SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2017] CSIH 72
PD2514/13

Lord Justice Clerk
Lady Clark of Calton
Lord Malcolm

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the reclaiming motion

DC

Pursuer and Respondent

against

(1) DG and (2) DR

Defenders and Reclaimers

Pursuer and Respondent: Di Rollo QC, Ross; Drummond Miller LLP
First Defender and Reclaimer: Bain, QC, L Thomson; TLT LLP
Second Defender and Reclaimer: O'Rourke, QC, Edward; Thorley Stephenson

28 November 2017

Introduction

[1] This is a civil action in which the pursuer and respondent seeks damages from the defenders and reclaimers in respect of their having committed the common law wrongs of sexual assault and rape against her. The respondent raised the action after a full police investigation resulted in no prosecution. The reclaimers accept that sexual intercourse took place but maintain that it was consensual. *Quantum* of damages was agreed between the parties and, after proof on liability, the Lord Ordinary found in favour of the respondent in an opinion dated 17 January 2017. In particular, the Lord Ordinary held that in the early

hours of 2 January 2011 at an address in Armadale each reclaimer raped the respondent in circumstances in which by reason of excessive consumption of alcohol she was incapable of consenting and that the reclaimers had no legitimate belief, whether reasonable or honest, that she was consenting. This is a reclaiming motion against that decision.

The issues

[2] Originally, five grounds of appeal were tabled, but the reclaimers did not insist in the first, second or fifth grounds, leaving two grounds, namely:

> 3. Whether the Lord Ordinary erred in his treatment of the witness, Mr Clifford Wilson, who lived in the flat upstairs from that in which the events in question were said to have occurred;
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> 4. Whether, by failing to give adequate weight to the CCTV evidence at about 0230 the Lord Ordinary erred in his assessment of the extent to which the respondent's degree of intoxication would have been apparent to the reclaimers, and in his conclusion that the reclaimers did not have an honest or reasonable belief in her consent. In this respect it is also asserted of the first reclaimer that the Lord Ordinary erred in failing to differentiate between the reclaimers: there being no evidence that the second reclaimer was a witness to the seriously drunken "off camera" behaviour spoken to by Gail McGregor.

It was a feature of both these grounds of appeal that they did not specify what the consequence of these alleged errors of assessment were said to be, or in what way they were said to impact on the Lord Ordinary's approach to the evidence generally, undermine his findings in fact or vitiate his conclusions.

Background

[3] The evidence was narrated in some detail by the Lord Ordinary and we will not therefore repeat it here. The basic circumstances of the case were that the respondent and her friend, Rachel Carrigan, had gone out together for the evening at about 2045 on 1 January 2011. They went to two public houses, then a nightclub, all in Bathgate. In the second public house, the Glenmavis Tavern, they met the reclaimers, one of whom they knew from school. They thereafter spent some considerable time in company together, the second reclaimer in particular drinking, chatting and dancing with the respondent, and the first reclaimer with Ms Carrigan. All four ended up in Chalmers nightclub. In the nightclub, one of the reclaimers obtained the key to a flat in Armadale from a witness, Brian Hutton. His sister occupied the flat but was on holiday. In her absence he had been staying there but was not using it that night. It was the intention, or anticipation, of both reclaimers that they, the respondent, and Ms Carrigan would go to that flat after the nightclub. The first reclaimer said he did not know what they were to do there; the second reclaimer candidly acknowledged that he was anticipating that the two couples would have sex.

[4] During the course of the evening, the respondent drank a half can of lager, 8 or 9 Jack Daniels and coke, and 2 Jaegerbombs. Ms Carrigan and other friends and acquaintances described her intoxicated condition as the night wore on. Three of the stewards also described her intoxicated condition. This evidence is referred to in more detail below. Some of the evening's events were captured on CCTV, at both the Glenmavis Tavern and Chalmers. In due course Ms Carrigan did not go to Armadale. She asked the respondent if she wanted to remain with her, but the respondent went to Armadale in a taxi with both reclaimers, sometime about 0230. She maintained that at the flat she was raped by both of them. For their part, the reclaimers both admitted having intercourse with the respondent, but maintained that this was consensual. The second reclaimer raised in his pleadings, the

question of whether either of the reclaimers had a reasonable belief that the respondent was consenting. The issue of whether either reclaimer had a reasonable or honest belief was explored in evidence. By the time of the reclaiming motion parties were agreed that the law of rape is now as defined in statute, which requires an absence of reasonable belief in consent, and that it was for the respondent to establish that the statutory definition had been met. The flat had two bedrooms, a child's room and an adult's room. It seems that the parties, or at least some of them, including the respondent were at some stage in each of the rooms. However, the sexual intercourse took place only in the child's room. Both reclaimers said that sexual activity commenced with the second reclaimer, in the child's room, the first reclaimer then came in, the respondent was content for him to be there and indeed started sexual activity with him whilst having intercourse with the second reclaimer. The second reclaimer left the room after a while, then left the flat, leaving the respondent and first reclaimer who proceeded to have intercourse.

[5] The respondent had no recollection of events from shortly after her arrival at the Glenmavis Tavern. Her next recollection was waking up to find herself in a strange house she did not recognise. She was naked and could not find her clothes. She spoke by phone to her mother and brother but could not tell them where she was. She found some clothing and went outside in search of help. There was a woman at the window of an upstairs flat but she closed her window and did not respond to the respondent. Eventually she gained assistance from two carers who were passing on the way to work.

[6] There was expert evidence as to (i) the respondent's blood/alcohol level at 1315 on 2 January 2011 (she had last eaten at 1530 the previous day); (ii) what her blood/alcohol level was likely to have been at 0300 and 0440 on 2 January, based on a back calculation made from the known level at 1315; and (iii) what was described as a "forward" calculation,

assessing what her likely blood/alcohol levels would have been at these times based on her known alcohol consumption. These were broadly consistent with one another, and placed the respondent in the "severe/potentially fatal" category of intoxication. There was expert evidence as to how someone of the respondent's age, size and gender, relatively unused to alcohol (as the respondent was, on the evidence), and with an average metabolism, would be likely to present to others when intoxicated to such a degree.

[7] The Lord Ordinary concluded that the respondent had been intoxicated to a degree that she was incapable of giving consent; that her condition was such that this would be obvious and manifest to both reclaimers; and that in light of that neither of them could have had a reasonable belief that she was consenting, in the sense of giving free agreement to intercourse.

[8] Evidence relevant to ground of appeal 3 was given by Brian Hutton and Clifford Wilson. The former gave evidence that in his sister's absence he had been staying in her flat. Having been out on Hogmanay, he had returned about 0700 and remained there until about 1300. During the time when he was in the flat he had sex with a female companion in both bedrooms.

[9] Clifford Wilson resided in the flat directly above that of Hutton's sister. His bedroom was directly above the adult bedroom of that flat. The CCTV evidence to which ground of appeal 4 relates depicted some events showing the respondent at both the Glenmavis Tavern and Chalmers. This is referred to in more detail below.

The Lord Ordinary's decision

[10] The Lord Ordinary, having correctly noted, in his summary of the evidence, what Wilson claimed to have overheard, referred in the assessment section of his opinion to the

phrases as having been "don't rub my breasts so hard" and "don't come inside me – I don't want another baby". In fact the second of these was what the second reclaimer reported the respondent as saying. The Lord Ordinary considered that Clifford Wilson's "evidence was sufficiently confused that little reliance ought to be placed on it" (para 326). Whilst his evidence of seeing a man staggering outside the flat and of a woman standing at the gate later that morning asking "where am I" were consistent with other evidence, the Lord Ordinary "did not consider it appropriate to ascribe what he heard otherwise specifically to the events involving the parties to this action, rather than the events which involved Brian Hutton and his sexual partner during the morning of 1 January 2011". The Lord Ordinary went on to say that he came to this view because:

> "(1) Brian Hutton's evidence was that on the previous night he had engaged in sexual activity in both bedrooms in the flat; (2) the child's bedroom, in which the events concerning the parties took place, was not the bedroom directly under that of Mr Wilson, from which, on his evidence, he could hear the sounds he described; (3) Mr Wilson, when giving a police statement, specifically identified the male voice which he heard as being that of Brian Hutton; and (4) the female voice which he heard in the morning saying "wake up, cos I'll have to go" and "could you let me out" could not have been that of the respondent, who was alone in the flat when she awoke."

In conclusion, he said:

> "[328] In these circumstances I do not think it possible, on the balance of probabilities, to ascribe what Mr Wilson heard, with any appropriate degree of certainty, to the central events at issue in this case. Other than the sightings by him which I have identified, I have not therefore taken his evidence into account."

In relation to the CCTV evidence the Lord Ordinary observed that:

> "[276] Some time was spent with a number of witnesses, examining the available cctv footage which depicted the respondent at various times over the evening of 1 January 2011. As a matter of generality, she was depicted throughout as intoxicated.
>
> [277] That is apparent where she is seen leaving the Glenmavis Tavern, and when together with the second reclaimer outside it, in the middle of the road and then on the pavement. It is also apparent when she is captured entering Chalmers nightclub.

> She appears to stumble in her attempt to reach for a handrail at the entrance, and is uncoordinated in the reception foyer to the extent that she is seen to drop an item three times within the space of a minute or two. She appeared to be intoxicated when leaving Chalmers nightclub."

[11] The grounds of appeal state that the Lord Ordinary gave inadequate weight to part of the CCTV footage where the respondent is said to have walked "unaided and without any apparent difficulty". This reflects a submission to that effect which had been made to the Lord Ordinary, and in respect of which he stated:

> "[278] These passages depicted a young woman who was drunk in the sense that her coordination and movement appeared to be impaired. I accept that the footage depicted her as being able to walk unaided throughout, but I consider it an overstatement to describe her as having been able to walk without difficulty. I would describe her, at the very least, as having been unsteady on her feet."

The Lord Ordinary stated his conclusions relating to the CCTV evidence thus:

> "[280] What is of significance, however, is that the available CCTV footage is not a comprehensive record of the respondent's movements. It did present a series of helpful snapshots indicating how events progressed but there was evidence from other sources which indicated that the respondent appeared to be more seriously under the influence of alcohol than was captured on camera. Since the available footage was not comprehensive, it does not follow that such other evidence must necessarily be unreliable."

Submissions

[12] Written submissions were lodged for each reclaimer, including a joint submission. During the hearing of the appeal, the arguments were advanced primarily by counsel for the first reclaimer, with counsel for the second reclaimer adding only to the arguments in relation to ground three. Other than as appears from the narrative below, we have therefore summarised the arguments in general as advanced for both reclaimers. In their written submissions counsel made reference to *Henderson* v *Foxworth Investments* 2014 SC (UKSC) 203 para 67.

Reclaimers

Ground 3

[13] In support of ground three it was asserted that the Lord Ordinary "chose to hold that (Mr Wilson) had overheard events involving Brian Hutton … during the morning of 1 January". This was said to be a critical finding which had no basis in evidence. The four reasons specifically mentioned by the Lord Ordinary as featuring in his decision-making were criticised, on the basis that (a) Wilson was talking about events occurring in the early hours of the morning, whereas Hutton had been referring to events between 0700 and 1300, not "on the previous night" as the Lord Ordinary stated - on this basis, it was an error to ascribe the comments to events involving Hutton; (b) although it was accepted that intercourse had only taken place in the child's bedroom, on the evidence the respondent had been in both bedrooms during the evening; (c) although Wilson did refer to the male voice as Hutton's, he had in other statements said he could be wrong about that – all he did was make an assumption which it was reasonable for him to make; and (d) whilst it was accepted that the words spoken by the female in the morning did not accord with what happened to the respondent, who was left alone in the flat, neither was there any evidence that these words had been spoken by the woman who had been with Brian Hutton.

[14] In addition, the Lord Ordinary placed inadequate weight on other aspects of Wilson's evidence which was consistent with other evidence in the case, namely hearing a car outside before the parties entered the flat (they had arrived by taxi); that the young woman he saw outside crossed the road and spoke to two carers; that later a man emerged from a red van carrying a plank of wood (consistent with the arrival of the respondent's brother, who had such a piece of wood with him in case he needed to defend her). It was unclear how Wilson could be right about these matters yet in error as to the night when he

heard the comments referred to. The respondent's evidence that her breasts were sore the following day was consistent with Wilson's evidence. The Lord Ordinary erred in excluding Wilson's evidence, rather he should have weighed it in the balance with all the rest of the evidence. The evidence was critical, because it involved a conversation at the critical period involving a man and a woman, in a context which is supportive of a consensual encounter. The words spoken show that, if this was the respondent, she was awake, alert, and capable of talking, in a way consistent with her being capable of giving or withholding consent to sexual activity. The reclaimers' argument was not undermined by the evidence of Professor Chick, since he accepted that the respondent's blood/alcohol level could have been anywhere within the suggested range of values produced by the toxicological evidence, not just at the midlevel. The evidence of Professor Chick as to how the respondent would have acted, and presented to others, with a blood/alcohol level of 275 was not consistent with Wilson's evidence of what he heard, nor with the CCTV evidence.

[15] Counsel for the second reclaimer submitted that whilst the Lord Ordinary would have been entitled to reject the evidence of Wilson for sound reasons, such as demeanour, and proceed on the basis of the eye witnesses and toxicology, what he did was to reject Wilson for reasons which are not rigorous and do not withstand the level of scrutiny which should apply. His reasons are insupportable, and in directing himself for those reasons to ignore that evidence he misdirected himself. Where a serious allegation such as the present is made in civil proceedings, it is incumbent upon the presiding judge to analyse and assess the evidence with rigour. By ignoring this evidence rather than analysing its proper place within the evidence as a whole, the Lord Ordinary erred in such a way that his findings were vitiated. What Wilson heard, if attributable to the respondent, demonstrated cognitive functioning consistent with an ability to consent.

Ground 4

[16] In respect of ground 4 it was maintained that the Lord Ordinary erred in two respects in his assessment of the extent to which the respondent's degree of intoxication would have been apparent to each reclaimer, leading to an error in his conclusion that neither of them had a reasonable belief in consent. The first error was in giving inadequate weight to the CCTV evidence, in particular that between 0208 and 0225 when it was submitted that she was seen to walk unaided and without difficulty. In relation to this point, the written Note of Argument submitted that the Inner House was in as good a position as the Lord Ordinary to assess the CCTV evidence. This argument was not advanced during the reclaiming motion and we were not asked to view the CCTV. In any event, we would not have agreed that we would have been in as good a position to assess this evidence as the Lord Ordinary: the CCTV evidence, being partial, and showing only snippets during the evening, would require to be assessed in the context of the whole evidence of the case, including the reliability and credibility of those witnesses who spoke of the respondent's intoxicated condition.

[17] As to the second error made by the Lord Ordinary, it was maintained that he had not assessed the evidence on this matter separately against each reclaimer. In particular, it was maintained that there was no evidence that the first reclaimer was a witness to the apparently seriously intoxicated behaviour "off camera" as spoken to by Gail McGregor. She had noted that the respondent was with two men, and had herself spoken to the second reclaimer, but she was unable to identify the second man, who had been standing by a wall, out of range of the CCTV camera. Even if it were reasonable to conclude that this man had been the first reclaimer, there was no evidence as to what he might have seen or heard. The

Lord Ordinary did not analyse the issue in the context of what might have been seen, heard and understood by the first reclaimer at 0300.

Respondent

[18] Counsel for the respondent submitted that there is no proper basis to interfere with the Lord Ordinary's treatment of Clifford Wilson's evidence. In any event, his evidence was not critical. Even having regard only to the transcripts, it was easy to understand why the Lord Ordinary reached the conclusion that Wilson's evidence was so confused that little reliance could be placed on it. It was not correct to say that the Lord Ordinary attributed Wilson's evidence as relating to the presence of Brian Hutton in the flat on the morning of 1 January. Rather, the Lord Ordinary decided that it was not possible, on the evidence, to say whether he overheard the central events or not. The essence of his findings regarding Wilson was that he could not be relied upon as shedding any light upon the central events. A successful challenge to the rejection by the Lord Ordinary of the evidence of a witness as unreliable is not easy to achieve. Counsel referred to *McGraddie* v *McGraddie* 2014 SC (UKSC) 12 and the discussion therein of the oft-quoted *dicta* from *Thomas* v *Thomas* 1947 SC (HL) 45. The Lord Ordinary had seen and heard all the witnesses in the case, and there was no basis for attacking either his reasons or his assessment of the witnesses concerned. His assessment that it is not possible to make a finding that what Clifford Wilson overheard related to the central events was an entirely reasonable one. As to the specific reasons he gave, there was a correspondence between Hutton saying he'd had sex in the adult bedroom in the earlier part of the day, which is where Wilson said the sounds came from, rather than the child's room, which is where the sex with the respondent took place: that was a reasonable point for the Lord Ordinary to put in the mix. The use of the word "night" is to

be understood in context, as covering the morning of the next day, and is in any event a trivial point. It should be borne in mind that Brian Hutton was not himself a particularly reliable witness either: it is clear that he was not anxious to co-operate. There is no doubt that Wilson specifically identified the voice as that of Brian Hutton. He said "I knew it as Brian Hutton". Had it been Hutton it must have been another occasion: this is another reasonable point for the Lord Ordinary to make. The female voice saying "wake up I have to go", and "could you let me out" could not have been the respondent. If Wilson was correct that these words were said that morning, they must have been said by someone else. It is not possible to make this aspect of Wilson's evidence fit with the central event. In any event, none of the words referred to by Wilson as spoken by the female would have been inconsistent with being spoken by someone who was so intoxicated as to be incapable of giving free agreement.

[19] On the evidence the respondent was severely intoxicated. There was ample evidence of this from a variety of sources and the CCTV footage could not be said to be inconsistent with that. The Lord Ordinary made his decision on the whole evidence in the case, concluding (para 344) that

> "Having carefully examined and scrutinised the whole evidence in the case, I find the evidence for the respondent to be cogent, persuasive and compelling."

Analysis and decision

[20] It is well established that the circumstances in which an appellate court can interfere with findings of primary fact made at first instance are very restricted, as explained in the passages from *Thomas* v *Thomas* referred to above. The importance to be attached to the views of the judge at first instance, who had seen and heard the witnesses, viewed in *Thomas* as a critical matter, was underlined by the UK Supreme Court in *McGraddie* v *McGraddie*.

The point had been emphasised by Lord Hope in *Thomson* v *Kvaerner Govan* 2004 SC (HL) 1 at paragraph 20:-

> "… the fact that reliability, not credibility, was the issue does not mean that an appellate court is in as good a position as to resolve it as the trial judge. This is because there are various ways of testing a witness's reliability. One way is to see how his account fits in with the other evidence. If that were to be regarded as the only test, it would no doubt be capable of being performed equally well by an appellate court as by the judge who was sitting at first instance. But another way is to examine the witness's demeanour in all its various aspects when he is giving his evidence. If his version of the facts is in conflict with that which is given by another witness whose honesty is not in doubt, the demeanour of that other witness too will also be relevant. … An appellate court should be slow to interfere with the decision based on a view of the reliability of witnesses of whom the Lord Ordinary was able to make a personal assessment."

[21] The matter was addressed in some detail by the UK Supreme Court in *Henderson* v *Foxworth Investments Limited* in which, delivering the Judgment of the Court, Lord Reed observed (paragraph 57):-

> "… the validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although, as I have explained, it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him, subject only to the requirement, as I shall shortly explain, that his findings be such as might reasonably be made. An appellate court could therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable."

[22] In respect of findings of primary fact, the question is whether the decision is one that is "plainly wrong" in the sense that the trial judge's decision cannot be explained or justified on the basis of the material which was before him. In *Henderson* Lord Reed said (paragraph 67):-

> "It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or

justified".

As Viscount Simon, in the minority in *Thomas* but expressing on this matter the same view as the majority, said in respect of whether a decision at first instance could be justified (page 47):-

> "If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate Court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight."

[23] In the present case, the assessment of the evidence by the Lord Ordinary was, to quote Lord Reed, "pre-eminently a matter for him." That includes evaluation of the evidence of Clifford Wilson, and of his reliability, and the assessment of the CCTV evidence, which must be examined in the context of the Lord Ordinary's treatment of the evidence as a whole.

[24] The Lord Ordinary accepted the respondent as credible and reliable and entirely genuine, and rejected the evidence of each of the reclaimers. Whereas the respondent was measured and prepared to concede appropriate matters, both reclaimers appeared clear on areas of evidence which they perceived to assist them, but unclear on areas which were adverse to them. The Lord Ordinary considered that the first reclaimer was not an impressive witness. Parts of his evidence were inconsistent with other evidence in the case, or contradicted his written pleadings. His evidence was designed to further his own interests, rather than to provide answers in accordance with his oath. As to the second reclaimer, the Lord Ordinary considered that his evidence was internally inconsistent, and contradicted his written pleadings. Like the first reclaimer, he was selective about what he was prepared to tell the court, and was not entirely candid.

[25] The Lord Ordinary considered the issue of the respondent's level of intoxication under reference to (i) the CCTV evidence; (ii) the eye witness evidence; (iii) her likely consumption during the evening; and (iv) the expert evidence.

[26] As the Lord Ordinary pointed out, the CCTV evidence provided only evidence of snapshots during the course of the evening. His view of it as a whole was that, whilst she could be seen to walk unaided in clips shown, the CCTV evidence generally depicted the respondent as intoxicated. In paras 276-278 of his opinion the Lord Ordinary provided some examples of what he took from the CCTV footage. Given the partial nature of the footage, the Lord Ordinary (rightly) did not consider it appropriate to take it as representing the whole picture of the respondent's condition or presentation on the evening in question, and in particular towards the end of the evening when she left in the company of the reclaimers. To reach a conclusion on that matter he required to consider the whole evidence in the case, including the eyewitness evidence and the expert evidence as to the effect of the likely blood alcohol levels in the respondent's system. He thus had before him a body of evidence which showed the respondent's progressive intoxication during the evening for most of which she was in the company of both reclaimers. Ms Carrigan and other friends in her company had all described the respondent as intoxicated. Ms Carrigan described the respondent as seeming more drunk than she would have expected when they left the Glenmavis Tavern. The walk to the nightclub took longer than would normally have been the case had they been sober. On their arrival at Chalmers, she described herself as supporting the respondent, taking her arm to take her weight. The respondent seemed slightly better once inside Chalmers, but it was plain that she had had a drink and was "not completely *compos mentis*". When leaving the nightclub, the respondent had lost her purse and forgotten to take her shoes and jacket. Ms Carrigan had gone back to collect them. The respondent

appeared to her to be quite drunk at that time. On leaving the club, although the respondent could walk on her own to some extent, the second reclaimer would have required to help her. At one stage, he had been holding the respondent in order to help her walk, but this was not captured on the CCTV footage.

[27] Anne Marie Mackay knew the respondent from work. In the Glenmavis Tavern, the respondent stumbled and fell against her. Seeing her again about 30 minutes later, she seemed quite drunk, and her words were "quite slurry". Her eyes appeared to be glazed over, and the words she was using did not make sense. Outside the Glenmavis she was staggering about. She appeared to be very drunk and Ms Mackay was concerned for her. She had assessed the extent of the respondent's drunkenness as 8 out of 10.

[28] Carrie-Anne Tugman also knew the respondent from school. She described the respondent as already drunk in the Glenmavis Tavern and, at Chalmers, not 100% steady, but not staggering, and able to walk and talk. She saw her again outside the nightclub, in circumstances in which the respondent had lost her balance and fallen against a door. She looked pretty "wasted". She was not steady on her feet.

[29] Apart from these witnesses, the Lord Ordinary also had the evidence of other witnesses (such as Gail McGregor) who had encountered the respondent in the course of their employment, and who were well qualified to make an assessment of her condition and describe her appearance. The Lord Ordinary was impressed by, and accepted, the evidence of these witnesses. Michael Parks was too ill to attend court, but his police statement had been adopted and incorporated into an affidavit. As a doorman with 28 years' experience, he described the respondent as looking confused, delirious and not making sense when questioned. She appeared not to understand when Gail McGregor was asking her questions.

[30] Ms McGregor had been working as part of the security staff at Chalmers nightclub for about a year, having 15 years' experience working in the security sector. Late in the evening, a purse had been found. It belonged to the respondent, who was identified from a driving licence inside the purse. Ms McGregor found the respondent leaning against the front door, not in control of herself. Her eyes were rolling in her head, she could not stand up straight, or speak properly. She was not *compos mentis*. Ms McGregor had held her up by putting her hands under the respondent's arms. Two men were standing in close proximity. The second reclaimer was at the front by the door, and inside a set of gates which are outside the door. The other was outside the gates by a wall. [It is in our view a reasonable inference from all the evidence as to the parties' movements that this was the first reclaimer.] Ms McGregor spoke to the second reclaimer. He said that he was going to take the respondent away with him, and she replied that the respondent needed an ambulance. She advised what to do should the respondent become unconscious. The second reclaimer said that she would be fine, that he knew her from school, that he was her pal, and that he was going to take her home. Shortly after, Ms McGregor can be seen on CCTV walking along by the outside wall of the building. She explained that this was to keep an eye on the respondent, and that they, the two men, were going to look after her. In her view she needed looking after, and was in no fit state for anything other than going home.

[31] Gavin Paterson, a member of the bar staff saw the respondent at about 0210 in what seemed to be a distressed state. When he spoke to her, she appeared to be becoming more and more drunk and started crying. Had she not been leaving anyway, she would have been asked to leave because of her drunken state. She had been falling around and she appeared to be getting more drunk in the fresh air outside. She hadn't fallen over, but had been stumbling and only stayed upright because she had stumbled against a wall. In

addition to this eye-witness evidence, the Lord Ordinary had available to him the evidence relating to the respondent's alcohol consumption, and the likely level of alcohol in her blood. The back calculation, based on her known blood alcohol level later in the day, and the "forward" calculation, based on her known consumption, tallied. These calculations placed her in a severely intoxicated category. The possible range at 0300 was said to be 183 to 388mg/100ml, and at 0400 hours to be from 174 to 359 mg/100ml. The severe/potentially fatal category is from 200 upwards, so even at the lower end of the range, the respondent would have been close to that category. However, there was evidence which suggested that the effect of the known alcohol consumption on someone of the respondent's age, size and gender, relatively unused to alcohol (as the respondent was, on the evidence), would have been likely to place them more towards the upper end of the range. It was therefore perfectly reasonable for the Lord Ordinary to approach matters on the basis that the respondent's level of intoxication probably placed her at about the middle of the range. There was evidence from Professor Chick as to how someone with the characteristics of the respondent, who had last eaten at 1530 the previous day and who possessed an average metabolism, would be likely to present to others when intoxicated to such a degree.

[32] In light of all this evidence we do not consider that there is any merit in the suggestion that the Lord Ordinary did not give sufficient weight to the CCTV evidence. As to the argument that there was room to differentiate between the reclaimers as to their likely degree of knowledge of the respondent's condition and presentation, we do not accept that there was a basis for differentiating between either reclaimer in this way to any material degree. Both had spent time in the respondent's company during the course of the night; her progressive intoxication, spoken to by several witnesses must have been apparent to them both; the second reclaimer was spoken to about this by two security guards, and the

evidence suggests that it was the first reclaimer who was at the wall, close by when this happened. There was some evidence that this individual was urging the second reclaimer (and the respondent) to "come on". [Favourably to the first reclaimer, the Lord Ordinary attributed these comments to the second reclaimer. This is understandable, given the way the evidence was given, identifying a person in a checked shirt (the second reclaimer) and the "other guy", but a perusal of the transcript suggests that it was the man at the wall, inferentially the first reclaimer, who was urging the second reclaimer and the respondent to hurry up.] In any event, the Lord Ordinary concluded that the respondent's "impaired cognitive functioning and general condition of intoxication was so obvious and manifest" that the reclaimers must have been aware of it, and that she was incapable of giving free agreement to sexual activity.

[33] Turning to the evidence of Clifford Wilson, we do not accept that it would be a fair reading of the Lord Ordinary's findings to say that he attributed what Mr Wilson claimed to have heard to the events involving Hutton on 1 January. It is clear that the Lord Ordinary did consider it a possibility that Mr Wilson had confused events of the 1st and 2nd January. Of the reasons he gave, it is correct to say that the sexual intercourse involving the respondent did not take place in the room where Mr Wilson said the sounds came from; it is correct that Hutton had engaged in sexual intercourse in that room the previous morning. We do not think that the Lord Ordinary's reference to the "previous night" should be invested with the importance which the reclaimers seek to attach to it as it is clear he was speaking colloquially. It is also correct that in his police statement Wilson has positively asserted that he knew the male voice as Brian Hutton and the Lord Ordinary is entitled to give weight to the initial response of the witness. Finally, on any view, the words which Mr Wilson spoke to hearing from the female speaking later in the morning could not be

attributed to the events involving the respondent. The Lord Ordinary did not find Mr Wilson to be an incredible witness: indeed, he was willing to accept that he might be correct on certain matters where his evidence coincided with other evidence. However, as a generality he concluded that Mr Wilson was not a witness whose evidence could be accepted as reliable. He considered the evidence to be confused, and that he could not, on a balance of probability, ascribe what Mr Wilson heard to the central events in question. In our view that was a conclusion which was open to the Lord Ordinary on the evidence. For the reasons we have explained, we consider that the Lord Ordinary's specific reasons for considering the possibility of confusion are not "insupportable" and that there is no merit in the attack upon his assessment of the evidence or the reasons he gave therefore. We agree with counsel for the respondent that we should in this context bear in mind the words of Lord Hoffman in *Piglowska* v *Piglowski* [1999] 1 WLR 1360, at p 1372:

> "The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. … An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."

[34] Even if we had concluded that the Lord Ordinary had erred in his treatment of the evidence of Clifford Wilson, we consider that this reclaiming motion would nevertheless be refused. Even if what Mr Wilson heard could have been attributed to the events in question, we are not persuaded that this would have made any difference to the outcome, standing the Lord Ordinary's acceptance of the evidence, including expert evidence, as to the respondent's condition, and his conclusion as to the reclaimers' awareness of it (none of which was the subject of challenge). As the Lord Ordinary observed the modern law of consent requires that an individual has the capacity to give free agreement. The words

heard by Mr Wilson do not shed any light on that issue, and are not inconsistent with the respondent having been in the condition described by Professor Chick, which, and again ultimately unchallenged in this reclaiming motion, the Lord Ordinary accepted rendered her unable to consent to sexual intercourse.

[35] For these reasons we will refuse the reclaiming motion and adhere to the interlocutor of the Lord Ordinary.