



Court File No.:

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Electronically issued : 28-Nov-2019
Délivré par voie électronique
Toronto

G.C. and J.C.

Plaintiffs

- and -

MARTIN JUGENBURG and
DR. MARTIN JUGENBURG MEDICINE PROFESSIONAL CORPORATION

Defendants

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

STATEMENT OF CLAIM

TO THE DEFENDANTS:

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

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

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

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

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL

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FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date November 28, 2019 Issued by _____
Local Registrar

Address of Superior Court of Justice
court office: 393 University Avenue, 10th Floor
Toronto, ON M5G 1E6

TO: **Martin Jugenburg**
Toronto Cosmetic Surgery Institute
The Fairmont Royal York Hotel
100 Front Street West, Level B
Toronto, ON M5J 1E3

TO: **Dr. Martin Jugenburg Medicine Professional Corporation**
Toronto Cosmetic Surgery Institute
The Fairmont Royal York Hotel
100 Front Street West, Level B
Toronto, ON M5J 1E3

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CLAIM

1. The Plaintiffs, on their own behalf and on behalf of Class members as defined in paragraph 10 below, claim:

- (a) an order permitting the Plaintiffs to be named by the pseudonyms G.C. and J.C.;
- (b) an order pursuant to the *Class Proceedings Act, 1992* (the “CPA”), certifying this action as a class proceeding and appointing G.C. and J.C. as the representative plaintiffs;
- (c) damages, including aggravated damages, in the amount of \$50,000,000, for breach of trust, breach of fiduciary duty, negligence, breach of confidence, intrusion upon seclusion, the tort of public disclosure of private facts, and unjust enrichment;
- (d) an order compelling the Defendants to make an accounting of all referrals obtained by them through social media and all profits they have obtained from using the Class members’ photographic images and videos over social media and disgorgement of those profits to the Class;
- (e) special damages, including lost wages, lost earning capacity, out-of-pocket expenses, and costs of past and future care, including any provincial or territorial health insurers’ subrogated claims, in an amount to be determined, particulars of which will be provided in advance of trial;
- (f) punitive and exemplary damages in the amount of \$25,000,000 or as fixed by the Court;

- (g) a declaration that the Defendants owed fiduciary and common law duties of care to the Class, and that they breached these duties by engaging in the conduct described below;
- (h) a declaration that the Defendants are liable to the Class for damages caused or materially contributed to by the Defendants' breaches of their fiduciary and common law duties of care;
- (i) a declaration that the Defendants breached the Class members' rights to privacy and confidentiality, and committed the torts of intrusion upon seclusion, breach of confidence, and public disclosure of private facts by engaging in the conduct described below;
- (j) a declaration that the Defendants have been unjustly enriched to the detriment of the Class by publishing the Class members' intimate photographic images and videos on the internet, with the intent and purpose of promoting and marketing the Defendants' plastic surgery business, and without the Class members' consent;
- (k) a mandatory order requiring the Defendants to immediately surrender to the Class members all images, videos and/or audio recordings of the Class members that remain in their possession, power, and control, and directing the Defendants to permanently delete and destroy all digital, film, or electronic copies of these images and/or videos;
- (l) damages in an amount to be fixed by the Court for the costs of providing notice of certification of this action as a class proceeding, and for administering the plan of distribution of the recovery of this action;

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- (m) such further and other damages as may be incurred by the Class from the date hereof until the ultimate disposition of this matter, particulars of which will be provided prior to trial;
- (n) an order directing a reference or giving such other directions as may be necessary to determine issues not determined at the trial of the common issues, in accordance with the Plaintiffs' litigation plan or as directed by the court;
- (o) pre-judgment and post-judgment interest compounded annually or pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "CJA");
- (p) costs of this action pursuant to the *CJA*, as amended, or, in the alternative, on a substantial indemnity basis together with applicable taxes payable pursuant to the provisions of the *Excise Tax Act*, R.S.C. 1985, c. E-15, as amended; and
- (q) such further and other relief as this Honourable Court may deem just.

OVERVIEW

2. Martin Jugenburg (who markets himself, particularly on social media, by the populist pseudonym "Dr. 6ix") is a plastic surgeon carrying on business in Toronto, Ontario, through his professional corporation Dr. Jugenburg Medicine Professional Corporation (together, "Dr. Jugenburg").

3. Dr. Jugenburg practices primarily out of his clinic in downtown Toronto, the Toronto Cosmetic Surgery Institute (the "Clinic"), where he offers a variety of cosmetic surgical procedures primarily targeted towards women – breast augmentations, liposuction, "Brazilian Butt Lifts", labia reduction, and so on.

4. Dr. Jugenburg enters into a doctor-patient relationship with, and therefore owes a duty of care to, every person who attends his Clinic for a consultation, appointment and/or medical or surgical procedure. He is required to give patients all of the information they need to make free and informed decisions with full knowledge of the facts about the treatment and care offered by the Clinic. Dr. Jugenburg also owes a fiduciary duty to his patients, which requires him to act in the best interest of his patients and to prioritize their interests over his own personal interests, with respect to his patients' health and well-being.

5. As a physician and health information custodian, Dr. Jugenburg is obliged to maintain patient-doctor confidentiality and to take all reasonable steps to protect the privacy of his patients and their personal information, including personal health information.

6. All of these duties were violated by Dr. Jugenburg. He surreptitiously placed recording devices (capable of capturing both video and audio) throughout his Clinic, including in waiting, consultation and examination rooms, where private conversations between patients and persons accompanying them took place, patient medical histories were discussed, and patients were often instructed to undress, respectively. These recording devices were also placed in operating rooms where patients were sedated and operated on while fully or partially undressed. Dr. Jugenburg operated these recording devices and collected photographic images, video and audio recordings of his patients without their consent.

7. Not only did Dr. Jugenburg intentionally violate his patients' privacy by recording them without their knowledge, he also violated their privacy by obtaining additional

intimate photographic images of his patients under the false pretense that the images would be used only for the purpose of providing the patients with medical care.

8. Dr. Jugenburg and his staff used many intimate photographic images and videos of patients, regardless of their source, to promote Dr. Jugenburg's plastic surgery business. These photographic images and videos were published on the internet, including on popular social media platforms such as Snapchat, Instagram, Twitter, Facebook, and YouTube, without patient consent and often even without the patient's knowledge.

FACTS

The Plaintiffs & the Class

9. G.C. was a patient of Dr. Jugenburg and the Clinic. She currently resides in the City of Waterloo, in the Province of Ontario.

10. J.C. was a patient of Dr. Jugenburg and the Clinic. She currently resides in the City of Markham, in the Province of Ontario.

11. G.C. and J.C. bring this action pursuant to the *CPA* on their own behalf and on behalf of former patients of Dr. Jugenburg and the Clinic (the "Class" or "Class members"), defined to include:

All patients who attended at the Toronto Cosmetic Surgery Institute from January 1, 2012 to February 28, 2019.

12. This action is also maintained on behalf of all provincial and territorial health insurance authorities.

Dr. Jugenburg and the Toronto Cosmetic Surgery Institute

13. Dr. Martin Jugenburg is a plastic surgeon who has been licenced to practice in Ontario by the College of Physicians and Surgeon (“CPSO”) since May 2007.

14. In or around May 2009, Dr. Jugenburg incorporated professionally under the name “Dr. Martin Jugenburg Medicine Professional Corporation”.

15. The Toronto Cosmetic Surgery Institute is a plastic surgery clinic owned and operated by Dr. Jugenburg. It operates out of the Fairmont Royal York Hotel in downtown Toronto.

16. At the Clinic, Dr. Jugenburg performs a variety of cosmetic plastic surgery procedures, including breast augmentations, breast lifts, breast reconstruction, breast reduction, abdominoplasty (also known as “tummy tucks”), liposuction, buttock lifts (including a proprietary procedure marketed as a “Brazilian Butt Lift by Dr. 6ix”), labia reduction, hymen reconstruction, and mons pubis liposuction. He also offers multi-procedure service packages such as “mommy makeovers”, non-surgical cosmetic procedures such as Botox injections, and cosmetic surgical procedures for men.

17. In the vast majority of cases, Dr. Jugenburg’s patients pay out-of-pocket for his services, as the cosmetic services are not covered by provincial or territorial health insurers, or by private health insurers.

18. Prior to and following surgical procedures performed by Dr. Jugenburg, patients must attend a variety of appointments with Dr. Jugenburg and/or staff under his direction, including initial, pre-operative, post-operative, and follow-up consultations. During these appointments, patients are often required to undress, partially or fully, to reveal the

subject area of the surgical procedure, which often requires the exposure of their breasts, buttocks and/or genitalia.

19. Although other plastic surgeons also practice at the Clinic, they do so only under the supervision and direction of Dr. Jugenburg. At all material times, the other plastic surgeons had no control over, nor did they operate, the surveillance and video cameras that were installed throughout the Clinic. At all material times, Dr. Jugenburg provided care to the Class members as their treating physician. As such, Dr. Jugenburg owed the Class a fiduciary duty, statutory duty, and common law duty of care, which included a duty of privacy and confidentiality.

Personal health information

20. Personal health information, as defined in the *Personal Health Information Protection Act, 2004*, S.O. 2004, c. 3, Sched. A (“*PHIPA*”), includes identifying information about an individual in oral or recorded form, if the information, *inter alia*:

- (a) relates to the physical or mental health of an individual, including information that consists of the health history of the individual's family;
- (b) relates to the provision of health care to the individual, including the identification of a person as a provider of health care to the individual; or
- (c) relates to payments or eligibility for health care in respect of the individual.

21. Pursuant to s. 29 of the *PHIPA*, a health information custodian such as a physician or medical clinic shall not collect, use or disclose personal health information about an individual unless it is done with the individual's consent and is necessary for a lawful purpose.

22. Pursuant to s. 31 of the *PHIPA*, a health information custodian that collects personal health information in contravention of the *PHIPA* shall not use or disclose it unless required by law to do so.

23. The procedures performed at the Clinic are of an extremely personal and intimate nature. As a result, the photographic images and videos captured of the Class members contain a significant amount of particularly sensitive personal information, including personal health information.

24. Simply the fact of a Class member's depiction in the photographic images and videos is evidence of their attendance at the Clinic, which is, in and of itself, sensitive personal health information. In marketing cosmetic surgery procedures on the Clinic website, Dr. Jugenburg acknowledges this, stating: "Dr. Jugenburg and his caring, professional staff understand the discreet nature of the need for this type of surgery and, as always, all information will remain strictly confidential."

25. The Clinic website contains a Privacy Policy, which states as follows:

At the Toronto Cosmetic Surgery Institute, you are within the confines of a medical clinic. As such, we follow the guidelines set out by the College of Physicians and Surgeons of Ontario titled "Confidentiality of Personal Health Information" which all physicians and medical offices follow. **All information about you, your health, and your procedures is strictly private. We do not share your medical records with anybody without your prior permission.**

The Policy on Confidentiality follows the Personal Health Information Protection Act 2004 (PHIPA), to ensure personal health information is protected at all times.

Dr. Jugenburg and the staff of the Toronto Cosmetic Surgery Institute act in accordance with all of their professional and legal obligations to establish and preserve trust in the physician-patient relationship, to provide patients with the confidence that their personal health information will remain confidential. Maintaining confidentiality is fundamental to providing the highest standard of patient care. Patients who understand that their information will remain confidential are more likely to provide the physician with complete and accurate health

information, which in turn, leads to better treatment advice from the physician. [emphasis added]

26. At all material times, Dr. Jugenburg and the Clinic were required to abide by the Canadian Medical Association *Code of Ethics and Professionalism*. Without limiting the generality of the foregoing, Dr. Jugenburg and the Clinic were required to:

- (a) prioritize the well-being of every patient and always act for the patient's benefit;
- (b) always treat patients with dignity;
- (c) never exploit a patient for personal advantage; and
- (d) fulfill a physician's duty of confidentiality by collecting, using, and disclosing only as much health information as necessary to benefit a patient; and sharing information only to benefit the patient and within the patient's circle of care.

27. At all material times, Dr. Jugenburg and the Clinic were required to abide by the CPSO's *Practice Guide*, which states: "Patients give information to physicians in a unique context where they have the utmost faith that the physician will maintain patient privacy and confidentiality...Physicians must safeguard patient information."

28. At all material times, Dr. Jugenburg and the Clinic were required to abide by the CPSO's *Confidentiality of Personal Health Information* policy, *Medical Records* policy, and *Physician Behaviour in the Professional Environment* policy. Without limiting the generality of the foregoing, Dr. Jugenburg and the Clinic were required to:

- (a) only disclose a patient's personal health information with consent and when disclosure is necessary for a lawful purpose;
- (b) only disclose a patient's personal health information outside of the patient's circle of care with express consent;

- (c) only assume implied consent of a patient to collect, use, or disclose the patient's personal health information if the personal health information is being used, collected or disclosed for the purpose of providing or assisting in the provision of health care to the patient; and
- (d) act in the best interests of the patient.

29. Ontario Regulation 856/93 "Professional Misconduct", made under the *Medicine Act, 1991*, S.O. 1991, c. 30, states that it is an act of professional misconduct for the purposes of clause 51(1)(c) of the *Health Professions Procedural Code* to "[give] information concerning the condition of a patient or any services rendered to a patient to a person other than the patient or his or her authorized representative except with the consent of the patient or his or her authorized representative or as required by law".

30. The Plaintiffs and the proposed class reasonably expected that Dr. Jugenburg complied with his professional obligations and ethical duties while treating them and all his patients. Compliance with these professional obligations and ethical duties was necessary for Dr. Jugenburg to meet the standard of care of a plastic surgeon.

The Defendant's wrongful conduct

31. In or around May 2016, Dr. Jugenburg began marketing himself as "Dr. 6ix" and began to promote his plastic surgery practice and the Clinic more actively on the internet, particularly on various social media platforms including Snapchat, Instagram, Instagram Stories, Twitter, Facebook, Facebook Live, and YouTube. As a result, Dr. Jugenburg's online and social media postings began to include more photographic images and videos of Clinic patients, including photographic images and videos taken during surgical procedures.

32. Instagram, Twitter, Facebook, and YouTube content may be viewed by any member of the public with access to the internet. Snapchat, Instagram Stories, and Facebook Live content may be viewed by followers of an account. At all material times, any member of the public could follow Dr. Jugenburg's Snapchat, Instagram or Facebook accounts, because Dr. Jugenburg never limited the followers of any of his social media accounts. Effectively, posting photographic images and videos of the Class members to a variety of social media platforms meant that Dr. Jugenburg distributed them for the entire world to access.

33. Those photographic images and videos were collected from two sources:

- (a) 24 recording devices (16 cameras on the first floor and eight cameras on the second floor), which Dr. Jugenburg installed beginning on or around January 1, 2012. The devices recorded continuously (24 hours a day), and covered the entire Clinic premises, including the reception areas, waiting rooms, consultation rooms, examination rooms, operating rooms, and hallways. The devices recorded audio and video of patients during confidential appointments and procedures, while nude or partially nude, discussing personal health information, in the course of being examined, and even while being operated on. At all material times, the recording devices were activated, recording without patient consent, and uploading footage to two Network Video Recorders located on the Clinic premises. In addition, live footage from all of the recording devices was available through an application on Dr. Jugenburg's smartphone. At all material times, the recording devices were not used for patients' medical

treatment and care, but rather were used solely to serve Dr. Jugenburg's personal and business interests; and

- (b) during some or all patient appointments, Dr. Jugenburg and/or his staff as directed by him instructed patients to undress so that photographs of their nude or semi-nude bodies could be taken. Patients were led to believe, by Dr. Jugenburg and/or his staff as directed by him, that these photographs were taken to assist Dr. Jugenburg in providing medical treatment and care to the patient. Thus, although patients consented to the collection of these photographic images to assist with providing medical treatment and care, they did not consent to their photographic images being publicly displayed to serve Dr. Jugenburg's personal and business interests.

34. Since in or around May 2016, the use of photographic images and/or videos depicting patients has constituted a significant majority of Dr. Jugenburg's marketing efforts in support of his Clinic. These efforts have resulted in Dr. Jugenburg enjoying greater professional success – as evidenced by the expansion of the Clinic – with associated elevated profits.

G.C.'s experience

35. In January 2018, G.C. contacted the Clinic to book a consultation appointment to discuss undergoing a potential breast augmentation procedure with Dr. Jugenburg. She paid a non-refundable \$200 consultation fee.

36. On or about January 30, 2018, G.C. and her husband attended at the Clinic for her consultation appointment. On arrival, G.C. and her husband were asked to take a seat in

the waiting room. While in the waiting room, G.C. and her husband engaged in private conversations.

37. After waiting for about one hour, G.C. and her husband were escorted by a nurse into a consultation room. The nurse, acting under the direction of Dr. Jugenburg, began the appointment without Dr. Jugenburg attending. As part of the appointment, the nurse obtained information from G.C., including her detailed medical history.

38. During the consultation, the nurse instructed G.C. to remove her top and bra. The nurse then proceeded to take photographs of G.C.'s naked breasts and torso, which G.C. understood to be for the purpose of providing her medical treatment and care. At no time was G.C. provided with a gown or cover-up. While standing there, being photographed while partially naked, G.C. felt exposed and uncomfortable. After the photographs were taken, G.C. was instructed to put her bra and clothing back on.

39. Later in the appointment, Dr. Jugenburg entered the consultation room. He reviewed the photographs that had been taken by the nurse and instructed G.C. to remove her top and bra again. He then asked G.C. to come towards him. Although G.C. continued to feel uncomfortable, she complied in an effort to ensure that she received proper medical treatment and care.

40. Dr. Jugenburg requested that G.C. come closer to him twice more, then commenced a physical examination which included touching her breasts. He did not confirm her consent to the physical examination or explain the purpose of the examination. Dr. Jugenburg also asked G.C. to flex her chest. G.C. was embarrassed and reluctant to comply with Dr. Jugenburg's requests, but ultimately did so, still under

the understanding that these actions were all for the purpose of providing her medical treatment and care.

41. Dr. Jugenburg then asked whether G.C. had any questions. In response to one of her questions, Dr. Jugenburg refused to answer the question and instead instructed her to follow him on Snapchat since he would be answering the question on his Snapchat account that night. Following this exchange, Dr. Jugenburg left the consultation room.

42. After Dr. Jugenburg left the consultation room, G.C. tried on different breast implant sizes and styles with the assistance of the nurse, which involved the nurse physically placing and adjusting the implants inside G.C.'s bra.

43. At one or more times during the consultation process, G.C. and her husband were left alone in the consultation room, during which they engaged in private conversations.

44. At no time before, during or after G.C.'s consultation appointment did Dr. Jugenburg or his staff:

- (a) advise G.C. that there were recording devices recording her in the Clinic, including in the consultation room;
- (b) obtain G.C.'s written or oral consent to be recorded while on the Clinic premises;
- (c) advise G.C. that the photographic images taken of her naked breasts and torso might be published on the internet; or
- (d) obtain G.C.'s written or oral consent to have photographic images of her published on the internet or at all.

45. G.C. decided not to proceed with the procedure with Dr. Jugenburg, based on the negative reaction she had to her experience at the Clinic.

46. On or about December 14, 2018, G.C. read a CBC News article which stated that CBC investigators had observed video surveillance cameras set up throughout Dr. Jugenburg's Clinic, including in consultation rooms like the one where G.C. had attended. G.C. then realized that she had been videotaped during her consultation at the Clinic and that her privacy had been invaded intentionally.

47. As a result of Dr. Jugenburg's deliberate and significant invasion of her personal privacy, G.C. felt distressed, embarrassed, utterly humiliated and overwhelmed by a deep sense of personal violation.

J.C.'s experience

48. In July 2018, J.C. contacted the Clinic to book a consultation appointment to discuss undergoing a potential breast augmentation procedure with Dr. Jugenburg. She also paid a non-refundable \$200 consultation fee.

49. On or about, August 14, 2018, J.C. attended at the Clinic for her consultation appointment. She was accompanied by a friend. On arrival, J.C. and her friend were asked to sit in the waiting room.

50. From the waiting room, J.C. was escorted by a nurse into a consultation room. Acting under the direction of Dr. Jugenburg, who was not present, the nurse conducted the consultation appointment. As part of the appointment, the nurse obtained information from J.C., including J.C.'s medical history.

51. During the consultation, the nurse asked J.C. to remove her top and bra. While undressed, the nurse took photographs of J.C.'s naked breasts and torso, which J.C. understood to be for the purpose of providing medical treatment and care to her.

52. The nurse then assisted J.C. in trying different types of breast implants. During the course of trying implants, J.C. was naked from the waist up, wearing only a bra. The nurse assisted J.C. by inserting and adjusting various breast implants inside J.C.'s bra.

53. After J.C. selected the type of implant to be used for her procedure, the nurse offered to bring J.C.'s friend into the consultation room to offer an opinion on the selected implant.

54. At some point during the consultation, J.C. advised the nurse that she was potentially also interested in an abdominoplasty procedure. The nurse instructed J.C. to remove her pants, which J.C. did, again on the understanding that it was for the purpose of providing medical treatment and care. J.C. felt exposed and uncomfortable as she stood in her underwear and the nurse examined her stomach. After the examination, J.C. got dressed.

55. Before the appointment concluded, the nurse reviewed J.C.'s surgical options and the associated costs.

56. At one or more times during the consultation process, J.C. and her friend were left alone in the consultation room, during which they engaged in private conversations.

57. At the conclusion of the appointment, J.C. left the clinic to consider her options. She ultimately decided not to have Dr. Jugenburg perform any procedures.

58. At no time before, during or after J.C.'s consultation appointment did Dr. Jugenburg or his staff:

- (a) advise J.C. that there were recording devices recording her in the Clinic, including in the consultation room;
- (b) obtain J.C.'s written or oral consent to be recorded while on the Clinic premises;

- (c) advise J.C. that the photographic images taken of her naked breasts and torso might be published on the internet; or
- (d) obtain J.C.'s written or oral consent to have photographic images of her published on the internet or at all.

59. On or about December 14, 2018, J.C. also read the CBC News article which stated that CBC investigators had observed video surveillance cameras set up throughout Dr. Jugenburg's Clinic, including in consultation rooms like the one where J.C. had attended. J.C. then realized that she had been videotaped during her consultation at the Clinic and that her privacy had been invaded intentionally.

60. As a result of Dr. Jugenburg's deliberate and significant invasion of her personal privacy, J.C. felt distressed, embarrassed, utterly humiliated and overwhelmed by a deep sense of personal violation.

RIGHTS OF ACTION

61. The Plaintiffs and Class members met with Dr. Jugenburg, or other Clinic staff directed by Dr. Jugenburg, to discuss and receive medical treatment and care. The Plaintiffs and Class members trusted Dr. Jugenburg and the Clinic staff directed by him to prioritize their treatment and care over Dr. Jugenburg's personal and commercial interests, to maintain their privacy, and to keep their personal and health information confidential, which they failed to do.

62. Dr. Jugenburg is liable to the Class for breach of trust and fiduciary duty, negligence, breach of confidence, intrusion upon seclusion, the tort of public disclosure of private facts, and unjust enrichment.

Breach of trust and fiduciary duty/negligence

63. Dr. Jugenburg enjoyed a special position of trust and confidence vis-à-vis the Class, as vulnerable patients over whom he exercised special power, authority, knowledge and control. At all material times, Dr. Jugenburg owed the Class a fiduciary duty to act in their best interests and not to abuse his dominant position in relation to them, nor to exploit their vulnerabilities or dependency on him, nor to betray the trust they placed in him, nor to otherwise act disloyally towards them by placing his personal and commercial interests ahead of their interests in receiving medical care complaint with the standard of care of a reasonably competent plastic surgeon acting in accordance with legislative, regulatory and professional standards.

64. Dr. Jugenburg owed a duty of care to the Class members to: collect, store, use retain, and/or disclose their personal health information only in accordance with legislative, regulatory, and professional standards; keep their personal information, including personal health information, confidential; and to ensure that their personal information, including personal health information, would not be disclosed to unauthorized individuals. Specifically, Dr. Jugenburg owed a duty of care to the Class members to take all reasonable steps to ensure that:

- (a) their personal health information would only be collected for the purpose of providing medical care and treatment;
- (b) their personal health information would only be collected with fully informed consent;
- (c) any of their collected personal health information would be used only for the provision of medical care and treatment;

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- (d) any of their personal information or personal health information that was collected but which was not necessary for the provision of medical care and treatment would not be retained and would be promptly destroyed or would be maintained in the patient's medical records in a manner that would preserve the patient's privacy and be in compliance with the *PHIPA*, the Canadian Medical Association *Code of Ethics and Professionalism* and relevant CPSO policies and guidelines;
- (e) any of their collected personal health information would be kept confidential and secure;
- (f) any of their collected personal information, including personal health information, would not be disseminated or disclosed to the public or to any individuals outside of their circle of care without the patient's express consent; and
- (g) their personal information, including personal health information, would only be collected, stored, used, retained, and/or disclosed in compliance with the *PHIPA*, the Canadian Medical Association *Code of Ethics and Professionalism*, and relevant CPSO policies and guidelines.

65. The Plaintiffs plead that Dr. Jugenburg breached his duty of care and fiduciary duty, particulars of which include:

- (a) failing to collect, store, use, delete and/or disclose the Class members' personal health information in accordance with legislative, regulatory and professional standards, including the *PHIPA*, the Canadian Medical Association *Code of Ethics and Professionalism*, and relevant CPSO policies and guidelines;

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- (b) installing and operating recording devices throughout his Clinic, including in waiting, consultation, examination, and operating rooms, and using those devices to collect personal information of the Class members, including personal health information, in the form of photographic images, video and audio recordings, without the Plaintiffs' or Class members' consent;
- (c) using photographic images, video and audio recordings which were non-consensually collected for purposes other than the provision of medical treatment and care, including for personal and commercial gain, without the Plaintiffs' or the Class members' consent;
- (d) collecting additional photographic images from the Class members purportedly for use in providing medical treatment and care, but in reality using those photographic images for personal and commercial gain – rendering any consent provided by the Plaintiffs or the Class members misinformed and therefore null and void;
- (e) retaining and failing to delete in a timely fashion the collected personal information of the Class members, including photographic images, video and audio recordings, which was not necessary for the provision of medical care and treatment;
- (f) disclosing the personal information, including personal health information, of the Class members, including photographic images, video and audio recordings of the Class members with individuals outside of their circle of care, including the public display of intimate photographic images and videos on online social

media platforms such as Instagram, Facebook, and Snapchat, without the Plaintiffs' or Class members' consent; and

- (g) failing to properly supervise Clinic employees, and/or failing to provide Clinic employees with proper training with regard to the collection, storage, use, retention, deletion, and/or disclosure of personal information, including personal health information.

66. At all material times, Dr. Jugenburg failed to act in the Class members' best interests, and placed his interests over theirs in pursuit of his own personal and commercial gain. He acted with reckless indifference to the consequences of failing to protect the Class members' privacy.

67. As a result of the aforementioned breaches, Dr. Jugenburg caused the Class members psychological, emotional and physical harm, including anguish, humiliation, and serious and prolonged mental distress.

Privacy torts

68. The Class members attended at the Clinic with the reasonable expectation that Dr. Jugenburg and Clinic staff acting under his authority and direction would respect their right to privacy.

69. The defendants committed the tort of intrusion upon seclusion because Dr. Jugenburg, and Clinic staff acting under his authority and direction, invaded the Class members' privacy intentionally and without lawful justification, in circumstances which would be considered highly offensive to a reasonable person.

70. The Class members' personal information, including personal health information, was confidential information which was not public knowledge, and included sensitive private details about the personal affairs of the Class members.

71. Further, the Class members' personal health information was imparted to Dr. Jugenburg and Clinic staff acting under his authority and direction in circumstances in which an obligation of confidence arose, and in which the Class members reasonably expected that their personal information, including personal health information, would be protected and kept confidential.

72. Dr. Jugenburg misused and made unauthorized use of the Class members' personal health information by the conduct described above. This breach of privacy resulted in unauthorized access and public disclosure of the Class members' personal information, including personal health information, to their detriment. As a result, Dr. Jugenburg is liable to the Class members for breach of confidence.

73. Dr. Jugenburg's disclosure of the Class members' personal information, including personal health information, served no legitimate concern to the public. It was flagrant, outrageous, and highly offensive to a reasonable person. As a result, Dr. Jugenburg is liable to the Class members for the tort of publicity given to private life.

Unjust enrichment

74. Dr. Jugenburg generated profits as a direct result of unlawful acts, being the non-consensual collection, use and disclosure of the Class members' personal information, including health information. These profits constitute unjust enrichment with corresponding deprivation to the Class members, and were obtained without any juristic reason.

DAMAGES

75. As a result of the Defendants' wrongful conduct pleaded herein, the Plaintiffs and the Class members have suffered and/or continue to suffer harms and injuries, which have caused or materially contributed to their serious and prolonged pain, suffering and loss of enjoyment of life, including emotional, physical and psychological harm. Particulars of the harms suffered by the Plaintiffs and Class will be provided prior to trial.

76. As a result of these harms and injuries, the Class members have required and/or will require ongoing therapy, counselling and treatment. They claim the costs of both past and future therapy, counselling and treatment, as well as any other expenses arising from the Defendant's wrongful conduct.

77. All relevant provincial and territorial health insurers have incurred expenses with respect to the medical treatment of the Class members as a result of the Defendant's negligence, breaches, actions or inactions. Consequently, the health insurers have suffered and will continue to suffer damages for which they are entitled to be compensated by virtue of their direct right of action or right of subrogation in respect of all past and future insured services.

Punitive and aggravated damages

78. The selfish, high-handed and callous conduct of the Defendants warrants condemnation of the court through awards of both aggravated and punitive damages.

79. The prolonged, intrusive and exploitative nature of the mistreatment to which the Class members were subject at the hands of Dr. Jugenburg—who showed no regard for their bodily integrity or emotional wellbeing—represented a willful and flagrant betrayal of

their trust and vulnerabilities and was of such a serious nature as to justify an award of both aggravated and punitive damages against the Defendants.

STATUTES RELIED UPON

80. This action is maintained on behalf of all provincial and territorial health insurers pursuant to the following legislation, all as amended:

- (a) *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27;
- (b) *Crown's Right of Recovery Act*, S.A. 2009, c. C-35;
- (c) *The Health Administration Act*, R.S.S. 1978, c. H-0.0001;
- (d) *The Health Services Insurance Act*, C.C.S.M., c. H35;
- (e) *Health Insurance Act*, R.S.O. 1990, c. H.6;
- (f) *Health Insurance Act*, R.S.Q., c. A-29;
- (g) *Health Services and Insurance Act*, S.N.S. 1989, c. 197;
- (h) *Hospital Services Act*, R.S.N.B. 1973, c. H-9;
- (i) *Medical Care and Hospital Insurance Act*, S.N.L. 2016, c. M-5.01;
- (j) *Hospital and Diagnostic Services Insurance Act*, R.S.P.E.I. 1988, c. H-8;
- (k) *Health Services Payment Act*, R.S.P.E.I. 1988, c. H-2;
- (l) *Hospital Insurance and Health and Social Services Administration Act*, R.S.N.W.T. 1988, c. T-3;
- (m) *Health Care Insurance Plan Act*, R.S.Y. 2002, c. 107; and
- (n) *Hospital Insurance and Health and Social Services Administration Act*, R.S.N.W.T. (Nu) 1988, c. T-3.

81. The Plaintiffs also plead and rely upon: the *CPA*; the *CJA*; the *PHIPA*; the *Negligence Act*, R.S.O. 1990, c. N.1; the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B; and the *Excise Tax Act*, R.S.C. 1985, c. E-15, all as amended.

PLACE OF TRIAL

82. The Plaintiffs propose that this action be tried in Toronto, Ontario.

November 28, 2019

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