

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: **F.G. v. R.F.,**  
2004 BCSC 889

Date: 20040705  
Docket: S023002  
Registry: Vancouver

Between:

**F.G.**

Plaintiff

And

**R.F.**

Defendant

Before: The Honourable Mr. Justice Vickers

**Reasons for Judgment**

Counsel for the Plaintiff:

T.J. Delaney  
C. Martin

Counsel for the Defendant:

J.L. Straith  
J.C. Henderson

Date and Place of Trial/Hearing:

June 14-18 and 21-23, 2004  
Vancouver, B.C.

[1] This is an action for damages arising from a sexual assault and battery that the plaintiff alleges occurred on April 19 and 20, 2001. The defendant says the acts complained of were consensual. Consent is the central question the court must decide.

[2] The plaintiff and the defendant are male persons and both are employed as paramedics working in Vancouver, British Columbia.

[3] On the evening of April 19, 2001 the plaintiff had been playing a pickup soccer game. He and the defendant had arranged the day before for the plaintiff to visit the defendant to view his newly purchased home in North Vancouver. When the game concluded he went to a restaurant with friends and had something to eat. From there he proceeded home and showered. He testified that about 9:00 p.m., at the invitation of the defendant, he drove to the defendant's home in North Vancouver.

[4] The plaintiff described viewing the home and then sitting in the living room with the defendant. He acknowledges consuming two beers. He was about to leave when he was persuaded by the defendant to have a drink of scotch. He said he told his host he did not like scotch and did not drink it. Nevertheless, he testified that he took a sip or two from a tumbler of scotch that had been poured by the defendant and thereafter, his memory of events is unclear. He described going in and out of consciousness and experiencing some paralysis in his limbs.

[5] He testified that he was assisted to the defendant's bedroom where the defendant removed his clothes. He recalled the defendant telling him he was too drunk to drive home. He said he woke lying naked on the defendant's bed and the defendant was performing fellatio on him. He recalls being kissed by the defendant and the defendant manually stimulating his penis. He has a recollection of lying face down on the bed, his legs spread apart with the defendant on top of him, but says his anus was not penetrated by the defendant. He recalls being on top of the defendant in a similar position. He denied vomiting, not only because he has no recollection of such an event but because he had no residual after taste of vomit lingering in his mouth.

[6] At about 2:00 p.m. on the morning of April 20, 2001, the plaintiff's wife tried to contact him. She paged him three times, the third time inserting the 911 code to signify the urgency of the call. He returned the call and she told him she was upset. She said the plaintiff told her the defendant had told him he had too much to drink and should not drive home. He said he would return home as soon as he could. She testified that he said very little, for the most part responding with "yes" and "no" answers. He did not sound like himself and she said he did not appear to her to be impaired by alcohol. When the conversation terminated she remained concerned about her husband and stayed up until he returned home.

[7] The plaintiff was unable to recall a telephone conversation with his wife. He said that about 2:00 a.m. the defendant told him his wife had called and that he had told her she was not to worry, and that he was too drunk to drive. The next thing he recalls is being told by the defendant to get up and shower. When he asked the defendant why he had to shower he was told "to get the come off of you." He says the defendant assisted him in washing, dried him off, assisted

him in dressing and told him to go home. He has no recollection of the drive home.

[8] On the plaintiff's arrival home at 5:00 a.m. his wife was sitting on a couch in the living room. He came in, leaned on the couch and said "I don't know what the fuck happened, I woke up in his bed, naked."

[9] The plaintiff's wife drove him to the emergency unit of the Lion's Gate Hospital. There he was examined by a general practitioner who coincidentally, happened to be the plaintiff's family doctor. Blood and urine samples were taken. The hospital records show arrival at 5:30 a.m. and discharge at 6:45 a.m. The plaintiff says he was home by 7:00 a.m.

[10] The urinalysis report records the urine specimen as a blood specimen and this is an error. The sample is said to have been taken at 0744 hours and this too is in error if the sample was taken from the plaintiff. The urine sample tested was negative for drugs and in particular, negative for Gamma Hydroxybutyrate (GHB). The sample was also negative for alcohol.

[11] The plaintiff's physician ordered baseline blood tests for sexually transmitted diseases and prescribed prophylactic anti-retroviral agents for HIV (HIV cocktail) which the plaintiff took over the following 30 days.

[12] The plaintiff is 30 years of age and is married with two young children. He says that he is heterosexual and has never experienced any desire for a same-sex relationship or encounter.

[13] The defendant is 43 years of age and he was separated from his wife at the time of the incident. He too is married with two young children. Following his separation he publicly acknowledged his homosexual preferences. He says he invited the plaintiff to see his new home during the evening of April 19, 2001. His recollection is that during the evening of April 19 he received telephone calls from the plaintiff explaining why he was delayed. Eventually the defendant arrived at about 9:30 p.m. A few minutes after his arrival they were sitting in his living room consuming a beer. They talked about a number of things and continued to drink throughout the evening. He says that amongst other things they discussed his failed marriage; difficulties the plaintiff was experiencing in his marriage; and, a sexual advance by a male Scout leader the plaintiff had experienced when he was a youth in the Boy Scouts.

[14] When the plaintiff indicated he was going to go home at about 12:30 a.m. on April 20, the defendant said he told him this was not a good idea. He remembers the plaintiff saying at that time that he had had a lot to drink. The defendant says he escorted the plaintiff to his bedroom. He turned down the cover and sheet and the plaintiff removed all of his clothes except his underwear. The plaintiff then laid down on his bed.

[15] He testified that as he was leaving the bedroom the plaintiff asked him where he was going and asked him to come and sit with him and talk. The defendant went to the kitchen where he poured himself another scotch. He then returned to the bedroom, sitting on the bed. He testified that as they spoke, the plaintiff touched his leg and his chest. The touching became caressing and kissing. The plaintiff assisted in undressing him and then told him he wanted to engage in anal sex. The defendant provided him with a condom and the plaintiff, fully aroused, put it on. The plaintiff proceeded to have anal intercourse and experienced an orgasm.

[16] The defendant testified that the plaintiff rolled off him and lay beside him on the bed. He then made advances on the plaintiff, including an attempt at fellatio. The plaintiff told him that what he was doing was bringing up too many issues for him, referring to the earlier conversation they had during the evening. The defendant testified that he "backed off" and they lay talking. The plaintiff's pager went off and it was the 911 call from his wife. He said the plaintiff called his wife from a telephone on a bedside table.

[17] The plaintiff then slept and about 3:00 a.m. he got up to vomit, thereafter returning to the bed. At approximately 4:00 a.m. the defendant got up and used his computer to send an e-mail. At approximately 5:00 a.m. the plaintiff got up and was shown to the shower and given a towel by the defendant. He says he did not assist the plaintiff in the shower. The plaintiff declined an offer of coffee and drove home.

[18] The plaintiff reported the matter to police later in April. In reconstructing the amount of alcohol consumed that evening for the RCMP, the defendant said there were 15 empty beer bottles to be taken to the recycle depot and three quarters of a 26 ounce bottle of scotch had been consumed. At trial he said the scotch was not a new bottle but had been used before. He acknowledged the plaintiff told him he did not like scotch and did not drink it. The defendant is unable to say how much either one of them consumed but he is certain they each had no less than two beer and two glasses of scotch. He estimates each glass would have contained about four ounces of liquor.

[19] The defendant denies he administered any drug to the plaintiff.

[20] Prior to this incident the plaintiff and his wife had been experiencing difficulties in their marriage. The plaintiff attended his general practitioner who diagnosed a clinical depression. He prescribed Paxil. The dosage had been gradually increased to 30 mg a day and this amount was being consumed by the plaintiff on April 19 and 20, 2001. Alcohol consumption is not recommended for any person using Paxil.

[21] W. K. Jeffery, a toxicologist, testified on behalf of the plaintiff. He says that if seven cans of beer and two one ounce drinks of scotch were consumed some alcohol would have been detected in the urine at 5:30 a.m. If two cans of beer and a sip of scotch were consumed he would not expect to find any alcohol in the urine at that time.

[22] Mr. Jeffery testified the drug GHB takes effect within 10 to 30 minutes of ingestion and

its symptoms last three to four hours. A light to moderate dose can produce relaxation, euphoria, muscle relaxation, drowsiness, tremors, amnesia, nystagmus and dilated pupils. The drug is eliminated from the human body very quickly and is usually not detectable in urine six to twelve hours after ingestion.

[23] After the incident the plaintiff was off work for about five weeks. He was seen by a psychiatrist, Dr. Azim, who diagnosed post traumatic stress disorder (PTSD) and a major depression. His anti depressant drug, Paxil, was increased to 40 mg. per day and he remains on that dosage to this day.

[24] It is fair to say that the events of April 19-20, 2001 have consumed the defendant. He reports having intrusive nightmares, intrusive memories and sleeplessness. He developed a sense of insecurity which remains to this day. He is quick to anger and no longer the "happy go lucky" person he used to be. He began to drink excessively. He felt humiliated and experienced a loss of libido. Eventually he and his wife separated. He has experienced suicidal ideations and social withdrawal.

[25] The theory of the plaintiff is that he was administered a drug, likely GHB, and then sexually assaulted by the defendant. His counsel argues that, based on the symptoms reported by the plaintiff and on what was said by the toxicologist and by his general practitioner, Dr. Leon Bard, and by Dr. Roy O'Shaughnessy, a psychiatrist, it is more probable than not that the plaintiff was drugged by the defendant on the night in question.

[26] It is the submission of counsel on behalf of the plaintiff that the evidence of the plaintiff should be accepted. He argues that the negative blood alcohol finding taken from the urine sample supports his client's recollection that he only had two beers and a sip of scotch. He relies heavily on the symptoms his client experienced following the event supported by the testimony of expert witnesses. In his submission the evidence of the plaintiff should be accepted and the evidence of the defendant should be rejected because it is the fabricated story of a sexual molester who subdued his victim with a noxious drug.

[27] There can be no doubt the parties engaged in sexual activities. The defendant says these acts were consensual and he bears the burden of proof of that defence, on a balance of probabilities.

[28] I recognize the importance of these proceedings to the well being of the plaintiff. Unfortunately, I have concluded that his evidence cannot be relied upon. He says his recollection of the event is not complete. I find he had at least two beer and two drinks of scotch as described by the defendant. He consumed this during a period of time when he was cautioned not to consume alcohol because he was on a prescription drug, Paxil. One can only speculate on what the impact of the alcohol was in these circumstances. The plaintiff was argumentative and evasive during cross examination. His narrative was more in the nature of what must have happened, because he cannot accept what actually took place. I am satisfied his evidence cannot be relied upon.

[29] His evidence of lack of consciousness and limb paralysis is inconsistent with the fact that he made a telephone call to his wife at 2:00 a.m. He has no explanation for his being in a position of anal intercourse. It is not a position that could be forced upon him by the defendant. His ability to drive home at approximately 5:00 a.m. cannot be ignored.

[30] In addition, I am unable to rely upon the results of the urine sample. While it was indeed a urine sample, it is noted as blood. The time of the taking of the sample is wrong, if it is indeed a sample of the plaintiff's urine. He was at home at the time the sample is said to have been taken. On a matter of this importance I am not at all confident the sample was a sample of the plaintiff's urine. None of the usual precautions were taken to ensure continuity of the sample.

[31] I accept the evidence of the defendant, preferring it to that of the plaintiff. Wherever there is a conflict in the evidence I have relied upon his version of events. With the exception of his estimate of alcohol consumption, the evidence is consistent with what he told the plaintiff in telephone conversations following the event, recorded by the plaintiff unknown to the defendant.

[32] On a consideration of the evidence I am unable to say why there are substantial gaps in the memory of the defendant. I am satisfied he was not administered a drug and in particular, was not administered any GHB. No doubt the alcohol and the Paxil were incompatibles, but whether they combined to cause gaps in the plaintiff's memory is not a conclusion I can draw from the evidence before me.

[33] As difficult as it might be for the plaintiff to accept, I am satisfied the sexual acts that took place between the parties, as described by the defendant, were consented to by the plaintiff.

[34] The action is dismissed.

[35] The plaintiff has made serious allegations against the defendant that if true, would constitute criminal conduct. In these circumstances I am satisfied the defendant is entitled to recover special costs.

[36] Before the trial the defendant brought a motion for an order that the plaintiff be found in contempt of court. The plaintiff says the application was frivolous, vexatious and bound to fail. The motion was adjourned generally. The plaintiff now wants to have that motion set for hearing. He seeks a dismissal of the motion and an order for special costs. If this motion for contempt of court is proceeded with I am not seized of the matter and it may be heard by the

Chambers Judge.

"D.H. Vickers, J."  
The Honourable Mr. Justice D.H. Vickers