

CITATION: Hartman v. Attorney General of Canada et al., 2025 ONSC 1831
COURT FILE NO.: CV-23-00115
DATE: 2025-03-24

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:)
)
DANIEL HARTMAN) Umar A. Sheikh and Angela Wood, Counsel
) for the Responding Party
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Responding Party)
(Plaintiff))
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- and -)
)
)
ATTORNEY GENERAL OF CANADA,) Mahan Keramati and Adrian Zita-Bennett,
THE DEPARTMENT OF HEALTH) Counsel for the Moving Parties
CANADA, and PATRICIA A. HAJDU)
(MINISTER OF HEALTH))
)
Moving Parties)
(Defendants))
)
) **HEARD:** November 12, 2024

REASONS FOR JUDGMENT

THE HONOURABLE JUSTICE S. ANTONIANI

Overview

[1] The Plaintiff advances a claim against the Defendants under s. 61 of the *Family Law Act*, R.S.O. 1990, c. F.3, following the tragic loss of his 17-year-old son, Sean Hartman. The claim alleges negligence and misfeasance in public office against the Defendants on the basis that a

Health Canada approved COVID-19 vaccine was administered to his son on August 25, 2021, causing his death on September 27, 2021.

[2] It cannot be overstated that Sean Hartman’s death at such a young age is a devastating loss to his family and to his community.

[3] The moving parties, the Attorney General of Canada (“Canada”), the Department of Health Canada (“Health Canada”), and Minister of Health, Patricia A. Hajdu (the “Minister”) (together, “the Defendants”) ask that the Plaintiff’s Statement of Claim be struck, without leave to amend, on the basis that it is plain and obvious that the claim, even if supplemented with the amendments the Plaintiff proposes, has no reasonable prospect of success.

[4] The moving parties request:

(a) An Order amending the style of cause to name the Attorney General of Canada and Patricia A. Hajdu (Minister of Health) as the sole Defendants;

(b) An Order striking the claim, in its entirety, without leave to amend;

(c) In the alternative, if leave to amend is granted, an Order that the Amended Statement of Claim be served within 45 days of the Order;

(d) In the further alternative, if this motion is dismissed, an Order that the Statement of Defence be served within 45 days of receipt of the Amended Statement of Claim or of the Order, whichever is later; and

(e) That no costs be awarded to either party.

Issues

[5] Have the Defendants established that it is plain and obvious that the claim cannot possibly succeed?

[6] If so, have the Defendants shown that this is one of the clearest of cases, and that no part of the claim can be cured by the Plaintiff's proposed amendments?

Decision

[7] It is plain and obvious that the claim cannot succeed, even with the proposed amendments. As such, the claim is struck without leave to amend.

Background Facts

[8] On September 16, 2020, in response to the COVID-19 pandemic, pursuant to her authority under s. 30.1(1) of the *Food and Drugs Act*, R.S.C. 1985, c. F-27 (the "FDA"), the Minister issued an *Interim Order Respecting the Importation, Sale and Advertising of Drugs for Use in Relation to COVID-19* (the "Interim Order"). The Interim Order allowed for a streamlined process to assess and approve COVID-19 vaccines, and it required Health Canada to "assess and monitor the safety and effectiveness" of vaccines on an ongoing basis, and to "take immediate action", if required, to protect the health and safety of Canadians.

[9] While the Interim Order both amended the administrative process for filing and examining drug authorization applications for COVID-19 related drugs and afforded new flexibility in the Minister's assessment of the evidence supporting the safety, effectiveness, and quality of these drugs, the type of evidence required in these applications (e.g., information supporting safety, efficacy, and quality) did not change.

[10] Summaries of safety and efficacy evidence that Health Canada relied upon to issue authorizations under the Interim Order were publicly available. The Minister was empowered to authorize vaccines for sale as long as certain requirements were met, including that: "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".

[11] On September 17, 2020, Health Canada published a document supporting the Interim Order, which stated, inter alia: "Health Canada will assess and monitor the safety and effectiveness

of all products authorized under the Interim Order. Health Canada will take immediate action, including the suspension or cancellation of authorizations or establishment licenses, if required, to protect the health and safety of Canadians.”

[12] On December 9, 2020, Health Canada authorized the use of a vaccine developed by Pfizer-BioNTech. Health Canada published information advising that the vaccine’s efficacy was 95% when compared to the placebo, that it was well tolerated, and that there were no significant safety concerns.

[13] The Plaintiff pleads that the cause of his son’s tragic death at age 17 was the Pfizer-BioNTech COVID-19 vaccine. He pleads that the Defendants failed to follow their own mandate pertaining to the assessment, approval, and continued authorization of the vaccine and knowingly made several negligent, reckless and false representations as to the vaccine’s safety and efficacy. He pleads that the Defendants’ actions were intended to and did in fact induce his son to take the vaccine, resulting in his death.

Positions of the Parties

[14] The Plaintiff does not take issue with either the Interim Order or the authorization of the use of the vaccine. Rather, he pleads that the representations were unreasonable and were made recklessly, in that they disregarded the Interim Order, overstating the vaccine’s efficacy when the results actually demonstrated minimal relative efficacy and showed more serious and significant risks of adverse events arising out of its use, including death. The Plaintiff pleads that the Defendants made these representations to the public to induce them to get vaccinated. The plaintiffs plead that the Defendants owed a duty of care to Sean Hartman and a duty to warn Sean Hartman of the risks associated with the safety and efficacy of the vaccines. The Plaintiff argues that the representations, together with his son’s reliance on them, created a relationship of proximity.

[15] The Plaintiff pleads that the Defendants made at least six types of representations encouraging the use of authorized COVID-19 vaccines. The Plaintiff pleads that some of the representations explicitly or implicitly stated the vaccine was effective, safe and/or that it met

Health Canada's stringent safety requirements, and that none of the representations mentioned information on concerns with the vaccine, including an increased risk of death.

[16] The Plaintiff pleads that during the period from December 9, 2020, to August 25, 2021, the Defendants did not issue any public statements or representations communicating that a possible side effect of receiving a COVID-19 vaccine was death. The Plaintiff pleads that the Defendants did not give effect to the Interim Order as they did not assess and monitor the safety and effectiveness of the vaccines on an ongoing basis, and failed to take immediate action to protect the health and safety of Canadians when they became aware of issues and health risks related to the vaccines, including the possibility of death.

[17] The Plaintiffs further plead at paragraph 80 of their claim that the Defendants were negligent in that they failed to disclose that individuals under 40 had an increased risk of myocarditis after receiving the Pfizer-BioNTech COVID-19 vaccination; (b) failing to disclose that rates of myocarditis were higher in adolescent males; (c) failure to require an adequate degree of testing, in a manner that would fully disclose the magnitude of the risks; (d) failing to complete post market surveillance and inform the public of the results

[18] The Plaintiff does not plead, either in the Statement of Claim or in the proposed amendments that there were any direct communications or representations from the Defendants or their agents to his son.

[19] The Defendants respond that the six representations relied on by the Plaintiff were statements made to the entire Canadian public communicating that the vaccine meets the required safety, efficacy, and quality criteria for use in Canada, and that mass vaccination is the most expeditious route to controlling the COVID-19 pandemic. The Defendants indicate that the statements were clearly not aimed at any discrete groups of individuals. The Defendants argue that the legislative scheme does not create any private law duty of care. An individual's reliance on public representations cannot by itself create a private law duty of care.

The Representations

[20] The six representations relied upon by the Plaintiff are as follows:

1. On December 9, 2020, Health Canada authorized the Pfizer-BioNTech vaccine for use in Canada on people 16 years of age and over. On that date, Health Canada stated publicly that it had determined that the vaccine met the Department's stringent safety, efficacy, and quality requirements for use in Canada.
2. On February 2, 2021, the Public Health Agency of Canada issued a news release entitled "Government of Canada supports protects to encourage vaccine uptake in Canada", stating therein:

"Today, the Minister of Health, the Honourable Patty Hajdu, announced an investment of more than \$64 million through the Immunization Partnership Fund (IPF) to help partners across the country in Canada increase COVID-19 vaccination uptake."

"These funds will also support the efforts of community members and leaders to increase vaccine confidence and address barriers to access and acceptance within their communities."

"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. Through these partnerships, we are ensuring that Canadians make informed and confident vaccine choices for themselves and their families. Increasing vaccination uptake and acceptance is how we can work together to protect those most at-risk."
(Attributed to the Minister of Health)

"All Canadians deserve a chance to achieve optimal health. This includes having access to credible information about vaccination and the opportunity to have open conversations with healthcare providers. Doctors, nurses, midwives, other healthcare providers and community leaders are invaluable in sharing knowledge to help keep us all safe, especially during

a pandemic.” (Attributed to Dr. Theresa Tam, Chief Public Health Officer of Canada)

3. On May 4, 2021, Prime Minister Justin Trudeau publicly stated that “[t]he impacts of catching COVID are far greater and far deadlier, as we’ve 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.”

4. On May 17, 2021, the Defendants launched the “Ripple Effect” advertising campaign to promote and encourage COVID-19 vaccinations. The campaign included the following statements:

“The Government of Canada is supporting Canadians to make informed COVID-19 vaccine choices. Today, the Honourable Patty Hajdu, Minister of health announced the launch of a new national campaign to encourage vaccine uptake, which will appear on television, radio, print, out-of-home and online.”

"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. Choosing to get vaccinated against COVID- 19 can have a cascading effect, culminating in a more vaccinated and protected Canada and eventual easing of public health restrictions."

"Vaccines are one of the most important ways to protect the health of Canadians. The COVID-19 pandemic has been challenging for everyone and the COVID-19 vaccines have provided us with hope for a return to what we miss most. This advertising campaign will help empower people to get vaccinated for their own health, and for the health of their families, loved ones and communities." (Attributed to the Minister of Health)

"As vaccine availability expands, I urge all people in Canada to get vaccinated and support others to get vaccinated as soon as they can. Through campaigns such as the 'Ripple Effect,' we are reminding people that the individual choices we make will have a positive impact on our collective future. As more and more people in Canada get vaccinated, we move closer to

getting back to the people, places, and activities we love. This is because getting vaccinated means you lower your personal risk of getting COVID-19 and you are less likely to transmit the virus to others." (Attributed to Dr. Theresa Tam, Chief Public Health Officer of Canada)

5. On June 15, 2021, the Defendants launched the "Ask the Experts" campaign to encourage vaccine uptake. The campaign included the following statements:

"Vaccines are a very important tool to fight the COVID-19 pandemic. Now that more and more Canadians are able to get vaccinated, it is important that everyone does their part. This small action makes a big difference – for you and those in your community. With the *Ask the Experts* campaign, credible experts will answer questions Canadians may have about these vaccines, to encourage uptake across the country." (Attributed to the Minister of Health)

"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!" (Attributed to Dr. Theresa Tam, Chief Public Health Officer of Canada)

6. On July 27, 2021, Prime Minister Justin Trudeau published a statement from the Prime Minister's Office stating that "[t]he best way to end this pandemic is for everyone to get their shots as soon as they can."

The Law

Rule 21

[21] Under r. 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, a pleading may be struck if it "discloses no reasonable cause of action." To succeed on this ground, the Defendants must show that it is "plain and obvious that the action cannot succeed": *PMC York Properties Inc. v. Siudak*, 2022 ONCA 635, leave to appeal refused, [2023] S.C.C.A. No. 40445, at paras. 30-31;

Attis v. Canada (Minister of Health), 2008 ONCA 660, 93 O.R. (3d) 35, at para. 23, leave to appeal refused, [2009] S.C.C.A. No. 32909.

[22] The claim must be “certain to fail because it contains a radical defect”, be “doomed to fail”, or be otherwise “hopeless” and incapable of being cured by amendment: *Filler Depot v. Copart Canada Inc*, 2024 ONSC 466, at para. 14; *Daly v. Landlord Tenant Board*, 2022 ONSC 2434, at paras. 21-22, aff’d 2023 ONCA 152, leave to appeal refused, [2023] S.C.C.A. No. 40729.

[23] It is well-established that the bar for striking a pleading is very high. As stated by the Supreme Court of Canada, “the motion to strike is a tool that must be used with care.” Courts must take a “generous approach” and “err on the side of permitting a novel but arguable claim to proceed to trial”: *PMC*, at para. 30; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 21.

[24] In assessing a r. 21 motion, the facts set out in the claim must be accepted as true. This does not include facts that are “patently ridiculous”, “manifestly incapable of being proven”, or “inconsistent with common sense, the documents incorporated by reference, or incontrovertible evidence proffered by both sides for the purpose of the motions.”: *PMC*, at para. 31; *Cerieco Canada Corp. v. Mizrahi*, 2024 ONSC 7001, at paras. 24 and 70. However, absent any such allegations, the facts set out in the claim must be taken as given, even though they will need to still be proven by the plaintiff at trial.

[25] Rule 25.06(1) of the *Rules* requires a statement of claim to “contain a concise statement of the material facts on which the party relies for its claim”, such that each defendant named “be able to look at the pleading and find an answer to a simple question: What do you say I did that has caused you, the plaintiff, harm, and when did I do it?”: *Burns v. RBC Life Insurance Company*, 2020 ONCA 347, 151 O.R. (3d) 209, at para. 16.

[26] Leave to amend should be disallowed only “in the clearest of cases,” for instance, “where it is clear that the deficiencies in the pleading cannot be cured by an appropriate amendment and

the plaintiff cannot allege further material facts that the plaintiff knows to be true to support the allegations.”: *Filler Depot*, at para. 19.

Negligent Misrepresentation

[27] The Defendants argue that the Plaintiff’s claims are bound to fail because:

- (a) There are sufficiently analogous legal precedents that definitively found no private law duty of care exists in these circumstances, in particular, the decision in *Adam, Abudu v. Ledesma-Cadhit et al*, 2014 ONSC 5726.
- (b) The applicable statutes and regulations do not give rise to a private law duty of care by the Defendants to the Plaintiff’s son;
- (c) The Plaintiff does not plead a relationship of sufficient proximity between the Defendants and his son to establish a private law duty of care; and
- (d) Any *prima facie* private law duty of care found to exist in the circumstances should be negated for residual policy reasons.

Negligence and a Private Law Duty of Care

[28] To establish negligence, the Plaintiff must show that:

- (a) The Defendants owed the Plaintiff a duty of care;
- (b) The Defendants’ behaviour breached the standard of care;
- (c) The Plaintiff sustained damage; and
- (d) The damage was caused by the Defendants’ breach.

[29] The crucial issue in this case is the first element: whether the Defendants owed the Plaintiff a duty of care, rather than owing its duty to the Canadian public, to act in the public interest: *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, at paras. 42-43.

[30] It is agreed by the parties that the test to be applied in the circumstances of this case is the *Anns/Cooper* test, which provides the framework for determining whether a public authority owes a private law duty of care to an individual plaintiff. The two-stage test is as follows:

1. Do the circumstances disclose reasonably foreseeable harm and sufficient proximity to establish a *prima facie* duty of care?
2. Are there residual policy considerations that may negate the imposition of such a duty?

[31] The existence of a private law duty of care can be most easily established if “the case falls within or is analogous to a category of cases in which a duty of care has previously been recognized.”: *Cooper*, at para. 41.

[32] However, a duty may be otherwise imposed if the plaintiff’s injury was reasonably foreseeable to the defendant and if the parties are in a sufficiently proximate relationship: *Cooper*, at para. 42.

[33] The Plaintiff agrees that this is not a situation where a duty of care has previously been recognized. As such, I must consider whether there was a sufficiently proximate relationship between the Plaintiff’s son and the Defendants such that it is “fair and just” to “require the defendant to be mindful of the legitimate interests of the plaintiff”: *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at paras. 29 and 181; *Cooper*, at paras. 33-34.

[34] In considering whether the Defendants owed the Plaintiff a *prima facie* duty of care, the first question to address is proximity. Where the defendant is a government party, the court is also required to review the relevant legislation to determine the issue of duty of care. Where the duty of care alleged conflicts with the defendant’s duty to the public at large, there must be a consideration of the parties’ specific conduct and interactions. As such, the inquiry will focus initially on the legislative scheme and secondly on the interactions, if any, between the regulator/government authority and the plaintiff: *Imperial Tobacco*, at paras. 37, 44-45.

The Legislative Scheme

[35] The Defendants derive their role in vaccine regulation from the *FDA* and its regulations. Health Canada is a federal department that is presided over by the Minister. The powers, duties, and functions of Health Canada and the Minister in relation to public health are set out in the *Department of Health Act*, S.C. 1996, c. 8 (the “*DHA*”), the *Public Health Agency of Canada Act*, S.C. 2006, c. 5 (the “*PHACA*”), and the *FDA*, and include “the protection of the people of Canada against risks to health and the spreading of diseases”: *DHA*, s. 4(2)(b). [Emphasis added.]

[36] The Public Health Agency of Canada (the “PHAC”) is a statutory federal agency established pursuant to the *PHACA* to assist the Minister in exercising the Minister’s powers, duties, and functions in relation to public health, including with respect to the protection, surveillance, and promotion of public health and responses to public health emergencies: *PHACA*, s. 3.

[37] The National Advisory Committee on Immunization (the “NACI”) is an external advisory body to the PHAC comprised of experts in the fields of pediatrics, infectious diseases, immunology, pharmacy, nursing, epidemiology, pharmacoeconomics, social science, and public health. The NACI provides the PHAC with guidance on the use of vaccines currently or newly approved for use in Canada.

[38] The PHAC and the Chief Public Health Officer communicate information received from the NACI to the public on matters relating to public health, including vaccination: Government of Canada, “National Advisory Committee on Immunization (NACI): Statements and publications” (last modified 12 January 2024).

[39] A vaccine is a drug within the meaning of the *FDA* and is normally authorized for sale in Canada under the submissions process for new drugs. A new drug submission must contain sufficient information and material for the Minister to assess the safety, efficacy, and quality of the new drug, pursuant to C.08.002 (2)(a) to (n) of the *Food and Drug Regulations*, C.R.C., c. 870.

[40] In the event the Minister believes that immediate action is required to deal with a significant direct or indirect risk to health, safety, or the environment, as was the situation in the case here, the Minister may make an interim order pursuant to s. 30.1 of the *FDA* and may order that certain provisions of the *Regulations* are not in effect.

Adam, Abudu v. Ledesma-Cadhit et al, 2014 ONSC 5726

[41] The pleadings here have strong similarities to those in *Adam, Abudu v. Ledesma-Cadhit et al* and I agree with the Defendants that the principles set out in that case are dispositive of the Plaintiff's claim.

[42] *Adam* arose out of the 2009 H1N1 pandemic. A young child received the government-sanctioned vaccine and died five days later. The child's parents brought an action against the governments of Canada and Ontario (together, the "Crowns"), as well as the doctor who administered the vaccine and the manufacturer of the vaccine. The claim alleged that the Crowns invited and encouraged the public to become vaccinated through public statements and advertising. The plaintiffs argued that they relied on the representations, comments, and public statements made by the Crowns. They alleged that the Crowns failed to caution the medical profession or the public that there were higher risks of death or injury when the vaccine was used on specific populations, such as the age group to which their daughter belonged, and they concealed such information: *Adam*, at paras. 19-20.

[43] The same statutory and regulatory authorities that are engaged in the present case were engaged in *Adam*. A s. 30.1 interim order was also in place.

[44] In *Adam*, in deciding on the r.21 motion brought by the Crowns, the court held that at the relevant time in 2009, there was a pandemic health risk facing the entire country, and that the Crowns anticipatorily developed a course of action designed to address the health and safety of the Canadian population. The decisions necessarily involved consideration and balancing of a myriad competing interests with the ultimate goal of protecting public health. Those same circumstances existed in the present case, during the COVID 19 pandemic.

[45] As with the present case, the representations alleged to have been made by the Crowns were to the Canadian public, and the court found that the group to which the plaintiffs' daughter belonged was neither discrete nor identifiable. The court held that the Crowns' decisions were identifiable policy decisions and could not ground an action in tort. The court dismissed the plaintiffs' claim because it was plain and obvious that they could not succeed: *Adam*, at paras. 5, 113 and 176.

[46] The court found that no material facts were plead and no causal nexus was alleged in relation to the claim that the Crowns concealed knowledge from the public. *Adam*, at para. 30.

[47] The court in *Adam* considered the very same legislative scheme as is engaged in the present case. It found that the *DHA* "did not create a duty of care to individuals"; the *PHACA* "indicates an obligation to protect Canadians against infectious diseases on a national level [...] not to an individual recipient of a vaccine"; and "the regulatory powers and functions of Health Canada under the FDA and regulations in relation to licensing of vaccines for use in Canada do not give rise to proximity between the regulator and individual users of a vaccine sufficient to create a relationship of proximity.": at paras. 128 and 135. The court undertook a comprehensive review of the legislative scheme and found in relation to each relevant legislation that the duty of the Crowns was in relation to the general public and not to specific groups of individuals: at paras. 120-144.

[48] I adopt the review and reasoning, and the conclusion of Chiappetta J. in *Adam* in relation to the legislative scheme. "Put simply, if the statutory scheme establishes only general duties to the public, the relationship between the parties must be of sufficient proximity to prioritize the interest of the individual over the general public interest. If sufficient proximity is established, tort liability may nonetheless be negated because of important policy considerations." *Adam*, at para. 45.

[49] The legislative scheme directing the actions of the Defendants in the present case gives rise to duties to the general public, and not to specific groups of individuals.

Material Facts

[50] There are no material facts plead and no causal nexus is alleged in relation to the claims in paragraph 80, where the Plaintiffs pled that adolescent males were at increased risk of myocarditis, and of failure of the Defendants to require an adequate degree of testing [of the vaccines] in a manner that would fully disclose the magnitude of the risks; or of the Defendants' failure to complete post market surveillance and inform the public of the results.

Proximity

[51] In considering proximity, I find that there is no significant factual distinction between *Adam* and the present case. As in *Adam*, the Defendants' actions were aimed at mitigating the health impact of a global pandemic on the Canadian public. The Defendants deemed that urgent action was necessary and endorsed an extensive program of immunization for the Canadian public.

[52] The plaintiff has pleaded that all six representations made by the Defendants and relied on in this claim, are statements made to the general public. There are no facts plead to suggest that the representations were made to a discrete or identifiable group.

[53] The representations are public representations by a regulator in relation to its public duties and obligations. The representations do not establish a relationship of proximity between any of the Defendants and the Plaintiff's son.

[54] Justice Chiappetta undertook an extensive examination of our court's previous findings in circumstances where a private law duty of care was alleged on facts addressing public health issues. I will not repeat here all of that court's thorough review, which is detailed at paras. 46-110, but I have reviewed each of those decisions in coming to my conclusion here. I have highlight some, below.

[55] In *Eliopoulos (Litigation Trustee of) v. Ontario (Minister of Health and Long-Term Care)* (2006), 82 O.R. (3d) 321 (C.A.), leave to appeal refused, [2007] S.C.C.A. No. 31783, Ontario's Minister of Health and Long-Term Care was sued by the estate of a man who died after contracting West Nile Virus. The court held that the Province of Ontario's statutory duties were a general

public law duty to be exercised in the general public interest and found that no private law duty of care existed. The court stated, at para. 20:

This case is concerned with a general risk faced by all members of the public and a public authority mandated to promote and protect the health of everyone located in its jurisdiction. The risk of contracting a disease that might have been prevented by public health authorities is a risk that is faced by the public at large.

[56] In *Abarquez v. Ontario*, 2009 ONCA 374, 95 O.R. (3d) 414, the court considered whether the government of Ontario owed a private law duty of care to nurses who contracted SARS while working pursuant to government directed policies. In dismissing the claim, the court held, at paras. 20, 28-29, that:

[W]hile Ontario is obliged to protect the public at large from the spread of communicable diseases such as West Nile Virus and SARS, Ontario does not owe individual residents of the province who contract such diseases a private law duty of care giving rise [to] claims for damages.

...

To impose a private law duty of care upon Ontario to safeguard the health of the nurses would conflict with the overriding public law duty to pronounce standards that are in the interest of the public at large. Simply put, the interests of nurses, like the interest of investors in *Cooper*, the clients in *Edwards* and the parents in *Syl Apps*, 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.

While Ontario was obliged to do its best to protect the public at large from the spread of SARS, this claim rests on the untenable proposition that Ontario owed the individual plaintiffs a general common-law duty of care affording them the right to sue for damages as a result of contracting SARS.

[57] In *Williams v. Canada (Attorney General)* (2005), 76 O.R. (3d) 763 (S.C.), aff'd 2009 ONCA 378, leave to appeal refused, [2009] S.C.C.A. No. 33257, the plaintiff sued the province of Ontario in relation to individuals who contracted SARS in 2003. The allegation was that Ontario

relaxed the infection control procedures imposed on hospitals both prematurely and negligently, thereby exposing people to SARS infection. In dismissing the claim, the court held, at para. 76:

It is clear that, to the extent that the provisions of s. 4 [of the *DHA*] purport to impose duties, they are owed “to the people of Canada”. They are not expressed to create private law duties and they are, in my opinion, by themselves, insufficient to create a relationship of proximity between the Minister, or Ministry, and any members of the public who may foreseeably be harmed by an exercise, or failure to exercise, the statutory powers or duties created.

[58] Upon concluding her review of the decisions considering a private law duty of care in scenarios involving public health, at para. 113 of *Adam*, Chiappetta J. stated:

In the current case, on the facts as pleaded, there is no combination of interactions between the parties sufficient to ground proximity: *Taylor*, para. 111. The pleading in terms of knowledge is bald and speculative, representations are alleged to have been made to the Canadian public, the group to which the Plaintiffs are alleged to have belonged was neither discrete nor identifiable and there are no allegations of a similar type of material misstatement.

[59] And at para. 115:

No such interactions or direct relationship exists in this case. This case involved a pandemic health risk facing the entire country. The Crowns’ course of action was developed out of concern for the health of Canadians and involved high level decisions and social and economic considerations.

[60] The conclusion in *Adam*, and here, is that there are very limited factual circumstances in which our courts have found sufficient proximity to ground a finding of a private law duty of care, in a public regulator, during a public health emergency. In those limited circumstances where the courts *have* found sufficient proximity, it was on the basis that the representations were made to discrete and identifiable segments of the community, or where the plaintiffs established specific and direct interactions with the government authority. The Plaintiff asks me to consider these cases in coming to a decision here.

[61] In *Taylor v. Canada (Attorney General)*, 2012 ONCA 479, 111 O.R. (3d) 161, at para. 114, the court found, in refusing to dismiss a claim relating to injury from a medical implant, that:

[T]he regulator failed to act to protect the life and safety of individuals when the regulator was fixed with knowledge of a clear, present and significant danger posed to a discrete and identifiable segment of the community. On these pleadings, there are the added features of a material misstatement by the regulator, a failure to correct that misstatement, a decision to refrain from notifying at least some of those individuals whom the regulator knew to be at risk as a result of the use of the implants, and a failure to adequately warn those whom Health Canada did notify of potential problems with the implants. [Emphasis added.]

[62] In *Heaslip Estate v. Mansfield Ski Club Inc.*, [2009 ONCA 594](#), 96 O.R. (3d) 401, the court refused to dismiss a claim where the plaintiff sued the province of Ontario for failure to provide air ambulance transport, resulting in death during land transport. The court held, at para. 20:

The claim asserted here does not rest solely upon a statute conferring regulatory powers, as in *Cooper and Attis*, but is focused instead on the specific interaction that took place between Patrick Heaslip and Ontario when the request for an air ambulance was made. In this case, the relationship between Patrick Heaslip and the governmental authority is direct, rather than being mediated by a party subject to the regulatory control of the governmental authority. [Emphasis added.]

[63] In *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, [2010] 1 S.C.R. 132, at para. 55, the court considered whether the government of Canada owed a duty of care to miners that were murdered after several months of violent conflict between striking miners and replacement workers. The court found that the requirements of foreseeability and proximity were met where the government knew of the ongoing issues and violence at the mines. The mine inspectors had a statutory duty to inspect the mine and to order the cessation of work if they considered it unsafe. They “had identified specific and serious risks to an identified group of workers” and knew that the steps being taken by management to maintain safe working conditions were not effective. [Emphasis added.]

[64] In the present case, I find that the exceptional factual circumstances as seen in *Taylor*, *Heaslip and Fullowka* do not exist, as there no direct interaction between the Defendants and the Plaintiff's son is alleged.

[65] I find that the facts pleaded underlying the claim are analogous to a growing category of claims where a duty of care has been denied, as there is no private law duty of care to individual members of the public injured by government core policy decisions in the handling of health emergencies which impact the general population: *Adam*; *Williams*; and *Eliopoulos*. The factual distinctions raised by the Plaintiff do not change the analysis.

[66] The Plaintiff also referenced para. 66 of *Attis*, wherein the Court stated:

However, once the government has direct communication or interaction with the individual in the operation or implementation of a policy, a duty of care may arise, particularly where the safety of the individual is at risk. If, for example, a government decides to issue a warning about a specific danger, in this case medical devices, or to make representations about the safety of a product, the government may be liable for the manner in which it issues that warning, or the content of those representations, especially where the government disseminates the warning or representation knowing that the individual consumer will rely on its contents and the individual does so.

[67] In my view, this paragraph emphasizes the reasons that the present case does not result in a duty of care, and does not assist the analysis. As stated, the Plaintiff does not plead any direct communication or interaction between his son and the Defendants in the operation or implementation of their vaccine campaign.

[68] As in *Adam*, the Plaintiff's tragedy is real, but there is no private law duty of care made out. After a careful reading of the claim, I have concluded that it does not establish a sufficient relationship of proximity between the Plaintiff's son and the Defendants to find a private law duty of care.

Core Policy Decisions

[69] The Defendants argue that the actions taken were core policy decisions and, as such, they are in any event immune from tort liability, even if a private duty of care was found to exist. The Plaintiff argues that the conduct he complains of was operational conduct and not policy decisions.

[70] I have considered the distinction between actions of the government which are operational, and policy decisions, and find that the actions of the Defendants here were clearly the expression of policy decisions and not operational.

[71] In *Imperial Tobacco*, the court examined what constitutes a policy decision that is generally protected from negligence liability, at para. 90:

I conclude that “core policy” government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. This approach is consistent with the basic thrust of Canadian cases on the issue, although it emphasizes positive features of policy decisions, instead of relying exclusively on the quality of being “non-operational”. It is also supported by the insights of emerging jurisprudence here and elsewhere. This said, it does not purport to be a litmus test. Difficult cases may be expected to arise from time to time where it is not easy to decide whether the degree of “policy” involved suffices for protection from negligence liability. A black and white test that will provide a ready and irrefutable answer for every decision in the infinite variety of decisions that government actors may produce is likely chimerical. Nevertheless, most government decisions that represent a course or principle of action based on a balancing of economic, social and political considerations will be readily identifiable. [Emphasis added.]

[72] At paras. 95-96, the court concluded that Canada’s campaign to promote the consumption of low-tar cigarettes was a core policy decision:

In short, the representations on which the third-party claims rely were part and parcel of a government policy to encourage people who continued to smoke to switch to low-tar cigarettes. This was a “true” or “core” policy, in the sense of a course or principle of action

that the government adopted. The government's alleged course of action was adopted at the highest level in the Canadian government and involved social and economic considerations. Canada, on the pleadings, developed this policy out of concern for the health of Canadians and the individual and institutional costs associated with tobacco-related disease. In my view, it is plain and obvious that the alleged representations were matters of government policy, with the result that the tobacco companies' claims against Canada for negligent misrepresentation must be struck out.

Having concluded that the claims for negligent misrepresentation are not actionable because the alleged representations were matters of government policy, it is not necessary to canvas the other stage-two policy grounds that Canada raised against the third-party claims relating to negligent misrepresentation.

[73] In *Adam*, the court considered the issue and concluded that authorizing vaccines in circumstances of a public health emergency is a core policy decision. The very same factors were at play here. The government faced a global pandemic, and made decisions in consideration of the health of the entire Canadian public.

Anns/Cooper Stage 2

[74] At the second stage of the *Anns/Cooper* test, the focus 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.

[75] The court in *Adam* cited *Eliopoulos* on this point, at para. 32-33:

In deciding how to protect its citizens from risks of this kind that do not arise from Ontario's actions and that pose an undifferentiated threat to the entire public, Ontario must weigh and balance the many competing claims for the scarce resources available to promote and protect the health of its citizens.

I agree with Ontario's submission that to impose a private law duty of care on the facts that have been pleaded here would create an unreasonable and undesirable burden on Ontario that would interfere with sound decision-making in the realm of public health. Public health priorities should be based on the general public interest. Public health authorities should be left to decide where to

focus their attention and resources without the fear or threat of lawsuits.

[76] As summarized by the Court of Appeal in *Williams*, at para. 25, with respect to *Eliopoulos*:

After considering the Cooper-Anns test, this court held, at paras. 17-19, that the exercise of the extensive discretionary powers to take measures to protect the public from the spread of infectious disease did not create a private law duty in that case. The powers “are to be exercised...in the general public interest” and they “are not aimed at or geared to the protection of the private interests of specific individuals”. While the Minister of Health is under a general public law duty “to promote, safeguard and protect the health of Ontario residents and prevent the spread of infectious diseases...a general public law duty of that nature does not give rise to a private law duty sufficient to ground an action in negligence”. Rather, the Minister is required to act in the general public interest, and in so doing must balance “a myriad of competing interests”, the nature of which are inconsistent with the imposition of a private law duty of care.

[77] As per *Taylor v. Canada*, 2020 ONSC 1192, aff’d 2022 ONCA 892, I find that imposing a private law duty of care on the Defendants in the circumstances of this case would create a chilling effect and constrain the ability of public health officials to communicate broader public health messages regarding vaccination and other health measures that are necessary to collectively protect the health of Canadians as a whole. Indeed, as this court put it, at para. 618:

The policy, which the legislation and regulation supports, is directed to all Canadians and to our collective benefit bringing to those in need medical devices that will bring relief. The balance between efficacy and safety which is at the foundation of this policy accepts that, for some, there are risks that may be realized. However, to fasten the Crown with a duty of care to those individuals would upset the policy. The balance would be skewed by the need of the Crown to minimize its liability by refusing to allow new devices into the market until it had assurance of the long-term benefit and absence of risk.

[78] I conclude that the representations made by the Defendants here were the expressions of core policy decisions, made in an effort to protect the general Canadian public during a pandemic.

The imposition of a private duty of care would have a negative impact on the ability of the Defendants to prioritize the interests of the entire public, with the distraction of fear over the possibility of harm to individual members of the public, and the risk of litigation and unlimited liability to an indeterminate class: *Cooper*, at para. 54; *Adam*, at para. 164; and *Attis*, at para. 74.

Misfeasance in Public Office – Fraud and Deceit

[79] The Plaintiff pleads misfeasance in public office and fraud and deceit, stating that:

- a) Health Canada and the Minister were both “recklessly indifferent or willfully blind in discharging [their] responsibilities of regulatory approval and oversight of the [vaccine]” which “produced the foreseeable result of Sean Hartman’s death”;
- b) Health Canada and the Minister “made false representations of fact...regarding the safety and efficacy of the [vaccine]” which Sean Hartman relied on and which “led to his death”; and
- c) Health Canada and the Minister “negligently misrepresented the safety of the vaccine” and “negligently exercised [their] operational function authorizing the [vaccine]”, which caused the “wrongful death” of Sean Hartman.

[80] The Plaintiff also pleads that the Defendants:

- a) “Eschewed their duty to assess and monitor but rather parroted the manufacturers’ positive claims while ignoring the evidence of [v]accine’s lack of relative efficacy and risk of significant adverse effects”;
- b) “[K]new that the [v]accine was unsafe, was likely to harm individuals such as the Plaintiff’s son, and yet took actions that were objectively inconsistent with their statutory duties”;
- c) “Knew that the [v]accine was not or was negligibly effective”; and

d) “[S]pecifically ignored and in fact concealed the significant and present risk of adverse events-including death” in encouraging Canadians to make informed decisions concerning vaccination.

[81] To prove misfeasance in public office, the Plaintiff must show:

- a) Deliberate, unlawful conduct in the exercise of public functions;
- b) Awareness that the conduct is unlawful and likely to injure the Plaintiff’s son;
- c) Harm;
- d) A legal causal link between the tortious conduct and the harm suffered; and
- e) An injury that is compensable in tort law.

Odhavji Estate v. Woodhouse, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 32.

[82] The court in *Odhavji Estate* distinguished two categories of behaviour which could ground an action in misfeasance in public office, at para. 22:

Category A involves conduct that is specifically intended to injure a person or class of persons. Category B involves a public officer who acts with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff.

[83] The court emphasized the fact that each of the two categories require deliberate misconduct, which consists of (i) an intentional illegal act; and (ii) an intent to harm an individual or class, at paras. 25 and 28:

Canadian courts also have made a deliberate unlawful act a focal point of the inquiry. In *Alberta (Minister of Public Works, Supply and Services) v. Nilsson* (1999), 70 Alta. L.R. (3d) 267, [1999 ABQB 440](#), at para. [108](#), the Court of Queen’s Bench stated that the essential question to be determined is whether there has been deliberate misconduct on the part of a public official. Deliberate misconduct, on this view, consists of: (i) an intentional illegal act; and (ii) an intent to harm an individual or class of individuals. See also *Uni-Jet Industrial Pipe Ltd. v. Canada (Attorney*

General) (2001), 156 Man. R. (2d) 14, [2001 MBCA 40](#), in which Kroft J.A. adopted the same test. In *Powder Mountain Resorts, supra*, Newbury J.A. described the tort in similar terms, at para. 7: . . . it may, I think, now be accepted that the tort of abuse of public office will be made out in Canada where a public official is shown either to have exercised power for the specific purpose of injuring the plaintiff (i.e., to have acted in “bad faith in the sense of the exercise of public power for an improper or ulterior motive”) or to have acted “unlawfully with a mind of reckless indifference to the illegality of his act” and to the probability of injury to the plaintiff. (See Lord Steyn in *Three Rivers*, at [1231].) Thus there remains what in theory at least is a clear line between this tort on the one hand, and what on the other hand may be called negligent excess of power — i.e., an act committed without knowledge of (or subjective recklessness as to) its unlawfulness and the probable consequences for the plaintiff. [Emphasis in original.] Under this view, the ambit of the tort is limited not by the requirement that the defendant must have been engaged in a particular type of unlawful conduct, but by the requirement that the unlawful conduct must have been deliberate and the defendant must have been aware that the unlawful conduct was likely to harm the plaintiff.

...

The requirement that the defendant must have been aware that his or her conduct was unlawful reflects the well-established principle that misfeasance in a public office requires an element of “bad faith” or “dishonesty”. In a democracy, public officers must retain the authority to make decisions that, where appropriate, are adverse to the interests of certain citizens. Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly. A public officer may in good faith make a decision that she or he knows to be adverse to interests of certain members of the public. In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office.

[84] The Plaintiff argues that establishing a duty of care is not an element of misfeasance of public office. However, a consideration of the second element, awareness that the conduct is unlawful and likely to injure the plaintiff, necessarily engages many of the same considerations. As stated by the court in *Odhavji Estate*, at paras. 29 and 38:

This requirement establishes the required nexus between the parties. Unlawful conduct in the exercise of public functions is a public wrong, but absent some awareness of harm there is no basis on which to conclude that the defendant has breached an obligation that she or he owes to the plaintiff, as an individual. And absent the breach of an obligation that the defendant owes to the plaintiff, there can be no liability in tort. [Emphasis added.]

...

[M]isfeasance in a public office is an intentional tort that requires subjective awareness that harm to the plaintiff is a likely consequence of the alleged misconduct.

[85] There is no allegation of any interaction between the Plaintiff's son and the Defendants upon which one could conclude there was a "subjective awareness that harm to the plaintiff was a likely consequence". There are no facts plead to establish liability under either Category A or B of misfeasance in public office, as defined by the court in *Odhavji Estate*.

[86] Given that the representations were made to the public at large and pursuant to lawful authority in the midst of a public health crisis, the Defendants could not have had a subjective awareness that any harm would be done to the Plaintiff's son.

The Current pleadings and the Proposed Amendments

[87] The Plaintiffs propose to amend their Statement of Claim by adding more than four pages of additional pleadings to it. The proposed amendments are a repetition and detailed expansion of the same facts already plead.

[88] While they provide greater detail, none of the proposed amendments address the primary deficit in the Claim: they do not advance any facts which would impact the assessment herein as to the lack of any sufficient relationship of proximity, upon which to find a private law duty of care. Specifically, they do not allege that there were any direct interactions between the Plaintiff's son and the Defendants, or that the communications of the Defendants were directed at a discrete group to which the Plaintiff's son belonged.

[89] The proposed amendments do not address any the deficiencies in relation to the tort of misfeasance of public office. In particular, they do not remedy the lack of facts plead which could allow for a conclusion that the Defendants or any of them had knowledge that their actions would likely injure the Plaintiff's son.

[90] The proposed amendments to the claim do not change the analysis and would not remedy the defect. Even with the proposed amendments, it is plain and obvious that the claim cannot succeed.

Conclusion:

[91] The necessary elements to ground an action in negligence are not present. The duties of the Defendants under the legislative scheme are to the Canadian public. Sufficient proximity is not established and there is no private law duty of care. Other policy considerations militate against finding such a duty. As such, it is plain and obvious that the claim cannot succeed.

[92] The necessary elements to ground an action in misfeasance in public office are not present. It is plain and obvious that the claim cannot succeed.

[93] The proposed amendments to the Statement of Claim would not assist in addressing these shortcomings.

Order:

[94] The style of cause shall be amended to name the Attorney General of Canada and Patricia A. Hajdu (Minister of Health) as the sole Defendants.

[95] The claim is struck in its entirety, without leave to amend.

[96] There shall be no costs awarded to either party.



S. Antoniani J.

CITATION: Hartman v. Attorney General of Canada et al., 2025 ONSC 1831
COURT FILE NO.: CV-23-00115
DATE: 2025-03-24

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

DANIEL HARTMAN

Responding Party
(Plaintiff)

- and -

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

Moving Parties
(Defendants)

REASONS FOR JUDGMENT

S. Antoniani, J.

Released: March 24, 2025