

FESSING UP TO FACEBOOK: *Recent Trends in the Use of Social Network Websites for Insurance Litigation*

Pamela D. Pengelley*

One Queen Street East • Suite 1920 • Toronto, ON M5C 2W5

P: 416.361.3200 • F: 416.361.1405 • ppengelley@cozen.com

INTRODUCTION

In December 2008, after several failed attempts to serve a couple with court documents by email and text messaging their mobile phones, an Australian lawyer won the right to serve a default judgment by posting the terms of the judgment on the defendant's Facebook "Wall". In a ruling that appears to be the first of its kind anywhere in the world, Master Harper of the Supreme Court of the Australian Capital Territory held that the lawyer could use the social networking site to serve court notices.¹ The Facebook profiles showed the co-defendants' dates of birth, email addresses and "friend" lists and declared the co-defendants to be friends of one another. This information was enough to satisfy the Master that Facebook would be effective in bringing knowledge of the legal proceedings to the attention of the defendants.² Facebook, for its part, was quite happy with the result, stating: "We're pleased to see the Australian court validate Facebook as a reliable, secure and private medium for communication. The ruling is also an

interesting indication of the increasing role that Facebook is playing in people's lives."³

There is no doubt that Facebook⁴ is now playing an increasing role in people's lives. For the few who are unfamiliar with the application, Facebook is a non-commercial "social website" or, as put by its Terms of Use, "a social utility that connects you with the people around you."⁵ The site's "Facebook Principles" state that a user may "set up a personal profile, form relationships, perform searches and queries, form groups, set up events, add applications and transmit information through various channels." As of June 2007, Facebook had more than 70 million active users, and users over the age of 25 made up its fastest growing demographic.⁶ If you have a computer, the odds are good that you are one of the now over 140 million people who have posted personally sensitive information onto Facebook or a similar social network site such as Myspace,⁷ Faceparty,⁸ Friendster,⁹ Bebo,¹⁰ Badoo,¹¹ Habbo,¹² Nexopia,¹³

* B.Sc., LL.B., LL.M., Lawyer / Litigation Attorney, Cozen O'Connor (Toronto). The author would like to thank Camille Worrell of Cozen O'Connor (New York) for her translation services.

1. This appears to be an unreported decision, although the details are provided in a number of online articles. The defendants, Carmel Rita Corbo and Gordon Kingsley Maxwell Poyser failed to keep up the repayments on \$150,000 they borrowed from MKM in 2007 to refinance the mortgage on their Kambah townhouse. It seems that the news of the default judgment got out before the lawyer, Mr. McCormack, had the opportunity to serve the papers. The couple's Facebook profiles disappeared from the social networking site. See: "Facebook okay for serving court documents: Australian Court," *National Post* (Wednesday, December 17, 2008) <http://www.nationalpost.com/news/world/story.html?id=1084050>; Rod McGuirk, "Aussie Court OKs Using Facebook for Serving Lien," *ABC News* (December 16, 2008) <http://abcnews.go.com/International/wireStory?id=6470258>; Bonnie Malkin, "Australian couple served with legal documents via Facebook," *Telegraph* (December 16, 2008), <http://www.telegraph.co.uk/news/newstoppers/howaboutthat/3793491/Australian-couple-served-with-legal-documents-via-Facebook.html>.

2. *Ibid.*

3. *Ibid.*

4. <http://www.facebook.com>

5. <http://www.facebook.com/terms.php>.

6. *Leduc v. Roman*, 2008 CanLII 6838 (Ont. S.C.), at para. 17 ["*Leduc*"].

7. <http://www.myspace.com> (popular in the United States – 253,000,000 users)

8. <http://www.faceparty.com> (popular in the United Kingdom)

9. <http://www.friendster.com> (popular in ASEAN countries – 90,000,000 users)

10. <http://www.bebo.com> (40,000,000 users)

11. <http://badoo.com> (popular in Europe – 13,000,000 users)

12. <http://www.habbo.com> (popular with teens – 117,000,000 users)

13. <http://www.nexopia.com> (popular in Canada – 1,400,000 users)

Tagged¹⁴ and many more.¹⁵ If you are a typical user, you network with friends, upload photographs of yourself and your family members, enter your email address and cell phone number, and much more.¹⁶

Facebook asserts that this information is “secure and private” and it is possible for a user to adjust their privacy settings to restrict access to a Facebook site. Yet it was just a few weeks prior to the writing of this article that Facebook backed down (for now) following a firestorm of protest regarding a change in its “Terms of Use” to claim ownership over user-generated content *in perpetuity* even after someone closed or cancelled their account.¹⁷ For insurance professionals who handle claims that proceed to civil litigation, this then begs the question; how does a user’s expectation of privacy play out in the litigation context?

Consider that a fully filled-out Facebook profile contains over *forty* pieces of recognizably personal information, including name; birthday; educational and employment history; online and offline contact information; sex; sexual preference and relationship status; political and religious views; favorite movies, books and music, and of course, pictures.¹⁸ Facebook is the largest photo-sharing application on the web with more than fourteen million photos uploaded daily. Facebook further offers multiple tools for users to search out and add potential contacts. In completing a typical Facebook profile, a person will have created a comprehensive database of information about both who they are and who they know.¹⁹ This is, for the most part, information that our laws treat as highly private. Not surprisingly, then, courts are struggling to define how the plethora of private information contained in social network websites should be used in litigation. Should a person’s choice to keep their Facebook profile private and share it only with selected “friends” override the right of other litigants to access information that may be relevant to a case?

For professional “fact-gatherers” such as lawyers, insurance adjusters, claims handlers and private investigators, the vast wealth of information that people volunteer on Facebook

can be a goldmine or a smoking gun, depending on your perspective. The personal information contained in a Facebook profile may be highly relevant to matters at issue in litigation; when dealing with claims, particularly in the personal injury context, the information contained on a Facebook page can make or break a case. It is therefore crucial that insurance professionals stay informed of new developments in this emerging area of law. This article summarizes the approach currently adopted by Canadian courts.

FACEBOOK AND THE LITIGATION PROCESS

It is important to understand that litigation is a fact-gathering process. In Canada, our procedural rules of litigation facilitate this process in two ways. First, courts place a positive obligation on each party to identify all of the documents in their possession or control that may be “relevant” to issues in the litigation, and to produce each such document unless privilege is claimed over it.²⁰ Second, lawyers are allowed to question a representative of each adverse party under oath – a process referred to as “examination for discovery”. The purpose of these processes is to uncover the facts of a case so that the law can be properly and fairly applied.

How does Facebook fit into these processes? Canadian courts have considered web-based networking sites such as Facebook and MySpace pages to be ‘documents’. If a party posts content on Facebook that relates to any matter at issue in an action, then that party is required to identify the content for the other side.²¹ In fact, a recent Ontario decision has held that it is now incumbent on lawyers to specifically raise the issue of Facebook profiles with their clients and explain that any relevant material that is posted on such sites will need to be produced in litigation.²²

It sometimes happens though, that relevant documents are overlooked or omitted. Facebook profiles are often among these overlooked documents. As noted by one judge, “[t]he concept of Facebook is relatively new. I see no fault on the part of counsel for the Plaintiff for not disclosing the existence of the Facebook page in the Affidavit of Documents. I suspect

14. <http://www.tagged.com> (70,000,000 users)

15. For a comprehensive list of social network sites, refer to Wikipedia’s List of Social Networking Websites at: http://en.wikipedia.org/wiki/List_of_social_networking_websites. See also James Grimmelmann, “Facebook and the Social Dynamics of Privacy,” *New York Law School Legal Studies Research Paper Series*, <http://ssrn.com/abstract=126288>, at p. 10 [“Grimmelmann”].

16. Farhad Manjoo, “You Have No Friends: Everyone else is on Facebook. Why aren’t you?” *Slate* (February 27, 2009), www.slate.com/id/2008678.

17. See, for example, Chris Walters, “Facebook’s New Terms of Service: We Can Do Anything We Want With Your Content. Forever.” *The Consumerist* (February 19, 2009), <http://consumerist.com/5150175/facebook-new-terms-of-service-we-can-do-anything-we-want-with-your-content-forever>.

18. Grimmelmann, *supra* note 16 at p. 9.

19. *Ibid.*

20. A party is required to prepare a list all the relevant documents, although the precise nature of the list will depend on the province. For example, in Ontario, the list of documents must be set out in an affidavit sworn by the party: Rule 30.03, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

21. *Murphy v. Perger*, [2007] O.J. No. 5511 2007 WL 5354848 (Ont. S.C.J.) [“Murphy”].

22. *Leduc*, *supra* note 6 at para. 28.

that when this action was filed in 2004, few people had heard of Facebook.²³ In such instances, where the privacy setting on a Facebook profile has been set to allow public access, few issues arise; anyone who learns of the site can search for and download any relevant information. Problems arise, however, where access to a Facebook page has been restricted.

Public Facebook Profiles

A number of cases in Canada have already admitted photographs or other information posted on a public Facebook page as evidence relevant to issues raised in the litigation.²⁴ In one case, the discovery of photographs of a party posted on a MySpace page was the basis for a request to produce more photographs that were not posted on the site.²⁵

In *Kourtesis v. Joris*,²⁶ the plaintiff claimed that, following a car accident, she was unable to engage in Greek dancing, an activity that she had previously enjoyed. During the course of trial, but after the plaintiff had testified, a member of the defence lawyer's staff happened across the plaintiff's private Facebook page showing post-accident pictures of her dancing at a party. The lawyer attempted to put these pictures into evidence. In deciding what to make of the photos, the judge decided that the photographs, as "snapshots in time" and "taken out of context," had only minimal evidentiary weight, but they were still "highly relevant" to the assessment of damages regarding the plaintiff's claim for loss of enjoyment of life. Further, the photographs were *not* on the same footing as surveillance photos because, unlike surveillance photos, the plaintiff had control of the photographs on her Facebook site and so she could not be surprised by their existence and content. Finally, the mere fact that the photographs were contrary to the plaintiff's evidence at trial did not make them "prejudicial". The judge held, however, that the plaintiff should be permitted to be recalled at trial so that she could have the opportunity to explain them.

Private Facebook Profiles

Canadian courts have mechanisms in place to monitor compliance with the disclosure duty. Where a party has reason to believe that another party has not complied with these

disclosure obligations, he or she can ask the court to order disclosure of the documents. However, a court can refuse to order the disclosure of documents where the information is of minimal importance to the litigation but may constitute a serious invasion of privacy.²⁷ A private document is, quite simply, any document that is not public, and includes private Facebook profiles.²⁸ This creates a dilemma for a party seeking production of a private Facebook page: in order for a court to order production of a document, a court requires *evidence*, as opposed to mere speculation, that a potentially relevant undisclosed document exists. Yet a party is unable to access a private Facebook site in order to determine whether it contains relevant information.

To date, there are two cases in Canada which have dealt with the production of the access-limited contents of a Facebook profile. The first case, *Murphy v. Perger*, is a decision of Justice Rady issued in October of 2007.²⁹ In that case the plaintiff, Ms. Murphy, was involved in a car accident which, she alleged, caused her to suffer from a chronic pain disorder. She sued the other driver, seeking damages for the detrimental impact on her enjoyment of life and her inability to participate in social activities. Shortly before the trial, the defendant's lawyer discovered a public website called "The Jill Murphy Fan Club" which contained post-accident pictures of Ms. Murphy at a party. This public webpage led the lawyer to Ms. Murphy's private Facebook page. The lawyer was able to view Ms. Murphy's name and a list of her 366 Facebook "friends", but she had set the privacy settings so that permission was required to view her other Facebook material. The defendant's lawyer sought production of the Facebook pages (but not the Facebook emails) on the basis that it likely contained relevant information. The plaintiff's lawyer objected, claiming that the defendant was on a "fishing expedition" because there was only a mere possibility of there being relevant material on the site, and that this was too speculative to justify an order for production given the plaintiff's expectation that the site would be kept private.

The judge disagreed with the plaintiff's argument and ordered the Facebook pages to be produced. He concluded

23. *Knight v. Barrett*, 2008 NBQB 8 (CanLII) at para. 7 ["Knight"].

24. For example, *Hollingsworth v. Ottawa Police Services Board*, [2007] O.J. No. 5134 (S.C.J.) (A plaintiff's entry on his Facebook page wherein he described how he became intoxicated on public occasions was used to contradict his claim of unlawful arrest); *Pawlus c. Hum*, [2008] J.Q. No. 12565 (J.C.Q.) (A landlord terminated a lease because of loud noises. The apartment would, on occasion, become a "fraternity house". In reaching the conclusion that the tenant did not fulfill his obligation as a renter, the Board examined evidence which included pictures published on the Fraternity Facebook site). See also *Goodridge (Litigation Guardian of) v. King*, [2007] O.J. No. 4611 (S.C.J.); *(C.M.) v. R (O.D.)*, 2008 N.B.Q.B. 253.

25. *Weber v. Dyck*, [2007] O.J. No. 2385 (S.C.J.).

26. [2007] O.J. No. 5539 (S.C.J.) ["*Kourtesis*"].

27. *United Services Funds v. Carter* (1986), 5 B.C.L.R. (2d) 222 (B.C.S.C.), leave to appeal dismissed (1996), 5 B.C.L.R. (2d) 379; *M.(A.) v. Ryan* (1994), 98 B.C.L.R. (2d) 1 B.C.C.A., *aff'd* [1997] 1 S.C.R. 157.

28. *Leduc*, *supra*, note 6.

29. *Murphy*, *supra* note 21.

that it was reasonable to assume that there would be relevant photographs on the site because www.Facebook.com is a social networking site where a large number of photographs are posted by its users. Since the plaintiff had already put pre-accident pictures of herself into evidence, the judge decided that post-accident pictures of the plaintiff would also be relevant. Finally, the judge decided that the plaintiff could not have any serious expectation of privacy given that 366 people had already been granted access to the private site.

The second case to consider this issue is *Leduc v. Roman*, in which a decision of a Master was appealed to Justice Brown.³⁰ The plaintiff, Mr. Leduc, was involved in a car accident which, he claimed, caused him to suffer various ailments and loss of enjoyment of life. Mr. Leduc underwent a psychiatric medical evaluation and told the defendant's expert psychiatrist that he did not have a lot of friends in his current area, although he had "a lot of Facebook friends." This remark apparently went unnoticed by the defence lawyer, for it was not until after Mr. Leduc had been examined for discovery that the defence lawyer's office was conducting a search of Facebook and discovered that Mr. Leduc had a Facebook account. His publicly available profile showed only his name and picture. Because Mr. Leduc had restricted access to his site to only his Facebook friends, the defence lawyer's office was unable to view the site.

The defence lawyer requested an up-to-date affidavit of documents from the plaintiff's lawyer including the Facebook profile. When this was refused, the defence lawyer brought a motion before the court seeking, among other things, (1) an order requiring Mr. Leduc to preserve all the information on the Facebook profile; and (2) production of the Facebook profile itself. Mr. Leduc's lawyer argued that it would be too speculative to infer that relevant material was posted on his Facebook site merely by proving the site's existence. He sought to differentiate his case from that in *Murphy*. In that case there was a public website that posted relevant pictures of the plaintiff, creating a reasonable inference that there was also relevant material on her private Facebook page. In this case, there could be no such inference.

When the matter had first been argued, the Master had granted the preservation order, but had refused to order production of the Facebook profile, holding that the request was a fishing expedition. Justice Brown disagreed. He was of the opinion that a court *can* infer from the social networking purpose of

Facebook that users intend to take advantage of it to make their personal information available to others. He stated:

From the general evidence about Facebook filed on this motion it is clear 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; 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.

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 at issue in an action.To permit a party claiming very substantial damages for loss of enjoyment of life to hide behind self-set privacy controls on a website, the primary purpose of which is to enable people to share information about how they lead their social lives, risks depriving the opposite party of access to material that may be relevant to ensuring a fair trial.

Justice Brown noted that mere proof of the existence of a Facebook site would not entitle a party to gain access to *all* of the material placed on that site. Some material on the site might be relevant to the action, some might not. In order to gain access to this material, the level of proof required to show that the information may be relevant should take into account the fact that one party has access to the documents and the other does not.³² Judge Brown also noted that a defendant would normally have the opportunity to ask about the existence and content of a Facebook profile during the examination for discovery, and where the answers reveal that the Facebook page may contain relevant content, a court can order that those portions be produced.

Facebook Emails

No Canadian case to date considers a request for the production of Facebook emails. It is likely that Facebook emails will be treated differently than the other information on a Facebook profile; the profile is viewable by all a user's "friends" whereas email is not. As a result, courts will likely hold that there is a greater expectation of privacy with respect to Facebook *email* communications. For this reason, a court

30. *Leduc*, *supra* note 6.

31. *Ibid*, at paras. 31-32 & 35.

32. *R.C.P. Inc. v. Wilding*, [2002] O.J. No. 2752 (Master) at para. 12., *Leduc*

may not be able to infer from the nature of the Facebook service the likely existence of relevant *email* communication. That being said, it seems likely that if there is enough evidence in a Facebook profile itself to suggest that email communications may be relevant and probative, this may be sufficient to convince a court to order disclosure.

CONCLUSION

It is important to note that lawyers' rules of professional conduct strictly prohibit them from making direct contact with parties who are represented by counsel, and this certainly includes contact by way of Facebook. It would be a breach of a lawyer's duties of honesty and candor to create a false profile in an attempt to elicit information from another party's private Facebook profile. Similarly, adjusters, private investigators, and claims handlers should be aware that attempts to elicit Facebook information through surreptitious means would likely not be looked upon favorably by a court and may constitute a breach of Facebook's Terms of Use. Consider the case of *Knight v. Barrett*.³³ In that case, it was unclear how a party had obtained information from another's private Facebook profile, so the court ordered the party who had *obtained* this information to include it in their affidavit of documents, and allowed cross-examination on that affidavit so that it could be determined how they had obtained the information. The judge stated that such disclosure would allow both parties to prepare for trial in the same light, and that it was not appropriate for the defendants to seek to ambush the plaintiff with his or her own Facebook page. With this cautionary tale in mind, a number of salient points should be taken from the cases referred to above:

- Where a party's personal information is relevant to an action, insurance professionals should be cognizant of the potential wealth of relevant information available on the Internet. Internet searches, including "Google" searches and searches of common social network websites should be commenced as soon as possible in the course of adjusting the claim. Follow-up searches should be commenced at regular intervals thereafter.

- The current case law suggests that many a lawyer has been surprised to learn that his or her own client maintained a Facebook page, and this fact was not brought to their attention until very late in the litigation. Thus, internet searches should be performed not just on opposing parties, but also on one's own insured/client.
- Insurance professionals should ensure that their insured understands that Facebook profiles are producible "documents", and that any relevant content that is posted on a Facebook profile will need to be disclosed, and preserved in order to avoid spoliation issues.
- Facebook pages are dynamic – where relevant material is discovered, this material needs to be preserved. Webpages should be downloaded, saved and dated. High-quality colour copies of these pages should be printed out for future use in litigation.
- Depending on the circumstances, it may be prudent to obtain a preservation order respecting the content of a Facebook page or other social network profile – for this reason, it is highly recommended that a lawyer who is experienced in these matters be consulted and involved early on in the investigative stage of a claim.

As observed by Mitchell Kapor, the pioneer of the personal computer revolution, "getting information off the internet is like taking a drink from a fire hydrant." The Internet is transforming the way we share and disclose personal information. In order for insurance professionals to obtain optimal results in litigation, be it a subrogated, defence or coverage action, it is important to be aware of the vast amount of potentially relevant information available online, and to stay alert for new developments in web-based technologies. If you have not heard of blogs, Twitter, Flickr, Internet communities, Wikipedia, cyber mobs, and other current trends, you are already "out of date" and could be missing out on key sources of relevant information. Cyberspace awaits – boldly go.

33. *Knight*, *supra* note 23.