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Date: June 27, 2008

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PLEASE DELIVER THIS FAX TO:

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FROM: Kim Taylor
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NUMBER OF PAGES (including cover sheet): 19

MESSAGE: *Hamilton Divisional Court File DC-07-421*
Kayhan et al v Greve – Heard February 19, 2008

Please find attached decision of the Divisional Court Panel in the above-noted matter.

DIVISIONAL COURT FILE NO.: DC-07-421

DATE: 200806~~27~~

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

CUNNINGHAM A.C.J., STAYSHYN and KITELEY JJ.

B E T W E E N:

**HASINA KAYHAN, SAMIA KAYHAN,
HASHIM KAYHAN and ANSLA
KAYHAN Personally, SATA KAYHAN,
MOJTABA KAYHAN and SONITA
KAYHAN by their Litigation Guardian,
Hasina Kayhan**

Plaintiffs (Respondents)

- and -

HILDEGARD GREVE

Defendant (Appellant)

)
)
) *David J. Levy,*
) for the Plaintiffs (Respondents)

)
)
) *Robert H. Rogers,*
) for the Defendant (Appellant)

)
)
)
)
) **HEARD: Tuesday, February 19, 2008**

Background

[1] This is an appeal from the order of Borkovich J. dated January 8, 2007 wherein he granted the plaintiffs' motion to strike the defendant's jury notice at the commencement of trial.

The action arose out of a motor vehicle accident involving the plaintiff, Hasina Kayhan, and the defendant, Hildegard Greve, which occurred November 16, 1999. In her statement of claim,

- 2 -

amongst other things, the plaintiff alleges she sustained serious and permanent personal injuries. The defendant served a jury notice along with her statement of defence in February 2001.

[2] This trial was to commence January 8, 2007 before Borkovich J. and a jury at Hamilton. At the opening of trial, the plaintiff moved to strike the defendant's jury notice in order to have the matter tried by a judge alone. This motion was brought on the grounds that the plaintiff, a Muslim-Canadian woman of Afghani descent, would not receive a fair trial because of "...the current political climate, which stems not only from the 9/11 attacks, but subsequent terror (and attempted terror) attacks around the world, a politically controversial war in Afghanistan, and the unfortunate, but very real, existence of racism in Canada."

[3] In support of the motion, counsel for the plaintiff relied on the affidavit of Renee Vinett dated January 2, 2007. Ms. Vinett is an associate at the law firm representing the plaintiff. A copy of the affidavit was not provided in the material on this appeal. However, the transcript of the proceedings provides considerable detail as to the contents. As described by Mr. Rogers in his submissions that the affidavit ought to be struck, the affidavit contained legal argument, conclusions of law and opinion evidence including the following: the growing controversy over the presence of Canadian troops as peacekeepers in Afghanistan; the high level of animosity between Muslims and the Western world, including Canada; copies of articles purporting to express opinions of people being put forward as experts; conclusions about groups that are most likely to be targets of racism ostensibly drawn from a poll. Mr. Levy resisted the motion to strike the affidavit.

- 3 -

[4] At page 19 of the transcript, the trial judge made the following observation:

But the question is this, is it something that's so notorious in the public that the court could take judicial notice of it? I'd have to be a pretty dumb citizen to not think that there is a considerable amount of animosity against Muslims and Arabs that's alive because of the circumstances that are happening in the world. I mean, I hear it and I read it every day. I hear it on the media and I hear statements of our government, et cetera, et cetera. . . It seems to me the issue is how do I deal with it. . . not whether I strike the jury holus bolus. . . but whether or not in fairness it should be dealt with by doing a challenge for cause.

[5] At page 21 of the transcript, the trial judge ruled that the affidavit was not proper and that he would not rely on the material in the affidavit as it related to the issue of racism. There is no appeal from that decision. As a result of that ruling, there was no evidence to support the motion by the plaintiffs to strike the jury notice.

[6] After hearing the motion, the trial judge struck the jury notice stating:

...I am taking judicial notice that there is a strong risk, a reasonable apprehension that there could be bias on the part of the jury based on a system where there are no checks. Prescreening is not an adequate check and there is no - not like in a criminal case, there is no opportunity to challenge by way of cause in a civil case.

I am of the view that Justices Jennings and Festeryga correctly concluded that there was a strong possibility of bias, given the circumstances, and I am going to strike the jury on this case.

[7] Leave to appeal in the present case was granted by Harris J. on October 11, 2007. He concluded there was reason to doubt the correctness of the decision and further that the matter involved issues of general importance. Harris J. was of the view that the case had "manifold implications" and required "further conversation."

Standard of Review

[8] The key issue in this case is whether the trial judge erred in taking "judicial notice that there is a strong risk, a reasonable apprehension that there could be bias on the part of the jury based on a system where there are no checks."

[9] The Supreme Court of Canada in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, addressed the standard of review on an appeal from a judge's decision, stating:

On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness.

The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error" (see *Stein Estate v. The Kathy K*, [1976] 2 S.C.R. 802).

Where the trier of fact has considered all the evidence that the law requires him or her to consider and still comes to the wrong conclusion, then this amounts to an

- 5 -

error of mixed fact and law and is subject to a more stringent standard of review [than for findings of fact].

[10] The decision to strike the jury notice was a question of law. We approach this appeal on the basis that the standard of review is correctness.

Positions of the Parties

[11] While the issue of judicial notice is determinative of the appeal, that issue was considered in the context of the jurisdiction of a trial judge to strike a jury notice. On this latter point, the appellant began with the proposition that a party to civil proceedings is *prima facie* entitled to have issues of fact tried, or damages assessed by a jury relying upon s. 108(1) of the *Courts of Justice Act*, R.S.O. 1990, Chap. C.43. Trial by jury is a substantive right of considerable importance, the appellant argues, which ought not to be taken away except for cogent reasons (see *King v. Colonial Homes Ltd.*, [1956] S.C.R. 528 at 533).

[12] Counsel for the appellant noted that Jennings J. in *Abou-Marie et al. v. Baskey et al.* (2001), 56 O.R. (3d) 360 (S.C.J.), and Festeryga J. in *Amana Imports Canada Ltd. v. Guardian Insurance Co. of Canada* (2002), 57 O.R. (3d) 587 (S.C.J.), struck the civil juries in somewhat similar circumstances. In *Abou-Marie, supra*, the plaintiffs in a personal injury action were Arab Muslims. The trial began on October 1, 2001, mere weeks after the tragic events of September 11, 2001. Jennings J. struck the jury on the basis that s. 108(2)12 of the *Courts of Justice Act* prohibited a jury in a claim against the municipality. In dealing with the alternative argument that the jury should be struck on the basis of the "climate created by the tragic events" that had

- 6 -

occurred three weeks earlier, he observed that challenge for cause is not available for civil actions in Ontario, and he held as follows:

I am not confident that at the present time in the prevailing climate created by unprecedented coverage in the media of the events to which I referred a strong caution to the jury would be sufficient to ensure that all prejudices could be set aside. Although there appears to be no cases on the subject, if required to do so, I would have acceded to the plaintiff's request on the second ground.

[13] In *Amana Imports, supra*, the plaintiff was a limited company whose principals were Palestinians and devout Muslims. The trial started on January 14, 2002, approximately four months following September 11, 2001. The plaintiff sued on a policy of insurance seeking coverage for a theft. The defendant denied that there had been a theft and alleged fraud. Credibility was "the central issue." Festeryga J. was asked to strike the jury notice served by the defendant on three grounds. He declined to strike on the grounds of the relief sought and complexity. On the ground that there was a likelihood of prejudice against the plaintiff if the matter were tried by a jury, he held as follows:

I am satisfied that there has been much confusion by the people in this community as to the difference between Muslims and Hindus. I am taking judicial notice there is a perceived bias on non-Muslims towards Muslims. This probability existed before September 11, 2001, but since then the perception has, in my view, been aggravated and become worse.

- 7 -

[14] Festeryga J. also observed that there are no provisions in the rules or in the *Courts of Justice Act* in a civil matter for challenges for cause, and that the Rules Committee and the Legislature ought to address this issue "because of the changing times."

[15] Counsel for the appellant noted that neither of those two decisions had been appealed. He asserted that they had been wrongly decided and, in any event, were clearly distinguishable from the present case given the passage of time since the events of September 11, 2001.

[16] For completeness on the issue, the appellant also referred to (but did not rely on) a decision of Browne J. in *Al-Haddad v. London & Middlesex (County) Roman Catholic Separate School Board*, 1996 CarswellOnt 5047 (Ct. J. (Gen. Div.)), which involved a motion to strike a jury notice. In that case, the "evidence" consisted of correspondence between counsel in which it was alleged that the defendant had filed a jury notice for reasons related to the nationality of the plaintiff and that it might have been done for tactical purposes. Browne J. addressed the issue on the basis that racial prejudice had been acknowledged to be the true ground for the jury notice. In para. 12 of his reasons, he stated:

In general pre-screening comments to a jury panel, the presiding justice addresses issues of personal hardship, citizenship, understanding of language and ability to hear. In criminal trials there is a statutory right for challenge for cause with certain procedure being specified. That procedure takes the issue of determination of a juror's partiality out of the hands of the trial judge and places the issue of partiality in the hands of the jurors (triers). The trial judge in a criminal case cannot usurp this statutory function of the jurors. There is no such statutory right in civil cases. In my view the trial judge in a civil case may ask

- 8 -

prospective jurors pre-screening questions. Such pre-screening questions might well be with the consent of counsel and/or agreement as to the particulars of pre-screening questions. But absent such a consent, in my view the presiding justice at a civil trial can pre-screen upon racial bias and might well consider a question along the following lines:

Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the plaintiffs are of -----
-- descent. If so, please signify and your individual comments will be considered.

[17] The respondents, while agreeing that the right to have an action tried by a jury is a substantive right, say it is not absolute, pointing to s. 108(2) of the *Courts of Justice Act*, which outlines a number of situations where an action must be tried without a jury, irrespective of the wishes of the parties. It is a matter of judicial discretion, they say, when a trial judge is faced with a motion, pursuant to s. 108(3) of the *Courts of Justice Act*, to discharge a jury, arguing that the test for discharging a jury confers a broad discretion on the court recognizing that the paramount objective of our civil justice system is to provide the means by which a dispute between parties can be resolved in the most just manner possible.

[18] On the key issue in this appeal of judicial notice, counsel for the appellant argued that the present decision was reached in an evidentiary vacuum and was based on the race, country of origin and religion of the plaintiffs, not on any individual qualities of the plaintiffs themselves or any other specific factors. He asserted that the decision has significant ramifications which transcend the present dispute, arguing that it stands as a general basis for prohibiting civil trials involving persons of the Arab race, Afghani origin or Muslim faith. Counsel took the position

that this would lead to an impossible result, applying equally to situations involving any identifiable minority.

[19] The appellant further argued that the trial judge improperly relied upon judicial notice of unsubstantiated social "facts." In *R. v. Find*, [2001] 1 S.C.R. 863, the Supreme Court of Canada identified the parameters of judicial notice at para. 48, as follows:

...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), 66 C.C.C. (2d) 219 (Ont. C.A.); [page 887] J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 1055.

[20] The appellant argued that the trial judge implicitly concluded that Hamiltonians harbour negative, racist prejudices against Afghanis, Arabs and/or Muslims, and that a jury selected from the Hamilton community could not be trusted to abide by the oath of impartiality, even after receiving appropriate instructions. Counsel asserted that the trial judge had no evidence before him to support such a conclusion. Counsel also submitted that it is not possible to recognize such "facts" as being so notorious as to be beyond the scope of reasonable debate, and nor can recourse be had to any authoritative reference source. Canada, it was argued, is an inclusive and tolerant society in which there is a presumption a juror will be able to impartially discharge his or her responsibilities to the administration of justice.

- 10 -

[21] On the issue of judicial notice, the respondents in their factum referred to Canadian and Ontario courts that have taken judicial notice of the "widespread existence of racism in Canada" and that that is important, "given the near impossible task of "proving racism." At the time of the motion, counsel for the respondents noted that in *Abou-Marie, supra*, and in *Amana Imports, supra*, there had been no evidence such as what had been offered to (and rejected by) the trial judge, and yet both Jennings J. and Festeryga J. had arrived at the conclusions they did. As indicated at page 29 of the transcript, counsel had argued that "nothing has changed" since September 11, 2001. He insisted that the "debate ha[d] gotten more fierce" and had extended from New York City and Washington to around the globe. He referred to the "war on terror" as the fight in Afghanistan in which Canada has been involved. He suggested to the trial judge that the additional factor was that the plaintiff was from Afghanistan. He had encouraged the trial judge to take judicial notice of the "climate that exists." At page 30 of the transcript, he took the position that:

. . . the plaintiff's name, the names of her family members, her skin colour, her country of origin, the fact that people will look at her and see a Muslim and perhaps not understand the difference between Muslims, not distinguish between Muslims, Arabs and terrorists. There is a very real apprehension that this plaintiff will not be able to get a fair trial in front of what we expect will be an all white jury.

[22] In this appeal, counsel for the respondents argued that although there was no evidence before the trial judge, due to the fact that the trial judge had struck the affidavit, this did not mean that the exercise of his discretion was "arbitrary or capricious."

- 11 -

Analysis:

[23] There is consensus that the trial judge has a broad discretion in determining whether to strike a jury notice. We turn to the issue of judicial notice.

[24] The case before us involves events which occurred on November 16, 1999, and a trial scheduled to commence January 8, 2007, five years and four months following the events of September 11, 2001.

[25] Mr. Levy described the main plaintiff as "a dark skinned Muslim woman from Afghanistan." Before the trial judge, he argued that the question was whether she could receive a fair trial with a jury.

[26] As indicated, at page 19 of the transcript, the trial judge properly instructed himself (albeit in the context of whether the affidavit ought to be struck) on the first of the two criteria identified in *R. v Find, supra*. He queried whether there was something so notorious in the public that the court could take judicial notice of it.

[27] However, the trial judge failed to consider the second of the two criteria identified in *R. v Find, supra*: whether the facts that are "so notorious or generally accepted" were "capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy."

- 12 -

[28] During submissions as to whether the affidavit should be struck, the transcript notes the observation of the trial judge at page 25:

I believe, although the affidavit, I think, is incorrect, I think that given the circumstances, that I could take judicial notice of the situation, that there is some discrimination against Muslims and Arabs.

[29] During submissions on the motion to strike the jury notice, the trial judge referred to his reading of the political situation in the United States, that the election in 2004 had been "won largely because of the vote of people who couldn't distinguish between Muslims and terrorists" (page 32); that the situation (since the decisions of Festeryga J. and Jennings J.) had not gotten worse but had "been compounded" (page 33); that the issue was, as Mr. Levy had framed it, that the "general population has a great deal of difficulty distinguishing between a Muslim and a terrorist" (page 33); that the population (of Canada) had been misled about the Arar case (page 34).

[30] While he did not return to such observations in rendering the decision referred to in paragraph 6 above, we infer that such considerations informed his decision.

[31] We are of the view that the trial judge erred in his reliance on judicial notice to support his decision that "there is a strong risk, a reasonable apprehension that there could be bias on the part of the jury." Assuming for the moment that the first criterion has been met, there is no basis for concluding that the second criterion has been considered or met.

- 13 -

[32] In her reasons, McLachlin C.J.C., in *R. v. Find, supra*, identified a two-fold test when juror partiality is at issue. At para. 32, the Supreme Court held as follows:

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 [reference omitted].

[33] The Supreme Court also dealt with the concepts of "bias" and "wide-spread" when dealing with the test for partiality. At para. 40, the Chief Justice concluded, given that trial procedures have been in place over centuries to counter biases, the trial process is sufficient to "cleanse" jurors' views and biases.

[34] As the Chief Justice held, there are two components to bias: the attitudinal component (i.e. the existence of a lack of impartiality), and the behavioural link (i.e. that the juror is not capable of setting aside the bias).

[35] Even if the trial judge had a basis for doing so, it is not enough to simply take "judicial notice" of inherent prejudices on the part of potential jurors in a case involving certain minorities. Arguably, minorities in Canada have suffered from intolerance and prejudice. Nevertheless, the trial process has prevailed. Needless to say, given the tragic events of September 11, 2001, and the subsequent terrorist attacks linked to radical Muslims, there may be a level of caution in Canada which may in some people have expanded to outright bias and prejudice. To conclude, however, that potential civil jurors would be impossibly tainted, without

any supporting evidence, and that the lack of impartiality would cause them to be unable to set aside their bias, notwithstanding procedural safeguards, would be to improperly exercise judicial discretion.

[36] We conclude, as the appellant has argued, by taking "judicial notice" as he did, the trial judge made a palpable and overriding error. It is not possible to recognize the "facts" that he did, as being so notorious as to be beyond the scope of reasonable debate. Furthermore, the behavioural link between the existence of a lack of impartiality and the inability to set those biases aside was not established. Accordingly, the appeal must be allowed and the matter remitted to a different trial judge.

Challenges for Cause in Civil Jury Cases

[37] Having disposed of the appeal, we turn now to the issue of challenges for cause in civil jury cases. While it is not necessary to address this issue, in view of the submissions made on this point before the trial judge and before us, we make these observations.

[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.

[39] We recognize that in *Abou-Marie, supra*, and in *Amana Imports, supra*, the judges each observed that challenges for cause were not available in civil actions, and in *Al-Haddad, supra*, there was reference to the prescreening of jurors. In the case before us, the trial judge also held that challenges for cause were not available.

- 15 -

[40] We recognize as well, that Ontario courts have consistently applied the "reasonable possibility of partiality" test as the appropriate standard in criminal cases in a determination of whether there should be a challenge for cause. The issues as to whether a challenge for cause should be permitted as a result of the nationality of the accused, and or the complainant, or the nature of the offence are far different from whether there should be a jury at all.

[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 multi-cultural 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.

Conclusion

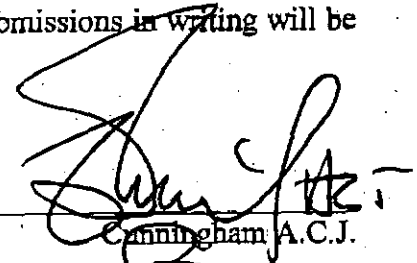
[43] As indicated above, the appeal is allowed, and the matter is remitted to a different trial judge.

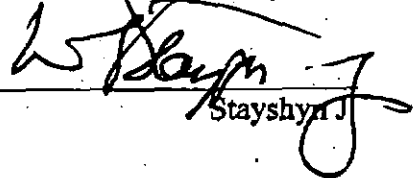
[44] In the factum of the respondents, counsel asked that the appeal be dismissed "on terms that will prevent the appellant from benefiting from the delay caused by this appeal." Having

- 16 -

allowed the appeal, we assume that the matter will proceed as expeditiously as possible and that any issues arising from delay will be addressed by the trial judge.

[45] Unless counsel are able to agree as to costs of this appeal, submissions in writing will be provided within 15 days of the release of these reasons.


Cunningham A.C.J.


Stayshyn J.

Addendum by Kiteley J.

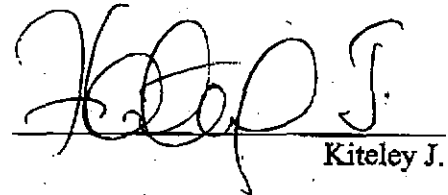
[46] I agree with the majority as to the disposition of the appeal for the reasons given. However, I depart from my colleagues only on their remarks in obiter on the subject of challenges for cause in civil actions.

[47] The Ontario *Juries Act*, R.S.O. 1990, c. J-3 enables peremptory challenges. It is silent on challenges for cause. Eight other provinces or territories permit challenges for cause by statute: in s. 12(2) of Alberta's *Jury Act*, R.S.A. 2000, c. J-3, s. 20 of Prince Edward Island's *Jury Act*, R.S.P.E.I. 1988, c. J-5.1, and s. 28 of Saskatchewan's *The Jury Act 1998*, S.S. 1998, c. J-4.2, challenges for cause are permitted for a number of specified grounds; in s. 20 of British Columbia's *Jury Act*, R.S.B.C. 1996, c. 242, and s. 33 of Manitoba's *The Jury Act*, R.S.M. 1987, c. J30, such challenges are authorized without identifying any limits on the challenge; s. 31 of Newfoundland and Labrador's *Jury Act*, SNL 1991 Chapter 16, provides that the presiding judge may try and determine the sufficiency of a challenge for cause; s. 20 of the Northwest

- 17 -

Territories' *Jury Act*, R.S.N.W.T. 1988, c. J-2, and s. 16(3) of Nova Scotia's *Juries Act*, S.N.S. 1998, c. 16, both provide that any party may challenge for cause.

[48] The criminal cases, on this topic, are in the context of whether there will be a challenge for cause, not whether there will be a jury. In civil cases in Ontario, it is an all or nothing proposition. If the Legislature saw fit to facilitate challenge for cause in civil matters in Ontario, the right to a trial by jury that now exists would not be undermined by the inability to challenge a potential juror on the grounds that the juror would be unable to set those biases aside and judge the matter fairly. As is evident from comments on pre-screening by Browne J. in *Al-Haddad*, *supra*, by Jennings J. in *Abou-Marie*, *supra*, by Festeryga J. in *Amana Imports*, *supra* and by Borkovich J. in the case before us, where the trial judge was struggling with this issue, it is clear that this is a matter which needs a legislative response.



Kiteley J.

Released: June 27 2008

DIVISIONAL COURT FILE NO.: DC-07-421

DATE: 200806²⁷

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

**CUNNINGHAM A.C.J. STAYSHYN and
KITELEY JJ.**

B E T W E E N:

HASINA KAYHAN et al.

Plaintiffs/Respondents

- and -

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Defendant/Appellant

REASONS FOR JUDGMENT

Released: June 27 2008