

Case Name:

**Jama (Litigation guardian of) v. McDonald's Restaurants
of Canada Ltd.**

Between

**Ayan Abdi Jama (by her Litigation Guardian Noora Mohamad),
Noora Mohamad, and Laila Abdi Jama (by her Litigation Guardian
Noora Mohamad), plaintiffs, and
McDonald's Restaurants of Canada Limited, McDonald's
Corporation, George A. Cohon, Ronald Cohen, Jack M. Greenberg,
James Cantalupo and Heath Miller, defendants**

[2003] O.J. No. 2247

[2003] O.T.C. 502

123 A.C.W.S. (3d) 604

Court File No. 00-CV-198953CM

Ontario Superior Court of Justice

Wilton-Siegel J.

Heard: January 8, 2003.

Judgment: June 5, 2003.

(46 paras.)

*Practice -- Pleadings -- Striking out pleadings -- With leave to amend -- Prolix pleading --
Grounds, failure to disclose a cause of action or defence -- False, frivolous, vexatious or
scandalous -- Pleading similar fact evidence -- Prejudice, embarrass or delay fair trial -- Abuse of
process or delay.*

Motion by the defendant, McDonald's Restaurants US, to dismiss the plaintiff Jama's claim against it on the ground that it disclosed no reasonable cause of action. McDonald's also moved to strike out a paragraph in the amended statement of claim on the grounds that it was prolix, would cause prejudice and delay, and was scandalous, frivolous or vexatious. The action was based on the claim

that the minor, Ayan Jama, ate a Big Mac at a McDonald's restaurant containing a severed rat's head. Jama claimed physical, psychological and punitive damages. Jama claimed against McDonald's US in negligence, claiming that its design of the food service system was negligent, and in negligence for failure to warn. The impugned portions of the amended statement of claim sought to be struck related to McDonald's duty of care relating to eight previous incidents of contaminated food in Canada and the US, dating back to 1989.

HELD: Motion allowed. The pleadings did not support a direct claim of negligence against McDonald's US. There were no material facts pleaded indicating the necessary degree of control on the part of McDonald's US on the Canadian restaurant's food delivery system. It was plain and obvious that the claim could not succeed and it was therefore dismissed. The claim relating to the previous incidents was not scandalous or vexatious. Similar facts could be pleaded, as long as their probative value outweighed the added complexity and delay. However, here the similar acts claimed were not restricted to deliberate tampering, which was the basis of Jama's claim. Further, the claims should be restricted to those involving McDonald's Canada in order to minimize the added complexity and delay. The paragraph was struck, with leave to Jama to amend accordingly.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rules 21.01(1)(b), 25.06, 25.11, 25.11(a), 25.11(b), 25.11(c).

Counsel:

Theodore Charney, for the plaintiffs.

Mark Veneziano, for the defendant, McDonald's Corporation.

Christopher Dunn, for the defendants, McDonald's Restaurants of Canada Limited and Heath Miller.

1 WILTON-SIEGEL J.:-- In this motion, the defendant McDonald's Corporation ("McDonald's U.S.") seeks an order under Rule 21.01(1)(b) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 dismissing the action against it on the basis that that the claim discloses no reasonable cause of action. In addition the defendants McDonald's U.S. and McDonald's Restaurants of Canada Limited ("McDonald's Canada") move under Rules 25.06 and 25.11 to limit the scope of production by striking paragraph 29 of the Amended Amended Statement of Claim on the grounds that the pleadings in that paragraph are prolix, will prejudice or delay the fair trial of the action and are scandalous, frivolous or vexatious.

2 The claim by the plaintiffs arises from the partial consumption by the minor plaintiff, Ayan, of a "Big Mac" on June 24, 1999 at a restaurant operated by McDonald's Canada in the City of

Toronto. It is alleged that the "Big Mac" contained the severed head of a rat, "complete with eyes, teeth, nose and whiskers". As a consequence of this event, Ayan alleges that she suffered physical injury and has suffered, and is continuing to suffer, extensive psychiatric damage. There are claims advanced by Ayan's mother and Ayan's sister of damages arising out of the effects suffered by Ayan. There is also a claim for punitive damages.

3 The claim is advanced against McDonald's Canada, as well as the individual who was the assistant manager of the particular restaurant on duty at the time of the incident, and against McDonald's U.S., the parent corporation of McDonald's Canada. The action was also commenced, but has now been discontinued against, the two most senior officers of each of McDonald's Canada and McDonald's U.S.

4 The plaintiffs allege that one or more unidentified employees of McDonald's Canada inserted the foreign object into the sandwich which was served to the plaintiff Ayan and that, in doing so, the employee or employees acted maliciously intending to cause injury. The plaintiffs allege this was made possible by the negligent design of the food system which was in place at the restaurant where this event occurred. They say that McDonald's Canada knew, or ought to have known, of the design defects but failed to take corrective steps. In these pleadings the plaintiffs assert a direct claim in negligence against McDonald's Canada.

5 On March 16, 2001, McDonald's U.S. and two individual defendants brought a motion before Nordheimer J. for an order dismissing the action on the basis that the claim disclosed no reasonable cause of action against them. All of the defendants also moved for an order striking out various paragraphs of the Amended Statement of Claim on the grounds that those portions of the pleading were prolix, pleaded evidence, would prejudice or delay the fair trial of the action, and were scandalous, frivolous or vexatious.

6 Nordheimer J. ordered that the Amended Statement of Claim be struck as against McDonald's U.S. In addition, Nordheimer J. struck certain paragraphs of the Amended Statement of Claim including paragraph 35, the predecessor of paragraph 29 before the Court in this action. Nordheimer J. stated that he had "grave doubts" about the ability to properly plead a claim against McDonald's U.S. in light of the factual circumstances. However, out of an "abundance of caution", Nordheimer J. granted the plaintiffs leave to amend the pleading in respect of the claim against McDonald's U.S. and to amend paragraph 35 of the Amended Statement of Claim. Subsequent to Nordheimer J.'s ruling on March 26, 2001, the plaintiffs have delivered the Amended Amended Statement of Claim which is the subject of this proceeding.

7 I will deal first with the relief sought under Rule 21.01(1)(b) and then with the relief sought under Rules 25.06 and 25.11.

Claim Against McDonald's U.S.

8 The plaintiffs seek damages against McDonald's U.S. on two separate grounds:

- (a) the food system utilized at the particular restaurant was negligently designed by McDonald's U.S.; and
- (b) McDonald's U.S. failed to warn customers of the possibility of food contamination as a result of design defects in the food system.

9 The particulars of the claim in negligence against McDonald's U.S. are set out in paragraphs 27(A)-27(E) of the Amended Amended Statement of Claim and the particulars of the claim based on the duty to warn are set out in paragraphs 27(F)-27(J).

10 In his reasons, Nordheimer J. concluded that the pleadings failed to plead an adequate factual foundation for the direct claims against McDonald's U.S. and struck out the claim against it. The plaintiffs submit that their revised claim cures the drafting deficiencies identified by Nordheimer J. by establishing the necessary nexus between the fundamental allegation of intentional food tampering underlying the proceeding and the specific actions and omissions of McDonald's U.S. They submit that the revised claim establishes the necessary elements of a duty of care on the part of McDonald's U.S., such that it is not "plain and obvious" that the claims as now pleaded against McDonald's U.S. could not succeed.

11 The essence of the plaintiffs' pleading against McDonald's U.S. is that McDonald's U.S. is the designer of a comprehensive food system for the manufacture and delivery of McDonald's Canada's food products to consumers. The system includes detailed specifications concerning store layout, hiring practices, food content and assembly, and security for all restaurants in Canada. The plaintiffs allege that McDonald's U.S. requires McDonald's Canada and all Canadian restaurants to adhere to the food system. The plaintiffs allege that McDonald's U.S. personnel monitor the Canadian stores to ensure adherence to their food system; that the specifications of the system are outlined in a manual which all stores in Canada are required to follow; and that the system is expounded at a central training facility in the United States where all managers (including Canadian managers) are trained.

12 The plaintiffs allege that this food system was in place at the particular restaurant on the date in question and that deficiencies in the design permitted undue opportunities for foreign objects to enter into food products served to consumers, by means which include (but are not limited to) employee tampering. On this basis they argue McDonald's U.S. is liable in negligence for the defects in the food system. The plaintiffs further allege that the deficiencies in the design of the McDonald's U.S. food system, particularly its vulnerability to employee food tampering, were known to, or ought to have been known to, McDonald's U.S. and therefore gave rise to a duty to warn the plaintiff of the risks inherent "in ingesting food products manufactured and distributed by McDonald's Canada employing the food system."

13 The defendant McDonald's U.S. argues that the plaintiffs' pleadings do not disclose a reasonable cause of action. In particular, they argue that the principles of manufacturers' liability, upon which the plaintiffs rely, do not extend to products manufactured by a different entity from the

designer and that, in any case, the product in this case was not a dangerous object of the kind contemplated by the cases on manufacturer's liability.

14 In a motion to strike out a claim under Rule 21.01(1)(b), the test is whether, assuming that the facts pleaded in the Amended Amended Statement of Claim can be proved, it is plain and obvious that the claim cannot succeed: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 (S.C.C.) at 980. The principles on a Rule 21 motion are also well established as set out in *Nash. v. The Queen in Right of Ontario* (1995), 27 O.R. (3d) 1 (C.A.):

1. the Court must accept the facts alleged in the Statement of Claim as proven unless they are patently ridiculous or incapable of proof;
2. the Court must read the statement of claim generously with allowance for inadequacies due to drafting deficiencies; and
3. the Court should not dispose of matters of law that are not fully settled in the jurisprudence.

15 I will discuss each alleged cause of action in turn.

16 First, I do not believe that these facts support a direct claim in negligence by the plaintiffs against McDonald's U.S. The pleading does not allege that McDonald's U.S. controlled McDonald's Canada in the sense that McDonald's Canada ceased to function as an independent corporate entity, with its own board of directors and management who were responsible for its activities, and became a mere agent of McDonald's U.S. It alleges that a relationship amounting to something less than control, in this case requiring that a food delivery system be used by McDonald's Canada in its operations, can nevertheless create a liability in negligence to third parties.

17 Recognizing this difficulty the plaintiffs rely on *Phillips v. Ford Motor Co. of Canada Ltd.*, [1970] 2 O.R. 714 (H.C.); rev'd on other grounds, [1971] 2 O.R. 637 (C.A.). The plaintiffs argue that McDonald's U.S. has an independent duty as a designer of a defective product that causes personal injury to consumers. The plaintiffs argue that this independent duty allows separate direct claims to be asserted against the designer of the food system as well as the manufacturer of the hamburger product.

18 Insofar as the plaintiffs rely on the principle in *Phillips*, I believe this action is clearly distinguishable on several grounds. First, the principle of designer and manufacturer liability articulated in that case related to a "dangerous or potentially dangerous thing". In addition, the duty imposed on the designer and supplier arose because the defects in question were not apparent on inspection by the purchaser. In the present matter, the product, a McDonald's hamburger, is not a dangerous object nor is the defect alleged one that cannot be inspected by the actual manufacturer, McDonald's Canada, or, prior to sale, by the purchaser.

19 Second, I am of the opinion that the principle in *Phillips* does not extend to impose liability on the designer of a "food system" as distinct from an actual product. In this case, the system referred

to by the plaintiff is in fact an extensive set of operating procedures to be employed by McDonald's Canada. I do not think that the principle of manufacturers' liability embraces operating procedures established for third parties. This is particularly the case where McDonald's Canada, in implementing the procedures, had both an independent opportunity as well as a legal obligation to ensure that the product was free from defects.

20 Lastly, in my opinion, the plaintiffs can only succeed if they can demonstrate that the product purchased at the restaurant was a product created by McDonald's U.S. The plaintiff recognized this in an alternative argument that the product delivered by McDonald's Canada was, in fact, a food system created by McDonald's U.S., that McDonald's U.S. essentially manufactured the hamburger, and that McDonald's Canada distributed the fast food product. I do not accept this characterization of the relationships involved in this matter. In this case, the hamburger was created or manufactured by McDonald's Canada at the particular restaurant. While it is true that McDonald's Canada utilized operating procedures established for McDonald's restaurants, at best the facts might give rise to a claim by McDonald's Canada in some circumstances. They do not, however, provide a basis for a direct claim by the plaintiffs because there was no purchase of a product created by McDonald's U.S.

21 For the foregoing reasons, while the standard is a high one, I am of the opinion that it is "plain and obvious" that the pleadings in paragraphs 27(A) to 27(E) of the Amended Amended Statement of Claim do not disclose a cause of action which has a reasonable chance of success.

22 I also do not believe that the facts support a direct claim against McDonald's U.S. for breach of a duty to warn consumers of an alleged defect in its food delivery system. This conclusion is based on the following two reasons. First, in my opinion, this claim can only succeed if the defendant owes a duty of care to the plaintiffs with respect to the food system. Given the conclusion above, it follows that the plaintiffs are also unable to assert a claim based on a duty to warn.

23 In addition, I am of the opinion that the duty to warn does not extend to McDonald's U.S. in this situation for an additional reason based on *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634 (S.C.C.). In that case LaForest J. described the obligation of a manufacturer as a duty to "warn consumers of dangers inherent in the use of its product of which it has knowledge or ought to have knowledge" (*italics mine*). In this case, however, the plaintiffs did not purchase a product from McDonald's U.S. nor is it correct to say that the plaintiffs "used" the product of McDonald's U.S. It may be correct to say that McDonald's Canada used the system of McDonald's U.S. That does not, however, give rise to an obligation of McDonald's U.S. to warn consumers of products of McDonald's Canada of any defects in the system. If there is a duty to warn in the present case, that duty is owed by McDonald's U.S. to McDonald's Canada which is the party using the system but not to the plaintiffs.

24 For the foregoing reasons, I am of the opinion that paragraphs 29(F) to 29(J) inclusive of the Amended Amended Statement of Claim should also be struck.

25 I have considered whether the Plaintiff's should be granted further leave to amend the Statement of Claim in respect of the claim against McDonald's U.S. As this is the second attempt by the plaintiffs to frame a direct cause of action in negligence against McDonald's U.S., I am of the opinion that further leave should not be granted.

The Rule 25.06 and Rule 25.11 Motion

26 The defendants also move to strike paragraph 29 of the Amended Amended Statement of Claim. While various allegations are made, I understand the main arguments of the defendants to be that the pleadings should be struck under the provisions of Rule 25.11(a) on the grounds that it may prejudice or delay the fair trial of the action or, alternatively, under the provisions of Rule 25.11(b) as being scandalous, frivolous or vexatious.

27 In his reasons, Nordheimer J. struck out paragraph 35 of the Amended Statement of Claim which read as follows:

The plaintiffs allege that the defendants ought to have been on notice as the potential for intentional and negligent food contamination, and resultant injuries and damages to consumers as a result of:

- (a) a pattern of unfavorable reports from health inspections;
- (b) reports and evidence from expert witnesses at civil trials regarding problems with contamination of McDonald's food products; and
- (c) a pattern of food contamination cases in McDonald's restaurants throughout North America and Europe, including a previous incident in which a sandwich containing a rodent head was served to a McDonald's customer.

28 As the reasoning remains relevant for the current motion, the following are Nordheimer J.'s reasons for striking this paragraph:

Counsel for the plaintiffs, during the course of the hearing, advised me that with respect to this paragraph, as well as in respect of the amended statement of claim generally, the plaintiffs were only intending to assert an ongoing problem with respect to "dangerous objects" being present in McDonald's products. That, however, is not how the amended statement of claim is pleaded and counsel for the plaintiffs fairly conceded that fact. In my view, that acknowledgement alone is a sufficient ground to strike out this paragraph. While any further comment on it might best wait for any amended pleading, I will nonetheless observe that the scope of the paragraph is troubling insofar as it would potentially permit a search for, and canvassing of, similar events within the McDonald's organization worldwide. I noted earlier that McDonald's U.S. operates 27,000 restaurants in

119 countries. The magnitude of the investigation that might be required if this or a similar type of allegation were permitted to stand is of great concern. I offer this observation in the hope that it might encourage counsel for the plaintiffs to ensure that any amendment of this paragraph is narrowly drafted so as to deal directly, and solely, with the issues raised by this action. (*italics mine*)

29 The plaintiffs have revised the pleading to read as follows:

The plaintiffs allege that all of the defendants ought to have been on notice as to the potential for foreign objects being served in food products at McDonald's restaurants in North America and the consequent injuries and damages to consumers, because they were aware of legal claims by other customers in North America concerning foreign objects in McDonald's food products. The pattern of foreign objects being served in McDonald's food products supports an award of punitive damages.

The pleading continues by setting out particulars of eight incidents alleged to be similar ranging in time from 1989 to 2000 and involving restaurants in the states of New York, Alabama and Oklahoma, as well as in Ontario, which they plead put the defendants on notice of defects in the food system.

30 The defendants argue that the scope of the similar fact pleading in this paragraph remains too broad and will extensively and unfairly lengthen the discovery process. They argue that the complexity of the allegations far outweighs any probative value. In particular they argue that, while the successor paragraph limits its scope to North America, it remains unlimited as to time or the nature of any incident of contamination. They argue, relying on *Garwood Financial Ltd. v. Wallace* (1997), 35 O.R. (3d) 280 (Gen. Div.); *Union Gas Ltd. v. Steel Co. of Canada Ltd.* (1976), 1 C.P.C. 325 (Ont. H.C.); and *Wilson v. Lind* (1985), 3 C.P.C. (2d) 113 (Ont. H.C.), that allegations of similar fact evidence should not be permitted if the discovery process could be extensively prolonged and the trial would unduly involve issues of prior and subsequent negligence.

31 The plaintiffs argue that the probative value of the evidence of a defective design of the food system is essential to their case against McDonald's Canada and would also be relevant in any consideration of punitive damages. The plaintiffs argue that the evidence of a design defect in the food system is not correctly characterized as similar fact evidence but that, in any event, the added complexity of this evidence, and any associated expense, does not outweigh its probative value.

32 I am of the opinion that the pleadings do not come within the provisions of Rule 25.11(b) as being scandalous, frivolous or vexatious. In reaching this conclusion I have had regard to the standard in *Warnikowski v. Kirkland Murphy & Ain* (1999), 50 O.R. (3d) 124 (C.A.) which provided, in the case of alleged abuse of process, that motions under Rule 25.11(c) should only be granted in the "clearest of cases". In my opinion, the same high standard is applicable under Rule 25.11(b) which excludes pleadings if the facts alleged are wholly immaterial and can have no effect

on the result.

33 This leaves the issue of the application of Rule 25.11(a). In considering this matter I have had regard to the principle articulated in *Garwood Financial* that similar facts may be pleaded as long as the added complexity arising from their pleading does not outweigh their potential probative value.

34 The issue before the Court is set out clearly in *Union Gas* at page 329 as follows:

There can be no doubt, I think, that if a complaint is made as to the quality of some manufactured mixture, evidence that the same complaint had been made by other purchasers of the mixture, out of the same batch, would be admissible to show that the mixture had some defect of quality. So too, if a complaint is made as to the design of a machine, complaints that other machines of the same design had operated in a similar manner would be relevant to show that there was a defect in the design. The problem in every case is to prove a sufficient degree of similarity before the other instances have any probative value. Moreover, that similarity must be provable without a prolonged enquiry; otherwise, there would be no end to the trial.

As this case indicates, the trial judge must determine whether the incidents identified by the plaintiffs constitute a set of random events without a common cause or actually reveals the existence of a design defect. To succeed, the plaintiffs must demonstrate a sufficient similarity of the incidents, a common element to each incident. In this case, the common element is food tampering; incidents which do not exhibit this element would not have any probative value.

35 The principles articulated in *Garwood Financial* require a balancing of the added complexity arising from paragraph 29 of the Amended Amended Statement of Claim against the probative value of the evidence. I am of the opinion that, looking at paragraph 29 in its totality, the probative value of the similar facts pleaded in that paragraph is outweighed by the resultant complexity of the litigation in three respects.

36 First, by referring to "foreign objects" and failing to restrict the pleading to intentional acts, paragraph 29 asserts claims that extend well beyond the act of intentional tampering which is the essence of this claim. In particular, in spite of the plaintiffs' suggestions to the contrary, the pleadings do not exclude actions arising out of negligent actions of employees. I note that it was, in part, for this very reason that Nordheimer J. struck the predecessor paragraph. As the pleading continues to allege evidence which has no probative value, I believe it could be struck on this ground alone.

37 Second, in my opinion it is unreasonable to extend the scope of the similar fact evidence beyond the experience of *McDonald's Canada* for three reasons.

38 First, the magnitude of the search, to which Nordheimer J. also referred in his reasons,

remains significant and would entail considerable complexity and attendant cost in the discovery process. The plaintiffs filed affidavit evidence intended to demonstrate that discovery of the information relevant to the pleading should not be overly difficult or costly. However, the evidence did not go that far. The plaintiffs' materials did indicate that McDonald's Canada has a process for investigating insurance claims involving foreign objects in food served at its Canadian restaurants. The evidence also suggests that McDonald's Canada maintains a central laboratory at its corporate headquarters to receive and analyze food products of McDonald's Canada alleged to have been contaminated. This evidence was not contradicted by the defendants. However, the evidence of McDonald's U.S., in the form of an affidavit of James. M. Marshall, the insurance and safety director of McDonald's U.S., was that McDonald's U.S. does not maintain a central repository of claims for food and drink contamination, that compiling these documents would involve attending at each individual McDonald's restaurant or its insurer and that any such process would be complicated, burdensome and expensive. From the foregoing, I am of the opinion that, while it is probably true, as the plaintiff argues, that at least some of the relevant information involving restaurants in the United States and Canada could be accessed on a less burdensome basis, the task of providing all the information implied by the pleading in paragraph 29 would add considerable complexity to the discovery process.

39 Second, by requiring a search of all North American restaurants of McDonald's, the pleading seeks evidence which, in my opinion, extends well beyond what is required to prove a pattern of similar incidents which would justify a finding of a design defect. Because the plaintiffs' assert that the food system is similar, if not identical, across all of North America, it would be expected that the incidents of food tampering would be randomly distributed across the North American restaurants. In view of the large number of such restaurants, it should not be necessary to canvass the experience of all of these restaurants in order to demonstrate the existence of a design defect if one exists. A smaller sample of restaurants determined on an appropriate basis would be sufficient to reveal the necessary pattern. In my view, the probative value of evidence which is surplus to that required to establish the existence of the alleged design defect is outweighed by the resultant additional complexity of the litigation in obtaining and introducing such evidence. In addition, it is also an important consideration that McDonald's Canada has an independent obligation, as well as an opportunity, to institute a safe food delivery. These two factors lead me to conclude that, in defining the scope of the pleading, any probative value to evidence of incidents in the United States would be outweighed by the complexity introduced into the litigation.

40 Third, given the finding that the cause of action against McDonald's U.S. should be struck, there is no basis upon which McDonald's U.S. can be required to provide the evidence contemplated by the pleading. There is also no evidence before the Court which indicates that McDonald's Canada would be entitled to obtain such information from McDonald's U.S. under the arrangements between them.

41 Finally, I also believe it is unreasonable to allege similar facts without imposing a time frame for several reasons. First, on the same reasoning set out in paragraph [39] above, if the alleged

design defect exists, the evidence should reveal itself without a review of all incidents in McDonald's history. Second, there is no evidence that the food system has remained unchanged over time. For this reason, the farther back in time it is necessary to extend the list of incidents in order to establish a pattern revealing an alleged design defect, the less reliable is the conclusion that such a defect existed at the time of the incident involving the plaintiff Ayan. In other words, there is a point in time beyond which the probative value of the evidence does not meet the standard in *Garwood Financial*.

42 Applying these principles to paragraph 29 of the Amended Amended Statement of Claim, I am of the opinion that the paragraph should be struck. While the plaintiffs are correct in arguing that evidence of a systemic design defect in the food system is of probative value, the balance struck in this pleading will result in an extensive discovery process which will far outweigh the probative value of the evidence arising out of that process.

43 I wish to add two additional comments relating to this part of the decision. First, the reasons above with respect to the scope of the pleading apply irrespective of whether McDonald's U.S. remains a party to this litigation. In addition, as a related matter, while it is alleged that McDonald's U.S. supervised the operations of McDonald's Canada with respect to standards, the evidence did not suggest that, in the course of any such activities, McDonald's U.S. would acquire any knowledge of any food tampering incidents which would not also come to the attention of McDonald's Canada.

44 There remains the question of whether the plaintiffs should be given a further opportunity to amend paragraph 29 of the Amended Amended Statement of Claim. In view of the significance of this pleading to the plaintiffs' claim, and if proven, the significance of this action generally, I believe that out of an abundance of caution and in line with *Normart Management Limited v. West Hill Redevelopment Company Limited (1998), 37 O.R. (3d) 97 (C.A.)*, the plaintiffs should be given leave to amend this pleading one further time. Accordingly, the plaintiffs are granted leave to amend further the Amended Amended Statement of Claim in respect of the pleading in paragraph only. As a related matter, in the absence of further evidence before the Court, I expressly decline to address the defendants' position that the pleading should be restricted to incidents arising out of Ontario only.

45 The plaintiffs are to deliver any further amended statement of claim with 30 days of the date of these reasons.

46 The parties shall have 30 days from the date of these reasons to make written submissions with respect to the disposition of costs in this matter. Any such submissions shall identify all lawyers on the matter, their respective years of call and rates actually charged to the client and shall include supporting documentation as to both time and disbursements.

WILTON-SIEGEL J.

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