CITATION: G.C. v. Jugenburg, 2021 ONSC 3119
COURT FILE NO.: CV-19-00631903-00CP
DATE: 20210510

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
G.C., J.C., and A.C.	)	
Plaintiffs	)	*Margaret Waddell, Tina Q. Yang, Kate Mazzucco, Josh Nisker, Paul Miller*, and *Valérie Lord* for the Plaintiffs.
- and -	)	
	)	
MARTIN JUGENBURG and DR. MARTIN JUGENBURG MEDICINE PROFESSIONAL CORPORATION	)	
Defendants	)	*Nina Bombier, Paul-Erik Veel* and *Brianne Westland* for the Defendants.
	)	
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD**: April 12-13, 2021

PERELL, J.

REASONS FOR DECISION

A. Introduction and Overview

[1] This is a breach of privacy action pursuant to the *Class Proceedings Act, 1992*.[1] The Plaintiffs, G.C., J.C., and A.C., sue Martin Jugenburg, who is a plastic surgeon, and his corporation, Dr. Martin Jugenburg Medicine Professional Corporation.

[2] Dr. Jugenburg carries on an entrepreneurial medical practice through his professional corporation. The corporation operates a clinic known as the Toronto Cosmetic Surgery Institute.

[3] The Plaintiffs sue on behalf of persons who consulted Dr. Jugenburg and/or were treated by him at his clinic and whose privacy was breached. This action is also brought on behalf of all provincial and territorial health insurance authorities for their subrogated health insurance

[1] S.O. 1992, c. 6.

expenditures.

[4] The Plaintiffs sue for: (a) breach of confidence; (b) breach of fiduciary duty; (c) breach of trust; (d) intrusion upon seclusion; (e) negligence; (f) public disclosure of private facts; and (g) unjust enrichment. The Plaintiffs claim damages of $50 million and punitive damages of $25 million.

[5] The Plaintiffs and the putative Class Members have two major grievances for which they seek compensation. The first major grievance may be labelled the Surveillance Complaint for the Surveillance Class.

[6] For the Surveillance Complaint, it is alleged that there were video cameras installed throughout the clinic, and the Plaintiffs allege that the Defendants used those video cameras to surreptitiously collect video and audio recordings of nude or semi-nude patients without their consent.

[7] The second major grievance may be labelled the Social Media Complaint for the Internet Class.

[8] For the Social Media Complaint, it is alleged that the Defendants obtained photographic images of patients, some of them nude or semi-nude, under the false pretense that the images would be used only for the purposes of medical care. Some of these images obtained under false pretense were used to market the clinic by postings on social media platforms including Facebook, Instagram, Snapchat, Twitter, and YouTube.

[9] For the Social Media Complaint, overarching the false pretense allegation is the Plaintiffs' allegation that the posting of the patients' images was without valid patient consent because the patients were not reasonably informed of the risks associated with posting personal images on the internet or on social media platforms. As will be seen, the factual and legal nature of the consent that a physician must have to post a client's image on social media is the fulcrum for the Social Media Complaint for the Internet Class.

[10] For both the Surveillance Complaint and the Social Media Complaint, the Defendants concede that the Plaintiffs satisfy the cause of action criterion for all seven of the pleaded causes of action.

[11] For the Surveillance Complaint, the Defendants concede that the Plaintiffs satisfy the identifiable class criterion and the representative plaintiff criterion.

[12] The Defendants, however, dispute the remaining certification criteria for both the Surveillance Complaint and the Social Media Complaint.

[13] For the reasons that follow, I certify the Surveillance Complaint but not the Social Media Complaint.

B. Procedural and Evidentiary Background

[14] The proposed Class Counsel are Waddell Phillips Professional Corporation, Beyond Law LLP, and Howie, Sacks & Henry LLP.

[15] G.C. and J.C. commenced this action on November 28, 2019.

[16] On February 21, 2020, with the joinder of A.C. as a co-plaintiff, an amended Statement of

Claim was delivered by G.C., J.C., and A.C.

[17] The Plaintiffs propose the following class definition:

> All patients who attended at the Toronto Cosmetic Surgery Institute from January 1, 2010, to December 13, 2018, and:
>
> (a) whose images were posted on the internet, published or otherwise displayed in a public setting by the Defendants, and who claim the publication was without their valid consent (the "Internet Class" or "Internet Class Members"); and/or
>
> (b) attended at the Toronto Cosmetic Surgery Institute during the time from January 1, 2017, until December 13, 2018, when video surveillance cameras were in operation (the "Surveillance Class").

[18] The Plaintiffs supported their motion for certification with the following evidence:

- the affidavits of the Plaintiff **A.C.** dated March 12, 2020 and August 27, 2020. A.C. was cross-examined.
- the affidavits of the Plaintiff **G.C.** dated March 12, 2020 and August 27, 2020. G.C. was cross-examined.
- the affidavits of the Plaintiff **J.C.** dated March 12, 2020 and September 1, 2020. J.C. was cross-examined.
- the affidavit of **Mary Anne Franks** dated June 8, 2020. Dr. Franks is a professor of law at the University of Miami, Florida. She has expertise in online privacy, online abuse, social media ethics, non-consensual dissemination of intimate imagery. She was retained by the Plaintiffs to provide an expert opinion. Dr. Franks was cross-examined.
- the affidavit of **J.L.** dated August 27, 2020. J.L. is a putative Class Member and a former employee of the Defendants. **J.L.** was cross-examined.
- the affidavits of **Paul Miller** dated March 12, 2020, August 28, 2020, October 1, 2020, and March 25, 2021. Mr. Miller is a partner of the law firm Howie, Sacks & Henry LLP. Mr. Miller was cross-examined.
- the affidavit of **Mathew Musters** dated March 13, 2020. Mr. Musters is a forensic investigator with Computer Forensics Inc. His expertise is in the forensic review of digital media including computers, cell phones, social media accounts, and websites. He was retained by the Plaintiffs to review Dr. Jugenburg's website and social media accounts including Snapchat, Instagram, Facebook, Realself, Twitter, and YouTube.
- the affidavits of **S.S.** dated July 14, 2020 and August 28, 2020. S.S. is a putative Class Member.

[19] The Defendants resisted the motion for certification with the following evidence:

- the affidavit of **C.B.** dated June 5, 2020. C.B. was a patient of Dr. Jugenburg. C.B. was cross-examined.
- the affidavit of **Kim Catherine Crawford** dated July 20, 2020. Ms. Crawford is a registered nurse who worked at the clinic. She is its Managing Director. Ms. Crawford was cross-examined.

- the affidavit of **S.L.G. (**known as **S.L.**) dated June 4, 2020. S.L. was a patient at the clinic in 2014 and 2018. S.L. was cross-examined.
- the affidavits of the Defendant **Martin Jugenburg** dated July 30, 2020 and October 29, 2020. Dr. Jugenburg was cross-examined.
- the affidavit of **Melanie Petriw** dated July 21, 2020. Ms. Petriw is a graduate of the theatre program of York University. She has been employed as Social Media Coordinator at the clinic since April 2018. Ms. Petriw was cross-examined.
- the affidavit of **Nora Rochman** dated July 22, 2020. Ms. Rochman has a B.S. in biology. She has been employed at the clinic with administrative responsibilities since 2012. Ms. Rochman was cross-examined.
- the affidavit of **A.Z.S.** dated June 9, 2020. A.Z.S. was a patient at the clinic. A.Z.S. was cross-examined.
- the affidavit of **N.S.** dated June 8, 2020. N.S. was a patient at the clinic. N.S. was cross-examined.
- the affidavit of **Jack Uetrecht** dated October 26, 2020. He is a Professor of Pharmacy and Medicine at the University of Toronto. He has a Ph.D. in organic chemistry from Cornell University and an MD from Ohio State University. He was retained to provide an opinion for the Defendants. Dr. Uetrecht was cross-examined.
- the affidavit of **J.V.** dated June 8, 2020. J.V. was a patient at the clinic. J.V. was cross-examined.

[20] On a preliminary motion, I dismissed the Plaintiffs' motion for leave to deliver Mr. Miller's supplementary affidavit dated March 25, 2021 about class size.[2]

[21] On a preliminary motion, I granted the Plaintiffs' motion to strike the Defendants' production of the medical records of A.C., G.C., J.C., J.L. and S.S.[3]

[22] On a preliminary motion, I granted the Defendants' motion to strike portions of the affidavit evidence of Paul Miller, J.L., and S.S. [4]

[23] On a preliminary motion, I granted the Defendants' motion to strike the expert report of Dr. Mary Anne Franks.[5]

C. Facts

1. The Regulation of Personal Health Information

[24] Personal health information under the *Personal Health Information Protection Act, 2004*, ("PHIPA"),[6] includes identifying information about an individual in oral or recorded form, if the information, among other things, relates to: (a) the physical or mental health of an individual,

[2] *G.C. v. Jugenburg*, 2021 ONSC 3115
[3] *G.C. v. Jugenburg*, 2021 ONSC 3114
[4] *G.C. v. Jugenburg*, 2021 ONSC 3118
[5] *G.C. v. Jugenburg*, 2021 ONSC 3116
[6] S.O. 2004, c. 3, Sched. A.

including information that consists of the health history of the individual's family; (b) 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) payments or eligibility for health care in respect of the individual.

[25] Pursuant to s. 29 of 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.

[26] Section 18 (1) of PHIPA prescribes the elements of a consent to collect, use or disclose personal health information. The consent must be: (a) a consent of the individual; (b) knowledgeable; (c) related to the personal health information; and (d) not obtained through deception or coercion.

[27] Section 30 (2) of PHIPA provides that a health information custodian shall not collect, use or disclose more personal health information than is reasonably necessary to meet the purpose of the collection, use or disclosure, as the case may be.

[28] Pursuant to s. 31 of PHIPA, a health information custodian that collects personal health information shall not use or disclose it unless required by law to do so.

[29] The College of Physicians and Surgeons of Ontario requires physicians to abide by its *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."

[30] Under the College of Physicians and Surgeons of Ontario's *Confidentiality of Personal Health Information Policy*, its *Medical Records Policy* and its *Physician Behaviour in the Professional Environment Policy*, physicians are 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.

[31] Ontario Regulation 856/93 (*Professional Misconduct*) made under the *Medicine Act*,[7] 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".

[32] The Canadian Medical Association's *Code of Ethics and Professionalism* requires physicians to: (a) prioritize the well-being of every patient and always act for the patient's benefit;

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[7] 1991, S.O. 1991, c. 30.

(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.

2. The Defendants and the Operation of the Clinic

[33] Dr. Jugenburg is a physician who specializes in plastic surgery. He completed medical school in 2001. He was qualified as a specialist in plastic surgery in 2006. In 2009, Dr. Jugenburg incorporated under the name "Dr. Martin Jugenburg Medicine Professional Corporation".

[34] In 2010 or in 2012, the Defendants opened the Toronto Cosmetic Surgery Institute, a plastic surgery clinic in premises rented at the Fairmont Royal York Hotel in downtown Toronto.

[35] Remarkably, based on the evidentiary record for the certification motion, it is a contested point about when, either 2010 or 2012, the clinic's premises were rented and opened for operation. For present purposes, I shall use the 2010 date.

[36] Dr. Jugenburg's corporation employs and Dr. Jugenburg supervises a staff of approximately twenty persons including anesthesiologists, other plastic surgeons, nurses, massage therapists, receptionists, administrators, a managing director, and a Social Media Coordinator.

[37] Before the COVID-19 pandemic, the clinic had approximately 100-120 patients per month.

[38] The premises of the clinic are on two floors of the Royal York Hotel. The premises include reception areas, hallways, waiting rooms, washrooms, consultation rooms, examination rooms, pre- and post-operative rooms, operating rooms, offices, and kitchen.

[39] Beginning in January 2012, the Defendants installed automatic recording devices at the leased premises. The Defendants say that the recording devices were installed for purposes of security. The devices operated continuously. Sixteen cameras were installed on the first floor (Level D). Eight cameras were installed on the second floor (Level B). The cameras were not in the washrooms.

[40] Live viewing of the surveillance was available through an application on Dr. Jugenburg's smartphone.

[41] The cameras were not hidden, but they were not conspicuous. Between January 2017 and December 2018, there was only one sign, which was located in the operating room on Level B, disclosing the presence of a surveillance camera. The clinic staff did not advise patients of the presence of surveillance cameras throughout the premises.

[42] The complete network of 24 cameras became operational in January 2017. The cameras on Level D recorded audio and video constantly. The cameras on Level B recorded only video and were activated by motion sensor. The data of the video and audio recordings is stored on two network video recorders that were located in two clinic closets. The data was overwritten after several months.

[43] The Defendants assert and the evidence establishes that the cameras were installed for security purposes and not for the purposes of patient care or for any nefarious or voyeuristic purposes. Dr. Jugenburg used the archived data to resolve security incidents and several patient complaints. There is no evidence that images from the surveillance cameras were posted on social

media. As I shall explain below, different images of patients were used for the internet postings and there was a consent procedure with respect to internet and social media postings. There was no consent procedure with respect to the surveillance cameras.

[44] At the clinic, Dr. Jugenburg performs cosmetic surgery and non-surgical cosmetic procedures. Cosmetic surgery includes abdominoplasty ("tummy tucks"), buttock lifts ("Brazilian Butt Lifts"), breast augmentations, breast lifts, breast reconstruction, breast reduction, face lifts, hymen-reconstruction, labia reduction, liposuction, mons-pubis-liposuction, and vaginal rejuvenation. Non-surgical cosmetic procedures include Botox injections, facial fillers, and lip injections.

[45] Dr. Jugenburg's services are in the main not covered by public or private health insurance.

[46] The clinic has a Privacy Policy. It may be found on its website, 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.

[47] In 2016, Dr. Jugenburg began marketing himself as "Dr. 6ix." Under this brand, he posted on social media platforms including Facebook, Facebook Live, Instagram, Instagram Stories, Snapchat, Twitter, and YouTube photographic images and videos of clinic patients, including photographic images and videos taken during surgical procedures.

[48] As described further below there was a consent procedure with respect to posting of images on the internet or on social media. The images that were posted did not name the patients and faces were blurred or obscured or cropped out of the images.

[49] At least some and likely many of the clinic's patients would have been aware of the Defendants' website and social media accounts before they became patients of the clinic.

3. CBC Marketplace, the College of Physicians and Surgeons, and the Information and Privacy Commissioner of Ontario

[50] On December 13, 2018, CBC Marketplace, a consumer protection news program, broadcast a story detailing an investigative reporter's discovery of the surveillance cameras in the room where she had undressed for a breast implant consultation.

[51] Also, on December 13, 2018, the Office of the Information and Privacy Commission of

Ontario, which had received a report from the CBC, attended at the clinic and closed down the surveillance cameras. The Commission began an investigation.

[52] After its investigation, the Commission released a decision. The Commission found that Dr. Jugenburg is a "health information custodian." The Commission found that the data recorded by the surveillance cameras at the clinic contained "personal health information" and are "recordings" under PHIPA.

[53] The Commission found that the clinic did not have patient consent, nor any other authority under the PHIPA, for collecting patients' images/personal health information through the video surveillance network.

[54] The Commission found that even if the clinic was authorized to use some cameras for security purposes, the extensive network of cameras and particularly the placement of cameras in consultation and examination rooms, were "broad-scale, intrusive measures" contrary to s. 30(2) of the PHIPA.

[55] In their communications with the Information Privacy Commission, the Defendants admitted that: (a) the data from the surveillance cameras was not recorded for health care purposes; (b) consent to being recorded was not obtained from patients; and (c) patients were not provided with adequate notice of the surveillance cameras.

[56] Also, on December 13, 2018, investigators from the College of Physicians and Surgeons attended at the clinic and seized the network video recorders.

[57] The College commenced a disciplinary proceeding against Dr. Jugenburg.

[58] The College directed Dr. Jugenburg not to operate video surveillance in patient rooms and to post prominently noticeable signage about the use of video surveillance cameras. He has complied with this directive.

[59] In January 2019, the Defendants activated a new surveillance camera system. The new system is limited to the two reception areas. The system does not operate until after office hours. Prominent signs about the video surveillance have been posted.

4. Class Size

[60] It is estimated that the Surveillance Class comprises 2,500 patients.

[61] The size of the Internet Class has not been estimated. However, based on Mr. Miller's evidence and common sense, there are more than two members of the Internet Class.

[62] As will be described in more detail in the next part of these Reasons for Decision, all of the patients who underwent surgeries at the clinic were asked to consent to the posting of their images on social media. Thus, the number of surgical patients who signed consents between when the clinic opened to the class closing date of December 13, 2018, although not yet estimated, can be determined, and it is certainly a number greater than two patients.

[63] The purport of the Plaintiffs' action is that all the consents of the surgical patients are not valid. Thus, it follows as a matter of logic and common sense, that the number of Internet Class Members is equal to the number of surgical patients that signed alleged to be invalid consents and whose images were posted on social media.

[64] The number of patients whose images were posted on social media is at present not calculated, but it appears to me that this is information that is determinable from the records of the Defendants.

[65] In any event, there is some basis in fact for concluding that membership in the Internet Class numbers in the hundreds. It is apparent from the evidentiary record that many but not all of the surgical patients have had their images posted on social media. Thus, it can be inferred as a matter of evidence, logic, and common sense that the size of the Internet Class is considerably more than two patients. As the Court of Appeal noted in *Keatley Surveying Ltd. v. Teranet Inc.*,[8] "Ordinarily, the existence of more than one claim will be apparent from the very nature of the claim being advanced."

[66] From the perspective of complaints, Mr. Miller's evidence vaguely suggests that several of the surgical patients made "the claim the publication was without their valid consent." I shall below return to the matter of the class definition, but for the present purpose of discussing the class size of the Internet Class, it can be said that Mr. Miller's evidence, vague as it was, would also have established that the Internet Class has more than two members.

5. The Clinic's Practices and Procedures for Patient Consent for Social Media Postings

[67] From the time of its opening (2010 or 2012), the clinic has operated a website. In addition to its own website, as noted above, the clinic has social media accounts, including Facebook, Facebook Live, Instagram, Instagram Stories, Snapchat, Twitter, and YouTube.

[68] Instagram and Snapchat are the social media most frequently used.

[69] The doctors and nurses of the clinic take photographic images and videos for two purposes.

a. First, photos are taken for diagnostic, pre- and post-operative analysis and for patient treatment and care. Photos taken for therapeutic purposes are part of the patient's medical file.

b. Second, photos are also taken to be posted on the clinic's website or on its social media accounts. Photos posted on the internet may also be taken from the patient's medical file. The internet photos are taken and administered by the clinic's Social Media Coordinator.

[70] Although there is a least one instance where a patient's image was posted by mistake (the instance of patient S.S.), patients are asked to consent to having their photographic images posted on the internet or on social media.

[71] The matter of obtaining the authorization of a patient to have his or her photographic image posted on the clinic's website or on its social media accounts is a matter of both oral and written contracting. Although, as described more fully below, the practice and procedures have evolved over time, all patients are asked to sign written consent forms. For some patients, there also will be conversations during which the topic of internet postings may be discussed.

[72] Before signing the consents or having these conversations, if any, most patients will have some familiarity with and be knowledgeable that the Defendants post images on the internet. Many

[8] 2015 ONCA 248 at para. 70.

of the patients will have visited the clinic's website or its social media accounts in making their decision to make an appointment for a first consultation.

[73] From 2012 to 2016, the only document relied on to confirm whether a patient consented to being posted on social media or the internet was a "General Surgical Consent" form. Insofar as the General Surgical Consent form addressed internet postings, there were two versions. One version stated:

> I also consent to the taking, publication and use of photography for scientific, educational, or illustrative purposes.

The second version stated:

> I also consent to the taking, publication and use of photography for scientific, educational, or illustrative purposes. (This refers to BEFORE/AFTER media, media to illustrate surgical technique.)

[74] With respect to the General Surgical Consent forms, patients are not required to consent to the publication of photos to undergo any procedure. The form is provided to patients in advance of their surgery, and they are encouraged to contact the clinic if they have any questions. While most patients consent, some patients choose not to consent.

[75] Over the years, additional consent forms were introduced. After 2016, the matter of the posting of images on the clinic's website and on its social media accounts was a topic mentioned in a package of documents of between 14 to 17 pages in length known as the "Surgical Information Package." The package came with the message that the forms in the Surgical Information Package must be signed to proceed with the surgery.

[76] I pause to note that the Plaintiffs make much of this express direction in the Surgical Information Package to advance their common issues arguments. The Plaintiffs argue that the consents were invalid - across the class - because the consent of the patient would be invalid as coerced or as involuntary or perhaps as unconscionable or as a breach of a doctor's professional standard of care or a breach of fiduciary obligations because the patient would believe that he or she had no choice about the posting of the images if he or she wished to proceed with the plastic surgery.

[77] The references in the Surgical Information Package to posting consents changed over time and in the summer of 2017, the clinic added a separate form for social-media-specific consent. For example, one version of the form stated:

> TORONTO COSMETIC SURGERY INSTITUTE SOCAL MEDIA CONSENT FORM
>
> Toronto Cosmetic Surgery Institute documents our procedures and processes for educational purposes and to inform others about the clinic's services. These photos show various procedures being performed and explained and are intended to educate our patients and the public about cosmetic procedures, enhance medical understanding and create realistic expectations.
>
> While social media can be fun and entertaining, it is taken very seriously at our facility. No images or other recordings of a patient will be posted to social media without consent. If you do consent, your face, name, and any identifying features are NEVER SHOWN (unless you specially state otherwise.) Your confidentiality and privacy are respected every step of the way. We encourage our patients to document their procedures on our social media, but if you choose otherwise your decision will not affect your standing with the clinic.
>
> I agree to the use of my photos and videos taken during surgery on the following platforms:

> Snapchat
> Instagram/Instagram Stories
> Twitter
> Facebook/Facebook Live
> YouTube
>
> My photos may be posted at any time without notification.
>
> I am aware that my photos may be shared by third party social media accounts including interested followers and other plastic surgery accounts.
>
> My photos may be removed from any of these platforms at any time if I change my mind, but may still exist elsewhere on the internet.
>
> I would like the following identifiable features covered in any photos or videos shared:
>
> ○ Face (ALWAYS covered unless you consent otherwise)
> ○ Tattoos – Location:
> ○ Birth Marks – Location:
> ○ Other Identifiable Features – Location:
> ○ Please check this box if you do NOT want your surgery procedure photos or videos on any form of social media.
>
> By signing this form, I agree that I understand all the information that has been given to me. If I change my mind, I will contact Melanie at melaniepetriw.tcsi@gmail.com.

[78] For present purposes, it may be noted that apart from the consent forms, there was no practice at the clinic to advise patients that they could refuse to consent to the posting of their images and patients were left to their own devices in understanding the various documents in the Surgical Information Package.

[79] After 2016, patients were also asked to sign a specific social media consent form in the pre-operative room around the same time as they were being medicated for the surgery. The consent form was presented on a computer tablet and contained a list of social media accounts with checkboxes that had been pre-populated with checkmarks.

[80] On the day of the surgery, the patient would be attended by the clinic's Social Media Coordinator to discuss the clinic's practices with respect to posting images. The Coordinator was trained on handling personal health information and PHIPA requirements and about how to conduct the pre-operative meetings to obtain consent from patients.

[81] Dr. Jugenburg's expert witness, Dr. Jack Uetrecht, confirmed that a surgeon or their staff who is asking for a social media consent needs to ensure that the patient understands all of the risks associated with that kind of posting, otherwise it would not constitute informed consent. There is no evidence that there were any conversations about the risks associated with having a patient's image posted on the internet or social media.

[82] When patients provided consent, the clinic endeavoured to hide the patient's identity when the image is posted. No names are mentioned with the photo and faces are blurred, obscured, or covered or the photos are cropped.

6. The Plaintiffs

[83] The Plaintiffs G.C. of Waterloo, Ontario, J.C. of Markham, Ontario and A.C. of Niagara

Falls, Ontario were respectively patients of Dr. Jugenburg at his clinic.

[84] For present purposes, it is not necessary to detail comprehensively the personal experiences of the Plaintiffs, which can be summarized as follows.

[85] In 2018, G.C. attended at the clinic for a consultation about a breast augmentation. G.C. was accompanied by her husband. There was a $200 fee for the consultation. A nurse took her medical history. Photographs were taken of G.C.'s breasts and naked upper torso. Dr. Jugenburg attended and physically examined G.C.'s breasts. After Dr. Jugenburg left the consultation room, with the nurse's assistance, G.C. tested different breast implant sizes and styles with the implants being placed inside her brassiere. G.C. and her husband were not alerted nor aware of the recording devices at the clinic. G.C. was never asked to consent to the posting of images on the internet. G.C. decided not to proceed with treatment at the clinic. G.C.'s images would have been recorded on the surveillance cameras. There is no evidence that G.C.'s images were posted on the internet.

[86] In 2018, J.C. attended at the clinic for a consultation about a breast augmentation and about an abdominoplasty. J.C. was accompanied by a friend. A nurse took J.C.'s medical history. Photographs were taken of J.C.'s breasts and naked upper torso. The nurse physically examined J.C.'s breasts. After J.C. disrobed to her underpants, the nurse examined J.C.'s stomach. The nurse assisted J.C. in testing different breast implant sizes and styles with the implants being placed inside her brassiere. J.C. and her friend were not alerted nor aware of the recording devices at the clinic. J.C. was never asked to consent to the posting of images on the internet. J.C. decided not to proceed with treatment at the clinic. J.C.'s images would have been recorded on the surveillance cameras. There is no evidence that J.C.'s images were posted on the internet.

[87] On December 13, 2018, CBC News published a news article that revealed that its investigators had observed video surveillance cameras at the clinic. The article came to the attention of G.C. and J.C. causing them respectively feelings of distress, embarrassment, humiliation, invasion of privacy, and personal violation.

[88] In 2018, A.C. attended at the clinic for a consultation about liposuction. A nurse took her medical history and discussed the procedure with A.C. A.C. was asked to disrobe except for her underwear and the nurse took photographs. A.C. paid the non-refundable $2,000 deposit for the procedure. Subsequently, A.C. received an email requesting information and the completion of various forms including a social media consent form. The social media consent form indicated that Dr. Jugenburg documents surgical procedures for educational purposes. A.C. was asked for payment of $9,865.

[89] A.C. was never alerted or aware that there were recording devices at the clinic. She never consented to being videotaped during appointments at the clinic. She does not accept that her written consents to the posting of images on the internet were valid consents.

[90] A.C. attended at the clinic for the surgery. She was accompanied by her partner. At the clinic, she undressed for the surgery and put on a surgical gown. She was medicated and sedated. Dr. Jugenburg performed a liposuction procedure on her chin and torso. After the surgery, she recuperated in a post-operative room and then was escorted by a nurse to her room at the Royal York Hotel. A month later, there was a follow-up appointment. Stiches and the drainage tube were removed. A nurse took photographs.

[91] It is not presently known whether images of A.C. were posted on the clinic's webpage or on its social media accounts.

[92] On December 19, 2018, A.C. received an email message from Dr. Jugenburg. The message stated:

> I would like to inform you about an important matter involving security and patient privacy concerns. Approximately two years ago, we installed security cameras throughout our clinic, including reception areas and examining rooms. The cameras were always visible, and signs were posted to inform our patients of the presence of video surveillance.
>
> The video footage captured on this system was for security purposes and to protect our team and our patients. The information was stored on a highly secure IT system with access limited to me or my senior office manager.
>
> As Canadian privacy legislation has continued to expand, both the scope of our security system and related signage should have been reviewed and updated. We have learned that we should have been more proactive in communicating the presence of the cameras through the office to you, allowing you to opt out if desired.
>
> We did not do this, and we apologize for this oversight.
>
> Our security system is currently disabled, and any previous recordings would be automatically deleted by the system every few weeks.
>
> Moving forward we will ensure that any future security cameras comply with all privacy interests and expectations.
>
> I would like to reiterate that patient safety and privacy is most important to me and my team.
>
> We want to ensure all of our patients are provided with the best clinical care and experience when you visit our premises.

[93] As a result of her experiences at the clinic, A.C. has suffered feelings of distress, embarrassment, humiliation, invasion of privacy, and personal violation.

D. Certification: General Principles

[94] The court has no discretion and is required to certify an action as a class proceeding when the following five-part test in s. 5 of the *Class Proceedings Act, 1992* is met: (1) the pleadings disclose a cause of action; (2) there is an identifiable class of two or more persons that would be represented by the representative plaintiff; (3) the claims of the class members raise common issues; (4) a class proceeding would be the preferable procedure for the resolution of the common issues; and (5) there is a representative plaintiff who: (a) would fairly and adequately represent the interests of the class; (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and (c) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[95] For an action to be certified as a class proceeding, there must be a cause of action shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers.[9] On a certification motion, the

[9] *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 at para. 14 (S.C.J.), leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Div. Ct.).

question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding.[10] The test for certification is to be applied in a purposive and generous manner, to give effect to the goals of class actions; namely: (1) to provide access to justice for litigants; (2) to encourage behaviour modification; and (3) to promote the efficient use of judicial resources.[11]

[96] For certification, the plaintiff in a proposed class proceeding must show "some basis in fact" for each of the certification requirements, other than the requirement that the pleading discloses a cause of action.[12]

[97] The some-basis-in-fact standard sets a low evidentiary standard for plaintiffs, and a court should not resolve conflicting facts and evidence at the certification stage or opine on the strengths of the plaintiff's case.[13] In particular, there must be a basis in the evidence to establish the existence of common issues.[14] To establish commonality, evidence that the alleged misconduct actually occurred is not required; rather, the necessary evidence goes only to establishing whether the questions are common to all the class members.[15]

[98] The some-basis-in-fact standard does not require evidence on a balance of probabilities and does not require that the court resolve conflicting facts and evidence at the certification stage and rather reflects the fact that at the certification stage the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight and that the certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action.[16]

[99] On a certification motion, evidence directed at the merits may be admissible if it also bears on the requirements for certification but, in such cases, the issues are not decided on the basis of a balance of probabilities, but rather on the much less stringent test of some basis in fact.[17] The evidence on a motion for certification must meet the usual standards for admissibility.[18] While evidence on a certification motion must meet the usual standards for admissibility, the weighing and testing of the evidence is not meant to be extensive, and if the expert evidence is admissible, the scrutiny of it is modest.[19]

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[10] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 16.
[11] *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 15 and 16; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 26 to 29.
[12] *Hollick v. Toronto* (City), [2001] 3 S.C.R. 158 at para. 25; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 99-105; *Taub v. Manufacturers Life Insurance Co*., (1998) 40 O.R. (3d) 379 (Gen. Div.), aff'd (1999), 42 O.R. (3d) 576 (Div. Ct.).
[13] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57; *McCracken v. CNR Co*., 2012 ONCA 445.
[14] *Singer v. Schering-Plough Canada Inc*., 2010 ONSC 42 at para. 140; *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 at para. 21 (S.C.J.); *Dumoulin v. Ontario*, [2005] O.J. No. 3961 at para. 25 (S.C.J.).
[15] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 110.
[16] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 102.
[17] *Cloud v. Canada* (2004), 73 O.R. (3d) 401 at para. 50 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.); *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 16-26.
[18] *Martin v. Astrazeneca Pharmaceuticals PLC,* 2012 ONSC 2744; *Williams v. Canon Canada Inc.*, 2011 ONSC 6571, aff'd 2012 ONSC 3992 (Div. Ct.); *Schick v. Boehringer Ingelheim (Canada) Ltd*., 2011 ONSC 63 at para.13; *Ernewein v. General Motors of Canada Ltd.* 2005 BCCA 540 (C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545.
[19] *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 at para. 76 (S.C.J.).

E. The Cause of Action Criterion

1. General Principles

[100] The first criterion for certification is that the plaintiff's pleading discloses a cause of action. The "plain and obvious" test for disclosing a cause of action from *Hunt v. Carey Canada*,[20] is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5(1)(a) of the *Class Proceedings Act, 1992*.[21]

2. Discussion and Analysis: Cause of Action Criterion

[101] On behalf of the Surveillance Class, the Plaintiffs assert claims of: (a) breach of fiduciary duty; (b) breach of trust; (c) intrusion upon seclusion; and (d) negligence.

[102] On behalf of the Internet Class, the Plaintiffs assert claims of: (a) breach of confidence; (b) breach of fiduciary duty; (c) breach of trust (d) negligence; (e) public disclosure of private facts; and (f) unjust enrichment.

[103] The Defendants concede that the Plaintiffs satisfy the common issues criterion for all of the causes of action.

[104] However, of the seven causes of action, the breach of confidence, the public disclosure of private facts, and the unjust enrichment claim are associated exclusively with the Social Media Complaint and the Internet Class. As I shall explain below, in my opinion, the Social Media Complaint is not certifiable. I, therefore, shall not certify these three causes of action.

[105] Based on the Defendants' concession and my own examination of the Amended Statement of Claim, I conclude that the Plaintiffs have satisfied the cause of action criterion for: (a) breach of fiduciary duty; (b) breach of trust; (c) intrusion upon seclusion; and (d) negligence.

F. The Causes of Action and the other Certification Criterion

[106] Although the Defendants conceded that the Plaintiffs satisfied the cause of action criterion for all seven pleaded causes of action, before moving on to consider the other certification criteria, it is necessary to note several legal and factual matters associated with these causes of action. In this regard, there are eight legal and or mixed legal and factual conclusions that are significant to the assessment of the remaining criteria, most particularly the common issues and the preferable procedure criteria for the Internet Class.

[107] The first conclusion is that with respect to the Social Media Complaint and the Internet Class, there is no basis in fact for an unjust enrichment cause of action in the immediate case. (The unjust enrichment claim is not advanced for the Surveillance Class.)

a. The constituent elements of the cause of action for unjust enrichment are: (a) the defendant being enriched; (b) a corresponding deprivation of the plaintiff; and, (c) no

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[20] [1990] 2 S.C.R. 959.

[21] *Wright v. Horizons ETFS Management (Canada) Inc.*, 2020 ONCA 337 at para. 57; *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572; *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68.

juristic reason for the defendant's enrichment at the expense of the plaintiff.[22]

b. While in the immediate case for the Internet Class, there might be a common issue with respect to whether or not there was a juristic reason for the Defendants' enrichment; *i.e.*, whether there was a valid consent to the posting of images on the website and on social media, there is no basis in fact that there was a corresponding deprivation of the patients.

c. Unjust enrichment is a restitutionary claim and while the Internet Class Members may have suffered compensable damages arising from the other causes of action, the remedial award for unjust enrichment is restitutionary. There is no basis for a restitutionary award in the immediate case.

[108] The second conclusion is that a negligence claim cannot be dispositive of the class action for the Surveillance Class or the Internet Class because breach of the standard of care, specific causation, and quantification of damages must be proven on an individual basis.

a. The elements of a claim in negligence are: (1) the defendant owes the plaintiff a duty of care; (2) the defendant's behaviour breached the standard of care; (3) the plaintiff suffered compensable damages; (4) the damages were caused in fact by the defendant's breach; and (5) the damages are not too remote in law.[23]

b. In the immediate case, while the duty of care and setting the standard of care are common issues, the other elements of the negligence tort are not, and the other elements would have to be proven individually.

[109] The third conclusion is that it is settled law that physicians have a duty of care to their patients including a duty of care with respect to the privacy and confidentiality of a patient's medical information.[24]

a. The significance of this conclusion is that while the duty of care element of the tort of negligence is a certifiable common issue, the heavy lifting in the immediate case for the Surveillance Class Members' and the Internet Class Members' claim in negligence will take place at individual issues trials.

[110] The fourth conclusion is that there is settled law as what is the standard of care for physicians in obtaining the informed consent of a patient to medical treatment and the leading case and frequently applied case of *Reibl v. Hughes*,[25] sets a high standard of disclosure required for an informed and knowledgeable consent.

a. With respect to the standard of care issue, in *Reibl v. Hughes*, Chief Justice Laskin stated at p. 884:

> It is now undoubted that the relationship between surgeon and patient gives rise to a duty of the surgeon to make disclosure to the patient of what I would call all material risks

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[22] *Moore v. Sweet*, 2018 SCC 52; *Kerr v. Baranow*, 2011 SCC 10; *Garland v. Consumers' Gas Co*., 2004 SCC 25 at para 30; *Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 at p. 784; *Pettkus v. Becker*, [1980] 2 S.C.R. 834 at p. 848.

[23] *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3; *Broutzas v. Rouge Valley Health System*, 2018 ONSC 6315.

[24] *Cuthbertson v. Rasouli*, 2013 SCC 53; *Leung v. Shanks*, 2013 ONSC 4943; *Burgess (Litigation Guardian of) v. Wu*, (2003), 68 OR (3d) 710 (S.C.J.).

[25] [1980] 2 S.C.R. 880. See also *Hopp v. Lepp*, [1980] 2 S.C.R. 192.

> attending the surgery which is recommended. The scope of the duty of disclosure was considered in *Hopp v. Lepp* [1980] 2 S.C.R. 192. at p. 210, where it was generalized as follows:
>
> > In summary, the decided cases appear to indicate that, in obtaining the consent of a patient for the performance upon him of a surgical operation, a surgeon, generally, should answer any specific questions posed by the patient as to the risks involved and should, without being questioned, disclose to him the nature of the proposed operation, its gravity, any material risks and any special or unusual risks attendant upon the performance of the operation. However, having said that, it should be added that the scope of the duty of disclosure and whether or not it has been breached are matters which must be decided in relation to the circumstances of each particular case.
>
> The Court in *Hopp v. Lepp, supra*, also pointed out that even if a certain risk is a mere possibility which ordinarily need not be disclosed, yet if its occurrence carries serious consequences, as for example, paralysis or even death, it should be regarded as a material risk requiring disclosure.

[111] The fifth conclusion is that it is settled law that physicians have a categorical fiduciary relationship with their patients including the attendant fiduciary obligations of confidentiality, loyalty, and the avoidance of conflicts of interest.[26]

a. Justice Laskin's observations reveal that it is undoubted that there is a duty to make disclosure to a patient but that the determination of the scope of the duty and whether or not it has been breached must be decided in relation to the circumstances of each particular case.

b. For the immediate case, the significance of these observations is that while setting the standard of care element of the tort of negligence is a certifiable common issue, the heavy lifting in the immediate case for the Surveillance Class Members' and the Internet Class Members' claim in negligence will take place at individual issues trials.

c. For the immediate case, it also means that the requirements of s. 24 of the *Class Proceedings Act*, for an aggregate assessment of damages will not be satisfied for the negligence claim.

[112] The sixth conclusion is that physical injury or monetary loss is not a necessary ingredient for liability under inclusion against seclusion.[27]

a. The constituent elements of intrusion on seclusion are: (a) the defendant intentionally or recklessly without lawful justification intrudes physically or otherwise upon the seclusion of the plaintiff in his or her private affairs or concerns; and (b) the invasion would be highly offensive causing distress, humiliation, or anguish to a reasonable person.[28]

b. That specific damage is not a constituent element of intrusion on seclusion should be kept in mind because it means that the prerequisites of s. 24 of the *Class Proceedings Act, 1992* for an aggregate award of damages may be available in the immediate case for

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[26] *Christian Medical and Dental Society of Canada v. College of Physicians and Surgeons of Ontario*, 2019 ONCA 393; *Norberg v. Wynrib*, [1992] 2 S.C.R. 226; *McInerney v. MacDonald*, [1992] 2 S.C.R. 138.
[27] *Stewart v. Demme*, 2020 ONSC 83 at para. 68; *Jones v. Tsige*, 2012 ONCA 32.
[28] *Hopkins v. Kay*, 2014 ONSC 321; *Jones v. Tsige*, 2012 ONCA 32.

the intrusion on seclusion cause of action. Visualize: in the immediate case, assuming the intrusion on seclusion common issues are decided in favour of the Surveillance Class, then every Class Member of the Surveillance Class arguably suffered the damages inherent in losing control over his or her privacy, and thus a baseline aggregate damages award may be available.

[113] The seventh conclusion is that the claim for breach of confidence requires misuse of confidential information and detriment. These constituent elements entail that individual inquiries are required to perfect the cause of action for breach of confidence.

a. The elements of a claim of breach of confidence are: (1) the plaintiff imparts information having a quality of confidence (confidential information); (2) the information was imparted in circumstances in which an obligation of confidentiality arises (communication in confidence); and (3) the defendant makes an unauthorized use of the information to the detriment of the plaintiff (misuse of information and detriment).[29]

b. In the immediate case, whether the Defendants made an unauthorized use of the Internet Class Member's images depends on whether the Class Member did not validly consent to the posting, which is an issue to be determined at individual issues trials.

[114] The eighth conclusion is that the cause of action for public disclosure of private facts is inherently individualistic.

a. The constituent elements of this privacy tort are: (a) the defendant gives publicity to a matter concerning the private life of the plaintiff; (b) the matter publicized, or the act of publication, would be highly offensive to a reasonable person; and (c) the matter publicized is not of legitimate concern to the public.[30]

b. In the circumstances of the immediate case, all of the elements of the tort of public disclosure of private facts would have to be determined at individual issues trials.

G. Identifiable Class Criterion

1. General Principles

[115] The second certification criterion is the identifiable class criterion. The definition of an identifiable class serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (3) it describes who is entitled to notice.[31]

[116] In *Western Canadian Shopping Centres v. Dutton*,[32] the Supreme Court of Canada explained the importance of and rationale for the requirement that there be an identifiable class:

> First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria

[29] *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999], 1 S.C.R. 142; *Lac Minerals Ltd. v. International Corona Resources Ltd*., [1989] 2 S.C.R. 574; *Coco v. A. N. Clark (Engineers) Ltd.*, [1969] R.P.C. 41 (Ch.).
[30] *Kaplan v. Casino Rama*, 2019 ONSC 2025; *Jane Doe 464533 v. D.(N.)*, 2016 ONSC 541.
[31] *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).
[32] 2001 SCC 46 at para. 38.

> should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria.

[117] In defining the persons who have a potential claim against the defendant, there must be a rational relationship between the class, the cause of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive.[33] An over-inclusive class definition binds persons who ought not to be bound by judgment or by settlement, be that judgment or settlement favourable or unfavourable.[34] The rationale for avoiding over-inclusiveness is to ensure that litigation is confined to the parties joined by the claims and the common issues that arise.[35] The class should not be defined wider than necessary, and where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended.[36] A proposed class definition, however, is not overbroad because it may include persons who ultimately will not have a successful claim against the defendants.[37]

2. Analysis and Discussion: Identifiable Class Criterion

[118] The proposed class definition has been set out above, but it is repeated here for convenience:

> All patients who attended at the Toronto Cosmetic Surgery Institute from January 1, 2010, to December 13, 2018, and:
>
> (a) whose images were posted on the internet, published or otherwise displayed in a public setting by the Defendants, and who claim the publication was without their valid consent (the "Internet Class" or "Internet Class Members"); and/or
>
> (b) attended at the Toronto Cosmetic Surgery Institute during the time from January 1, 2017, until December 13, 2018, when video surveillance cameras were in operation (the "Surveillance Class").

[119] This proposed class definition is unacceptable, but the following modest modification of the class definition does satisfy the identifiable class criterion for the Surveillance Class. The class definition set out below also addresses the objections raised by the Defendants to the Plaintiffs' original proposed definition. I, therefore, certify the following class definition:

> All patients who attended at the Toronto Cosmetic Surgery Institute from January 1, 2017, to December 13, 2018.

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[33] *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 at para. 57 (C.A.), rev'g [2004] O.J. No. 317 (Div. Ct.), which had aff'd [2002] O.J. No. 2764 (S.C.J.).
[34] *Robinson v. Medtronic Inc*., [2009] O.J. No. 4366 at paras. 121-146 (S.C.J.).
[35] *Frohlinger v. Nortel Networks Corporation*, [2007] O.J. No. 148 at para. 22 (S.C.J.).
[36] *Fehringer v. Sun Media Corp*., [2002] O.J. No. 4110 at paras. 12-13 (S.C.J.), aff'd [2003] O.J. No. 3918 (Div. Ct.); *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 21.
[37] *Silver v. Imax Corp*., [2009] O.J. No. 5585 at para. 103-107 (S.C.J.) at para. 103-107, leave to appeal to Div. Ct. refused 2011 ONSC 1035 (Div. Ct.); *Boulanger v. Johnson & Johnson Corp*., [2007] O.J. No. 179 at para. 22 (S.C.J.), leave to appeal ref'd [2007] O.J. No. 1991 (Div. Ct.); *Ragoonanan v. Imperial Tobacco Inc.* (2005), 78 O.R. (3d) 98 (S.C.J.), leave to appeal ref'd [2008] O.J. No. 1644 (Div. Ct.); *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 at para. 10 (Gen. Div.)

[120] The above class definition accords with my conclusion explained below that only the Surveillance Complaint is certifiable. This definition serves the purposes of the identifiable class criterion. The definition identifies the persons who have a potential privacy claim against the defendant. The definition identifies those persons bound by the result of the action, and the definition describes who is entitled to notice.[38]

[121] The Defendants' objections to the class definition largely concerned the definition of the Internet Class. However, I need not resolve those objections because I am not certifying the Social Media Complaint. Thus, the objections to the definition of the Internet Class are moot. For example, there is a dispute about whether the start date for the Internet class is in 2010 or in 2012, but this dispute is no longer an issue because I shall not be certifying the Social Media Complaint. In contrast, there is no dispute that the starting date for the Surveillance Class is January 1, 2017.

[122] Although the point is moot, because there may be an appeal or appeals, for completeness, I note that I would have certified the following definition for the Internet Class:

> All patients who attended at the Toronto Cosmetic Surgery Institute from January 1, 2010, to December 13, 2018 whose images were posted on the Defendants' internet website or on the Defendants' social media accounts (the "Internet Class" or "Internet Class Members").

[123] This definition for the Internet Class would satisfy the criteria for a proper class definition and responds to all of the objections raised by the Defendants to the proposed class definition for the Internet Class.

H. Common Issues Criterion

1. General Principles

[124] The third criterion for certification is the common issues criterion. For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim.[39]

[125] The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis of an issue that is a substantial ingredient of each class member's claim and thereby facilitate judicial economy and access to justice.[40]

[126] In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*,[41] the Supreme Court of Canada describes the commonality requirement as the central notion of a class proceeding which is that individuals who have litigation concerns in common ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings.

[127] All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. The answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the

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[38] *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).
[39] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 18.
[40] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 39 and 40.
[41] 2013 SCC 57 at para. 106.

class.[42]

[128] An issue is not a common issue if its resolution is dependent upon individual findings of fact that would have to be made for each class member.[43] Common issues cannot be dependent upon findings which will have to be made at individual trials, nor can they be based on assumptions that circumvent the necessity for individual inquiries.[44]

[129] The common issue criterion presents a low bar.[45] An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution.[46] Even a significant level of individuality does not preclude a finding of commonality.[47]A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation.[48]

[130] From a factual perspective, the Plaintiff must show that there is some basis in fact that: (a) the proposed common issue actually exists; and, (b) the proposed issue can be answered in common across the entire class, which is to say that the Plaintiff must adduce some evidence demonstrating that there is a colourable claim or a rational connection between the Class Members and the proposed common issues.[49]

2. Proposed Common Issues

[131] The Plaintiffs propose the following 26 common issues:

Negligence

1. Did the Defendants, or either of them, owe a duty of care to the Class Members in the collection, retention, use, and/or disclosure of the Class Members' Personal Information?

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[42] *Batten v. Boehringer Ingelheim (Canada) Ltd*., 2017 ONSC 53, aff'd, 2017 ONSC 6098 (Div. Ct.), leave to appeal refused (28 February 2018) (C.A.); *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City),* 2015 ONCA 572 at para. 48; *McCracken v. CNR,* 2012 ONCA 445 at para. 183; *Merck Frosst Canada Ltd. v. Wuttunee,* 2009 SKCA 43 at paras. 145-46 and 160, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 512; *Ernewein v. General Motors of Canada Ltd.,* 2005 BCCA 540 (C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545; *Western Canadian Shopping Centres Inc. v. Dutton,* 2001 SCC 46 at para. 40.

[43] *Fehringer v. Sun Media Corp*., [2003] O.J. No. 3918 at paras. 3, 6 (Div. Ct.).

[44] *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 at para. 126 (S.C.J.), leave to appeal granted [2010] O.J. No. 3183 (Div. Ct.), var'd 2011 ONSC 3882 (Div. Ct.); *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 at paras. 50-52 (S.C.J.); *Collette v. Great Pacific Management Co.*, [2003] B.C.J. No. 529 at para. 51 (B.C.S.C.), var'd on other grounds (2004) 42 B.L.R. (3d) 161 (B.C.C.A.).

[45] *203874 Ontario Ltd. v. Quiznos Canada Restaurant Corp*., [2009] O.J. No. 1874 (Div. Ct.), aff'd [2010] O.J. No. 2683 (C.A.), leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 348; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 52 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.); *Carom v. Bre-X Minerals Ltd*. (2000), 51 O.R. (3d) 236 at para. 42 (C.A.).

[46] *Cloud v. Canada (Attorney General),* (2004), 73 O.R. (3d) 401 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.).

[47] *Hodge v. Neinstein*, 2017 ONCA 494 at para. 114; *Pro-Sys Consultants Ltd. v. Microsoft Corporation,* 2013 SCC 57 at para. 112; *Western Canadian Shopping Centres Inc. v. Dutton,* 2001 SCC 46 at para. 54.

[48] *Harrington v. Dow Corning Corp.,* [2000] B.C.J. No. 2237 (C.A.), leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.

[49] *Kuiper v. Cook (Canada) Inc.*, 2020 ONSC 128 (Div. Ct.).

2. If the answer to question #1 is yes, what is the applicable standard of care?

3. If the answer to question #1 is yes, did the Defendants, or either of them, breach the duty of care? If so, how?

Vicarious Liability

4. Are the Defendants, or either of them, vicariously liable for the wrongful conduct of employees or contractors of Dr. Martin Jugenburg Medicine Professional Corporation or the Toronto Cosmetic Surgery Institute?

Breach of trust and fiduciary duty

5. Did the Defendants, or either of them, owe a fiduciary duty to the Class Members?

6. If the answer to question #5 is yes, did the Defendants, or either of them, breach their fiduciary duty? If so, how?

7. Were the Defendants, or either of them, a trustee of the Class Members with regard to their Personal Information and, if so, did the Defendants, or either of them, breach the duty of trust imposed upon him, it, or them with respect to maintaining the confidentiality of the Class Members' Personal Information? If so, how?

Breach of confidence

8. Was the Internet Class Members' Personal Information confidential?

9. If the answer to question #8 is yes, did the circumstances in which the Class Members' Personal Information was collected import an obligation of confidence upon the Defendants, or either of them?

10. If the answer to question #9 is yes, did the Defendants, or either of them, breach the confidence of the Internet Class Members? If so, how?

Intrusion upon seclusion

11. Did the Defendants, or either of them, invade, without lawful justification, the private affairs or concerns of the Surveillance Class Members?

12. If the answer to question #11 is yes, did the Defendants, or either of them, act

intentionally or recklessly?

13. If the answer to questions #11 and #12 is yes, would a reasonable person regard the invasion of the Surveillance Class Members' privacy as highly offensive causing distress, humiliation or anguish?

Public disclosure of private facts

14. Did the Defendants, or either of them, publish, display publicly and/or post the Internet Class Members' Personal Information on the internet? If so, how?

15. If the answer to question #14 is yes, is the publication, public display, and/or posting on the internet of patient Personal Information by a health information custodian a "disclosure" as that term is defined in s. 2 of the *Personal Health Information Protection Ac*t, 2004, S.O. 2004, c. 3, Sched. A ("PHIPA")?

16. If the answer to question #15 is yes, is express consent by the patient to the publication, public display, and/or posting on the internet of their patient Personal Information required under s. 18(3) of the PHIPA?

17. Between January 1, 2010, and December 13, 2018, what were the information practices (as defined in s. 2 of the PHIPA) of the Defendants with regard to the publication, public display, and/or posting on the internet of patient Personal Information?

17a. Did the Defendants' information practices include obtaining a signed consent form from the patient prior to publication, public display, and/or posting on the internet of any patient Personal Information? If so, which forms were used and when?

18. If the answer to question #17a is yes, were any of the consent forms adequate to establish that the patient was providing consent to the disclosure of their Personal Information through publication, public display, and/or posting on the internet, as required by s. 18(1) of the PHIPA?

19. If the answer to question #14 is yes and the answer to question #18 is no, would the publication, public display, and/or posting on the internet of the Internet Class Subclass Members' Personal Information be highly offensive to a reasonable person of ordinary sensibilities?

20. Was the publication, public display, and/or posting on the internet of the Internet

Class Members' Personal Information of legitimate concern to the public?

Unjust enrichment

21. If the answer to question #14 is yes and the answer to question #18 is no, were the Defendants, or either of them, enriched as a result of the publication, public display, and/or posting on the internet of the Internet Class Members' Personal Information?

22. If the answer to question #21 is yes, did the Internet Class Members suffer a corresponding deprivation?

23. If the answer to question #21 is yes, was there a juristic reason for the Defendants' enrichment?

Damages

24. Can an award of aggregate damages be made pursuant to s. 24(1) of the *Class Proceedings Act, 1992* for the Class?

25. Does the conduct of the Defendants, or either of them, justify an award of punitive, exemplary and/or aggravated damages?

3. Common Issues Criterion: Discussion and Analysis for the Surveillance Class

[132] For the reasons that follow, I certify twelve common issues for the Surveillance Class.

[133] Each of the twelve questions, which are set out below, is a substantial ingredient of the Surveillance Class Members' case. The answer to each of the twelve questions is capable of extrapolation in the same manner to each member of the class.

[134] For example, each Class Member will benefit from having the court at the common issues trial determine the intrusion upon seclusion question of whether the Defendants without lawful justification invaded the affairs or concerns of the Surveillance Class Members. In turn, as noted above, an affirmative answer to this question along with affirmative answers to the other two intrusion upon seclusion questions would provide the foundation for an aggregate damages award.

[135] Taken as a package, the twelve questions will provide efficient access to justice for both the Class Members and also for the Defendants. Visualize:

a. If the Defendants succeed on the various cause of action questions, then the class action will be at end.

b. Conversely, if the Class Members succeed on the various cause of action questions, then while, in theory, the Class Members could proceed to individual issues trials to attempt to perfect the negligence and breach of trust and fiduciary duty causes of action, likely most Class Members would be content with the aggregate damages award for the

intrusion upon seclusion, which is a general damages award, and not proceed to attempt for additional damages or to perfect the other causes of action at individual issues trials.

c. But, a point to emphasize is that the possibility of individual issues trials does not negate or minimize the productivity and access to justice provided by the common issues trial for the Surveillance Class.

[136] Another point to emphasize is that the twelve common issues for the Surveillance Class Members do not depend upon individual findings of fact to be made for each Class Member.

[137] I conclude that the Plaintiffs satisfy the common issues criterion for the Surveillance Class Members.

[138] The twelve common issues for the Surveillance Class are as follows:

Negligence

1. Did the Defendants, or either of them, owe a duty of care to the Class Members in the collection, retention, use, and/or disclosure of the Class Members' Personal Information?

2. If the answer to question #1 is yes, what is the applicable standard of care?

3. If the answer to question #1 is yes, did the Defendants, or either of them, breach the duty of care? If so, how?

Vicarious Liability

4. Are the Defendants, or either of them, vicariously liable for the wrongful conduct of employees or contractors of Dr. Martin Jugenburg Medicine Professional Corporation or the Toronto Cosmetic Surgery Institute?

Breach of trust and fiduciary duty

5. Did the Defendants, or either of them, owe a fiduciary duty to the Class Members?

6. If the answer to question #5 is yes, did the Defendants, or either of them, breach their fiduciary duty? If so, how?

7. Were the Defendants, or either of them, a trustee of the Class Members with regard to their Personal Information and, if so, did the Defendants, or either of them, breach the duty of trust imposed upon him, it, or them with respect to maintaining the confidentiality of the Class Members' Personal Information? If so, how?

Intrusion upon seclusion

8. Did the Defendants, or either of them, invade, without lawful justification, the private affairs or concerns of the Surveillance Class Members?

9. If the answer to question #8 is yes, did the Defendants, or either of them, act intentionally or recklessly?

10. If the answer to questions #8 and #9 is yes, would a reasonable person regard the invasion of the Surveillance Class Members' privacy as highly offensive causing distress, humiliation or anguish?

Damages

11. Can an award of aggregate damages be made pursuant to s. 24(1) of the *Class Proceedings Act, 1992* for the Class?

12. Does the conduct of the Defendants, or either of them, justify an award of punitive, exemplary and/or aggravated damages?

4. Common Issues Criterion: the Internet Class

[139] I do not certify the common issues for the Internet Class. My explanation is better understood as a part of the discussion and analysis of the preferable procedure criterion that follows in the next part of my Reasons for Decision.

I. Preferable Procedure Criterion

1. General Principles

[140] Under the *Class Proceedings Act, 1992*, the fourth criterion for certification is the preferable procedure criterion. Preferability captures the ideas of: (a) whether a class proceeding would be an appropriate method of advancing the claims of the class members; and (b) whether a class proceeding would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute.[50]

[141] In *AIC Limited v. Fischer*,[51] the Supreme Court of Canada emphasized that the preferability analysis must be conducted through the lens of judicial economy, behaviour modification, and access to justice. Justice Cromwell stated that access to justice has both a procedural and substantive dimension. The procedural aspect focuses on whether the claimants have a fair process to resolve their claims. The substantive aspect focuses on the results to be obtained and is

[50] *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para. 69, leave to appeal to SCC ref'd [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, 2001 SCC 68.
[51] 2013 SCC 69 at paras. 24-38.

concerned with whether the claimants will receive a just and effective remedy for their claims if established.

[142] Thus, for a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims.[52] Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues.[53]

[143] To satisfy the preferable procedure criterion, the proposed representative plaintiff must show some basis in fact that the proposed class action would: (a) be a fair, efficient and manageable method of advancing the claim; (b) be preferable to any other reasonably available means of resolving the class members' claims; and (c) facilitate the three principal goals of class proceedings; namely: judicial economy, behaviour modification, and access to justice.[54]

2. Analysis and Discussion: Preferable Procedure Criterion for the Surveillance Class

[144] The Defendants make three discrete arguments that a class action is not the preferable procedure for both the Surveillance Class and the Internet Class. The Defendants argue that: (a) there is no evidence of a meaningfully sized class "clamouring" for access to justice; (b) even if there were some common issues that were certified, the individual issues necessarily overwhelm the common issues; and (c) a class action is not necessary for behaviour modification because that has already occurred by reason of the intervention of the Information and Privacy Commission and the College of Physicians and Surgeons.

[145] Insofar as the Surveillance Class is concerned, I disagree with the Defendants' preferable procedure arguments. I conclude that a class action is the preferable procedure for the Surveillance Class Members' claims.

[146] Whether there is any "clamouring" for access to justice is irrelevant, but as the discussion above about class size and class definition reveals there is a meaningfully sized class that would benefit from access to justice for the alleged wrongdoings suffered by members of the Surveillance Class.

[147] Given the economics of litigation, there is no meaningful litigation alternative for the Surveillance Class. Individual actions in the Superior Court or in the Small Claims Court branch of the Superior Court would be prohibitively expensive for the Surveillance Class.

[148] As explained above, it is possible that most of the Surveillance Class Members would be content with a share of an aggregate damages award, but even if they were not so inclined, some of the heavy litigation lifting for any individual issues trials would have been accomplished at the common issues trials. The Class Members would be able to assess the value of proceeding to a common issues trial. A class procedure is the preferable route to access to justice for the

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[52] *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 52 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.).
[53] *Markson v. MBNA Canada Bank*, 2007 ONCA 334; *Hollick v. Toronto (City)*, 2001 SCC 68.
[54] *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp*., 2014 ONCA 901; *AIC Limited v. Fischer*, 2013 SCC 69; *Hollick v. Toronto (City)*, 2001 SCC 68.

Surveillance Class.

[149] It may be the case that the Defendants' behaviour has already been modified, but the behaviour modification goal and the social utility of class proceedings includes sending a message about the law to others and to the public. The goal of behaviour modification would be met by a class action for the Surveillance Class.

[150] Viewed through the lens of judicial economy, behaviour modification, and access to justice, a common issues trial followed by some individual issues trials for those Class Members of the Surveillance Class who suffered beyond a share of any aggregate damages award is preferable and provides a fair process for both the Class Members and the Defendants.

[151] I conclude that the Plaintiffs have satisfied the preferable procedure criterion for the Surveillance Class.

3. Analysis and Discussion: the Common Issues and the Preferable Procedure Criteria for the Internet Class

[152] The analysis of why the Internet Class does not satisfy the common issues and the preferable procedure criteria is complex, and the analysis involves explaining why the Surveillance Complaint is certifiable and why the Social Media Complaint of the Internet Class is not.

[153] In the analysis below, it shall be important to keep in mind that for the Social Media Complaint, the holy litigation grail for both the Defendants and the Internet Class Members is the issue of whether the Internet Class Member consented to the posting of his or her image on the Defendants' webpage or on the Defendants' social media accounts.

[154] I say that this issue is the holy litigation grail for both the Class Members and the Defendants because if the Class Members' consent was invalid, then the Class Member may succeed on their various causes of action, but if the Class Members' consent was valid, then the Class Members' causes of action will fail. The validity of a Class Member's consent is the critical issue of the Social Media Complaint.

[155] The analysis of the common issues and the preferable procedure criteria for the Internet Class may begin by noting that on behalf of the Internet Class, the Plaintiffs assert claims of: (a) breach of confidence; (b) breach of fiduciary duty; (c) breach of trust (d) negligence; (e) public disclosure of private facts; and (f) unjust enrichment. The Internet Class does not assert an intrusion upon seclusion cause of action.

[156] There are twenty-three questions that are proposed for the Internet Class. Of the twenty-three questions, the three negligence questions, the vicarious liability questions, the three breach of trust and fiduciary duty questions, and the two damages questions, replicate nine questions of the Surveillance Class (1-7, 11 and 12). There are fourteen additional proposed common issues questions for the Internet Class. The fourteen additional questions are the three unjust enrichment questions, the three breach of confidence questions, and the eight Public Disclosure of Private Facts questions.

[157] As already mentioned above, there is no basis in fact for the unjust enrichment cause of action, and therefore, its three common issues are not certifiable. These three proposed questions can be removed from the analysis.

[158] The aggregate damages issue can be removed because with the absence of the intrusion on

seclusion claim and the removal of the unjust enrichment claim, there are no causes of action upon which liability could be established at the common issues trial. Thus, there is no basis for a baseline or partial or minimum award across the Internet Class.

[159] Putting aside for the moment the punitive damages question, the remaining twenty questions essentially fall into two groups.

[160] One group of questions for the Internet Class are questions that advance the Class Members' class action but do not advance it substantially because the answers to the questions are already settled issues of law.

a. For this group of questions, the very heavy lifting would have to be done at the individual issues trials. These questions technically satisfy the common issues criterion, but it is a matter of the exercise of the court's discretion as to whether these common questions satisfy the preferable procedure criterion.

b. For this group of questions, the heavy lifting must be done at individual issues trials because none of the proposed causes of action could produce an award of damages at the common issues trial.

c. Positive outcomes for the Class Members at the common issues trial of their questions about breach of confidence, breach of fiduciary duty, breach of trust, negligence, and public disclosure of private facts all would have to be perfected at individual issues trials where the Class Member would be confronted by challenging adjudications of causation and quantification of harm that can only be resolved at individual issues trials.[55]

d. That the causation issue is all of challenging and idiosyncratic may be shown by what Justice Cory said in *Arndt v. Smith*[56] about *Reibl v. Hughes*[57] at p. 544:

> *Reibl* is a very significant and leading authority. It marks the rejection of the paternalistic approach to determining how much information should be given to patients. It emphasizes the patient's right to know and ensures that patients will have benefit of a high standard of disclosure. At the same time, its modified objective test for causation ensures that our medical system will have some protection in the face of liability claims from patients influenced by unreasonable fears and beliefs, while still accommodating all the reasonable individual concerns and circumstances of plaintiffs. The test is flexible enough to enable a court to take into account a wide range of the personal circumstances of the plaintiff, and at the same time to recognize that physicians should not be held responsible when the idiosyncratic beliefs of their patients might have prompted unpredictable and unreasonable treatment decisions.

[161] The second group of questions for the Internet Class are questions that cannot be answered on a class wide basis because the circumstances of the Class Members are idiosyncratic. The second group of the proposed common issues do not satisfy the criteria for a common issue. In the second group of questions, the underlying question or premise to the question is whether the Class Members validly consented to the postings on the clinic's webpage or on its social media accounts.

[162] The three proposed negligence questions illustrate the two groupings of the proposed

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[55] *Arndt v. Smith* [1997] 2 S.C.R.539; *Hollis v. Dow Corning Corp*., [1995] 4 S.C.R. 634; *Reibl v. Hughes*, [1980] 2 S.C.R. 880..
[56] [1997] 2 S.C.R.539.
[57] [1980] 2 S.C.R. 880.

common issues. The duty of care and the applicable standard of care for physicians questions are not controversial. These questions fall into the first group. The question of whether the duty of care was breached, however, is idiosyncratic and depends on individual determinations of the circumstances of the individual Class Member and whether he or she consented to the posting of images and if there was a consent, then was the posting beyond the purposes for which the consent was granted. The breach of the duty of care issue is in the second grouping of the proposed common issues.

[163] The validity of the consent is the pivotal and critical issue of the Social Media Complaint for the Internet Class. The validity of the consent raises numerous permutations and combinations among the Internet Class Members. In contrast, the breach of the standard of care question for the Surveillance Complaint and the Surveillance Class does not raise idiosyncratic factors. If there was a breach of the standard of care, then it is common to all of the Class Members all of whom were surreptitiously surveilled.

[164] For the Internet Class, there are numerous permutations and combinations, because the signing of consents was not uniform.

a. The number and character of the consent forms that a Class Member signed is idiosyncratic.

b. The factual nexus for the interpretation of the consent forms is idiosyncratic. Some Class Members would have been attracted to the clinic because of its webpage and social media postings. Some Class Members would be very familiar with social media platforms while others would be unfamiliar with the nature of internet postings. Some Class Members would have read the Defendants' postings or publications about the clinic's privacy policies. Other Class Members would have ignored the postings or publications.

c. Depending on their level of familiarity and understanding Class Members would have a greater or lesser understanding of what they were consenting to when the signed one or more consent forms.

[165] The validity of the consents is further idiosyncratic because for some Class Members there may have been oral discussions with one or more clinic nurses, doctors, or staff about the postings of his or her image on the website or on social media. For other Class Members, there may have been no meaningful conversations about the postings on the internet.

[166] The validity of the consents is still further idiosyncratic because as argued by the Plaintiffs, some patients may have felt coerced to sign the consent form in the Surgical Information Package by the message that the form must be signed to proceed with the surgery. The problem for the Plaintiffs is that it cannot be inferred that all of the Class Members would have understand the message as necessitating an affirmative answer to the consent form before the surgery could proceed.

[167] I appreciate that the scope of a consent was certified as a common issue in *Douez v. Facebook, Inc.*[58]; however, unlike that case, where much of the experience of the Facebook users who constituted the Class Members was common, the experience of the patients in the immediate case was not common but was idiosyncratic. Moreover, unlike the Class Members in *Douez v. Facebook, Inc.*, where the matter of consent might devolve into individual inquiries, in the

[58] 2018 BCCA 186.

immediate case, it is inevitable that there will have to be individual inquiries.

[168] Apart from the consent issue, further idiosyncratic complications arise for the Internet Class because the Defendants dispute that they have posted the Internet Class Members' Personal Information on the internet.

[169] In relation to the proposed common issue of whether the Defendants published the Internet Class Members' personal information on the internet, the Defendants argue that personal information has not been posted because the posted images do not identify the Class Member. They submit that that identification is key to whether or not the information is personal. I cannot and need not decide this point at a certification motion, but if the Defendants are correct, then little could be accomplished at the common issues trial and the personalization and identification of the posted images becomes another idiosyncratic matter for the Internet Class to resolve at individual issues trials.

[170] In relation to the proposed common issue of whether the Defendants published the Internet Class Members' personal information, the Defendants also argue that the nature of the information posted online varied widely from individual to individual and given what was depicted and how it was depicted it was an individual issue as to whether personal information was posted.

[171] I agree with the Defendants that the nature of what was posted is idiosyncratic. In the immediate case, the images are not of a common nature apart from the fact that the images relate to plastic surgery treatments. But there are diverse types of plastic surgery images given the diversity of body parts.

[172] For the Social Media Complaint, if there has been a breach of privacy, each Internet Class Members' privacy was not breached in the same way or to the same degree.[59]

[173] The Plaintiffs tried mightily to generalize the validity of the consent issue that underlies the Internet Complaint causes of action, but, in my opinion, these efforts at generalization did not establish that there was some basis in fact for a common issue.

[174] The issue of the validity of the consent can only properly be resolved at individual trials, and the Social Media Complaint for the Internet Class is not certifiable because of the absence of commonality.[60]

[175] Further, in my opinion, the Plaintiffs' evidence and argument did not establish that there was some basis in fact to make a common issue trial the preferable procedure for the resolution of the Class Member's causes of action.

[176] I repeat what I said in *Broutzas v. Rouge Valley Health System,*[61] which was a case

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[59] *Kaplan v. Casino Rama*, 2019 ONSC 2025.

[60] *Kaplan v. Casino Rama*, 2019 ONSC 2025; *Ladas v. Apple Inc*, 2014 BCSC 1821; *Egglestone v. Barker*, [2003] O.J. No. 3137 (S.C.J.), aff'd [2004] O.J. No. 5433 (Div. Ct.), leave to appeal to the Court of Appeal denied on May 18, 2005.

[61] 2018 ONSC 6315. See also: *RG v. The Hospital for Sick Children*, 2018 ONSC 6315, aff'd 2018 ONSC 7058 (Div. Ct.); *Bennett v. Lenovo* , 2017 ONSC 1082; *Dennis v. Ontario Lottery and Gaming Corp*. 2010 ONSC 1332, aff'd 2011 ONSC 7024, aff'd 2013 ONCA 501, leave to appeal refused [2013] S.C.C.A. No. 373; *Loveless v. Ontario Lottery and Gaming Corp*., 2011 ONSC 4744; *Williams v. Mutual Life Assurance Co.; Zicherman v. Equitable Life Insurance Co. of Canada* [2003] O.J. No. 1160 and 1161 (C.A.), aff'g [2001] O.J. No. 4952 (Div. Ct.), which aff'd (2000), 51 O.R. (3d) 54 (S.C.J.); *Mouhteros v. DeVry Canada Inc.*, [1998] O.J. No. 2786 (Gen. Div.) with respect to the preferable procedure criterion and the balance between common and individual issues.

involving an alleged breach of privacy and intrusion on seclusion and negligence claim with respect to the disclosure of hospital medical records, at paras. 293-294 [footnotes omitted]:

> 293. In undertaking a preferable procedure analysis in a case in which individual issue trials are inevitable, it should be appreciated that the *Class Proceedings Act, 1992* envisions the prospect of individual claims being litigated and it should be noted that sections 12 and 25 of the *Act* empower the court with tools to manage and achieve access to justice and judicial economy; thus the inevitability of individual issues trials is not an obstacle to certification. In the context of misrepresentation claims, numerous actions have been certified notwithstanding individual issues of reliance and damages.
>
> 294. That said, in a given particular case, the inevitability of individual issues trials may obviate any advantages from the common issues trial and make the case unmanageable and thus the particular case will fail the preferable procedure criterion. Or, in a given case, the inevitability of individual issues may mean that while the action may be manageable, those individual issue trials are the preferable procedure and a class action is not the preferable procedure to achieve access to justice, behaviour modification, and judicial economy. A class action may not be fair, efficient and manageable, having regard to the common issues in the context of the action as a whole and the individual issues that would remain after the common issues are resolved. A class action will not be preferable if, at the end of the day, claimants remain faced with the same economic and practical hurdles that they faced at the outset of the proposed class action.

[177] I, therefore, conclude that putting aside for the moment the punitive damages question, the remaining twenty questions are not certifiable because they fail to satisfy the common issues and or the preferable procedural criteria.

[178] That leaves the punitive damages question. The case law establishes that if punitive damages is the only common issue, then the question will not be certified.[62] Moreover, and in any event, unlike the situation for the Surveillance Class, the punitive damages question is not a common issue, once again because the appropriateness of punitive damages is idiosyncratic and could only be determined at individual issues trials.

J. Representative Plaintiff Criterion

1. General Principles

[179] The fifth and final criterion for certification as a class action is that there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan. The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all of the class members as against the defendant.[63]

2. Analysis and Discussion: Representative Plaintiff Criterion

[180] Without conceding the adequacy of the litigation plan, the Defendants do not dispute the

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[62] *Kaplan v. Casino Rama*, 2019 ONSC 2025 at para. 83; *Batten v. Boehringer Ingelheim (Canada) Ltd*., 2017 ONSC 53 at para. 206, aff'd, 2017 ONSC 6098 (Div. Ct.), leave to appeal refused (28 February 2018) (C.A.).
[63] *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 at paras. 36-45 (S.C.J.); *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 at para. 40 (S.C.J.), aff'd [2003] O.J. No. 4708 (C.A.).

Representative Plaintiff Criterion for the Surveillance Class. In any event, I conclude this criterion is satisfied.

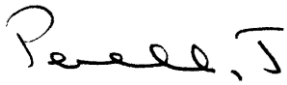
[181] The Defendants dispute that there is a representative plaintiff for the Internet Class because they submit that there is no evidence that A.C.'s photos were published on the internet. For the purposes of certification, the circumstance that A.C. may at this juncture be unable to prove an element of her cause of action does not mean that she does not have the cause of action.

[182] Although I am not certifying the Internet Class Members' action, for the purposes of any appeals, I conclude that representative plaintiff criterion would have been satisfied for the Social Media Complaint for the Internet Class.

K. Conclusion

[183] For the above reasons, I certify the Surveillance Complaint as a class action.

[184] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Plaintiffs' submissions within twenty days of the release of these Reasons for Decision followed by the Defendants' submissions within a further twenty days.



Perell, J.

Released: May 10, 2021.

CITATION: G.C. v. Jugenburg, 2021 ONSC 3119
COURT FILE NO.: CV-19-00631903-00CP
DATE: 20210510

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

G.C., J.C., and A.C.

Plaintiffs

- and -

MARTIN JUGENBURG and
DR. MARTIN JUGENBURG MEDICINE
PROFESSIONAL CORPORATION

Defendants

REASONS FOR DECISION

PERELL J.

Released: May 10, 2021.