COURT OF APPEAL FOR ONTARIO

CITATION: Hartman v. Canada (Attorney General), 2026 ONCA 270
DATE: 20260416
DOCKET: COA-25-CV-0502

Miller, Monahan and Pomerance JJ.A.

BETWEEN

Daniel Hartman

Plaintiff/Responding Party (Appellant)

and

Attorney General of Canada and Patricia A. Hajdu (Minister of Health)

Defendants/Moving Parties (Respondents)

Umar Sheikh, for the appellant

Mahan Keramati and Adrian Zita-Bennett, for the respondents

Heard: January 26, 2026

On appeal from the order of Justice Sandra Antoniani of the Superior Court of Justice, dated March 24, 2025, with reasons reported at 2025 ONSC 1831.

By the Court:

I. OVERVIEW

[1] This appeal arises from the tragic death of the appellant's son, 17-year-old Sean Hartman, who passed away on September 27, 2021, 33 days after receiving a Pfizer-BioNTech COVID-19 vaccine (the "Vaccine"). The appellant commenced

an action under s. 61(1) of the *Family Law Act*, R.S.O. 1990, c. F.3 against the respondents for negligence and misfeasance in public office (the "Claim").[1] The Claim alleged that the respondents were negligent, recklessly indifferent, and/or willfully blind in their approval, monitoring, and promotion of the Vaccine, and that Sean Heartman's death was a foreseeable and proximate result of the respondents' conduct.

[2] While recognizing that Sean Hartman's death at such a young age was a devastating loss to his family and his community, the motion judge struck the Claim in its entirety on the basis that it was plain and obvious that the Claim had no reasonable prospect of success, even if supplemented with amendments proposed by the appellant.

[3] The appellant argues that the motion judge fundamentally misapplied the test for striking a claim by failing to read the Claim generously and accepting the facts pleaded as true. He submits that the motion judge instead reached determinative conclusions akin to a summary judgment on an arguable "novel claim", where it was not "plain and obvious" the Claim would fail. Alternatively, the motion judge erred by denying the appellant the opportunity to amend the Claim to cure any perceived defects.

[1] The Claim also included causes of action in deceit and fraud. No appeal is taken from the motion judge's decision to strike out those elements of the Claim.

[4] We conclude that the motion judge did not err in holding that it was plain and obvious that the Claim had no reasonable prospect of success. As we explain below, the negligence claim was doomed to fail because there is no private law duty of care owed to a member of the general public who may have been injured as a result of the respondents' approval and promotion of the Vaccine. Nor does the Claim plead material facts attesting to any malice or bad faith, which are necessary to sustain a claim for misfeasance in public office. The Claim was not viable in its existing form or with the proposed amendments. We therefore dismiss the appeal.

II. BACKGROUND[2]

A. The COVID-19 pandemic and Canada's initial response

[5] The health and societal impacts of the COVID-19 pandemic are well known and not in dispute in this proceeding. Moreover, this court has previously taken judicial notice of basic facts relating to the pandemic: see e.g. *R. v. Morgan*, 2020 ONCA 279, at para. 8.

[6] COVID-19 is a disease caused by a coronavirus known as SARS-CoV-2. It was first detected in China in December 2019 and subsequently spread across the globe, leading to the World Health Organization declaring it a pandemic in March

[2] Unless otherwise expressly indicated, the facts set out below are based on statements made in the Claim or in documents incorporated by reference into the Claim, in accordance with *Del Giudice v. Thompson*, 2024 ONCA 70, 169 O.R. (3d) 731, at para. 18, leave to appeal refused, [2024] S.C.C.A. No. 113.

2020. In the ensuing year, COVID-19 was reported to have infected more than 118 million people worldwide and to have been associated with 2.6 million deaths. In that same period, there were approximately 900,000 infections and over 22,000 deaths resulting from COVID-19 in Canada. See *Spencer v. Canada (Health)*, 2021 FC 621, [2021] 3 F.C.R. 581, at paras. 19-27; *Lavergne-Poitras v. Canada (Attorney General)*, 2021 FC 1232, at paras. 17-22.

[7] In the first few months of the pandemic, the response of governments in Canada and elsewhere was focused on public health measures designed to reduce the risk of COVID-19 transmission in the community, such as physical separation or social distancing, the testing of exposed or symptomatic individuals, and school and business closures. At the same time, an overriding priority was the development of safe and effective vaccines to more effectively address the significant threat to public health posed by COVID-19.

[8] New vaccines in Canada are ordinarily reviewed and approved by the Minister of Health (the "Minister"), based on a detailed submission from the manufacturer sufficient to enable the Minister to assess its safety and effectiveness: see *Food and Drug Regulations*, C.R.C., c. 870, C.08.001 (the "New Drugs Regulation"). Section 30.1 of the *Food and Drugs Act*, R.S.C. 1985, c. F-27 (*FDA*) authorizes the Minister to make interim orders where the Minister believes that "immediate action is required to deal with a significant risk, direct or indirect, to health, safety or the environment".

[9] Pursuant to that authority, on September 16, 2020, the Minister issued an interim order creating a new regulatory pathway for the approval of COVID-19 drugs: see *Interim Order Respecting the Importation, Sale and Advertising of Drugs for Use in Relation to COVID-19*, (2020) C. Gaz. I, 2542-56 (*Food and Drugs Act*) (the "Interim Order"). The Interim Order stated that the Minister believed that immediate action was required to deal with a significant risk to health, safety, or the environment posed by COVID-19. The Interim Order amended the administrative process for filing applications for drug authorizations designed to combat COVID-19 and afforded new flexibility in the Minister's assessment of the evidence supporting the quality, safety, and effectiveness of these drugs. However, the type of evidence required to establish a vaccine's quality, safety, and effectiveness was substantially similar.[3]

[10] Section 5 of the Interim Order required the Minister to approve a COVID-19 drug if the following conditions were met:

> a. the applicant has submitted an application to the Minister that meets the requirements set out in subsection 3(1) or 4(2);
>
> b. the applicant has provided the Minister with all information or material, including samples, requested under subsection 13(1) in the time, form and manner specified under subsection 13(2); and

[3] Subsections 3(1) and 4(2) of the Interim Order set out the information that an applicant had to submit to enable the Minister to determine whether to issue an authorization. The required information largely mirrored that required under the New Drugs Regulation, except that the Interim Order provided for rolling submissions whereby manufacturers could submit partially completed applications to Health Canada at the time of the initial filings, and Health Canada would continue to accept new evidence as it became available until the application was deemed complete.

> c. the Minister has sufficient evidence to support the conclusion that the benefits associated with the drug outweigh the risks, having regard to the uncertainties relating to the benefits and risks and the necessity of addressing the urgent public health need related to COVID-19.

B. Authorization of the Vaccine

[11] Following the issuance of the Interim Order, on October 9, 2020, Pfizer-BioNTech submitted an application to Health Canada for authorization of its COVID-19 vaccine. In its evaluation, Health Canada considered the results of an ongoing 'Phase 3' clinical trial which was a randomized, placebo-controlled study (the "Clinical Trial"). The appellant referenced particulars of the preliminary Clinical Trial data in his statement of claim, which he called "Study 1".[4] Topline results of the Clinical Trial to this point in time were also detailed in a "Regulatory Decision Summary" published on December 9, 2020 by Health Canada, which the appellant explicitly referred to in his statement of claim.[5]

[12] The Clinical Trial enrolled approximately 44,000 participants in multiple countries, half of whom received the Vaccine and the other half a placebo. The Decision Summary notes that at the time of approval in December 2020, efficacy of the Vaccine was evaluated to be 95%. The "efficacy" of a vaccine is a measure of how much the vaccine reduced the risk of contracting the disease in a controlled

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[4] The data which the appellant cites is consistent with the data recorded in a New England Journal of Medicine article published on December 31, 2020. See Fernando P. Polack et al., "Safety and Efficacy of the BNT162b2 mRNA Covid-19 Vaccine" (2020) 383:27 N. Engl. J. Med. 2603.

[5] See Canada, Public Health Agency of Canada, *Summary of the Rationale for Authorization for Use in Relation to the COVID-19 Pandemic: Pfizer-BioNTech COVID-19 Vaccine* (Regulatory Decision Summary), Control No. 244906 (9 December 2020) (the "Decision Summary").

study.[6] In this case, a 95% efficacy rating means that the vaccinated group had a 95% lower risk of developing COVID-19 than the unvaccinated placebo group. The evidence also demonstrated that the vaccine was well-tolerated across demographic subgroups. The most common side effects were injection site pain, fatigue, headache, muscle pain, chills, joint pain, and fever. No life-threatening adverse effects or deaths were reported.

[13] The Study 1 data may be summarized as follows:

Datapoint	Vaccine Group	Placebo Group
COVID-19 cases	8	162
Severe COVID-19 cases	1	9
Any adverse event	5,770 (26.7%)	2,638 (12.2%)
Related adverse event	4,484 (20.7%)	1,095 (5.1%)
Any serious adverse event	126 (0.6%)	111 (0.5%)
Related serious adverse event	4 (0.0%)	0 (0.0%)

This data demonstrates a vaccine efficacy against COVID-19 infection of 95.0%.

[14] Based on the Clinical Trial results available at the time, and having regard to the necessity of addressing the urgent public-health concerns related to COVID-19, the Minister concluded that the benefits associated with the Vaccine outweighed the risks and authorized its use by individuals 16 years of age and older in accordance with s. 5 of the Interim Order. The Decision Summary noted that one limitation of the data at that time was the lack of information on the long-

[6] See generally World Health Organization, “Vaccine Efficacy, Effectiveness and Protection” (10 March 2025), online: <www.who.int/news-room/feature-stories/detail/vaccine-efficacy-effectiveness-and-protection>.

term safety and efficacy of the Vaccine. However, the Clinical Trial was ongoing and Health Canada would continue to collect data to monitor and assess these considerations. The Vaccine began to be administered to the Canadian population on December 14, 2020.

C. Subsequent Clinical Trial results

[15] On April 1, 2021, Pfizer-BioNTech released updated results of the Clinical Trial capturing six-month data following study participants receiving the second dose of the Vaccine. The appellant referenced particulars of the six-month Clinical Trial data in his statement of claim, which he called "Study 2".[7] The updated study data was also detailed in a press release by the manufacturer, which the appellant expressly referred to in his statement of claim.[8] As of April 2021, the Vaccine's overall efficacy remained greater than 90%, and the Vaccine reduced the incidence of severe COVID-19 by up to 95%. Moreover, the Clinical Trial did not find evidence of any significant safety concerns arising from the administration of the Vaccine, with side effects remaining consistent with Study 1. Deaths of study participants were roughly equivalent between the vaccinated group and the placebo group, and no deaths were considered to be related to the Vaccine.

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[7] The data which the appellant cites is consistent with the data recorded in a New England Journal of Medicine article published on September 15, 2021. See S.J. Thomas et al., "Safety and Efficacy of the BNT162b2 mRNA Covid-19 Vaccine through 6 Months" (2021) 385:19 N. Engl. J. Med. 1761.

[8] See Pfizer, Press Release, "Pfizer and BioNTech Confirm High Efficacy and No Serious Safety Concerns Through Up to Six Months Following Second Dose in Updated Topline Analysis of Landmark COVID-19 Vaccine Study" (1 April 2021), online: <www.pfizer.com/news/press-release/press-release-detail/pfizer-and-biontech-confirm-high-efficacy-and-no-serious>.

[16] The Study 2 data may be summarized as follows:

Datapoint	Vaccine Group	Placebo Group
COVID-19 cases	77	850
Severe COVID-19 cases	1	30
Any adverse event	6,617 (30.2%)	3,048 (13.9%)
Related adverse event	5,241 (23.9%)	1,311 (6.0%)
Any serious adverse event	127 (0.6%)	116 (0.5%)
Related serious adverse event	3 (0.0%)	0 (0.0%)
Deaths	15	14

This data demonstrates a vaccine efficacy against COVID-19 infection of 91.3% and against severe cases of COVID-19 of 95.3%.

[17] The appellant pleaded that Pfizer-BioNTech was required to provide this updated data from the Clinical Study to Health Canada as part of the ongoing, post-authorization monitoring process, meaning that the respondents were either aware of it, or ought to have been aware of it prior to Sean Hartman receiving the Vaccine. As will become evident below, data from these two datasets provides the factual foundation for both of the appellant's causes of action.

III. THE CLAIM

[18] Sean Hartman received the Vaccine on August 25, 2021 and died on September 27, 2021. The Claim asserts that his death was caused by the Vaccine and that it resulted from the respondents' negligence, reckless indifference, and/or wilful blindness in approving and promoting the Vaccine for use in Canada when

they knew, or ought to have known, that the Vaccine was minimally effective and that the risks associated with its use included severe illness and death.

[19] The Claim pleads that Study 2 disclosed that the "difference between the vaccinated and the placebo group" was only "3.6%". The appellant appears to arrive at this figure by comparing the rate of COVID-19 cases in the placebo group (850 cases among 21,096 participants, or approximately 4.0%) and the vaccinated group (77 cases among 20,998 participants, or approximately 0.4%), with the "difference" between 4.0% and 0.4% being 3.6%. Conversely, he argues that Clinical Trial participants who received the Vaccine were 300% more likely to suffer a related adverse event than placebo recipients, and 10% more likely to suffer a serious adverse event. The Claim asserts that the respondents nevertheless approved the Vaccine and falsely stated that it was safe and effective, including through six public statements (collectively, the "Impugned Statements"). These statements read in material part as follows:

1. "Health Canada has determined that the Pfizer-BioNTech vaccine meets the Department's stringent safety, efficacy and quality requirements for use in Canada" (Health Canada, December 9, 2020).
2. "Vaccines are an important and effective way to protect Canadians and stop the spread of COVID-19. Working with our partners, we will make sure that Canadians have the latest information about how and when they can get vaccinated, but also why they should get vaccinated" (Minister of Health Patty Hajdu, February 2, 2021).
3. "The impacts of catching COVID are far greater and far deadlier, as we have seen across the country, than potential side effects. Let me remind everyone that every vaccine administered in Canada is safe and

effective, as evaluated by Health Canada" (Prime Minister Justin Trudeau, May 4, 2021).

4. "Getting vaccinated will help reduce infection rates, ease pressure on the health system and create the conditions that will allow us to get back to important social, economic and recreational activities" (Public Health Agency of Canada, May 17, 2021); "I urge all people in Canada to get vaccinated and support others to get vaccinated as soon as they can" (Chief Public Health Officer Dr. Theresa Tam, May 17, 2021).
5. "Having safe and effective vaccines along with informed, confident and motivated people getting vaccinated are key to Canada's success for widespread and long term control of COVID-19. Through the *Ask the Experts* campaign, trusted Canadian health experts listen and provide answers to your important questions about COVID-19 vaccination that are fundamental to vaccine confidence and informed decision making for you and your loved ones" (Chief Public Health Officer Dr. Theresa Tam, June 15, 2021).
6. "The best way to end this pandemic is for everyone to get their shots as soon as they can" (Prime Minister Justin Trudeau, July 27, 2021).

[20] The Claim alleges that the respondents owed Sean Hartman (1) a duty of care when exercising operational functions concerning the regulation of the Vaccine; (2) a duty of care when making representations about the safety and efficacy of the Vaccine; and (3) a duty to warn of the risks associated with the Vaccine, including the fact that individuals under the age of 40, and particularly adolescent males, had an increased risk of myocarditis after receiving the Vaccine. The Claim asserts that the respondents knew or ought to have known that the Impugned Statements were inaccurate or unreasonable and that Sean Hartman would reasonably rely on them. But for the Impugned Statements, Sean Hartman would not have received the Vaccine. The respondents' negligent conduct produced the foreseeable and proximate result of Sean Hartman's death.

[21] The Claim further alleges that the respondents were recklessly indifferent or wilfully blind in discharging their statutory responsibilities in approving, regulating, and promoting the Vaccine despite the fact that they possessed evidence which showed the Vaccine was not safe and/or effective. The respondents' reckless indifference or wilful blindness produced the foreseeable result of Sean Hartman's death and, as such, the respondents are liable for misfeasance in public office.

IV. THE MOTION JUDGE'S REASONS

[22] The motion judge found that it was plain and obvious that both the negligence and misfeasance in public office claims were certain to fail and therefore struck the Claim without leave to amend.

[23] The motion judge held that the claim in negligence was bound to fail because the statutory scheme established only general duties to the public, there were no specific interactions alleged between the respondents and Sean Hartman, and the respondents' actions in approving and promoting the Vaccine were an expression of core policy decisions taken in order to protect the Canadian public as a whole. The motion judge further concluded that even if she had found a *prima facie* basis for recognizing a private law duty of care, there were residual policy concerns that would negate the existence of such a duty. In particular, the imposition of a private law duty of care in these circumstances would create a chilling effect on government decision-makers who were responsible for protecting the general Canadian public during a pandemic.

[24] The claim in misfeasance was bound to fail because there were no material facts pleaded upon which it could be concluded that the respondents had a subjective awareness that harm to the appellant's son was a likely consequence of their actions.

[25] The motion judge found that the appellant's proposed amendments to the Claim did not address these shortcomings but were merely a repetition and detailed expansion of the same facts already pleaded. The motion judge therefore struck the Claim in its entirety without leave to amend.

V. GROUNDS OF APPEAL

[26] The appellant argues that the motion judge erred in the following respects:

(a) by misapplying the "plain and obvious" test for striking a pleading and failing to read the Claim generously, thereby prematurely dismissing arguable claims;

(b) by finding it was plain and obvious that the respondents owed no private law duty of care to Sean Hartman;

(c) by classifying all the impugned government conduct as immune "core policy", thereby failing to distinguish between policy and operational acts;

(d) by striking the claim for misfeasance in public office where the necessary elements of the tort were pleaded; and

(e) by refusing to grant leave to amend the Claim.

VI. STANDARD OF REVIEW

[27] The parties agree that the standard of review of a motion judge's determination to strike a claim under r. 21.01(1)(b) of the *Rules of Civil Procedure*,

R.R.O. 1990, Reg. 194, is correctness: *Fowler v. Family and Children's Services of the Waterloo Region*, 2024 ONCA 41, at para. 28, leave to appeal refused, [2024] S.C.C.A. No. 151. The motion judge's decision to deny leave to amend was discretionary and is owed deference on appeal, absent a palpable and overriding error of fact or law: *Conway v. The Law Society of Upper Canada*, 2016 ONCA 72, 395 D.L.R. (4th) 100, at para. 16.

VII. LEGAL PRINCIPLES GOVERNING A MOTION TO STRIKE

[28] The essential principles governing motions to strike pursuant to r. 21.01(1)(b) of the *Rules* include the following:

(i) The test for striking a pleading is whether, assuming the facts pleaded are true, it is plain and obvious that it does not disclose a reasonable cause of action and cannot possibly succeed. This is a stringent test and the moving party must satisfy a very high threshold in order to succeed: PMC York Properties Inc. v. Siudak, 2022 ONCA 635, 473 D.L.R. (4th) 136, at paras. 30-31, leave to appeal refused, [2022] S.C.C.A. No. 407; Fernandez Leon v. Bayer Inc., 2023 ONCA 629, at para. 8;

(ii) The claim should be read as generously as possible erring on the side of permitting an arguable claim to proceed to trial, since cases should, if possible, be disposed of on their merits: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420, at paras. 87-88, *per* Karakatsanis J. (dissenting, but not on this point); *Tran v. University of Western Ontario*, 2015 ONCA 295, at para. 16;

(iii) The facts set out in the claim must be accepted as true unless they are manifestly incapable of being proven: *The Catalyst Capital Group Inc. v. Dundee Kilmer Developments Limited Partnership*, 2020 ONCA 272, 150 O.R. (3d) 449, at para. 45; *PMC York Properties*, at para. 31;

(iv) Bare conclusory statements of fact and allegations of legal conclusions unsupported by material facts are not assumed to be true for purposes of a motion to strike: *Trillium Power Wind Corporation v. Ontario (Natural Resources)*, 2013 ONCA 683, 117 O.R. (3d) 721, at para. 31; *Das v. George Weston Limited*, 2018 ONCA 1053, 43 E.T.R. (4th) 173, at para. 74, leave to appeal refused, [2019] S.C.C.A. No. 69;

(v) The motion judge is entitled to examine documents incorporated by reference into the pleading as part of the material facts that are pleaded and accepted for purposes of the motion: *McCreight v. Canada (Attorney General)*, 2013 ONCA 483, 116 O.R. (3d) 429, at para. 32; *Das*, at para. 74; and

(vi) The court should always consider whether a deficiency in the pleadings can be addressed through an amendment, and leave to amend should only be denied in the clearest of cases where it is clear that the deficiencies in the pleading cannot be cured: *Spar Roofing & Metal Supplies Limited v. Glynn*, 2016 ONCA 296, 401 D.L.R. (4th) 318, at paras. 35-37; *Fernandez Leon,* at para. 5. However, although the general rule is that amendments are presumptively approved, there is no absolute right to amend pleadings and the court has a residual right to deny amendments where appropriate: *Marks v. Ottawa (City)*, 2011 ONCA 248, 280 O.A.C. 251, at para. 19; *McFadden v. Psutka*, 2024 ONCA 203, at para. 12.

VIII. DISCUSSION

A. The motion judge did not err in concluding that it was plain and obvious that the Claim did not disclose a private law duty of care sufficient to ground a claim in negligence

[29] We first set out below the legal principles governing public authorities' liability in negligence. We then explain why, based on those governing principles, the motion judge correctly found that neither the statutory scheme nor the relationship between the parties was sufficient to establish a private law duty of care. Moreover, as the motion judge explained, any *prima facie* private law duty of

care that might have been found to exist would have been negated for residual policy reasons.

1. Legal principles governing negligence liability of public authorities

[30] The existence of a duty of care is essential to liability in negligence. Whether a public authority owes a private law duty of care is determined on the basis of the so-called "*Anns*/*Cooper*" test: *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537; *Nelson (City) v. Marchi*, 2021 SCC 41, [2021] 3 S.C.R. 55, at para. 16.

[31] The court first determines whether a plaintiff's claim falls within or is analogous to an established duty of care. If not, the court then applies the following two-stage test: (1) does the relationship between the parties disclose sufficient foreseeability and proximity to establish a *prima facie* duty of care; and (2) if the answer to the first question is yes, are there any residual policy considerations that negate or otherwise preclude the existence of such a duty. See *Cooper*, at paras. 30-39; *Nelson*, at paras. 15-19; and *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 39. The plaintiff bears the burden of establishing a *prima facie* duty of care. If established, the burden shifts to the defendant to demonstrate countervailing policy considerations sufficient to negate the duty: *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643, at para. 13.

[32] In considering whether there is sufficient proximity between the parties at the first stage of the *Anns*/*Cooper* test, such proximity may arise explicitly or by

implication from the statutory scheme and/or from specific interactions between the parties: *Imperial Tobacco*, at para. 43.

[33] While some statutes may impose duties on public authorities with respect to particular individuals, more often statutes are aimed at public goods and broad policy goals. In such cases it is often difficult to infer that the legislature intended to create private law tort duties towards the plaintiffs. This will be especially true if the recognition of a private law duty would conflict with the public authority's duty to the public: *Imperial Tobacco*, at para. 44; *Taylor v. Canada (Attorney General)*, 2012 ONCA 479, 111 O.R. (3d) 161, at paras. 75-78.

[34] Where proximity is said to have arisen from specific interactions between the parties, the plaintiff must factually demonstrate that the government created a special relationship with them through its conduct to establish the necessary proximity. Even if only specific interactions are pleaded to ground proximity, the governing statute remains relevant to the analysis since, if a finding of proximity would conflict with the public authority's statutory duty, the court may hold that no proximity arises: *Imperial Tobacco*, at para. 45; *Rausch v. Pickering (City)*, 2013 ONCA 740, 369 D.L.R. (4th) 691, at paras. 45-46, 50-53; and *Heaslip Estate v. Mansfield Ski Club Inc.*, 2009 ONCA 594, 96 O.R. (3d) 401, at paras. 16-20, 28.

[35] If the plaintiff succeeds in establishing a *prima facie* duty of care at the first stage of the *Anns*/*Cooper* test, the onus shifts to the defendant at the second stage

to establish residual policy considerations that might limit or negate the existence of such a duty of care. The focus at this stage is not on the relationship between the parties but, rather, on "the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally": *Cooper*, at para. 37. In a claim against a government authority, these residual policy concerns may include the potential for the creation of unlimited liability to an indeterminate class and/or the chilling effect on the ability of government to perform its statutory duties, unencumbered by extraneous considerations: *Cooper*, at paras. 37, 54; *Attis v. Canada (Health)*, 2008 ONCA 660, 93 O.R. (3d) 35, at paras. 73-75, leave to appeal refused, [2008] S.C.C.A. No. 491; and *Eliopoulos (Litigation Trustee of) v. Ontario (Minister of Health and Long-Term Care)* (2006), 82 O.R. (3d) 321 (C.A.), at paras. 31-33, leave to appeal refused, [2006] S.C.C.A. No. 514.

2. The statutory scheme does not give rise to a private law duty of care

[36] The statutory scheme applicable in this case establishes duties that are owed to the general public rather than to particular individuals or groups. In particular, s. 4(1) of the *Department of Health Act*, S.C. 1996, c. 8, defines the powers, duties, and functions of the Minister as extending to all matters within federal jurisdiction "relating to the promotion and preservation of the health of the people of Canada". This includes the promotion and preservation of "the physical, mental and social well-being of the people of Canada"; the protection of "the people of Canada against risks to health and the spreading of diseases"; and

"investigation and research into public health, including the monitoring of diseases" (s. 4(2)).

[37] The Minister is assisted in performing these duties by the Public Health Agency of Canada (the "PHAC"), a statutory body whose responsibilities include providing the Minister with "public health advice that is developed on a scientific basis", that will contribute to "federal efforts to identify and reduce public health risk factors and to support national readiness for public health threats": *Public Health Agency of Canada Act*, S.C. 2006, c. 5, Preamble, s. 7(1.1).

[38] Plainly, these statutory references to the Minister's duty to protect and promote the health of "the people of Canada", along with the PHAC's mandate "to identify and reduce public health risk factors and to support national readiness for public health threats", entail duties to Canadians as a whole, rather than to particular individuals or groups.

[39] The motion judge's finding that the statutory scheme establishes duties owed to the general public rather than to particular individuals or groups is consistent with a growing body of jurisprudence which has declined to impose private law duties of care in the context of government policy decisions which are made in response to health emergencies impacting the general population.

[40] For example, in *Williams v. Ontario*, 2009 ONCA 378, 95 O.R. (3d) 401, leave to appeal refused, [2009] S.C.C.A. No. 298, this court upheld an order

striking out a negligence claim brought by a surgery patient who had contracted SARS while in hospital during the SARS outbreak in Toronto in the spring of 2003. The plaintiff argued that Ontario had prematurely eased infection control procedures designed to limit the spread of SARS in the province's hospitals, thereby exposing her to a heightened risk of contracting the disease.

[41] In holding that it was plain and obvious that this claim could not succeed, this court noted that when assessing how best to deal with the SARS outbreak, the provincial government was required to address the interests of the public at large rather than to focus on the interests of the plaintiff specifically, or a class of individuals similarly situated. Sharpe J.A. explained in *Williams*, at para. 31, that such decisions involve difficult trade-offs between competing interests which often necessarily involve making decisions adverse to some individuals in pursuit of the broader public interest. Even though such decisions might be adverse to the interests of some, they were nevertheless necessary and therefore justified by the interests of the public as a whole:

> Restrictions limiting access to hospitals or parts of hospitals may help combat the spread of disease, but such restrictions will also have an impact upon the interests of those who require access to the hospital for other health care needs or those of relatives and friends. Similarly, a decision to lift restrictions may increase the risk of the disease spreading but may offer other advantages to the public at large including enhanced access to heath [*sic*] care facilities. The public officials charged with the responsibility for imposing and lifting

> such measures must weigh and balance the advantages and disadvantages and strive to act in a manner that best meets the overall interests of the public at large. [Emphasis added.]

[42] Endorsing the approach taken in *Eliopoulos*, the court in *Williams* held that the public health statutory scheme in Ontario could not ground a duty of care given its focus on the public at large, rather than specific individuals. In furtherance of the general public interest, public officials must "balance 'a myriad of competing interests', the nature of which are inconsistent with the imposition of a private law duty of care": *Williams*, at para. 25 (emphasis added).

[43] In *Abarquez v. Ontario*, 2009 ONCA 374, 95 O.R. (3d) 414, leave to appeal refused, [2009] S.C.C.A. No. 297 (a companion case to *Williams*), this court applied the same reasoning in striking out a claim in negligence brought by nurses and their family members who contracted SARS in 2003. The claim in *Abarquez* was based on the fact that the province issued legally binding directives to nurses and other healthcare workers requiring them to treat SARS patients. The nurses argued that by issuing these directives, the province created a direct relationship with the nurses sufficient to trigger a common law duty of care to protect them from contracting SARS.

[44] This court found that it was plain and obvious that the claim by the plaintiff nurses was bound to fail. Recognizing a private law duty to the nurses would conflict with the province's duty to the public at large. The government's overriding

responsibility was to do its best to protect the Ontario public as a whole from the spread of SARS. The province determined that the best way to discharge that responsibility was to issue the directives to nurses and other healthcare professionals requiring them to treat SARS patients, even though it was apparent that this would inevitably expose them to a higher risk of contracting the disease: *Abarquez*, at paras. 21-29. Such difficult trade-offs were inevitable when dealing with a public health emergency such as SARS. As Sharpe J.A. succinctly explained, “the interests of nurses … cannot be prioritized over the general public interest, yet that would be the effect of finding that they were owed the special consideration in the formulation of health care policy that a private law duty of care would entail”: *Abarquez*, at para. 28.

[45] In *Adam, Abudu v. Ledesma-Cadhit et al*, 2014 ONSC 5726, the parents of a 5-year-old girl who died after receiving an H1N1 influenza vaccination brought a negligence claim against the federal government (among other defendants) for failing to sufficiently assess the safety of the vaccine and for promoting the vaccine without advising of the risks of adverse effects and/or death, in particular for patients with hypersensitivities particularly vulnerable to vaccine-related injuries. Approval of the H1N1 vaccine was issued on the basis of an interim order promulgated under s. 30.1 of the *FDA*, as in the present case.

[46] In her detailed reasons, Chiappetta J. found that the governing statutes, including the *FDA*, imposed a duty on the government “to promote and protect the

health of the entire population". This responsibility necessarily involves balancing "a multitude of competing interests while identifying and responding to widespread threats to public health": *Adam*, at para. 122. At para. 163, Chiappetta J. explained that recognizing a private law duty of care owed to particular classes of individuals would be inconsistent with the duty owed to the public as a whole:

> Inherent in such a program [of immunization against H1N1] is potential for some individuals to suffer harm – either from contracting the disease or through adverse effects associated with immunization. The Minister exercised his discretion to issue a notice of compliance allowing a manufacturer to sell a prescription drug in Canada. Such actions were aimed at mitigating the health impact on the public of a potential influenza pandemic and cannot attract a private law duty of care. To do so would interfere with sound decision-making in the realm of public health and risk the displacement of public health priorities from the general public interest to the fear or threat of lawsuits. [Emphasis added.]

[47] Similar reasoning applies in this case.

[48] By December 2020, it was apparent that there was an urgent need to address the serious threat to public health posed by COVID-19. At that point, hundreds of thousands of Canadians had contracted the disease, including tens of thousands who became severely ill and, in many cases, died. Without a vaccine, it was certain that the numbers of Canadians who would become sick or die would continue to grow exponentially. On the other hand, as the Decision Summary itself acknowledged, there were uncertainties as to the long-term benefits and risks

associated with the Vaccine. Thus, the Minister's difficult responsibility was to balance the myriad (and in some respects, competing) interests and determine what was in the best interests of Canadians as a whole.

[49] The Clinical Trial provided evidence that the Vaccine would be highly effective both in reducing the incidence of the disease as well as lessening its severity in those who might contract it despite having received the Vaccine. If the results observed in the Clinical Trial were replicated in the general population, the benefits would be widespread and palpable. Many thousands of Canadians would avoid the illness, severe illness, and death which may result from COVID-19. Additionally, the pressures on the health care system would be reduced (thereby freeing up resources for the treatment of those experiencing other serious health conditions), costly public health restrictions such as school and business closures could be eased or eliminated, and important social activities could be resumed.

[50] These benefits had to be balanced against the potential risks associated with the Vaccine. The Clinical Trial data in December 2020 showed that approximately 27% of participants receiving the Vaccine experienced some form of adverse event, and about 0.6% experienced a serious adverse event. Even though no deaths were attributed to the Vaccine among participants in the Clinical Trial, the Decision Summary recognized that at that early stage there was a lack of information on the long-term safety and efficacy of the Vaccine.

[51] The point is simply that there was no cost-free or risk-free alternative available to the Minister. Her responsibility (and indeed, her heavy burden) was to carefully weigh the benefits and risks, knowing that no matter what she decided there may be some Canadians who were inadvertently negatively affected. As Sharpe J.A. pointed out in *Abarquez*, the fact that some individuals might be negatively affected by a government decision cannot in itself give rise to a private law duty of care, since that would amount to prioritizing the interests of particular individuals or groups over the interests of the public as a whole. In summary, there is no doubt that the legislative scheme did not give rise to a private law duty of care.

3. The Claim did not plead any specific interactions sufficient to support a private law duty of care

[52] Nor did the motion judge err in finding that the Claim did not plead interactions that could create a relationship of proximity between the respondents and the appellant's son. The Impugned Statements were on their face directed to Canadians as a whole rather than to particular groups or individuals. For example, in his May 4, 2021 statement, Prime Minister Trudeau said "*let me remind everyone* that every vaccine administered in Canada is safe and effective, as evaluated by Health Canada"; in her May 17, 2021 statement, Dr. Tam urged "*all people in Canada* to get vaccinated and support others to get vaccinated as soon as they can"; and in his July 27, 2021 statement, Prime Minister Trudeau opined

that the best way to end the pandemic "*is for everyone* to get their shots as soon as they can" (emphasis added). These exhortations to "everyone" or to "all people in Canada" reflect the fact that the statements were directed to the public as a whole, since the benefits associated with the Vaccine would only be fully realized if a significant majority of the population was vaccinated.

4. Residual policy considerations would have negated any *prima facie* duty of care

[53] The motion judge was similarly correct in her finding that, even if a *prima facie* duty of care might have been found to exist, residual policy considerations warranted negating any such duty. As discussed above, not only was it inevitable that some members of the public would be adversely affected no matter what the Minister decided, it was impossible to predict in advance the extent or severity of these adverse impacts. As such, this was a classic case where subjecting government actions to liability in tort carried with it the potential for indeterminate liability to an unlimited class. Both this court as well as the Supreme Court of Canada have emphasized that such unlimited liability weighs against recognizing a novel duty of care: *Cooper*, at para. 54; *Attis*, at para. 74; and *Eliopoulos*, at para. 32. Relatedly, imposing private law duties toward individuals would impair the ability of government decision-makers to make difficult but necessary decisions that advance the general public interest, out of a fear that in so doing they might incur civil liability in relation to persons who might be adversely affected: *Attis*, at

para. 75; *Eliopoulos*, at para. 33. We agree with the motion judge that recognizing a duty of care toward individual Canadians who may receive a vaccine in the circumstances of a global pandemic would unduly constrain the ability of public health officials to appropriately respond with measures that protect the health of Canadians as a whole.

[54] We therefore conclude that the motion judge did not err in finding that it was plain and obvious that the respondents did not owe a private law duty of care to the appellant's son and, accordingly, the cause of action in negligence was bound to fail.

B. The motion judge did not err in finding that it was plain and obvious that the claim for misfeasance in public office was bound to fail

[55] As we explain below, a key governing principle in establishing liability for misfeasance in public office is that the defendant was subjectively aware, reckless, or wilfully blind to the fact that their conduct was unlawful and would likely harm the plaintiff. The motion judge correctly identified this as the key shortcoming in the appellant's pleading of this cause of action. The Claim baldly alleged that the respondents were reckless or wilfully blind to the fact that (1) their conduct in approving, overseeing, and promoting the Vaccine was unlawful and (2) their unlawful conduct was likely to injure Sean Hartman. Neither assertion can be supported by the facts pleaded. We will review the essential elements of the tort, and then each of the two bald assertions in turn.

1. Legal principles governing claims for misfeasance in public office

[56] In order to make out a claim for misfeasance in public office, the plaintiff must establish two elements: (1) a public officer was engaged in deliberate and unlawful conduct in their capacity as a public officer; and (2) the public officer was aware both that their conduct was unlawful and that it was likely to harm the plaintiff: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 23.

[57] The rationale behind the imposition of this form of tortious liability is that "in a legal system based on the rule of law executive or administrative power 'may be exercised only for the public good' and not for ulterior and improper purposes": *Odhavji Estate*, at para. 26, citing *Three Rivers District Council v. Bank of England (No. 3)*, [2000] 2 W.L.R. 1220, at p. 1230. The tort is not directed at public officers who fail to adequately discharge their public duties through inadvertence or negligence, but rather at public officers who "could have discharged his or her public obligations, yet wilfully chose to do otherwise": *Odhavji Estate*, at para. 26 (emphasis in original omitted).

[58] Significantly, the tort of misfeasance in public office requires an element of bad faith. Thus, the mere fact that the public officer is aware that a decision may cause harm to certain individuals does not, in itself, give rise to a claim of misfeasance since "[i]n a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain

citizens": *Odhavji Estate*, at para. 28. A claim for misfeasance can only arise where an officer "blatantly disregards his or her official duty … [and] demonstrates a conscious disregard for the interests of those who will be affected by the misconduct in question" *Odhavji Estate*, at para. 29. The alleged misconduct by the public officer must be deliberate and unlawful, with some awareness of harm to the plaintiff as an individual: *Odhavji Estate*, at paras. 24-25, 29.

[59] Since misfeasance in public office is an intentional tort requiring bad faith or dishonesty, r. 25.06(8) of the *Rules* demands the pleading contain "full particulars": see *Robson v. The Law Society of Upper Canada*, 2018 ONCA 944, at paras. 17-20; *Conway*, at para. 39; and *Gratton-Masuy Environmental Technologies Inc. v. Ontario*, 2010 ONCA 501, 101 O.R. (3d) 321, at paras. 88-89. This court has held that pleadings alleging intentional torts must meet a "stringent standard of particularity": *Ceballos v. DCL International Inc.*, 2018 ONCA 49, at para. 12.

[60] While acknowledging the inherent limitations on pleadings at the early stages of litigation, this court has recognized and endorsed the policy concern underlying the stringent standard of particularity in the case of misfeasance claims, as expressed in *St. John's Port Authority v. Adventure Tours Inc.*, 2011 FCA 198, 335 D.L.R. (4th) 312, at para. 63: "it is all too easy for a plaintiff who is aggrieved by governmental conduct to assert, perhaps without any evidence at all, that 'the government' acted, 'knowing' it did not have the authority to do so, 'intending' to harm the plaintiff": see *Trillium Power*, at paras. 60-61. Therefore, a bald plea that

a public officer's conduct was improper is insufficient. There must be circumstances, particulars, or facts pleaded upon which a trier of fact could infer or conclude that the public officer's conduct was deliberate and unlawful, with knowledge of the potential consequence to the plaintiff.

2. The Claim baldly alleged awareness of unlawful conduct without pleading material facts

[61] The Claim makes allegations against Health Canada and the Minister personally relating to their responsibilities concerning approval, oversight, monitoring, and promotion of the Vaccine. For example, the Claim asserted that they were recklessly indifferent or wilfully blind in: failing to reasonably and accurately review, interpret, and report on the clinical data provided by the Vaccine manufacturer regarding efficacy and safety; approving the Vaccine; failing to monitor and report on new data as it became available; failing to revoke the Vaccine's approval following the release of data showing that the risks outweighed the Vaccine's minimal efficacy; and representing that the Vaccine was safe and effective despite possessing data to the contrary.

[62] Clearly, the appellant's pleadings concerning the respondents' "unlawful conduct" rest on an assertion that the Vaccine was minimally effective. The difficulty is that the only fact pleaded in support of this allegation was that Study 2 showed the incidence of COVID-19 among vaccinated participants in the Clinical Study was only "3.6%" lower than among participants who received the placebo.

As we explained above in para. 19 of these reasons, the appellant appears to calculate this figure by comparing the rate of COVID-19 cases observed in the placebo group (4.0%) with the vaccinated group (0.4%), to arrive at a “difference” of “3.6%”.

[63] Far from demonstrating the minimal efficacy of the Vaccine, the data which the appellant cited in his Claim actually tends to show the opposite. The fact that 4.0% of placebo participants contracted COVID-19 as compared with only 0.4% of vaccinated participants meant that participants who received the placebo were 10 times more likely to contract COVID-19 than those who received the Vaccine. The 3.6% figure that the appellant cites merely represents the difference in percentage points between the two rates, which does not assist him in establishing the allegation of minimal efficacy on which the Claim rests. The data which the appellant relies on in fact demonstrated an efficacy of 91.3% which, as we explained above in para. 12, means that the vaccinated group had a 91.3% lower risk of developing COVID-19 than the unvaccinated placebo group. This is the material figure to assess whether the Vaccine was “minimally effective”.

[64] Moreover, the respondents’ Impugned Statements that the Vaccine was highly effective in combatting COVID-19 were based not only on the fact that it appeared to significantly reduce incidence of the disease, but also that it dramatically lessened the severity of the disease in those who were vaccinated and nevertheless contracted it. Study 2 showed that participants who received the

placebo were 30 times more likely to develop severe COVID-19 as compared with those who received the Vaccine. It was the combined impact of a reduction in both the incidence and severity of the disease which led to the respondents' concluding that the Vaccine was highly effective. Therefore, even accepting the appellant's pleaded facts as true, he has not pleaded any material facts to support the assertion that the Vaccine was "minimally effective". Without pleading minimal efficacy, the appellant cannot possibly establish the necessary element that the respondents were engaged in deliberate and unlawful conduct, much less that they were aware their conduct was unlawful and exhibited either bad faith or dishonesty.

3. The Claim baldly asserts awareness of harm to the plaintiff without pleading material facts

[65] An even more fundamental problem with the appellant's Claim is that it does not in any way allege, beyond the bald assertion, that the respondents were aware their purportedly unlawful conduct was likely to harm Sean Hartman. There are no material facts pleaded that could establish subjective awareness or imputed knowledge through recklessness or willful blindness. The motion judge correctly noted that this requirement engages many of the same considerations as the proximity analysis in the negligence claim. Some nexus between the parties is required to conclude that the public official breached an obligation they owe to the plaintiff as an individual: *Odhavji Estate*, at para. 29.

[66] There is certainly no suggestion in the Claim that the respondents were aware their conduct could harm Sean Hartman individually. Nor does the Claim

allege any material facts in support of the allegation that the Minister was aware of, recklessly indifferent to, or willfully blind of, a risk of myocarditis among young people and/or adolescent males who received the Vaccine. As noted above, although Study 2 showed that about 24% of Vaccine recipients experienced some form of related adverse side effects, less than 1% experienced serious adverse side effects, only 3 participants experienced serious adverse side effects related to the Vaccine, and none of the deaths that occurred among participants to that point were considered by investigators to be related to the Vaccine. Study 2 did not show any increased risk of myocarditis among participants who received the Vaccine among any age group.

[67] In short, there are no material facts pleaded from which it could be inferred that the respondents knew, ignored, or were wilfully blind to evidence that the risks associated with the Vaccine outweighed its alleged minimal efficacy. There are also no material facts pleaded from which it could be inferred that the respondents knew that their approval, oversight, or promotion of the Vaccine was likely to cause harm to Sean Hartman or any population group of potential vaccine recipients that he was a member of. These allegations of subjective bad faith or dishonesty were bald conclusory statements of fact and allegations of legal conclusions unsupported by material facts, which are not assumed to be true for purposes of a motion to strike: *Imperial Tobacco*, at paras. 19-22; *Das*, at para. 74; *Darmar*

Farms Inc. v. Syngenta Canada Inc., 2019 ONCA 789, 58 C.C.L.T. (4th) 1, at para. 11, leave to appeal refused, [2019] S.C.C.A. No. 409.

[68] The motion judge therefore did not err in finding that the Claim failed to plead the necessary elements of the tort of misfeasance in public office and thus it was bound to fail.

C. The motion judge did not err in refusing leave to amend the Claim

[69] The motion judge found that amendments proposed by the appellant were insufficient, since they merely repeated and expanded upon the same facts already pleaded without addressing the primary deficits in the Claim. Even with the proposed amendments, the Claim failed to plead material facts upon which it could be concluded either that the respondents had a private law duty of care towards the appellant's son, or that they had subjective awareness that their actions were unlawful and likely to injure the appellant's son. Having reviewed the proposed amendments, we see no basis to interfere with the motion judge's findings that the proposed amendments would not have cured the deficiencies in the Claim.

[70] The appellant further argues that the Claim should be allowed to proceed because facts could emerge through the discovery process in support of the allegations of negligence or misfeasance. He relies upon this court's decision in *Shaulov v. Law Society of Ontario*, 2023 ONCA 95, 166 O.R. (3d) 241, where this court granted leave to the appellant to amend his pleading and permitted his claim

to proceed on the basis that the plaintiff required access to documents which were in the defendant's possession in order to particularize his claim.

[71] In *Shaulov*, it was acknowledged that the defendant was in possession of documents at the heart of the plaintiff's claim (the licencing examinations which the plaintiff alleged were discriminatory), and that the defendant refused to disclose them: *Shaulov*, at para. 17. No such circumstance or allegation exists in the present case. The preliminary data (December 2020, "Study 1") and six-month data (April 2021, "Study 2") from the Clinical Study, which the appellant alleges the respondents relied upon while approving and promoting the Vaccine, were published on December 31, 2020 and September 15, 2021, respectively. These reports are publicly available online and clearly were relied on by the appellant in drafting the Claim.

[72] As the Federal Court of Appeal pointedly observed in *Painblanc v. Kastner* (1991), 58 C.P.R. (3d) 502 (F.C.A.), at p. 503, "[a]n action at law is not a fishing expedition and a plaintiff who starts proceedings simply in the hope that something will turn up abuses the court's process". The same principle was articulated by the Supreme Court in *Imperial Tobacco*, at para. 22:

> It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must

> be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

[73] The motion judge's decision to deny leave to amend involved the exercise of discretion which is entitled to deference. We see no error in principle or palpable or overriding error that would justify intervention by this court.

IX. DISPOSITION

[74] We recognize that this decision will be disappointing to the appellant. The death of Sean Hartman was unquestionably a tragic event. However, as we have explained above, the motion judge made no error in concluding that the Claim could not, as a matter of law, succeed.

[75] The appeal is dismissed. Like the motion judge, we decline to order costs.

Released: April 16, 2026 "B.W.M."

"B. W. Miller J.A."
"P.J. Monahan J.A."
"R. Pomerance J.A."