

Indexed as:

**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, Heath Miller, defendants**

[2001] O.J. No. 1068

[2001] O.T.C. 203

104 A.C.W.S. (3d) 66

Court File No. 00-CV-198953CM

Ontario Superior Court of Justice

Nordheimer J.

Heard: March 16, 2001.

Judgment: March 26, 2001.

(33 paras.)

*Practice -- Pleadings -- Striking out pleadings -- Grounds, failure to disclose a cause of action or
defence -- Grounds, evidence -- Grounds, unnecessary, irrelevant, immaterial or redundant.*

Application by the defendants to strike out the statement of claim as not disclosing a reasonable cause of action and to strike portions of the statement of claim. Jama ate a hamburger in a restaurant operated by the defendant McDonald's Canada. She claimed that the sandwich contained the severed head of a rat. Jama sued McDonald's Canada, McDonald's Corporation, the American parent corporation and the two most senior officers of each corporation. She claimed that the officers owed a duty to take reasonable care to establish procedures to prevent tainted food. These

defendants had actual knowledge of previous incidents of food contamination. Jama also claimed that the head was placed in the sandwich intentionally or negligently by an employee of McDonald's Canada. The defendants submitted that the statement of claim pleaded evidence, similar facts whose complexity outweighed their probative value or did not add anything to the basic allegations previously pleaded. Other facts were pleaded that added colour but not substance to the claim for punitive damages.

HELD: Application allowed. The statement of claim was struck out against the defendant officers and against McDonald's Corporation. Some of the paragraphs were struck out because they pleaded evidence, added nothing substantive to the allegations or to the claim for punitive damages. Jama failed to plead essential and material facts that would provide a fitting foundation for the claims against the officers and McDonald's Corporation. There was an insufficient connection between the fundamental allegation and the inactions of the officers and McDonald's Corporation. These defendants were too remote from this particular restaurant. Jama was given leave to amend the pleading that provided evidence and that introduced irrelevant similar facts. She could not amend the pleadings that pertained to the claim for punitive damages.

Statutes, Regulations and Rules Cited:

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

Counsel:

Ted Charney and Julian K. Roy, for the plaintiffs.

Brian Brock Q.C., for the defendants, McDonald's Restaurants of Canada Limited, George Cohon, Ronald Cohen and Heath Miller.

Mark Veneziano, for the defendants, McDonald's Corporation, Jack M. Greenberg and James Cantalupo.

1 NORDHEIMER J.:-- The defendants move to strike out the amended statement of claim on the ground that it discloses no reasonable cause of action against them pursuant to rule 21.01(1)(b) of the Rules of Civil Procedure. They also move to strike out various paragraphs of the amended statement of claim on the ground that those portions of the pleading are prolix, plead evidence, will prejudice or delay the fair trial of the action and are scandalous, frivolous or vexatious pursuant to rules 25.06 and 25.11.

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 damages. There are claims advanced by Ayan's mother and Ayan's sister for damages arising out of the effects suffered by Ayan. There is also a claim for punitive damages.

3 In addition to advancing a claim against McDonald's Canada and against the individual who was the assistant manager of the particular restaurant and who was on duty at the time of the incident, the plaintiffs also claim against the two most senior officers of McDonald's Canada, and against McDonald's Corporation, the U.S. parent corporation of McDonald's Canada, and also against its two most senior officers.

4 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.

The rule 21.01(1)(b) motion

5 This aspect of the motion deals primarily with the repeatedly litigated issue as to when it is appropriate to assert a claim against officers and directors of corporations in their personal capacities. The issue has been extensively canvassed by the Court of Appeal in cases such as *Meditrust Healthcare Inc. v. Shoppers Drug Mart*, [1999] O.J. No. 3243 (C.A.); leave to appeal dismissed [1999] S.C.C.A. No. 530 (S.C.C.), *AGDA Systems International Ltd. v. Valcom Ltd.* (1999), 43 O.R. (3d) 101 (C.A.), *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (C.A.) and *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.* (1995), 26 O.R. (3d) 481 (C.A.).

6 I do not believe that it is necessary to review in detail the various statements made in these cases regarding the factual situations in which it is, and in which it is not, proper to advance a claim against an officer or director personally. In my view, it is sufficient to say that those cases establish that there are essentially two categories or situations where officers or directors can be the subject of direct claims. They are (i) where the officer or director acts outside of the scope of his duties and responsibilities or not in the best interests of the corporation in a manner that causes damage to another or (ii) where the officer or director is acting in furtherance of his duties and responsibilities and in the best interests of the corporation but the acts of the officer or director are themselves tortious, always subject to the *Said v. Butt*¹.] exception which precludes a claim against an officer or director based in tort for inducing a breach of contract where there is a concomitant claim against the corporation for breach of the contract. It is the latter category of claims that is in issue here although it is clear that the *Said v. Butt* exception has no application.

7 The allegations made against the four officers in the amended statement of claim are virtually identical and they can be dealt with together. By way of illustration, it is alleged that the defendant Cohon, the Senior Chairman of McDonald's Canada, owed a duty to the plaintiffs to take reasonable care to establish corporate policies, procedures, and practices to prevent tainting, tampering with and contamination of food served at McDonald's restaurants. It is also alleged that this defendant

had actual knowledge of previous incidents of food contamination at McDonald's restaurants but failed over a long period of time to initiate a safety program including corrective measures to prevent and reduce the risk of further incidents of contamination. It is further alleged that this defendant was aware that a "very dangerous situation" existed regarding McDonald's products and that he breached his duty to the plaintiffs. The particulars of the negligence are pleaded as follows:

- (a) the failure to implement adequate policies and procedures concerning the production process to safeguard against food contamination;
- (b) the failure to implement adequate policies and procedures to ensure that ingredients for McDonald's restaurants were procured from safe and sanitary sources;
- (c) the failure to implement adequate policies and procedures concerning the safe and sanitary storage of ingredients;
- (d) the failure to implement adequate policies concerning the design and construction of kitchen facilities to safeguard against food contamination;
- (e) the failure to implement adequate policies and procedures concerning the screening and selection of managers and employees, and their supervision at the work site;
- (f) the failure to implement adequate policies and procedures concerning the training of managers and employees;
- (g) The failure to implement adequate quality control mechanisms and security measures at McDonald's restaurants, including video surveillance of kitchen, counter and storage areas; and,
- (h) The failure to implement a system of adequate warning, so consumers, in particular children, and their parents would be aware of the potential for contamination of McDonald's products due to intentional tampering with such products by employees and that the products for vulnerable to contamination. Specifically, customers should be warned to inspect sandwiches prior to consumption;
- (i) and the failure to take adequate corrective measures to prevent food contaminated products from being served to the public when he knew or ought to have known that the products were vulnerable to contamination and that McDonald's existing practices and procedures were inadequate in reducing the risk of contamination and preventing employees from intentionally contaminating food products.

8 It is of importance in considering this issue to also recite paragraph 27(a) of the amended statement of claim which introduces the paragraphs dealing with the alleged liability of the defendants. It asserts the following fundamental allegation:

"The plaintiffs state that one or more employees of McDonald's Canada intentionally or negligently placed the severed head of a rat in the sandwich."

9 I am mindful of the fact that in approaching this issue the hurdle that the defendants must cross to have the claims struck out is a high one in that it must be "plain and obvious" that the claims cannot succeed - *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959. However, I am also mindful of the frequently expressed concern of judges in this court of the tendency for plaintiffs to advance claims against officers and directors for tactical or leverage purposes. The legitimacy of this concern was recognized by Carthy J.A. in *AGDA Systems International Ltd. v. Valcom Ltd*, supra where he said, at pp. 104-105:

"My first observation is that I recognize the policy concern expressed by the Divisional Court, and other General Division judges, over the proliferation of claims against officers and directors of corporations in circumstances which give the appearance of the desire for discovery or leverage in the litigation process. This is a proper concern because business cannot function efficiently if corporate officers and directors are inhibited in carrying on a corporate business because of a fear of being inappropriately swept into lawsuits, or, worse, are driven away from involvement in any respect in corporate business by the potential exposure to ill-founded litigation"

10 There is some tension between these two principles which was evident in the submissions of the parties on this motion. While the presence of that tension is inevitable, one way of easing the tension is for the court to take a "hard look" at the pleading as it stands and determine whether it contains the necessary elements to properly found a claim against the officer or director. In that regard, it seems to me, as a general proposition, that if plaintiffs wish to advance claims against officers or directors of corporations, particularly where such allegations arise out of the second category of claims I set out above, it is not unreasonable to hold plaintiffs to a fairly high standard regarding the content of their pleading. Having made that point, I should say that I do not believe that this view conflicts with the principle that the pleading is to be read with "due allowance for drafting deficiencies" - see *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441. It simply means that the "due allowance" may be a less liberal allowance in the case of such claims than it might reasonably be in the case of other claims.

11 I find support for adopting this approach in the decisions in *Meditrust Healthcare Inc. v. Shoppers Drug Mart*, supra, and *AGDA Systems International Ltd. v. Valcom Ltd*, supra, since in both of those decisions the Court of Appeal specifically refers to the requirement that the claims against officers and directors be "properly pleaded". Indeed, in *AGDA*, Mr. Justice Carthy made the point explicitly when he said, at pp. 113-114:

"In the meantime the courts can only be scrupulous in weeding out claims that are improperly pleaded or where the evidence does not justify an allegation of a personal tort."

12 In my view, the claims against the officers here, as they are currently pleaded, fail to meet that

necessary standard. As I noted earlier, the plaintiffs specifically plead that the rat head was intentionally or negligently "placed" in the sandwich by an employee or employees of McDonald's Canada. The plaintiffs have, in their amended statement of claim in general, and in the particular allegations against the officers, failed to establish a nexus between that fundamental allegation and the alleged actions or inactions of the named officers. I contrast, for example, the allegation made against the restaurant manager that he failed to adequately supervise and discipline employees with the generalized allegations made against the officers regarding their failure to implement adequate policies and procedures concerning kitchen design, the safe and sanitary storage of ingredients, etc. While the former allegation might reasonably be seen to have some connection or relationship to the central event complained of, the latter allegations would appear to have little, if anything, to do with the prevention of indiscriminate actions of rogue employees intent on contaminating a particular sandwich. I believe it is fair to observe in this regard the allegation made by the plaintiffs in the amended statement of claim that McDonald's Canada employs 70,000 people and that McDonald's U.S. operates 27,000 restaurants in 119 countries to demonstrate the apparent remoteness of these officers from the central event that is in issue in this action.

13 I also have difficulty with the nature of the allegations made here being characterized as personal torts of the officers. It is hard to see how the failure to implement policies and procedures could be otherwise than a failing of the corporations, albeit a failing caused by the corporations' human agencies. I note that Mr. Justice Finlayson in *Normart Management Limited v. West Hill Redevelopment Company Limited et al.*, supra, expressed the same concern regarding the allegations made in that case when he said, at p. 105:

"Assuming cold calculation, can the decision of the directing minds of the two corporate entities to cause their corporations to ignore their corporate obligations under the joint venture agreement and pursue an independent course amount to a conspiracy by the directing minds to injure the third contracting party or its directing mind? I think not. To give effect to this argument simpliciter would eliminate any semblance of the corporate veil. This fact situation on its face is a straight action for breach of contract. It cannot proceed as an action in tort unless something radical is added to the present fact situation."

14 It could similarly be said, regarding this case, that the facts give rise to a straight claim for negligence against McDonald's Canada regarding the operation of one of its restaurants. If the claim is to be expanded into a general attack on the manner in which the operations of McDonald's are undertaken worldwide, and the manner in which the senior officers of the two corporations perform, or fail to perform, their duties, then it seems to me to be incumbent on the plaintiffs to thoroughly and precisely plead an adequate factual foundation for that expanded claim.

15 As the amended statement of claim currently stands, the plaintiffs have failed to properly plead the essential and material facts that would provide a fitting foundation for the claims advanced against the four officers. Consequently, I have concluded that the claims against those

officers must be struck out.

16 I now turn to the claim against McDonald's U.S. The same allegations are made, almost word for word, against McDonald's U.S. as are made against the officers. Those allegations reveal the same inadequacies that I found regarding the claim against the officers. In addition, it is not clear to me from reading the amended statement of claim how McDonald's U.S. can be seen to have owed any duty of care to the plaintiffs in light of the pleaded facts that the operations of McDonald's in Canada in general, and of the specific restaurant involved here, are those of McDonald's Canada. It is important in this regard to be aware of the fact that counsel for the plaintiffs maintained during the argument of the motion that the claim being advanced against McDonald's U.S. was a direct claim and not one of a parent corporation being responsible for the actions of its subsidiary.

17 The plaintiffs' position in this regard, however, gives rise to another concern regarding the contents of the amended statement of claim. The amended statement of claim pleads that McDonald's U.S. was "at all material times in complete control" of McDonald's Canada. One might understand why I initially assumed from that pleading that the plaintiffs intended to attempt to "pierce the corporate veil" and hold the American parent liable for the actions of its Canadian subsidiary and why I was then somewhat surprised when counsel for the plaintiffs advised me in the argument that no such attempt was being made. Rather, as I have said, the plaintiffs purport to advance a direct claim against McDonald's U.S. If there is a direct claim being advanced by the plaintiffs against McDonald's U.S., then I am at a loss to understand the need for, or the relevance of, the pleading that McDonald's U.S. was in "complete" control of McDonald's Canada. Indeed, as I mentioned to counsel during the hearing, it is difficult in one sense to see how there could be a claim against McDonald's Canada if it was being completely controlled by McDonald's U.S.

18 For all of these reasons, I have concluded that the amended statement of claim fails to plead an adequate factual foundation for the claims against McDonald's U.S. and the claim against it must therefore be struck out.

19 Before leaving this aspect of the motion, I should mention that the defendants also submitted that the claims against the officers and McDonald's U.S. should be struck out on policy grounds. They assert that to allow such claims in such circumstances would open the "floodgates" and would offend the so-called Anns/Kamloops²] test, which was recently reaffirmed by the Supreme Court of Canada in *Hercules Managements Ltd v. Ernst & Young* (1997), 146 D.L.R. (4th) 577 (S.C.C.) at p. 587, regarding the policy considerations that should be measured before extending liability for negligence.

20 Given my conclusion regarding the inadequacies of the pleading, I do not consider it necessary to deal with this issue. I am also cognizant of the view recently expressed by Madam Justice Feldman in *Anger v. Berkshire Investment Group Inc.*, [2001] O.J. No. 379 (C.A.) that such policy concerns ought not to be considered in a vacuum without the benefit of a record such as would be available to a trial judge. The defendants' submissions in this regard are, therefore, best

dealt with at another time.

The rule 25.06 and 25.11 motion

21 The defendants claim that the amended statement of claim is prolix, pleads evidence, will prejudice or delay the fair trial of the action and is scandalous, frivolous or vexatious. Various paragraphs of the amended statement of claim are challenged on this basis and I will deal with each of them in turn. However, before doing so, it is worthwhile to set out the principles that should be applied to this aspect of the motion. Those principles include:

- (a) motions under rule 25.11 should only be granted in the "clearest of cases" - see *Wernikowski v. Kirkland Murphy & Ain* (2000), 181 D.L.R. (4th) 625 (Ont. C.A.);
- (b) any fact which can effect the determination of the rights of the parties can be pleaded but the court will not allow facts to be alleged that are immaterial or irrelevant to the issues in the action - see *Duryea v. Kaufman* (1910), 21 O.L.R. 161;
- (c) portions of a pleading that are irrelevant, argumentative or inserted for colour, or that constitute bare allegations should be struck out as scandalous - see *George v. Harris*, [2000] O.J. No. 1762 (S.C.J.);
- (d) facts may be pleaded but not the evidence by which those facts are to be proved - rule 25.06(1) of the Rules of Civil Procedure;
- (e) similar facts may be pleaded as long as the added complexity arising from their pleading does not outweigh their potential probative value - see *Garwood Financial Ltd. v. Wallace* (1997), 35 O.R. (3d) 280 (Gen. Div.).

22 The defendants attack paragraph 18 on the basis that it is a pleading of evidence. I do not agree. Paragraph 18 pleads two very important facts. One is that Ayan's mother showed the manager on duty, the defendant Miller, the contaminated sandwich. The other is that Ayan left the restaurant and sought medical attention. Paragraph 18 should remain.

23 The defendants complain about paragraph 20 on the basis that it is prolix in that it recites in great detail the various problems from which Ayan has suffered since the occurrence of the alleged event. While the paragraph may be a great deal more detailed than one would commonly find in such a pleading, that fact, in and of itself, does not support a finding that it is prolix. Each of the effects represent separate allegations of problems suffered by Ayan which she alleges are connected to the event of the sandwich. Those effects are fairly pleaded and I do not therefore see any basis to strike out that paragraph.

24 Paragraph 21 is challenged on this same basis as well as on the ground that it pleads evidence. There is merit to both of these points with respect to this paragraph. While there are elements of paragraph 21 which would be unobjectionable by themselves, such as the allegation that the injuries were accompanied by great pain and suffering or that Ayan's ability to pursue gainful employment

has been reduced or restricted, there is a large portion of paragraph 21 which clearly pleads evidence that will be proffered in support of the damages suffered as opposed to the fact that damages have been suffered. Consequently, I consider that paragraph 21 offends rule 25.06(1) and must be struck out.

25 Paragraph 35 is challenged on the basis that it pleads similar facts whose complexity outweigh their probative value. That paragraph states:

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 unfavourable 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.

26 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.

27 Paragraphs 40, 41, and 42 can be dealt with collectively. These paragraphs principally involve an allegation by the plaintiffs that the defendants engaged in a comprehensive marketing campaign directed at children with the purpose of instilling feelings of trust and confidence in those children of the safety of the defendants' products. They are all advanced in support of a claim for punitive damages. In my view, these paragraphs have been inserted for the purpose of colour and do not add anything to the basic allegations that are made in paragraphs 39 and 43 that the defendants have engaged in conduct that is reprehensible and that consequently an award of Punitive damages "is

appropriate in order to deter the defendants from weighing the costs of preventative measures against the safety of children and other consumers". The allegations might also be said to be irrelevant in the context of a claim for punitive damages. These three paragraphs are therefore struck out.

28 Lastly, paragraph 44 is also attacked. It is also included in the amended statement of claim in Support of the claim for punitive damages. It pleads that the defendants "attempted to confiscate the contaminated" sandwich, have conducted covert surveillance, have refused to explain how the sandwich became contaminated and have continued to deny liability for the incident. None of these facts can bear on the issue of punitive damages. By way of example, I am not aware of any case, and counsel for the plaintiffs could not refer me to any, where the denial of liability by a defendant provided a basis for an award of punitive damages. Similarly, I am not aware of any case where the act of surveillance has provided a basis for an award of punitive damages. In my view, these allegations are irrelevant to any proper issue in the action and the paragraph must therefore be struck out.

Summary

29 The amended statement of claim is struck out against the defendants, Cohon, Cohen, Greenberg, Cantalupo and McDonald's Corporation. In addition, paragraphs 21, 35, 40, 41, 42 and 44 of the amended statement of claim are also struck out.

30 While I have grave doubts that the claim against the defendants, Cohon, Cohen, Greenberg, Cantalupo and McDonald's Corporation can be properly pleaded given the factual circumstances of this case, I note that Mr. Justice Finlayson in *Normart Management Limited v. West Hill Redevelopment Company Limited et al.*, supra, concluded that even though the court there was not provided with any basis upon which the conspiracy claim could be reframed he nevertheless considered that, out of an abundance of caution, leave should be granted to amend the pleading. It seems to me that I should exercise the same degree of caution and permit the plaintiffs to further amend the amended statement of claim in respect to the claims against these defendants if they are so advised.

31 In addition, I grant to the plaintiffs leave to amend paragraphs 21 and 35 of the amended statement of claim. However, I do not grant leave to the plaintiffs to amend paragraphs 40, 41, 42 and 44 of the amended statement of claim. As I have already said, I cannot see how these allegations have anything to do with the fundamental nature of any of the claims being advanced.

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

33 Finally, the parties may make written submissions to me on the appropriate disposition of the costs of the motion. I am also prepared to fix the costs of the motion upon receipt of proper submissions in that regard. The defendants shall file their submissions within 10 days of the release

of these reasons and the plaintiffs shall file their response within 10 days thereafter. No reply submissions are to be filed without leave. As always, I would appreciate it if counsel would keep their submissions brief.

NORDHEIMER J.

cp/s/qlrme

1 [1920] 3 K.B. 497

2 *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.); *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2