



## OUTER HOUSE, COURT OF SESSION

[2017] CSOH 5

PD2514/13

### OPINION OF LORD ARMSTRONG

In the cause

DC

Pursuer

against

(FIRST) DG and (SECOND) DR

Defenders

Pursuer: Di Rollo QC, Divers; Drummond Miller LLP

First Defender: Bain QC, Thomson; Wallace, Hodge & Co

Second Defender: McIlvride QC, Edward; Thorley Stephenson

17 January 2017

### Introduction

[1] The pursuer is 30 years of age. She claims damages from both defenders on the basis that in the early hours of 2 January 2011, when she was aged 24 years of age, they both committed the common law wrongs of sexual assault and rape against her. Although there was a full police investigation into the events concerned, no criminal prosecution resulted. The defenders each maintain that they did have sexual intercourse with her at that time, but that it was consensual. The issue of *quantum* of damages was agreed amongst the parties. The issues in the case for determination by the court were, firstly, whether, by reason of excessive consumption of alcohol, the pursuer was incapable of consenting at the material time, and secondly, whether each of the defenders had a legitimate belief, whether reasonable or honest, that she was consenting.

[2] In the course of the proof, I heard the evidence of 20 witnesses, over 10 days. Since the matters in issue necessitate a close analysis of what can be said to have happened on the evening in question, I have set out the pertinent aspects of the evidence in some detail.

## The Evidence

### *DC (The pursuer)*

[3] In January 2011, the pursuer lived in the West Lothian area, close to Bathgate. At that time she was 24 years old, and was in full employment. She lived alone with her daughter, who was then 4 years old. Her mother and father lived nearby, at a distance of some 5 minutes travel by car. At the time, her father was seriously ill. He subsequently passed away in April 2011.

[4] In January 2011, the pursuer was maintaining a relationship with the father of her daughter, but only to the limited extent that they remained in touch and that he had contact with the child. The relationship had subsisted from 2004 up till 2009. In January 2011, the pursuer was in a relationship with another man, and had been for some 3 months.

[5] Prior to January 2011, the pursuer drank alcohol only infrequently, normally at home with friends. She rarely went out to drink socially and had done so only twice in the preceding year, once in March and once in April. She did not use recreational drugs. In January 2011 she was not taking prescribed medication. Although she used contraceptive measures with her current partner, none was used during the incident in question.

[6] On the afternoon of Saturday 1 January 2011, the pursuer had been visiting her parents for a family lunch, beginning at about 3.30 pm. She did not eat again until the next day. She had left her parents' home at about 7pm, leaving her daughter with them. She had made arrangements with a friend, Rachel Carrigan, to go out in Bathgate that evening. Rachel Carrigan lived in Bathgate and the intention was that they would spend the evening there. To that end, PC, her brother, collected her at about 8pm and drove her to Bathgate. Her intention was only to meet Rachel. While waiting for Rachel to make herself ready, the pursuer had about half a can of beer whilst sitting in her brother's car. She was wearing a black dress, black jacket, black tights and red shoes, and carrying a black handbag. The weather was cold and there was snow on the ground. She described the temperature as freezing.

[7] When Rachel Carrigan was ready, they set off, at about 8.45pm, and walked to The James Young, a bar in Bathgate. While there, the pursuer had a single measure of Jack Daniels with coke, followed by a further double measure with coke. Ms Carrigan received a text message suggesting that they meet others at The Glenmavis Tavern, otherwise known as Smiths, another bar in Bathgate.

[8] They went there and met a number of friends from school. On arrival at The Glenmavis Tavern, the pursuer had a single measure of Jack Daniels with coke and then moved through to the back bar. The second defender was also there. He was someone whom she had known from school but whom she had not seen for 2 years or so. She had a recollection of him placing two drinks in front of her on the bar. She remembered taking one, although she was unsure whether she in fact drank it.

[9] She was unable to remember anything else of significance from that time until the following morning. Although in fact she left The Glenmavis Tavern in due course, and went on to a nightclub called Chalmers, she had no recollection of that.

[10] Her next recollection was the following morning when she awoke to find herself in a house which she did not recognise. She was naked and could not find her clothes. She did not know where she was. She recognised nothing of the view from the windows. She had a telephone conversation with her mother and with her brother, but was unable to tell them where she was.

When she had awoken in the strange bedroom, she was in a lot of pain. Her thighs were sore, as was her right hand side generally. She felt sore internally, in her vagina. At that time, she did not know what had happened. Although she did eventually find some of her clothing, she was unable to find her pants.

[11] Before eventually finding some of her own clothes, she found and put on a pair of jeans and white shirt and went outside in search of help. She was unsuccessful, and returned to the house. At some time after 9.15am, she saw two women outside the house on the pavement and asked them to confirm the address. She was in Greig Crescent, Armadale. The last time she had been in Armadale had been more than a year before.

[12] She gave her brother the address, by phone, and he drove to the house. When he was there, she telephoned the police who advised her either to remain where she was or to go home where they would make contact with her. She chose the second option.

[13] On the way home, when speaking on the phone to Rachel Carrigan, who had been with the pursuer in Chalmers nightclub, the pursuer said that she was thinking that something terrible had happened. Rachel Carrigan told her, in answer to a question about what had happened, that she had left the nightclub with two men named D. Those men were the defenders. Although she knew the second defender, she had no recollection of meeting the first defender, and to her knowledge had never met him before.

[14] In the days that followed, she made a number of statements to the police: two on 2 January 2011, a cognitive interview on 5 January 2011, and two further statements on 10 January and 21 January 2011. She confirmed that she had told the police the truth, but for details as to whether she was then currently in a relationship, and when she had last had sexual intercourse. She had been reluctant to reveal these details for fear that it might affect her relationship with her daughter and her former partner.

[15] On 17 January 2011, it was confirmed to the pursuer that DNA evidence had been obtained from vaginal swabs taken from her. Until that point, she had not known with certainty whether sexual intercourse had taken place.

[16] In the following days, she did her best to resume her normal life by going back to work, but found it impossible, given the police enquiry. After a week or so, she required to take time off from work and in fact did not return to work until May 2011, when she did so only on a part-time basis. In July 2011, she was told of the Crown Office decision not to proceed with a prosecution.

[17] Whereas, prior to these events, the pursuer had functioned normally and had enjoyed life, her life had changed following the decision not to proceed with a prosecution. When, in July 2011, she was informed by the Crown Office that there was to be no prosecution of the defenders, she had felt devastated, upset and confused. She found the decision difficult to understand and had felt that she had not been believed. She felt that her life had been destroyed by something which had happened although, because of her lack of memory, she was not fully aware of what it was that had caused that effect. Although she had previously been physically fit, she subsequently had problems with weight gain and loss. She was keenly aware of the high profile investigation being conducted by the police and the fact that everyone seemed to be talking about it. There had been significant comment in the media, including adverse comments and, at least one threat made against her, in social media. She had found it difficult to trust anyone and had become unsociable. She preferred her own company to that of others. Her dress sense was affected. She chose to wear

clothing which covered up her appearance. Her mood was low. She had never been back to Armadale, and although she visited parts of the periphery of Bathgate she would not venture into the centre of it. She had experienced suicidal thoughts several times. In September 2011, following her father's death, she had moved back to live with her mother. She had experienced depersonalisation, by which nothing of significance appeared or felt to be real, particularly when she found herself to be in a busy place or under stress. She felt that she had been avoiding challenges in her life which really should have been part of it. It had taken her until 2016 before she felt comfortable forming an intimate relationship again.

[18] She had subsequently been granted an award under the Criminal Injuries Compensation Scheme.

[19] The events of the evening in question, in and around The Glenmavis Tavern and Chalmers nightclub, had been captured on CCTV. The critical footage, which extended from about 23:00 on Saturday 1 January 2011 to about 02:30 on Sunday 2 January 2011, showed the pursuer and a number of her friends together with the defenders, and their friends, drinking and generally behaving in an inebriated fashion. When shown footage of her at Chalmers nightclub, the pursuer identified herself as being unsteady on her feet, attempting to open a door by pulling it when in fact it was necessary to push it, by stumbling, repeatedly dropping possessions, and not wearing her shoes. She described herself, as depicted in the CCTV footage, as having trouble balancing.

[20] She maintained emphatically that she would never voluntarily have had sexual intercourse with two men simultaneously, and that she had never ever done that before. As she put it, she would never ever agree to do that.

[21] In cross-examination she confirmed that she, Rachel Carrigan, and others present in the course of the evening, including the second defender, had all known each other because they had attended the same secondary school together.

[22] She confirmed that on the evening of 1 January 2011, she could recall consuming half a can of beer, one single measure of Jack Daniels with coke, a further double measure, and another single measure, before moving from the front bar of The Glenmavis Tavern to the rear bar. She had spoken to the second defender whilst in the rear bar. She could recall standing at the bar, talking to the second defender, with two drinks in front of her. She recalled taking one drink into her hand, but had no recollection of actually consuming it.

[23] She accepted that CCTV footage of the rear bar of The Glenmavis Tavern appeared to show her standing close to the second defender and being apparently happy in his company. They appeared to be getting on well. There were others in the company. Subsequently, the group was joined by the first defender. Although these events were depicted in the CCTV footage, the pursuer maintained that she had no actual recollection of them.

[24] She agreed that the CCTV footage, from a later stage in the evening, showed her with a glass in her hand but did not depict the second defender giving her anything to drink. She agreed that, at that stage, she appeared to be happy and to be enjoying herself. She agreed that the footage also depicted her standing at the bar and taking her purse from her handbag. Although, at that time, there appeared to be a drink on the bar in front of her, she was unable to say what it had been. She agreed that she was depicted as standing close to the second defender and smiling.

[25] When it was suggested to her that there might be evidence to the effect that she had been acting in a flirtatious and provocative manner with the second defender in the rear bar of The

Glenmavis Tavern, she conceded that if there was such other evidence, then that could have been the case, although she maintained that she, herself, was unable to confirm it. She accepted that the CCTV footage depicted her using her phone in the rear bar at a later stage, and that the footage was consistent with available telephone records which indicated an exchange of text messages between her and her brother at about that time. She accepted that at that time, the CCTV footage appeared to show her bending down to take the phone from her handbag, and being able to locate the phone, pick it up and use it. She accepted that CCTV footage depicted her embracing the second defender on the street outside The Glenmavis Tavern, apparently kissing him, but maintained that she had no recollection of that. The CCTV footage indicated that she had not been wearing her shoes at that time. She accepted that the CCTV footage showed that she had moved from the road onto the pavement in order to avoid oncoming traffic. Subsequent video footage showed her leaving The Glenmavis Tavern with her shoes in her hand, together with Rachel Carrigan and Carrie-Anne Tugman, the three of them thereafter making their way to Chalmers nightclub. CCTV footage depicting the three women *en route*, showed the pursuer wearing her shoes before arriving at Chalmers nightclub. The pursuer accepted that CCTV footage of the entrance foyer of Chalmers nightclub depicted her entering, opening her purse and retrieving money and an ID card, and speaking to reception staff.

[26] She also accepted that by the time she arrived at Chalmers nightclub, she had been drinking for some four hours, and confirmed that that was a sufficient period for her to become drunk. She accepted that she was not a regular drinker and that she had been feeling drunk.

[27] She accepted that CCTV footage depicted her leaving Chalmers nightclub, walking without her shoes on, holding her handbag and her phone, in the company of the second defender, followed by Rachel Carrigan and the first defender, all four apparently in conversation. The pursuer maintained that the CCTV footage depicted her as being unsteady on her feet at that time.

[28] She accepted that, in the course of the evening, by acting towards the second defender as she had, in effect she had been making it clear to him that she was attracted to him, and that the CCTV footage which depicted them in close proximity, laughing and joking together, was consistent with that.

[29] She accepted that her loss of recollection might have been due to the amount of alcohol consumed by her. She agreed that because of her lack of recollection she could not dispute that she may have been disinhibited by the effect of the alcohol, but maintained strongly that she would not have consented to have sex with the two defenders. She conceded that because of her lack of recollection, she was unable to dispute the accounts of the evening by others, or that, in particular, she had engaged consensually in sexual intercourse with both defenders, but maintained that she knew she would never have done something like that.

[30] On re-examination, she maintained she would not have done what was suggested on behalf of the defenders. She maintained that she knew her own character, in that regard, and confirmed that she had been in a relationship at the time. She had never previously been unfaithful to anyone in the past.

### **Catherine Peden**

[31] Ms Peden had been working on the morning of Sunday 2 January 2011 together with Sharon Clouston, her colleague. The two women were care assistants acting for the local authority,

and were making home visits to the sick and elderly in Armadale. She described the weather as freezing cold.

[32] The two women had come across a young girl outside a house in Greig Crescent, Armadale. The young girl had been on the phone, but had a cigarette in her hand and asked for a light. She had been wearing black jeans and a white blouse which she was holding shut. She was wearing only one boot. She was wearing nothing on the other foot.

[33] The young girl had asked who lived in the flat that she had come from. She had wanted to know the address in order to give directions to her brother, who was on the phone. She had said that she did not understand what had happened to her. The two women gave the young girl directions which she relayed over the phone to her brother.

[34] Ms Peden formed the impression that there was something wrong with the young girl. She appeared to be confused. She did not appear as if she had a hangover, but rather, in her assessment, appeared as though she ought to have been seen by a doctor.

## PC

[35] PC is the pursuer's brother. He had taken her into Bathgate, by car, on the evening of Saturday 1 January 2011, the arrangement being that, at the end of her evening, she would phone him and that he would collect her and drive her home.

[36] While the pursuer was waiting for Rachel Carrigan, he had bought a can of Tennent's lager, part of which the pursuer had consumed.

[37] Later, as the evening wore on, PC had become increasingly concerned. He had tried on a number of occasions to make telephone contact with the pursuer but she had never answered. He had become worried. By about 2am on the morning of Sunday 2 January 2011, he was even more concerned. He had not gone to bed that night, but rather had been driving between his own home and Armadale and Bathgate looking for the pursuer, as she had not contacted him by phone as previously arranged.

[38] At about 9.00 am on the Sunday morning, he had been in the pursuer's home together with his mother, who had been speaking to the pursuer on the phone. When her mother asked the pursuer where she was, the pursuer had been adamant that she was in her own bed, which was patently not the case. PC understood that when the pursuer had got up, still on the phone, she had then realised that she was not in her own home. While on the phone to him, she had been asking someone where she was, and had subsequently confirmed that she was at an address in Armadale. He drove straight there, and arrived within 10 minutes. On his arrival, the pursuer was standing at the front door of a ground floor flat wearing black jeans and a white blouse but nothing else. She appeared to him to be confused. She did not know what had happened to her, or how she had come to be in the flat. The flat was exceedingly untidy. They had remained there for some 10 to 15 minutes in the course of which they had searched for her clothes. He had told the pursuer that if she felt something was not right then she ought to phone the police, and she had then done that. The police had advised her to go home, and accordingly he took her there, where her mother was waiting with the pursuer's young daughter.

[39] From the time when she arrived at her own home, the pursuer hardly spoke. She had wanted to have a shower but her mother had advised her not to. The pursuer changed out of the

clothes she had been wearing, put on a dressing gown and sat on the sofa with the hood of the dressing gown over her head, saying nothing.

### **Mrs DC**

[40] Mrs DC is the pursuer's mother. She confirmed that on 1 January 2011 it had been arranged that the pursuer would go out for the evening and that she would babysit her granddaughter in the pursuer's home.

[41] She confirmed that, at that time, the pursuer had not gone out much in the evenings, but that, when she did, it was the custom that she would babysit. On the evening in question, it had been agreed that the pursuer would return at 1am, in order that Mrs DC could return to her own home to be with her husband who was then very ill.

[42] In the course of the evening she had no contact with the pursuer. She tried to contact her by telephone on a number of occasions but there had been no answer. By about 2am she had become worried. She contacted her son PC, who came over to the pursuer's home two or three times in the course of the night. He had sat up with her, and had also gone looking for the pursuer.

[43] She did have contact with the pursuer at about 9 o'clock in the morning, by telephone. Nothing like this had ever happened before. When asked where she was, the pursuer had said that she was in her own home which, of course, Mrs DC knew not to be the case. She handed the phone to her son and he subsequently went out to find her.

[44] When she saw the pursuer next, it was about an hour later, when she arrived at her home. The clothes the pursuer was wearing were not her own, and she was crying and upset. She went straight to her room and did not speak to anyone in the house. She changed her clothes, had nothing to eat or drink that morning, and did not bathe or have a shower. The police duly arrived.

[45] She thought that the effect of the incident had caused the pursuer to become more withdrawn. She did not talk to people as she formerly had, and generally wanted simply to stay at home, whereas before she had a bubbly personality. She was not the smiling, happy young woman whom she had previously been. Sometime she would cry, apparently for no reason. She tended not to go out anymore.

[46] In cross-examination, under reference to her previous police statement and to the relevant telephone records, she accepted that at about 1am, she had phoned the pursuer's mobile telephone five times or so, and that on three or four occasions it had appeared that someone had simply hung up without answering. She also confirmed that at 2am she had texted the pursuer, asking if she was alright, but had received no answer, despite the fact that the text message had apparently been read.

### **Rachel Carrigan or Rankin**

[47] Mrs Rankin, known as Rachel Carrigan in 2011, had been at the same secondary school as the pursuer and the two women had given birth to daughters at approximately the same time. They had seen each other from time to time as a result, but only very occasionally had gone out with each other for the evening.

[48] It had been arranged that on Saturday 1 January 2011 they would do that, as they had not seen each other for some time. Mrs Rankin had arranged to see some other friends and it had occurred to her that the pursuer might like to join them.

[49] They had gone to the The James Young, where each had bought a round of drinks, the pursuer having Jack Daniels with coke and Mrs Rankin having a gin and tonic. They had stayed in the pub for about 1½ hours, and thereafter had proceeded to The Glenmavis Tavern where Mrs Rankin had arranged to meet two other friends Carrie-Anne Tugman and Cheryl Paton. When they arrived it was apparent that others from the school, including the second defender, were also present. On arrival, Mrs Rankin bought the pursuer another Jack Daniels with coke. She estimated that they had remained in the Glenmavis Tavern for about 2 hours. While there, she had seen the pursuer with the second defender at the bar, where it seemed to her that they were drinking, chatting and flirting with each other. They appeared to be standing close to one another. She thought she saw her kiss him at one point.

[50] Mrs Rankin, Carrie-Anne Tugman and the pursuer left The Glenmavis Tavern and went, together, to Chalmers nightclub. It had appeared to Mrs Rankin that the walk to the nightclub was taking longer than would normally have been the case had they had been sober. In particular, the pursuer had forgotten something, and had to go back to collect it. She had been stopping and starting. She stopped to have a cigarette on the way, and was finding it difficult to walk, either because of her high heeled shoes or because she was under the influence of alcohol. Mrs Rankin thought that there had been insufficient time for any of them to become drunk, but the pursuer appeared to her to be more drunk than Mrs Rankin was. She had thought that the pursuer could not be as drunk as she was apparently seeming to be.

[51] Once in Chalmers nightclub, Mrs Rankin and the pursuer were in each other's company for only moments at a time. Mrs Rankin had been at the bar and had been dancing. She had been in a group of other people which meant that, consequently, she did not always know where the pursuer was. On arrival, she and the pursuer had spent some time in the ladies' toilet, having a chat and adjusting makeup. At that time the pursuer's condition had appeared to be better than when she had been *en route*. However it was plain that she had had a drink, and was "not completely *compos mentis*".

[52] Mrs Rankin accepted that the pursuer probably had more to drink whilst in Chalmers Nightclub. At one point, she noticed that the pursuer's tights had become ripped and had felt embarrassed for her, as it appeared to her that the pursuer was unaware of the fact. In the course of the evening, Mrs Rankin had told the pursuer that the second defender had a girlfriend, and that it was probably not a good idea to become involved with him romantically.

[53] Whilst in the nightclub, Mrs Rankin had been speaking to the first defender throughout the evening. She had not met him before, although she knew who he was. Their conversations comprised only of small talk. She thought that he was interested in her romantically, but although she thought he was an attractive man she had not wanted to act upon it. She had no intention of becoming involved with anyone that night. She agreed that in the course of the evening the first defender had been "chatting her up".

[54] When leaving Chalmers nightclub, it had become apparent that the pursuer had lost her purse and that she had also forgotten to take her shoes and jacket. Mrs Rankin had gone back to collect these items. The pursuer had appeared to her to be quite drunk at that time. In due course a steward had found the purse and handed it to the pursuer.

[55] It took some time for Mrs Rankin and the pursuer to leave Chalmers nightclub. The pursuer and the second defender left first, and Mrs Rankin followed behind them with the first

defender. Although Mrs Rankin had been shouting to the pursuer to catch her attention, neither she nor the second defender had acknowledged her. As they were setting off, it was her impression that although the pursuer could walk on her own to some extent, the second defender would have required to have helped her. At one stage the second defender had been holding the pursuer in order to help her walk.

[56] Mrs Rankin had been intending to return to her mother's house which was approximately 10 minutes from the nightclub. There was a taxi rank near to her mother's house, approximately 5 or 10 minutes from the nightclub. On the way there, she had told the first defender that she was going home since her mother was babysitting for her daughter. He had suggested that either he come too, or that they continue themselves, as a couple, to go on somewhere else. She had declined, indicating that she was definitely going home.

[57] Afterwards, a taxi was hailed, and the pursuer got in the back. She thought the first defender sat with her in the back of the taxi, the second defender sitting in the front, although she was not entirely certain – their positions may have been the reverse of that. Mrs Rankin had said to the second defender something along the lines that he should look after the pursuer, make sure that she was alright, and make sure that she got home. She was unsure whether the second defender had responded to her. The pursuer had told Mrs Rankin that she was fine and that she was going back to her mother, and in that context it had not seemed to Mrs Rankin that there was a potentially dangerous situation. She had trusted the second defender to take care of the pursuer.

[58] She had received a telephone call from the pursuer the next morning, in the course of which, as the first thing that she had said, the pursuer had asked what had happened the night before. The pursuer had been trying to find out where she had been and how she had got there. She did not know who she had been with. She had asked how the evening had ended.

[59] When shown CCTV footage Mrs Rankin identified herself and the pursuer leaving The Glenmavis Tavern with Carrie-Anne Tugman, but the pursuer then re-entering it, possibly to search for her jacket. Mrs Rankin had gone in, following her, and subsequently had re-emerged with the pursuer.

[60] When shown footage of the group arriving at Chalmers nightclub, she described herself as supporting the pursuer by taking her arm in order to take her weight.

[61] The CCTV footage of the group leaving the nightclub showed Mrs Rankin leaving, holding the pursuer's shoes and trying at one stage to help the pursuer put on her jacket. The CCTV footage also showed a degree of general coming and going outside the nightclub before the group eventually moved off.

[62] She adopted a police statement which she had given, in which she referred to the pursuer as being quite drunk but still able to dance.

[63] In cross-examination, she accepted that she had two to three glasses of sparkling wine in the course of the afternoon, a double measure gin and tonic and a glass of white wine in The James Young, and that, in The Glenmavis Tavern, the pursuer had bought her a glass of white wine. In The Glenmavis Tavern, she had not been in the pursuer's company for much of the time since the pursuer was mostly with the second defender. She confirmed that she was unable to say how much the pursuer had to drink in the course of the evening. She confirmed that both she and Carrie-Anne Tugman had warned the pursuer against involvement with the second defender on

the basis that he had a girlfriend, and had somewhat of a reputation with women in Bathgate, but that nevertheless the pursuer had remained in his company.

[64] When viewing the CCTV footage outside The Glenmavis Tavern, she confirmed that it depicted the pursuer with the second defender embracing in the middle of the road, following which both had moved to the pavement in order to avoid traffic. She confirmed that the CCTV footage appeared to show the pursuer and the second defender comfortable in each other's company, consistent with what she, herself, had seen inside the bar.

[65] She confirmed that, when leaving The Glenmavis Tavern, the fact that the pursuer had difficulty walking could have been attributed to her high heels, which she had described as being "awfully high". She confirmed that when the first defender had been "chatting her up", he had asked her to accompany him to a flat in Armadale.

[66] When shown the CCTV footage which depicted the pursuer's movements in and around The Glenmavis Tavern and Chalmers nightclub, she agreed that it did not depict any instance of the second defender in fact holding the pursuer up, or otherwise assisting her in walking. She maintained, however, that the footage, at one stage, depicted the pursuer as though she looked unsure, unsteady, and not sure what she was doing, and she pointed out that the CCTV footage did not depict the whole journey between leaving the nightclub and finding the taxi.

[67] She accepted that when leaving the nightclub, neither the pursuer nor she had been wearing shoes, and that each had left the nightclub with each other's shoes in their hands, subsequently exchanging them.

[68] She confirmed that after having left the nightclub, she had the impression that the pursuer and the second defender both appeared to be dismissive towards her. That was unlike the pursuer. Such a thing had never happened before.

[69] The pursuer had made it plain to her that she was going home to her mother. Mrs Rankin had asked the pursuer what she was doing, and if she knew what she was doing, but although the pursuer had said she was fine, Mrs Rankin had not been convinced of that in fact being the case. She described usage of the word "fine" in that context as simply a common standard response, just something which people said unthinkingly.

[70] She accepted that she had become annoyed in the course of the events of the evening, and that she had had a heated discussion with Carrie-Anne Tugman and had apologised to her the next morning, explaining that she had felt that the group were not behaving well that night. She accepted that no one was perfect, especially where excess of alcohol was involved. Despite what she had described as flirting and kissing in the street and in the bar, she did not accept it as being obvious that the pursuer was sexually attracted to the second defender and that she had wanted to go to Armadale with him for the purpose of having sex. She conceded that the earlier conduct could be regarded as a possible indicator of future intention, but refuted the contention that the pursuer had voluntarily set off in the taxi with the intention of going to Armadale, on the basis that she, the pursuer, had been insistent that she was going to go home to her mother.

[71] The pursuer, while at Chalmers nightclub, had been talking to the second defender at tables or at the bar. She accepted that when not dancing in the nightclub, the pursuer had spent her time with the second defender, but could not say for how long or how often. She did accept that the person with whom the pursuer had spent most time while in The Glenmavis Tavern was the second defender, but she was less sure about the position in Chalmers nightclub.

## **Professor Anthony Busuttil**

[72] Professor Busuttil, emeritus professor of forensic medicine, explained that he had examined the pursuer on 2 January 2011, at 18:00. He spoke to his report, dated 6 January 2011.

[73] On examining the pursuer, he noted tenderness over the right sacral area and on rotation of the right hip; tenderness on touching the labia, but with no redness; that the pursuer had reported soreness when passing urine; and that vaginal swabs and blood samples for DNA testing and toxicology had been taken. The morning-after pill had been dispensed to the pursuer, and she was given advice in relation to seeking assistance about sexually transmitted diseases.

[74] He confirmed his experience that in 50% of cases of complaints of rape, on examination there was no sign of physical injury, and that in only 9% - 10% of such cases was there any injury at all to the genital area.

[75] He confirmed that the effect of alcohol was to render a person more clumsy and accident prone, and less risk adverse. Having taken alcohol, a person would be expected to lose mental inhibitions and the tone of judgment would be reduced.

[76] He confirmed that, when he examined her, the pursuer had no recent injuries and, in particular, no injuries to the neck, face, back, breast area or abdomen.

## **Miss Gail McGregor**

[77] On the night of Saturday 1 January 2011, Ms McGregor had been working as part of the security staff at Chalmers nightclub, Bathgate. At that time, she had been working at the nightclub for about a year, and had some 15 years' prior experience of working in the security industry. She explained that the public entrance to the nightclub was at the side of the building and that what appeared to be a front entrance, of what had formerly been a church, was used by staff and not by the public who had no access to the building by that route. On the night in question she had begun work at 10.30pm and had stopped at 3.30am. She had been on duty with Michael Parkes, another security guard. Mr Parkes had been monitoring the public entrance to the reception foyer. Her role had been to monitor the nightclub generally.

[78] She confirmed that in the course of the evening she had received a call, via her earpiece, in relation to a purse which had been found. She went to the reception desk in order to collect it, looked inside it to find the identification of the owner, and was told that the woman had just left the nightclub. Ms McGregor went out to find her but was unable to do so. She had seen the woman in the nightclub earlier.

[79] Subsequently she saw her again at the front door of the building. At that time the woman was leaning against the door, and was not in control of herself. Her eyes were rolling in her head, she could not stand up straight, and could not speak to Ms McGregor properly. Ms McGregor's assessment of her was that she was not *compos mentis*. It was apparent from the CCTV footage that the woman Ms McGregor was describing was the pursuer. She had been aware of two men standing in close proximity, one of whom could be seen from the CCTV footage to be the second defender. He had said to Ms McGregor that he was going to take the pursuer away with him, and she had replied by saying that what the pursuer really needed was an ambulance. She was not making sense and was not in control of herself. The second defender had 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.

On that basis, Ms McGregor passed the pursuer to the second defender, and the couple appeared to move off to the left, as if to find a taxi.

[80] Mr Parkes had been outside, nearby, when this was going on. CCTV footage showed Mr Parkes speaking to the pursuer outside the front doors at about 2.25am. At that time the pursuer had her purse in her hand. Subsequently, the CCTV footage depicted Ms McGregor emerging from the front doors of the nightclub and walking along the front of the building in order to watch the pursuer and the second defender walking away, as she put it, to make sure that she was going to be alright and that the two men, the defenders, would look after her. In Ms McGregor's view she had needed to be looked after, and was in no fit state for anything other than to go home.

[81] In cross-examination, she confirmed that she had spoken to the pursuer earlier in the evening in the ladies toilets, when the pursuer had been chatty. It had been clear to Ms McGregor that the pursuer had been drinking, but, at that time, she had been able to hold a conversation.

[82] She confirmed that when she had seen the pursuer leaning against the front doors, Mr Parkes had been standing next to her. Ms McGregor had held up the pursuer by putting her hands under her arms. Mr Parkes had been behind her at that time. Ms McGregor had spoken to the pursuer and had asked her what she had had to drink, and whether she had taken drugs, but had received no coherent reply. She had been concerned about the pursuer. At that time Mr Parkes had been talking to the second defender. A short time later, the second defender had urged the pursuer to move on, and had given the impression of wishing to take her away with him. Ms McGregor had been really worried about the pursuer who, in her opinion needed an ambulance, and she had said that. She had given advice to the second defender, to the effect that if the pursuer became unconscious he should phone 999.

[83] When shown the relevant CCTV footage she confirmed that the whole incident which took place at and around the front doors of the nightclub involving herself, Mr Parkes, the pursuer, the second defender, and the other man, had taken something of the order of only 6 minutes. She accepted that a statement given to the police by Mr Parkes did not include some of the details of the incident as described by her. In particular, she accepted that his statement did not include any reference to her having been holding the pursuer up, speaking to the second defender, saying in particular that the pursuer needed an ambulance, or giving the second defender advice in the event of the pursuer becoming unconscious.

[84] In relation to her police statement, she insisted however that, when giving her own statement, she had told the police the truth, and had not been exaggerating in her description of the pursuer when she was at the front doors. She confirmed her description of the pursuer as being "like a jelly" when she was trying to stand, and of her giving the impression of moving in and out of self-control. She accepted that she had not phoned an ambulance or the police, but explained that she was satisfied that she had fulfilled her duty of care to the pursuer. It had been her duty to see the pursuer off the premises. She had been reassured by the fact that the pursuer was leaving in company. She had been concerned about the pursuer and her condition, not least because, at around that time, there had been a number of incidents in the area of "spiked" drinks, adulterated with a drug which had an effect similar to that of Rohypnol.

[85] Shortly after these events, in about mid-2011, she had stopped working at Chalmers nightclub. She accepted that there had been a disagreement between herself and her employers,

partly relating to her understanding that, in the months following the events of 1 and 2 January 2011, the first defender had been allowed back into the nightclub. She also accepted that she had been quoted in the press, in particular in the Daily Record, and that her photograph had also been published as part of the newspaper article. She maintained, however, that the text of the printed article did not reflect her own words, the sense of which she said had been altered. She had consented to speak to a reporter only because she had been contacted by the press repeatedly. She accepted that there were differences in the detail of her police statement compared to what had been printed in the Daily Record. She denied some of the quotations which had been printed in the Daily Record and which were said to be attributed to her. Although there were differences between the text of the printed article and her evidence in court, she did not accept that, in the generality, the tenor of the article was greatly different from the content of her police statement which she adopted. She maintained throughout that her description of the events in which she had been involved was not an exaggerated one.

### **Gavin Paterson**

[86] On the evening of 1 January 2011, Mr Paterson had been employed at Chalmers nightclub as a member of the bar staff. He had begun work that night at 7pm and had finished at 3.30am or 4am on the following morning. At about 2am, he had been present in the reception foyer at the side entrance of the nightclub. When shown the relevant CCTV footage, he was able to identify himself and to confirm that he had spoken to the pursuer at about 2.10am because she had seemed to be distressed. He had asked her if she was alright, and she had replied that she was. He confirmed that subsequently he had seen her with her purse. When he had seen her, she appeared to be becoming more and more drunk and had started crying.

[87] He adopted the terms of a statement, given by him to the police, which included his description of the pursuer as someone who, had she not been leaving anyway, would have been asked to leave the nightclub because she was too drunk, that she had been falling around, and appeared to be getting more drunk in the fresh air outside. She had never actually fallen over, but had been stumbling, and only stayed upright because she had stumbled against a wall. He also confirmed that he had described the pursuer as looking as if she was falling asleep. He confirmed that he had asked the pursuer if she was alright on two occasions. He accepted that he had seen the pursuer only for a matter of minutes, but maintained that she had seemed to him to be becoming more and more drunk.

### **Brian Hutton**

[88] Mr Hutton is the brother of Dee Hutton, who, as at January 2011 was the occupier of the ground floor flat at 57 Greig Crescent, Armadale. Over the festive period she had been away from home and Mr Hutton had been using the flat. During that period, he was joined there, on a fairly regular basis, by a female acquaintance with whom he was having a sexual relationship.

[89] The ground floor flat contained two bedrooms, both looking onto the street. One, a child's room was to the right hand side, as one entered the front door. The other, an adult's bedroom, was to the left of the front door.

[90] On the morning of 2 January 2011, having been out the evening before, and having spent the night at his mother's house, he returned to the flat at Greig Crescent, at about 10am, to find the

police in attendance. They had asked him who had been in the flat overnight and he had replied that he had given the first defender the key to the flat in the course of the previous evening, although he explained that he had been drinking throughout the previous day, 1 January, and could not be 100% sure.

[91] In all, he had given three statements to the police. In the third, he had stated that, on the morning of 1 January 2011, he had sexual intercourse with his female acquaintance in both bedrooms in the flat. He had co-operated with the police. The police had taken bed clothes from the flat for examination.

[92] He confirmed that it had been the first defender to whom he had given the key to the flat. Under reference to his police statements, he confirmed that on the evening of 1 January 2011 he had been at Chalmers nightclub, and, at about 1am, had met the first defender who had asked for the key to Mr Hutton's sister's flat. Mr Hutton had given him the key. His impression was that there were five or six men looking for a party, but he accepted that the available photographs of the flat showed no evidence of any drink having been taken. It was possible that it might have been that it was in The Glenmavis Tavern that he had given the first defender the key to the flat. It had been on the basis that the first defender had nowhere to stay that night.

[93] On the morning of 2 January 2011, after having spoken to the police at the flat, Mr Hutton had telephoned the second defender and asked him who had been back at the flat. The second defender had replied that he and first defender had been there.

[94] In cross-examination, he confirmed that on 1 January 2011 he had been drinking throughout the day from about 1pm. He had been in The Glenmavis Tavern at about 9pm, by which time he estimated he may have consumed ten or more measures of vodka and coke. Notwithstanding that, his impression of the first and second defenders, whom he met there, was that they were sober. He had left The Glenmavis Tavern at about midnight in order to go to Chalmers nightclub. He described himself as being, by that time, very drunk. He confirmed that whilst in The Glenmavis Tavern, he had been aware of the second defender talking to a woman, who matched the description of the pursuer, for a lengthy period. They had been standing at the bar, drinking together.

### **Anne Marie MacKay**

[95] Ms MacKay had been in The Glenmavis Tavern on the evening of 1 January 2011, having arrived there at about 8.30 - 9pm. She had not previously been drinking that day. While buying a first round of drinks, she was aware of the pursuer standing next to her at the bar. Although she had never seen the pursuer in that bar before, she knew her as they were both employed at the same workplace.

[96] As Ms MacKay was speaking to the barmaid, the pursuer fell against her. Ms MacKay was surprised and asked her if she was alright. The pursuer had said that she was fine and that she was having a night out.

[97] Sometime later, possibly 30 minutes - 1 hour later, the pursuer passed the table at which Ms MacKay had been sitting. The pursuer was making her way from the rear bar to the front bar. At that time, the pursuer appeared to Ms MacKay to be quite drunk. She described the pursuer's words as being "quite slurry", and had thought that she was not making much sense. The pursuer's eyes appeared to be glazed over, and the words she was using did not make sense.

[98] Having been in The Glenmavis Tavern until about 00:30am, Ms MacKay and some friends set off for Chalmers nightclub, but, while on the way there, decided to change their minds, retraced their steps, and walked past The Glenmavis Tavern. At that point, Ms MacKay had seen the pursuer whom she described as staggering about. She was wearing only one shoe. Ms MacKay had again asked if she was alright, and where her other shoe was. The pursuer had replied that she was trying to find her shoe. Ms MacKay had noticed another two women nearby but was not sure if they were with the pursuer. Her assessment of the pursuer was that she did not look in good condition, and had appeared to be very drunk. She had been concerned for her.

[99] She confirmed that when she had encountered the pursuer at the bar in The Glenmavis Tavern, the pursuer had been wearing high heels, but she did not consider that to be a factor in the pursuer falling into her. The pursuer had simply been standing at the time, rather than walking. She also confirmed that, at the time when the pursuer had passed Ms MacKay's table, she had been saying something about a footballer and had pointed to the bar. Ms MacKay accepted that, to that extent, she had got the gist of what the pursuer had been saying. She maintained, however, that her impression of the pursuer had been that she was very drunk, and that when she had seen the pursuer later, between midnight and 1am, the pursuer had appeared still to be very drunk. She accepted that she had never before seen the pursuer very drunk, but maintained that she had been able to judge how drunk she was by reference to her overall ability to carry on a conversation and to walk. She had told the police, when asked, that her assessment of the measure of the pursuer's drunkenness was "8 out of 10".

### **DS Rebecca Gregson**

[100] DS Gregson had been the reporting officer in the enquiry into the pursuer's complaint in relation to the events of 1 and 2 January 2011. She had experience of rape investigations, and had worked in the Rape Investigation Unit of the Criminal Investigation Department. She was a trained sexual offences liaison officer, and had been since 2005.

[101] On 2 January 2011, at about 2pm, she had been with the pursuer at the time of her forensic medical examination. At that stage, the pursuer had not known whether sexual intercourse had taken place or not, although she had thought that something may have happened.

[102] She had been involved in taking statements from the pursuer and had also participated in a cognitive interview designed to assist the pursuer's memory recall. The pursuer had reported a gap in her memory from the time when she had been in The Glenmavis Tavern until waking up in the flat at Greig Crescent on the morning of 2 January 2011.

[103] The pursuer had confirmed to her that she had undergone surgery to her breasts in mid-2010, that after the operation she had not suffered any pain, but that after 2 January 2011 she had been feeling painful twinges in her breasts which she had never experienced before. The pursuer had complained that the scars around her breasts had felt tender.

[104] Following the taking of intimate swabs, a positive DNA result had confirmed the presence of the first defender's semen. The pursuer had been told of that on 17 January 2011, but had confirmed that, at that time, she did not know who he was.

[105] When shown relevant CCTV footage, she confirmed that a figure, matching the description of the second defender, could be seen walking in the snow at 3.22 am on 2 January 2011, moving in the direction from Armadale to Bathgate.

[106] She also confirmed that, in the period between 4.15 and about 5 am, a person, matching the description of the first defender, could be seen walking in the same direction, from Armadale to Bathgate, as the second defender had been depicted, and thereafter making his way through South Bridge Street, Bathgate and to Hopetoun Street, in the vicinity of The James Young, where he was seen to enter a car and drive away. The car had been identified as the car in which the first defender had arrived, earlier the previous evening. The car had moved away, out of Bathgate, heading west. DS Gregson was satisfied that the images, apparently depicting the first defender, indicated a continuous journey by him.

[107] She confirmed that both the first and second defenders had been interviewed initially but that, on legal advice, they had each made no comment to any questions asked. Both had been subsequently released. Both had provided samples for DNA analysis. The first defender's positive DNA match had provided a sufficiency of evidence to justify him being charged with rape. He had been charged on 17 January 2011. In relation to the second defender, no DNA match was found. A report had been prepared and provided to the Crown Office. Ultimately, the decision was taken that there would be no proceedings in relation to the second defender, who subsequently gave a statement as a witness. In the course of that statement, the second defender had confirmed that he had sexual intercourse with the pursuer in the early hours of 2 January 2011.

[108] A urine sample had been taken from the pursuer for the purpose of testing for alcohol, and subsequently a back calculation had been carried out. The examination of hair samples taken from the pursuer did not disclose ingestion of anything other than alcohol.

[109] DS Gregson had also taken a statement from Mr Parkes, the door steward at Chalmers nightclub. In the course of that statement, Mr Parkes had said that he had come across the pursuer outside the nightclub at the front doors. She had been shivering and was without shoes. She had told him that she wanted to go home. He had described her in his statement, as "looking delirious", "awfully withdrawn", and not making sense. She had not been particularly concerned about being reunited with her lost purse. He had also stated that when Gail McGregor had asked the pursuer if she was alright, the pursuer had not understood what she was being asked. He had described the pursuer as having had "too much of something". He had considered that she was not in a fit state to be left on her own, and that she would not have been able to get home if left by herself.

### **Dr Janusz Knepil**

[110] Dr Knepil gave evidence as an expert in toxicology. He was principal toxicologist for the North Glasgow University Hospitals Biochemistry Department of NHS Greater Glasgow and Clyde Health Board, an honorary senior lecturer in the School of Medicine of the University of Glasgow, and an occasional consultant for the Forensic Institute, Glasgow.

[111] He was referred to a toxicology report prepared by Scottish Police Services Authority, Forensic Services (Edinburgh), in terms of which it was recorded that the pursuer's urine sample was found to have a urine alcohol concentration of 122mg/100ml, equivalent to a blood alcohol concentration of 91mg/100ml. An appropriate back calculation indicated that, on that basis, and applying average metabolism rates, at 3am on 2 January 2011, the pursuer would have had a blood alcohol concentration of 275mg/100ml, and at 4am, one of 257mg/100ml. He confirmed that, on

these figures, the pursuer, at 3.00 am, would have been 3.5 times over the former drink driving limit, and, at 4am, over it by a factor of 3.2.

[112] Under reference to an extract from ToxBase, a document originating from the Scottish Poison Information Bureau, he confirmed that the ability to metabolise alcohol varied significantly from person to person, that is to say between individuals, but also that there could be variation in relation to a single individual at different times. In the context of the effects to be expected of differing levels of blood alcohol concentrations, the document set out three bands in the following terms:

"Mild (50-100mg/100ml):

Decreased reaction time, diminished judgement, fine motor incoordination, dysarthria, nausea.

Moderate (100-200mg/100ml):

Diplopia, violence, disorientation, confusion, ataxia, vasodilation, stupor, vomiting, sweating.

Severe and potentially fatal (200-400mg/100ml):

Respiratory depression, hypotension, loss of protective airway reflexes, hypothermia, incontinence, coma, hypoglycaemia ..."

On that basis, the pursuer's blood alcohol levels produced by the back calculation carried out by the police forensic scientists indicated that she fell within the category of "severe and potentially fatal".

[113] When referred to a report by Dr Sharp and Dr Skett, forensic pharmacologists, dated 29 July 2016, he agreed with the stated conclusions that the pursuer would have been obviously intoxicated at 3 am – 4 am on 2 January 2011, and that she would have fallen within the range of blood alcohol concentrations associated with alcoholic blackouts and memory impairment.

[114] He was referred to his own toxicology report, dated 6 October 2016, for the purposes of which he had made the assumptions that the pursuer's ability to eliminate alcohol, based on her medical history, was normal, that she was not a regular drinker to excess, was not a heavy user of alcohol, and drank alcohol only occasionally. He had also proceeded on the basis that the pursuer had begun drinking on 1 January 2011 at 8.30 - 9pm, and had stopped drinking shortly before 2am on 2 January 2011, that she had no further alcohol thereafter, and had not eaten in the period between about 4pm on the afternoon of 1 January until at least 13.15 on 2 January, when her urine sample was taken. He also proceeded on the basis that she had not voided urine after 2am on 1 January until 13:15 on 2 January. He had carried out calculations on the basis that the pursuer had consumed a half can of beer, either eight or nine measures of Jack Daniels, and two Jagerbombs, the applicable spirit measures of which were taken to be 25ml. On that basis, from the amount of alcohol the pursuer had consumed, he had calculated what her blood alcohol level would have been at 3am on 1 January 2011.

[115] Having regard to the variations between individuals, he had taken into account the pursuer's age, (24 years), her gender, and the pattern of her regular alcohol consumption, all of which would have impacted upon the rate at which she was capable of metabolising alcohol. Allowing for the possibility of three elimination rates: 9mg/100ml/h;

18mg/100ml/h; and 29mg/100ml/h; and allowing for measures of 25 ml of spirit in the Jagerbombs consumed, his calculation resulted in relative blood alcohol concentrations of: allowing for 8 measures of Jack Daniels – 194mg/100ml; 162mg/100ml; and 124mg/100ml; and in respect of 9 Jack Daniels: 215mg/100ml; 183mg/100ml; and 145mg/100ml. On the basis that it was appropriate to allow for a high level of approximation in calculations of these types, given the variables involved, he considered that the results of his calculations matched those of the police forensic scientists fairly well.

[116] He disagreed with the assertion in the Sharp/Skett report that, in this context, because of certain anatomical aspects, measurement and calculation by breath sample was more accurate than the use of either blood or urine samples. In his view, research indicated otherwise, and was to the effect that any of these methodologies involved unavoidable variables. He did not consider that, for these purposes, a breath sample was better than a urine sample.

[117] He did not approve of the bands of generalized dose specific effects set out in the Sharp/Skett report, nine in all, on the basis that the level of specification indicated was inappropriate. In reality, the level of variation was much greater than suggested by these descriptions. As an example, he confirmed that the total mental confusion indicated at a level of 220 - 249mg/100ml of blood alcohol, which would affect conscious decision making, could also be possible at a level below 200mg/100ml.

[118] He also disagreed with the assertion made in the Sharp/Skett report in relation to the issue of alcohol and consent, to the effect that it cannot be stated with certainty that alcohol affects working memory and the ability to consent. On the contrary, he considered that alcohol does affect brain function of that type. Working memory was immediate memory, necessary for physical, and some intellectual, functionality. He also considered, disagreeing with a further assertion made in the report, that it was difficult and inappropriate to judge levels of intoxication simply from viewing physical movements on CCTV footage. It was always possible that apparent physical impairment could be caused for other reasons. It was not possible to place an individual within a particular blood alcohol level band simply by viewing CCTV footage.

[119] In cross-examination, he accepted that, of the possible options in relation to samples, for these purposes, a blood sample would be the optimum choice where a clinical decision was required. In so far as urine was concerned, variation could be produced by its constituent components which were themselves subject to variation. He accepted that the calculations undertaken could only be approximate and involved a significant level of inaccuracy. He also accepted that the calculations carried out both by himself and by the police forensic scientists involved a broad range of values, and that in relation to either scenario, whether eight or nine measures of Jack Daniels were consumed, the pursuer could have fallen within any part of the calculated ranges.

[120] He explained that in respect of the ToxBase bands, on the basis that the pursuer fell within the category “severe, potentially fatal”, that is between 200 - 400mg/100ml, she could have been expected to be exhibiting effects listed in that category, but also any of the effects of the other two bands. In so far as the bands set out in the Sharp/Skett report were concerned, he considered the stated categories to be too tightly described, and would have expected more variation in practice. It would be possible to exhibit total mental confusion at a blood alcohol level of less

than 200mg/100ml. It was also conceivable that there could be no total mental confusion at a blood alcohol level above that figure.

[121] In relation to blackouts and memory loss, he was referred to an academic paper by Aaron White Ph.D., entitled "What happened? Alcohol, Memory Blackouts, and the Brain", the content of which suggested that doses of alcohol which cause blackouts do not necessarily preclude some types of active functioning during the period affected. Although he agreed broadly with the content, he thought it important to recognise, given that the article was published in about 2003, that this area of research was one which was developing rapidly. The degree to which alcohol affects working memory was the subject of some debate amongst experts.

[122] He accepted that, on the basis that peak blood alcohol concentration occurred sometime after the last alcoholic drink had been consumed, in order for any calculation of that level to be definitive, it was necessary to know when that had occurred.

### **Professor Jonathan Chick**

[123] Professor Chick gave evidence as a consultant psychiatrist, specialising in the metabolism, addiction and harm related to alcohol. He is the medical director of Castle Craig Hospital, Scotland, and a visiting professor of Edinburgh Napier University.

[124] He confirmed that he had been given access to certain witness statements, the relevant CCTV footage, and the toxicology calculations conducted by the police forensic scientists indicating blood alcohol levels for the pursuer at 3 am (275mg/100ml) and 4am (257mg/100ml). He noted that only alcohol had been detected in the pursuer's urine sample. In particular, no psychoactive drug had been detected. The information given to him had been that the pursuer had consumed a half can of lager, eight or nine measures of Jack Daniels, and two Jagerbombs. He had seen extracts of the pursuer's general practitioner records and had found no relevant indication of heavy drinking.

[125] He confirmed that variations occurred between individuals as to the extent to which blood alcohol levels affected brain function. He considered that, in that regard, recent drinking patterns were of greater impact than age on its own. Where an individual drank heavily on a regular basis, the brain adapted to alcohol in so far as the functions involving thought and behaviour were concerned. Alcohol dose levels caused less impairment where there had been regular recent exposure to alcohol.

[126] He had considered matters on the basis that the pursuer had eaten at about 3.30pm on 1 January and had not eaten again until after 13:15 on 2 January, and that she had begun drinking alcohol at about 8.30pm on 1 January and had ceased at about 2am on 2 January. On the basis that strong spirits can delay the passage of alcohol from the stomach to the small intestine, where absorption occurs, it was possible that on leaving Chalmers nightclub, the pursuer had not yet attained her peak level of intoxication. In addition, the caffeine in the Jagerbombs may have given the impression that she was less drowsy shortly after drinking them than she might have appeared when leaving the nightclub. Although caffeine taken with alcohol gave the impression that an individual was apparently more alert, the effect of the alcohol was not affected by the caffeine.

[127] He considered that, on the basis that the pursuer had experienced confusion on waking on the morning of 2 January 2011, and had high levels of alcohol in her urine sample, taken at 13:15 that day, having had nothing to drink that morning after waking, the results of the police forensic

scientist's calculations as to blood alcohol level were consistent with the available evidence. At the levels calculated by the police forensic scientists (275mg-257mg /100ml) the pursuer would be expected to be unsteady, staggering, to look drowsy when sitting down, and to appear muddled, in perception and conversation, and in relation to where she was and what was happening to her. He would have expected quite a degree of mental confusion which would have been caused by her brain not functioning properly in respect that things would look fuzzy to her, she would hear sounds as if mumbled, and she would be unable to formulate a plan or to find an appropriate answer to a question put. Conversation would be possible, but her speech would be slurred, and the content and flow would be hesitant and off the point. Others would have had difficulty understanding her. She would have been confused in relation to time and place, and would have been likely to misinterpret cues from others, in relation to what they said and how they looked. Her brain would not have been processing these perceptions normally. She would have been slow to weigh up the pros and cons of how to act and would have appeared undecided. She would have appeared not to have understood questions and would have been liable to make impulsive choices.

[128] He confirmed that, for these purposes, research always involved lower blood alcohol levels than were suggested in the pursuer's case (that is, more than 200mg/100ml). That was because there were ethical considerations to be taken into account where voluntary subjects were concerned. Thus, for example, a blood alcohol level of 183mg/100ml was one which would never be encountered in laboratory conditions.

[129] He confirmed that the blood alcohol levels calculated by the police forensic scientists were consistent with a situation where a person was unable to have a coherent conversation, was not making sense, was unsteady on her feet, and had lost her purse and was not concerned about the fact of its loss. Descriptions that her "eyes had gone" or that she was withdrawn, or was as if about to fall asleep, were all consistent with such blood alcohol levels.

[130] The fact that the pursuer had no recollection whatsoever in relation to the period from when she was in The Glenmavis Tavern until waking up on the morning of 2 January was consistent with the calculated blood alcohol levels. It was possible to continue to function, be awake, and perform actions, and yet, subsequently have a complete blank in recollection which was never recovered. That was because the parts of the brain which function to lay down memory are particularly sensitive to the effect of alcohol. The fact that there was no recollection was an indicator that no memories had been laid down. The fact that there was no memory whatsoever was not particularly relevant to blood alcohol level. Such experiences were not atypical in individuals who were not recent drinkers to excess. A blood alcohol level of 240mg/100ml was perfectly capable of producing that state. As to whether such a state would be obvious to others, he considered that there would certainly be some signs of such a severe level of intoxication. An individual would not necessarily fall over, but the state would be perceptible in the course of dialogue, and there would be a slowness of response and an apparent failure to understand.

[131] He agreed that the use of a mobile phone, in relation to the receipt and sending of text messages, could be categorised as a well-rehearsed act.

[132] In response to the assertion stated in the report by Sharp/Skett report, to the effect that it cannot be stated with certainty that alcohol affects working memory and the ability to consent, he indicated that he would agree with the contention, but subject to the qualification that the

statement was valid only in relation to alcohol at low levels. He agreed broadly with the definition of working memory stated in the report:

“...working memory is defined as a cognitive system with a limited capacity that is responsible for the transient holding, processing, and manipulation of information. Working memory is an important process for reasoning and the guidance of decision making and behaviour ..... Working memory plays no role in remembering things but guides the actions of the individual.”

He described working memory as the process of taking in information in real time, processing it, remembering how it had been processed, remembering the resultant decision, and remembering how the decision had been reached. It concerned being able to know where one was and what was happening. High blood alcohol levels would impair that function.

[133] He disagreed with an assertion in the Sharp/Skett report to the effect that although, alcohol was recognised to inhibit short and long term memory, and thus the ability to lay down memories, it did not have any significant effect on working memory and the ability to reason and make conscious decisions. The assertion was wrong in respect that high blood alcohol levels did affect the processes of working memory. Because of that, the ability to give consent would be affected by a high blood alcohol level. His clinical experience was consistent with that.

[134] In relation to the band classifications set out in the report, in particular to the band relating to a level of 200mg - 249mg/100ml, he confirmed that total mental confusion was not consistent with the ability to consent. He considered that total mental confusion had the effect of blocking the ability to give informed consent.

[135] He accepted that calculations of blood alcohol level were necessarily only approximate, that they produced a wide range of values, and that in the case of the pursuer her blood alcohol level could be fixed at any point within the ranges calculated, depending upon the amount of alcohol she had actually consumed.

[136] In relation to the CCTV footage which he had viewed, he confirmed that in terms of his report, he had viewed the pursuer as exhibiting unsteadiness but not stumbling or falling. In that regard, he considered it possible that, when depicted on the CCTV footage, the pursuer had not yet reached her peak level of intoxication. He accepted that it was important to recognise the fact that individuals varied considerably in their responses to alcohol.

[137] On the basis of the calculations produced by the police forensic scientists, and under reference to the bands set out in the ToxBase article, he confirmed that he would not have expected an individual with a blood alcohol level of about 200mg/100ml to exhibit respiratory depression. In relation to the bands set out in the Sharp/Skett report, he accepted that the categorisation accorded broadly with his own clinical experience.

[138] He confirmed that alcohol interferes with the ability to form long term memory, although he considered that it was not possible to say that the magnitude of impairment of recollection necessarily increased in proportion to the amount of alcohol ingested. Having said that, complete blackouts did occur where large volumes of alcohol were taken. Total amnesia could result and be effective from a definite starting point. The experience of a blackout was not equivalent to a loss of consciousness. An individual could be awake, alert and conscious, and could carry out conscious acts, yet later have no memory of the period concerned. He accepted that the receipt, reading and

sending and reply, of text messages by the pursuer, (consistent with relevant CCTV footage at 00:52:41 and the telephone analysis reports compiled in relation to her mobile phone), was an example of that. The pursuer had apparently been able to read a text message from her brother, give him an explanation in response, and do so without any error spelling. Notwithstanding that, she had no memory of that occurring. In that context, he accepted that sexual intercourse could be described as a conscious act in the sense of being a conscious engagement. It would be possible to engage in sexual intercourse under the influence of alcohol and yet have no memory of it, as documented in the paper by Aaron White.

[139] He confirmed that, as it was put to him, a lack of memory is not the same thing as an absence of consent.

[140] He agreed that at lower blood alcohol levels, there was no significant effect on working memory and conscious decision making. He agreed that impairment of working memory was a question of degree and that it could be impaired to a greater or lesser extent. He also agreed that there was a debate within the relevant medical and research communities as to the effect of alcohol on working memory, although he was unwilling to comment on the extent to which that debate was academically valid.

[141] He agreed that it was possible that an individual could appear to be intoxicated but still be able to perform well rehearsed conscious acts. The matter was a question of degree. It was correct to state that to some extent, the effect on working memory increased in relation to the amount of alcohol consumed.

### **Professor Christopher Freeman**

[142] Professor Freeman is a consultant psychiatrist with 30 years experience. He has published widely and is an honorary professor at Queen Margaret University, Edinburgh. He is a regional consultant for NHS Scotland, south east region. He is a specialist in the field of post-trauma psychiatric disorders.

[143] He had interviewed the pursuer on two occasions, once in February 2015 and again in August 2016. The effect of the events of 1 and 2 January 2016 had affected the pursuer psychiatrically. She had developed a number of psychiatric symptoms and syndromes. She had found her total absence of memory in respect of the early hours of 2 January 2011 to be profoundly distressing. She had become more anxious, had experienced breakdowns at work, and had been unable to continue with her employment. She had been unable to continue with her previous fitness regime and had developed an eating disorder which resulted in her losing weight. Her mood had been low. Under reference to his report, he had diagnosed a panic disorder and an eating disorder not otherwise specified (EDNOS).

[144] Significantly, she had not suffered from post-traumatic stress disorder. That was because she had, in effect, been protected by her amnesia. Since she had no memory, she was not vulnerable to flashbacks or related intrusive thoughts. For the same reasons, she had not developed an adjustment disorder.

[145] In the period between February 2015 and August 2016, he had detected significant improvement in her psychiatric condition. At February 2015, in his view, expert psychological treatment had been required. In the event, she had not followed that course, but instead had made use of a life coach, whose intervention had in fact helped her a great deal. He confirmed that her

panic attacks continued, but that they were less frequent now than previously. The pursuer was now in a stable sexual relationship with a new partner. She was able to tolerate intimacy, and indeed was able to enjoy it without flashbacks or other intrusive thoughts. In his opinion, that set of facts, specifically the lack of any triggering of anxiety symptoms, memories or flashbacks, supported the suggestion that at the relevant time in the early hours of 2 January 2011, the pursuer had been, in fact, unconscious as the result of high levels of blood alcohol. Where there was impaired consciousness, memory, particularly working memory was not laid down by the brain.

[146] He noted the results of the calculations conducted by the police forensic scientists. He explained that he was not a specialist in alcohol disorders *per se*, but he had significant experience of dealing with intoxicated patients. He ran inpatient and day patient clinics for women with eating disorders in which, on a regular weekly basis, patients would present under the influence of alcohol. As a result, because of a requirement to identify whether altered states of consciousness were explicable by alcohol, or by something else, he had developed an experience of being able to recognise the effects of differing levels of blood alcohol levels.

[147] He confirmed that a lack of memory could be explained by a high level of alcohol ingestion consistent with the range calculated by the police forensic scientists. In the range 180mg - 200mg/100ml significant impairment of memory could be expected. At the mid-200mg/100ml level, stupor, comprising impairment of consciousness to the extent that there would be no response to shaking or verbal commands, but a withdrawal response evident on pain, could be expected. At blood alcohol levels above 250mg/100ml, coma and death could follow. In the pursuer's case, the blood alcohol levels calculated were consistent with the possibility of stupor, in which circumstances she may well have appeared to have been unconscious. Factors such as age, body weight and gender could influence the effect. Young women in particular, were likely to be more greatly affected by a higher alcohol level and to experience a greater short term effect.

[148] Under reference to the generalised dose specific effect bands set out in the Sharp/Skett report, specifically in the range 200mg - 249mg/100ml, his view was that the term "blackout" was synonymous with unconsciousness. However a further phrase, "alcoholic blackout", had a different meaning which encompassed a description of an individual who perhaps did not appear to be drunk, but nevertheless could not remember anything afterwards. That was an experience associated with alcoholism and regular drinkers to excess. In the pursuer's case, the explanation for the fact that she had a significant memory loss was that the degree of ingestion of alcohol had constituted a poison which had significantly impaired sensory input to the brain, so that normal signals to the cerebral cortex were absent. In that situation there was no cognitive processing, and therefore an inability to make decisions.

[149] In relation to the banding set out in the ToxBase extract, the blood alcohol levels calculated by the police forensic scientists in the pursuer's case were consistent with the top end of the moderate range or the lower end of the severe and potentially fatal range. At those blood alcohol levels, the pursuer could have been apparently awake but not responding. Her condition could have been less severe than stupor, but nevertheless with significant impairment of consciousness.

[150] In cross-examination, he accepted that alcohol and its effects was not a specific area of his expertise, in the sense that he did not treat alcoholics. His expertise lay in treating young women with eating disorders. He was not a specialist in treating alcoholics, but had experience of alcohol

abuse from his practice. He accepted that Professor Chick's professional qualifications and experience, referable to the impact of alcohol, were greater than his own. Notwithstanding that, he would not accept that he ought to defer to the opinion of Professor Chick as a matter of generality. On the contrary, whereas Professor Chick's patients were of an older age group who presented with severe alcohol problems, his patients were normal young women, such as the pursuer who, on the evidence, on one occasion, had drunk to excess. That set of facts was very much more within his expertise than that of Professor Chick.

[151] He confirmed that the high level of blood alcohol calculated for the pursuer had led him to deduce that she may have been unconscious at the relevant time. He accepted that if on the contrary, it was proved to be the case that she was not unconscious, but rather was speaking and laughing, then he agreed that would be inconsistent with his finding. However, he considered the evidence to be consistent with his finding to the effect that she would have been unable to consent. If it had been the case that the pursuer had consented to sexual intercourse, then it would have been unlikely that her experiences of sexual relations afterwards would have been traumatic, as in fact they had proved to be.

[152] Additionally, the contention that the pursuer had engaged in consensual sexual intercourse at the relevant time, would necessarily mean that the pursuer had not been a reliable and true historian when interviewed by him, which was inconsistent with his assessment of her. The contention raised obvious questions as to how and why the pursuer had suffered the psychiatric syndromes which she had in the years following January 2011. The contention was not consistent with those facts, and was not consistent with his assessment of the witness as a reliable witness.

## **The Case for the First Defender**

### *DG (the first defender)*

[153] The first defender is a professional footballer, currently playing for Plymouth Argyle. He is aged 27 years, and was 21 years of age in January 2011.

[154] On 1 January 2011, he had played for Dundee United against Aberdeen, at Pittodrie. The game had begun at 3pm and he had scored an equalising goal in the 95<sup>th</sup> minute. After the match, he had returned to his home at Stirling and had initially gone out in the evening with his cousin. Subsequently, he had contacted his friend and fellow team mate, the second defender, and arranged to meet him and his friends in Bathgate. The first defender and his cousin had driven to Bathgate in the first defender's car, a black Peugeot 207.

[155] On arrival in Bathgate they had gone to The Glenmavis Tavern. On the way, when in Bathgate, they had sought directions from two women whom they subsequently met in the bar. These two women were the pursuer and Rachel Carrigan. The first defender and his cousin arrived at The Glenmavis Tavern at about 10 pm and met the second defender and his friends. Whilst in the front bar, he had said hello to the pursuer and Rachel Carrigan, but had not had a conversation with them at that time. He had been drinking vodka with Red Bull, and beer. It was his custom to begin with beer and then move on to vodka with Red Bull. He was also drinking shots of spirits. He spent a few hours in The Glenmavis Tavern and probably had some six drinks, including single and double measures of spirits. When in the back bar, he had introduced himself to the pursuer and Rachel Carrigan. He had spent some time speaking to Rachel Carrigan and dancing with her. When in the back bar, he had noticed the second defender spending time with

the pursuer. Each had seemed attracted to the other and they both appeared to be getting on well, having a few drinks together.

[156] At one stage, while in The Glenmavis Tavern, there had been a brief discussion amongst the group comprising the first defender, the second defender and his friends, about the possibility of going to a party afterwards, but in fact the party never materialised. Although the pursuer and Rachel Carrigan had been with the group, the first defender could not say whether they had been in the company at the time of that discussion.

[157] The first defender and his cousin left The Glenmavis Tavern at about midnight and followed the others, comprising the second defender and his friends, to Chalmers nightclub. By the time they arrived there it would have been almost 1am. The first defender described himself at that time as being probably drunk, having had a few drinks, probably being not aware of what was really happening. At that time he was with, among others, his cousin, the second defender, and Brian Hutton who was the second defender's friend. At the bar, the pursuer, Rachel Carrigan, and Carrie-Anne Tugman also joined the company and spent time together with the group who were drinking, and at one stage dancing, as a group.

[158] The first defender thought that, whilst at the nightclub, he had another five or six drinks, and possibly some shots in addition, and that the women probably drank the same amount, as rounds of drinks were being purchased. He himself did not buy the pursuer a drink, but the pursuer and the second defender were buying drinks and the pursuer had bought the first defender a drink. At one stage the second defender was dancing with the pursuer and the first defender was dancing with Rachel Carrigan. The first defender confirmed that he had been sexually attracted to Rachel Carrigan.

[159] Although it had not involved the first defender personally, at one stage there had been a discussion involving Brian Hutton about the flat in Armadale. It had been hoped that the first defender and the pursuer and the second defender and Rachel Carrigan would all go back there together, although the first defender maintained that he did not know what it was that was intended should happen there.

[160] He had left Chalmers nightclub at about 2am and described his condition at that stage as being probably really drunk, but able to walk, talk, and decide where to go. The decision was to go to the flat at Armadale. He had left the nightclub with Rachel Carrigan, and the second defender had left with the pursuer. At that time, the pursuer and Rachel Carrigan had each other's shoes. He had seen the pursuer leaving the nightclub and she had appeared to him to be fine. She was drunk, but no more so than the rest of them, and was able to speak and walk. The pursuer had forgotten her jacket and purse and had to go back into the nightclub to collect them. He had gone back into the nightclub after her and had left a second time. The foursome then walked down the main street of Bathgate in order to find a taxi.

[161] Before that, he remembered standing outside the nightclub and seeing the pursuer there. He had simply been standing around, like the rest of them. He had not seen the nightclub stewards and could not say if, at that time, a steward had spoken to the second defender.

[162] As they approached Rachel Carrigan's home, a taxi appeared and they, together, flagged it down. The pursuer got in a back seat behind the driver, the first defender sat in the back and the second defender sat in the front passenger seat. Rachel Carrigan had indicated that she was not going to come with them and instead was going home. She stood for a while at the rear passenger

door and spoke to the pursuer to make sure that everything was alright. She said something like "Are you OK with this?", (meaning, setting off in a taxi with two men), and the pursuer had replied "Yes, I'm fine". At that point there had been a disagreement, to some extent, between Rachel Carrigan and the pursuer about the fact that Rachel Carrigan was not going with them.

[163] There had been nothing remarkable about how it was that the pursuer got in the taxi. The journey to Armadale took about 10 - 15 minutes. In the taxi, each of the three of them had used their phones, there had been conversation and laughter, and there was music playing from the car radio. At that time, the pursuer appeared drunk, but fine; she was engaging in conversation and knew what the first defender was saying. He was not concerned about her.

[164] On arrival at the flat in Armadale, the first defender got out of the taxi, and the pursuer followed, moving over the width of the back seat to do so. No one had any difficulty in getting out of the taxi.

[165] Once in the flat, they went to the living room and sat on a couch. The second defender and the pursuer had been kissing and giggling, and shortly afterwards they left the room. Shortly after that, the first defender found them in a bedroom, a child's room, where they were kissing. That room was located to the right hand side of the front door as one viewed the flat's front elevation. The second defender had said to the pursuer "Are you OK with him in the room?" and she had replied that she was fine with it. The first defender had not said anything at that point. He simply sat on the edge of the bed while the others were kissing.

[166] The pursuer then reached over to him and began touching him around his private parts. He unbuttoned his jeans and pulled them down and got on the bed. The second defender and the pursuer were having sexual intercourse, she facing away from him and the second defender behind her. Then, facing the first defender, she engaged in oral sex with him. He confirmed that at that stage there was no indication that she was unhappy in any way or did not know what she was doing.

[167] All of that activity lasted only about 1 - 2 minutes. The second defender's phone began to vibrate and everyone stopped what they were doing. The second defender left the room and the first defender and the pursuer remained, kissing while sitting on the bed.

[168] After a minute or so, the second defender came back into the room. He said that he had to leave, and asked the first defender "Are you two going to be OK together?". Both the first defender and the pursuer said yes. The first defender had thought that the pursuer was unhappy that the second defender was leaving. Once the second defender had left, the first defender and the pursuer continued kissing and then engaged in sexual intercourse for about 1 - 2 minutes. At that time there was no conversation between them. After intercourse, the first defender and the pursuer were kissing and laughing and engaging in mutual masturbation. At one stage, she had asked him not to squeeze her breasts so firmly. He had asked her to "grab my balls". The first defender maintained that at no time did he think she was not consenting or was too drunk to consent. At no time had she said "No" to him. In all, the sex which took place between them had last for about 40 minutes.

[169] When it was over, she had got up from the bed and had gone to the bathroom. He got dressed and followed her. He could hear her giggling in the bathroom. She came out of the bathroom, walked past him and got into the bed in the other bedroom. He followed her and, fully clothed, lay on top of the covers beside her. There had been a conversation between them, briefly

for about 10 minutes, but he was unable to remember the details of it. The first defender had indicated that he wished to go home. The pursuer had said she did not want to leave. The first defender suggested that they should share a taxi. She maintained that she did not want to leave the flat. Eventually the first defender had said that he was leaving and the pursuer had said something to the effect that she could not believe he was doing that and swore at him, saying "Fuck off then". She had plainly been annoyed.

[170] Having left the flat, the first defender made his way to Bathgate, to his car, and then drove from Bathgate to Stirling. He arrived there at about 5am and went straight to bed.

[171] He confirmed that earlier in the evening he had been spending time not with the pursuer, but rather with Rachel Carrigan. He maintained that he had not thought about having sex with the pursuer until he had entered the bedroom, where she was with the second defender. He did not know why he had entered the bedroom and thought he had done so because he was "just drunk". From then, one thing had simply led to another. He had never thought that she was not agreeing to what took place between them.

[172] He maintained that he now regretted having left, and conceded that his behaviour had been wrong. In his view, had he not left, the court case and other consequences would never have taken place. He conceded that it would be a terrifying experience for a young woman to wake up in a strange flat, not knowing where she was, and that, had he not left, he could have assisted her.

[173] The police had contacted him about a week or ten days later and had asked him to report to them voluntarily. Subsequently, on 17 January 2011 he was charged with rape of the pursuer, but was told in July of that year that, in the event, there would be no further proceedings.

[174] He confirmed that, while in The Glenmavis Tavern, he had seen the second defender and the pursuer in conversation. He estimated that they had spent over an hour together in all. They had appeared to be getting on really well. In Chalmers nightclub, he had seen the second defender again in conversation with the pursuer, again for over an hour. They had appeared to be getting on well. It was his impression that the second defender and the pursuer were attracted to each other. He had formed that view just by looking at them and observing how they were behaving.

[175] He confirmed that while the three people had been in the bedroom there had not been any significant conversation other than that, at one stage, the pursuer had said "Don't come inside me, I don't want another baby", or words to that effect.

[176] In cross-examination, he maintained that he had not decided to have sex with the pursuer until he had entered the bedroom, joining her and the second defender. He maintained that on the way to Armadale, when they had been in the taxi, he at that time had no intention of having sex with her. When asked why then he had gone back to the flat at all, his response was that he did not know.

[177] He maintained that it had always been his position that he had been in the back seat of the taxi. That was inconsistent with his position as stated in his written pleadings which were to the effect that the pursuer had sat in the back seat together with the second defender, and that the first defender had sat in the front passenger seat. He maintained however, that he had been in the back seat, and that these pleadings were simply a mistake. He confirmed that he was aware that the second defender had given a statement to the police in which he, the second defender, had confirmed that the first defender had been in the back seat. The first defender conceded that in

that respect, the terms of that statement were inconsistent with his stated position in his own written pleadings.

[178] Although he maintained that in the taxi, they had asked the driver to turn up the volume of the radio to hear a particular song, he could not remember what that song had been.

[179] He confirmed that he had first met the pursuer in The Glenmavis Tavern and maintained that at that time, she had not appeared to be drunk. In the context of the pursuer's evidence that she could not remember meeting the first defender there, he referred to the fact that she had been spending time with the second defender.

[180] He conceded that the relevant CCTV footage did not depict him walking with the pursuer, with their arms linked. That was inconsistent with his own written pleadings, in which it was specifically stated that it depicted the pursuer walking with her arm linked through the first defender's arm. He described the content of these pleadings as a mistake.

[181] He maintained that the arrangement to obtain the key of the flat from Brian Hutton, had been made by the second defender in Chalmers Nightclub. The purpose had been that the four of them, he, the second defender, the pursuer and Rachel Carrigan would go back there together.

Any previous reference to a party had been a reference to a party at a different house with other people. He accepted that the purpose of obtaining the key had been in order to facilitate sex with the women. He maintained that the arrangement had been made by the second defender. That was inconsistent with the content of his own written pleadings, in which it was stated "...while in the company of Brian Hutton, the first defender made arrangements with him to gain access to the property (at 57 Greig Crescent)". He described that stated position in the pleadings as a mistake, and maintained that he had never said that he had made any arrangement with Brian Hutton to obtain the key.

[182] He maintained that although he was aware that the pursuer had lost her purse and could not find it, he did not think at that time that she was drunk. He maintained that there were no other signs of her being drunk. She had not had difficulty speaking, and had not been staggering or falling over. She had not had any difficulty in conversation. Despite that, he accepted that in evidence he had said that she was drunk, but maintained that he had said that because they had been drinking together, and they had been on a full night out. He had never noticed that, in the course of the evening, the pursuer had a ladder in her tights. In the suggested context of he having been earlier interested in Rachel Carrigan, and she having, in effect, turned him down by not going in the taxi, he maintained that he had not had the thought, at that stage, of taking things forward with the pursuer.

[183] He maintained that outside Chalmers nightclub, he had never heard Gail McGregor, the steward, saying to the second defender that he ought to be taking the pursuer home. He maintained that he could not remember there being any delay in leaving the nightclub. He conceded that he might have asked Rachel Carrigan if he could stay the night with her.

[184] He said that the pursuer was using her phone in the taxi, but could not say what exactly she was doing with it. He conceded that she may have been simply scrolling through it or simply fiddling with it in an automatic manner. He maintained that she had been engaging in conversation while in the taxi. He maintained that she had no difficulty getting out of the taxi once they had arrived at Armadale.

[185] When asked if he would be concerned about having sex with a drunk women, he confirmed that he would not have sex with a woman who could not walk. He maintained that you could not know how drunk a woman was if you yourself were drunk.

[186] He confirmed that the second defender had engaged in sexual intercourse with the pursuer from behind her and that it had not been frontal intercourse. That was inconsistent with his own written pleadings, in which it was stated "The second defender was on top of the pursuer".

[187] He confirmed that the pursuer had begun to touch him before sexual intercourse took place between her and the second defender. That was inconsistent with his own written pleadings, in which it was stated "The pursuer and the second defender got undressed and then started to have sexual intercourse. The second defender was on top of her. The pursuer then took hold of the first defender and unbuttoned his trousers". When asked if that too was a mistake, his response was that it was hard to recall. He conceded that it was not hard to recall the truth.

[188] He insisted that the pursuer had something like "Don't come in me, I don't want another baby". It was put to him that, although the pursuer's position was that she would never have said that, if it had been said, and he had heard it, then plainly he had ignored her in that respect. His response was that he had not known that he had ejaculated inside her. He conceded that he had never asked her whether she was using contraception.

[189] In response to the suggestion that once he had reached his own car in Bathgate, he could have returned to the flat and taken the pursuer to her own home, he maintained that he would not have done that because he had been driving under the influence of alcohol.

[190] He confirmed that his transfer from Dundee United to Blackburn Rovers had taken place after it had been confirmed to him by the Crown Office that there would be no further proceedings. He maintained that he had been unaware that the decision that there should be no proceedings against him was taken after the second defender had given a statement as a witness, he, the second defender, having been previously told that there would be no proceedings against him.

[191] He maintained that at no point had the pursuer been too drunk to consent to sexual intercourse.

### **Clifford Wilson**

[192] In January 2011, Mr Wilson lived at number 59 Greig Crescent, Armadale, the flat directly above that at 57 Greig Crescent which was normally occupied by Dee Hutton. At that time, he was living there with his mother. He suffered from scoliosis and had difficulty sleeping as a result of his pain. His bedroom was on the first floor to the left of the front door of the building as one viewed its front elevation. On 1 January 2011, he had spent the afternoon in a local pub. On returning home, he had watched television until the early hours of the morning. Sometime after 2am, he heard the front door of the flat downstairs closing and the sound of people entering the flat. As he put it, they were carrying on and laughing. There were male and female voices, and there was talking, laughing and giggling. He thought there were maybe two people. He could hear that they went into a bedroom, he heard the sound of something being dragged across the floor, they started to talk, and at some point he heard the male voice say "Could you grab my stanes?". He also heard a female voice saying the words "Don't squeeze my tits so hard". There

was moving about, and mumbling, it was quiet for a while and then he heard the female voice humming a tune.

[193] In the police statement which he gave on 5 January 2011, he had stated that he had heard a car stopping, things being moved around in the room downstairs, laughing and joking. He had heard the man asking the woman things and had heard her say "No". There had been raised voices for a while, but not shouting. He had heard the woman saying "No" three times, but did not know what she had been asked. Sometime later, he had heard the front door bang and had seen a young male, in his early 20s, staggering outside the house. He was at the garden gate. He appeared to be drunk. It was after that, that he heard the male voice saying "Can you grab my stanes?". He had commented to his mother about all the banging about going on downstairs, and had gone to bed about 4am. Everything had been quiet after that.

[194] He had thought that the man and woman were having sex. He heard the man grunting and the woman making a noise. She had been giggling. She did not sound upset or distressed. He confirmed that he had heard the woman say "No" before having sex. He had heard male and female voices throughout the whole time. He had heard the bed banging off the wall. He was certain that he had heard sex taking place in the bedroom immediately below his own.

[195] In the morning he had heard a voice saying "Wake up cos I'll have to go", and also, "Could you let me out?". He had then seen a woman standing at the gate. She had been saying "Where am I?". His mother had told the woman that she was in Greig Crescent. Later, he had seen a red van arrive and a man come in the gate carrying a piece of wood. Shortly after that the police had arrived.

[196] Although he was normally prescribed painkillers, such as paracetamol, on this particular day he had not taken any as he had been drinking in the afternoon.

[197] He confirmed that, in his first statement to the police, he had stated that he had thought the male voice was that of Brian Hutton. He had been aware of Brian Hutton coming and going from the flat. He had thought that it was Brian Hutton and his girlfriend who were having sex downstairs. He had told the police that he knew it was his voice. He had heard banging and shuffling about. The noises sounded as though they were coming from a number of rooms in the house. He confirmed that he had heard voices downstairs at about 9.15am on 2 January 2011. In particular he had heard a female voice say "Come on, hurry up and get up", "I'll need to get up and go", and "Could you let me out?".

[198] He confirmed that he had not slept well on the previous night, that is the night of 31 December, and had not slept well on the night of 1 January either, because of pain.

### **Carrie-Anne Tugman**

[199] Ms Tugman was a close friend of Rachel Carrigan. They had been to school together. She also knew the second defender from school. Although the pursuer had been at the same school as them, Ms Tugman had not been friendly with her.

[200] On the evening of 1 January 2011, Ms Tugman had met Rachel Carrigan and the pursuer in The Glenmavis Tavern, sometime after 8pm. Before arriving there, Ms Tugman had spent the afternoon drinking at the British Legion in Bathgate. Although she had been drinking quite a lot, for most of the day, principally vodka with coke, she had not been drunk. She had left the British Legion at about 5 pm and had gone to The James Young, and from there to The

Glenmavis Tavern. In The Glenmavis Tavern, she had spent most of her time with a group including her father and the second defender. Rachel Carrigan and the pursuer had come through to the back bar, where they were, between 8 and 9pm. Ms Tugman had not seen the pursuer since they had been at school together. The first defender and the second defender were in the bar. She was introduced to the first defender by the second defender.

[201] In the course of the evening, she had noticed the pursuer apparently flirting with the second defender. It had been the subject of comment, in the group. The pair had been standing close. There had been nothing inappropriate, but it was clear from their body language that they were openly flirting with each other. Ms Tugman knew that the second defender had a girlfriend and she told the pursuer that, advising her that it would be best to "stay clear". She had spoken to the pursuer about that on the way from The Glenmavis Tavern to Chalmers nightclub. At that point, she had thought that the pursuer had obviously had a drink, but was not drunk. She appeared to be in good spirits and was happy. The walk from the Glenmavis Tavern to Chalmers nightclub had taken longer than it normally would. She had been cajoling the pursuer, trying to keep her moving, but she had been walking slowly in high heeled shoes. At that point the pursuer had been capable of walking and talking. They had arrived at the nightclub at about 00:30am. Once there, she had spent most of her time talking to Stephen Scott, a friend from school. The pursuer, Rachel Carrigan and the first and second defenders had spent the evening together talking and dancing. The pursuer had been drinking, but appeared to be fine. She was not 100% steady, but had not been staggering. She had been able to walk and talk.

[202] Ms Tugman had not had much to do with the pursuer while in Chalmers nightclub, but she had seen the pursuer leaving. The pursuer, Rachel Carrigan and first and second defenders had all been leaving the nightclub together. There had been some coming and going before they left because a handbag or shoes had been lost. The pursuer had appeared to be fine. She was walking by herself. She had not been carried out of the nightclub, and appeared to make a conscious decision to leave with the others.

[203] A short time later, in the precinct in Bathgate, she had seen the pursuer in the doorway of a hairdressers salon, together with the second defender. The pursuer had fallen against the door having lost her balance. She had looked pretty "wasted", her tights were ripped and her hair was a mess. She had not been steady on her feet at all. Although the pursuer had stumbled backwards in the doorway in the precinct, she had not fallen to the ground, and had used the door to prop herself up. Although she had lost her balance, she had regained it.

[204] When Ms Tugman was leaving Chalmers nightclub, Rachel Carrigan had passed her on the way back to the nightclub entrance. She had been obviously annoyed and had snapped at Ms Tugman, who had asked "What's the problem?", and Rachel Carrigan had answered "It's just D". Ms Tugman had said to Rachel Carrigan that she should not take it out on her.

[205] She confirmed that in her police statement, given on 4 January 2011, she had stated that the following morning Rachel Carrigan had texted her, saying sorry for being grumpy and apologising for having snapped at her. In the text, Rachel Carrigan had said that she had been annoyed with the pursuer and the second defender. In Chalmers nightclub, Rachel Carrigan had kept on "having a go" at the pursuer. The pursuer had been unable to walk properly in her high heeled shoes and kept taking them on and off.

[206] Ms Tugman adopted what she had stated to the police, to the effect that the pursuer had been drunk, and had not been steady on her feet. She had thought her to be drunk because the pursuer was saying things like "I love you" to Ms Tugman, in circumstances where she hardly really knew her.

[207] In so far as the second defender was concerned, the pursuer had looked like she "wanted more". It had been her impression that things between the pursuer and the second defender could have gone further, in the sense that they might have gone home together.

[208] At the time, it was about some 7 years since Ms Tugman had been at school with the pursuer. She confirmed that on 1 January 2011, she had been drinking all day, and described herself as an experienced drinker who knew how to handle alcohol. In her police statement, she had confirmed that the pursuer had been drunk when she, the pursuer, had arrived at The Glenmavis Tavern. She had not been too steady, and had appeared to be drunk because of the way she was speaking, saying to Ms Tugman "I love you", and calling her by the wrong name.

[209] She confirmed that she had not seen the pursuer kissing anyone or being kissed while at The Glenmavis Tavern. In the course of the evening, Rachel Carrigan had become annoyed with the pursuer who kept on leaving things or losing things. It was her impression that Rachel Carrigan had been "babysitting" the pursuer.

### **William McNeill**

[210] Mr McNeill was a taxi driver who had been working in the early hours of 2 January 2011. His taxi, which was a Renault Scenic, was licensed to carry four people, having three rear passenger seats.

[211] He had picked up a fare near The Royal Bar, in Bathgate, at about 2.10am. A man had flagged the taxi down, but there appeared to be a group of others nearby. One man had got in the front passenger seat, and a man and a woman sat in the rear passenger seat. There had been a conversation between the woman in the rear passenger seat and another woman who was outside the taxi. Not everyone had got into the taxi at the same time. The conversation between the two women had been along the lines of "Are you sure you want to go there?", and the response "I'll be fine", or words to that effect. The conversation had taken place at the nearside of the taxi and all of the passengers had entered from the nearside doors.

[212] The man who was sitting in the front passenger seat had been wearing a plain white T-shirt, and the man who was sitting in the rear passenger seat had been wearing a shirt and a dark jacket. The front passenger had asked Mr McNeill to take them to Armadale. He did not have a precise address, but the man in the rear passenger seat was on the phone and Mr McNeill assumed that he was obtaining the address. That was not an uncommon state of affairs in Mr McNeill's experience.

[213] The journey to Armadale took about 6 - 7 minutes. He had been speaking to the front passenger, and confirmed that he had probably been playing music, as was his custom. Mr McNeill had spoken to the woman in the rear seat at the end of the journey but not during it. He had not heard her speaking in the course of the journey. The front passenger had asked the man in the rear seat "Have you got the keys?". The man in the rear seat had confirmed that he did.

[214] When the taxi reached its destination, the man in the rear passenger seat alighted and waited for the young girl to get out of the nearside passenger door. In order to do that she had to slide over the seat and had done so on her own. The front passenger had left the taxi and had

walked to the house, and the two rear passengers had walked after him. Mr McNeill had not heard the woman speaking to the two men when they were outside the taxi.

[215] When the taxi had stopped, the woman in the rear seat had been on her own in the taxi as the male rear passenger stood at the door. Mr McNeill had said to her "If you don't want to go in, I could take you home". In fact, he had said that to her twice. In response the woman had said "It's OK, I'll be fine", in a low voice, as if she was perhaps speaking to herself. Then she had got out of the taxi on her own and had walked towards the house with the man who had been the other rear passenger.

[216] Mr McNeill confirmed that he thought he had recognised the men's faces but he said that did not know them personally. He was quite clear that he had been paid with a £20 note.

[217] He confirmed that the front passenger had a large tattoo on his right arm. Subsequently, Mr McNeill had realised that the front passenger was the first defender. It was he who had paid for the fare. In the course of the journey, he had said to Mr McNeill, making a motion with his arm, "You've got to do your duty", or words to that effect. The first defender had been looking at Mr McNeill as he had said it. Mr McNeill had taken that to mean that it was the first defender's intention to have sex with the woman sitting in the back seat. The woman had not spoken to the first defender, the front passenger, in the course of the journey.

[218] On arrival, Mr McNeill had noticed that the house was in darkness. He had assumed that other people might be following, for a party.

[219] He had felt that the woman had looked a bit anxious or nervous. That was why he had spoken to her. He knew that she had had a drink, but he could not say how much. When referred to his police statement, he confirmed that he had stated to the police that he could tell straight away that she had been drinking by the way she had got in the taxi. He confirmed that there had been no conversation in the taxi in the course of the journey. In particular, it appeared to him, from the way they behaved, that the woman was a stranger to the two men. The man and the woman in the rear seat had sat with the vacant central seat between them.

[220] He confirmed that before she left the taxi, the woman had remained sitting in the back seat for a while, perhaps 30 seconds or a minute, before getting out. She had not immediately followed the male rear passenger. Mr McNeill had thought it had taken her too long to get out of the taxi. She had not immediately followed the man, but just sat there mumbling to herself. It was as if she had been trying to convince herself that she was doing the right thing, but she seemed uneasy. As she had been sitting there, the man who had been the other rear seat passenger had kept the door open. When she had left the taxi, she had left the door open. When following the man, she had not closed it.

[221] He was adamant that the man in the front seat had been wearing a white T-shirt, had a tattoo on his right arm, and had been in fact the first defender. When the first defender had been paying the fare, he had emptied his pockets, looking for change, and it had been apparent that he did not have the keys to the house.

[222] He confirmed that he had stated to the police that the girl had been on the phone while in the taxi, not speaking, but as if texting. She had been holding the phone in her hand at the end of the journey.

### **Gareth Neilson**

[223] Mr Neilson was the first defender's cousin. They had a good relationship and socialised together regularly, once per week in the past, but now perhaps only once a month.

[224] On 1 January 2011, Mr Neilson had gone out for a drink with the first defender in Stirling, but had then gone with him to Bathgate to meet up with the second defender and his friends. The first defender had driven them there. On the way to the pub where they were to meet the second defender and his friends, they asked directions from two women in the street. Once in the pub, which was The Glenmavis Tavern, they spent about 15 minutes in the front bar with the second defender and his friends. They had one drink there and then moved to the lounge bar at the back of the pub. In all, Mr Neilson estimated that he had four glasses of Jack Daniels whilst there. Subsequently, the two women whom they had asked for directions arrived in the pub and were in the company with Mr Neilson and the first defender. There were about six men in all and the two women. The company remained in The Glenmavis Tavern for a few hours. By the time they left, the company was generally merry and everyone, including the two women, was enjoying themselves.

[225] From The Glenmavis Tavern, Mr Neilson, the first defender and the second defender and his friends made their way to Chalmers nightclub. Sometime later, the two women appeared there also and joined their company again. The two women seemed fine at that time, appeared to be happy and to be enjoying themselves. Mr Neilson had left the nightclub at about closing time by which time he had been there for a few hours. Whilst there, he had two beers as, by that stage, he was not drinking much. After sharing a taxi with a woman, he had gone on home to Stirling on his own. The first and second defenders had left the club before Mr Neilson. He had not known where they were going. Before that, the first defender had said to him that he would be leaving soon, and had arranged to see him when they were both home.

[226] The first defender had been wearing a black leather jacket, grey hoodie, a dark top and jeans. Under reference to the relevant CCTV footage taken at The Glenmavis Tavern, he confirmed that the first defender had been wearing these items and also a black T-shirt. He confirmed that the first defender had a tattoo on his right arm which extended to his mid-forearm, nearer the elbow than the wrist. He confirmed that the weather on the night of 1 January 2011 had been cold and that there had been snow lying on the ground.

### **Case for the Second Defender**

#### *DR (the second defender)*

[227] The second defender had lived in Bathgate for his whole life. He had attended local schools. He was currently playing football, part-time, for Cowdenbeath. In January 2011, he had been a professional footballer, playing for Dundee United, having joined the club full-time when 16 years of age. At that time he had met the first defender who, at the same age, had also joined the club. The first and second defenders were friends, and socialised together now and then. They knew each other's friends. In January 2011 the second defender had a girlfriend, to whom he was now married.

[228] On 1 January 2011, both the first and second defenders had played for Dundee United against Aberdeen, at Pittodrie. The second defender had made arrangements to go out with friends in the evening. These friends included Brian Hutton and others, all of whom he had

known for some time. The arrangement was to meet in Bathgate at The Glenmavis Tavern. The second defender arrived at the pub at about 8pm. At that time he was drinking beer in the front bar. The first defender had made contact with him by phone call or text message, and the second defender had invited him and his cousin to join them in Bathgate. Subsequently, the group moved to the lounge bar in the rear of the pub. Whilst in The Glenmavis Tavern, the second defender saw and spoke to the pursuer, Rachel Carrigan and Carrie-Anne Tugman, all of whom were former school friends. Although the second defender had known the pursuer when at school, they had not been particularly close.

[229] When in the lounge bar, the second defender and the pursuer had spent quite a long time talking at the bar. The pursuer had complimented the second defender saying that he was better looking now than he had been at school. The second defender had been drinking spirits at that time, probably vodka with cranberry juice. Rounds of drinks were being bought by the members of the company. The second defender had bought a few rounds, including drinks for the pursuer. He had also sometimes bought drinks separately for the pursuer. The pursuer herself had tried to buy drinks, but the second defender had insisted on paying for them.

[230] The pursuer and the second defender spoke to one another for some time. The second defender had been standing about a yard from the bar. It was loud in the bar. They had been standing close, touching each other, joking, exchanging compliments and generally enjoying banter. He described the conversation as flirty. Because it was loud in the bar, they had been speaking in each other's ears. In short, they had been chatting up each other. At one stage, when they were sitting at a table, the pursuer had tried to kiss him, but he had pulled away, saying that he had a girlfriend. She had turned, as if annoyed, but had then turned back saying "Who am I kidding, that I really care."

[231] The men in the company, comprising the first and second defenders, the first defender's cousin and the second defender's male friends, left The Glenmavis Tavern in order to go to Chalmers nightclub. Although there had been talk of a party at Dougie Sibbald's house, he had left early and, instead, the company decided to go to Chalmers nightclub. The second defender had told the pursuer that his group intended going to Chalmers nightclub, but she had told him that she and her friends were intending to go to a different nightclub in Bathgate.

[232] In The Glenmavis Tavern, the pursuer had spoken to the first defender when in the company, but the first defender had been speaking more to Rachel Carrigan. The pursuer had mentioned the first defender to the second defender, asking who he was and saying that he was "quite good looking". The first defender's assessment of the pursuer, at that time, was that she was no more drunk than anyone else, and appeared to be fine. He never saw her staggering or falling over. Her words were not slurred.

[233] When shown the relevant CCTV footage, he confirmed that outside The Glenmavis Tavern, he had been speaking with the pursuer in the middle of the road, where they had kissed and cuddled. They had been talking then about the intention of each to go to a different nightclub. After some three or four minutes the first defender and the pursuer had separated. He had carried on to Chalmers and ultimately caught up with his group, and the pursuer re-entered The Glenmavis Tavern.

[234] The second defender's assessment was that it was obvious that the pursuer was attracted to him. He was attracted to her. It was obvious that she was attracted to him because of the way she

was talking and the fact that they had embraced.

[235] In Chalmers nightclub, the second defender's group spent time at the bar, drinking, but also dancing. It was a good night out. Everyone was in good spirits. About 30 minutes or an hour after their arrival, the pursuer arrived at Chalmers nightclub together with Carrie-Anne Tugman and Rachel Carrigan. They joined the second defender's group at the bar. Everyone was in conversation. The pursuer bought a round of shots, probably Jagerbombs. The second defender was still drinking at that time, although he had slowed down a bit since leaving The Glenmavis Tavern. He had noticed the pursuer dancing but without shoes. She had mentioned to him that her feet were sore on a few occasions.

[236] At one point when the second defender and the pursuer had been kissing at a table, one of his friends had slapped him on the head, commenting "Remember where you are"; a reference to the fact that the second defender had a girlfriend.

[237] The second defender had a conversation with Brian Hutton who had confirmed that his sister was out of town and that he had the key to her flat. He had given the key to the second defender. The purpose of obtaining the key was to continue on to the flat with the first defender and the pursuer and Rachel Carrigan. He had mentioned that to the pursuer just before the company left Chalmers nightclub, and she had indicated that she wanted to do that. The second defender's impression had been that the first defender would go back there with Rachel Carrigan, and he would go back with the pursuer.

[238] The whole company left Chalmers nightclub at about 2am. Then the foursome, comprising the first and second defenders, the pursuer and Rachel Carrigan began making their way to the flat in Armadale. The second defender's assessment at that time was that they were doing so because of the possibility of having sex there.

[239] There had been a delay in leaving the nightclub because the pursuer had left her shoes behind and she had gone back in to find them. She had also left her handbag. He did not remember either Rachel Carrigan or the first defender going back into the nightclub. Outside the nightclub one of the stewards had asked the second defender if he knew the pursuer. He had confirmed that he did. His assessment of himself was that, at that time, he was pretty drunk, but not falling over. When leaving, he had known what he was doing. His assessment of the pursuer was that she was drunk, but not slurring her words. Compared to her condition in The Glenmavis Tavern, she was not much more drunk than she had been there. He never saw the pursuer fall or stagger. He never saw her eyes rolling in her head. She had never slurred her words when she was speaking to him. He had never seen anyone assisting her by holding her up, or supporting her by putting hands under her armpits. His understanding was that they were going to the flat in Armadale on the basis that the evening would probably progress to sex.

[240] Having left Chalmers nightclub, they flagged down a taxi in Hopetoun Street, some 300 or 400 yards from the nightclub. Before reaching the point where they flagged down a taxi, the first and second defenders had been walking together, chatting generally. The pursuer and Rachel Carrigan had been walking on their own behind them. Rachel Carrigan and the pursuer had been arguing about going back to the flat in Armadale. Rachel Carrigan had not wanted to do that, but the pursuer wanted to go. The pursuer had told Rachel Carrigan to "Fuck off". Rachel Carrigan had wanted the pursuer to go with her, but the pursuer had said she wanted to go

with the first and second defenders. It had not been a friendly conversation. They had been arguing about it.

[241] The taxi was a four door saloon. The second defender had sat in the front passenger seat. And the pursuer and the first defender sat in the rear seats. The second defender had entered the taxi from the pavement. The pursuer had not required help in order to get in. The second defender had a conversation with Rachel Carrigan in which he asked if they, he and she, had fallen out, since he had not spoken to her much in the course of the evening. At that point, the second defender had been sitting in the taxi and Rachel Carrigan had been standing on the pavement beside it. Rachel Carrigan had asked the pursuer again if she was sure she did not want to go with her, but the pursuer had responded that she would be fine. Rachel Carrigan had been annoyed about that.

[242] The journey to Armadale had taken about 10 minutes. On the way, the second defender had spent time on his phone and had not spoken to anyone. If there had been music playing it was not loud. The first defender had been on his phone but had not been speaking into it. There had not been much conversation. The second defender had spoken to the driver. The first defender and the pursuer had been chatting away, in the back seats, although he could not say what they were talking about.

[243] When the taxi arrived at Greig Crescent, the first and second defender got out. Before getting out, the second defender had paid the driver with coins. He had just enough cash to do that. The pursuer had come out of the taxi after the two men, not long afterwards, perhaps 10 seconds after them. He could not remember which door she used to exit the taxi. She had walked to the door of the flat, not stumbling and not falling. She had walked without difficulty and had not staggered. No one had required to assist her.

[244] Once in the flat, the three went to the living room. There was general conversation. The second defender asked the pursuer if she wanted to go to the bedroom and she had said "Yes". He went to a room which was at the front of the house, on the right hand side as you went through the front door. It appeared to be a child's room; there were toys, and a single bed. In that room, the first defender and the pursuer started kissing. They then moved to the bed. She had been saying to him that she should not be doing this because he had a girlfriend, but that she could not help it. She had undone the buckle of his belt and was touching his penis. He was touching her in the area of her vagina. They kissed and touched each other for about 5 minutes. Either she or he took off the pursuer's dress. He took off his jeans. As they were kissing, the first defender walked into the room, just before the second defender and the pursuer had begun to have sex. The second defender had asked the pursuer if she was alright with the fact that the first defender was in the room. She had replied that she was. The first defender came to the bed and she began touching him. When his trousers were down, the pursuer performed oral sex on the first defender. The second defender had asked the pursuer if she was comfortable with that, and she had replied that she was, saying "I'm fine. The second defender then began to have full penetrative intercourse with the pursuer. That lasted for about 5 minutes. The pursuer was still engaging in oral sex with the first defender. She turned to the second defender and said "Don't come inside me, I don't want another baby". The second defender had not been wearing a condom. They had been having sex for about 5 minutes until she said that. At that point, however, he stopped. From that point he did not want to continue. He realised that he did not want to cheat on his girlfriend. He got up, pulled

on his jeans, and checked his phone. The pursuer was still administering oral sex to the first defender. He asked them if they were alright, and left the room. He went to the living room to check his missed calls, before returning to the bedroom, where he found the first defender and the pursuer lying beside each other on the bed, kissing. He said that he was going to leave and asked if they were okay. They replied that they were. He then left the flat.

[245] He began walking to Bathgate before flagging down a taxi. He arrived home at about 3am or shortly afterwards.

[246] When in the flat, when foreplay and intercourse was taking place between him and the pursuer, at no stage did she indicate that she did not agree with what was happening, and at no stage was her speech slurred. She was always capable of coherent speech, and capable of making her wishes known. He confirmed that if she had not consented, he would not have had sex with her.

[247] He confirmed that, on 1 July 2011, on his solicitor's advice, he had given a statement to the police. At that time, his understanding was that it was as yet undecided whether or not there were to be criminal proceedings against him. He agreed that the terms of his statement, which were broadly in line with his evidence in chief, were accurate. In the course of the interview it had been indicated to him that the police intended to caution him. He had sought advice from his solicitor and, thereafter, after having been cautioned, had continued giving the statement.

[248] In cross-examination, he agreed that in The Glenmavis Tavern, the pursuer must have had at least three drinks, and that in Chalmers nightclub she must also have had at least three drinks.

[249] He had not seen the pursuer since they had been at school, which had been some 7 - 8 years previously. He confirmed that he had not known her well at school. His friend had been Rachel Carrigan. He agreed that Rachel Carrigan would have been entitled to think that she could trust him. He maintained that he had told the pursuer that he had a girlfriend while they were in The Glenmavis Tavern. He confirmed that he and the pursuer had not kissed while there. He agreed that chatting up, and getting on well with a person did not necessarily mean that the person wanted to have sex with you. At the time when he and the pursuer had been outside The Glenmavis Tavern, he had not been sure whether she wanted to sleep with him. He accepted that having a kiss and a cuddle in the street was not necessarily an indicator that a woman would want sex with him, but he maintained that she had been flirting with him. He conceded that at that time, he must not have been troubled by the fact that he had a girlfriend of his own.

[250] He confirmed that, while in Chalmers nightclub, he had a discussion with Brian Hutton about the possibility of using Brian Hutton's sister's flat. He was unaware whether the first defender had spoken to Brian Hutton about it. Because of the indications that had been given in the course of the evening, he thought that the group of four would be going to the flat for the purpose of having sex. He conceded, however, that he had not told the police that in his statement. Although in his statement, he had told the police that there had been no plans for the rest of the night, in other words that he had no intentions in that regard, he confirmed that it had been clear to him that he, the first defender, the pursuer and Rachel Carrigan would go back to the flat for sex.

[251] He confirmed that, in the course of the evening, he had never specifically asked the pursuer, in terms, if she wished to spend the night together with him. He confirmed that his own written

pleadings, to the effect that he had done so, were wrong in that regard. What was averred on his behalf, in that regard, had never happened.

[252] Although, in his police statement, Brian Hutton had said that he gave the key for the flat to the first defender, the second defender maintained, on the contrary, that Brian Hutton had given him the key.

[253] He maintained that, when they were *in* the taxi, Rachel Carrigan had asked the pursuer if she wished to stay with her. That was inconsistent with his own written pleadings which were to the effect that, *before* boarding the taxi, the pursuer had declined an invitation from Rachel Carrigan to stay with her.

[254] He maintained that in the taxi the first defender had been telling jokes. He did not know what the jokes were, but there had been laughing in the back seat. He confirmed that otherwise in the taxi, there had been no other conversation. He confirmed in particular that there had been no conversation or flirting between the pursuer and the first defender. That was inconsistent with his own written pleadings which were to the effect that during the journey the pursuer was in conversation with both defenders. His position was that his pleadings were wrong.

[255] He maintained that Mr McNeill, the taxi driver, must have been wrong when he gave evidence to the effect that the first defender had been sitting in the front seat and the second defender in the rear seat. Despite the written pleadings on behalf of the first defender to the effect that the second defender had been sitting in the rear of the taxi, the second defender maintained that that he in fact had been sitting in the front. He had told the police that in his statement of 1 July 2011.

[256] Under reference to relevant CCTV footage, he confirmed that the pursuer, when entering Chalmers nightclub, was depicted dropping something, and bending down to pick it up, on three separate occasions. He conceded that she had appeared, at that time, to be drunk.

[257] Under reference to evidence given by Gavin Paterson, the first defender could not remember whether at that point he had been attempting to comfort the pursuer. Gavin Paterson's evidence had been to the effect that the pursuer had appeared to be becoming more and more drunk, was crying without saying why, and that men came over to comfort her. The second defender maintained that he could not remember any of that. He did not recall the pursuer calling Carrie-Anne Tugman by the wrong name or the pursuer telling her that she loved her. He did not recall the pursuer leaving articles behind in the bar. He did not recall the pursuer sitting outside The Glenmavis Tavern, without her shoes. He could not remember the pursuer crying. He could not remember the pursuer appearing as if she was about to fall asleep, or leaning against a wall to prevent herself falling down. He did not remember her having ripped tights. He could not remember speaking to Mr Parkes, the senior nightclub steward. He could not recall whom he had been looking at, as depicted on the CCTV footage, outside the front door of the nightclub. When asked how he had difficulty recalling these events, his response was that it must have been because he was drunk. He conceded that, after leaving The Glenmavis Tavern, the pursuer had more to drink in Chalmers nightclub.

[258] He could not remember whether, in the course of leaving the nightclub, he had a conversation with the female steward, other than to confirm that he was with the two girls. He confirmed that CCTV footage appeared to depict him speaking to someone who was off-camera. He had no recollection whatever of any conversation between him and Gail McGregor outside the

front door of Chalmers nightclub. In particular he did not recall having said to her that he would take the pursuer home. He confirmed that his intention had been to take her to Armadale for the purposes of having sex. He conceded that if it was correct that he had told Gail McGregor that he was going to take the pursuer home then, having regard to his intention, he had been lying to her. He conceded that it was possible that he had said to her that he had been at school with the pursuer. He maintained that he had no recollection of saying to Gail McGregor that the pursuer was his best mate and that he would not let anything happen to her. He conceded that in fact the pursuer was not his best mate, but maintained that he did not know why he would have said something like that.

[259] He accepted that the pursuer should not have been left on her own in a strange house. He maintained that he had left because he had realised that he was uncomfortable with the idea of being unfaithful to his girlfriend, although he had not said that expressly to the police, when giving his statement, but rather had said to them : "When (the pursuer) said not to come inside her, it kind of put me off". He maintained, nevertheless, that the reason he had left was because of his realisation of being unfaithful to his girlfriend. That had bothered him, although he conceded that it had not bothered him earlier in the evening.

[260] He conceded that there was no mention in his police statement of him having missed phone calls while at the flat in Armadale. He could not remember his phone ringing or vibrating while in the bedroom.

[261] He denied that he had in fact been sitting in the rear of the taxi and that the first defender had been sitting in the front passenger seat. He denied that he had told the police that the contrary was the case in order to create evidence putting the pursuer and the first defender together, as an explanation of how she had come to have sex with him, all in an attempt to assist the first defender at a time when his career was being prejudiced by the ongoing allegation.

[262] He maintained that when he was in the bedroom in the flat with the pursuer, he personally was not concerned when the first defender entered the room. He could not explain why he had not asked the first defender simply to leave. He denied that the first defender had asked him if he was happy that the first defender should remain. Although that was consistent with the first defender's pleadings, the second defender maintained that the pleadings were wrong. He accepted that the situation, involving one woman with two men in a sexual situation, was unusual. He accepted that he must have been comfortable with the first defender also participating sexually while he, the second defender, was having sex with the pursuer.

[263] He did not agree with the statement by Mr Parkes, the senior steward at Chalmers nightclub, to the effect that the pursuer was "delirious looking", "awfully withdrawn", not making sense, and not understanding what Gail McGregor was saying to her. He thought Mr Parkes must be wrong about that. He conceded, however, that it was possible that he had reassured Mr Parkes by saying to him that they, he and the first defender, would look after the pursuer.

[264] He accepted that when giving his first police interview on 6 January 2011 on the advice of his lawyer he had answered every question put to him with the words "No comment". He accepted that a decision by the Crown Office, that there should be no further proceedings against the first defender, would have been in the interests of the first defender and, in particular, in the interests of his career at that particular time. He agreed that following the interview given by him

in July 2011, it was in fact the case that the Crown Office then made a decision that there should not be further criminal proceedings against the first defender.

[265] He maintained that at the time when he made his police statement in July 2011, it had not been clear to him that the Crown was not proceeding against him.

## Discussion

[266] In what follows, I have taken full account of the written submissions tendered on behalf of the parties, as expanded upon at the bar by senior counsel for the pursuer and the second defender, and by junior counsel for the first defender.

## The Law

[267] There was no dispute among the parties that the act of rape is an actionable civil wrong, and that, whether the act was to be viewed as criminal or delictual, no material distinction arose in respect of its constituent elements (Hume, Lectures, Volume 13: *Obligations ex delicto*, page 120; Personality, Confidentiality and Privacy in Scots law, Elspeth Reid, paragraph 2.01; Anatomy, Consent and the Body in Delict, Alistair MacLean (SULS) Chapter 11, paragraph 11.79; and generally, Stair Encyclopedia, Volume 15, Obligations Arising from a Wrongful Act, paragraphs 2.13 - 2.16).

[268] In circumstances where there was no recent authority concerning, directly, the issue of proof of rape in civil proceedings, it was relevant to note that the definition of the crime has continued to develop in line with changing social attitudes (see, *S v HMA* 1989 SLT 469; Lord Advocate's reference number 1 of 2001, 2002 SLT 466; Sexual Offences (Scotland) Act 2009, section 1).

[269] The pursuer offered to prove (1) that at the time when sexual intercourse took place with each defender, she was incapable of giving free agreement because of the effect of alcohol; (2) that both defenders were aware that she was incapable of giving free agreement; and (3) that neither of the defenders had a reasonable belief that the pursuer consented to sexual intercourse. In that regard, it was relevant to note that drunkenness on its own is not enough to preclude the capacity to consent. It is possible to give meaningful consent, even when drunk (*R v Bree* (2008) QB 131).

[270] The issue of whether there is meaningful consent arises most clearly where some expression or indication of consent to sexual activity is given. In such circumstances, if the individual is so intoxicated as to have no capacity to make free agreement, then whatever she has said or done to indicate consent does not amount to free agreement. There is, however, no fixed test, nor could there be, given the need to recognise the broad range of possible degrees of intoxication. The matter must be determined having regard to the prevailing facts and circumstances, but the essential distinction to be drawn is that between intoxication which, on the one hand, results in a lack of capacity to make free agreement, and that, on the other, which results merely in a loss of inhibition such as to alter the choices which a person might otherwise make when sober, but being insufficient to deprive that person of the capacity to consent (*Bree* (*supra*), at paragraphs 25, 26; Scottish Law Commission: Report on Rape and Other Sexual Offences (Dec. 2007), paragraphs 2.62, 2.63).

[271] Counsel for the pursuer and the second defender approached the case on the basis that the onus lay on the pursuer to demonstrate *inter alia* an absence of reasonable belief. Counsel for the

first defender adopted the position that whether the character of the belief to be proved to be absent was to be categorised as reasonable, or honest and genuine, it was appropriate in either case to determine the matter by reference to the relevant surrounding facts and circumstances. The issue was not whether either defender could prove that he had such a belief at the relevant time, but whether the pursuer could successfully prove that he did not, and that there was no basis on which such a belief could have been held.

[272] Notwithstanding the nature of the allegation made, the standard of proof to be satisfied was that of the balance of probabilities (*Mullan v Anderson* 1993 SLT 835).

[273] However, it was recognised that the gravity of an allegation might require proof by evidence of particular weight (*Mullan*, at paragraph 851F). Thus, the more grave the allegation made, the greater the requirement that the evidence should be cogent (*1<sup>st</sup> Indian Cavalry Club Limited v HM Commissioner of Customs and Excise* 1998 SC 126, at 138B).

[274] Although I was referred to *Mullan*, at 851F, for the proposition that in certain cases the evidence necessary for proof should be “careful and precise”, that was a test considered appropriate in circumstances where, for success, it was necessary to overcome a presumption. Since that was a situation not comparable to this case, I do not consider it appropriate to apply such a test framed in these terms. I do accept, however, that in determining the issues arising in this case, it is appropriate that, in applying the civil standard of proof, the evidence should be carefully examined and scrutinised.

## **The Pursuer**

[275] I accepted the pursuer as a credible and reliable witness. She gave her evidence in a measured way, and was happy to concede points put to her, as appropriate. In particular, given the extent of her amnesia, she accepted that she, personally, was not able to rebut the contentions of either defender as to the events which took place in the flat in Greig Crescent. I assessed her as entirely genuine in her descriptions of the matters about which she was questioned.

## **The Level of the Pursuer's Intoxication**

### *(i) The CCTV footage*

[276] Some time was spent, with a number of witnesses, examining the available CCTV footage which depicted the pursuer at various times over the evening of 1 January 2011. As a matter of generality, she was depicted as though intoxicated.

[277] That is apparent where she is seen leaving The Glenmavis Tavern, and when together with the second defender 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.

[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.

[279] Although there was evidence of the pursuer, at various times, removing her high heeled shoes and walking without them, it is not clear on the evidence that these actions were significant in this respect. Notwithstanding the cold temperature that night, she was not alone in doing that, and there was some general evidence that the practice is not uncommon.

[280] What is of significance, however, is that the available CCTV footage is not a comprehensive record of the pursuer'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 pursuer 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.

[281] Lastly, the CCTV footage, coupled with the evidence of witnesses, indicated that the pursuer was having difficulty retaining control of her belongings, both in The Glenmavis Tavern and at Chalmers Nightclub. She left personal items at both locations and had to return to collect them before finally leaving.

#### *(ii) Eye Witness Evidence of the Pursuer's Condition*

[282] All the witnesses who were part of the company with which the pursuer was engaging in The James Young, The Glenmavis Tavern and Chalmers nightclub were themselves intoxicated. In addition to the defenders, these were Rachel Carrigan, Anne Marie MacKay and Carrie-Anne Tugman.

[283] Rachel Carrigan described the pursuer, variously, as being more drunk than she would have expected, not *compos mentis*, being unaware that her tights were ripped, being quite drunk, and, on leaving Chalmers nightclub, being able to walk on her own to some extent "although the second defender would have required to help her". On arrival at Chalmers nightclub, she had supported the pursuer by taking her arm in order to take her weight.

[284] Carrie-Anne Tugman described the pursuer as being drunk on arrival at The Glenmavis Tavern; and, when in Chalmers nightclub, as being not 100% steady, but not staggering, and able to walk and talk. Subsequently, having left the nightclub, she saw the pursuer again, with the second defender, in the doorway of a hairdresser's salon. In terms of her police statement, she had said that the pursuer had fallen against a door, having lost her balance. The pursuer looked pretty "wasted", her tights were ripped and her hair was a mess. She had not been steady on her feet at all.

[285] Anne Marie MacKay described the pursuer falling against her while standing at the bar in The Glenmavis Tavern. She had appeared to be very drunk, her words were "quite slurry", her eyes were glazed over and the words she was using did not make sense. Later, outside The Glenmavis Tavern, she had seen the pursuer staggering about wearing only one shoe. The pursuer had not looked in good condition and had appeared to be very drunk. She had been concerned for the pursuer.

[286] Others who encountered the pursuer in the course of the late evening of 1 January and the early hours of 2 January 2011, did so in the course of their working lives. There was no evidence

that any of them had been taking alcohol, and I assume therefore that they were sober. These were Gavin Paterson, Gail McGregor, Michael Parkes, and William McNeill.

[287] Gavin Paterson, one of the bar staff, described the pursuer, at about 2am, shortly before she left Chalmers nightclub, as appearing to be distressed, apparently becoming more and more drunk, crying, and appearing as someone who ordinarily would have been asked to leave the nightclub because of being too drunk. She had been falling around, had looked as if she was falling asleep, and appeared to become more drunk in the fresh air outside.

[288] Gail McGregor had 15 years experience of working in the security industry. Shortly after 2am, she saw the pursuer leaning against the front doors of Chalmers nightclub. She seemed not to be in control of herself, her eyes were rolling in her head, she could not stand up straight and could not speak properly. Her assessment of the pursuer was that she was not *compos mentis*. She was not making sense, "looked as though she really needed an ambulance", and was in no fit state for anything other than to go home.

[289] William McNeill, a taxi driver for 19 years, could tell that the pursuer had been drinking as soon as she got in his car. She looked anxious and nervous. He was sufficiently concerned about her to offer, twice, to take her home rather than allow her to alight from the taxi in Armadale. At that time, she was quiet, mumbling to herself, and "it took her too long to get out of the car".

[290] Although various criticisms were made of the reliability and credibility of this second group of witnesses, notably Gail McGregor, they were all well qualified to make a relevant assessment of the pursuer at the times they saw her, and were each in a position to do so unimpaired by alcohol. My impression of each of them, having assessed their demeanor in court and the manner of the delivery of their evidence, was that they were witnesses who gave their evidence in a matter of fact and straightforward way, without fear or favour.

[291] Michael Parkes' police statement, adopted in terms of his affidavit, contained descriptions of the pursuer as looking confused, as if "not quite with you", "glaring through you", "delirious looking", and "awfully withdrawn". She was not making sense when asked questions by him. She appeared not to understand when Gail McGregor was asking her questions. With some 28 years' experience as a doorman, his assessment was that she was not in a fit state to be left on her own. Mr Parkes' evidence was tendered in the form of an affidavit in circumstances where he was too ill to attend court, and its contents therefore were not subject to cross-examination. In assessing his evidence, I have taken that into account.

[292] Much was made of the fact that Mr Parkes' police statement lacked references to aspects of the detail of the evidence given by Gail McGregor, but in the whole circumstances of the incident concerned, where it is apparent from the relevant CCTV footage that Mr Parkes was not always by her side, and indeed was himself involved in other exchanges, I do not consider that to be either significant or surprising.

[293] Specific criticism was made of Gail McGregor's description of the pursuer as being "like a jelly", which was characterised as exaggeration. I do not accept that. Rather, in my assessment, Ms McGregor was simply adopting a colloquial expression in order to describe how the pursuer appeared when unable to support her own body weight and requiring assistance to remain standing.

[294] Neither do I attach weight to the fact that Gail McGregor was subsequently quoted in the press, and subsequently had a significant disagreement with the management of

Chalmers nightclub. Although it was suggested that, in these circumstances, she might have a possible motive to exaggerate, I consider that it would be speculative to draw such an inference from these facts alone. My assessment of her as a witness, on the contrary, was that she gave her evidence in a considered and balanced manner.

[295] Criticisms were also made of the reliability of Mr McNeill's evidence. Although his description of the clothes worn by his front seat passenger must, on any view, be wrong, he was clear that he had seen a prominent tattoo which matched the description of that of the first defender's, and that, in hindsight, he had recognised him as DG. On my assessment of Mr McNeill, otherwise than in respect of his description of what the first defender was wearing in the taxi, I found him, like Gavin Paterson and Gail McGregor to be both credible and reliable.

[296] Catherine Peden, who spoke to the pursuer at about 9am on the morning of 2 January 2011, was also a witness unimpaired by alcohol and well qualified to assess the pursuer's condition. Given her role as a care assistant, accustomed to treating the sick and elderly, I attach weight to her assessment, which was that the pursuer, far from appearing to be hungover, appeared confused and as though she required to be seen by a doctor.

#### *(iii) The Amount of the Pursuer's Alcohol Consumption*

[297] The calculations carried out by Dr Knepil assumed that in the course of the evening, until 2am on the morning of 2 January 2011, the pursuer consumed one half can of beer, eight or nine glasses of Jack Daniels with coke, and two Jagerbombs.

[298] Those amounts reflected the analysis of the evidence submitted on behalf of the pursuer. For the first defender, a total consumption of one half can of beer, nine Jack Daniels with coke and one Jagerbomb was submitted as the relevant amount. Neither analysis was seriously challenged on behalf of the second defender. Rather, in the context of the pursuer acting out of character, emphasis was placed on evidence which suggested that she was consuming alcohol, throughout the evening, at a level which was clearly at odds with her description of her normal consumption.

#### *(iv) The Expert Evidence*

[299] The pursuer's urine sample, taken at 13.15 on 2 January 2011, was found to have a urine alcohol level of 122mg/100ml, equivalent to a blood alcohol level of 91mg/100ml. On appropriate back calculation, recognising that the results of such an exercise can only be approximate, the pursuer's blood alcohol level at 3am on 2 January 2011 was 275mg/100ml (the mid point of a range 183 - 388mg/100ml), and at 4am, it was 257mg/100ml (the mid point of a range 174 - 359mg/100ml).

[300] Dr Knepil calculated the pursuer's blood alcohol level at 3am on 2 January 2011. Allowing for a measure of 25ml of spirits in servings of Jack Daniels and Jagerbombs, his calculations produced, in respect of one half can of beer, eight Jack Daniels and two Jagerbombs, and in relation to low (9mg/100ml), medium (18mg/100ml) and high (29mg/100ml) alcohol elimination rates, mid-range levels respectively of 194mg/100ml, 162mg/100ml and 124mg/100ml. In respect of a comparable consumption of one half can of beer, nine Jack Daniels and two Jagerbombs, on the same basis, his resultant figures were 215mg/100ml, 183mg/100ml and 145mg/100ml. Thus, his mid point figures, as at 3am, were 162mg/100ml and 183mg/100ml, compared to the police forensic scientists' figure of 275mg/100ml.

[301] Recognising that such an exercise is necessarily only approximate, having regard to recognised variations, I accept that the results of the forward calculations carried out by Dr Knepil are broadly consistent with those of the back calculations carried out by the forensic scientists acting on behalf of the police, and can legitimately be regarded as a positive cross-check of their results. Subject to the noted limitations on accuracy, it is reasonable to conclude that both sets of calculations are, within the accepted parameters of variation, valid and correct. Although emphasis was placed on the recognised approximate nature of the outcomes of the calculations, no challenge was made to the methodology of either exercise, which I therefore regard as falling within the relevant acceptable norms. On the basis that both sets of calculations are correct, and given the empirical nature of the valuation of her urine alcohol level at 13.15 on 2 January 2011, there is scope for the conclusion that the pursuer did in fact have more to drink than is suggested by the evidence of the witnesses.

[302] Professor Chick considered that the relevant bands set out in the Sharp/Skett Report accorded broadly with his own clinical experience. These bands were:

“(130-159 milligrammes of alcohol in 100 millilitres of blood). ”

Gross motor impairment and lack of physical control. Blurred vision and major loss of balance. Euphoria is reducing and beginning dysphoria (a state of feeling unwell).

“(160-199 milligrammes of alcohol in 100 millilitres of blood). ”

Dysphoria predominates, nausea may appear. The drinker has the appearance of a sloppy drunk.

“(200-249 milligrammes of alcohol in 100 millilitres of blood). ”

Needs assistance walking; total mental confusion. Dysphoria with nausea and vomiting; possible blackout.”

[303] The pursuer was a young woman with a low tolerance of alcohol due to her habitual low level of consumption of it. On the evidence of Professor Chick, her low recent consumption level was likely to impact on the extent to which the functions of her brain involving thought and behaviour would be affected by alcohol. Her low recent exposure to alcohol would increase the level of expected impairment. He considered the results of the calculation by the police forensic scientists (275-257mg /100ml) to be consistent with the available facts. At that level of intake, the pursuer would have appeared to be unsteady, staggering, looking drowsy when sitting down, and appearing muddled, in perception and conversation and in relation to what was happening to her. He would have expected a degree of mental confusion, manifested in the inability to formulate a plan or to find an appropriate answer to a question put. She would have been confused in relation to time and place, and would have been likely to misinterpret cues from others. Her failure to understand would be apparent. I find that his description of such a presentation is consistent with the persuasive evidence, as I have set it out and which I accept, of those eye-witnesses who were placed to assess the pursuer in a calm and sober fashion.

[304] Those aspect of the evidence of Rachel Carrigan, Carrie Anne Tugman, and Anne Marie MacKay, which I have set out, are also consistent with Professor Chick’s description of the effects of blood alcohol levels in such a range and, on that basis, I accept those parts of the evidence of

these witnesses. Given that evidence, the relevant personal characteristics of the pursuer in this regard, and the view of Professor Chick that, having regard to them, he would have expected her blood alcohol level to be in the upper part of such a range, I accept the mid-range figures calculated by the police forensic scientists as an appropriate valuation of what the pursuer's blood alcohol level was at 3.00 - 4.00 am on 2 January 2011.

[305] Significantly, no alternative expert evidence was led on behalf of either defender.

### **The Evidence of the First Defender**

[306] The first defender was not an impressive witness. He also had been drinking throughout the evening. He described himself, on arrival at Chalmers nightclub, as being probably drunk, probably being not aware of what was really happening. His own estimate of his consumption was that, while at Chalmers nightclub, he had another five or six drinks and possibly some shots in addition. He described his condition on leaving Chalmers nightclub, at about 2am, as being probably really drunk.

[307] My impression of him was that his evidence was apparently clear on matters affecting his own interests, yet his recollection apparently faulty on matters possibly prejudicial to him.

[308] His clear position was that the pursuer had not been greatly affected by alcohol, that she had no difficulty speaking, was not staggering, and had consented throughout to all the sexual conduct which had taken place.

[309] In contrast, he had no recollection, despite standing outside Chalmers nightclub at the relevant time, of any interaction involving the nightclub's stewards.

[310] He maintained that, until he entered the bedroom of the flat in Greig Crescent, he had no intention of engaging in sexual conduct with the pursuer, but was unable to explain why then he had gone to the flat at all.

[311] He maintained that, in the context of sexual intercourse with the pursuer, he had not known that he had ejaculated.

[312] Parts of his evidence were inconsistent with other evidence in the case. His evidence that there was conversation amongst the parties when in the taxi was inconsistent with the evidence of Mr McNeill, the taxi driver, as was his evidence that no-one appeared to have any difficulty in exiting the taxi on arrival in Armadale. His evidence that the second defender stopped having sexual intercourse with the pursuer because his phone was vibrating was contradicted by the second defender in evidence.

[313] In a number of respects, his own evidence was inconsistent with the stated position in his written pleadings: (1) his pleadings stated that in the taxi he had been sitting in the front passenger seat, whereas his evidence, contrary to that of Mr McNeill, was that he had been sitting in the rear with the pursuer; (2) his pleadings stated that he, personally, had made an arrangement with Brian Hutton to obtain access to the flat in Greig Crescent. That was consistent with what Brian Hutton had told the police, but, in his evidence, the first defender insisted that he had not personally been involved; and (3) his pleadings stated that when engaging in sexual intercourse, the second defender had been on top of the pursuer, whereas in his evidence, he stated that the second defender had penetrated her from behind.

[314] In a number of respects, the stated position in his own written pleadings was inconsistent with other evidence in the case: (1) contrary to his own written pleadings, the CCTV footage did

not depict the pursuer and the first defender walking arm in arm; (2) his pleadings stated, contrary to the evidence of the second defender, that, once in the flat, the pursuer and the second defender had been kissing before entering the bedroom; and (3) his pleadings stated that, on entering the bedroom, he had asked the pursuer and the second defender if they were happy for him to be there, whereas the evidence of the second defender was that he, the second defender, had asked the pursuer if she was happy for the first defender to be there.

[315] According to Brian Hutton, the first defender had told him that he wished to use the flat at Greig Crescent because he had nowhere to stay that night. Notwithstanding that, the first defender's own evidence was that he was unable to explain why he had gone to the flat at Greig Crescent and that, in any event, disregarding his own alcohol intake, he was happy to drive from Bathgate to Stirling, arriving home at about 5.00 am.

[316] My general impression of the first defender was that, particularly in relation to his assessment of the pursuer's condition, his evidence was given with a view to his own interests rather than in accordance with the oath which he had taken. I did not find his evidence to be persuasive.

### **The Evidence of the Second Defender**

[317] The second defender had also been drinking throughout the evening. His assessment of himself, when leaving Chalmers nightclub, was that he was pretty drunk, but not falling over.

[318] His assessment of the pursuer was that she was drunk, but not slurring her words. He never saw her fall or stagger, her eyes rolling in her head, or her being held up, or sounding as though she was slurring her words.

[319] His evidence was internally inconsistent. He said in evidence that his understanding had been that he and the pursuer, and the first defender and Rachel Carrigan, would be going back to the flat in Greig Crescent for the purpose of having sex. In contrast, in terms of his police statement, which he accepted in evidence as being accurate in its whole terms, he had told the police on 1 July 2011 that as far as he was concerned there was no plan for the rest of the night.

[320] His evidence was inconsistent with his stated position in the written pleadings. His position in evidence, that he had never had a discussion with the pursuer about spending the night together, was contrary to his own averments.

[321] His position in evidence was that, in the taxi, other than the first defender telling jokes, there had been no conversation with the pursuer. That was contrary to his stated position in his own pleadings, which was to the effect that during the journey the pursuer had engaged in conversation with both defenders.

[322] He had apparently clear recollection of events possibly supportive of the contention that the pursuer was not greatly impaired by alcohol, and of consensual sexual conduct, but apparently no memory of matters possibly indicative of the contrary.

[323] In evidence he maintained that he had no recollection of (1) the pursuer sitting outside The Glenmavis Tavern; (2) the pursuer calling Carrie-Anne Tugman by the wrong name or telling her that she loved her; (3) himself attempting to comfort the pursuer at Chalmers nightclub prior to leaving; (4) the pursuer crying at any time; (5) the pursuer appearing as if she was falling asleep; (6) the pursuer leaning against a wall to prevent herself falling down; (7) he speaking to

Mr Parkes; or (8) speaking to Gail McGregor outside the front doors of Chalmers Nightclub and telling her that he would take the pursuer home.

[324] Like the first defender, I assessed the second defender as a witness who was being selective as to what he was prepared to tell the court and whose evidence, directed as it was entirely to his own interests, was partial and partisan. He also did not present as a witness who was being entirely candid. On the significant issues arising in the case, I did not find his evidence to be credible or reliable.

### **The Evidence of Clifford Wilson**

[325] On behalf of both defenders, some emphasis was placed on the evidence of Mr Wilson, in particular in relation to his recollection of hearing a woman's voice saying "Don't rub my breasts so hard", and "Don't come inside me – I don't want to have another baby".

[326] In my assessment, however, his evidence was sufficiently confused that little reliance ought to be placed on it. His sightings of a man staggering outside the flat, and of a woman standing at the gate asking his mother "Where am I?", are consistent with other evidence in the case, but I do 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.

[327] I have come to that 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 had 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 pursuer, who was alone in the flat when she awoke.

[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. For completeness, I would add that, even if it was the pursuer who said "Don't come inside me, I don't want to have another baby", I would not accept that such language is necessarily consistent with consensual sexual intercourse.

### **Was the Pursuer Capable of Meaningful Consent?**

[329] For the reasons I have indicated, I consider it reasonable in the whole circumstances of this case to ascribe to the pursuer, at the relevant time, a blood alcohol level of the order calculated by the police forensic scientists as the mid-point of the ranges identified by them, that is, a level in the range of 275 - 257mg/100ml. I accept that calculations of that sort are necessarily approximately and subject to recognised variables, and also that, in theory, it would be possible for the pursuer's blood alcohol level to have been one at any point on the identified ranges. However, having regard to the pursuer's own characteristics relevant for these purposes, the reasonable inference to be drawn, on the basis of the difference between the outcomes of the calculations carried out by the police forensic scientists and Dr Knepil, that she may have had more to drink than the amounts

taken into account by Dr Knepil, and the eye witness accounts which I accept as to the progress of her condition during the evening, those figures appear to me to be reasonable given the whole facts and circumstances relating to the pursuer's perceived condition and the behaviour and signs likely, on the evidence, to be exhibited at such levels.

[330] For these purposes, I reject the evidence on which reliance was placed on behalf of both defenders, to the effect that the pursuer was not particularly affected by alcohol and was no more drunk than anyone else in the company.

[331] There was unchallenged evidence to the effect that peak levels of blood alcohol concentration occur some time after consumption of the last alcohol ingested. In that regard, the evidence of Gavin Paterson provided some support for the inference that on leaving Chalmers nightclub, the effect of the alcohol taken by the pursuer had not yet reached its maximum impact on her. His description of her, shortly prior to her leaving the nightclub, was that, as she appeared before him, she seemed to be becoming increasingly more and more drunk.

[332] Expected manifestations of the effects of such a blood alcohol level, as described by Professor Chick, included an impairment of the functioning of working memory. At such levels, the pursuer's ability to take in information in real time, to process it, to remember how it had been processed, to remember the resultant decision, and to remember how the decision had been reached, would have been impaired, as would her ability to know where she was and what was happening. At such levels, she would fall into the category of those specific effects set out in the Sharp/Skett Report which included the manifestation of total mental confusion. In Professor Chick's view, that condition was not consistent with the ability to consent.

[333] Professor Chick was a highly qualified and experienced expert witness whose evidence I found to be persuasive and which I accept. He was broadly supported by Professor Freeman whose evidence was also to the effect that in cases of impaired consciousness, working memory was impaired.

[334] It would appear, on the evidence, that the pursuer's amnesia was best explained by the phenomenon of alcoholic blackout. I accept that during the period for which she has no memory, at least until she entered the flat in Armadale, she was awake and conscious. I also accept that the level of blood alcohol necessary for alcoholic blackout is such that it is possible for an individual to suffer the phenomenon and yet still perform conscious acts during the affected period. On the basis of Professor Chick's evidence, I accept that in such circumstances it would be possible to engage in sexual intercourse and have no memory of it, and indeed to consent to it, without having residual memory. Accordingly, in reaching my decision on this matter, I have attached little weight to the fact of the pursuer's amnesia. It is an indication that she ingested a significant amount of alcohol, but it is not by itself a basis on which to determine whether she was capable of consent.

[335] Having regard to the whole evidence on the matter, I must decide whether among the possibilities which have emerged, one can be identified which reflects the balance of probabilities. Having carried out that process, I do not accept the accounts by either defender as to the pursuer's condition at the relevant time. On the basis, in particular, of the forensic findings as to the pursuer's blood alcohol level, the eye witness evidence which I have identified, and the evidence of Professor Chick, I find that, in the period when she was in the flat at Greig Crescent with the

defenders, the pursuer lacked the level of cognitive functioning necessary to make reasoned decisions and, consequently, lacked the ability to give meaningful consent by free agreement.

[336] Although it was submitted that there was an inherent unlikelihood of the pursuer consenting to have sexual intercourse with two men given her own personal circumstances, in the light of my decision that she was, at the relevant time, in any event, incapable of meaningful consent, it is unnecessary to consider that issue.

[337] It was argued for the second defender, that, equally, there was an inherent unlikelihood that he, given his personal circumstances, and in an area where he was well known, would act in a manner consistent with predatory sexual conduct in relation to a vulnerable woman. Such conduct, however, just as would apply to the pursuer's own behaviour in relation to him at earlier points in the evening, could be an apt illustration of the disinhibiting effects of alcohol, by which individuals make decisions which they might not normally make and which they might later regret. In the case of the pursuer, however, the effect of my finding is that her level of intoxication was beyond that under consideration in *Bree (supra)*, and was such as to preclude consent.

[338] There was evidence of flirtation between the pursuer and the second defender. Although that would be relevant to the issue of whether a person capable of consenting to sexual intercourse might indeed have consented to it, the fact of flirtation, or even of sexual attraction, must cease to be a relevant factor in circumstances where, through impaired cognitive functioning, the ability to make a decision, whether influenced by prior experience or not, is simply absent. The mere fact of sexual attraction does not preclude rape.

## **Did the Defenders Have a Reasonable or Honest Belief that the Pursuer was Consenting to Sexual Activity?**

[339] In this regard, also, the onus of proof lay on the pursuer. Again, having regard to the whole evidence on the matter, I must determine which of the possibilities which have emerged reflects the balance of probabilities.

[340] For the reasons I have already indicated, and which I consider of equal application to this aspect of the case, I found neither defender to be credible or reliable in relation to this issue.

[341] I accept that, on the evidence, at various points throughout the evening, the pursuer was apparently able to function normally to the extent necessary, for example, to use her phone and to handle and use her purse and its contents. That might be consistent with the possibility that at those times she was not yet approaching her peak level of intoxication. However, there was evidence that individuals, even when obviously intoxicated and suffering from impairment of working memory, are capable of such well rehearsed conscious or automatic acts. Professor Chick accepted that engagement in the physical mechanics of sexual intercourse could fall within that category. Thus, it would be reasonable to consider a scenario in which, in the absence of other indicators which might point to an inability to consent, an individual, though clearly intoxicated, could engage in a sexual act in a manner which appeared to be consistent with consent. On my assessment of the evidence, however, such a scenario would not be consistent with the pursuer's presentation at 3.00 am on 2 January 2011.

[342] On the evidence of Professor Chick as to how the pursuer would have presented, given what I accept as an appropriate valuation of her blood alcohol level at the relevant time, I find that,

viewed objectively, there is no persuasive basis to support the contention that either man had a legitimate belief, whether reasonable or honest, that the pursuer was consenting to what took place between them in the flat in Greig Crescent. For the reasons I have given, not least Professor Chick's observations that she would have appeared muddled in perception and in conversation, and in relation to where she was and what was happening to her, and that there would have been a failure to understand which would have been apparent, I find that it has been proved that the pursuer's impaired cognitive functioning and general condition of intoxication was so obvious and manifest that the defenders must have been aware that she was not capable of meaningful consent, and that neither of them could have had a reasonable belief that she was. In relation to the alternative position submitted for the first defender in this regard, I consider that, on the evidence which I accept, the pursuer's condition must have been so apparent that the possibility of an honest but mistaken belief does not arise.

[343] I note, in passing, that it was taken from both defenders that, in relation to the events in the flat at Greig Crescent, at no time had the pursuer said "No". That, however, in a case of this sort, could never be determinative. The current state of the law, having regard to the modern defined meaning of consent in this respect, is such that its value is that it sends a clear signal that anyone dealing with someone who is intoxicated is put on notice that that person may not be able to give consent no matter what she says or does (Scottish Law Commission: Report on Rape and Other Sexual Offences (Dec. 2007)). In that regard, I have found on the balance of probabilities that both defenders culpably ignored what, on the evidence, were clear indicators that the pursuer was not capable of meaningful consent, and instead deliberately took advantage of the situation in order to sexually assault her.

## **Decision**

[344] Having carefully examined and scrutinised the whole evidence in the case, I find the evidence for the pursuer to be cogent, persuasive and compelling. In the result, therefore, I find that in the early hours of Sunday 2 January 2011, at the flat in Greig Crescent, Armadale, both defenders took advantage of the pursuer when she was vulnerable through an excessive intake of alcohol and, because her cognitive functioning and decision-making processes were so impaired, was incapable of giving meaningful consent; and that they each raped her.

[345] In these circumstances, the pursuer having proved her case, I shall pronounce decree against the first and second defenders, jointly and severally, in the agreed sum of £100,000.

[346] I shall reserve, meantime, all questions of expenses.