ADMISSIBILITY OF SOCIAL NETWORKING WEBSITES

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Increasing Popularity of Social Networking Websites

With the increasing popularity of internet use for the purpose of socializing and networking with users across the world, the admissibility of evidence obtained from such sites is becoming a growing issue of concern for defendants and courts.

Facebook, Myspace, Bebo, Friendster and hi5 are but a few websites offering free accounts to users to post personal information in written form such as emails and message boards and in visual form such as photographs. In a judicial system that requires disclosure by litigants of all relevant documentation and information, it is important to know whether personal information posted on such sites can be obtained and admitted at trial.

The courts have had occasion to consider production and admissibility of private electronic information stored on computer databases, emails, cellular telephones, text messages, printers and blackberries. The issue has gained much attention, particularly since the inception of the *Sedona Canada* guidelines for electronic discovery.

Similarly, discovery of electronic information stored on social networking websites is garnering the judiciary's attention as requests for production of private information are made by litigants defending claims of personal injury.

Status of the Law

In Ontario, the *Rules of Civil Procedure* codifies at rule 30.02 the obligation of litigants to disclose and produce for inspection "every document relating to any matter in issue in an action", unless privilege is claimed. Rule 30.01 clearly states that a "document" includes photographs and "data and information in electronic form". In determining whether a document should be disclosed, the court must be satisfied that it is relevant to an issue in the

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proceeding, having regard to the well-established proposition that the production of documents should not be compelled for the sole purpose of testing credibility.[1]

The Ontario Superior Court of Justice has had two occasions to deal with requests for production of personal information from the social networking website of *Facebook* in the context of plaintiffs claiming damages for personal injury.

First, in the London case of *Kourtesis* v. *Joris*[2], Browne J. dealt with a request for four colour photos taken from *Facebook* during the third week of a jury trial involving the assessment of damages for chronic pain arising out of a motor vehicle accident. The plaintiff gave evidence about her inability, after the accident, to participate in Greek dancing which involves circle type dancing and arm pulling. Her brother testified that while vacationing in Greece, during a festival which included Greek dancing, his sister did not participate to the extent that he wanted or expected her to. Instead, she sat at a table at a café.

Thus, the defendant sought an order compelling examination of the plaintiff as an adverse witness on the photos obtained or obtainable from the internet site showing the plaintiff dancing at a St. Patrick's Day celebration. The defence counsel's staff had conducted a random search of the internet and had come across the description of the photos which were not accessible to a random searcher, absent some procedure performed by the account holder to make them available. Given the timing of discovery of the photographs, the plaintiff had not been examined or cross-examined on the content of the photographs.

Browne J. reiterated that there is an ongoing obligation relating to discovery up to and including the time of trial. Notwithstanding arguments by the plaintiff that the photographs were prejudicial, the judge ordered that the photos must be introduced into evidence. With reference to the continuing disclosure obligation, a further ruling was made that the relevant website information that was not capable of access at that time ought to be subsequently made available.

[1] *Glowinsky* v. *Stephens* (1989), 38 C.P.C. (2nd) 102 (Ont. H.C.J.).
[2] (2007) O.J. No. 5539 (S.C.J.).

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The Court's finding may be summarized as follows:

- The photographs were not analogous to surveillance, of which the party is not aware and over which she has no control;
- The photographs were "highly relevant";
- The photographs had minimal probative value but they related to a material issue, namely the assessment of general damages;
- The images themselves were not prejudicial although there might be prejudice to the extent that they were contrary to the plaintiff's evidence, a prejudice that could be overcome by permitting the plaintiff to be recalled.

The same court heard a second motion by the defendant for production of copies of the plaintiff's *Facebook* webpage in *Murphy* v. *Perger*[3]. The plaintiff claimed damages for personal injuries arising out of a motor vehicle accident and advanced a claim for general damages for pain and suffering and loss of enjoyment of life. The trial was scheduled for later that month. Her physicians had diagnosed her with temporomandibular joint dysfunction and fibromyalgia.

The plaintiff had served photographs showing her participating in various forms of activities prior to the accident. The plaintiff and other witnesses were anticipated to testify about the detrimental impact that the accident had on her enjoyment of life and her ability to participate in social activities.

The defendant had access to a publicly accessible site called "The Jill Murphy Fan Club" that contained photographs of the plaintiff engaged in various social activities. However, the defence wished to access a private *Facebook* site, which was created by the plaintiff's sister but over which it was admitted that the plaintiff had control.

It was argued that the information was relevant to the assessment of the plaintiff's claim and that given that 366 people had been given permission to access the site by the plaintiff, there

[3] *Murphy* v. *Perger*, [2007] O.J. No. 5511 (S.C.J.).

was no or very little prejudice to the plaintiff. It was further argued that the information would be shielded from disclosure in the future by virtue of the implied undertaking rule which prevents parties from using evidence or information obtained in the context of a legal proceeding for any other purpose or in a subsequent proceeding.

On the issue of credibility, Justice Rady held that is it possible that the documents sought might be used by the defendant to impeach the plaintiff's credibility regarding the impact of the accident on her life, depending on what her evidence would be at trial and what the photographs depict. However, that was said not to be the sole purpose of the documents. They might also be useful as a means of assessing the value of the plaintiff's claim for damages.

Importantly, the defence had no knowledge of the contents of the plaintiff's *Facebook* profile and was faced with arguments by the plaintiff that the request was a fishing expedition where there was merely the possibility of the existence of relevant material. On this issue, the judge held:

> It seems reasonable to conclude that there are likely to be relevant photographs 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.

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The court also considered privacy issues. The plaintiff referred to authority for the proposition that a court retains jurisdiction to refuse disclosure where the information is of minimal importance to the litigation but may constitute a serious invasion of privacy. However, Rady J. found that any invasion of privacy was minimal and was outweighed by the defendant's need to have the photographs in order to assess the case. It was reasoned that the plaintiff could not have a serious expectation for privacy given that 366 people had been granted access to the private site.

As a result, the defence was provided with copies of the web pages posted on the plaintiff's private *Facebook* site.

Conclusion

These authorities provide a good basis for the defence to seek production of relevant and admissible information and documentation on the ever-so-popular social networking websites, which may disclose useful information to test or challenge a plaintiff's claim.

The information or documentation must be proven to be relevant in that it must relate to a specific claim, such as a claim for loss of enjoyment of life in the context of a personal injury claim. As such, photographs depicting a plaintiff engaged in a social activity cannot necessarily be used to test a claim for loss of income per se.

Nevertheless, given the existing two liberal Ontario rulings, it is arguable that production of social networking web pages is likely to be granted in a great number of personal injury cases. The issue should be considered early on in the litigation, during the investigation and information gathering stage, as it may be used to assess a plaintiff's claim and potentially lead to timely and efficient settlements.