

Court File No. CV-19-00631903-00CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

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

Plaintiffs

and

MARTIN JUGENBURG and  
DR. MARTIN JUGENBURG MEDICINE PROFESSIONAL CORPORATION

Defendants

**PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992***

**FRESH AS AMENDED STATEMENT OF DEFENCE**

1. The Defendants admit the allegations contained in paragraphs 9-11 and 14-16 of the Fresh as Amended Statement of Claim.

2. Except as hereinafter expressly admitted, the Defendants deny each and every other allegation contained in the Fresh as Amended Statement of Claim and put the Plaintiffs to the strict proof thereof.

**Background**

3. The Defendant Dr. Martin Jugenburg is a physician licenced to practice medicine in the Province of Ontario, with a specialty in plastic surgery. Dr. Jugenburg practices under the Dr. Martin Jugenburg Medicine Professional Corporation, which is a corporation incorporated under the laws of the Province of Ontario.

4. The Defendants practice medicine at the Toronto Cosmetic Surgery Institute (the “Clinic”). The Clinic is located inside the Fairview Royal York Hotel in Toronto, Ontario.

5. The Defendants take all reasonable steps to protect the privacy of patients and their personal health information at the Clinic. The Defendants utilize a secure electronic medical record platform (“EMR”) for all clinical records and information, including clinical photographs taken as part of treatment, which is password protected and accessible only to authorized persons within the circle of care.

6. The Defendants secure informed consent for all medical procedures undertaken at the Clinic, and provide extensive information on proposed procedures, their risks and benefits, and endeavour to answer all questions of patients. The Defendants take the education of patients, their privacy and their best interests very seriously.

7. As part of that, security is important to maintaining safety and confidences in the Clinic. The Clinic houses private patient information and records, expensive medical equipment, and various pharmaceuticals and narcotics. Each of these must be maintained securely.

8. Located inside the Royal York Hotel, the Clinic is accessible via a public elevator from street level and through the underground “PATH” network in downtown Toronto. While the location makes the Clinic convenient and accessible to patients, it also faces an elevated risk of security incidents on its premises.

9. A system of security cameras was installed throughout the Clinic in order to enhance security with a renovation of the Clinic in or about December 2016.

10. The presence of cameras served to deter would-be criminals from engaging in unlawful or otherwise inappropriate behaviour, and recordings would help apprehend any perpetrators of crime.

11. The cameras were visible at all times. The public, including patients, were notified upon entering the Clinic by posted signs that they were under video and audio surveillance. At no time were the security cameras ever hidden or obstructed from view anywhere in the Clinic, which would have defeated a central purpose of deterrence.

12. The security cameras transmitted footage to two secure network video recorders (“NVRs”) stored in locked closets within the Clinic. The privacy of the footage was secure and password protected, accessible only to the Defendants.

13. The security camera data was stored only temporarily and exclusively on the secure NVRs, until they were systematically and automatically overwritten as new data replaced old data once storage capacity was reached. Once overwritten, this data was not recoverable.

14. The physical location of the NVR systems within the Clinic did not permit review of the footage. As a default feature of the security system, access of the footage was permitted through a secure access application installed on Dr. Jugenburg’s mobile phone. At no time was footage saved or copied locally onto the phone.

15. At all times, the privacy and security of the footage was protected prior to its automatic deletion. At no time was any footage accessed, downloaded or disclosed to any unauthorized person.

16. At no time were images, videos or recordings from the security camera system ever disclosed anywhere; and they were never utilized for any improper purpose.

17. The Clinic and the Defendants utilize social media in order to educate patients on exactly what transpires during plastic surgery, including preoperatively and postoperatively. The Defendants strive to be transparent, and to provide the public with honest and detailed information about plastic surgery and what to expect.

18. The social media platform is designed to increase transparency, education, and awareness, as well as decrease public misinformation and stigma associated with the cosmetic procedures offered by the Clinic.

19. All images, videos or recordings posted on the Clinic and Defendants' social media are secured and disclosed only after patients provide informed and written social media consent to this collection and disclosure which includes the default that any identifying features including a patient's face or tattoos will not be shown.

20. Footage from the security camera systems is never posted to the Clinic's social media.

**Plaintiff G.C.**

21. The Plaintiff, G.C., attended at the Clinic for a consultation regarding breast augmentation surgery on January 30, 2018.

22. G.C. was seen by a member of the Clinic's nursing staff, who conducted an appropriate assessment which included taking a relevant history and performing a physical examination. In the presence of Clinic staff, G.C. disrobed from the waist up, to permit assessment for the proposed surgery of breast augmentation.

23. Dr. Jugenburg attended the consultation, performed an appropriate physical examination, and discussed options for treatment, including the risks and benefits of each option. G.C. was provided with an opportunity to ask any questions. With G.C.'s consent, photographs were taken for her medical file, in order to assist with providing appropriate medical treatment.

24. The photographs taken were stored in the Clinic's secure EMR system and never disclosed beyond the circle of care.

25. Following the consultation, G.C. wrote an email to Clinic staff asking questions relating to the breast augmentation procedure. Clinic staff provided answers to G.C.'s questions.

26. G.C. elected not to proceed with breast augmentation surgery at the Clinic. The Clinic and the Defendants had no further involvement in G.C.'s care.

27. The Defendants deny the allegation that G.C.'s privacy was invaded, intentionally or otherwise, as a result of the security cameras in operation at the Clinic during the time of her consultation.

28. G.C. was notified of the presence of the security camera system by signs posted at the entrance of the Clinic and the visible presence of the cameras throughout the Clinic. These cameras were visible at all times and would have come to G.C.'s attention.

29. Any footage of G.C. collected on the security system was temporarily and securely held on the NVRs, and then automatically overwritten. At no time was security camera footage of G.C.'s consultation accessed, used, or disclosed in the manner alleged in the Fresh as Amended Statement of Claim or in any manner whatsoever. The footage of G.C. was never viewed by the Defendants or anyone else at any time.

30. To the extent that, as pleaded in the Fresh as Amended Statement of Claim, any conversations between G.C. and her husband were recorded, which is denied, such conversations were never accessed, used, or disclosed. The footage was collected and then deleted automatically by the NVR system. The footage was not accessed or disclosed to anyone, at any time.

**Plaintiff J.C.**

31. The Plaintiff, J.C., attended at the Clinic for a consultation regarding breast augmentation and abdominoplasty on August 14, 2018.

32. J.C. was seen by a member of the Clinic's nursing staff who conducted an appropriate assessment which included taking a relevant history and performing a physical examination. J.C. partially disrobed in the presence of Clinic staff to permit assessment for the proposed breast augmentation and abdominoplasty procedures. The options for treatment and their risks and benefits were discussed with J.C. With her consent, photographs were taken for J.C.'s medical file, in order to assist with providing appropriate medical treatment.

33. J.C.'s photographs were stored in the Clinic's secure EMR system and never disclosed beyond the circle of care.

34. J.C. elected not to proceed with breast augmentation or abdominoplasty at the Clinic. The Defendants had no further involvement in J.C.'s care.

35. The Defendants deny the allegation that J.C.'s privacy was invaded, intentionally or otherwise, as a result of the security cameras in operation at the Clinic during the time of her consultation.

36. J.C. was notified of the presence of the security camera system at the Clinic by signs posted at the entrance of the Clinic and the visible presence of cameras throughout the Clinic. These cameras were visible at all times and would have come to J.C.'s attention.

37. Any footage of J.C. collected on that security system was temporarily and securely held on the NVRs. At no time was security camera footage of J.C.'s consultation accessed, used, or disclosed in the manner alleged in the Fresh as Amended Statement of Claim or in any manner whatsoever. Any footage of J.C. was never viewed by the Defendants or anyone else.

38. To the extent that, as pleaded in the Fresh as Amended Statement of Claim, any conversations between J.C. and her friend were recorded, which is denied, such conversations were never accessed, used or disclosed. The footage was collected and would have been deleted automatically by the NVR system. The footage was not accessed or disclosed to anyone, at any time.

**Plaintiff A.C.**

39. The Plaintiff, A.C., attended the Clinic for a consultation regarding liposuction on her chin and torso on February 27, 2018.

40. A.C. was seen by a member of the Clinic's nursing staff who conducted an appropriate assessment which included taking a relevant history and performing a physical examination. In the presence of Clinic staff, A.C. disrobed to the extent necessary for assessment of possible liposuction. With A.C.'s consent, photographs were taken in order to assist with providing appropriate medical treatment and recommendations. The options for treatment and their risks and benefits were discussed with A.C.

41. A.C. elected to proceed with liposuction of the torso and chin at the Clinic. She was provided with detailed information, including various consent forms.

42. Among other things, A.C. provided written and duly informed consent as follows:

- (a) Consent to the taking and posting of her pre-operative, intra-operative and post-operative photos and videos on Snapchat, Instagram, Twitter, Facebook and YouTube (provided her face was covered);
- (b) Consent to the taking, publication and use of photography for scientific, educational or illustrative purposes;
- (c) Consent to general and liposuction-specific surgical risks, including pain, scarring, bruising, bleeding, swelling, infection, or asymmetric outcome;
- (d) Consent to the understanding that she would need to follow exact postoperative instructions; and
- (e) Certification that all aspects of the surgery had been explained, and she had thoroughly reviewed the consent forms and understood the goals, limitations and possible complications of the procedure.

43. Contrary to the allegation of the Fresh as Amended Statement of Claim, patients are never pressured to sign social media consents, and many decline to do so. A.C. was provided with ample time and information with which to make an informed decision of whether to sign the consent.



44. On July 16, 2018, A.C. attended the Clinic and Dr. Jugenburg and his medical team performed the liposuction procedure on A.C.'s chin and torso. The procedure was uneventful. A.C. was transferred to a recovery room and later discharged to her room in the Royal York Hotel.

45. A.C. was appropriately followed by the Clinic thereafter, including by a Clinic nurse checking in on her that evening and assessing her post-operative condition the next day in the hotel room. Detailed post-operative instructions were provided to A.C..

46. A.C. attended the Clinic for a follow-up appointment on July 26, 2018. A.C. was seen by a member of the Clinic's nursing staff who carried out an appropriate physical examination. In accordance with her written consent, further photos were taken for A.C.'s file in order to document her progress. Dr. Jugenburg attended the follow-up appointment and provided A.C. with appropriate instructions regarding the importance of massage after liposuction.

47. Contrary to the allegations of the Fresh as Amended Statement of Claim, Dr. Jugenburg did not "rant" at anyone regarding the importance of massage following liposuction at this visit or otherwise. In accordance with his educational objectives and to facilitate optimal outcomes, he provides information to patients and others about the importance of following post-operative instructions and massaging after liposuction, both in person and on social media.

48. The Defendants deny that A.C.'s privacy was invaded, intentionally or otherwise, as a result of the security cameras used throughout the Clinic during the time of her attendances.

49. As described above, security cameras were entirely visible and never hidden. A.C. was notified of the presence of the security camera system by signs posted at the entrance of the Clinic,

in the operating room and the visible presence of the cameras throughout the Clinic. These cameras were visible at all times and would have come to A.C.'s attention.

50. Any footage of A.C. collected on that security system was temporarily and securely held on the NVRs. At no time was security camera footage of A.C.'s attendances at the Clinic accessed, used, or disclosed in the manner alleged in the Amended Statement of Claim or in any manner whatsoever. The footage of A.C. was never viewed by the Defendants or anyone else.

51. To the extent that conversations between A.C. and her partner in the waiting room were captured, which is denied, such conversations were never accessed, used, or disclosed. The footage was not accessed or disclosed to anyone, at any time.

52. To the extent that any images of A.C. may have been published on social media, the images would only have been taken by Clinic staff directly during visits with A.C. and with her express consent and knowledge. Further any publication was carried out entirely in accordance with A.C.'s express and written consent and with no identifying features to A.C.

### **No Breach of Trust or Breach of Fiduciary Duty/Negligence**

53. The Defendants deny that the Fresh as Amended Statement of Claim has pleaded any material facts that would give rise to a cause of action for breach of trust, breach of fiduciary duty or negligence on behalf of any of the three Plaintiffs in the manner alleged in the Fresh as Amended Statement of Claim or in any manner whatsoever. The Defendants deny that they enjoyed a special position of trust and confidence vis-à-vis the Class in the manner alleged in paragraph 86 of the Fresh as Amended Statement of Claim.

54. The Defendants deny that they owed the Plaintiffs a fiduciary duty in the manner alleged in paragraph 87 of the Fresh as Amended Statement of Claim. As set out above, Dr. Jugenburg carried out any fiduciary duties he did owe to the Plaintiffs Class in accordance with his obligations, contrary to the allegations contained in the Fresh as Amended Statement of Claim.

55. The Defendants deny that they owed the Plaintiffs a duty of care in the manner alleged in paragraph 88 of the Fresh as Amended Statement of Claim. As set out above, Dr. Jugenburg upheld any duties he did owe to the Plaintiffs Class in accordance with his obligations, contrary to the allegations contained in the Fresh as Amended Statement of Claim. In any event, the Plaintiffs have not suffered any damages which are compensable at law. If the Plaintiffs have suffered damages, these were not caused by any breach in the standard of care by Dr. Jugenburg, and are in any event, too remote and the Plaintiffs have failed to mitigate such damages.

### **No Intrusion Upon Seclusion**

56. The Defendants deny that the Fresh as Amended Statement of Claim has pleaded any material facts that would give rise to a cause of action for the tort of intrusion upon seclusion on behalf of any of the three Plaintiffs in the manner alleged in the Fresh as Amended Statement of Claim or in any manner whatsoever.

57. In any event, the Defendants deny that they intentionally invaded the privacy of the Plaintiffs without lawful justification in circumstances that would be considered highly offensive to a reasonable person.

### **Damages and Other Relief Sought**

58. The Defendants deny that the Plaintiffs are entitled to any of the relief sought in the Fresh as Amended Statement of Claim.

59. The Defendants deny that the Plaintiffs have sustained the injuries and damages as alleged in the Fresh as Amended Statement of Claim and put the Plaintiffs to the strict proof thereof. The said injuries and damages are, in any event, excessive and too remote, and the Plaintiffs have failed to mitigate such damages.

60. If the Plaintiffs have sustained any damages and injuries as alleged in the Fresh as Amended Statement of Claim, which is denied, those injuries and damages are not caused or contributed to in whole or in part to any actionable act or omission on the part of the Defendants.

61. The Defendants deny that they behaved with arrogance, high-handedness, callous disregard or lack of care. The Defendants deny any basis for the Plaintiffs' claim of aggravated and punitive damages.

### **General**

62. The Defendants plead and rely upon:

- (a) the *Class Proceedings Act*, as amended from time to time;
- (a) the *Negligence Act*, as amended from time to time; and
- (b) the *Limitations Act*, as amended from time to time.

63. The Defendants ask that this action be dismissed with costs.

July 25, 2022

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