or provide sufficient contextualisation, reasoning or analysis for the conclusion that he has reached.

152. In relation to the assertions that the Defendant asked the Claimant to masturbate in session or record masturbating at home and offered to help her to masturbate, Doctor Watts described this as grossly inappropriate and considered that there could never be any therapeutic rationale for making these requests. However, in cross examination Dr Watts accepted that there were sex therapists who used various techniques like these. His real criticism was that the Defendant was not qualified to do so and that made it grossly inappropriate in the circumstances of the service that he was providing to the Claimant. In relation to this evidence it seems to me that despite Doctor Watts' lack of experience in sexual and psycho-sexual therapy, and lack of training in those fields, and his lack of expertise in counselling, I can apply weight to his opinion. He has worked alongside many therapists and when these allegations are considered an element of common sense arises. More importantly the Defendant accepted that those actions (which he denied) would have been a breach of his duty of care to the Claimant.

153. In the last page and a half of his report Doctor Watts advised that all of the actions that he had considered, all the BACP findings, were inappropriate and also amounted to breaches of duty. What he did not set out was the nature of the duty of care owed by the Defendant to the Claimant or the standard of care of a counsellor in each circumstance. He made no reference and gave no express consideration to the *Bolam* test. Doctor Watts did not need to recite the case law but, in my judgment, he did need to set out not only the duty of care and but the standard of care that he was applying when advising that there was a breach. His only attempt at analysis is provided right at the end of his report, at 31F, in which he does finally provide some context to the allegation relating to the Defendant asking the Claimant what type of pornography she watched but then describes it as overly sexualised. That was not sufficient by way of explanation or analysis to discharge the burden of proof for civil liability.

154. It is a challenging task for a litigant in person to cross examine a medical expert. The Defendant did so with calmness and politeness. Doctor Watts could not explain why he had given the Defendant the wrong name in his report. The Defendant's first name is Brett. Doctor Watts described him as "Bryan". Doctor Watts was challenged on the basis that he had not engaged with the Defendant's version of events in his report and had based his report entirely on the Claimant's version of events. Doctor Watts agreed he would change his opinion if his assumptions were inaccurate. He accepted that he had seen the Defendant's witness statement of the 2nd of February, but stated that he was not aware of any incongruities with his report despite that witness statement. This was an unimpressive statement. The counterfactual situation to the Claimant's assertions was not considered at all by Doctor Watts.

155. When asked about the underlying schemas which the Claimant was suffering Doctor Watts said that he had not done a psychiatric evaluation of the Claimant. That was an unhelpful comment. He is not a psychiatrist yet he was prepared to summarise her

post index event suffering in psychiatric terms yet he avoided assisting the Court on the pre-existing conditions. He advised that to understand her underlying beliefs he would have needed to do a psychiatric evaluation of her. When challenged in relation to the nature of the services the Defendant provided Doctor Watts repeated his view that the Defendant was providing therapy. He accepted that coaching and counselling are unregulated fields of practice and poorly defined. He opined that counselling and therapy were both therapy. He accepted that the Defendant's actions had not caused the Claimant's mental health conditions but he agreed with the psychiatrist that those conditions had been exacerbated. Doctor Watts accepted that by June of 2021 the GP notes showed that the Claimant was stable. He noted that the Claimant had never been seen by a psychiatrist but had been seen by a range of therapists and counsellors for cognitive behavioural therapy, counselling, sex therapy and hypnotherapy and each time she had withdrawn after only a few sessions for various reasons. Doctor Watts advised that the Claimant had difficulties engaging with treatment. He advised he had seen this pattern of behaviour a lot in people with mental health difficulties. In relation to contact between sessions, Doctor Watts advised there was a debate over the validity and extent of such contact. In his experience it was only offered between sessions for patients with severe personality disorders.

156. In cross examination when challenged on his qualifications to act as an expert at all in the case he admitted that he was not a counsellor, was not a member of the BACP and he was not an expert on the duties of care of counsellors. However he had 20 years of experience in the therapeutic field and working with therapists. He advised that there were experts on counselling and the ethics of counselling and regulation of counselling but he was not one such. When challenged on whether he could prove that the Claimant's allegations against the Defendant did not arise out of her pre-existing pathology he stated he was not aware of prior mental health generated allegations of the type in this claim.

157. In re-examination Doctor Watts stated that he had provided high level counselling and therapy across the board at all levels. In relation to his experience in psycho-sexual counselling he would refer patients to other experts to deal with that and would not deal with it himself.

158. When asked whether the text messages sent between the Claimant and the Defendant would give rise to a foreseeable risk of psychiatric injury Doctor Watts said that in his opinion they would not. In contradistinction Doctor Watts opined that when the Defendant asked this Claimant to undress in session and to masturbate in front of him that would have given rise to a foreseeable risk of injury to this Claimant.

Assessment of witnesses' credibility and reliability

159. I have carefully considered the credibility of both the Claimant and the Defendant. When considering this I have taken into account the demeanour of each in the witness box and on video, the consistency of their evidence over time, the consistency of their

evidence when compared with source documents, any likely exaggerations or motivations and the logic of their evidence. I have specifically taken into account the unlevel playing field created by the Claimant being given the Defendant's cross examination questions in advance and potentially being able to discuss them with her lawyers pursuant to the order made in January 2023.

160. I found the Claimant's evidence to be manipulative and inconsistent. She had a tendency to take no responsibility for her own actions and to blame others and in particular the Defendant, for mirroring her actions. For instance the Claimant asserted to the BACP and the Court that the Defendant started electronic communications with her in late 2017 when in fact the communications started in August 2016. She asserted that he started texting late at night when in fact she was either the instigator or generator of much of the after work traffic. She first inserted "x" on electronic communications and but complained that the Defendant did so. She complained that the Defendant used the words "stunning" and that she should be "fucking proud" of herself in his communications, when she herself used expletives verbally and in text communications and did not find them offensive at the time and that she found encouragement helpful. The Claimant's evidence on when her anxiety started in relation to the counselling was not supported by contemporaneous documentation. The Claimant asserted that she suffered growing anxiety from late 2017 through February 2018 and into the private sessions in April 2018. This is undermined by the fact that she asked for the private sessions to start in early April 2018. The Claimant asserted her anxiety was generated only by the counselling sessions, without mentioning that in late 2017 her relationship with her long term, abusive and controlling boyfriend was very turbulent. In January through February 2018 she split up with him. She moved out of their co-owned a property, and in with her mother. This clearly caused great upset and anxiety to her. In addition in March 2018 she made her first complaint to the police about the rape which she asserted had occurred seven years earlier in 2011. This was likely to have been a very difficult thing to do. In addition she failed to mention the substantial anxiety caused by her father leaving her mother.

161. I also take into account that the Claimant failed to call her manager (M) or her assistant manager (AM) as a witness either before the BACP or in the civil trial to support the assertions of her alleged growing anxiety and concern over the Defendant's behaviour during therapy which she and M alleged started in late 2017 or February of 2018. I was unconvinced by the Claimant's assertion that she had left working at ER solely because of the Defendant's actions. This assertion was made by the Claimant whilst she made no mention of the context. At the hearing it became clear that the more powerful driving force in that context was that her manager, (M), had told her, and repeatedly so, that M had been sleeping with the very counsellor about whom the Claimant was complaining. Furthermore, in the documentation, it is clear that the Claimant was deeply troubled when she saw her historic rapist

fraternising in an establishment with a member of her pole dancing club and therefore found Watford a place that she needed to leave to prevent that happening again.

162. I found that the Claimant's choice to be selective in the way that she presented her evidence and her complaints out of context and in an exaggerated way or a way that did not disclose highly relevant contextual matters undermined her credibility.

163. As for the Defendant's evidence, I found his attempts to manipulate the facts and avoid his duty of care unimpressive. His efforts to downgrade his duty of care below that of a counsellor to that of a someone who is merely "collegial" was indicative. His attempts to define her role, whilst he was her well-being consultant, as a company "resource" were cold hearted and showed a lack of insight and understanding of his position and responsibility. He refused to accept that the Claimant was his patient or client for the purposes of receiving coaching or counselling for 18 months. His attempt to persuade the Court that he was impressed by the "stunning" quality of the *photography* of the pole fitness photos rather than accepting that he was commenting on the Claimant's body shown in the photographs, was not believable. The Defendant's evidence in relation to the advice relevant to the sex therapy he was giving the Claimant, by recommending two pornography websites, was also unimpressive. Initially he said the links had been provided by another therapist, then in evidence he said they were recommended in an article he had read and later, not being able to find the article, he provided a range of articles he had drawn off the internet relating to sex therapy and pornography. Worse, in my judgment, he admitted in cross examination that he had never visited either of the websites he recommended and so had no personal or professional knowledge of them. I do not understand how, as a paid well-being consultant, he could ever feel that it was right to recommend that a consultee should go to potentially pornographic websites which he had not visited or assessed himself. That is so, whether or not the consultee was already visiting pornographic websites of her own choice. He wrote no notes at all. This was a window into his lack of insight and care. I also take into account that, in his witness statement, he did not deny the pivotal allegations made about his behaviour in the third private counselling session and he made no effort in his written questions in cross examination to challenge the Claimant's assertions about what happened in the third private session. I was unimpressed by his attempts to contact the Claimant after he was banned from doing so by ER when the complaint first arose.

164. In relation to the evidence of Doctor Watts I consider that he should have thought far more carefully before he agreed to provide evidence on breach of duty and standard of care as a neuro-psychologist when the subject of the allegations was a counsellor with a wholly different set of qualifications and experience. I also struggle to understand why he completely ignored the Defendant's clinical notes of the private therapy sessions and failed even to mention them in his report and why he did not give any sufficient analysis and reasoning in relation to the nature and scope of the Defendant's duty of care and the standard of care in context. Furthermore Doctor Watts did not

reason out his opinions on the allegations which he found were breaches of the Defendant's duty of care as a counsellor and did not put them into the context of the counselling being given on each relevant issue.

Findings of fact

165. Using the balance of probabilities, taking into account the agreed facts, the documents, the witness evidence and all of the evidence put before me, I make the following findings of fact.

166. The Defendant provided coaching and counselling to the Claimant under a contract between his company and the Claimant's employer (ER) between the 3rd of August 2016 and the end of March 2018.

167. During that time there were a minimum of 18 sessions (if they were only monthly) and a maximum of 72 sessions (if they were wholly weekly). I find that they started weekly and then reduced to monthly but I have insufficient evidence to calculate how many sessions were actually held.

168. From the first month the Claimant instigated out of session messaging with the Defendant, as was usual between ER staff and the Defendant. The Defendant was regarded as "*Brett the well-being man"* and was well known to almost all of the staff at ER in their many offices. In the context, out of session messaging was not regarded as inappropriate or unusual and most of the messaging related to whether the Claimant was coming to the next session and the practical details of timings and dates. In some of the messaging the Defendant asked the Claimant about how she felt. In messaging in November 2017 the Claimant sent the Defendant professional photographs of her doing a pole fitness routine. She sent these to work colleagues and posted them on social media. The Defendant looked at those and commented that they were "stunning". In doing so I find that the Defendant was using the sort of language that the Claimant had shown she was very comfortable with and I find as a fact that he was describing her body as stunning in the context of her long held concerns about how she looked and in the context of the pole fitness that she had taken up, with his support, having made her body shape better in her own eyes. She was proud and he was trying to make her more self confident and indeed he told her to be proud to encourage her to feel proud of her progress.

169. Throughout at least the later stages of the counselling provided by the Defendant in 2017 or early 2018 the Claimant expressed to the Defendant that she had difficulties having penetrative sex with her boyfriend and that they used cannabis and pornography for their non penetrative sexual activities. This led, in early 2018, to a discussion in a session in which the Defendant sought to advise the Claimant to reduce her use of mainstream pornography, which showed people detached from reality and objectified women, and advising that he would make suggestions of more appropriate websites, where the pornography was more real and the women were less

objectified. The Defendant did so in a text in early 2018, providing the names of two sites for the Claimant to search on a web browser. The Defendant had never visited the sites himself.

170. At the back end of 2017, through to early 2018, the Claimant's difficulties with her boyfriend, with whom she owned a property and a dog, and who she regarded as repulsive, abusive and controlling, came to a head and in early 2018 she moved out from their jointly owned property and moved back in with her mother. Their relationship was either dead or dying and this caused her huge upset and anxiety. In March 2018 the Claimant finally decided to report the rape that she considered she had suffered in 2011 to the police and signed a statement permitting the police to access her GP records in that month. All this was set against the background of the Claimant's father and mother being separated. All of these matters weighed heavily on the Claimant's shoulders and led to her suffering high levels of anxiety and depression.

171. The Defendant's use of "x" and expletives was mirroring to put the Claimant at ease when messaging.

172. When ER (the company) ceased paying for the Defendant's well-being counselling, the Claimant requested private counselling in a communication in early April 2018. The Defendant agreed to provide that and three sessions were provided in April 2018. In the first session various matters were discussed along the lines set out in the therapy notes and the Defendant suggested keeping a photographic journal with past pictures, current pictures and future pictures, so that the Claimant could see how she looked in the past and compare it with her current look, to improve her self-image. In that first therapy session the Claimant set and decided upon her goals and she herself wished to address her psycho-sexual issues in the private therapy sessions in more depth than she had before and the Defendant agreed to do so. In addition the Defendant helped the Claimant with her confidence applying for an assistant manager job at ER, which she succeeded in obtaining after the first session.

173. After the first or second private session the Claimant sent to the Defendant photographs of herself, some of which were of her wearing underwear. These were sent pursuant to the plan to start a photographic journal, agreed in the first session. They were to be annotated once they were in the journal.

174. In the second session the Claimant shared her joy at getting the new job with the Defendant.

175. In the second and third therapy sessions the Claimant's psycho-sexual issues were examined more in depth and as a result the Defendant's questions were more challenging. These covered sensual clothing, her sexual preferences and the Defendant's suggestions for alternative sexual behaviour for the Claimant to consider.

I do not accept that the Defendant asked the Claimant to undress. At times in these sessions her difficulty with penetrative sex was address and lubrication was discussed. The Defendant advised the Claimant to ask someone else to buy it for her if she was too shy to do so herself. He did not buy any for her.

176. During the third therapy session, on the 24th of April 2018, I find that the subject of the Claimant's sexual difficulties was discussed in more depth and in a more challenging manner using in IFS modality in which the Defendant suggested the Claimant was painting her relationships through three character types: villain, rescuer and victim. In addition, in that session, masturbation was discussed. I find that during that discussion the Defendant did ask the Claimant to undress in the consultation room and did ask the Claimant to masturbate herself with her clothes on and in a joking way offered to help. When she refused I find that the Defendant advised her to go home, masturbate and record herself doing so and to bring that tape back to him for the next session on the 1st of May 2018. The Defendant did not touch the Claimant or assault her.

177. I make those pivotal findings of fact in relation to the third private session because I accept the core of the Claimant's complaint about that session. In my judgment substantial parts of her evidence concerning all of the other allegations which she made were out of context and have been reframed in her mind through retrospect. I consider that the reframing occurred partly because of her distress caused by the events at the third therapy session. As she explained in her evidence, when she left that session and thereafter looked back over the whole course of the sessions, she reinterpreted many of the events which she then saw could have been the Defendant seeking his own sexual gratification rather than seeking to improve her mental health through counselling. Therefore, she reinterpreted his viewing of her pole fitness photographs and her underwear photographs; she reinterpreted his advice in relation to her boyfriend, and sexual experimentation and in relation to using lubrication.

178. I also find, as a fact, that as the boundaries became more and more blurred by the Defendant, he was justifying in his own mind that he was providing therapy to the Claimant, when in fact he was getting closer to satisfying his own voyeuristic desires and sexual needs and in the third session he went over the boundary. When he did so the Claimant refused and left.

179. I do not find as a fact that the Defendant intended to injure the Claimant. Whilst no psychiatric report has been provided on the Defendant, nor has the Defendant disclosed his own medical records and therefore I have no expert evidence on his psychological state and motivation, I do accept the assertion from him that he believed, in his own mind, that he was doing the best he could for the Claimant. I consider he was well motivated up until that third therapy session, when his boundaries became not only blurred, but in my judgment, utterly indistinct, as his own desires took over. His explanation that he was off "his game" due to the death of a

friend in that last session, which he gave in the 18th May 2018 email was, in my judgment, no justification for his breach of duty. However he did not intend to harm the Claimant.

The Law

Duty of care

180. The Claimant asserts that the Defendant owed her a duty of care whilst providing well-being counselling and when she became his private client. The Defendant denies that the Claimant was his client or patient before 10th April 2018. He said that the Claimant was "a resource", to use his words and he worked for her employers. He asserted that he was not a counsellor or therapist but instead a coach.

181. In my judgment the starting point for determining whether the Defendant owed to the Claimant a duty of care in this case is the judgment of Hale LJ in *Parkinson v St James NHS Trust* [2001] EWCA Civ 530 at para. 56:

> "56. The right to bodily integrity is the first and most important of the interests protected by the law of tort, listed in *Clerk & Lindsell on Torts,* 18th ed (2000), para 1-25. *"The fundamental principle, plain and incontestable, is that every person's body is inviolate":* see *Collins v Wilcock* [1984] 1 WLR 1172, 1177. Included within that right are two others. One is the right to physical autonomy: to make one's own choices about what will happen to one's own body. Another is the right not to be subjected to bodily injury or harm. These interests are regarded as so important that redress is given against both intentional and negligent interference with them."

182. This principle applies equally to negligence causing purely psychiatric injury: see *Page v Smith* [1996] A.C. 155. However, as a general rule, distress or injury to feelings does not come within the definition of psychiatric injury, where no physical injury is caused.

183. The classic test for whether a duty arises between the Defendant and the Claimant was set out long ago in *Donoghue v Stevenson* [1932] A.C 562, at para. 580 per Lord Atkin:

> "At present I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy.

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

184. In tort law a tortfeasor must take his victim as he finds her. An eggshell skull vulnerability is relevant when a tortfeasor taps a fellow worker on the head with a hammer. An egg shell personality is relevant when a coach/counsellor/therapist advises and counsels a vulnerable person on how to improve her life or how to behave or act. The authority for this proposition is the classic case of *Smith v Leech Brain* [1962] 2 Q.B. 405, per Lord Parker C.J. at page 414:

> "For my part, I am quite satisfied that the Judicial Committee in the *Wagon Mound* case did not have what I may call, loosely, the thin skull cases in mind. It has always been the law of this country that a tortfeasor takes his victim as he finds him. It is unnecessary to do more than refer to the short passage in the decision of Kennedy J. in *Dulieu v. White & Sons,* where he said:
>
> > "If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart."

The standard of care for a counsellor

185. So what was the appropriate standard of care within any duty of care laid upon the Defendant's shoulders whilst providing psycho-sexual counselling? In my judgment the standard of care imposed in law in this case follows the principles set out in *Bolam v Frien Hospital* [1957] 1 WLR 582, by McNair J., who was addressing a jury and ruled thus:

> "… I must tell you what in law we mean by "negligence." In the ordinary case which does not involve any special skill, negligence in law means a failure to do some act which a reasonable man in the circumstances would do, or the doing of some act which a reasonable man in the circumstances would not do; and if that failure or the doing of that act results in injury, then there is a cause of action. How do you test whether this act or failure is negligent? In an ordinary case it is generally said you judge it by the action of the man in the street. He is the ordinary man. In one

> case it has been said you judge it by the conduct of the man on the top of a Clapham omnibus. He is the ordinary man. But where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."

And

> "… in the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time."

186. I have also taken into account the ruling of Lord Browne-Wilkinson in *Bolitho v City and Hackney HA* [1998] AC 232:

> "In the Bolam case itself, McNair J. [1957] 1 W.L.R. 583, 587 stated that the Defendant had to have acted in accordance with the practice accepted as proper by a 'responsible body of medical men.' Later, at p. 588, he referred to 'a standard of practice recognised as proper by a competent reasonable body of opinion.' Again, in the passage which I have cited from *Maynard's case* [1984] 1 W.L.R. 634 , 639, Lord Scarman refers to a 'respectable' body of professional opinion. The use of these adjectives - responsible, reasonable and respectable - all show that the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. In particular in cases involving, as they so often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter."

187. When considering the actions of the Defendant, who held a diploma in counselling and was a counsellor (not a neuro-psychologist) with 6 years of experience and supervision and when taking into account his level of seniority and experience, I am guided by the Court of Appeal decision in *FB v Princess Alexander Hospital NHS Trust* [2017] EWCA Civ 334, per Jackson LJ at paragraph 59:

> "In *Wilsher v Essex AHA* [1987] 1 QB 730 the Court of Appeal for the first time gave detailed consideration to the standard of care required of a junior Doctor. (This issue did not arise in the subsequent appeal to the House of Lords). The majority of the court held that a hospital Doctor should be judged by the standard of skill and care appropriate to the post which he or she was fulfilling, for example the post of junior houseman in a specialised unit. That involves leaving out of account the particular experience of the Doctor or their length of service. This analysis works in the context of a hospital, where there is a clear hierarchy with consultants at the top, then registrars and below them various levels of junior doctors. Whether doctors are performing their normal role or 'acting up', they are judged by reference to the post which they are fulfilling at the material time. The health authority or health trust is liable if the Doctor whom it puts into a particular position does not possess (and therefore does not exercise) the requisite degree of skill for the task in hand."

188. There is some precedent in case law for negligent counselling which causes psychiatric harm. In *Brayshaw v Aspley Surgery* [2018] EWHC 3286, Martin Spencer J. gave judgment for a very vulnerable Claimant with a psychiatric condition against a GP due to the negligence of the GP in seeking to advise her verbally in relation to her faith in a way which led to her suffering exacerbation of her mental health condition. At para. 66 he ruled as follows:

> "66. … Dr O'Brien was negligent in relation to the Claimant's mental health. Given his knowledge of her, he owed her a duty of care not to subject her to the unreasonable and avoidable risk of harm, and that duty of care should have included and encompassed the risk that the Claimant would fail to follow through her commitment to the doctrine of Christianity which he and his wife were espousing, with the consequences of the potential breakdown of their relationship. Effectively, the Claimant was left without a safety net in circumstances where the doctors at the Surgery and, in particular, Dr Jorsh, were not aware of what was going on and therefore how the Claimant could be supported medically, and particularly psychiatrically. In my judgment it was negligent of Dr O'Brien to expose the Claimant to the meeting of 12 January 2013 when, given the Claimant's psychological and psychiatric make-up, together with all her physical problems, it was foreseeable that she might react adversely in the way that she did. By reason of his zealous promotion of the religious aspects, he became blind to the

> medical aspects and thereby caused or contributed to the deterioration in the Claimant's mental health. Accordingly, in my judgment, the Second Defendant is liable to the Claimant for the psychiatric damage which she has sustained and its consequences."

The tort of Intentionally causing Harm by Words (IHW)

189. The Claimant also seeks a separate award (of £20,000) for aggravated damages for the tort of IHW, over and above compensatory damages for personal injury which the Claimant claims at £30,000.

190. In opening the Claimant relied upon the old rule in *Wilkinson v Downton* [1897] 2 QB 57 and upon *Wainright v Home Office* [2003] UKHL 53, to submit that the IHW tort is completed on proof of intention to cause harm or recklessness about whether harm would result from the Defendant's actions.

191. *Wilkinson* was a novel decision. The facts were that a female, married publican suffered a recognised psychiatric disorder as a result of a "joke" played upon her by a customer. He told her that her husband had suffered a serious accident and was lying in the road bleeding with two broken legs. He did not mean to harm her but he did. She had no pre-existing psychiatric vulnerability. Wright J ruled as follows:

> "The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant."

192. The IHW tort was approved in *Janvier v Sweeney [1919] 2 KB 316*. During the first World War, in order to persuade a Mayfair maid (or companion) to hand over letters belonging to her employer, the defendant (a private investigator) pretended to be from Scotland Yard and working on behalf of the military and told her that she had been corresponding with a German spy. The plaintiff suffered a severe shock, resulting in neurasthenia, shingles and other ailments. Duke LJ ruled as follows:

> "This is a much stronger case than *Wilkinson v. Downton* . In that case there was no intention to commit a wrongful act; the defendant merely intended to play a practical joke upon the plaintiff. In the present case there was an intention to terrify the plaintiff for the purpose of attaining an unlawful object in which both the defendants were jointly concerned."

193. In *Wong v Parkside* [2001] EWCA Civ 1721, the Court of Appeal ruled that for the IHW tort to be made out the Claimant had to prove a recognised psychiatric injury. Hale LJ ruled as follows at para. 12:

> "12. For the tort to be committed, … there has to be actual damage. The damage is physical harm or recognised psychiatric illness. The defendant must have intended to violate the claimant's interest in his freedom from such harm. The conduct complained of has to be such that that degree of harm is sufficiently likely to result that the defendant cannot be heard to say that he did not 'mean' it to do so. He is taken to have meant it to do so by the combination of the likelihood of such harm being suffered as the result of his behaviour and his deliberately engaging in that behaviour."

194. The IHW tort was reconsidered in *Wainwright v Home Office* [2003] 2 A.C. 406. The relevant facts were that a mother and son were strip searched by prison officers on a prison visit. This was humiliating and distressing. The son had cerebral palsy and suffered post traumatic stress syndrome as a result. The judge held that two torts had been committed: (1) trespass to the person of both claimants, consisting of wilfully causing a person to do something to himself which infringed his right to privacy, and (2) trespass to the person, consisting of wilfully causing a person to do something calculated to cause harm to him, namely infringing his legal right to personal safety, against the second claimant, and battery (touching his penis and pulling back his foreskin). He awarded basic and aggravated damages totalling £2,600 to the first claimant and £4,500 to the second claimant. The Court of Appeal overturned the judgment for the mother ruling that there was no tort of invasion of the right to privacy. The House of lords dismissed the appeal upholding the ruling that there was no tort of invasion of the right to privacy. Further the House dismissed the claim for IHW because the evidence was insufficient to prove "intent" but acknowledged the existence of the tort. Lord Hoffman set out the development of the law relating to nervous shock which had pretty much overshadowed the need to argue IHW because, so long as a claimant could prove negligence by shock and recognised psychiatric injury, damages were awarded. Lord Hoffman dealt first with the issue of whether anything less than a recognised psychiatric disorder could found an IHW claim:

> "41. Commentators and counsel have nevertheless been unwilling to allow *Wilkinson v Downton* to disappear beneath the surface of the law of negligence. Although, in cases of actual psychiatric injury, there is no point in arguing about whether the injury was in some sense intentional if negligence will do just as well, it has been suggested (as the claimants submit in this case) that damages for distress falling short of psychiatric injury can be recovered if there was an intention to cause it. This submission was squarely put to the

> Court of Appeal in *Wong v Parkside Health NHS Trust* [2003] 3 All ER 932 and rejected. Hale LJ said that before the passing of the *Protection from Harassment Act 1997* there was no tort of intentional harassment which gave a remedy for anything less than physical or psychiatric injury. That leaves *Wilkinson v Downton* with no leading role in the modern law."

Dealing with intention element of the IHW tort head-on Lord Hoffman said this:

> "44. I do not resile from the proposition that the policy considerations which limit the heads of recoverable damage in negligence do not apply equally to torts of intention. If someone actually intends to cause harm by a wrongful act and does so, there is ordinarily no reason why he should not have to pay compensation. But I think that if you adopt such a principle, you have to be very careful about what you mean by intend. In *Wilkinson v Downton* Wright J wanted to water down the concept of intention as much as possible. He clearly thought, as the Court of Appeal did afterwards in *Janvier v Sweeney [1919] 2 KB 316* , that the plaintiff should succeed whether the conduct of the defendant was intentional or negligent. But the *Victorian Railway Comrs case 13 App Cas 222* prevented him from saying so. So he devised a concept of imputed intention which sailed as close to negligence as he felt he could go."

Then Lord Hoffman himself effectively restricted IHW without recognised psychiatric injury thus:

> "45. If, on the other hand, one is going to draw a principled distinction which justifies abandoning the rule that damages for mere distress are not recoverable, imputed intention will not do. The defendant must actually have acted in a way which he knew to be unjustifiable and either intended to cause harm or at least acted without caring whether he caused harm or not. Lord Woolf CJ, as I read his judgment [2002] QB 1334, 1350, paras 50-51, might have been inclined to accept such a principle. But the facts did not support a claim on this basis. The judge made no finding that the prison officers intended to cause distress or realised that they were acting without justification in asking the Wainwrights to strip. He said, at paragraph 83, that they had acted in good faith and, at paragraph 121, that:
>
> > "The deviations from the procedure laid down for strip-searches were, in my judgment, not intended to increase the humiliation necessarily involved but merely sloppiness."

> 46. Even on the basis of a genuine intention to cause distress, I would wish, as in *Hunter's case* [1997] AC 655, **to reserve my opinion on whether compensation should be recoverable.** In institutions and workplaces all over the country, people constantly do and say things with the intention of causing distress and humiliation to others. This shows lack of consideration and appalling manners but I am not sure that the right way to deal with it is always by litigation. The *Protection from Harassment Act 1997* defines harassment in section 1(1) as a "course of conduct" amounting to harassment and provides by section 7(3) that a course of conduct must involve conduct on at least two occasions. If these requirements are satisfied, the claimant may pursue a civil remedy for damages for anxiety: section 3(2). The requirement of a course of conduct shows that Parliament was conscious that it might not be in the public interest to allow the law to be set in motion for one boorish incident. It may be that any development of the common law should show similar caution.
> 47. In my opinion, therefore, the claimants can build nothing on *Wilkinson v Downton* [1897] 2 QB 57. It does not provide a remedy for distress which does not amount to recognised psychiatric injury and so far as there may be a tort of intention under which such damage is recoverable, the necessary intention was not established."

195. So Lord Hoffman left an uncertain and tiny gap open for claimants to argue that an IHW tort could lead to an award of damages for distress falling short of a recognised psychiatric injury despite Hale LJ's decision to the contrary in *Wong*.

196. Lord Scott was stricter still and stated:

> "60 …I agree with the Court of Appeal, and with your Lordships, that if there had been no touching, as there was not in Mrs Wainwright's case, no tort would have been committed. The unjustified infliction of humiliation and distress does not, without more, suffice at common law to constitute a tort."

197. The Claimant relied on *C v D and SBA* [2006] EWHC 166. This was a sex abuse case involving physical acts and videoing naked boys. Three allegations were made: (1) touching genitals (denied); (2) videoing showering (admitted); (3) partially undressing and looking at genitalia and touched them (denied). Field J found that a school teacher who pulled down a school boy's trousers and stared at his genitalia and touched when the boy felt faint and was in the infirmary so was liable for causing the Claimant's psychiatric condition (para. 98). Field J also awarded damages for intentionally causing harm on the basis, not that the Defendant intended such but instead, that he was reckless, para 100:

> "In my judgment, although it was foreseeable that psychiatric injury to C would result from D1's conduct in the first infirmary incident, such injury was not sufficiently likely for the necessary intention to cause harm to be imputed on the first two bases of imputation. However, I am satisfied that D1, behaving as he did during this incident, was reckless as to whether he caused psychiatric injury to C and accordingly I hold that he is liable to C under the *Wilkinson v Downtown* principle for the psychiatric injury caused by his conduct on the first occasion in the infirmary."

198. Despite this decision as to recklessness, I do not consider that it is sufficient to make out the tort of intentional harm by words. By the end of submissions, the Court having put before the parties (the Defendant was after all a litigant in person) the decision in *O (a child) v Rhodes* [2015] AC 2019, the Claimant abandoned the assertion that recklessness can be sufficient to make out the "intentional harm" tort (IHW) and accepted that intention was required for it. Baroness Hale ruled in *Rhodes* as follows:

> "87. … Our answer to the second question is not to include recklessness in the definition of the mental element. To hold that the necessary mental element is intention to cause physical harm or severe mental or emotional distress strikes a just balance…"
>
> "88. … We are inclined to the view, which is necessarily obiter, that the tort is sufficiently contained by the combination of (a) the conduct element requiring words or conduct directed at the Claimant for which there is no justification or excuse, (b) the mental element requiring an intention to cause at least severe mental or emotional distress, and (c) the consequence element requiring physical harm or recognised psychiatric illness."

Furthermore at paras. 112-113 Lord Neuberger ruled as follows:

> "112 Thirdly, I consider that there must be an intention on the part of the Defendant to cause the Claimant distress. This requirement might seem at first sight to be too narrow, not least because it might appear that it would not have caught the Defendant in *Wilkinson v Downton:* he merely intended his cruel statement as a joke. However, the fact that a statement is intended to be a joke is not inconsistent with the notion that it was intended to upset. How, it might be asked rhetorically, could Mr Downton not have intended to cause the apparently happily married Mrs Wilkinson significant distress by falsely telling her that her husband had been very seriously injured? That was the very purpose of the so-called joke.

> **There are statements (and indeed actions) whose consequences or potential consequences are so obvious that the perpetrator cannot realistically say that those consequences were unintended**.
> 113. Intentionality may seem to be a fairly strict requirement, as it excludes not merely negligently harmful statements, but also recklessly harmful statements. However, in agreement with Baroness Hale DPSC and Lord Toulson JSC, I consider that recklessness is not enough." (my emboldening)

199. Mixed physical abuse and IHW were considered in *C v WH* [2015] EWHC 2687. Nelson J was judging a sexual grooming case which involved physical abuse and emotional manipulation. Normal tort and intentional tort were asserted. Nelson J ruled at para. 89 as follows:

> "89 I should note, however, that I am entirely satisfied that a claim under *Wilkinson v Downton* as explained in *Rhodes* is established. This tort of intentional infliction of harm in its reformulation has three elements: (a) the conduct element; (b) the mental element; and (c) the consequence element. (*Rhodes* at [73]) I am satisfied that each is established. Mr Whillock acted unjustifiably towards the Claimant by emotionally manipulating her and encouraging her to send indecent images of herself to him and engaging in sexual banter in the texts. His manipulation was successful in that she became infatuated with him and wanted to make him happy. She is still infatuated by him now. The mental element requires the Claimant to establish that Mr Whillock intended to cause severe mental or emotional distress to her. There are however, as was said in *Rhodes* at [112], actions whose "consequences or potential consequences are so obvious the perpetrator cannot realistically say that those consequences were unintended". It was obvious that the illicit relationship would in the end cause nothing but harm to the vulnerable Claimant some 39 years younger than her groomer and those consequences must have been entirely clear and obvious to Mr Whillock. The consequence element is also established. As I have found under the heading of causation she suffered from an adjustment disorder after the disclosure in January 2010 with an acute exacerbation of her mental health problems when the abuse became public.
> 90 The assessment of damages involves considering both the *Wilkinson v Downton* element and the assault element as one. I therefore deal with them together."

200. *C v WH* was reported in the same year as but appears to have been decided before the judgment in *Rhodes* was delivered because *Rhodes* was not referred to in the judgment.

201. As a result of ruling in *Rhodes* the Claimant's counsel, Mr O'Donnell, revised his submissions to assert that the Defendant's actions in the third counselling/therapy session in April 2018 had consequences which were *so obvious* that the Defendant cannot realistically say that those consequences were unintended.

202. Rounding up, despite the passage of over 100 years there is still lack of clarity surrounding the long term effects of the decision in *Wilkinson* and the tort of IHW. Assault and battery have long attracted the potential for an award uplift for aggravated damages, but in my judgment, from the case law in the appellate courts, that should be reflected in the compensatory award for personal injuries being increased to cover all of the distress and humiliation caused by any malicious intent. Absent physical assault or batter or abuse the IHW tort is made out if a recognised psychiatric condition has been caused to the victim and the two other elements are proven: intention and sufficiently damaging words with a foreseeable result of personal injury in those words. So where is IHW to be of use as a stand alone tort claim when there has been no recognised, diagnoseable psychiatric injury? Herein lies the problem. Personal injury law exists to compensate for personal injury not mere distress and humiliation. Libel and slander law compensate for damage to reputation and the like. The Harassment legislation deals with harassment. In my judgment it is difficult to justify, in personal injury law, a tort of IHW which causes no personal injury but only distress and humiliation.

203. The editors of *Clerk & Lindsell* on Tort law suggest at para. 14-17 that foreseeability of harm is not relevant for intentional torts relying on *Wainwright* but I do not accept that foreseeability has no role in IHW torts, which are verbal torts. Foreseeability of harm affects both the existence and scope of the duty of care and the standard of care. It may be different with the torts of assault and battery.

Aggravated damages

204. In the late 1990s the *Law Commission* published a report on *Aggravated and Exemplary damages*. At para 1.1 they wrote this:

> "Although the precise meaning and function of 'aggravated damages' is unclear, the best view, in accordance with Lord Devlin's authoritative analysis in *Rookes v Barnard,* appears to be that they are damages awarded for a tort as compensation for the plaintiff's mental distress, where the manner in which the defendant has committed the tort, or his motives in so doing, or his conduct subsequent to the tort, has upset or outraged the plaintiff. Such conduct or motive 'aggravates' the injury done to the plaintiff, and

> therefore warrants a greater or additional compensatory sum. Unfortunately, there is a continuing confusion in the case law, reflected in some of the substantive and procedural preconditions of an award of aggravated damages, about whether they in fact serve a different function, which is punitive in nature."

205. *Rookes v Barnard* [1964] AC 1129, was a trade dispute not a personal injury claim. It concerned the tort of intimidation by threats to breach a contract. Lord Devlin explained the nature of aggravated damages thus at page 1211:

> "Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. It may well be thought that this confuses the civil and criminal functions of the law; and indeed, so far as I know, the idea of exemplary damages is peculiar to English law. There is not any decision of this House approving an award of exemplary damages and your Lordships therefore have to consider whether it is open to the House to remove an anomaly from the law of England.
>
> It must be remembered that in many cases of tort damages are at large, that is to say, the award is not limited to the pecuniary loss that can be specifically proved. In the present case, for example, and leaving aside any question of exemplary or aggravated damages, the appellant's damages would not necessarily be confined to those which he would obtain in an action for wrongful dismissal. He can invite the jury to look at all the circumstances, the inconveniences caused to him by the change of job and the unhappiness maybe by a change of livelihood. In such a case as this, it is quite proper without any departure from the compensatory principle to award a round sum based on the pecuniary loss proved.
>
> Moreover, it is very well established that in cases where the damages are at large the jury (or the judge if the award is left to him) can take into account the motives and conduct of the defendant where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride. These are matters which the jury can take into account in assessing the appropriate compensation. Indeed, when one examines the cases in which large damages have been awarded for conduct of this sort, it is not at all easy to say whether the idea of compensation or the idea of punishment has prevailed."

206. It is clear to me from this passage that compensatory damages include damages for the Defendant's bad conduct which aggravates the Claimant's suffering.

207. In support of the claim for aggravated damages Mr O'Donnell relied on *Broome v Cassell & Co* [1972] AC 1027 and the ruling at 1124F. The paragraph relied upon from the judgment of Lord Diplock and was follows:

> "…torts for which damages are "at large" are classified under three heads. (1) Compensation for the harm caused to the plaintiff by the wrongful physical act of the defendant in respect of which the action is brought. In addition to any pecuniary loss specifically proved the assessment of this compensation may itself involve putting a money value upon physical hurt, as in assault, upon curtailment of liberty, as in false imprisonment or malicious prosecution, upon injury to reputation, as in defamation, false imprisonment and malicious prosecution, upon inconvenience or disturbance of the even tenor of life, as in many torts, including intimidation. (2) Additional compensation for the injured feelings of the plaintiff where his sense of injury resulting from the wrongful physical act is justifiably heightened by the manner in which or motive for which the defendant did it. This Lord Devlin calls "aggravated damages." (3) Punishment of the defendant for his anti-social behaviour to the plaintiff This Lord Devlin calls "exemplary damages." I should have preferred the alternative expression "punitive damages" to emphasise the fact that their object is not to compensate the plaintiff but to punish the defendant and to deter him, and perhaps others, from committing similar torts."

208. The case was not about aggravated damages or personal injury law. The facts related to libel alleged by a retired naval officer against a book publisher over events in a world war. He claimed compensatory damages and exemplary damages. These were both awarded by the jury, upheld by the Court of Appeal and the appeal to the House of Lords was over the exemplary damages award. Ignoring the other issues which the House dealt with, the relevant part of the decision turned on exemplary damages. Lord Hailsham summarised the law before *Rookes v Barnard* [1964] A.C. 1129, at 1070 onwards in relation to compensatory damages for personal injury and damages for loss of or damage to reputation. He explained that aggravated damages (which he explained were to compensate for the claimant's injured feelings due to the defendant's bad conduct) and exemplary damages (which were punitive) had been confused in the past. He stated that these were clarified in *Rookes*. Lord Hailsham (obiter) extracted this passage from the judgment of Lord Devlin in *Rookes* on the justification for aggravated damages:

> "On pp. 1232-1233 where Lord Devlin says:
> "I doubt whether the facts disclosed in the summing-up show even a case for aggravated damages; a different impression may be obtained

when the facts are fully displayed upon a new trial. At present there seems to be no evidence that the respondents were motivated by malevolence or spite against the appellant. They wronged him not primarily to hurt him but so as to achieve their own ends."

209. In addition the Claimant relied upon *AT v Dulghieru* [2009] EWHC 225 in which Treacy J. was assessing quantum in a personal injury claim for the victims of people traffickers who were forced into prostitution. At para. 56 he stated:

> "**Aggravated Damages**
> 56. These Claimants seek additional compensation in the form of an award of aggravated damages. It is important to be aware of the risk of double recovery. These Claimants must not be compensated twice over for the same injury.
> 57. In my award of general damages, I have included an element to cover the psychiatric harm suffered. That however, is to be distinguished from the injury to feelings, humiliation, loss of pride and dignity and feelings of anger or resentment caused by the actions of the Defendants.
> 58. Having regard to the approach taken by the Court of Appeal in *Rowlands v Chief Constable of Merseyside Police* [2007] 1 WLR 1065 and in particular the observations of Moore-Bick LJ at paragraph 26 of that decision. I consider it appropriate in this case to make an award of aggravated damages. I have also considered the observations of Smith LJ in *Choudhary v Martins* [2008] 1 WLR 617, where at paragraph 18 she observed that it was positively helpful if the judge separated the award for psychiatric injury from that for injury to feelings. This, she said, was a helpful process as long as the judge takes care to avoid the risk of double recovery."

210. The trigger for a claim for aggravated damages in a personal injury claim is the assertion against the Defendant of malevolence or intentional harm. The Claimant's submissions were that the award should be made because the Defendant manipulated her; breached her trust and his conduct was self serving; the Claimant was vulnerable and the interactions were intensely personal to her and that the Defendant continued to deny the allegations despite the BACP findings.

211. Cases of assault may attract such awards due to the inherent intentionality and in my judgment due to the physicality. So in *Richardson v Howie* [2004] EWCA Civ 1127, the Defendant attacked the Claimant with a bottle whilst they were on holiday in Barbados. The trial judge awarded compensatory and aggravated damages but was unimpressed by both the evidence of the Claimant and the Defendant. On appeal Thomas and Jacob LJJ subsumed aggravated damages within compensatory damages thus:

"18. It is, we think, clear since that decision that the compensatory principle has prevailed; this is clear from the decision of this court in *A.B v South West Water Service Ltd.* [1993] Q.B. 533 and two relatively recent first instance decisions. In *AB v South West Water* exemplary and aggravated damages were claimed in an action for nuisance arising out of the contamination of water by the defendant utility; the judgment of Sir Thomas Bingham M.R. placed a clear emphasis on the compensatory principle:

> "A defendant accused of crime may ordinarily be ordered (if convicted) to pay a financial penalty. In such a case he will enjoy the constitutional safeguards afforded to defendants in criminal cases, which may include trial by jury, and the sum he is ordered to pay is received by the state, not (even in the case of a private prosecution) by the prosecutor. In a civil case, arising out of a civil wrong (whether or not it is also a crime), the defendant may be ordered to pay damages. In the ordinary way, damages bear no resemblance to a criminal penalty. The damages awarded to a plaintiff will be such as will compensate him for the loss he has suffered as a result of the wrong, so far as money can. The court looks to the extent of the plaintiff's loss, not to the quality of the defendant's conduct. Since the damages are awarded to compensate the plaintiff they are of course paid to him"

19. In considering the claim for aggravated damages at he continued:

> "The plaintiffs are of course entitled to be fully compensated for all they suffered as a direct result of the defendants' admitted breach of duty. The ordinary measure of compensatory damages will cover all they have suffered as a result of that breach, physically, psychologically and mentally. Full account will be taken of the distress and anxiety which such an event necessarily causes. To the extent that any of these effects was magnified or exacerbated by the defendants' conduct, the ordinary measure of damages will compensate. The question is whether, in addition to that full compensatory measure, the plaintiffs have pleaded a sustainable claim for additional compensation by way of aggravated damaged. This is claimed in paragraph 27 on the basis that the plaintiff's feelings of indignation were aroused by the defendants' high-handed way of dealing with the incident. I know of no precedent for awarding damages for indignation aroused by

> a defendant's conduct. Defamation cases in which a plaintiff's damages are increased by the defendant's conduct of the litigation (as by aggressive cross-examination of the plaintiff or persistence in a groundless plea of justification) are not in my view a true exception, since injury to the plaintiff's feelings and self-esteem is an important part of the damage for which compensation is awarded. In very many other tort actions (and, for that matter, actions in contract, boundary disputes, partnership actions and other disputes) the plaintiff is indignant at the conduct of the defendant (or his insurers). An award of damages does not follow: nor, in my judgment should it, since this is not damage directly caused by the defendant's tortious conduct and this is not damage which the law has ever recognised."

20. … More important is the judgment of Woolf J. in *W v Meah* [1986] 1 All E.R. 935; the defendant had attacked two women, one of whom he had raped and the other he had seriously sexually assaulted. They brought actions against him claiming damages for personal injuries. The woman who was raped was subjected to what was described by the trial judge as extremely obscene and terrifying behaviour, was then tied up whilst still naked and stabbed in the chest with a knife. She was taken to hospital where she remained for five days. Though she managed to make a complete physical recovery, she suffered psychological problems. The Criminal Injuries Compensation Board awarded her £3,600:

> "That was without the Board having any medical reports of the sort that I have had, or indeed having, as I understand, the opportunity to hear Miss D give evidence as I have had. The board does not take into account aggravated damages. However, so far as aggravated damages are concerned, the award must be moderate, and the primary purpose of the damages must still remain to compensate the person concerned for the injuries they have suffered, although of course the circumstances in which the injuries are suffered does affect the amount of injury they are entitled to be compensated for".

Woolf J. awarded £10,250. It is important to note that he stressed that the compensation extended to the effect of the circumstances in which the injury was suffered.

21. In *Appleton v Garrett* [1996] P.I.Q.R P1, the plaintiffs were patients of the defendant dentist who had carried out unnecessary treatment on them; they claimed damages for trespass and sought aggravated damages. Dyson J., distinguishing the decision in *AB v South West Water*, held that he could see no reason in principle why

awards of aggravated damages should not be made for feelings of anger or indignation in cases of trespass to the person where injury to the feelings were an important part of the damage for which compensation was awarded. He added

> "To say that the law permits recovery of aggravated damages where the relevant conduct has caused injury to feelings, insult indignity, humiliation and a heightened sense of injury or grievance, but not where it has caused anger or indignation, is very difficult to justify in terms of principle or common sense".

22. He concluded that the plaintiffs were entitled to aggravated damages. He agreed with the judgment of Woolf J. to which we have referred that awards of aggravated damages must be moderate. He added:

> "If substantial awards are made to reflect the court's disapproval of the defendant's conduct, they would become punitive. It is important to keep in mind that aggravated damages are compensatory."

On the facts, he assessed aggravated damages in each case at 15 per cent of the sum he had awarded for general damages, pain, suffering and loss of amenity.

23. It is and must be accepted that at least in cases of assault and similar torts, it is appropriate to compensate for injury to feelings including the indignity, mental suffering, humiliation or distress that might be caused by such an attack, as well as anger or indignation arising from the circumstances of the attack. It is also now clearly accepted that aggravated damages are in essence compensatory in cases of assault. **Therefore we consider that a court should not characterise the award of damages for injury to feelings, including any indignity, mental suffering, distress, humiliation or anger and indignation that might be caused by such an attack, as aggravated damages; a court should bring that element of compensatory damages for injured feelings into account as part of the general damages awarded.** It is, we consider, no longer appropriate to characterise the award for the damages for injury to feelings as aggravated damages, except possibly in a wholly exceptional case.

24. Where there is an assault, the victim will be entitled to be compensated for any injury to his or her feelings, including the anger and indignation aroused. Those feelings may well also be affected by the malicious or spiteful nature of the attack or the motive of the assailant; if so, then the victim must be properly compensated for that, particularly where the injured feelings have been heightened by the motive or spiteful nature of the attack. In our view, damages

> which provide such compensation should be characterised and awarded therefore as ordinary general damages which they truly are. The misapprehension as to the nature of the damages to be awarded for injured feelings which plainly arose in the trial judge's mind and which led him to award a sum that was wholly extravagant as aggravated damages would not have arisen, if the award had been made as one of ordinary compensatory general damages and not as an award of aggravated damages. The facts of this case clearly did not in any way approach the wholly exceptional case where an award of aggravated damages might still be appropriate.
> 25. This was indeed a case of a spiteful attack in an outburst of irrational anger with a weapon which Mr Howie must have appreciated would scar Miss Richardson; her feelings were, as is accepted, plainly injured by the circumstances and nature of the attack. She was entitled to be compensated for that as part of the general damages awarded." (My emboldening).

212. After this decision it might be said that the issue was decided but in *Choudhary v Martins* [2008] 1 W.L.R, Smith LJ did not follow *Richardson* and instead ruled as follows at para.18:

> "17. The submissions fell into two parts. First, it was said that the judge should not have made two separate awards; in assessing the psychiatric injury separately from injury to feelings, there was bound to be some overlap. In any event, in *Richardson v Howie* [2005] PIQR Q48, the Court of Appeal had recommended a single global award to compensate the claimant for all the harm she had suffered.
> 18. It is true that one division of this court did so recommend in the context of a case of modest damages for assault. In the *Vento case* [2003] ICR 318, however, another division of this court approved the making of separate awards for psychiatric harm, injury to feelings and aggravated damages in the context of sex discrimination. I would venture to suggest that there should be no hard and fast rule about whether separate awards should be made. It will all depend on the facts of the individual case. If, for example, as is sometimes the case, the psychiatric harm is very modest and to all intents and purposes merges with the injury to feelings, it will plainly be more convenient to make one award covering both aspects. If, as here, where the psychiatric injury is not insubstantial, it is positively helpful to the parties (and to this court) if the judge separates the award for psychiatric injury from that for injury to feelings. This leads to a better understanding of the judge's thought processes. However, I do accept that there is a risk of double

recovery by overlap if two awards are made and the judge must take care to avoid that."

213. From the above cases it can be seen that the issue of whether to split out a separate sum for aggravated damages from the main compensatory award for pain, suffering and loss of amenity in a personal injury awards is the subject of differing appellate rulings. There are indeed many separate awards reported in *Kemp & Kemp on Quantum.*

Applying the law to the facts

214. The case before me concerns a counsellor with a diploma in counselling (2011) who is a member of the BACP. He had 5 years of experience counselling after gaining his diploma and 3 at ER before 2016, when he met the Claimant. He signed up to a code of ethics with BACP. The Claimant was referred to him by her employer. He coached or counselled her.

215. When the Defendant was counselling or coaching the Claimant in relation to her health, lifestyle, sexual relationships, body image, sexual and emotional issues, anxiety and her work, I consider that the Claimant was a person so closely and directly affected by the Defendant's actions that he ought reasonably to have had her in his contemplation as being so affected by what he said and did. The title of the role did not matter, the substance did.

216. The Claimant and the Defendant had a relationship of proximity and an imbalance of power in that the Claimant was vulnerable and disclosing her vulnerabilities and the Defendant was powerful in his advisory, coaching or counselling role.

217. Therefore I rule that the Defendant owed to the Claimant a duty of care both whilst coaching in well-being between August 2016 and March 2018 and whilst she was his counselling client in April 2018.

218. In addition I consider that foreseeability of harm applied to the relationship between the Claimant and the Defendant in their respective roles. If at any time in sessions during inter session communications the Defendant gave the Claimant advice which would foreseeably injure her mental (or physical) health by causing psychiatric injury or aggravating her pre-existing psychiatric conditions, then the three constituent elements of the tortious duty of care were engaged: duty or care, breach of the relevant standard of care and foreseeability of harm.

219. I find that the Claimant had fragile and vulnerable mental health conditions, centering around her abusive past relationships with her father and her sexual partners, so that it was foreseeable to the Defendant that if he breached her trust in him as an independent counsellor who was acting in her best interests, and sexually abused her (verbally) for his own gratification, her mental health conditions would foreseeably be exacerbated.

220. I consider that the nature of the duty was: (1) to use all the reasonable skill and care of a reasonably skilled counsellor when he provided his services to the Claimant; and (2) to do and say what a reasonable counsellor would do and say in the circumstances; and (3) not to use words which a reasonable counsellor in the circumstances would not use.

221. I do not consider that the findings of the BACP panel on the Claimant's complaint assisted me much in the assessment of whether the Defendant was negligent. The BACP procedure is paper based, with only a one day hearing and time limited live evidence. The reasoning in the findings is scant and no reference was made at all to the Defendant's own therapy notes. In addition the panel were seeking to consider breaches of their ethics code not of any tortious duties.

222. I do not consider that the Claimant's evidence about the BACP complaint made by M assists me at all save that when she was told by M that M had been sleeping with the Defendant in counselling sessions I find that this had a substantial negative affect on the Claimant's emotional state and her opinion of the Defendant and M herself.

223. To judge and determine what a trained counsellor would and should have done in the shoes of the Defendant I would have needed to hear from a well qualified, experienced and properly trained counsellor or psycho-sexual counsellor giving expert evidence subject to the duties set out in CPR Part 35. I did not receive such evidence in this trial. Instead the Claimant called evidence from a neuro-psychologist. This fundamental gap in the Claimant's case has required me to treat the expert evidence on standard of care and breach with the greatest of care.

224. I do not consider that the Doctor Watts was sufficiently expert in the field of counselling and psycho-sexual counselling to be able to satisfy the burden of proof on the Claimant to establish (1) the requisite standard of care or (2) any breach thereof, in relation to any of the text messages or outside session communications between the Claimant and the Defendant or the majority of the in-session allegations. Doctor Watts himself accepted that there was a range of practices and approaches to communication outside sessions for counsellors.

225. I do not consider that the Claimant has discharged the burden of proof on the balance of probabilities through Doctor Watts' evidence in relation to any of the treatment modalities used by the Defendant: IFS; sexual advice; body image journals or changing the nature of the pornography watched by the Claimant or suggestion of using lube for facilitating penetrative sex. He did not profess expertise in those areas as a psycho-sexual counsellor. His opinions on what was and what was not appropriate were not sufficiently analytical or set in context and were not compared with good practice of counsellors dealing with the identified specific concerns of the Claimant.

226. I do not consider that any of the allegations made by the Claimant against the Defendant constituted a breach of his duty of care save as set out below. I find, taking into account part of the evidence of Doctor Watts, that there was no therapeutic justification for asking the Claimant: (1) to undress in the last private counselling session and (2) to masturbate in front of the Defendant and/or at home whilst recording herself and that those actions would give rise to a foreseeable risk of personal injury. This finding is partly a matter of common sense in the circumstances of this case, as well as being based on Doctor Watts' expert opinion. If the Claimant had been a specialist sexual counsellor with a specific "naked sessions" model of therapy and with proper, advance, informed consent, the finding might have been different. But the Defendant was not a specialised sexual therapy or psycho-sexual counsellor. He admitted that he referred clients on to specialists in these areas. In my judgment, with the Claimant in the third session, the Defendant by his words breached his duty to avoid saying things which would foreseeably be damaging to a vulnerable individual. He threw fuel upon the fire of her vulnerability for his own gratification.

227. In relation to the claim that the Defendant also committed the tort of intentional harm by words (IHW) and for a separate award of aggravated damages arising therefrom I have already made findings above (para. 179) in relating to the Defendant's intention. I am satisfied that the Defendant's words were deliberate and that he should have foreseen that they would probably cause personal injury to the Claimant because they constituted a gross breach of her trust in him and she was vulnerable. However, I do not accept that the Claimant has discharged the burden of proof in relation to the requisite intention to cause harm to the Claimant. I did not assess the Defendant to have formed that intention. I do not think he considered what effects of his words might have been on the Claimant. He was reckless as to the consequences of his actions but in law that is not enough. As to the assertion that harm was obvious and should be inferred, I distinguish between words like "I am going to kill you" or "I am going to kill your children" or "I am going to rape you" and the current set of facts. There is no assertion by the Claimant that she ever felt he would physically assault her. Nor did the Defendant ever touch the Claimant or assault or batter her in that session. I do not consider that the Courts should be quick to imply intention where there is no assault and where negligence already covers the need for compensation and the size and scope of the compensation. If a recognised psychiatric injury has been caused, all of the pain, suffering and loss of amenity, including humiliation and distress will be compensated.

228. It follows that I do not consider that aggravated damages should be awarded in this claim. There are various reasons for this decision. The first is that I have found that the requisite intention is not proven therefore the IWH tort is not made out. The second is that there was no physical assault or battery. This is a verbal only case. The third is that the Defendant was not in a position of governmental or official authority (he was not a member of the police force or armed forces). As to recklessness, there is

distressingly a huge number of circumstances in which reckless behaviour injures innocent people: drunk drivers killing children on roads; negligent companies failing to spend necessary money on safety measures leading to staff amputations; negligent doctors causing brain damage to unborn children. All are tragic. But without the necessary intention for aggravated damages they do not attract such awards.

229. In my judgment the Claimant has made out her claim for damages for personal injury for negligence. I have not found intentionality or malevolence on the Defendant's part. I am not prepared constructively to imply intention from a verbal only tort, whereas I would have been able to do so had the tort been physical sexual abuse, because the Defendant had assaulted or battered the Claimant sexually. In any event I am not convinced that aggravated damages would add anything to the quantum of the claim. For the reasons set out above I make no separate award for aggravated damages in this claim. In relation to compensatory damages I assess them below in the normal way for the Claimant's pain, suffering and loss of amenity including her distress and the breach of her trust by the Defendant.

Quantum

230. The Claimant was born in May 1991 and is now aged 31 years nine months. Her father was an electrician whose business went bust and who suffered a nervous breakdown in 2017, had an affair and emigrated to Spain. The Claimant describes him as drinking a lot. Her mother worked for the council. The Claimant's parents had a stormy relationship. The Claimant is not close to her brother who is married and is a plasterer. The Claimant went to school but started to suffer depression at the age of 14 and was bullied. She obtained eight GCSEs with grades between B and E. Between 2007 and 2009 she attended Watford College and obtained a triple merit in fashion and clothing. After college she continued her hobbies of kickboxing and tap dancing and held an interest in pole fitness but as far as I am aware had never started.

231. In approximately 2010 she worked as a shop assistant at Topshop and then between approximately 2011 and 2015 she was a trainee hairdresser and then a hairdresser. For a while she worked supporting homeless people in 2015 through 2016 and then started at ER as a support worker for homeless people. ER was a council funded organisation. The Claimant did not disclose any of her income in the civil proceedings.

232. The Claimant's medical history is set out in her GP records and in the psychiatric report of Doctor de Taranto. In summary she had a long past history of depression, anxiety and post traumatic symptoms which had never been formally diagnosed by any psychiatrist. In her witness statement at paragraph 48 she alleged that she had been raped when she was younger and in the trial bundle was her statement to the Police. In 2012 in December she reported to her GP that she had sexual problems with her partner about intercourse and had suffered intercourse problems for years. She used lubrication (a fact which she contradicted in evidence). She had received psycho-

sexual counselling in the past. She admitted cutting her wrists and self harming in the past. In March 2013 she was referred to a counsellor, Rosemary Gillingham for counselling. In February 2014 she reported that she did not get on with her parents and was very tense and had lost her job but had a supportive boyfriend and was prescribed Sertraline. In April 2015 she was receiving counselling from Craig Phillips under the NHS well-being provisions which consisted of cognitive behavioural therapy for post traumatic symptoms. Looking at Craig Phillips' counselling notes between May and November 2015 some of them are concerned the rape allegation. There are graphs of her improvement over the period. She felt guilty and was worried that she *wanted* to be raped. She ended the sessions herself and said she would get back in contact if necessary, but never did. In 2016 the Claimant underwent laparoscopic surgery for chronic colecystitis and complained of epigastric pain and gallstones for the two years prior to that.

233. During the course of her sessions with the Defendant between August 2016 and April 2018 there are likewise multiple GP entries. In April 2017 the GP referred to Claimant to Doctor Brito for psycho-sexual counselling. I have not seen the notes of those sessions but the Claimant reported she did not connect well with this therapist and so terminated the therapy.

234. In February 2018 the GP noted that the Claimant had split up with her boyfriend and moved back in with her mother. In May 2018 the Claimant accepted a promotion to assistant manager at ER. On the 15th of June 2018 the Claimant filled in her full report to the police in relation to her rape allegation. That is a two page ABE interview in which the Claimant reported that she had met the rapist in a bar and he had come over to her and stuck his tongue down her throat and asked if she was a lesbian. They had mutual friends. She could not remember if they exchanged numbers. She went out late one night with him in her car and remembers him trying to kiss her. Her car broke down. She "hung out" with him a couple more times and had been to his house on a couple of occasions. He was 26 years old. On a later occasion in a bar he was with his brother and friends and, having ignored her all night, she decided to go home. She was leaving when he took her by the hand and walked her into the car park and had sex with her in the car park. She said "I have not come here to have sex". She said he knew she was a virgin, he put her on the floor where they were laying and kissing for a while and then they had sex. Her phone rang whilst they were having sex and it was her brother. After having sex she sorted herself out and they both got in a taxi and went back to his house because it was around the corner. Although she wanted to go to sleep they had sex again and she did not object. During this time his friend knocked on the door and he told the friend to go away. He drove her home at about 5:00 o'clock the next morning to her parents. After the event she remembered thinking "well that's done". She went into work the next day and spoke to a colleague but she did not tell the colleague she had been raped. She had no injuries in her vagina. She told the police that she had come forward in 2018 because she had had a lot of counselling therapy and also wanted to speak to the police about

her counsellor who was acting sexually towards her. She also told the police that she remembered the rapist had a small willy because the rapist had asked her to toss him off some time before the rape. She accepted that on three occasions she kissed him and on one occasion she masterbated him before hand.

235. The police did not pursue the prosecution.

Psychiatric evidence

236. Doctor de Taranto's first report was dated April 2021. She was provided with the Claimant's medical records, the police disclosure and the Claimant's BACP disciplinary hearing bundle. She examined the Claimant in December 2019. She set out the Claimant's family and past medical history which I have summarised above. She had told her GP in 2009 that she was experiencing pain on attempted intercourse. Again in April 2010 the Claimant complained to her GP about pain on intercourse. When Doctor de Taranto described the alleged rape but omitted some parts. The Claimant told Doctor de Taranto that after the alleged rape she *"went on a bit of a binge with men and slept with anyone*". The psychiatrist went through the Claimant's psychiatric history noting her teenage self-harm and depression, her anger when she was a hairdresser and in 2008, her low mood and suicidal ideations. She had self-harmed by cutting her wrists in 2009. In 2012 the Claimant described having sexual problems for years with intercourse. In March 2013 she was prescribed Sitalopram by her GP due to mild to moderate depression and anxiety. In February 2014 the GP diagnosed anxiety with depression due to very tense family relationships, losing her job and internal anger. She had fleeting thoughts of self-harm but her boyfriend was supportive. In May 2015 the GP noted the Claimant suffered from post-traumatic stress disorder. She was engaged in counselling for that. In March 2016 the Claimant reported to her GP that she had been raped a year ago (this was chronologically a contradiction with her later report) and was struggling to feel close to her partner. The GP provided the Claimant with options for psychotherapy sexual counselling and medication. By April 2016 she had improved but was still suffering sleep difficulties. In August 2016 the GP noted the Claimant was suffering from depression because her father had been having an affair and had moved to Spain (the accurate chronology of the father's move is difficult to discern).

237. The Claimant informed the psychiatrist that she had psycho-sexual counselling in 2017 but did not think it was working because the female counsellor spoke about vaginal dilators and she had been through that before. In June 2017 the GP noted that the Claimant had mood issues relating to her parents and alleged she had been abused as a child. (The Claimant denied to the psychiatrist that she had ever been abused as a child).

238. The Claimant then described her relationship with her boyfriend Steve, which started in 2016 and ran through to them buying a flat together in June 2017.

239. Doctor de Taranto described the Claimant's self report of her interactions with the Defendant. She told the psychiatrist that things got "*really weird*" in the last three private counselling sessions.

240. The Claimant described reporting the last session to AM and then him reporting this to her female manager, M. The Claimant also told the psychiatrist that more recently the Claimant understood that M *"was sleeping with Gunning in sessions"*.

241. The Claimant ended her relationship with her boyfriend in February 2018 and moved back to her mother's house and that her boyfriend had been controlling and emotionally abusive. She told the psychiatrist that in June 2018 she contacted the police but this is factually incorrect because it happened first in March 2018. She admitted seeing the rapist walking down Watford High Street. In August 2018 she left ER because she needed to get away from Watford, on the Claimant's assertion because of the Defendant being there, also because the managers at work knew so much of her personal information. The Claimant was living with her mother and asserted that she had not had sex for five years. She was working full time as a probation officer supporting ex prisoners after release.

242. In July 2018 the Claimant had psychotherapy sessions and saw a counsellor weekly for many months which she told the psychiatrist really helped her and were "amazing".

243. The Claimant stated that the BACP disciplinary hearing led to panic attacks and severe insomnia. In December 2018 the GP again noted a history of child sexual abuse (which the Claimant again denied to the psychiatrist during the report). Through 2019 after the BACP hearing the Claimant took antidepressant medication.

244. In the opinion section Doctor de Taranto diagnosed that the Claimant had a history of mental health issues and a difficult family background. She diagnosed pre-existing depression, anxiety and post traumatic symptoms (not PTSD the full disorder) together with significant psychosexual problems prior to the index events.

245. On causation Doctor de Taranto considered the Claimant's psychiatric issues were exacerbated by the Defendant's abuse and also by the subsequent panel hearing.

246. On the but for prognosis, Dr Toronto advised that the Claimant would have suffered in any a case from depression, anxiety and post traumatic symptoms and would have suffered ongoing chronic psychosexual problems and none of these were caused by the Defendant.

247. Doctor de Taranto advised that when the Defendant manipulated the Claimant in order to get her to comply, for his own purposes and she realised this had occurred this caused her significant distress which was later exacerbated during the disciplinary

hearing. This caused a significant increase in depressive anxiety and post traumatic symptoms and probably her psychosexual symptoms too. But for the breaches Doctor de Taranto advised that the Claimant's symptoms would have improved.

248. Work: Doctor de Taranto did not consider that the alleged torts by the Defendant affected the Claimant's ability to work directly. She considered that it was a factor in her need to move jobs however moderated that view accepting that the Claimant's rape assailant still lived in Watford and that was a factor. Also during cross examination Doctor de Taranto accepted that once the Claimant had received the revelation from her manager (M) that she was sleeping with the Defendant in sessions that would have been a driving factor for her leaving work.

249. Doctor de Taranto recommended weekly cognitive behavioural therapy for four to six months (at £75-125 per hour) and suggested that the Claimant would be vulnerable to future difficulties in relationships and might need further therapy in three month blocks in future were exacerbations to occur.

250. **In her second report** dated July 2022 Doctor de Taranto was provided by the Claimant's lawyers with details from the BACP website of another case started by another complainant (M) against the Defendant. She set out under the Claimant's "Personal History" a detailed account of M's allegations which Doctor de Taranto appears to have sourced from the BACP website. They had published their findings made at a hearing at which the Defendant did not attend. Doctor de Taranto wrote that she "spoke further" to the Claimant about this. I shall call this MBACP evidence. It had nothing to do with the Claimant's personal history.

251. I do not know when the second report was served and filed however in my judgment this was a deliberate attempt by the Claimant to introduce alleged similar fact evidence through the expert's report.

252. Under CPR Part 32 the Court has the power to control the evidence to be admitted at the trial. CPR r.32.1(1) the Court can give directions about which issues evidence is to be required upon and the nature of the evidence necessary to decide the issues. Under CPR r.32.1(2) the Court may exclude evidence that would otherwise be admissible. Relevance to the pleaded issues is a key factor in making such decisions. Also the probative value of the proposed evidence is relevant.

253. The MBACP evidence as summarised by Doctor de Taranto is not a criminal conviction. The MBACP findings and the complaints made to them are hearsay evidence which if relevant is admissible under the *Civil Evidence Act 1995,* S.1(1). The procedure for doing so is set out in S. 2. The Claimant should have served a *Civil Evidence Act* notice and under S.2(4). The failure to serve a notice does not make the evidence inadmissible but that may be taken into account by the Court when considering the exercise of its powers with respect to the course of the proceedings

and as adversely affecting the weight to be given to it. S.4 provides a list of factors to be taken into account when considering the weight of hearsay evidence. I have taken those into account concerning not only the MBACP allegations made by M but M's written evidence to the BACP in the Claimant's complaint.

254. If the Claimant had pleaded, whether originally or by amendment, the alleged similar fact evidence contained in the MBACP report upon which she intended to rely at trial as a relevant fact or matter then it could have been considered in advance at the case management conferences and pleaded to in response. It was not pleaded. It was not supported by an application before trial to rely on it as hearsay evidence or as alleged similar fact evidence. It was not mentioned in the Claimant's witness evidence. It was not mentioned in the witness statement from M. No disclosure of the MBACP report to the Defendant was provided by the Claimant under the continuing duty imposed by the CPR before the trial.

255. The Defendant, being a litigant in person, did not apply to exclude the paragraphs in Doctor de Taranto's concerning the MBACP report from the evidence before this Court.

256. Instead of following the required procedures which are designed to ensure fairness the Claimant's counsel applied during re-examination to put in the MBACP panel's report. I refused that application for the reasons given in my ex-tempore judgment.

257. I take into account the guidance in *O'Brien v Chief Constable of South Wales* [2005] UKHL 26, when considering admissibility of this evidence. Following that case and *JP Morgan v Springwell* [2005] EWCA Civ 1602, I apply a two stage test. I ask is the evidence potentially probative of an issue in the case? The second is: are there good grounds why this Court should refuse to admit the evidence in the exercise of its case management powers?

258. On the first part of the test, the contents of the MBACP report could not either prove or disprove what happened between the Claimant and the Defendant in the April 2018 sessions. It relates to separate allegations. The Claimant did not plead that the Defendant had a propensity to sexualised behaviour with clients. So there is no pleaded issue that the report is potentially probative of. To assess the weight of the findings I would need to see the written evidence and photographic which the panel saw. That was not put in evidence. On the second part of the test, I consider that the circumstances in which the Claimant attempted to put the report in evidence were wholly unfair to the Defendant. Applying to admit the report during re-examination of the Claimant was far too late. It avoided permitting the Defendant to ask questions in cross examination of the Claimant's assertion that the findings were true (if she wished to assert that they were true).

259. I therefore exclude those parts of Doctor de Taranto's report on the MBACP report from being admissible in evidence. Those were the last paragraph on Bundle 1 page 124 of the trial bundle and the first 3 paragraphs on page 125.

260. In the rest of the second report Doctor de Taranto updated the Claimant's history. She had dated an older man who was a traveller, a drug addict with a criminal record and a history of domestic violence. He threatened to put a gun to her head and burn her mother's house down when it ended. Despite this the Claimant still communicated with him. The Claimant was still living with her mother, working, socialising with friends, doing pole dancing and kick boxing. By May 2021 the Claimant stopped taking medication (Sertraline). She restarted in May 2022. She presented normally with some anxiety symptoms and some intrusive memories of the Defendant.

261. Doctor de Taranto gave the opinion that despite having psychotherapy since the first report and being on anti-depressants the Claimant was still suffering significant psychiatric problems including depressive and anxiety and post traumatic symptoms and psycho-sexual problems. She did not say that they were caused by the Defendant. She advised that these "*were materially exacerbated by*" the Defendant's behaviour. She did not advise that the symptoms "are" being materially exacerbated by the Defendant's behaviour. She advised that the Claimant still needed 6 months of specific CB therapy. What Doctor de Taranto did not do is separate out what, if any, part (or percentage) of the continuing symptoms were caused by the Defendant's torts and what part of the treatment she proposed was caused by the Defendant's torts.

Doctor de Taranto's verbal evidence

262. In her evidence to the Court Doctor de Taranto had heard of mirroring by therapists. She accepted that the Claimant changed her assertions in relation to threats to kill by her more recent boyfriend which were "discrepancies", and also statements in her GP notes over child abuse which she contradicted were discrepancies

263. Doctor de Taranto conceded that after the Claimant was told by M that M had been sleeping with the Defendant that would have affected the Claimant and her decision to leave ER. She advised that not all of the post event treatment which the Claimant claimed as past loss was caused by the Defendant. The pre-existing conditions were some of the "multiple roots" giving rise to the need for that therapy. She clarified that any future therapy would not in her opinion be caused by or related to the alleged torts of the Defendant. Doctor de Taranto confirmed the final paragraph of her report that the Claimant was not disabled on the labour market or disadvantaged by any symptoms caused by the Defendant. She refused to put a percentage figure on the exacerbation. She called it: not the majority but a small portion.

Pain suffering and loss of amenity

264. The level of exacerbation caused by the Defendant's breaches was not quantified by Doctor de Taranto. She did not allege that the majority of the symptoms of

depression, anxiety and post traumatic symptoms were caused by the Defendant's breaches so it is clear that a minority was. I must make an assessment by implication. I do so based on the medical notes and her report. The suffering did not affect the Claimant's ability to work. She accepted and received counselling after the events and by 2021 was stable and off medication. She described the counselling as amazing. I find that none of her future need for counselling for adverse life events is attributable to the torts on the expert evidence.

265. The JC Guidelines on psychiatric suffering at 4(A) set out the six factors to be taken into account. I have done so. Assessing all of her symptoms, not just the exacerbation, I consider that the correct award bracket would be "Moderate" between £5,860 and £19,070 and right at the high end thereof. However her work has not been affected and the duration of the suffering due to the exacerbation is in my judgment around 3 years until her improvement in July 2021. The symptoms affected mainly her social and sexual functioning, her mood and self-esteem, which were all substantially and chronically damaged before the exacerbation caused by the torts.

266. The other relevant JC Guidelines category is 4(C) sexual abuse. In my judgment the Claimant falls into the "Less Severe" category. The abuse was short lived and non-physical and the prognosis is good. The bracket is £8,730-20,570.

267. I set out below a range of the comparables in *Kemp & Kemp* section Q Vol 4, most of which are for the full psychiatric conditions suffered:

267.1 *C v WH* [2015] Nelson J: (Kemp Q1-009.2) £35,000. The events were far more traumatic and the symptoms more severe.
267.2 *C v D* [2006] Field J.: £20,000.
267.3 *Various v Ayling* 2002 HHJ Poulton, claimants C, F, H and Q: £8,000 each (Kemp Q1-015).
267.4 Inflation updating needs to be applied to those figures.

268. The Claimant has suffered no physical pain. I consider that for the exacerbations caused to the Claimant's pre-existing medical conditions by the Defendant's torts and the injury to her feelings, loss of trust and distress, the award for pain suffering and loss of amenity should be £10,000.

Loss and expense

269. I also award 30% the cost of the past counselling claimed at £2,580, hence £774. The specialist CBT advised by Doctor de Taranto which has not apparently yet been arranged was in my judgment subsumed within that therapy which the Claimant herself described as amazing.

270. I award the Claimant the legal costs of her appearance at the BACP hearing. But for the tort she would not have made the complaint. Those are £1,320 plus interest at the full SIAR from the date of payment of those fees.

271. Interest should be added to the award of general damages at 2% pa from the date of service of the claim form. Interest should be added on the past expenses (£774) at one half of the special investment account rate until 20.7.2021 and thereafter at the full SIAR. I shall rely on the Claimant's counsel to do the calculations.

272. I dismiss the claim for future therapy because Doctor de Taranto did not support that as caused by the torts.

273. The claim for *Smith v Manchester* damages is not sustainable on the evidence. The Claimant moved on to other work and no claim was made for post loss of earnings. Doctor de Taranto advised that the torts will not affect the Claimant's work capacity in future. No figures were provided for the Claimant's earnings in the past or the present in any event.

Conclusions

274. I find that the Defendant breached his duty of care to the Claimant on 24.4.2018 and as a result the Claimant is entitled to damages of £10,000 for her pain, suffering and loss of amenity and £774 for counselling and £1,320 for the legal costs of the BACP hearing and appropriate interest on each sum.

END