THE PROOF IS IN THE PROFILE:

Obtaining Disclosure of Plaintiffs' Facebook Information

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The Proof is in the Profile[1]

As of May 2011, Facebook had more than 600 million users worldwide. Canadian users, who are the most active Facebook users in the world, total more than 18 million – that is more than half of the entire population. In Ontario alone there are over 7 million users. In light of Facebook's popularity in Canada, it is becoming an increasingly important and useful tool in the civil litigation process and particularly, in personal injury actions. Although the only issues which may arise when the plaintiff's Facebook profile is "open" to the general public are those concerning relevancy, significant issues may arise where the profile is "private". Maintaining a private profile may suggest that the plaintiff has an "expectation of privacy". Over the past 3 to 4 years, Canadian courts have started granting the production or limited production of plaintiffs' Facebook profiles, with a mind to balancing privacy interests with the requirement to disclose relevant information. This is significant as engaging Facebook in the early stages in the litigation process may impact settlement opportunities, while introducing Facebook evidence during trial may have an effect on the trial outcome.

Background

This article will look at cases across Canada and in Ontario in particular, to better understand the circumstances in which courts will order plaintiffs to disclose information contained in social networking sites. By being aware of the considerations and concerns of the court, defendants may be more successful in both obtaining and relying on information from social networking sites to challenge the plaintiff's credibility and their claim for damages.

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Pursuant to Rule 30.02 of the *Rules of Civil Procedure*, every party is required to disclose "every document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party" and to produce such documents unless privilege is being claimed. This duty to disclose continues throughout the duration of the action. The definition of "document" in Rule 30.01 of the *Rules of Civil Procedure* is broad: it includes (but is not limited to) a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account and data and information in electronic form. Where the court is satisfied by any evidence that a relevant document in a party's possession may have been omitted from an affidavit of documents, the court may order: cross-examination on the affidavit; service of a further and better affidavit; disclosure or production of the document for inspection; or the inspection of the document to determine relevance. In the past few years, courts have directly considered the above obligations in relation to information contained on social networking sites and the obligations of parties, mainly plaintiffs, who use these sites to post and exchange information.[2]

One of the earliest cases dealing with the admissibility of information obtained from Facebook was the 2007 Ontario Superior Court decision in *Kourtesis v. Joris.*[3] This case arose from a motor vehicle accident wherein a 25 year old plaintiff, described as "pleasant" by the judge, claimed to suffer from chronic pain. Her claim included damages for future loss of income and a permanent loss of enjoyment of life. The plaintiff and other witnesses gave evidence that she had very little of a social life beyond friends at school. During the third week of trial and after the plaintiff had already given evidence, defence counsel was able to view some Facebook

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[2] *Ontario Rules of Civil Procedure*, RRO 1990, Reg. 194, Rule 30.01, 30.02 , 30.06

[3] [2007] OJ No. 5539 (SCJ)

pictures of the plaintiff (which the plaintiff posted) through accessing her cousin's Facebook profile. These pictures showed the plaintiff dancing and being involved in recreational activities. The plaintiff's own Facebook account was "private", meaning that you had to be the plaintiff's "friend" to view her site. A motion was brought mid-trial to allow the defendant to submit photos of the plaintiff *after* the plaintiff had given evidence. Justice Brown held that the plaintiff had an ongoing discovery obligation, including during the trial. In assessing fairness, he found that the probative value of the photos outweighed the potential prejudice to the plaintiff. The probative value in this case related to the issue of loss of enjoyment of life.

When the plaintiff was recalled before the jury the following day, she provided evidence that many of the pictures were "posed" and provided details for each photograph in this regard. In reaching its decision, the jury awarded the plaintiff $45,000 for general damages and $25,000 for future loss of income. Due largely in part to the introduction of the Facebook photos and the plaintiff's evidence, Justice Brown then granted the defendant's threshold motion. In reaching this decision, he stated as follows:

> The photographs and the oral testimony are revealing. Fotini had control of these particular photographs. She was the one who placed them on the web site. She placed them on the web site to present herself to those who had access. Most of the photographs were of a party celebratory nature, completely at odds, even if inadvertently so, from the balance of evidence on behalf of the plaintiff.
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> The ruling referred to dealt with whether the photographs discovered during the course of the trial and after Fotini's evidence would be admitted. In the result, they were admitted with Fotini being given the opportunity to be recalled. She was recalled. She gave animated and detailed accounts of the times and places of the events depicted. This was in contrast to other evidence of memory and concentration.
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> In the result, at the least, this part of the evidence displays Fotini's excellent ability to learn and articulate in the context of visualization. The evidence was that many of the photographs were posed. Even if posed, the photographs were taken in an active social life setting. I conclude that Fotini has an active social

> life and that the photographs and testimony support a conclusion, I make, that Fotini enjoys life.[4]

Not only did Justice Brown's ruling mean that the plaintiff's general damages claim was dismissed, the defendant had also beat its Rule 49 Offer of $85,000, plus interest and costs. However, Justice Brown declined to order costs against the plaintiff, finding that she did not have the ability to pay the costs of a 5 week trial.[5]

Inferring Relevance

Unlike *Kourtesis*, where access to some of the plaintiff's pictures was obtained through her cousin's profile, *Murphy v Perger* involved counsel seeking access to the plaintiff's private profile based on information obtained through a public website.[6] The public site in question was created by the plaintiff's sister and called the "Jill Murphy Fan Club", Jill being the plaintiff. The public site contained a number of pictures showing the plaintiff in different social settings and travelling in Europe. Similar to the *Kourtesis* case, the plaintiff in *Murphy* was a young woman involved in a motor vehicle accident, whose claim included damages for loss of enjoyment of life. Unlike *Kourtesis*, the plaintiff had provided pictures of herself *before* the accident, which showed her participating in various activities and travels. The defendant in this case brought an *ex parte* motion for the preservation of the plaintiff's Facebook profile, which was granted. The portion of the motion dealing with the production of the Facebook profile was adjourned and heard on notice. In rendering his decision, Justice Rady agreed with the defence that the pictures and text posted on the plaintiff's profile were documents for the purposes of

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[4] [2007] OJ No. 2677 (SCJ)

[5] [2007] OJ No. 3606 (SCJ)

[6] [2007] OJ No. 5511 (SCJ)

Rule 30.01 of the *Rules of Civil Procedure.* He also agreed that there were likely relevant pictures and information on the site for two reasons:

> …First, www.facebook.com is a social networking site where I understand a very large number of photographs are deposited by its audience. Second, given that the public site includes photographs, it seems reasonable to conclude the private site would as well.

Further, since the plaintiff provided pictures of herself pre-accident, similar pictures of her post-accident would be relevant. In response to the plaintiff's argument that production of the private Facebook profile was an intrusion of the plaintiff's privacy, Justice Rady was of the view that the plaintiff did not have a reasonable expectation of privacy, as she had 366 "friends" on Facebook.

Where questions on Facebook or other social networking sites are not asked of the plaintiff during their examination for discovery, defendants will face greater challenges in obtaining the information contained on these sites. In the 2009 case *Leduc v. Roman,*[7] another case involving a young man injured in a motor vehicle accident, no questions were asked of whether Mr. Leduc maintained an active Facebook profile. However, during a subsequent defence medical examination, the report mentioned that although the plaintiff did not have a lot of friends in his area, he did have "a lot on Facebook". After defence counsel discovered that the plaintiff maintained a private profile, a motion was brought for several orders, including: (i) the interim preservation of all information contained on Mr. Leduc's Facebook profile; (ii) production of all information on the Facebook profile, and (iii) the production of a sworn Supplementary Affidavit of Documents. At first instance, Master Dash found that the Facebook profile pages were "documents" that lay within the control of the plaintiff. Although he found that the profile could

[7] [2009] OJ No. 681 (SCJ)

contain information that "might have some relevance to demonstrating the Plaintiff's physical and social activities, enjoyment of life and psychological well being", he refused to order the production of the pages. In refusing production, Master Dash stated that speculation of what may be on the plaintiff's site was insufficient. He distinguished this case from *Murphy* as there was no evidence that the plaintiff posted pictures on another public site or that he granted access to 366 friends. Master Dash did however go on to say that if Mr. Leduc had posted pictures or other information on his Facebook profile depicting his activities or his enjoyment of life, those documents should be listed in a supplementary affidavit of documents.

In reversing Master Dash's decision, Justice Brown agreed with Justice Rady in *Murphy* that a court can infer from the social networking purpose of Facebook that users intend to make personal information available to others. In his view, a distinction should not be made between public and private sites and he states as follows:

> 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. Master Dash characterized the defendant's request for content from Mr. Leduc's private profile as "a fishing expedition", and he was not prepared to grant production merely by proving the existence of the plaintiff's Facebook page. With respect, I do not regard the defendant's request as a fishing expedition. Mr. Leduc exercised control over a social networking and information site to which he allowed designated "friends" access. It is reasonable to infer that his social networking site likely contains some content relevant to the issue of how Mr. Leduc has been able to lead his life since the accident.

Justice Brown did however agree with Master Dash that "mere proof of the existence" of a Facebook profile does not entitle a party to gain access to all material placed on the site. Rather, questions may be asked at the examinations for discovery to ascertain the existence and content of the Facebook profile. Where questions are not asked at an examination or a party learns of the existence of a profile after the fact, the user should preserve and print-out the posted material,

swear a supplementary affidavit of documents identifying any relevant Facebook documents and the other party should be permitted to cross-examine on the affidavit. As the plaintiff had consented to providing a supplementary affidavit of documents, Justice Brown granted the defendant leave to cross-examine the plaintiff on his affidavit regarding the nature of the content he posted on his Facebook profile.

An inference was also drawn in the 2010 case of *Frangione v. Vandongen*,[8] where the plaintiff was claiming $1,000,000 in damages from injuries sustained in a motor vehicle accident. Frangione allegedly suffered from a traumatic brain injury, neck and back pain and headaches and was declared catastrophically impaired in 2008. At his examination, he advised that he had a Facebook profile which was private and accessible by his 200 "friends". He thereafter produced pages from the public part of his profile, namely pages that were posted on his "wall" and pictures of him in social settings in the form of a supplementary affidavit of documents. In referring to *Leduc*, the court commented that it is now "beyond controversy" that a person's Facebook profile may contain relevant documents. Significantly, Master Pope echoes the comments of Justice Brown in *Leduc*, stating that a court can infer from the nature of the Facebook service that relevant documents likely exist on a limited-access Facebook profile. Further, based on the productions from the public Facebook profile, the court could "safely infer" that his private profile also contained similar relevant documents. As a result, the court ordered the preservation of the Facebook profile, in addition to the production of all material contained on his Facebook website including any postings, correspondence and photographs.

[8] [2010] OJ No. 2337 (SCJ)

Relief Sought and Timing of Motion

The court did not follow the earlier authorities regarding the "inference" that can be drawn by the existence of a Facebook profile in the 2009 case of *Schuster v. Royal Sun Alliance Insurance.*[9] However, there are a number of factors, including the precise relief sought, which distinguish this case from the earlier authorities. This case, once again involved a plaintiff who was involved in a motor vehicle accident and was suing her insurer for damages. After the examinations for discovery, the defendant learned that the plaintiff maintained a private Facebook profile which restricted access to 67 "friends". Pictures of the plaintiff were obtained through accessing the site of one of her "friends". However, these pictures simply showed the plaintiff standing or sitting in a chair or on the floor. The defendant brought an *ex parte* motion seeking an interim order preserving documents contained in the plaintiff's Facebook profile. The defendant was also seeking an order under Rule 45.01 of the *Rules*, which resembles a civil search warrant and is subject to a higher threshold test than an ordinary *ex parte* injunction. The court found that providing the defendant with an order under Rule 45.01 would "at the very least", require the plaintiff to provide the defendant with her personal username and password. The court found that the defendant did not prove any "irreparable harm" to support an order for *ex parte* injunctive relief. There was also no evidence that the plaintiff's profile contained any relevant information. The court did however accept the statement in *Leduc* that a party may be required to deliver a supplementary affidavit of documents and leave was granted to cross-examine the plaintiff on her affidavit on the subject, if deemed appropriate.

[9] [2009] OJ No. 4518 (SCJ)

In *Kent v. Laverdiere,*[10] the defendant brought a motion for the production of a supplementary affidavit of documents listing the Facebook pages of the plaintiffs (including the *Family Law Act* claimants). In this case, no questions were asked about social networking during the examinations for discovery. This motion was brought within one month of the fixed trial date. Firstly, Master Haberman found that she lacked jurisdiction to make an order than would interfere with this fixed date. Further, she found that there was no evidence of a substantial change of circumstances that rendered it "unjust" to proceed to trial in the absence of further documentary discovery. The plaintiff's evidence was that there were approximately 1,500 pages of documents on Facebook for the three plaintiffs. These included blogs and pictures of people who were not parties to the litigation. The plaintiffs estimated that it would take 75 hours to review, redact and then list the documents in a supplementary affidavit. She found that before a party can rely on the reasoning in *Leduc*, there must be something to suggest a possible connection between the matters in issue and the documents sought. She did find that if there were pictures on the website showing the plaintiff enjoying life, these would be relevant to her loss of enjoyment of life claim. However, she dismissed the motion based on her earlier findings.

Probative Value of Facebook Evidence

Facebook information has also been used as evidence to oppose advance payments. The 2008 British Columbia case *Cikojevic v. Timm,*[11] involved a motor vehicle accident where the defendant had already admitted liability and a trial date was set to determine damages. The

[10] [2009] OJ No. 1522 (SJC)

[11] [2008] BCJ No. 72 (BC SC)

plaintiff brought a motion for an advance payment of $36,000, claiming financial hardship. In opposing the motion, the defendants brought to the court's attention some 600 photographs, all showing the plaintiff engaging in physically straining (and expensive) activities, including golf, snowboarding, and rock climbing. Based on these pictures, the court found that failure to grant an advance payment would not create an undue hardship on the plaintiff; perhaps more significantly, the existence of these pictures created doubt in the court's mind that damages at trial would exceed $36,000.

Of course, mere admission of pictures posted on Facebook into evidence does not necessarily mean that courts will accept those pictures for the reasons they are admitted. In the 2009 British Columbia case of *K.T. v. A.S.*,[12] the plaintiff was injured in a motor vehicle accident and claimed, among other things, that the accident affected her ability to play sports. The defence tendered into evidence photos from the plaintiff's Facebook profile showing the plaintiff being active post-accident, including juggling a soccer ball. The court did not find much probative value in the photographs, explaining,

> …The key issue is whether the injuries from the accident cause the plaintiff discomfort or pain while participating in such conduct or afterward, or otherwise compromises her ability to do so. The plaintiff's very nature is to challenge her limitations at the extremes of her reduced post-accident abilities.

In this particular case, the plaintiff's own honesty in providing evidence (that she could engage in these activities but that she experienced discomfort) negated any damaging impact the photographs may otherwise have had. As this case illustrates, Facebook photos may be introduced as evidence at trial, but have no practical effect on the decision of the court.

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[12] [2009] BCJ No. 2396 (BC SC)

Extraordinary Court Orders

Perhaps the most extreme example of a court ordering a Facebook profile be preserved and maintained occurred in the recent 2011 New Brunswick case *Sparks v. Dubé.*[13] This decision was based partly on the *Kourtesis v. Joris* case, in which the court ordered the plaintiff to preserve pictures from her Facebook profile and, immediately after the order was made, the material was removed from the website.

In *Sparks v. Dubé*, the plaintiff claimed for general and special damages due to a serious impairment following a motor vehicle accident. The plaintiff's Facebook privacy settings allowed for some pictures to be viewed by the general public and others to be viewed only by Facebook friends. Concerned that the plaintiff would, of her own initiative, delete all of the data on her Facebook profile, the defendant in this case brought a motion without notice to preserve the data until it could be downloaded to a hard copy, memory stick, or CD.

Ultimately, the court ordered that all Facebook profile data meeting the "semblance of relevance" test, including pictures that were not publically available, should be disclosed, pending a hearing to determine relevancy. In order to ensure that the plaintiff did not remove the data of her own initiative, the court ordered the plaintiff's solicitor to hire a second lawyer, to be paid for by the defendant. That second lawyer's role would be to schedule a meeting with the plaintiff without disclosing the subject matter to be discussed and, upon meeting, inform the plaintiff of the order and require her to save the profile data to a hard copy. The data contained in the hard copy would be preserved and become the subject of the separate hearing to determine

[13] [2011] NBJ No. 38 (QB)

what information the defendant would be entitled to view. This decision is controversial as the court directly ordered the plaintiff's lawyer to keep information secret from his client and, arguably, indirectly ordered the plaintiff's lawyer to take part in an ambush against her. Based on the Ontario decisions reviewed above, it is unlikely that such an order would be made in Ontario.

The *Sparks v. Dubé* case, although seemingly far reaching, was trying to deal with a legitimate concern amongst defendants: once questions are asked about one's Facebook profile at the examinations for discovery, what is to stop the plaintiff from deleting their profile or portions of it that may contain information contradicting or discrediting the plaintiff's evidence? In one case, after the plaintiff was cross-examined on pictures from his profile, including pictures of him at parties, drinking and using drugs, the plaintiff's account was shutdown. When confronted on this point, the plaintiff stated that he shutdown the site as he did not want "any incriminating information" in court. As a result, the court drew an adverse inference against the plaintiff.[14]

Summary

The principles that emerge from this line of cases may be summed up as follows: information contained in Facebook profiles are documents for the purposes of discovery and should be listed in a party's Affidavit of Documents, if they relate to any matter in issue. Given the social purpose of Facebook, this is especially true where plaintiffs allege that they have suffered from a loss of enjoyment of life. The mere existence of a Facebook account is insufficient to require its production on discovery. Therefore, establishing relevance, either by asking questions at the

[14] *Terry v Mulowney*, [2009] NJ No 86 (NLSC). In this type of situation a supbeona may be served on Facebook for the deleted information, although it may be necessary to obtain the consent of the user before this information is released.

examinations for discovery or by relying on portions of the public profile, is imperative. However, the court may be willing to "infer" that relevant information exists, given the purpose of Facebook. Further, the plaintiff will be required to preserve his Facebook profile, just as if it were any other potentially relevant documentation. Additionally, whether Facebook documents are listed in the party's affidavit of documents or not, the responding party is entitled to cross-examine on the affidavit to determine whether a Facebook profile exists, the relevance of the contents and the production of the relevant portions for which privilege is not claimed. [15]

Defendants are eager to obtain information that may be helpful in assessing the plaintiff's claim and ultimately, reducing an award for damages. As Facebook has gained prevalence both amongst the general public and the legal process, plaintiffs' lawyers in particular are bringing this issue to the forefront with their clients. Once plaintiffs become aware that Facebook photos, videos, status updates, wall-posts and messages may be relevant and subject to production, there is a real risk that some or all of these items will be deleted. However, as the statistic indicate, Facebook and other forms of social networking are, and will continue to be, an important element in the lives of millions of people across Canada. Although plaintiffs are becoming more mindful of the potential pitfalls of being on Facebook, the need to be social and active on Facebook may ultimately eclipse these concerns. This is especially true given the length of typical litigation, which can go on for years, without a quick end in sight. As the need to remain social continues to grow, defendants will be able to benefit from the information contained in Facebook profiles, both with respect to reaching reasonable settlements and as evidentiary tools at trial.

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[15] *Ottenhof v. Kingston (City) Police Services Board* [2011] OJ No. 976 (SCJ)