CITATION: Kapoor v. Kuzmanovski, 2018 ONSC 4770
COURT FILE NO.: CV-09-4318-00
DATE: 20180808

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
PREETI KAPOOR	Jeffrey W. Strype, Jason E. Brown and Mark A. De Sanctis, for the Plaintiff
Plaintiff	
- and -	
RADOJE KUZ MANOVSKI also known as RADOJA KUZ MANOVSKI, KRASIMIR PETROV, JAYSON AGUILAR, and UNIFUND ASSURANCE COMPANY	Brian M. Bangay, Bruce Chambers and Todd McCarthy for the Defendants Kuzmanovski and Petrov
	Derek Abreu, for the Defendant Unifund
Defendants	Assurance Company
	Brent Kettles, for the Intervenor Attorney General of Ontario
	Peter W. Kryworuk and Jacob Damstra, for the Intervenor The Advocates' Society
	HEARD: April 26 and 27, 2018

REASONS FOR DECISION

Daley, RSJ.

Introduction

[1] The Plaintiff has brought a motion for:

(a) an Order excluding potential jurors who drive and pay for automobile insurance premiums or have automobile insurance premiums paid on

their behalf from the jury pool in this action due to an inherent conflict of interest;

(b) in the alternative, an Order removing all potential jurors who are ratepayers of automobile insurance premiums from the jury due to an inherent conflict of interest;

(c) in the alternative, an Order permitting the Plaintiff to challenge potential jurors who pay for automobile insurance premiums or have automobile insurance premiums paid on their behalf for cause;

(d) in the alternative, an Order permitting the Plaintiff to challenge potential jurors who pay for automobile insurance premiums for want of eligiblity; and

(e) in the alternative, an Order striking the Jury Notices in this action.

[2] This action was scheduled to proceed to trial during the January 2017 concentrated sittings. However, as a result of this motion by the Plaintiff, the case was struck from the trial list in order to allow for this motion to be argued and considered.

[3] At the heart of the Plaintiff's motion is the assertion that prospective jurors in civil motor vehicle accident cases who drive motor vehicles and are insured under Ontario's motor vehicle insurance legislation have an inherent conflict of interest that prevents them from carrying out their duties as jurors in an impartial manner. The Plaintiff alleges these

prospective jurors' financial obligation to pay motor vehicle liability insurance premiums constitutes a personal interest adverse to that of Plaintiffs in motor vehicle accident cases.

[4] The intervenors – The Advocates' Society (the "Society") and the Ministry of the Attorney General of Ontario ("Ontario") – accepted the court's invitation to intervene and render assistance as friends of the court pursuant to rule 13.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, in accordance with my endorsements of March 16 (*Kapoor v Kuzmanovski*, 2017 ONSC 1709 (CanLII)) and August 2, 2017.

[5] For the reasons set out below, I have concluded that the Plaintiff's motion must be dismissed in its entirety.

Evidentiary Record and Ruling on *Voir Dire*:

[6] The principal evidence put forward by the Plaintiff on this motion is contained in the affidavit of Judit E. Denesi, sworn May 29, 2017. The deponent is a senior law clerk in the employ of the Plaintiff's solicitors.

[7] The plaintiff also relies upon the affidavit of Erin M. Neal, a partner in the plaintiff's solicitors' firm, sworn on February 23, 2017.

[8] The evidence in the Neal affidavit is almost entirely hearsay and based on Internet webpages from various sources related to the Canadian insurance industry and as such the evidence is of little, if any, probative value. Counsel for the defence did not seek to exclude this affidavit from the record.

[9] In her affidavit the deponent Ms. Denesi attached several documents as exhibits including the pleadings, articles from various publications such as Canadian Underwriter and The Globe and Mail, and publications which considered auto insurance rates in Ontario and, specifically, in Brampton.

[10] In addition to other materials regarding auto insurance rates from the insurance industry, included in this deponent's affidavit is a letter signed by Raj Manocha, Executive Vice President of AskingCanadians, dated February 2, 2017. Attached to this letter is a survey conducted of 300 Brampton residents from January 23 to January 25, 2017 (the "Survey"). Mr. Monacha also included an Acknowledgment of Expert Duty signed by him on February 9, 2017 in accordance with rule 53.03 of the *Rules of Civil Procedure*, purportedly in his capacity as an expert witness.

[11] In his letter accompanying the Survey from AskingCanadians, Mr. Monacha states that this business conducts surveys and data collection. He further states that he graduated from the University of Toronto in 2003 with a Bachelor of Commerce and that he has been "working in the data collection industry for over 10 years."

[12] Mr. Monacha describes the task or purpose of the Survey as follows: "...to survey 300 Brampton residents who drive an automobile and hold valid automobile insurance regarding questions posed by Strype Injury Lawyers on behalf of Preeti Kapoor."

[13] In his letter, Mr. Monacha further states that the survey company:

> "[A]ttests to the proper administration of the survey in accordance with the industry standards pertaining to conducting surveys, recruiting panelists

> and hosting data. All data collection related tasks are in line with the Gold Seal Standards set by the MRIA, which creates best practices for research, including data collection. The interpretation and analysis of the survey is left to the reader."

[14] Counsel for the defendants opposed the introduction of the Survey. As such, a *voir dire* was held to determine the admissibility of the Survey. No *viva voce* evidence was adduced on this *voir dire* and the evidence referred to was confined to the Survey, the covering letter accompanying it, and the underlying affidavit and exhibits attached.

[15] The survey results are displayed graphically in charts in response to various questions posed to the member of the Survey sample group. The questions posed deal with the impact of higher auto insurance premiums on the persons interviewed and whether or not they would seek to lower their auto insurance premiums by limiting the damages awarded to a claimant in a motor vehicle accident case or whether they would award damages regardless of whether their insurance premiums would be increased. The Survey responses to this question indicate that 73% of those questioned would limit the damages awarded in order to lower their insurance premiums and the remaining 27% would award damages without regard to their insurance premiums.

[16] I reserved my decision on the admissibility of the Survey until the release of my decision on the Plaintiff's motion.

[17] I have concluded that the Survey must be excluded from the evidentiary record on this motion.

[18] Before considering the recent jurisprudence on the court's gatekeeper role related to the admission of expert evidence, consideration must first be given to the admissibility of social science research and pure statistical evidence as proffered in this case.

[19] In *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, McLachlin C.J. considered social science and statistical evidence in the context of the right to a challenge for cause. In that case, the defence submitted that charges of sexual assault against children gave rise to a realistic possibility of juror partiality entitling the accused to a challenge for cause.

[20] In considering how a realistic potential for partiality may be established through scientific and statistical evidence, McLachlin C.J. stated as follows at para. 49:

> 49 The scientific and statistical nature of much of the information relied upon by the appellant further complicates this case. Expert evidence is by definition neither notorious nor capable of immediate and accurate demonstration. This is why it must be proved through an expert whose qualifications are accepted by the court and who is available for cross-examination. As Doherty J.A. stated in *R. v. Alli* (1996), 1996 CanLII 4010 (ON CA), 110 C.C.C. (3d) 283 (Ont. C.A.), at p. 285: "[a]ppellate analysis of untested social science data should not be regarded as the accepted means by which the scope of challenges for cause based on generic prejudice will be settled".

[21] Further, McLachlin C.J. stated following at para. 57:

> 57 The only social science research before us on the issue of victim empathy is a study by R. L. Wiener, A. T. Feldman Wiener and T. Grisso, "Empathy and Biased Assimilation of Testimonies in Cases of Alleged Rape" (1989), 13 Law & Hum. Behav. 343. The appellant cites this study for the proposition that those participants acquainted in some way with a rape victim demonstrated a greater tendency, under the circumstances of the study, to find a defendant guilty. However, as the Crown notes, this

> study offers no evidence that victim status in itself impacts jury verdicts. In fact, the study found no correlation between degree of empathy for rape victims and tendency to convict, nor did it find higher degrees of victim empathy amongst those persons acquainted with rape victims. Further, the study was limited to a small sample of participants. It made no attempt to simulate an actual jury trial, and did not involve a deliberation process or an actual verdict. In the absence of expert testimony, tested under cross-examination, as to the conclusions properly supported by this study, I can only conclude that it provides little assistance in establishing the existence of widespread bias arising from the incidence of sexual assault in Canadian society.

[22] Survey or social science evidence is simply a category of evidence. In this case its admissibility must be considered within the context of current jurisprudence regarding the admissibility of expert opinion evidence.

[23] Expert evidence is presumptively inadmissible in Canadian courts. The burden of proving admissibility rests on the proponent of the evidence. The judicial approach to the admissibility of expert evidence has been reshaped since the Supreme Court's decision in *R. v. Mohan*, [1994] 2 S.C.R 9, and most recently in that court's decision in *White Burgess Langille Inman v. Abbott & Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182.

[24] The Supreme Court's test for admissibility of expert evidence consists of a threshold inquiry followed by a more qualitative investigation of the costs and benefits of the proposed evidence (the "discretionary gatekeeping analysis"): *White Burgess*, at paras. 22-24.

[25] Pursuant to *White Burgess*, at paras. 19, 23, a trial judge must consider four requirements at the threshold stage of the admissibility analysis:

(1) relevance;

(2) necessity in assisting the trier of fact;

(3) the absence of any exclusionary rule; and

(4) the need for a properly qualified expert.

[26] If the proffered expert evidence survives the four-part threshold analysis, the discretionary gatekeeping assessment must be conducted by the court where the potential risks and benefits of admitting the evidence must be weighed and balanced: *White Burgess*, at para. 24.

[27] Notably, there is no affidavit evidence offered by Ray Manocha, the author of the covering letter which accompanied the Survey. As such, all the evidence related to the Survey is at best hearsay. Even if the evidence directly related to the Survey were admissible, it must be considered with great caution, especially in light of McLachlin C.J.'s comments in *Find* as to the uncertain quality and reliability of social science and survey evidence.

[28] Generally, although it is not determinative of this issue, proffered opinion evidence should not be in the form of reports attached to an affidavit of a deponent who has no personal knowledge whatsoever with respect to the contents of the reports. Such evidence is purely hearsay and the author of the purported expert opinion report is insulated from cross-examination: *Suwary (Litigation Guardian of) v. Women's College Hospital*, [2008] O.J. No. 883, at paras. 25-26, 30 (Strathy J., as he then was).

[29] Crucial to considering potential juror bias or partiality in the context of the Survey is whether or not the survey's respondents, as prospective jurors, would be capable of setting aside any bias if instructed to do so. Questions of this nature are not considered in the survey and answers to such questions would speak to whether a survey respondent's views would be amenable to "cleansing by the trial process": *Find*, at para. 54.

[30] Before examining the threshold questions for admissibility of survey evidence, there is a more fundamental question as to whether or not the proffered evidence is in fact expert opinion evidence.

[31] The proffered evidence in the case at bar is simply made up of a cover letter dated February 2, 2017 signed by Raj Manocha. The cover letter contains three sections. The first section is titled "Introduction" and outlines the criteria used to screen eligible and ineligible survey participants. The second section is titled "Qualifications," which outlines the business activities of AskingCanadians and includes a very brief description of the author's position with the company, his undergraduate education at the University of Toronto, and the fact that he sits on the Board of Directors of the Marketing Research and Intelligence Association.

[32] As noted, Raj Manocha also signed an Acknowledgment of Expert Duty dated February 9, 2017.

[33] Notably absent is any evidence from proposed expert Raj Manocha as to his education, training or experience in conducting surveys, and knowledge of the scientific

principles applicable to gathering survey evidence and its analysis. Further, the cover letter and the Survey itself contain no evidence as to the survey methodology utilized, how the Survey was constructed, the questions posed, how the survey was administered, or the anticipated margin of error.

[34] Furthermore, other than apparently overseeing the collection of survey data based on the questions posed, the author offers no analysis or opinion regarding the Survey results. In fact, in the third section of his letter referred to as the "Task", Mr. Manocha expressly states that the interpretation and analysis of the Survey results are left to the reader.

[35] Dickson J. (as he then was) in *R. v. Abbey*, [1982] 2 S.C.R. 24, at 42, described the role of expert witness and opinion evidence in the following way:

> With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary" (Turner (1974), 60 Crim. App. R. 80, at p. 83, per Lawton L.J.).

[36] Given the very serious shortcomings of the Survey outlined above, including its status as hearsay evidence and the manner in which this evidence was adduced, I have concluded that it does not even meet the minimum requirements to constitute expert opinion evidence. At its highest, it is a summary of data collected without any analysis or

opinion expressed as to its validity or reliability. Absent evidence as to the qualifications of its author and absent analysis of the data and a corresponding opinion, no reasonable inferences can be drawn from the proffered Survey.

[37] Having reached this conclusion, further consideration of the four-part threshold inquiry would ordinarily not be necessary. However, I will conduct that inquiry for the completeness of my assessment of this proposed evidence.

[38] As to the first threshold inquiry of relevance, the Supreme Court has defined logically relevant information as that which tends to "increase or diminish the probability of the existence of a fact in issue": *R. v. Arp*, [1998] 3 S.C.R. 339, at para. 38.

[39] The proposed evidence fails to meet the requirement of relevance under the first threshold inquiry. The Survey is not a random or representative sample of prospective Brampton jurors. It only surveyed individuals who drive and who pay for motor vehicle liability insurance or have it paid on their behalf. Jury panels summoned to court for the purpose of jury selections for trials are composed of a broad spectrum of citizens from the community in terms of their age, employment history, education, and ethnicity and would include citizens who drive automobiles and those who do not. Thus, the evidence outlined in the Survey is of little or no relevance as to whether or not a properly constituted jury selected from a random and representative jury panel could be impaneled in Brampton.

[40] As to the second threshold inquiry of necessity, the court in *Mohan*, at 23, established that necessity is satisfied in any of three circumstances. First, the expert may

provide information which is likely to be outside the experience and knowledge of the trier of fact. Second, the expert evidence may be necessary to assist the trier of fact to appreciate technical dimensions of the matters in issue. Third, the evidence may relate to something about which ordinary people are unlikely to form a correct judgment without expert assistance.

[41] Assuming again that the Survey and the accompanying letter constituted expert opinion evidence, the Survey may be of assistance for the court's determination of the attitudes of prospective jurors. However, as already noted, given the inadequacies of the survey evidence and complete lack of analysis and any opinion expressed by a qualified expert, I cannot conclude that the evidence as tendered is necessary in the circumstances.

[42] I have also concluded that as a result of the serious deficiencies in the Survey its probative value would be significantly reduced and there would be an increase in the prejudicial effect and as such under the gatekeeping part of the admissibility inquiry outlined in *White Burgess* I would also exclude the Survey from the evidentiary record.

[43] The third threshold criterion for admissibility of expert evidence is the absence of another exclusionary rule. Again, apart from the core question as to whether the evidence constitutes expert opinion evidence, the only applicable exclusionary rule engaged in this instance arises from the fact that the evidence proffered in the deponent's affidavit is entirely hearsay. The proposed expert, Mr. Manocha, offers no evidence by way of an

affidavit upon which he would be exposed to cross-examination and the testing of his qualifications, views and methodology.

[44] Finally, as to the fourth threshold criteria that the expert be properly qualified to offer the relevant evidence, the judicial evaluation of qualifications has changed somewhat since *Mohan* was decided, where Sopinka J. held that "the evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience": *Mohan*, at p. 25. In *White Burgess*, Cromwell J. extended the reach of the qualification criterion to include considerations of whether the expert is independent and impartial: *White Burgess*, at paras. 52-53.

[45] For the purpose of considering the proffered evidence, lack of independence or partiality of the proposed expert was not argued. Quite apart from all of the shortcomings of the proposed evidence, on the record available, I cannot conclude that Raj Manocha possesses the requisite qualifications by training, education and experience to offer evidence with respect to the Survey and the methodology applied let alone any opinion or conclusion that could be drawn or inferred from the Survey data. As already noted, there is limited, if any, evidence as to Mr. Manocha's education, training or experience in conducting surveys, and knowledge of the scientific principles applicable to gathering survey evidence and its analysis.

[46] On balance, considering the proffered evidence under the *Mohan* criteria, the Survey does not meet the threshold test for admissibility as expert evidence.

[47] For these reasons, I have concluded that the letter of February 2, 2017 signed by Raj Manocha on behalf of AskingCanadians and the Survey which accompanied that letter must be excluded from the evidentiary record on the Plaintiff's motion. It is not expert evidence, and therefore is inadmissible hearsay evidence contained in Judit E. Denesi's affidavit. Even if it were expert evidence, it is inadmissible pursuant to the test set out in *Mohan* and expanded on in *White Burgess*. As such, I will not consider this proffered evidence in my decision.

Positions of the Parties and Intervenors:

Position of the Plaintiff:

[48] The Plaintiff submits that while the right to have an action tried by a jury is a substantive right, although not a constitutional right, there are limits on that right. For example, the Plaintiff submits any person who has an interest or perceived interest in the action should automatically be determined to be ineligible for selection as a jury member.

[49] This submission arises from what the Plaintiff refers to as an "inherent conflict of interest" with respect to citizens of Brampton who pay for automobile insurance premiums, or have it paid on their behalf, and are selected as prospective jurors in a personal injury trial arising from a motor vehicle accident. This conflict, it is asserted, arises from the widespread and publicly known fact that increased courts awards and settlements for motor vehicle accidents increase automobile insurance premiums.

[50] As to the relief sought, the Plaintiff submitted that residents of Brampton who pay for automobile insurance, or have it paid on their behalf, should be excluded from the jury selection process as ineligible to serve as jurors due to their inherent conflict of interest.

[51] Alternatively, the Plaintiff requests that these residents of Brampton be excluded from the jury selection process as ineligible to serve as jurors due to the widespread bias that exists in the community and their inability to set aside this bias, despite trial safeguards, to render an impartial decision.

[52] In the further alternative, the Plaintiff requests that these residents of Brampton be subject to challenge for cause based on bias and lack of impartiality.

[53] In the final alternative, the Plaintiff simply requests that the jury notices filed in this action be struck.

[54] It was further submitted on behalf of the plaintiff that the lack of courtroom space for jury trials in Brampton, which has resulted in civil jury cases being transferred to Kitchener and other judicial centres, could be avoided, along with the expense and inconvenience associated with this, if motor vehicle cases in Brampton were tried without a jury.

Positions of the Defendants:

[55] In summary, the Defendants Manovski, Petrov and Unifund Assurance Company submit that the right to a trial by a jury is a substantive one and that there is no basis upon which to limit the right to a jury trial as proposed by the Plaintiff.

[56] Further, the Defendants posit that the statutory scheme governing the selection and conduct of civil jury trials does not allow for a challenge for cause process similar to that provided for in the *Criminal Code*, R.S.C., 1985, c. C-46.

Submission of the Intervenor – Attorney General of Ontario:

[57] The intervenor Ontario takes no position on whether any prospective jurors have a conflict of interest as alleged by the Plaintiff. Nor does it take a position on whether such a conflict of interest makes the impugned jurors ineligible to serve on a jury in the trial of this action or justifies striking out the jury notice.

[58] It is Ontario's position that jurors in civil cases may only be challenged for want of eligibility under the *Juries Act*, R.S.O. 1990, c. J.3. Ontario also posits that s. 3(3) of the *Juries Act* does not authorize a challenge for cause for juror partiality and only renders persons ineligible to be included on a jury if they are (or are likely to be) required to participate in another court proceeding during the same sittings.

[59] A large part of the submissions on behalf of Ontario was in response to the alleged inconvenience of conducting civil jury cases scheduled to be tried in Brampton which were required to be transferred to other judicial centres

[60] I will briefly address the submissions on behalf of Ontario regarding this issue at this time.

[61] For several years the Brampton courthouse has not had adequate courtroom space for many of the trials in the Superior Court of Justice. In particular, the Brampton

courthouse has suffered from a serious lack of jury courtrooms for both criminal and civil matters.

[62] In order to ensure that criminal, civil and family trials were dealt with as expeditiously as possible and not delayed in reaching trial due to lack of courtroom facilities in Brampton, the Chief Justice of the Superior Court of Justice authorized the Regional Senior Justice for Central West Region to transfer trials from Brampton to other centres within Central West Region. Where other courtrooms within Central West Region are not available, the Regional Senior Justice for Central West Region was authorized to transfer cases to Kitchener in Central South Region.

[63] Initially when the court at Brampton began transferring trials out of Brampton due to lack of jury courtroom space, the juries for the trials being transferred were selected in Brampton from a jury panel of Brampton residents. Transportation arrangements were made for the jurors to travel to the other court location, where the trial would be conducted, on a daily basis and return to the Brampton courthouse at the end of each court day.

[64] As a result of the serious lack of courtroom space in Brampton and the need to transfer trials to other judicial centres, the Ministry of the Attorney General put in place, what has become referred to as the Jury Transport Program. This program provided jurors with transportation options they could choose from, such as travel by taxi, their own private vehicle, the cost of which would be reimbursed by the Ministry of the Attorney General. Following the implementation of this program, several Brampton civil jury trials were transferred to other centres in Central West Region as well as to Kitchener.

[65] Counsel in this action were advised, when this case was initially called for trial, that there was a possibility that this case could be transferred to Kitchener for trial, following jury selection in Brampton.

[66] In March 2018, Durno J., in *R. v. Singh et. al.*, 2018 ONSC 1532, 2018 CarswellOnt 9134, comprehensively reviewed the dire courtroom shortage in Brampton as well as the jurisdiction of the court to transfer trials to other judicial centres.

[67] As to the jurisdiction of the court to transfer trials as a result of the shortage of courtrooms in Brampton, Durno J. stated as follows at paras. 148 and 151:

> [148] To address the Brampton courtroom shortage, the Chief Justice has ordered that any proceeding in Brampton can be transferred from the Central West Region to Central South Region if it is determined by the RSJ or his or her designate that the proceeding cannot be held in Brampton. As has been repeatedly stated, there is always an overriding commitment by the Court to take all reasonable steps to keep as many proceedings in Brampton as possible.
>
> ...
>
> [151] In sum, pursuant to s. 14 of the *Courts of Justice Act*, the Chief Justice has the authority to transfer cases anywhere in Ontario and R.S.J.s have the authority to transfer cases anywhere within his or her region.

[68] Following Durno J's decision in *Singh*, as Regional Senior Judge I have determined that where there is no courtroom space in Brampton for a civil jury trial, the appropriate and lawful course is to conduct the jury selection in the judicial centre where the case is to be tried. For example, a Brampton civil jury trial transferred to Kitchener would have the jury selected in Kitchener from a jury panel of Kitchener residents. Thus, there would be no need to look to the Jury Transport Program. This jury selection model

will continue to apply to all civil jury cases transferred from Brampton whether to Kitchener or to another judicial centre in Central West Region.

[69] During the argument of this motion, all parties' and intervenors' counsel were advised of Durno J.'s decision in *Singh* and the new court practice of selecting juries in the judicial centre where the case is to be tried, following transfer of a trial out of Brampton.

[70] Given this change in circumstances, which counsel may not have been aware of, and the new practice with respect to civil jury trials and jury selections, there is no reasonable basis to consider the past practice of transporting jurors to other centres as a relevant factor on this motion.

[71] As to the main issues at stake on this motion, it was Ontario's position that:

> (I) the only valid challenges for cause are those specifically enumerated in the *Juries Act* which relate to juror eligibility, not partiality;
>
> (II) jurors who have an interest in the action to be tried are not automatically ineligible to serve under the *Juries Act*;
>
> (III) the common law permits a limited judicial "pre-screening" of prospective jurors to exclude those with obvious partiality;
>
> (IV) challenging jurors requires an evidentiary basis sufficient to displace the presumption that jurors will be impartial; and

(V) jurors should not be challenged in a manner that undermines the representative nature of the jury or is unduly invasive.

Submissions of the Intervenor – The Advocates' Society:

[72] The submissions made by counsel on behalf of the Society generally aligned with those made by counsel for the defendants and the intervenor Ontario, subject to one distinction as discussed below.

[73] It was the Society's general submission that the weight of judicial authority in Ontario does not support the availability of any challenges for cause beyond those expressly provided for in the *Juries Act* and the *Courts of Justice Act*, R.S.O. 1990, c. C.43. It was further submitted that any substantive reform to the civil jury system allowing for a general challenge for cause procedure should only be done through measured and carefully considered legislative amendments and/or changes to the *Rules of Civil Procedure*.

[74] The Society also made submissions regarding s. 3(3) of the *Juries Act*, which reads as follows:

> **Connection with court action at same sittings**
> (3) Every person who has been summoned as a witness or is likely to be called as a witness in a civil or criminal proceeding or has an interest in an action is ineligible to serve as a juror at any sittings at which the proceeding or action might be tried.

[75] The Society's submits that this subsection somewhat supports the Plaintiff's position. The Society posits that if the court determines that "an interest in an action"

includes partiality, a two-staged test should be considered. At the first stage, a threshold analysis would be required to determine whether a challenge for want of eligibility should be permitted and, if so, at the second stage the court would consider whether the challenging party has discharged its onus to satisfy the court that a prospective juror ought to be dismissed due to partiality.

[76] It was urged that once the threshold test had been met, at the second stage, in line with the decision in *Find*, the party seeking to challenge a prospective juror would have to introduce evidence to establish a "realistic potential" for juror partiality by demonstrating that:

> (1) a widespread bias existed in the community; and
>
> (2) some jurors may be incapable of setting aside this bias despite the limited judicial pre-screening and trial safeguards.

Analysis:

[77] The substantive right to a civil trial by a jury has been long recognized. Over time, that right has become an integral part of Ontario's civil justice system.

[78] As was correctly pointed out by counsel for Ontario, the Plaintiff does not challenge the constitutionality of the *Courts of Justice Act* or the *Juries Act*. Absent such a challenge, the wisdom of legislation or government decision-making generally is not justiciable: *Ontario Federation of Anglers & Hunters v. Ontario (Ministry of Natural Resources)* (2002), 158 O.A.C. 255 (C.A.), at para. 51, leave to appeal denied: [2002]

S.C.C.A. No. 252. Thus, the determination of the Plaintiff's motion rests entirely on the statutory construction of the applicable legislation and consideration of the relevant jurisprudence.

[79] In the 1950s, it was held that the court's exercise of discretion to strike a jury notice was reviewable and that the discretion to strike must be exercised judicially and not in an arbitrary or capricious manner: *Burton v. Harding and Marks*, [1952] 3 D.L.R. 302, at 306 – 307 (Ont. C.A.).

[80] The right to a trial by a civil jury was more recently emphasized by the Court of Appeal in *Hunt (Litigation Guardian of) v. Sutton Group Incentive Realty Inc.* (2002), 60 O.R. (3d) 665 (C.A.), at para. 73, where Austin J.A. stated:

> Finally, it bears repeating that the right to trial by jury is a substantial right and one which is not to be taken away lightly. The onus is upon a party moving to discharge a jury and that onus must also be substantial.

[81] Section 108(1) of the *Courts of Justice Act* provides:

> 108(1) In an action in the Superior Court of Justice that is not in the Small Claims Court, a party may require that the issues of fact be tried or the damages assessed, or both, by a jury, unless otherwise provided.

[82] Section 108(2) enumerates those actions which must be tried without a jury. In my view, this list is a complete code. It exhaustively sets out the types of actions and relief claimed that are barred from being tried by a jury.

Unavailability of a Broad/General Challenge for Cause in the *Juries Act*

[83] The *Juries Act* provides for the qualifications that individuals must have to serve on a jury. It also governs the procedure by which juries are selected in civil cases. The *Juries Act* only provides for two forms of challenges for cause in civil cases:

> **Lack of eligibility**
> 32 If a person not eligible is drawn as a juror for the trial of an issue in any proceeding, the want of eligibility is a good cause for challenge.
>
> ...
>
> **Ratepayers, officers, etc., of municipality may be challenged**
> 34 In a proceeding to which a municipal corporation, other than a county, is a party, every ratepayer, and every officer or servant of the corporation is, for that reason, liable to challenge as a juror.

[84] As such, the two permissible forms of challenges for cause in civil cases enunciated in the *Juries Act* are challenges:

> (1) for want of eligibility; and
>
> (2) for ratepayers and officers/servants of municipal corporations, where the municipal corporation is a party.

[85] The *Juries Act* does not expressly provide any other basis for a challenge for cause of the kind sought by counsel for the Plaintiff. Several Canadian provinces' legislation governing civil juries authorize challenges for cause in civil jury trials, however, the Ontario*'s Juries Act* does not contain equivalent provisions.

[86] In the Supreme Court of Canada's decision of *R. v. Sherratt*, [1991] 1 S.C.R. 509, L'Heureux-Dube J. noted, at p. 534, that when considering the proper procedure to be used in a challenge for cause in a criminal case governed by the *Criminal Code*:

> There is absolutely no room for a trial judge to increase further his/her powers and take over the challenge process by deciding controversial questions of partiality. If there exist legitimate grounds for a challenge for cause, outside of the obvious cases addressed by the *Hubbert*, procedure, it must proceed in accordance with the *Code Provisions* – the threshold pre-screening mechanism is a poor, and more importantly, an illegal substitute in disputed areas of partiality.

[87] In the recent decision of this court in *Nemchin v. Green*, 2017 ONSC 2126, 137 O.R. (3d) 784, at para. 56, Corthorn J. referred to L'Heureux-Dube J.'s statement above in *Sherratt* and concluded that a trial judge in a civil jury case must adhere to the jury selection process prescribed by the *Juries Act* in the absence of express statutory authority to allow for a challenge for cause. I agree with Corthorn J.'s reasoning.

[88] In the earlier decision of *Thomas-Robinson v. Song* (1997), 34 O.R. (3d) 62 (Gen. Div.), Jennings J. reached a similar conclusion where Plaintiff's counsel sought to have a civil jury selection process include a *Parks* challenge as to racial bias.

[89] In respect to the challenge for cause referred to in section 32 of the *Juries Act*, Jennings J. stated as follows at paras. 10-12:

> Section 32 provides that "want of eligibility is a good cause for challenge". Section 33 provides for peremptory challenges. Section 34 provides for challenges where a municipal corporation is a party. No other provision is made for a challenge unless it is to be found in s. 27(2) which describes the procedure to be followed to empanel six jurors.

> In my opinion, the phrase in that section, "...after all just causes of challenge allowed..." when read in context, must refer to the challenges provided for in ss. 32, 33 and 34. Nor do I believe that the somewhat imprecise language of s. 32, referring as it does to a "want of eligibility" being "a good cause for challenge" (emphasis added), permits me to infer that the legislature intended there be other unspecified good causes for challenge.
>
> In my opinion, by declining to provide for challenge for cause in the Juries Act, the legislature did not believe it necessary to extend that right to litigants in civil cases. It may well be that the issue should be reconsidered but that is for legislature and not for me. The motion must therefore be dismissed.

[90] See also*: Amana Imports Canada Ltd. v. Guardian Insurance Company of Canada* (2002), 57 O.R. (3d) 587, at paras. 9-11.

[91] In *Kayhan v. Greve* (2008), 92 O.R. (3d) 139 (Div. Ct.), the Divisional Court considered an appeal from an order striking the defendant's jury notice on the basis that there was a reasonable apprehension of anti-Muslim bias against the Plaintiff.

[92] The obiter commentary at paras. 38 and 41 – 42 the decision of the majority in *Kayhan* is instructive on the question of whether or not a challenge for cause process should be included in civil jury selections:

> [38] We acknowledge there is no recognized procedure in Ontario for challenges for cause in civil cases. We also acknowledge it is not prohibited. Some might suggest the time has come for the Civil Rules Committee and the legislature to give consideration to this issue given the rapidly changing nature of Canadian society. We do not.
>
> ...
>
> [41] What are the ramifications of a challenge for cause in civil matters? First of all, there is the potential, as the appellant suggests, of never having civil jury cases in Ontario involving members of minority groups who may feel aggrieved. This, in our view, is a wholly untenable result and does not

> accord with Canada's reputation as an open and tolerant multicultural society.
>
> [42] The other ramification is that there would be considerable delay and expense involved in many civil cases in large urban centres. Evidence would need to be brought to the attention of the trial judge on the issue of potential prejudice. We already have a civil system that is seriously overloaded, and to this extent, challenges for cause in civil cases would not do anything but to increase the current backlog.

[93] This review of the jurisprudence makes it clear that the *Juries Act* does not permit a broad/general challenge for cause, and nor should one be read into the *Act*.

Analogous Challenges for Cause under s. 34 of the *Juries Act*

[94] The Plaintiff submitted that the challenge with respect to prospective jurors provided for in section 34 of the *Juries Act* is somewhat analogous to the circumstances in the present case.

[95] With respect, this argument cannot be accepted.

[96] As was noted by counsel for the Society, the *maxim expressio unius exclusio alterius* (to express one thing is to exclude another) applies to the interpretation of this provision of the *Juries Act* leading to a result contrary to the Plaintiff's position. The "implied exclusion" maxim is described in *Sullivan on the Construction of Statutes* as "widespread and important in interpretation" and arises whenever "there is reason to believe that if the Legislature had meant to include a particular thing with in its legislation, it would have referred to that thing expressly": Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: Lexis-Nexis Canada Inc., 2008).

[97] Again, as submitted by counsel for the Society, sections 32 – 34 of the *Juries Act* provide clear evidence of the legislative intention as to the limits on challenges of prospective jurors. Section 32 provides a challenge based on "want of eligibility." Section 33 provides each side on the case with four peremptory challenges and section 34 provides challenges with respect to prospected jurors who are ratepayers and officers of municipal corporations.

[98] All of these statutory provisions are clearly silent with respect to any challenge based on or related to prospective jurors being insured under a policy of motor vehicle liability insurance or paying premiums in respect of same. As such, a challenge for cause based on bias or lack of partiality for such prospective jurors ought not to be read into the *Juries Act*: *Sullivan on Construction of Statutes*, at p. 244; *Canada (Canadian Private Copying Collective) v. Canadian Storage Media Alliance*, 2004 FCA 424, [2005] 2 F.C.R. 654, at para. 96.

[99] Based on these authorities, I have concluded that the legislative silence in the *Juries Act* as to challenges based on prospective jurors' status as being insured under or paying for motor vehicle liability insurance was deliberate. This silence reflects an intention on the part of the legislature to exclude challenges for cause based on grounds not mentioned in the *Juries Act* itself.

Scope of Ineligibility Under Section 3(3) of the *Juries Act*

[100] The Plaintiff also submitted that a prospective juror's bias or partiality, if established, is tantamount to having an "interest" in the action and thereby renders

"ineligible" and/or subject to challenge on the basis of "want of eligibility" under s. 3(3) of the *Juries Act*. I have concluded that this submission cannot be sustained.

[101] I agree with Ontario's submission that the words, purpose and context of s. 3(3) and the *Juries Act* as a whole demonstrate that s. 3(3) does not automatically disqualify jurors with an interest in the action. Proper statutory interpretation requires that the words of an Act be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature: *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26.

[102] As to the intention of the legislature, the legislative history of s. 3(3) prior to 1974 is instructive. The earliest version of what is now s. 3(3) was introduced in 1936 as section 3(2) by *The Jurors Amendment Act*, S.O. 1936, c.32 s. 2, and it read as follows:

> **Exemption where person under subpoena**
> (2) Every person who is under subpoena or is likely to be called as a witness in any civil or criminal proceeding shall be exempt from being returned and from serving as a grand or petit juror at any sittings of a court at which such proceeding might be tried, and his name shall not be entered on the rolls prepared and reported by the selectors of jurors for any such sittings and if entered, shall be deleted therefrom.

[103] The phrase "an interest in an action" was added to s. 3(3) by way of amendments to the *Juries Act* in 1974. The *Hansard* debates preceding the 1974 amendments are instructive as to the legislative intention. For example, see former Attorney General Robert Welch's comments on June 25, 1974:

> What this new Act attempts to do, however, is to minimize the exemptions....I've been attempting to get the particular volume but McRuer would not include in jury duty, for the same reasons I give, the groups related to the administration of justice. However, that aside, I think what we're trying to accomplish is to ensure a wide cross-section of the public being represented on our juries. The simplest way to do this was to minimize the list of exemptions about which there can be valid differences of opinion, let me admit – to go through the new selection procedures which the Act provides for and to provide wide powers of discretion in the sheriff and, ultimately, the judge to either defer or excuse people from jury duty.
>
> What I'm pleading for is not to broaden the exemptions by statute any further but to rely, as a matter of practice, on the good judgment of our sheriffs and the county court judges, who have wide powers in this Act, to defer and/or excuse.

Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 29th Leg. 4th sess., (26 June 1974), at p. 3799 (Hon. Robert Welch).

[104] The legislative intention, as demonstrated by the former Attorney General's remarks, is entirely inconsistent with the interpretation put forward on behalf of the Plaintiff. The Minister's statements demonstrate no legislative intention to create a statutory challenge for cause procedure in the selection of civil juries or to broaden the basis for exclusion of prospective jurors, while at the same time recognizing judicial pre-screening as discussed below.

[105] Counsel advised that there has been no judicial interpretation of the phrase "an interest in an action" in s. 3(3) of the *Juries Act*.

[106] Section 632 of the *Criminal Code* provides that a judge may order a jury panel member to be excused from jury service on several grounds, including the ground that the panel member has "a personal interest in the matter to be tried." That phrase has

been held to mean circumstances of "obvious partiality" or "manifest partiality": *R. v. B. (A.)* (1997), 33 O.R. (3d) 321 (C.A.), at paras. 94 – 95.

[107] The Plaintiff submitted that all prospective jurors who drive cars or who pay for automobile insurance have "an interest in an action" – namely, the action in which they are summoned as jurors – and that this interest is in fact a financial conflict of interest with the financial interests of the Plaintiff.

[108] Nowhere does the *Juries Act* expressly state that lack of impartiality is a ground to disqualify a juror based on ineligibility as referred to in the heading immediately above the opening words of s. 3 – namely "Ineligibility to serve as juror."

[109] Furthermore, proper statutory interpretation of s. 3(3) necessarily includes consideration of the heading above the subsection which states as follows: "Connection with court action at same sittings." This heading must be read alongside the phrase "an interest in an action" within the body of the subsection.

[110] In *Sullivan on the Construction of Statutes* (5th Edition) Prof. Sullivan observed, at pp 393 – 394:

> "The view in most recent judgments from the Supreme Court of Canada is that for the purposes of interpretation headings should be considered part of the legislation and should be read and relied on like any other contextual feature..... This approach to headings in the *Charter* has been applied to the ordinary federal legislation and, despite the Interpretations Acts to provincial legislation as well. These cases make it clear that headings are a valid indicator of legislative meaning and should be taken into account in interpretation."

[111] The word "interest" as used in s. 3(3) can only reasonably be construed contextually to refer to having a "connection" to an action. This conclusion is in keeping with the *ejusdem generis* rule of construction. This rule was explained by the LaForest J. in *National Bank of Greece (Canada) v. Katisikonouris*, [1990] 2 S.C.R. 1029, at 1040, where he stated:

> "Whatever the particular document one is construing, when one finds a clause that sets out a list of specific words followed by a general term, it will normally be appropriate to limit the general term to the genus of the narrow enumeration that precedes it."

[112] The language of s. 3(3) of the *Juries Act* contains specific words related to persons who may possibly be summoned as jurors, namely "summoned as a witness" or "likely to be called as a witness," which phrases are followed by the general phrase "has an interest in an action." Applying the *ejusdem generis* rule, I conclude that the expression "has an interest in an action" is limited to the persons described in the preceding phrases – i.e. witnesses and prospective witnesses – when considered within the context of the whole legislation including the heading, "Connection with court action at same sittings."

[113] Section 3(3) of the Juries Act therefore only makes individuals who are or who are likely to be called as witnesses ineligible to serve as jurors. In the result, I conclude that ineligibility on the grounds of having "an interest in an action" cannot be founded on any other conflict or partiality. Other such possible conflicts, partiality, or "connections," for example an association with a witness or party to the action, are typically dealt with by the court during the judicial pre-screening process, prior to the formal jury selection.

Conclusions: No Statutory Basis for Automatic Exclusion or Challenge For Cause of Prospective Jurors with or paying for Motor Vehicle Insurance

[114] I have concluded that the absence of an express provision in the *Juries Act* or the *Courts of Justice Act* or any other related legislation or rules allowing for the exclusion of residents from a jury panel who are insured under motor vehicle liability insurance policies warrants dismissing the Plaintiff's request for same. For the same reasons, removing all potential jurors who are ratepayers of automobile insurance premiums from the jury itself would be similarly inappropriate.

[115] Similarly, I have concluded that, in the absence of an express statutory provision allowing for a challenge for cause of prospective jurors on the basis that they pay premiums for motor vehicle liability insurance or have same paid on their behalf, the Plaintiff's request for a challenge for cause process in the jury selection in this case must also be dismissed.

No Basis to Strike Jury Notice

[116] As to the Plaintiff's request that the jury notice filed by the defendants be struck, I have concluded that there is an insufficient evidentiary basis to warrant striking the jury notice.

[117] This case involves a motor vehicle accident and resulting injuries to the Plaintiff. There is no evidence of factual or evidentiary complexities that would prevent a properly instructed jury from trying this action. Thus, I dismiss this aspect of the Plaintiff's motion,

subject to the terms of Rule 47.02(3) which leaves unfettered the discretion of the trial judge to strike the jury notice, in the event the Plaintiff's motion is renewed at trial on grounds available under the *Rules*.

Procedural Safeguards in Civil Jury Trials to Guard Against Partiality

[118] I have excluded the Plaintiff's proposed survey evidence and determined that there is no express or other statutory basis for the exclusion of prospective Brampton jurors who are insured under policies of motor vehicle liability insurance, or allowing for a challenge for cause. In spite of these rulings, in the event I am in error as to any of the conclusions I have reached, I will consider the statutory and judicial safeguards in place, as well as the nature of the evidentiary record adduced in this case and the type of evidence that would otherwise be needed to consider the Plaintiff's assertion that prospective jurors covered under motor vehicle liability insurance policies could not impartially and fairly try this action.

[119] It must be noted that there is no evidence whatsoever of partiality on the part of any Brampton residents who could potentially be summoned to a jury panel for a civil jury selection in this case. Even if the Survey evidence was admitted, that Survey and all the other evidentiary material filed by the Plaintiff offer no evidence of partiality on behalf of prospective jurors in this matter. More importantly, the Plaintiff himself does not offer any evidence that jurors would put their own personal financial interests ahead of his by making liability findings adverse to the Plaintiff or by making damage awards lower than would otherwise be appropriate and reasonable in the circumstances of this case.

[120] Absent a challenge for cause as proposed by the Plaintiff, there are several judicial and statutory safeguards in place that enhance the broad, representative nature of the civil jury selected and as well contribute to randomness in the jury selection process. These safeguards, reviewed below, all ensure the integrity of the civil jury system and trial fairness.

[121] The common law has long recognized judicial pre-screening in jury selections. Further, the peremptory challenges available to Plaintiffs and defendants, the trial judge's instructions during the jury selection process, any mid-trial instructions given, the closing jury charge, and the trial process itself provide the jury with much guidance on how they are to conduct themselves as triers of fact in the trial process. Further, s. 108(7) of the *Courts of Justice Act* provides that the trial judge may discharge a selected juror during the course of a trial on several grounds, including partiality.

[122] In *Find*, McLachlin C.J. described the common law power to excuse prospective jurors by judicial pre-screening:

> 22 Members of the jury pool may be excluded from the jury in two ways during the empanelling process. First, the trial judge enjoys a limited preliminary power to excuse prospective jurors. This is referred to as "judicial pre-screening" of the jury array. At common law, the trial judge was empowered to ask general questions of the panel to uncover manifest bias or personal hardship, and to excuse a prospective juror on either ground. Today in Canada, the judge typically raises these issues in his remarks to the panel, at which point those in the pool who may have difficulties are invited to identify themselves. If satisfied that a member of the jury pool should not serve either for reasons of manifest bias or hardship, the trial judge may excuse that person from jury service.
>
> 23 Judicial pre-screening at common law developed as a summary procedure for expediting jury selection where the prospective juror's

> partiality was uncontroversial, such as where he or she had an interest in the proceedings or was a relative of a witness or the accused: *Barrow*, supra, at p. 709. The consent of both parties to the judicial pre-screening was presumed, provided the reason for discharge was "manifest" or obvious. Otherwise, the challenge for cause procedure applied: *Sherratt,* supra, at p. 534. In 1992, s. 632 of the *Criminal Code* was enacted to address judicial pre-screening of the jury panel. This provision allows the judge, at any time before the trial commences, to excuse a prospective juror for personal interest, relationship with the judge, counsel, accused or prospective witnesses, or personal hardship or other reasonable cause.

[123] It must be noted, however, that the judicial pre-screening of jurors relates to obvious or manifest partiality and the threshold for judicial pre-screening is much different than that of a challenge for cause authorized by statute. The threshold for pre-screening potential jurors for obvious partiality is much higher than the "perception of a conflict of interest."

[124] The Supreme Court of Canada affirmed the Ontario Court of Appeal's decision in *R. v. Hubbert* (1975), 11 O.R. (2d) 464 (C.A.), which made it clear that the pre-screening of jurors is only appropriate in cases where the connection between the prospective juror and the proceeding or a party is direct, manifest, obvious and uncontroversial: *R. v. Hubbert*, at paras. 35 – 38.

[125] Thus, the common law does not permit pre-screening of prospective jurors at large, as has been proposed by the Plaintiff in this case.

Test to Establish Prospective Jurors' Bias/Conflict of Interest

[126] Turning to the nature of the evidentiary record that might otherwise be required for the Plaintiff in this case to be entitled to a challenge for cause in the jury selection process on the basis of bias and/or partiality and/or conflict of interest, the decision of McLachlin C.J. in *Find*, although a criminal case, is both authoritative and apt in the context of a civil jury trial as well.

[127] As was noted by McLachlin C.J., in contrast to the juries in the American criminal justice system, the Canadian system presumes that jurors are capable of setting aside their views and prejudices and acting impartially between the prosecution and the accused upon proper instruction by the trial judge: *Find*, at para. 26.

[128] The Chief Justice also set out, at paras. 31–32, that there must be a demonstrated "realistic potential" that the jury pool contains people who are not impartial. The necessary evidentiary basis to establish this "realistic potential" is described as follows:

> 31 In order to challenge for cause under s. 638(1)(*b*), one must show a "realistic potential" that the jury pool may contain people who are not impartial, in the sense that even upon proper instructions by the trial judge they may not be able to set aside their prejudice and decide fairly between the Crown and the accused: *Sherratt*, *supra*; *Williams*, *supra*, at para. 14.
>
> 32 As a practical matter, establishing a realistic potential for juror partiality generally requires satisfying the court on two matters: (1) that a widespread bias exists in the community; and (2) that some jurors may be incapable of setting aside this bias, despite trial safeguards, to render an impartial decision. These two components of the challenge for cause test reflect, respectively, the attitudinal and behavioural components of partiality: *Parks*,

> *supra*, at pp. 364-65; *R. v. Betker* (1997), 1997 CanLII 1902 (ON CA), 115 C.C.C. (3d) 421 (Ont. C.A.), at pp. 435-36 [emphasis in original.]

[129] As to prospective juror's impartiality, the Chief Justice made it clear in *Find* that a party must establish an evidentiary foundation to challenge for cause and overcome the presumption of juror impartiality. The court noted at para. 40 that the law accepts that jurors may enter the trial with biases but also presumes that jurors' views and biases will be cleansed by the trial process. Therefore the law does not permit a party to challenge their right to sit on the jury because of the existence of widespread bias alone.

[130] The presumption of impartiality may be overcome or displaced by calling evidence or by asking the court to take judicial notice of facts or both: *Find*, at para. 46. Evidence which is simply based on speculation or assumptions without a substantial foundation cannot found a challenge for cause.

[131] As established at para. 47 of *Find,* determining whether or not a challenge for cause would be appropriate requires a two-step inquiry. The first line of inquiry is to determine whether or not there is sufficient evidence to find that there is widespread bias. In the event such evidence is adduced or the court takes judicial notice of widespread bias, the second line of inquiry requires a determination as to whether or not the prospective jurors will be unable to set aside their biases despite the cleansing effect of the judge's instruction and the trial process.

Lack of Evidence in Case at Bar to Establish Prospective Jurors' Bias/Conflict of Interest

[132] Applying these principles to this case and the evidentiary record presented, without regard to the so-called expert opinion Survey evidence as excluded, there is no evidence whatsoever that would demonstrate the presence of a widespread bias among Brampton citizens, as prospective jurors, against the interests of the Plaintiff or generally against similarly situated Plaintiffs. Therefore, the first branch of test in *Find* is not made out and it is unnecessary to consider the second branch.

[133] As noted above, other provinces' jury legislation do allow for challenges for cause in civil jury trials.

[134] In *Moreland v. Sutherland*, 1999 BCCA 586, 130 B.C.A.C. 206, the British Columbia Court of Appeal considered an appeal involving a challenge for cause in a civil jury trial. *The British Columbia Jury Act*, R.S.B.C. 1996, c. 242, s. 20(2), provides that in civil jury trials, each party is entitled to challenge any of the prospective jurors for cause.

[135] The appellant in *Moreland* submitted that the trial judge erred by refusing to allow Plaintiff's counsel to challenge prospective jurors for cause by questioning them as to whether they were biased against motor vehicle accident claimants as a result of publicity associated with a media campaign conducted by the Insurance Corporation of British Columbia inveighing against high legal costs in the tort-based system. The media campaign also linked the increasing cost of insurance premiums with the size of damage awards.

[136] The trial judge's decision denying the Plaintiff's request for a challenge for cause based on bias over auto insurance was upheld by Donald J.A. of the British Columbia Court of Appeal.

[137] Donald J.A. stated as follows at para. 33:

> [33] Since *Sherratt* the law has not equated the possibility of bias with a potential for prejudice. This is because although many persons have biases most can put them aside in the courtroom and decide cases fairly on the evidence. Indeed, there is a presumption that they will do so. In contrasting our system with that in the United States McLachlin J. said in Williams at para. 13 [pp. 1139-40]:
>
> > Canada has taken a different approach. In this country, candidates for jury duty are presumed to be indifferent or impartial. Before the Crown or the accused can challenge and question them, they must raise concerns which displace that presumption. Usually this is done by the party seeking the challenge calling evidence substantiating the basis of the concern. [Emphasis added].

[138] With respect to the cogency of the evidence required in a race-based challenge for cause, as distinct from the nature of challenge for cause sought in *Moreland* and in the present case, Donald J.A. stated as follows at paras. 38 – 39:

> [38] I cannot see any similarity between the kind of bias alleged in the instant case (a *generic* bias, as a result of publicity against claimants and personal injury lawyers generally; and an *interest* bias in relation to one's own premiums for auto insurance) and racial prejudice. The words chosen by McLachlin J. to describe racial prejudice: "insidious", "invasive", "illusive", and "corrosive", simply do not fit the biases alleged here. I conclude on the authority of *Sherratt* that it should be presumed, unless the contrary is shown, that any juror having a bias against a motor vehicle accident claimant or her lawyers will be able to put that bias aside, along with any self-interest related to the juror's insurance costs and that the usual safeguards (the juror's oath, the judge's directions and jury deliberations) will have their desired effect.

> [39] Returning to the questioned ruling in the present case, it was not, in my opinion, wrong for the trial judge to ask himself whether the appellant demonstrated a realistic potential of partiality. He was not bound to infer it. In finding that the appellant failed to make the crucial link between bias and partiality he exercised a judgment which should not be disturbed on appeal.

[139] In the absence of clear and cogent evidence, McLachlin C.J. identified the parameters of judicial notice in *Find* at para. 48 where she stated as follows:

> In this case, the appellant relies heavily on proof by judicial notice. Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy: *R. v. Potts* (1982), 1982 CanLII 1751 (ON CA), 66 C.C.C. (2d) 219 (Ont. C.A.); J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 1055.

[140] Even if the survey evidence which has been excluded were to be admitted, and if it were determined that the plaintiff was entitled to a challenge for cause by statute or otherwise, as noted, there is no clear and cogent evidence whatsoever that demonstrates a widespread bias among Brampton residents nor is there any evidence upon which judicial notice can be taken of such wide spread bias. The survey evidence of 300 Brampton residents could not reasonably form the basis for the court to take judicial notice of the presence of a wide spread bias among the residents of Brampton.

Conclusion and Costs

[141] For these reasons the Plaintiff's motion is dismissed in its entirety.

[142] As to the matter of costs, counsel for the defendants shall file submissions on costs of no longer than three pages, plus a Costs Outline, within 20 days, followed by submissions of a similar length on behalf of the Plaintiff within 20 days thereafter. No reply submissions shall be filed.

[143] I wish to thank all counsel for their very helpful submissions. I especially wish to thank counsel for the intervenors for their most valuable assistance.

Daley, RSJ.

Released: August 8, 2018

CITATION: Kapoor v. Kuzmanovski, 2018 ONSC 4770
COURT FILE NO.: CV-09-4318-00
DATE: 20180808

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

PREETI KAPOOR

Plaintiff

- and –

RADOJE KUZ MANOVSKI also known as RADOJA KUZ MANOVSKI, KRASIMIR PETROV, JAYSON AGUILAR, and UNIFUND ASSURANCE COMPANY

Defendants

REASONS FOR DECISION

Daley, RSJ.

Released: August 8, 2018