

CANADA / JUDGMENT

Behan v. Park

2014 BCSC 1982

COURT

Supreme Court of British Columbia

DECIDED

22 October 2014

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2014 BCSC 1982 Behan v. Park

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Behan v. Park,

2014 BCSC 1982

Date: 20141022

Docket: S127695

Registry: Vancouver

Between:

Alex Lee Behan

Plaintiff

And

Pius Park and Eric Kim

Defendants

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for the Plaintiff:

I.G. Nathanson, Q.C.

Counsel for the Defendant Eric Kim:

J.H. Rosner

Defendant Pius Park

No appearance

Place and Date of Hearing:

Vancouver, B.C.

August 21, 2014

Place and Date of Judgment:

Vancouver, B.C.

October 22, 2014

Overview

- [1] The plaintiff, Ms. Behan, commenced an action against the defendants, Messrs. Park and Kim, alleging, inter alia, that one or both of them had sexually assaulted her. That action was heard before a jury who, after 17 days, found Mr. Park liable for having sexually assaulted Ms. Behan but dismissed the action against Mr. Kim.
- [2] Both Ms. Behan and Mr. Kim now seek various cost orders. Specifically, Ms. Behan seeks orders that would have:
 - i) Mr. Park pay the special costs of the action; and
 - ii) Mr. Kim denied his costs or, alternatively, have Mr. Park pay the costs of Mr. Kim (a Sanderson Order).
- [3] Mr. Kim, in turn, seeks to recover his costs from Ms. Behan on a special costs basis.

Failure of Mr. Park to Appear at the Cost Application

- [4] Mr. Park, who was represented at trial, did not attend at the hearing of this application. I was advised that Mr. Park had dismissed his counsel in relation to all Supreme Court proceedings in the action, including this cost application. He has, however, continued to retain that same counsel for the purposes of the appeal that has been filed and that is being advanced on his behalf.
- [5] This was an application that was originally scheduled months in advance, based on the calendars of all counsel, and on the premise that written submissions would be exchanged by counsel prior to the application. There was no indication, in any form, from Mr. Park that he wished to adjourn the application or that he wished to retain new counsel to address the application. On its face, this is not a case where counsel and client have parted ways, in which case I may well have sought some further input from Mr. Park and adjourned for that purpose. Instead, it appeared to be a measured decision to not participate in the application. Accordingly, I decided to proceed with the application in Mr. Park's absence.

Background

- [6] On April 13, 2012, Ms. Behan was 37 years old. She had been married for eight years and had two young children. She was employed by the Edgewater Casino. On the evening of April 13, 2012, she hosted an event, on behalf of her employer, in a suite in Rogers Arena. The Canucks were playing in a playoff game.
- [7] Ms. Behan had invited Mr. Kim, a client, to the game. Shortly before the game, another seat in the suite became available and Mr. Kim invited his close friend, Mr. Park, to the game. There were perhaps 15 to 20 other persons in the suite, at different times, that evening.
- [8] At trial, Ms. Behan said that she had no memory of anything that had occurred after about the second period of the hockey game. She awoke in her bed the following morning and later discovered that there was an approximately 2 cm long laceration on her labia and blood on her thighs. She made her way to the Vancouver General Hospital and was examined by a team that specialized in sexual assaults.
- [9] There was evidence at trial which indicated that from the evening of April 13, 2012 until the following morning, Ms. Behan was only alone with Mr. Park and Mr. Kim; with Mr. Mohamoud, the limousine driver who drove her home; and with her husband, Jordan Behan. Both Mr. Mohamoud and Mr. Behan gave evidence that they did not sexually assault Ms. Behan. So too did Messrs. Park and Kim.
- [10] The notice of civil claim filed on behalf of Ms. Behan alleged that either or both of the defendants had:
- i) sexually assaulted Ms. Behan,
 - ii) assaulted her by giving her a date rape drug,
 - iii) conspired to sexually assault and/or assault Ms. Behan.
- [11] The jury was asked a series of specific questions in relation to both issues of liability and quantum. The jury concluded, as I have said, that Mr. Park had sexually assaulted Ms. Behan. The jury also concluded that Mr. Kim had not sexually assaulted Ms. Behan, that neither defendant had assaulted Ms. Behan by giving her a date rape drug, and that neither defendant had conspired to sexually assault or to assault Ms. Behan by giving her a date rape drug.
- [12] The evidence at trial, which in this respect was largely unchallenged, was that after April 13, 2012, Ms. Behan suffered from depression and post-traumatic stress disorder. She had not worked since that evening. Both she and Mr. Behan testified that the resulting stress on their marriage contributed to their separation.
- [13] The jury awarded Ms. Behan \$152,000 for her non-pecuniary losses, \$236,000 for her past wage loss claim, and \$2,544.11 for her special damages, giving rise to a total award of \$390,544.11. The jury declined to award Ms. Behan punitive damages.

Making the Necessary Findings of Fact from the Jury's Conclusions

[14] During the course of counsels' submissions, I asked for authority that addressed how a trial judge is to make the necessary findings of fact, from a jury's verdict, that may, for example, be required for a cost award. I was directed to *Mudhar v. Brar*, 2005 BCSC 805, a case in which the defendants sought special costs following a trial by jury. The plaintiffs argued that the jury's verdict reflected an adverse finding on the credibility of the plaintiff warranting an award of special costs. McEwan J. discussed the issue as it related to the case before him and said:

[9] I have not located a case that specifically addressed the question of what inferences a trial judge can draw in assessing costs following a jury verdict. In the Criminal Law it is well established that in sentencing a trial judge may draw his or her own inferences regarding the facts. Section 724(2) reads:

Where a court is composed of a judge and jury, the court

- (a) shall accept as proven all facts, express or implied that are essential to the jury's verdict of guilty; and
- (b) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.

[10] I think similar principles should apply, with the necessary modifications, to questions of this kind presented in civil cases. I would, however, qualify this to say that where the question of whether conduct is "reprehensible" arises out of matter that might have been, but were not pleaded (i.e. "fraud"), the court should only reluctantly and in the clearest of cases impute findings the jury could have been but was not asked to make.

[11] Counsel for the defendants submits that it is "clear" that the jury found that Baldev Mudhar was not at the scene of the accident and that he had obviously attempted a fraud on the court and on the defendants. This was not so obvious to the defendants, however, that the allegation found its way into the pleadings in a form which would require a specific finding by the jury.

[12] I am therefore left with my own impressions as to what was definitively established before the jury as a foundation for its verdict that Baldev Mudhar was not entitled to damages. There was evidence on both sides of the question which, if believed, could have led to a finding for or against Mr. Mudhar. In my view, the jury verdict reliably reflects only a finding that Baldev Mudhar did not carry the burden of proof respecting his claim. I do not think more can be made of it than that. Accordingly, I do not consider this an appropriate case for an award of special costs.

[15] Mudhar appears to focus on the fact that the defendants could have, but did not, plead fraud and that they thereafter sought, as a basis for their claim for special costs, to infer such fraud from the jury's verdict.

- [16] This case is different. Here, counsel for Ms. Behan argues that apart from it being clear from the jury's verdict that it did not accept aspects of Mr. Park's evidence, I should also conclude that Mr. Park deliberately fabricated or concocted evidence to mislead the jury. This is an issue that is simply not before a jury in the normal case.
- [17] In this case, the matter is further complicated by the fact that counsel for Ms. Behan argued, and I charged the jury to consider, whether Mr. Park had deliberately lied so as to mislead it. If so, this might constitute circumstantial evidence of guilt or an inculpatory circumstance against Mr. Park. It is not clear to what extent, if at all, the jury accepted counsel's submissions or drew any such conclusions.
- [18] I consider that there is some value in returning to the criminal context for further guidance.
- [19] In *R. v. Ferguson*, 2008 SCC, McLachlin C.J.C., for the court, confirmed the principles that govern the manner in which a sentencing judge is to determine, from the issues before the jury and the jury's verdict, the facts necessary for sentencing:
- [17] Two principles govern the sentencing judge in this endeavour. First, the sentencing judge "is bound by the express and implied factual implications of the jury's verdict": *R. v. Brown*, [1991] 2 S.C.R. 518, p. 523. The sentencing judge "shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty" (Criminal Code, s. 724(2)(a)), and must not accept as fact any evidence consistent only with a verdict rejected by the jury: *Brown*; *R. v. Braun* (1995), 95 C.C.C. (3d) 443 (Man. C.A.).
- [18] Second, when the factual implications of the jury's verdict are ambiguous, the sentencing judge should not attempt to follow the logical process of the jury, but should come to his or her own independent determination of the relevant facts: *Brown*; *R. v. Fiqia* (1994), 162 A.R. 117 (C.A.). In so doing, the sentencing judge "may find any other relevant fact that was disclosed by evidence at the trial to be proven" (s. 724(2)(b)). To rely upon an aggravating fact or previous conviction, the sentencing judge must be convinced of the existence of that fact or conviction beyond a reasonable doubt; to rely upon any other relevant fact, the sentencing judge must be persuaded on a balance of probabilities: ss. 724(3)(d) and 724(3)(e); see also *R. v. Gardiner*, [1982] 2 S.C.R. 368; *R. v. Lawrence* (1987), 58 C.R. (3d) 71 (Ont. H.C.). It follows from the purpose of the exercise that the sentencing judge should find only those facts necessary to permit the proper sentence to be imposed in the case at hand. The judge should first ask what the issues on sentencing are, and then find such facts as are necessary to deal with those issues.
- [20] The comments found in para. 17 of *Ferguson* mirror the comments of McEwan J. in *Mudhar* and are clear. The comments found in para. 18 of *Ferguson* establish that a trial judge should not try to follow the "logical process of the jury". Instead the trial judge is to "independently" determine the facts necessary for the determination before him or her, so long as such conclusions are impliedly and expressly consistent with the jury's verdict.

- [21] This makes sense. The issue of whether a party has given unreliable or inaccurate or false evidence as opposed to evidence that has been concocted or fabricated so as to mislead, is an issue that normally has no place in a determination of liability in a civil proceeding and plays no part in a jury's determination. That issue may, however, be directly relevant in an application for costs.
- [22] The next question is what standard of proof pertains, in the civil context, to such an analysis?
- [23] In *Schwabe Estate v. Lisinski*, 2005 BCSC 1284, Williams J. dealt with another application for special costs which followed a trial by jury:
- [27] In the present case, the trial proceeded before a jury so I did not make any specific findings regarding matters such as the defendant's credibility or the authenticity of the documents that he relied upon. I am also mindful of the fact that it is not possible to know the precise basis upon which the jury reached its verdict and that, consequently, I must be cautious in drawing inferences from that verdict.
- [28] It is apparent that the jury rejected the testimony of the defendant with respect to the central issue of why the documents were not forwarded to the insurer. However, given the standard of proof which the jury was required to apply, namely, the balance of probabilities, I am not satisfied that I can necessarily conclude that his testimony was a deliberate lie. While certainly an available view of the outcome, it is not the only one. Similarly, I am not satisfied that I can necessarily conclude that the chart notes, although suspicious, were fabrications or were concocted to mislead the Court.
- [24] Respectfully, I do not consider that Schwabe is quite accurate. In the criminal context it is clear, for example, that all aggravating circumstances must be proven beyond a reasonable doubt. However, in the civil context that burden is always proof on a balance of probabilities. In *F.H. v. McDougall*, 2008 SCC 53, Rothstein J. for the Court said:
- [40] Like the House of Lords, I think it is time to say, once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof.
- [25] In this case, the allegations being made against Mr. Park are serious as are the consequences, in the form of special costs, that are being sought. This context requires that I proceed with caution and recognize that the relief being sought is exceptional or extraordinary - matters that I will return to. I do not consider, however, that the test I am to apply is that I must "necessarily conclude" that Mr. Park lied deliberately or that I must be satisfied that this is the "only view" that can arise from the evidence that the jury and I heard. Similarly, I do not consider that the standard referred to in *Mudhar*, that the trial judgment must determine what was "definitely established" is accurate.

Special Costs against Mr. Park

[26] The plaintiff seeks the special costs of this action from Mr. Park on two somewhat related bases: first that Mr. Park knowingly fabricated evidence to deceive the trier of fact; and second, that Mr. Park sought to tamper with Mr. Kim's evidence.

i) Jurisdiction

[27] This court has jurisdiction to award special costs under R. 14-1(1) of the Supreme Court Civil Rules as well as under its inherent jurisdiction to control its process: *Harrington (Guardian ad litem of) v. Royal Inland Hospital* (1995), 14 B.C.L.R. (3d) 201 (C.A.) at paras. 217-218 (addressing the former R. 57(1)); *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 25.

ii) Threshold

[28] In *Westsea*, Gropper J. succinctly summarized the threshold required for an award of special costs:

[27] The award of special costs departs from the traditional approach to the award and assessment of costs.

[28] The leading authority for special costs in British Columbia is the Court of Appeal's decision *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.). There, Mr. Justice Lambert, writing for the court, determined that the threshold for awarding special costs is "reprehensible" conduct.

[30] In the decision on special costs, Lambert J.A. noted that different terms had been used to describe the appropriate circumstances for awarding special costs. In particular, he drew attention to the finding of Madam Justice McLachlin (as she then was) in the Supreme Court of Canada decision *Young v. Young*, [1993] 4 S.C.R. 3 in regard to costs (with which the majority concurred) at 134:

Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.

[32] Lambert J.A. decided to introduce clarity into the law of special costs by synthesizing the different variations on the standard for a special costs award into a single standard, that of reprehensible conduct. He held at para. 17:

Having regard to the terminology adopted by Madam Justice McLachlin in *Young v. Young*, to the terminology adopted by Mr. Justice Cumming in *Fullerton v. Matsqui* (District), and to the application of the standard of "reprehensible conduct" by Chief Justice Esson in *Leung v. Leung* in awarding special costs in circumstances where he had explicitly found that the conduct in question was neither scandalous nor outrageous, but could only be categorized as one of the "milder forms of misconduct" which could simply be said to be "deserving of reproof or rebuke", it is my opinion that the single standard for the awarding of special costs is that the conduct in

question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all-encompassing expression of the applicable standard for the award of special costs.

[37] More importantly, Garcia emphasizes that the purpose of a special costs award is to chastise a litigant. By rebuking reprehensible conduct, the court punishes bad behaviour and deters it. It also serves to distance the court from the conduct at issue.

iii) Conduct that may Warrant an Award of Special Costs

[29] In *Westsea*, Gropper J. identified various categories or "thematic groups" of circumstances where courts have been prepared to make an award of special costs: paras. 42-75. The assertion that Mr. Park intentionally gave false evidence with the intention of misleading the jury can, if established, ground an award of special costs. Such conduct, and some of the case law relevant to it, was captured by Gropper J. in *Westsea* under the heading "Misleading the Court": paras. 65-72.

[30] Similarly, the conclusion that Mr. Park's attempted to tamper with Mr. Kim's evidence would, on a separate basis, support an award of special costs.

iv) The Relevant Evidence

a) Fabricating Evidence to Mislead the Trier of Fact

[31] On the morning following April 13, 2012, Mr. Park called Ms. Behan at home and indicated that he had her cell phone. She drove to his home to recover the phone. Shortly after her arrival she told Mr. Park that she had no memory of the previous evening after the second period of the game. She asked Mr. Park if he recalled the events of the previous evening and he responded that he too had no memory of what had happened after the second period of the hockey game.

[32] On discovery and at trial, Mr. Park agreed that he had later told Mr. Kim that he had a good memory of the events of that evening and he gave evidence at trial in relation to a series of events whose components, individually and collectively, were exculpatory.

[33] Much of Mr. Park's evidence was contradicted by one or more witnesses. Mr. Park's evidence, or at least portions of it, was, having regard to the jury's verdict, rejected by the jury. The question is whether Mr. Park's evidence was, in fact, concocted and intended to mislead.

[34] The following examples are illustrations, but are not exhaustive, of some of the difficulties with Mr. Park's evidence. Mr. Park gave evidence, in discovery and at trial, that he and Mr. Kim had never sat on the same couch, in the suite, as Ms. Behan; that she did not sit between them; and that they had not touched her that evening. The evidence of different

witnesses placed Mr. Park and Mr. Kim seated on a couch with Ms. Behan and established that the group were laughing and touching each other in different ways at different times over the evening.

- [35] Mr. Park asserted that he and Mr. Kim were never alone in the suite with Ms. Behan. He said there were always others present. This evidence was contradicted by various witnesses who testified that when they had left the suite for the evening they left only Mr. Park, Mr. Kim and Ms. Behan behind.
- [36] Ms. Lewis, a concierge at Rogers Arena and an important witness, testified that when she walked into the suite at the end of the game she saw only Mr. Park, Mr. Kim and Ms. Behan in the suite. She said that Mr. Kim and Ms. Behan were passed out. Mr. Park, on the other hand, said that when Ms. Lewis walked into the suite he was speaking to Mr. Kim and Ms. Behan and that he had been doing so for the previous 15 minutes. Again, Mr. Park said there were others present at that time and that when Ms. Lewis told them it was time to leave, he, Mr. Kim and Ms. Behan got their coats and left. In response to a question from counsel for Ms. Behan, Mr. Park agreed that the whole thing was "straightforward". Ms. Lewis, on the other hand, said that Ms. Behan had trouble speaking and walking. She fell twice. Once inside the suite (which Mr. Park acknowledged) and once outside the building.
- [37] Ms. Lewis testified that when she was in the suite at the end of the game she saw that Mr. Park had Ms. Behan's cell phone. She asked Mr. Park to return the phone. He refused to do so holding the phone over his head. Mr. Park denied any such exchange or behaviour and said that he was "shocked" the next morning to find that he had Ms. Behan's phone.
- [38] Ms. Lewis testified that Mr. Park insisted that he and Mr. Kim would walk Ms. Behan home. Ms. Lewis said that Ms. Behan's condition caused her concern and, in fact, caused her to escort Ms. Behan out of the building and to place her in a cab or town car. Mr. Park denied that he had said he would walk Ms. Behan home.
- [39] Counsel for Ms. Behan also relied, in concept, on a second body of evidence in support of the proposition that Mr. Park actively sought to mislead the trier of fact. This material consisted of correspondence from counsel for Mr. Park, an affidavit of Mr. Park, and the response to civil claim filed by Mr. Park's former counsel. This material, in different ways, all suggested that Mr. Park was told by the police that their investigation was complete and that they did not require a sample of his DNA. These statements, Mr. Park conceded his cross examination, were not accurate. He was not told by the police that their investigation was complete. He was not told by the police that they did not require a sample of his DNA. Mr. Park said that he had inferred these things from his discussions with the police.
- b) Evidence of Mr. Park Tampering with the Evidence of Mr. Kim
- [40] On the morning following April 13, 2012, Mr. Kim too told Ms. Behan and Mr. Park that he had no memory of what had transpired after the second period of the hockey game. He said the same thing to the Vancouver Police when he was later interviewed.

[41] On discovery and at trial, Mr. Kim asserted that he now remembered certain things from the evening in question. In particular, he said that he recalled that there were two large East Indian men in the suite with Mr. Park, Ms. Behan and him when they were asked to leave by Ms. Lewis. Mr. Kim said that following his interview with the police he had a detailed conversation with Mr. Park who refreshed his memory in certain respects, including in relation to the fact that there were others in the suite at the end of the evening. The following is one of several instances where Mr. Kim explained how and why he had come to change his evidence:

Q Sir, you say that but you told the police not in and out. You said a complete blank.

A When I went to see the police, I didn't remember anything after what happened after the second period. When I had a discussion with Pius [Mr. Park] there were certain things that I was told and I tried hard to remember those things and it sort of came back.

Q Let me be clear on this. You say your memory, which was completely blank after the second period, became not so blank after you talked to Pius, is that right?

A Yes.

Q It's Pius who refreshed your memory, is that right?

A Yes. He helped me.

Q So Pius told you things and then you say that brought back my memory which was otherwise completely blank after the second period?

A Yes.

[42] Mr. Park accepted that he had discussed the events of April 13, 2012 with Mr. Kim but denied ever telling him that there were two large East Indian men in the suite with them and Ms. Behan at the end of the evening.

v) The Relevant Legal Principles

a) The Case Law that is Relevant to a Party Who Gives False Evidence that is Intended to Mislead

[43] A deliberate attempt to mislead a trier of fact through contrived, concocted or fabricated evidence can ground an order for special costs: *Webber v. Cdn. Aviation Ins. Mgrs. Ltd.*, 2003 BCSC 274 at para. 14; see also the authorities referenced in *Westsea* at paras. 65-72.

[44] However, a deliberate attempt to mislead must be contrasted with a simple finding that a court does not accept the evidence of a witness. There are a great many instances where a party's recollection may be poor or where a witness may be honest but mistaken. There are many instances where the witness's evidence is considered unreliable. Indeed there will be cases where the witness has, over the course of time, come to remember a set of events in a more positive light that is ultimately determined to be accurate.

- [45] Thus in *Grewal v. Sandhu*, 2012 BCCA 26 at para. 107, leave to appeal ref'd [2012] S.C.C.A. No. 120, the court remarked, "but special costs are not awarded based on the acceptance or rejection of testimony. If it were otherwise, instead of being an extraordinary measure, special costs could be imposed whenever credibility was an issue": see also *Kongrecki v. Rafael* (1994), 2 B.C.L.R. (3d) 196 at paras. 16, 18 (S.C.), aff'd 19 B.C.L.R. (3d) 301 (C.A.); *O'Cadlaigh v. Madiuk* (1994), 33 C.P.C. (3d) 117 at para. 6 (B.C.S.C.); *Bronson v. Hewitt*, 2011 BCSC 102 at paras. 144-146.
- [46] Three further decisions of this court are useful. Each of *Steinebach v. Fraser Health Authority*, 2011 BCSC 1369 at paras. 28-29, *Schwabe* at para. 25 and *Westsea* at paras. 65-72, discuss various authorities where courts have made awards of special costs, either on the basis that a party has deliberately misled the court or in circumstances where that factor is considered in combination with other reprehensible behaviour.
- [47] In addition, two appellate authorities provide useful guidance. In *Marchen v. Dams Ford Lincoln Sales Ltd.*, 2010 BCCA 29, the court, in sustaining an award for special costs, described the background to the issues before it as well as its conclusion:
- [70] Although the judge conflated the analysis damages and costs analysis, he made findings of fact relevant to and supportive of his award of special costs. They can be summarized as concluding that very shortly after this action was commenced, the appellant began to lay the groundwork for a defence that was based on facts it knew to be untrue: that Mr. Marchen was terminated as a result of downsizing the body shop operations. It persisted with this defence throughout the trial and it was rejected by the trial judge. He concluded the appellant's "conduct was planned and deliberate and intended to mislead the court".
- [71] The appellant contends it is condemned for pursuing a defence it was entitled to pursue and that an award of special costs has a chilling effect on the ability of defendants to advance legitimate defences that ultimately are rejected.
- [72] In my view, the appellant's concern is misplaced. There is no question a defendant is entitled to advance defences in good faith.
- [73] In this case, the judge's conclusions go far beyond merely rejecting a defence. Looking at the evidence overall, he concluded the appellant sought to mislead the court and to drive Mr. Marchen from the judgment seat. No palpable and overriding error has been shown in the judge's findings of fact. They are based on his appreciation of the evidence. There is no basis in principle on which this Court could interfere.
- [48] In *Unternaher v. Wheat Sheaf Inn Ltd.* (1998), 114 B.C.A.C. 299, *Prowse J.A.* overturned an award of ordinary costs:
- [11] I now turn to the issue of costs. The trial judge found that two of the respondents who gave evidence at trial concocted their evidence with respect to whether there was a system in place for snow removal on the corporate respondent's premises - a critical issue with respect to liability. One of the witnesses was a shareholder and employee of the corporate

respondent; the other was employed from time-to-time by the corporate respondent. A third witness for the defence also admitted to lying by suggesting that Mr. Unternaher was intoxicated to a significant degree prior to his fall. Despite his findings that these witnesses had not been truthful in giving their evidence, the trial judge concluded that the conduct of the respondent, by which I take him to mean the corporate respondent, was not reprehensible and not deserving of an order of special costs. He granted Mr. Unternaher ordinary costs at scale 3.

- [12] In my view, the conduct of the corporate defendant's employees in lying, and thereby attempting to mislead the court with respect to the issue of liability, was conduct which should have attracted an award of special costs. In essence, by lying, they sought to deprive Mr. Unternaher of the damages to which he was ultimately found to be entitled in compensation for his injuries. Their actions, in my view, are attributable to the corporate respondent and constitute reprehensible conduct calling for an award of special costs within the meaning of the relevant authorities, including *Garcia v. Crestbrook Forest Industries Ltd.* (No. 2) (1994), 45 B.C.A.C. 222; 72 W.A.C. 222; 119 D.L.R. (4th) 740 (C.A.), a decision of this court. The evidence of the third witness who lied is also to be deplored, but there is no evidence that she did so at the behest of the respondents and I do not rely on her conduct in concluding that the trial judge erred in failing to award special costs. I would allow this ground of appeal.
- [13] In the result, I would allow the appeal to the extent of substituting an award of special costs for the award of ordinary costs. Otherwise, I would dismiss both the appeal and the cross-appeal.
- [49] What flows from the foregoing discussions is a recognition that an award of special costs is an "extraordinary measure": *Grewal* at para. 107, and limited to "exceptional circumstances": *Westsea* at para. 39. Such an order is, however, warranted where a party gives:
- i. false evidence that has been contrived, concocted or fabricated;
 - ii. with an intention to mislead: *Marchen* at para. 70, *Unternaher* at para. 12;
 - iii. on an issue that is central to the matter before the court: *Waters v. Michie*, 2013 BCCA 441 at paras. 39-40, and, which if accepted, would "drive [the opposing party] from the judgment seat": *Marchen* at para. 73.
- b) The Case Law Relevant to Tampering with the Evidence of a Witness
- [50] The authors of *Frederick M. Irvine, McLachlan & Taylor: British Columbia Practice*, 3d. ed., loose-leaf, (Markham: LexisNexis, 2006) vol. 2 at 14-126.3, state:

Witness tampering can be a basis for an award of special costs. It does not matter whether there is evidence that the witness, as a result of actions or activities by a party or agent of a party, has altered his evidence to the benefit of that party. The proper focus is on the conduct of the party or the agent of the party. An effort to contaminate the evidence of a witness was conduct worthy of rebuke and remained so whether the effort met with success: *Coulter v. Ball*, [2003] B.C.J. No. 1804, 35 C.P.C. (5th) 350 (S.C.), at para. 23.

vi) Conclusions

a) Intention to Mislead

- [51] The jury found Mr. Park liable for the civil sexual assault of Ms. Behan. It clearly did not accept components of the evidence he gave. The jury was not expressly or necessarily required to go further and to determine whether that evidence was fabricated and whether it reflected an intention on the part of Mr. Park to mislead the jury. I am satisfied that the evidence was fabricated and it did reflect an intention to mislead. Significant aspects of the evidence given by Mr. Park, at discovery and again at trial, recounted a relatively detailed narrative, consisting of multiple components, each of which was intended to be exculpatory. This narrative was given against the backdrop of Mr. Park having told Ms. Behan that he had no memory of the events of the evening after the second period of the hockey game.
- [52] Each of the components of Mr. Park's evidence from, for example, whether he so much as sat beside Ms. Behan, to whether he was alone in the suite at the end of the evening with Ms. Behan and Mr. Kim, to whether Ms. Behan and Mr. Kim were passed out, or whether he was talking to them when Ms. Lewis walked into the suite, to whether he knowingly withheld Ms. Behan's phone from Ms. Lewis, to whether he insisted that he and Mr. Kim would walk Ms. Behan home was contested by one or more witnesses. His benign rendition of events stood in stark contrast with the evidence as a whole.
- [53] This is not a case where Mr. Park was forgetful or mistaken or where he exaggerated. Instead, I am satisfied that he knew the evidence he gave was not truthful and that when he gave that evidence he sought to mislead the trier of fact.
- [54] I am mindful of the need to proceed cautiously and I have not arrived at this conclusion lightly. I have also considered the fact that Mr. Park drank relatively heavily that evening and that he said, at times, that there were things he either did not remember or that he did not remember precisely. The matters I have addressed are generally different. Though Mr. Park's evidence was periodically inconsistent, the matters I have referred to are generally instances of where Mr. Park denied what others were saying and where he professed to have a memory of events.

[55] The separate body of evidence, in the form of Mr. Park's counsel's correspondence, or his pleadings or of Mr. Park's affidavit, stand in a different category. It does not appear that Mr. Park saw some of these documents. Furthermore, although the statements made within them or by Mr. Park were not entirely accurate, I would not conclude that Mr. Park's intention in their creation, or in allowing them to be created and to then stand, was to deliberately mislead.

b) Intention to Tamper with Evidence

[56] This aspect of the application turns on several factual questions. I am satisfied that Mr. Park told Mr. Kim that there were others and, in particular, two East Indian men in the suite with them at the end of the evening. Unless Mr. Kim was mistaken or made this up or somehow came to recall this independently, which I do not accept, there was no other source of this information or evidence than Mr. Park.

[57] This conclusion aligns with Mr. Park agreeing that he did discuss the events of that evening with Mr. Kim. It aligns with Mr. Park telling Mr. Kim that he had a good memory of events after the second period of the hockey game when Mr. Kim had no such memory. It aligns with Mr. Park's own evidence on discovery and a trial that there were others in the suite with them when Ms. Lewis entered the suite and that all of these people exited the suite together. It further aligns with Mr. Park's evidence, or acceptance, that he had given the police a statement and told them that there were two other men in the suite with himself, Mr. Kim and Ms. Behan when Ms. Lewis entered that suite. I also note that Mr. Kim was at all times supportive and protective of Mr. Park. No aspect of his evidence sought to distance himself from Mr. Park or to cast Mr. Park in a negative light. Though Mr. Kim was uncertain of many things, he was quite clear that it was Mr. Park who told him about the two East Indian men and he gave this same evidence several times.

[58] The next issue is whether the information Mr. Park communicated to Mr. Kim was untrue. It is clear from the conclusion of the jury that they did not accept Mr. Park and Mr. Kim's evidence that there were others in the suite with them when Ms. Lewis entered the suite and when they later exited the suite.

[59] The next issue is whether Mr. Park communicated the information about the presence of two East Indian man to Mr. Kim in an effort to contaminate his evidence. Again, I am satisfied that he did. I have said that I consider that Mr. Park fabricated evidence with an intention to mislead the jury. One significant component of that evidence was the false assertion that Mr. Kim and he were never alone with Ms. Behan. Specifically, Mr. Park said that there were others present in the suite at the end of the evening. His only object in communicating that same falsehood to Mr. Kim, who had very little memory of the evening, was to endeavor to taint Mr. Kim's memory and to implant that same fiction.

[60] Having made the foregoing findings, I am satisfied than an order of special costs against Mr. Park is appropriate. That conclusion is consistent with two concepts that underlie such orders. The first being that the court must be satisfied that the conduct in question is

reprehensible: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 at para. 17 (C.A.). It is a given that knowingly providing false evidence to a trier of fact where such evidence is intended to mislead is reprehensible conduct. This is so whether that act stands alone or whether it is undertaken, as in this case, in combination with an effort to tamper with the evidence of another witness.

- [61] The second is that special costs are a punitive measure intended to communicate the court's reproach or rebuke: *Garcia* at para. 17. The forms of conduct that I have identified, and concluded that Mr. Park engaged in, warrant such reproof or rebuke.

vii) Assessment of Costs

- [62] An assessment of special costs is normally undertaken before a Registrar.
- [63] Nevertheless, in *Buchan v. Moss Management Inc.*, 2010 BCCA 393, the Court of Appeal confirmed that i) a trial judge has the inherent jurisdiction to summarily determine the amount of special costs (at para. 2) and ii) such jurisdiction should be exercised sparingly (at paras. 3 and 30).
- [64] Several factors militate in favour of my exercising such jurisdiction in this case. First, this was a trial of some length, and I am familiar with the proceedings at trial: *Buchan* at para. 13; *Bronson* at para. 127.
- [65] Second, in an affidavit filed by Mr. Park, in response to an application for security for costs brought in the Court of Appeal, Mr. Park has deposed that he is impecunious and that he is "without the resources to pay \$1.00 to any Judgement". He has further deposed that while his parents will fund an appeal, his parents are unprepared "to post security of the trial in any amount or security for the Judgment in any amount". Furthermore, Mr. Park did not, as I have said, appear at this application, though the affidavit he filed in the Court of Appeal discloses that he was aware of it. An affidavit filed by Ms. Behan addresses her own difficult financial circumstances. In such circumstances, I do not consider it appropriate that the plaintiff should have to incur the expense and further delay that would be associated with a separate assessment undertaken before the Registrar.
- [66] There are various means available to me to undertake an assessment of special costs. Some are more conservative than others and address some of the concerns that may arise when a court, rather than the Registrar, undertakes an assessment.
- [67] In *Buchan*, at trial, 2010 BCSC 121 at para. 27 [*Buchan* (S.C.)], Bauman C.J.S.C., as he then was, addressed the three means of addressing a lump sum award for special costs:
- a) actual legal costs;
 - b) a percentage of legal fees (often 75 - 90% of actual legal fees are assessed); and

- c) \$5,000 per half day, plus disbursements and costs, also known as the "rough and ready" approach; increased for inflation to \$5,800 per half day in *Morriss v. Prism Properties Inc.*, 2011 BCSC 615 at para. 31 and to \$6,250 per half day in *Clare's Cove Marina Ltd. v. Salmon Arm (City)*, 2013 BCSC 912 at para. 36.
- [68] The general rule is that where special costs are awarded they are to be awarded for the entire proceedings: *Coulter v. Ball* 2003 BCSC 1186 at para. 13.
- [69] Counsel for Ms. Behan has filed a detailed affidavit which attaches a billing record that tracks each time entry made by each lawyer in the firm who worked on the matter and which also provides a general description of what was done at each such entry. An earlier affidavit filed by counsel for Ms. Behan has deposed that the firm's total fees were \$363,540. Taxes on that amount would be \$43,624.81 and disbursements totaled \$33,562.33. The issue of disbursements, in terms of the specific cost for each such disbursement, is addressed in the affidavit material. The plaintiff's total legal fees, together with her taxes and disbursements, would give rise to a total amount of \$440,727.14.
- [70] Applying the "rough and ready approach" to special costs, and calculating special costs on the basis of \$5,800 per half day, results in a total of approximately \$197,200 for the 17 day trial. The calculation totals \$170,000 if \$5,000 per half day is used, and \$212,500 if \$6,250 per half day is used. Using a middle ground, an amount of \$5,800 per half day, gives rise to a figure of \$197,200. Taxes on that figure of \$23,664 and disbursements of \$33,562.33 results in a lump sum total of \$254,426.33.
- [71] Relying on the "rough and ready" methodology, as I have, is relatively conservative. It applies a generic calculation, a calculation broadly considered to be appropriate, to an action. In *Buchan (S.C.)* at para. 28, it was described as "inherently reliable". It addresses, at least in part, the concern that a trial judge is "only aware of what happened in the courtroom" while "the reasonableness of counsel's fees will often depend upon events that took place outside the courtroom of which the judge has no knowledge": *Bronson* at para. 124.
- [72] In *Buchan (S.C.)* at paras. 20-23 and 29, the court said that a lump sum assessment should be carried out in light of the considerations that are identified in what is now R. 14-1(3): see also *Bradshaw v. Stenner*, 2012 BCSC 237 at paras. 16, 19, leave to appeal ref'd 2012 BCCA 481.
- [73] Application of the factors in R. 14-1(3) confirms the appropriateness of the lump sum figure I have identified. This was a relatively lengthy matter involving various causes of action that are only infrequently undertaken before a jury. The action engaged serious interests on the part of the plaintiff and put the character of Mr. Park at issue. It was a case based entirely on circumstantial evidence and it required a detailed and skillful examination by counsel for the plaintiff. The deception of Mr. Park both extended and transformed the nature of the proceeding.

- [74] I have also considered that the plaintiff did not succeed on each cause of action or on each issue that was raised on her behalf. I consider that there was only one substantive issue at trial - whether the plaintiff had been sexually assaulted by the defendants - and in that respect the plaintiff succeeded against Pius Park.
- [75] It would be erroneous to approach this action as though there were three distinct issues - the allegation of the sexual assault against the defendants; the alleged conspiracy by the defendants to do so; and the alleged drugging of the plaintiff to accomplish that result. The latter two pleas were not separate and discrete issues and do not, in any event, attract any apportionment of costs in favour of Mr. Park. Thus, in response to my question to plaintiff's counsel, it was confirmed that the allegation that the plaintiff was drugged by the defendants related solely to the issue of punitive damages. The pleas of conspiracy and drugging were inextricably bound together with the core issue of sexual assault: see *Mawdsley v. Meshen*, 2011 BCSC 923 at paras. 44-45.
- [76] Sixteen different witnesses were called at trial. Overwhelmingly, those witnesses addressed what happened on the evening in question, what happened the following day and then described Ms. Behan's health and well-being thereafter. Overwhelmingly, this evidence was directed at the sexual assault pleading. Of the four experts called, three dealt with Ms. Behan's physical injuries and mental well-being. Only one, the toxicologist, gave evidence that was directed at the pleading that Ms. Behan had been assaulted by being given a date rape drug.
- [77] Costs are awarded to the party that substantially succeeds in the litigation. In *Marquez v. Zapiola*, 2014 BCCA 35, the Court of Appeal said:
- [16] Success in the event has been interpreted as "substantial success": see *Fotheringham v. Fotheringham*, 2001 BCSC 1321, 13 C.P.C. (5th) 302, leave to appeal ref'd 2002 BCCA 454. In *Fotheringham*, Mr. Justice Bouck described this standard as follows:
- [45] Gold now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when [looking] at all the disputed matters globally.
- [78] I am satisfied that in all of the circumstances an award of special costs in the amount of \$254,426.33 is appropriate.

Mr. Kim's Claim for Special Costs

- [79] Mr. Kim seeks special costs against the plaintiff. Alternatively, he seeks to recover his costs on a party and party basis. His application for special costs is based on the plaintiff's failure to make out her various claims against him. Those claims he asserts, correctly in my view, advanced various claims of serious wrongdoing - all of which attacked his character and reputation.
- [80] Counsel for the plaintiff argues that a lack of candor on the part of Mr. Kim should deprive him of any of the costs that he might otherwise be entitled to. Alternatively, it is argued that in the circumstances of this case the most that Mr. Kim should be entitled to is costs on a party and party basis.
- i) Should Mr. Kim be Deprived of his Costs?
- [81] The usual rule is that costs follow the event: R. 14-1(9). That rule can, in given cases, be displaced. One such instance is where a court is satisfied that the party, notwithstanding its success at trial, has intentionally sought to mislead the court: *Medeiros v. Vuong*, 2001 BCSC 326 at para. 12; *LeClair v. Mibrella Inc.*, 2011 BCSC 533 at paras. 10, 11.
- [82] The assertion that Mr. Kim intentionally sought to mislead the court is based on the fact that Mr. Kim too, on discovery and at trial, departed from the evidence he had given in an earlier statement. It is also apparent that the jury, notwithstanding its ultimate findings, did not accept at least portions of Mr. Kim's evidence.
- [83] On the morning following April 13, 2012, Mr. Kim told Ms. Behan that he had no memory of anything after the second period of the hockey game. When interviewed a month and a half later by the Vancouver Police Department, he said the same thing. He told police he had "blacked out" and that he "was completely gone" after the second period. Later on discovery and at trial, Mr. Kim said he had a memory of some things and gave evidence which aligned, in various respects, with the evidence of Mr. Park.
- [84] Thus, for example, at trial Mr. Kim said that, to his memory, he had never sat on the same sofa as Ms. Behan. He said that he had a memory of two large East Indian men being in the suite with the group as they left the suite. He said, as did Mr. Park, that he recalled taking the stairs down to exit the building when videotape evidence suggests, and the evidence of Ms. Lewis was, that they all took an elevator together to leave the building.
- [85] These various assertions by Mr. Kim were inconsistent with the preponderance of the evidence. The claim that there were two East Indian men present in the suite as they exited is inconsistent with the jury's verdict that Mr. Park assaulted Ms. Behan.

- [86] The question becomes whether Mr. Kim, in giving inaccurate or false evidence, sought to deliberately mislead the jury. I do not consider that he did. By all accounts Mr. Kim was extremely drunk that night. He passed out in the suite. He accepts that it was necessary for Mr. Park to wake him. He told the police that he had no memory of how he got home. Mr. Park said he took Mr. Kim home and placed him in the elevator in his building. Remarkably, Mr. Kim went out gambling later that evening and he again passed out.
- [87] My own view is that though Mr. Kim's evidence was inaccurate and unreliable, his evidence was not intended to mislead. His memory was a blank. He was facing serious allegations of wrongdoing. His good friend Mr. Park professed to have a good memory of events. Mr. Kim said that after his interview with the police, he had a "detailed" discussion with Mr. Park about the events of April 13, 2012. Thereafter certain things he was told "sort of came back" to him. The jury's verdict, as it pertains to Mr. Kim, also suggests, but does not establish, that it did not accept the submission of counsel for Ms. Behan that if the jury considered that Mr. Kim's evidence was fabricated and intended to mislead, it could look to that fact as circumstantial evidence of his guilt.
- [88] Such circumstances do not warrant any sanction, and I do not consider that there is any basis to deny Mr. Kim his costs.

ii) Should Mr. Kim be Awarded Special Costs?

- [89] The allegations that Mr. Kim had sexually assaulted Ms. Behan and/or drugged her and/or conspired with Mr. Park to do one or both of these things are clearly extremely serious. This would be so in any context. Mr. Kim is an accountant and such allegations, though not directed to professional conduct, had the prospect of damaging his reputation.
- [90] Though the language in some cases is ambiguous and though there are cases which suggest that the mere inability to make out an allegation of fraud or conspiracy may warrant an award of special costs, this does not appear to be the better view.
- [91] In Bradshaw at para. 10, Dhillon J. notes:
- [10] Unproven allegations of fraud may attract an award of special costs (*Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 26, [2004] 1 S.C.R. 303; *Cabaniss* at para. 75). Factors to consider are whether the allegations were obviously unfounded, recklessly made, or made out of malice (*Shedwill v. Wilson* (1991), 48 C.P.C. (2d) 70 at para. 7 (B.C.S.C.); *Hung v. Gardiner*, 2003 BCSC 285 at para. 16; *College of New Caledonia v. Kraft Construction*, 2010 BCSC 1695 at para. 23). Madam Justice Ballance summarized the law in *International Hi-Tech Industries Inc. v. FANUC Robotics Canada Ltd.*, 2007 BCSC 1724, where, at paras. 7-11, she said:
- [7] The case law demonstrates a wide variety of circumstances that have resulted in the awarding of special costs. The failure to prove allegations of fraud will not automatically result in such an award (see: *307527 B.C. Ltd. v. Langley*, 2005 BCCA 161, 210 B.C.A.C. 155). However, where the totality of the circumstances reveal that allegations of fraud have been

made frivolously, are without foundation, or made in circumstances where the alleging party had access to information sufficient to conclude that the defendant was merely negligent or had committed no wrongdoing at all, the allegations themselves are seen to be reprehensible warranting an order of special costs: *Chaplin v. Sun Life Assurance Company of Canada et al.*, 2004 BCSC 116, 1 C.P.C. (6th) 271); *Hamilton v. Open Window Bakery Ltd.*, [2004] 1 S.C.R. 303, 235 D.L.R.(4th) 193.

- [8] In *Ip v. Insurance Corp. of British Columbia* (1994), 89 B.C.L.R. (2d) 251 at 253, 23 C.P.C. (3d) 345 (S.C.), Mr. Justice MacKinnon remarked that a party must give thoughtful consideration before making serious allegations of fraud. He stated, "At the very least, a prima facie case must exist and if it does not then special costs by way of 'chastisement' is a reminder to exercise better care in the future." []
- [9] In *Ahluwalia v. Richmond Cabs Ltd.* (1994), 28 C.P.C. (3d) 226 (S.C.) [In Chambers], the plaintiffs brought an action for specific performance, deceit, and fraudulent misrepresentation. Newbury J. (as she then was) stated at p. 230:

The question in every case is whether, on a consideration of the substantive conduct of the party making the allegation, and the conduct of the litigation itself, the person or persons against whom the order is sought, has acted in a manner that is sufficiently reprehensible to warrant chastisement by the court.

- [10] Madam Justice Newbury further stated at p. 231 that where a party has "consciously advanced allegations of fraud and deceit and testified as to facts which were found to be untrue " as well as created delays, pressured the defendants, and failed to comply with court orders and the Rules, such actions qualify as reprehensible conduct and warrant an order for special costs. (Also see: *Paz v. Hardouin* (1996), 138 D.L.R. (4th) 292, 25 B.C.L.R. (3d) 201 (C.A.)).
- [11] An underlying rationale of the authorities which have considered the relationship between unproven allegations of fraudulent conduct and special costs is an obvious one: a recognition that such allegations are potentially damaging to those accused of practising such deception and, accordingly, should not be made lightly.
- [92] In *Westsea*, Gropper J. said:
- [42] Meritless claims alone will not attract special costs. This proposition was affirmed in the Supreme Court of Canada decision *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9. Madam Justice Arbour, writing for the Court, held that an unsuccessful attempt to prove fraud or dishonesty does not inexorably lead to the conclusion that the unsuccessful party should be held liable for solicitor-client costs (para. 26).
- [43] However, meritless claims that are pursued for some improper motive have generally attracted special costs.
- [93] In *Hung v. Gardiner*, 2003 BCSC 285, aff'd 2003 BCCA 257, Joyce J. said:

- [16] In order to justify an award of special costs, it is not sufficient simply to establish that the plaintiff's allegations of bad faith and malice were not proven. It is necessary to show that the plaintiff acted improperly in making or maintaining the allegations in this proceeding or otherwise acted improperly in the manner in which she conducted the litigation before special costs will be awarded. It must be shown, not just that the allegation was wrong, but that it was obviously unfounded, reckless or made out of malice. The matter must be considered from the point of view of the plaintiff at the time she made or maintained the allegations: (see *Native Citizens Fisheries v. James Walkus*, (July 10, 2002) 2002 BCSC 1030).
- [94] In *Taser International Inc. v. British Columbia* (Thomas Braidwood, Q.C. Study Commission), 2010 BCSC 623, Sewell J. made an award of special costs where allegations of dishonesty were made against a doctor and the petition had not "presented any evidence" to the court to support that contention.
- [95] I do not consider that any part of the plaintiff's pleading or the decision to pursue the claim advanced against Mr. Kim warrants an award of special costs.
- [96] The plaintiff's case was never based on any direct evidence of wrongdoing by Mr. Park or Mr. Kim. No one saw either individual sexually assault or drug Ms. Behan. There was no unequivocal DNA evidence. There was no direct toxicological evidence that Ms. Behan had been drugged. Instead the case, at all times, was based on various pieces of circumstantial evidence. That evidence included, among other things, Ms. Behan's physical injuries, evidence of Ms. Behan's psychological collapse after April 13, 2013, the fact that both men were alone in the suite with Ms. Behan, the fact that the evidence of both men had materially changed in multiple respects over the course of time, and the fact that the evidence of both men was inconsistent with the evidence of others.
- [97] Furthermore, it is relevant that both defendants professed, at one time, to have no memory of the events. Both thereafter said they recalled various things. The matters that they said they recalled overlapped or were similar. The matters they recalled were, however, inconsistent with the evidence of other witnesses and it is clear that the jury did not accept much of their evidence.
- [98] Furthermore, though Ms. Lewis said Mr. Kim was passed out when she entered the suite and Mr. Kim said he recalled being woken by Mr. Park, this was not the evidence of Mr. Park.
- [99] Finally, I observe that at the close of the plaintiff's case I dealt with a no evidence motion brought by each of Mr. Park and Mr. Kim. My reasons dismissing that application are indexed at 2014 BCSC 898. In those reasons, though I only dealt with a single cause of action, I discussed the defendants' application and concluded that the plaintiff had led some evidence from which the jury could conclude that she had been assaulted by one or both of the defendants.

- [100] Similarly, though there was no direct evidence of Ms. Behan being drugged, Ms. Behan gave evidence of various symptoms or sensations she experienced on April 13, 2012 and on the following day. These symptoms were generally consistent with what an expert, called on behalf of the plaintiff, testified were symptoms or sensations that are frequently associated with being given a date rape drug. Various witnesses, including people who knew Ms. Behan quite well, testified that her behaviour that evening was quite different from anything they had seen from her in the past. The claim that the defendants or one of them, had administered a drug to the plaintiff, though rejected by the jury, was advanced in a serious way.
- [101] The claim of conspiracy was the most tenuous claim advanced by Ms. Behan. It was based on the assertion that Messrs. Park and Kim had agreed to cause injury to Ms. Behan - here her sexual assault and/or the assault (by drugging). It was a claim which, if its various elements were established, would have made both defendants liable though only one of them may have actually assaulted and/or drugged her.
- [102] The various elements of a civil conspiracy claim invariably make this a difficult cause of action. The fact that there was no direct evidence of any agreement between the defendants, without more, is not, however, remarkable. Conspiracy claims are rarely based on any direct evidence of an agreement to injure.
- [103] The reality is that post-discovery, the findings that a jury would make, or that it was likely to make, were unclear. If the jury accepted the evidence of Messrs. Park and Kim, over the evidence of Ms. Lewis, about whether there were others present in the suite at the end of the evening, neither would likely have been liable. If the jury accepted the evidence of Mr. Park, over the evidence of Ms. Lewis and Mr. Kim, about whether Mr. Kim was awake when Ms. Lewis walked into the suite, but concluded that no one else was present at the time and that Ms. Behan was not awake, a different result pertaining to Mr. Kim may well have arisen.
- [104] The case advanced by the plaintiff was not made frivolously or without any foundation or as a result of an improper purpose. The decision to go to trial, on the pleadings as they stood, was a measured decision made by counsel. The evidence from the defendants was internally inconsistent. It was also inconsistent on multiple issues with the evidence of various third party witnesses. Finally, there were a range of inferences available to the jury depending on what evidence it accepted. Though the jury concluded that no case was made out against Mr. Kim, this is not a case where the conduct of the plaintiff warrants any censure, chastisement or, ultimately, an award of special costs.
- [105] Mr. Kim is, however, to have his costs, on a party and party basis.

iii) Should Mr. Park Pay Mr. Kim's Costs?

[106] Rule 14-1(18) allows a court to order that an unsuccessful defendant pay the costs of a successful defendant directly. Such orders are commonly called Sanderson orders. In this case, Ms. Behan seeks an order that Mr. Park pay the costs that she would ordinarily have to pay to Mr. Kim.

[107] In *Davidson v. Tahtsa Timber Ltd.*, 2010 BCCA 528 at para. 50, the court quoted Fraser, Horn & Griffin, *Conduct of Civil Litigation in British Columbia*, 2nd ed., loose-leaf, (Markham: LexisNexis, 2007), vol. 2 at para. 38.19, where the authors discussed the nature of a Bullock order and of a Sanderson order respectively, and the considerations that are relevant when choosing between the two orders:

Rule 14-1(18) provides that the court may order that a successful plaintiff pay the costs of a successful defendant and recover such costs as a disbursement against an unsuccessful defendant. Such order is commonly known as a Bullock order. The Rule also provides that the court may, as an alternative, order that the unsuccessful defendant pay the costs of the successful defendant directly. Such order is commonly known as a Sanderson order. A court may make such order where there is more than one defendant in an action and also where actions have been consolidated for trial or ordered to be tried at the same time.

Where all parties are solvent, it does not matter much which form of order is made. The advantage of a Sanderson order in such a case is confined to avoiding circuitousness.

If the unsuccessful defendant is insolvent, then the Bullock form of order imposes a hardship upon the plaintiff who may recover nothing from the unsuccessful defendant and yet has to pay the successful defendant. A Sanderson form of order, on the other hand, imposes the hardship upon the successful defendant. Where the successful defendant is blameless, the courts have generally refused to make a Sanderson order.

[Footnotes omitted.]

[108] One aspect of the foregoing description, that being the insolvency of the unsuccessful defendant, is of particular importance in this case and renders it unnecessary for me to consider the additional factors or circumstances that should ordinarily be present before I can properly exercise my discretion to make a Sanderson order.

[109] Mr. Park did not file any materials for this application. However, Mr. Park did address his financial circumstances in Ms. Behan's application for security for costs of the appeal undertaken by Mr. Park. I agree with counsel for Ms. Behan that aspects of Mr. Park's materials appear to be carefully crafted and do not address his present financial circumstances. Nevertheless, his affidavit discloses that he borrowed most of the funds needed to pay his counsel for the trial of this matter and that he lacks the funds to pursue his appeal without the assistance of his parents.

[110] To the extent there is any ambiguity about Mr. Park's materials, the risks associated with that ambiguity should fall on Ms. Behan rather than on Mr. Kim. In saying this, I recognize that Ms. Behan's own financial circumstances are difficult. Nevertheless, Mr. Kim was successful in his defence of this action. I have also concluded that the various inconsistencies in his evidence, though unfortunate, were not willful. As such I do not consider that there is any "blame" to be attached to Mr. Kim.

[111] In *Imperial Salmon House Ltd. v. Krdzalic* (1983), 48 B.C.L.R. 256 at 258-259 (S.C.), McLachlin J., as she then was, said:

The question, then, is how the court's discretion should be exercised. The question, at base, is one of policy; with which of the plaintiff and the successful defendant should rest the risk that the defendant Krdzalic would be unable to pay the defendant A. E. LePage's costs? In determining this question, it must be borne in mind that the effect of a Sanderson order is that the court nominates the unsuccessful defendant as the only person to whom the successful defendant is entitled to look for payment of its costs, thus depriving the successful defendant of its right against the unsuccessful (as against him) plaintiff, upon whose ability to pay the successful defendant might have been quite content to rely: *Munshaw Colour Service Ltd. v. Vancouver* (1960), 31 W.W.R. 273 at 278 (B.C.S.C.). In the absence of special circumstances, such as where the unsuccessful defendant is legally related to the successful defendant (see *Kemp v. Lee*, B.C.S.C., Toy J., Dawson Creek No. 83/1982, 9th May 1983 (not yet reported)), I would decline to make such an order. The plaintiff, as the party which initiated proceedings, must bear the primary risk of meeting the costs of parties against whom it is eventually unsuccessful. The fact that the conduct of the defendants was related is in itself insufficient; that exists in most cases where more than one defendant is properly joined by a plaintiff.

[112] The foregoing considerations are relevant. There is no legal relationship between Mr. Park and Mr. Kim. There are no special circumstances that would militate in favor of a different result. Accordingly, I am not prepared to make the Sanderson order that the plaintiff seeks. The plaintiff's application materials do not suggest that she seeks, in the alternative, a Bullock order.

[113] Mr. Kim is also to have the costs of this application. Ms. Behan is to have her costs of this application as against Mr. Park.

"Voith J."

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Prepared on 26 October 2026 · Esheria