

Court file number:

CV-10-409585


**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

ELIZABETH GWENDOLYN JOY WAWRZYNIAK

Plaintiff

and



**DONALD J. LIVINGSTONE
MARTIN G. CHAPMAN
SUNNYBROOK HEALTH SCIENCES CENTRE**

Defendants

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: August 30, 2010

Issued by:



Registrar

Address of court office:

393 University Avenue, 10th Floor
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TO: Donald J. Livingstone
c/o Sunnybrook Health Sciences Centre
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Toronto, Ontario
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AND TO: Martin G. Chapman
c/o Sunnybrook Health Sciences Centre
2075 Bayview Avenue
Toronto, Ontario
M4N 3M5

AND TO: Sunnybrook Health Sciences Centre
2075 Bayview Avenue
Toronto, Ontario
M4N 3M5

CLAIM

1. The plaintiff claims:
 - (a) general damages in the amount of \$1,000,000.00;
 - (b) special damages in the amount of \$200,000.00;
 - (c) a declaration that the plaintiff's father, Douglas MacKenzie DeGuerre and the plaintiff were discriminated against by the defendants on the prohibited grounds of age, disability and family status in breach of subsection 5(1) of the *Human Rights Code*, R.S.O. 1990, c. H. 19 (*Code*);
 - (d) damages in the amount of \$25,000.00 pursuant to s. 46.1 of the *Code*;
 - (e) an order that the defendants make restitution to the plaintiff in respect of their discrimination against Douglas MacKenzie DeGuerre and the plaintiff by apologizing to the plaintiff in writing, and undertaking to adhere to the provisions of the *Health Care Consent Act, 1996* and any successor legislation respecting patient consent;
 - (f) a declaration that the defendants breached the rights and freedoms of Douglas MacKenzie DeGuerre and the plaintiff protected by sections 7, 12 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (*Charter*);
 - (g) punitive damages in the amount of \$1,000,000.00;
 - (h) pre-judgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
 - (i) her costs of this action on a substantial indemnity basis; and
 - (j) such further and other relief as this Honourable Court deems just.

2. The plaintiff is a registered nurse who resides in the City of Oshawa. She is the daughter of the late Douglas MacKenzie DeGuerre (DeGuerre).

3. The defendant Donald J. Livingstone (Livingstone) is a licensed physician specializing in Internal Medicine who, at all material times, held privileges at Sunnybrook Health Sciences Centre.

4. The defendant Martin G. Chapman (Chapman) is a licensed physician specializing in Anesthesiology who, at all material times, held privileges at Sunnybrook Health Sciences Centre.

5. The defendant Sunnybrook Health Sciences Centre (Sunnybrook) is a public hospital pursuant to the *Public Hospitals Act*, R.S.O. 1990, c. P.40.

6. DeGuerre was a World War II veteran who died at the age of 88 on September 22, 2008 while a patient at Sunnybrook.

7. The plaintiff was DeGuerre's attorney for personal care and his substitute decision maker (SDM). DeGuerre appointed the plaintiff to be his attorney for personal care on November 9, 2007. In the document of appointment, he provided instructions to the effect that if his condition was terminal and death was imminent, life-prolonging procedures that would serve only to prolong the dying process were to be withheld or withdrawn. In subsequent discussions with the plaintiff and healthcare providers, however, DeGuerre countermanded those instructions.

8. DeGuerre lived independently in his home in Oshawa until the end of April 2008. He suffered from several medical conditions, one of which required hemodialysis three times a week at Lakeridge Health Oshawa (Lakeridge). He had dry gangrene on toes of his left foot and superficial diabetic ulcers on both feet. A homecare nurse would change his dressings and he was taking antibiotics orally.

9. On May 1, 2008, DeGuerre was admitted to Lakeridge as he was experiencing increased pain and difficulty ambulating. It was confirmed that his left lower extremity had limb-threatening ischemia and that his right foot had critical ischemia. In an attempt to save DeGuerre's left lower leg, the plaintiff contacted a vascular surgeon at St. Michael's Hospital in Toronto (St. Michael's).

10. On May 14, 2008, DeGuerre was transferred to St. Michael's for assessment. The vascular team there was successful in placing a stent in DeGuerre's left femoral artery, increasing the blood flow to his lower leg. On May 18, 2008, he was transferred back to Lakeridge. Because he had problems walking, however, it was decided that DeGuerre would not be able to return home.

11. On July 2, 2008, a lengthy family conference was held at Lakeridge. Present were Dr. Luigi T. Pedretti (Pedretti) who was DeGuerre's primary physician, a social worker, the dialysis leader, DeGuerre and the plaintiff. Pedretti reviewed DeGuerre's medical history and explained the severity of DeGuerre's vascular disease and all of his comorbidities. DeGuerre's code status was reviewed and both DeGuerre and the plaintiff stated that they wished to have the full

code continued. Pedretti asked DeGuerre if he wanted treatment and explained that without treatment he would certainly die from gangrene infection. DeGuerre replied: "I did not come this far to give up now."

12. On July 3, 2008, Pedretti's Progress Note contained the following item: "Code Status is Full Code and this again was discussed at the family meeting yesterday."

13. On July 29, 2008, DeGuerre was transferred from Lakeridge to live at Sunnybrook's "K Wing", a care facility for veterans.

14. At no time did the defendants or Sunnybrook's employees seek instructions from DeGuerre personally with respect to his code status when he was capable of providing them.

15. On or about September 9, 2008, DeGuerre's condition deteriorated and he was transferred to the Sunnybrook Emergency Department for acute treatment. He was admitted to C4 medical floor under the care of Livingstone. Treatment required that both of DeGuerre's legs be amputated above the knee, failing which he was likely to die. After consulting with DeGuerre, the plaintiff requested that DeGuerre receive the necessary surgery.

16. Prior to signing the surgical consent, the plaintiff had a discussion with Livingstone regarding DeGuerre's code status. Livingstone asked the plaintiff what should be done in the event that DeGuerre had a cardiac arrest during surgery. She advised Livingstone that if DeGuerre did have a cardiac arrest during surgery, all resuscitative measures were to be used. If

DeGuerre could not breathe on his own, however, after suffering a cardiac arrest, he was not to be placed on a ventilator.

17. On September 17, 2008, both DeGuerre's legs were amputated above the knee. DeGuerre survived the surgery without complication. He was sent to the Intensive Care Unit (ICU) for recovery.

18. On September 18, 2008, Dr. Antonio Bellini (Bellini), the attending physician in the ICU, asked the plaintiff to clarify the post-operative code status for DeGuerre. After a lengthy discussion with Bellini, which included a detailed explanation of possible consequences in using resuscitative measures, the plaintiff directed that DeGuerre was to be treated as full code. Bellini wrote an order in DeGuerre's hospital chart: "Pt is now FULL CODE." The same day, Bellini also wrote a Progress note confirming that he had discussed the code status with the plaintiff.

19. On September 19, 2008, Dr. Lawrence Aoun (Aoun), a junior resident, documented in DeGuerre's hospital chart his intention to discuss DeGuerre's plan of care with the plaintiff, "as now pt made full code."

20. As his condition improved, DeGuerre was transferred from the ICU to C4 medical floor on September 20, 2008. The transfer note in DeGuerre's hospital chart reads: "Patient is full code, daughter very involved with his care."

21. In the evening of September 21, 2008, the plaintiff had a discussion with Aoun regarding DeGuerre's plan of treatment and his code status. Aoun made an entry in the hospital chart chronicling that: "Daughter wants FULL CODE."

22. During the discussion referred to in the previous paragraph, the plaintiff requested that Aoun make a referral for the management of DeGuerre's pain. Aoun told the plaintiff that DeGuerre would receive a full assessment the next morning.

23. On September 22, 2008, the plaintiff received a voicemail message on her home telephone from Chapman. His message gave no indication of urgency. He asked that the plaintiff call Livingstone or the ward. He did not leave a telephone number or extension and he expressly stated that there was no change in DeGuerre's condition. The plaintiff contacted Sunnybrook, but did not learn the reason for Chapman's request.

24. Earlier that day (September 22, 2008), unbeknownst to DeGuerre or the plaintiff, and without lawful authority, Livingstone and Chapman changed DeGuerre status from full code to do not resuscitate (DNR).

25. The plaintiff arrived at Sunnybrook in the late afternoon of September 22, 2008, expecting to visit DeGuerre and speak with his physicians. Upon arrival, she immediately noticed that DeGuerre was congested and had trouble breathing. She quickly went to the nursing station and asked about the treatments that DeGuerre received that day, as Aoun had assured her that DeGuerre would receive a full assessment. The nurse, Florinda S. Gliddon

(Gliddon), did not answer the plaintiff. The plaintiff informed Gliddon that DeGuerre was having trouble breathing. Gliddon appeared unconcerned with DeGuerre's respiratory status.

26. The plaintiff took DeGuerre's vital signs and tried to help him, but DeGuerre was very agitated and fighting to breathe. The plaintiff rushed to the nursing station and asked that a respiratory therapist be called immediately.

27. Jennifer M. Ahmed (Ahmed), a medical resident on the floor entered DeGuerre's room. The plaintiff asked Ahmed about the treatments DeGuerre received during the day. Ahmed, appeared unable to answer, and went to the nursing station to check DeGuerre's hospital chart. After Ahmed flipped through the chart, the plaintiff believes that Ahmed placed a number of calls, one of which was to Livingstone.

28. Ryan Smith (Smith), a respiratory therapist, arrived on the scene and began providing breathing assistance to DeGuerre. Smith started to prepare DeGuerre for intubation and transfer to the ICU. While he was treating DeGuerre, nurse Jerina Patel (Patel) whispered to Smith: "He's DNR." Upon hearing the whispered words, the plaintiff shouted: "He's not DNR, he's a full code. I am his daughter and his power of attorney for care. Please help my father." Smith then interrupted his treatment and used the bedside telephone to make two calls. The plaintiff overheard Smith say: "I have a patient that may need intubation and transfer to ICU but I may not have time and may need to call a code." While Smith was on the telephone, Chapman arrived and spoke to Smith. Smith put down the telephone and withdrew from further treatment of DeGuerre.

29. Chapman, whom the plaintiff had never met, introduced himself to the plaintiff as the doctor who left the voicemail message earlier in the day. Chapman told her: "It's not good for your father. This is for his own good." Chapman did not inform the plaintiff that he had changed DeGuerre's status from full code to DNR.

30. The plaintiff pleaded with Chapman and everyone in the room to help DeGuerre. Again she stated that she was his daughter and substitute decision maker and that DeGuerre was a full code. DeGuerre's respiratory status was deteriorating while the healthcare team stood beside his bed refusing to provide breathing support.

31. The plaintiff then grabbed the respiratory bag from Smith in order to help her father breathe.

32. In a desperate attempt to obtain help, the plaintiff used the bedside phone and dialled 9-1-1 with her right hand while squeezing the respiratory bag to help her father breathe with her left hand. She then dialled "0" for the hospital operator and asked for a hospital administrator to come to the room immediately. Chapman said: "Nobody will come."

33. The respiratory distress of DeGuerre became respiratory arrest. He then lurched slightly forward, went into cardiac arrest and died.

34. Chapman and the others stood still. The plaintiff screamed at them to get out of the room. She was in complete shock and disbelief. She stayed at DeGuerre's bedside for about 30 to 40 minutes and, without speaking to anyone, left Sunnybrook. The plaintiff was alone and drove back to Oshawa.

35. On September 23, 2008, the plaintiff and her husband drove to Sunnybrook and went to C4 medical floor to sign a consent for a full autopsy. She asked to see DeGuerre's hospital chart. The plaintiff read in the chart that a DNR order was written on September 22, 2008 and signed by both Chapman and Livingstone. That order was given without the plaintiff's knowledge or consent.

36. The plaintiff states that the acts and omissions of the defendants described in paragraphs 24 to 35, both inclusive, constitute abuse of power, assault, battery, intentional infliction of mental anguish, negligent infliction of mental anguish, and wrongful death.

37. The plaintiff states that Livingstone and Chapman were negligent in their care and treatment of or failure to treat DeGuerre, particulars of which negligence include that they:

- (a) failed to seek instructions from DeGuerre personally with respect his code status when he was capable of providing them;
- (b) failed to read DeGuerre's hospital chart;
- (c) failed to note the entries in DeGuerre's hospital chart specifying his full code status;
- (d) chose to ignore the entries in DeGuerre's hospital chart specifying his full code status;

- (e) disregarded the directions of the plaintiff with respect to the code status of DeGuerre when they knew or ought to have known that she was DeGuerre's SDM;
- (f) preferred their own opinion over the directions of DeGuerre and the plaintiff with respect to the code status of DeGuerre;
- (g) failed to respect DeGuerre's code status as directed by the plaintiff;
- (h) failed to maintain the standard of care of a physician with regard to respecting the code status of DeGuerre;
- (i) failed to consult with DeGuerre or the plaintiff regarding DeGuerre's code status;
- (j) failed to notify the plaintiff of their intention to write the DNR order with respect to DeGuerre;
- (k) wrote the DNR order in respect of DeGuerre in the absence of consultation with the plaintiff;
- (l) determined DeGuerre's code status despite the plaintiff's directions to the contrary;
- (m) deprived the plaintiff of her rights as a SDM;
- (n) deprived DeGuerre of his right to have his prior capable wishes respected and of his choice of the plaintiff as his SDM;
- (o) knew or ought to have known that harm could come to the plaintiff from their DNR order with respect to DeGuerre;
- (p) failed to consider the harm that could come to the plaintiff from their DNR order with respect to DeGuerre;
- (q) knew or ought to have known that harm could come to DeGuerre from their DNR order with respect to DeGuerre;
- (r) failed to consider the harm that could come to DeGuerre from the DNR order with respect to DeGuerre;
- (s) deprived DeGuerre of his right to life and his right to self-determination;
- (t) failed to maintain the standard of care of a physician with regard to changing the code status of DeGuerre;

- (u) failed to follow the policies and protocols of Sunnybrook in respect of changing the code status of DeGuerre;
- (v) failed to follow the policies and protocols of the College of Physicians and Surgeons of Ontario in respect of changing the code status of DeGuerre; and
- (w) failed to follow the legal procedure available to challenge the code status of DeGuerre.

38. The plaintiff states that Chapman was further negligent in his care and treatment of or failure to treat DeGuerre, particulars of which negligence include that he:

- (a) wrote the DNR order in respect of DeGuerre despite never having met or consulted with the plaintiff;
- (b) failed to alert the plaintiff in his voicemail message to her that he had written or contemplated writing a DNR order in respect of DeGuerre;
- (c) failed to countermand the DNR order in respect of DeGuerre even though he was unable to communicate directly with the plaintiff;
- (d) ordered Smith to discontinue his resuscitative efforts with respect to DeGuerre;
- (e) failed to assist or arrange for the assistance of the plaintiff in her attempts to resuscitate DeGuerre;
- (f) intentionally ignored the pleas of the plaintiff when she sought help to resuscitate DeGuerre;
- (g) treated the plaintiff in a dismissive manner when she was crying out for help to resuscitate DeGuerre;
- (h) ensured that the improper DNR with respect to DeGuerre was carried out in the face of the plaintiff's protest;
- (i) missed the last clear chance to take steps to avoid an irreversible decision respecting DeGuerre's fate; and
- (j) failed to provide DeGuerre with the necessities of life.

39. The plaintiff states that Sunnybrook and its employees, including Gliddon, Smith and Patel, were negligent in the care and treatment of or failure to treat DeGuerre, particulars of which negligence include that they:

- (a) failed to have appropriate policies and protocols in place in respect of the code status of patients;
- (b) failed to train its employees about appropriate procedures to be followed in respect of the code status of patients;
- (c) failed to train physicians with hospital privileges at Sunnybrook about appropriate procedures to be followed in respect of the code status of patients;
- (d) failed to supervise its employees with a view to ensuring that appropriate procedures are followed in respect of the code status of patients;
- (e) failed to supervise physicians with hospital privileges at Sunnybrook with a view to ensuring that appropriate procedures are followed in respect of the code status of patients;
- (f) failed to seek instructions from DeGuerre personally with respect to his code status when he was capable of providing them;
- (g) failed to have an emergency mechanism available to resolve the dispute that arose in the case of the code status of DeGuerre;
- (h) failed to comply with the procedures required by law in respect of the code status of DeGuerre;
- (i) failed to follow the directions of the plaintiff;
- (j) failed to assist the plaintiff in her attempts to provide breathing support for DeGuerre;
- (k) permitted the DNR order with respect to DeGuerre to be fulfilled in the face of the plaintiff's protests;
- (l) had the last clear chance to save DeGuerre, but failed to act; and
- (m) failed to provide DeGuerre with the necessities of life.

40. The plaintiff states that the defendants stood in a fiduciary position to DeGuerre arising from his situational disability. The defendants breached their fiduciary duties by placing their own opinions with respect to the code status of DeGuerre above the directions of the plaintiff.

41. The plaintiff states that the acts and omissions of the defendants and Sunnybrook's employees as described in paragraphs 24 to 35, both inclusive, were motivated, in part, by DeGuerre's age, disability and family status and constitute breaches of section 5(1) of the *Code*.

42. The plaintiff states that the plaintiff and DeGuerre were entitled to rights guaranteed by the *Charter* and that the defendants breached those rights.

43. The regime of consent to treatment in Ontario requires that wishes with respect to treatment expressed by persons while capable and after attaining 16 years of age be adhered to. Such wishes bind substitute decision-makers and health practitioners.

44. Where a substitute decision-maker or a health practitioner wishes to depart from a prior capable wish respecting treatment, he or she may do so only in accordance with the provisions of section 36 of the *Health Care Consent Act, 1996*, which requires that application be made to the Consent and Capacity Board.

45. Where a health practitioner is of the opinion that a substitute decision-maker has not complied with the substitute decision-maker's statutory obligations in relation to the treatment of a patient, the health practitioner has resort to the provisions of section 37 of the *Health Care*

Consent Act, 1996, which again requires that application be made to the Consent and Capacity Board.

46. The regime described in paragraphs 43, 44 and 45 not only reflects the law in Ontario but the requirements of section 7 of the *Charter*, which guarantees life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

47. In implementing the regime for consent to treatment in Ontario and in determining whether to invoke the provisions of sections 36 or 37 of the *Health Care Consent Act, 1996*, hospitals and health practitioners, including the defendants, are state actors and are therefore government within the meaning of section 32(1) of the *Charter*.

48. In overriding DeGuerre's capable wishes and the directions of the plaintiff as DeGuerre's substitute decision-maker other than in accordance with the regime for consent to treatment in Ontario, the defendants and Sunnybrook's employees infringed the rights of DeGuerre and the plaintiff under section 7 of the *Charter*.

49. The unilateral change in DeGuerre's status from full code to DNR ordered by Chapman and Livingstone and the acts and omissions of the defendants and Sunnybrook's employees described in paragraphs 24 to 35, both inclusive, infringed the right of DeGuerre and the plaintiff under section 15(1) of the *Charter* to equal protection and equal benefit of the law without discrimination based on age or mental or physical disability.

50. In failing to act in accordance with the regime for consent to treatment in Ontario, the defendants and Sunnybrook's employees further subjected DeGuerre and the plaintiff to cruel and unreasonable treatment contrary to section 12 of the *Charter*.

51. To the extent that the defendants and Sunnybrook's employees infringed the rights of DeGuerre and the plaintiff under the *Charter*, none of the infringements constitute reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

52. As a result of the defendants' abuse of power, assault, battery, intentional infliction of mental anguish, negligent infliction of mental anguish, wrongful death, negligence, breach of fiduciary duties and breached the rights of DeGuerre and the plaintiff that are protected by the *Charter* and the *Code*, the plaintiff has sustained damages and injuries which include:

- (a) severe psychological injuries;
- (b) nervous shock;
- (c) suicidal ideation while driving home alone from Sunnybrook after DeGuerre's death;
- (d) anxiety;
- (e) irritability;
- (f) anger;
- (g) trouble concentrating;
- (h) loss of energy;
- (i) thoughts of death;
- (j) feelings of guilt;

- (k) unusual tendency to cry;
- (l) inability to sleep;
- (m) poor quality of sleep;
- (n) loss of the guidance, care and companionship that the plaintiff might reasonably have expected to receive from DeGuerre if his death had not occurred;
- (o) post-traumatic stress disorder associated with objects that remind her of DeGuerre and the events immediately before and after his death;
- (p) constant thoughts about the day of DeGuerre's death;
- (q) frequent flashbacks, replaying events of the day of DeGuerre's death;
- (r) gnawing remorse for not remaining at DeGuerre's bedside the night before he died;
- (s) preoccupation to seek justice in respect of the circumstances of DeGuerre's death;
- (t) recurring stressful feelings in respect of the circumstances of DeGuerre's death;
- (u) a negative impact on her relationship with her husband and her friends because of her constant need to discuss the circumstances of DeGuerre's death;
- (v) mistrust of healthcare personnel and the healthcare system;
- (w) hyperawareness of the passage of time, of changing seasons and of aging;
- (x) loss of enjoyment of life;
- (y) expenses for medical and related treatment;
- (z) funeral expenses incurred in respect of DeGuerre; and
- (aa) further out-of-pocket expenses, full particulars of which will be provided prior to trial.

53. The plaintiff states that Sunnybrook is vicariously liable for the acts and omissions of its employees.

54. The plaintiff pleads and relies upon the provisions of the:

- (a) *Family Law Act*, R.S.O. 1990, c. F.3;
- (b) *Health Care Consent Act, 1996*, S.O. 1996, c. 2;
- (c) *Human Rights Code*, R.S.O. 1990, c. H.19;
- (d) *Medical Act*, S.O. 1991, c. 30;
- (e) *Negligence Act*, R.S.O. 1990, c. N.1.
- (f) *Nursing Act 1991*, S.O. 1991, c. 32;
- (g) *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18;
- (h) *Substitute Decisions Act, 1992*, S.O. 1992, c. 30;
- (i) *Criminal Code*, R.S.C. 1985, c. C-46;
- (j) *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982*, (U.K.) 1982, c. 11 (*Charter*).

and amendments to those statutes and regulations made under them.

55. The plaintiff applies under section 24(1) of the *Charter* for damages arising from the acts and omissions of the defendants as described in paragraphs 23 to 35, both inclusive.

56. The plaintiff states that the acts and omissions of the defendants as described in paragraphs 23 to 35, both inclusive, were highhanded, callous and arbitrary and conducted without regard to their impact on her such that an award of punitive damages is both warranted and necessary to deter such conduct in the future.

WAWRZYŃIAK
Plaintiff

and

LIVINGSTONE *et al.*
Defendants

Court file number: CV-10-409585

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at Toronto

STATEMENT OF CLAIM

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