

FORM 61A

*Courts of Justice Act*

NOTICE OF APPEAL TO THE COURT OF APPEAL

COURT OF APPEAL FOR ONTARIO

BETWEEN:

**DANIEL HARTMAN**

Appellant

and

**ATTORNEY GENERAL OF CANADA, THE DEPARTMENT OF HEALTH CANADA,  
and PATRICIA A. HAJDU (MINISTER OF HEALTH)**

Respondents

**NOTICE OF APPEAL**

THE APPELLANT, DANIEL HARTMAN, APPEALS to the Court of Appeal from the judgment of The Honourable Judge S. Antoniani, dated March 24, 2025, made at the Ontario Superior Court of Justice, striking out the Appellant's Statement of Claim in its entirety, without leave to amend, on the basis that it disclosed no reasonable cause of action.

THE APPELLANT ASKS that the judgment be set aside, and a judgment be granted as follows:

1. Reinstatement of the Claim – An order restoring the Appellant's action (Statement of Claim) in the Superior Court, effectively reinstating the claim that was struck by the motion judge.
2. Leave to Amend – An order permitting the Appellant to amend the Statement of Claim. This would allow the Appellant to cure any deficiencies in the pleadings by adding further facts or particulars, as proposed in the court below or as may be necessary.
3. Other Relief – Such further or other relief as the Court of Appeal deems just.

THE GROUNDS OF APPEAL are as follows:

1. Error in Dismissing the Claim under Rule 21 (No Reasonable Cause of Action):  
The learned motion judge erred in law by striking the Statement of Claim under Rule 21.01(1)(b) for failure to disclose a reasonable cause of action. The learned judge misapplied the “plain and obvious” test applicable on a motion to strike. In particular, the judge failed to read the pleading generously and assume the facts pleaded to be true, as required. It was not “plain and obvious” that the Appellant’s claim had no reasonable prospect of success. The causes of action pleaded – negligence and misfeasance in public office – raise novel questions of law and mixed fact (especially in the context of a public health response to a pandemic). Novel issues should not be cut off at the pleadings stage unless it is absolutely certain that the claim cannot succeed. The learned motion judge’s threshold for striking was unduly low and amounted to an improper determination of the merits of the case without evidence. This constitutes a reversible error in applying Rule 21, which warrants the Court of Appeal’s intervention.
2. Error in Duty of Care/Proximity Analysis (Anns/Cooper Test): The learned motion judge erred in concluding that the Respondents (the Government of Canada, Health Canada, and the Minister of Health) owed *no private law duty of care* to the Appellant’s son, Sean Hartman. In applying the Anns/Cooper two-stage test for duty of care, the judge mischaracterized or misapplied the proximity analysis at stage one. The judge accepted the Respondents’ argument that government statements and actions directed to the general public cannot give rise to a private duty owed to an individual. In particular, the judge focused on the fact that the safety and efficacy representations about the COVID-19 vaccine were made to the Canadian public at large and found there were no direct communications to or special relationship with Sean Hartman.
3. The Appellant submits that this analysis was flawed. The Statement of Claim pleaded that the Respondents *knew of specific risks* (e.g. heightened myocarditis risk in adolescent males) and nonetheless targeted the youth population (including Sean) with assurances of safety. Facts, if proven, could establish a relationship of proximity despite the broad public context. While the legislative scheme does not expressly create a private law duty, that *by itself* is not determinative. The Appellant’s claim is that government actors undertook responsibilities (e.g. regulatory approval, public risk communication) that directly and foreseeably affected a defined class of individuals – namely, recipients of the vaccine in Sean Hartman’s circumstances. It is at least arguable that a novel duty of care exists in these circumstances, or that the proximity requirement could be satisfied by the foreseeability of harm to an identifiable class and the reliance on

government pronouncements. By dismissing the duty of care at the pleadings stage, the learned motion judge prematurely extinguished a potentially viable claim, contrary to the admonition that novel duty questions should be allowed to proceed to trial if plausible.

4. **Error in Finding Government Actions to be “Core Policy” Immune from Liability:** The learned motion judge further erred by characterizing the impugned government conduct as core policy decisions and thereby immunizing the Respondents from negligence liability. The learned judge, relying on authorities such as the Supreme Court’s decision in *R. v. Imperial Tobacco*, found that the Respondents’ decisions in authorizing COVID-19 vaccines under an interim order and making public health recommendations were “made at the highest level” of government and involved social and economic considerations, thus constituting true policy decisions. As a result, the learned judge held that any alleged negligence was not justiciable in tort due to core policy immunity. The Appellant submits that this was an error for two reasons: (a) Not all the alleged misconduct was “core policy” in nature, and (b) determining the policy/operational classification on a pleadings motion was inappropriate. The Statement of Claim includes allegations of operational negligence, such as failing to adequately communicate known risks, failing to conduct proper post-market surveillance, and ignoring specific safety data. These actions (or inactions) could be viewed as the implementation of policy or as ordinary administrative duties, rather than high-level policy formulation. The law draws a distinction between core policy decisions (which are immune) and operational acts or omissions (which can attract liability). The motion judge, however, adopted a blanket approach effectively shielding all conduct of the Respondents.
5. This blanket approach is inconsistent with Supreme Court guidance that true “core policy” decisions are those involving political, social, and economic deliberations at a high level, and that there is no simple bright-line test. Many governmental activities – especially in administering programs or disseminating information – are not pure policy choices but exercises of statutory duties or administrative functions. Whether the Respondents’ acts were policy or operational is a fact-specific question that should not have been determined without evidence. By deciding this issue on a Rule 21 motion, the judge deprived the Appellant of the opportunity to develop a factual record that might show the impugned decisions were operational or ministerial in nature. In short, the learned motion judge erred in law in overly broad application of policy immunity, resulting in the premature dismissal of the negligence.
6. **Error in Striking the Misfeasance in Public Office Claim:** The learned motion judge also erred in striking the Appellant’s claim for misfeasance in public office at the

pleadings stage. Misfeasance in public office is an intentional tort aimed at wrongful exercises of public power by officials who either intend to harm or act with knowledge that they are exceeding their lawful authority and that their conduct will likely harm the plaintiff. The Appellant's pleading expressly set out the key elements of misfeasance as recognized in *Odhavji Estate v. Woodhouse*, 2003 SCC 69. In particular, the Statement of Claim (as proposed to be amended) alleged that Health Canada and the Minister acted unlawfully and in bad faith, knowing their conduct was improper and likely to cause harm. For example, the pleading states that the Respondents were "*recklessly indifferent or willfully blind in discharging [their] responsibilities of regulatory approval and oversight*" of the vaccine, leading to Sean Hartman's death. It further alleges that the Respondents "*knew that the vaccine was unsafe [and] was likely to harm individuals such as the Plaintiff's son and yet took actions that were objectively inconsistent with their statutory duties*", and that they "*specifically ignored and in fact concealed the significant and present risk of adverse events – including death*" while encouraging Canadians to vaccinate. These pleaded facts, if proven, satisfy the elements of misfeasance in public office: (i) deliberate unlawful conduct in the exercise of public functions, and (ii) awareness that the conduct was unlawful and likely to harm the plaintiff (along with causation and damage). Despite these detailed allegations, the learned motion judge concluded that the "*necessary elements to ground an action in misfeasance in public office are not present*" in the pleading. With respect, this was an error. The learned judge appeared to require a level of particularized proof that is not realistic at the pleading stage – effectively demanding evidence of the officials' state of mind and knowledge before discovery.

7. On a Rule 21 motion, the court must assume the truth of the facts pleaded. Here, the facts pleaded (e.g. that the Minister knew of specific dangers and knowingly misled the public or ignored legal duties) should have been taken as true for the purposes of the motion. If so assumed, the misfeasance claim is legally tenable. Moreover, the judge's invocation of "core policy" or lack of proximity is irrelevant to misfeasance, since misfeasance is an intentional tort that does not depend on a duty of care and does not immunize bad faith or unlawful conduct. In other words, there is no "policy immunity" for acts done in bad faith or unlawfully. By conflating the misfeasance claim with the negligence analysis, the motion judge fell into error. The Appellant submits that the misfeasance claim was sufficiently pleaded (or at least could be sufficiently pleaded with amendment) and should have survived the Rule 21 motion. The judge's failure to allow this claim to proceed was a serious error warranting appellate intervention.

8. Error in Denying Leave to Amend the Pleading: The learned motion judge erred in law by denying the Appellant leave to amend the Statement of Claim. It is a fundamental principle of civil procedure that amendments to pleadings should be freely allowed unless the defects are incurable, and amendment would be futile or prejudicial. Rule 26.01 of the *Rules of Civil Procedure* directs that the court “shall grant” leave to amend a pleading “at any time” unless the opposing party would suffer prejudice not compensable in costs. Even on a motion to strike, if it is possible that an amendment could save the claim, the plaintiff should be given an opportunity to re-plead rather than the action being dismissed outright. The motion judge in this case acknowledged the governing principle that leave to amend should only be refused in the “clearest of cases” where the pleading’s deficiencies *cannot* be cured. However, the learned judge then proceeded to deny any amendment, asserting that even the proposed amended pleading would have no reasonable prospect of success. The Appellant respectfully submits that this was unjustified. The Appellant had tendered a draft Amended Statement of Claim (adding over four pages of additional material) to address the concerns raised. Those amendments provided further details of the alleged duty of care and the bad faith conduct of the Respondents. The learned judge ruled that the amendments did not fix the “primary deficits” in the claim, chiefly the lack of a proximate relationship and the lack of particularized unlawful conduct – and thus deemed any amendment futile. In doing so, the learned judge effectively decided contested issues of law against the Appellant in a final manner. This approach is inconsistent with the general policy of allowing amendments to determine matters on their merits. Even if the initial pleading was imperfect, the proper course was to permit amendment, especially given the importance of the issues (involving the death of the Appellant’s son) and the evolving legal context of pandemic-related claims. This was not one of the “clearest” cases where amendment was hopeless – reasonable jurists might disagree on the duty of care or misfeasance questions, which suggests that a refined pleading could arguably succeed. By denying leave to amend, the motion judge imposed an unnecessary finality. The Appellant submits that the Court of Appeal should overturn that aspect of the decision and grant leave to amend the Statement of Claim so that the claim can be pleaded properly and adjudicated on its merits.

#### THE BASIS OF THE APPELLATE COURT’S JURISDICTION IS:

1. The Judgement made on March 24, 2025, was a final judgment of Justice Antoniani, a judge of the Superior Court of Justice in Toronto, dismissing the Appellant’s Claim, pursuant to s.137.1 of the Courts of Justice Act.

2. pursuant to s. 6(1)(b) and (d) of the Courts of Justice Act, an appeal lies to the Court of Appeal from a final order of a judge of the Superior Court of Justice under s.137.1 of the Courts of Justice Act; and
3. There is no requirement of leave to appeal under the Courts of Justice Act or the Rules.

The Appellant requests that this appeal be heard at Toronto.

*April 23, 2025*

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Court File No.

*Court of Appeal for Ontario*

PROCEEDING COMMENCED AT  
TORONTO

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RCP-F 4C (September 1, 2020)