

CANADIAN
DEFENCE
LAWYERS

Face up to Facebook:

Using Social Networking
Sites as Investigative Tools

John Young, Giffin Koerth
Jennifer Malchuk, Hughes Amys LLP

“Creeping” Up on Plaintiffs

The Use of Facebook in Litigation

Facebook creeping (definition) – “when you go on facebook to look at peoples profiles and or photos and you go look through their friends and their friends and so on” (urbandictionary.com)

The prevalence of social networking sites in today’s society makes it imperative to have some familiarity with them and their implications to the defence of personal injury actions. The most recognizable and widely used social networking site is Facebook.com. Facebook describes itself as “giving people the power to share and make the world more open and connected” (Facebook.com, wall). However, there are a number of other sites gaining in popularity as well. These include MySpace.com, YouTube.com, and Twitter.com.

With Facebook becoming an everyday tool of communication, its use in the defence of personal injury claims has also become more prevalent. The use of the information contained on a plaintiff’s Facebook profile page can change the landscape of an action. We have long used surveillance and background investigations to gain an understanding of a plaintiff’s day to day activities and presentation. The information contained on a Facebook profile page can provide this same picture. Facebook allows a user to post photographs and videos for viewing by a select (or not so select) audience, and even post updates of activity and allow for conversations between users. Accessing the photos, videos, updates and conversational posts can provide a description of a plaintiff’s day to day life. Clearly, there is relevant, usable information on these sites. The issue is how to access, and use, that information.

Although the default setting on a user’s profile page allows access by anyone with a Facebook account, a user has the option to limit the availability of his or her information to select users. These select users are then designated as “friends”. Profile pages can then be made ‘private’ and only accessible by one’s “friends”. Accordingly, private profile pages will likely not be freely accessible by the defendant.

Disclosure Obligations in Litigation

Rule 30 of the *Rules of Civil Procedure* governs the disclosure of documents within an action in the Superior Court of Justice in Ontario. There is an obligation on each party to an action to disclose "every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party" (Rule 30.02(1)), and to produce each such document unless privilege is claimed over it (Rule 30.02(2)). In accordance with this obligation, Rule 30.03 compels each party to produce a sworn affidavit of documents, listing the documents. Similarly, in a FSCO arbitration, parties are under an obligation to produce all documents, reports and assessments that will be introduced at an arbitration hearing, at least 30 days in advance of the start of the hearing (Rule 39 of the *Dispute Resolution Practice Code, Rules of Procedure*).

The disclosure obligation continues throughout the course of the action, and Rule 30.07 of the *Rules of Civil Procedure* requires that supplementary affidavits of documents be served to address subsequently obtained non-privileged documentation or inaccuracies in the original affidavit of documents. Where the Court is satisfied that a relevant document in a party's possession, control or power may have been omitted from the party's affidavit of documents or that a claim of privilege has been improperly made, the Court may order cross-examination on the affidavit of documents, order service of a further and better affidavit of documents, order the disclosure of the document, or inspect the document (Rule 30.06). In a FSCO arbitration, parties have an ongoing responsibility to ensure the prompt and complete exchange of documents that are reasonably necessary to determine the issues being arbitrated (Rule 32.2). This includes providing updates to previously exchanged information and any additional documents obtained.

It has been argued that a plaintiff's counsel has a responsibility to review the issue of the necessity of including Facebook information in an affidavit of documents with the plaintiff. This could include an obligation to review the profile page, determine what information must be listed within the affidavit of documents, and to preserve the page as it existed at the time of their first meeting, and up to the time of trial. If information is removed or deleted, argument of spoliation of evidence may be raised.

Production and Use of Social Networking Information

The Ontario court first reviewed the issue of the admissibility of information taken from a Facebook profile page in *Kourtesis v. Joris*, [2007] O.J. No. 5539 (S.C.). The plaintiff alleged to suffer from injuries arising as a result of a motor vehicle accident, and claimed damages for, among other things, a loss of enjoyment of life. During the trial, the plaintiff and other witnesses gave evidence that the plaintiff's social and recreational activities were limited. After the plaintiff had given her evidence in chief, it was determined by the defendant that she maintained a Facebook profile page. The page was restricted to her Facebook 'friends', and therefore defence counsel was unable to access any of the information contained therein. However, defence counsel was able to access the plaintiff's cousin's page, which contained post accident photographs depicting the plaintiff dancing and performing other recreational activities. The photographs were posted by the plaintiff herself. On an in-trial motion, the defendant sought to introduce the photographs into evidence. As the plaintiff had put her enjoyment of life in issue, and had previously produced pre-accident photographs depicting her engaging in various activities, Justice Browne held that the photographs could be admitted, with leave granted to the plaintiff to recall the plaintiff.

Of particular interest is that after the jury returned with its verdict awarding the plaintiff \$45,000.00 for general damages, Justice Browne granted the defendant's threshold motion, noting that the photographs supported a conclusion that the plaintiff continued to have an active social life and continued to enjoy life (see *Kourtesis v. Joris*, [2007] O.J. No. 2677).

The Ontario Court then went on to consider the issue of the production of information from a private Facebook page in *Murphy v. Perger*, [2007] O.J. No. 5511 (S.C.). In an action arising from injuries allegedly sustained in a motor vehicle accident, one of the claims put forth by the plaintiff was a loss of enjoyment of life. Several months prior to trial, defence counsel became aware that the plaintiff maintained a Facebook profile page. However, the page was 'private', and restricted to access by her online 'friends'. Of note is that the plaintiff had deemed 366 other users to be her 'friends'. Defence counsel was unable to access the information contained on the site. However, defence counsel had also located a publicly accessible page maintained by the plaintiff's sister, which contained a number of photographs of the plaintiff engaged in social activities. Some text posted by others on the plaintiff's sister's page made

reference to the plaintiff's social activities and referred to the plaintiff as the "life of the party".

The defendant brought an *ex parte* motion for the preservation of the plaintiff's private Facebook page. The *ex parte* motion also sought production of the information contained on the profile page. The Order for the preservation of the page was granted, and the portion of the motion seeking production was adjourned, to allow notice to be served on the plaintiff's solicitor.

The portion of the motion dealing with the production of the documentation was then heard by Justice Rady. Justice Rady confirmed that photographs and other information posted on the plaintiff's Facebook profile page were 'documents' as governed by Rule 30 of the *Rules of Civil Procedure*. However, the defendant was not able to provide details of what was posted, as the contents of the profile page were private. Plaintiff's counsel argued that without knowing what was on the page, the defendant was merely embarking on a fishing expedition. Plaintiff's counsel also argued that the plaintiff had an expectation of privacy in respect of what was posted on her private profile page. Justice Rady agreed with the defendant that it was likely that there was relevant information posted on the profile page, and dismissed the plaintiff's privacy argument on the basis that the plaintiff had granted access to the site by 366 'friends'. Justice Rady ordered that the defendant be provided with copies of the information posted on the plaintiff's page.

In a February 20, 2009 decision, *Leduc v. Roman*, [2009] O.J. No. 681, the Ontario Superior Court of Justice has delved into the issues of the access to and the production of material contained in 'private' Facebook pages in more detail. In *Leduc*, the defendant appealed a Master's decision dismissing a motion to compel production of all of the plaintiff's Facebook pages.

The plaintiff had been involved in a motor vehicle accident in 2004, and put forth a claim that his enjoyment of life was lessened and that there were limitations to his personal life. The plaintiff was not asked about Facebook on his examination for discovery, held in late 2006. However, a medical report, received some time after discoveries, made note of the plaintiff's use of Facebook and noted that he had a lot of friends on the social networking site. The plaintiff maintained a private profile page that was only fully accessible to users designated as 'friends'. Defence counsel could not access the information contained on the site. The defendant brought a motion for a broad spectrum of relief, including interim preservation of all of the information on the site;

production of all of the information on the site; and a supplementary sworn affidavit of documents.

On the initial return of the motion, Master Dash found that the Facebook profile pages were "documents" as defined in Rule 30.02 of the *Rules of Civil Procedure*, and that they were within the power and control of the plaintiff. He also conceded that the profile pages might have some relevance as they related to the plaintiff's post-accident activities. However, Master Dash declined to order production of the profile pages. He held that the defendant bore the onus to show that there were relevant documents on the website, not just that there might be. Master Dash characterized the defendant's request as a "fishing expedition". He did, however, order that the plaintiff serve a sworn supplementary affidavit of documents.

On appeal, Justice Brown agreed with Justice Rady's comments in *Murphy v. Perger (ibid)*, and concluded that the court can infer that Facebook users will take advantage of the different applications, including photographic applications, and that users share information about themselves. He noted that:

"Facebook is not used as a means by which account holders carry on monologues with themselves; it is a device by which users share with others information about who they are, what they like, what they do, and where they go, in varying degrees of detail. Facebook profiles are not designed to function as diaries; they enable users to construct personal networks or communities of 'friends' with whom they can share information about themselves, and on which 'friends' can post information about the user".

In ordering production of the private pages, the Court further indicated that:

"[a] party who maintains a private, or limited access, Facebook profile stands in no different position than one who sets up a publicly-available profile. Both are obliged to identify and produce any postings that relate to any matter in issue in an action".

Of note, however, is that Justice Brown did indicate in his ruling that mere proof of the existence of a Facebook profile page does not entitle a party to gain access to all information contained on the page. He noted that some material may relate to matters in issue, and some may not. Citing Rule 30.06 of the *Rules of Civil Procedure*, Justice Brown confirmed that some evidence of relevance must be adduced, which may come from the plaintiff's examination for discovery.

Alternatively, it appears that a motion may be brought to have the plaintiff preserve the contents of a profile page, swear a supplementary affidavit of documents and submit to cross-examination on the affidavit. Justice Brown granted leave to the defendant to cross-examine the plaintiff on his supplementary affidavit of documents as to the content of his Facebook profile page.

While it appears from the aforementioned cases that Courts are now willing to allow access to a plaintiff's private profile pages, a recent Master's decision in *Kent v. Laverdiere*, [2009] O.J. No. 1522, serves as an example of judicial restraint in ordering production.

Following the decision in *Leduc*, the defendant in *Kent* sought production of a supplementary affidavit of documents from the plaintiffs, specifically listing their Facebook pages. Master Haberman refused the defendant's request. In her ruling, Master Haberman first indicated that she was precluded from making the order as it would interfere with a fixed trial date, but then went on to indicate that in any event, she would have refused the motion on its merits. The trial date was less than 4 weeks from the date that the motion was heard. The Master placed emphasis on the fact that parties had agreed to set the matter down for trial, and the trial date had already been moved in the past due to an unrelated issue, although counsel were prepared at that time to go to trial (despite knowing about the existence of the plaintiffs' accounts on the social networking sites). Master Haberman did not feel that there was any evidence of a substantial change of circumstances that rendered it unjust to proceed to trial without the requested documentation. She noted that no questions were asked at the examination for discovery about social networking sites or the production of photographs of the plaintiffs.

Conclusion

Information contained on social networking websites may prove to be invaluable resources in defending a personal injury claim. The potential effect of candid information posted by a plaintiff in weakening evidence pertaining to a lessened enjoyment of life following an accident can be seen in the Ontario cases discussed herein and in emerging case law from across the country (see for example, *Bishop v. Minchiello*, [2009] B.C.J. No. 692 (S.C.J.) and *Terry v. Mullowney*, [2009] N.J. No. 86).

Plaintiff counsel are aware of the potential threat to their clients' cases as well and will no doubt advise their clients to increase privacy settings, and be cautious of what they post.

However, it is difficult to know with any certainty what information will be present, and whether or not it is worth the expense of proceeding with motions to secure that information. Insurers will want to be selective with respect to cases on which motions are brought, choosing cases where the plaintiff appears

especially active, with many "friends" and where there is some indication of what material may be present from either discovery evidence of the Facebook sites of family and friends.

It is clear that it is fundamental in these electronic times to perform searches of plaintiffs in an effort to determine their status on social networking sites. Early searches should be performed on every file. Searches should be updated on a periodic basis. Searches should also be performed in respect of a plaintiff's family members and friends, as information about the plaintiff may also be present therein. Information secured should be preserved.

It is important to keep in mind that searches must be performed without making direct contact with a plaintiff. There are ethical concerns in making direct contact with a plaintiff who is represented by counsel. One should not ask to be made a 'friend' on a plaintiff's page, write on a plaintiff's wall (if the page is open), or 'poke' a plaintiff as this will communicate to the plaintiff that you are wishing to make contact.

The impact and potential use of social networking sites should be borne in mind from the outset of a file to help ensure that the way is paved for a greater chance of success on a motion if same is necessary at a later time in the litigation.

Prepared By: Jennifer M. Malchuk
HUGHES AMYS LLP