Mixed results in privacy class action against doctor who allegedly filmed patients

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A plastic surgeon alleged to have filmed his patients with surveillance cameras faced a privacy class action case.

In *G.C. v. Jugenburg* (2021 ONSC 3119), the Ontario Superior Court certified a privacy breach class action against Dr. Martin Jugenburg, but declined to certify a class action for patients whose images were posted on the internet, published, or otherwise displayed in a public setting, allegedly without their consent.

Background

The defendant operated a plastic surgery clinic in Toronto.

In January 2017, the clinic completed installation of 24 continuously-operating cameras. The cameras were located across the clinic except for the washrooms. They were not hidden, but were also not overly noticeable. Between January 2017 and December 2018 there was only one sign, located in an operating room that disclosed the presence of a surveillance camera. Clinic staff did not let patients know there were cameras throughout the premises.

Dr. Jugenburg maintained that the cameras were installed for security purposes, not for patient care or any nefarious or voyeuristic purposes.

In 2016, the defendant began marketing himself on various social media platforms. He shared photos and videos of clinic patients, including ones taken during surgery. The patients were not named and their faces were blurred or cropped out. The clinic had a consent procedure with respect to posting of images on the internet or social media.

Following exposure by CBC's *Marketplace* in December 2018, the media coverage and regulatory actions resulted in the cameras being shut down and seized. Professional disciplinary proceedings also began against Dr. Jugenburg.

Patients of the defendant brought a class action on behalf of two classes:

- Approximately 2,500 patients who attended the clinic when the surveillance cameras were operational (the Surveillance Class); and
- An undetermined number of patients whose images were posted on the internet, published or otherwise displayed publicly, and who claimed they were published without their consent (the Internet Class).

Class action certified for the Surveillance Class, but not the Internet Class

Justice Perell certified a class action for the Surveillance Class on common issues related to negligence, vicarious liability, breach of trust and fiduciary duty, intrusion upon seclusion, and damages.

However, Justice Perell did not agree there had been public disclosure of private facts because this tort must be determined on a case-by-case basis. He also did not find evidence that Dr. Jugenburg had been unjustly enriched at the expense of the patients, and did not certify the unjust enrichment claims.

Furthermore, Justice Perell declined to certify the Internet Class altogether, holding that the "holy grail" issue relating to the Internet Class is whether their informed consent was valid.

While the clinic had a policy for getting informed consent before putting patient images and videos online, Justice Perell concluded that whether valid informed consent was obtained is inherently an individualistic issue. It depends on characteristics such as a patient's understanding of what they were consenting to, which in turn is based on their exposure to social media and the clinic's presence on social media. Due to the varied nature of the procedures, the degree of privacy breach was also individualistic. In sum, Justice Perell found there was no basis in fact for any common issue for the Internet Class.

Plaintiffs receive full agreed-on costs

Before the certification motion, the parties agreed to costs in the amount of $150,000.

Following Justice Perell's decision, the defendant argued that costs should not be paid because the plaintiffs were only partially successful.

In a costs decision (2021 ONSC 5213), Justice Perell disagreed with the defendant and awarded the full amount of the agreed-upon costs to the plaintiff. According to Justice Perell, this was justified because the parties came to an agreement when the claims of the Surveillance Class and Internet Class were joined as a singular action.

Takeaways

Privacy breach class actions remain viable in Ontario when they are based on torts such as negligence, breach of fiduciary duty, and inclusion upon seclusion against defendants alleged to have deliberately invaded plaintiffs' privacy. However, Justice Perell confirmed that courts will carefully scrutinize the existence of common issues

where an element of informed consent is involved in the exchange. Furthermore, Justice Perell confirmed that the tort of “public disclosure of private facts” is individualistic and may be unsuitable for a class action.

The costs result is also noteworthy, and serves as a cautionary tale that parties entering into cost agreements should take into account situations where the plaintiffs may only have partial success, especially when the certification of multiple classes are sought.

Reach out to any of the key contacts below if you have further questions on the implications of *G.C. v. Jugenburg*.

By

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