

Production of Information on Social Networking Websites

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Jane Doe, a socially outgoing and physically active young woman, was recently involved in a tragic motor vehicle accident in which liability is not at issue. The Statement of Claim contains allegations of every soft tissue injury imaginable, along with claims that her once-active lifestyle has been drastically changed. Her injuries apparently prevent her from enjoying the same sporting activities of seasons past. Allegations of depression and anxiety, and other emotional and psychological difficulties are made, and Jane also complains of a much-reduced social life. You are gravely concerned.

Seeking distraction from the stresses presented by this lawsuit, you decide to spend a few moments updating your Facebook profile. While on-line, your niggling worries about the lawsuit continue to press upon you, and you conduct a search on Jane Doe. Sure enough, her name and picture pop up and her profile just happens to be open to viewing by the general public. After hesitating for a moment out of fear that her postings will include gruesome images of the accident and her injuries, you bravely click on her name and are taken to her Facebook page. What you find shocks and amazes you.

You find a multitude of posts and pictures documenting Jane's recent hiking and camping expeditions with her large groups of friends. Her physical prowess is demonstrated

in pictures showing her carrying heavy packs, climbing sheer rock walls, and swimming against the current in the rapids of crisp mountain rivers. At first the pictures sadden you even further, as you assume that they were taken before the accident and are demonstrative of the grave loss sustained by poor Jane. However, you quickly notice that although some of the activities predate the accident, they also continued after it as well. You notice that she has over 400 Facebook friends and that her wall is rife with recent discussions planning another camping trip. You begin to suspect that something may be amiss.

You decide to revisit Jane's Facebook page the following day to gather and print off the incriminating evidence. Unfortunately, you've missed your chance. Jane has altered her Facebook settings and her page is now only viewable by those who have been granted the honour of being her Facebook friends. You attempt to "friend" her, but oddly enough, Jane never responds.

Affidavits of Records are exchanged in the lawsuit, and Jane's Affidavit omits any reference to the Facebook pages you saw earlier. At Examinations for Discovery, Jane describes her situation as remaining just as grim as it was portrayed in her Statement of Claim. You decide to confront her with questions as to the Facebook postings you saw earlier, but Jane's response is a blank stare, followed by her saying that you could not have accessed her Facebook page because it was only open to her friends. You request an

undertaking for production of all her Facebook entries, but opposing counsel refuses the undertaking on the basis of irrelevance, and on the basis that production would violate Jane's privacy rights and would cause Jane further anxiety and emotional problems.

What recourse do you have?

SOCIAL NETWORKING WEBSITES AND APPLICATION OF THE USUAL RULES OF PRODUCTION

Although social networking websites such as Myspace and Facebook have been a prevalent aspect of popular culture for several years, the Canadian court system has only recently started coming to grips with the evidentiary issues posed by these websites. Parties to lawsuits often publish a wealth of personal information on such websites that could be relevant to the issues involved in their lawsuits. In many cases, however, it is not readily available to opposing counsel as the party has restricted access to the information to a limited group of people.

The issue that arises is whether opposing parties can demand production of all information posted on such social networking sites on the presumption that some of the information will be relevant to the action. Can the risk of disclosure of a great deal of information that is not relevant to the lawsuit and the party's privacy interests in non-disclosure trump the opposing party's interest in obtaining all information necessary for a fair trial?

The usual rules of production indicate that as long as the information on the social

networking website involves documents or records that are relevant and not privileged, they are producible. This test will almost always be met in the case of social networking pages. The term "record" is defined so broadly in the Alberta Rules of Court that such pages will most certainly qualify as such—they merely have to be a "thing" that is capable of being represented visually. Information posted on social networking websites most certainly meets these criteria. The test for relevance is also easily satisfied. Under the Alberta rules, it only has to be the case that the information in question would reasonably be expected to significantly help determine one or more of the issues raised in the pleadings. Inevitably, the issue of just how seriously injured a plaintiff in fact is, and whether they truly are disabled from work and leisure activities, will be raised in any personal injury lawsuit. If the plaintiff's social networking page includes any information on these points, these portions of the page will be relevant.

Privilege will almost never apply to prevent production, as social networking pages will not fall within any of the usual classes of privileged information. Postings will usually not count as communications between a solicitor and client, a husband and wife, a priest and a confessor, a journalist and a source, a doctor and patient, or a therapist and a patient. They will usually have nothing to do with attempts to settle a lawsuit, self-incrimination, public interest immunity or with anticipated litigation.

Therefore, applying the usual rules of production, it appears that as long as the Facebook or Myspace information is related

to the extent of the plaintiff's injuries and resulting disabilities, it is producible.

SPECIAL CONSIDERATIONS APPLICABLE TO THE PRODUCTION OF SOCIAL NETWORKING WEBSITES

Two recent cases have dealt with the issue of whether a party's postings to a social networking website are producible in a lawsuit. These cases indicate that although the basic rules of production summarized above continue to apply, the courts have also applied some additional special considerations to their determinations of producibility in the context of information found on social networking websites. Namely, the courts will consider the privacy concerns raised by the production of this evidence. Further, they will also consider the special problems related to the relevance of this evidence—particularly whether the courts are to hold that the information on such sites is relevant even though the defendant has no access to the plaintiff's webpage, and cannot therefore provide much in the way of evidence showing that portions of the webpage will indeed be relevant. However, these cases demonstrate that privacy interests and concerns as to relevance will rarely trump the interest in full disclosure where social networking website postings are concerned. At most, privacy concerns will limit the production obligation to all relevant entries.

In *Murphy v. Perger*, 2007 CarswellOnt 9439, the plaintiff claimed to have suffered various injuries in a motor vehicle accident. She intended to call evidence as to the detrimental impact that the accident had had on her

enjoyment of life and her ability to participate in work and social activities. The defendant had found photos of the plaintiff engaged in various social activities following the accident on a publicly accessible website, and moved for production of a webpage bearing the plaintiff's name on Facebook. This webpage was not publicly accessible, but was controlled by the plaintiff, who had to grant permission to anyone seeking to view the material posted there.

The court applied the usual rules of production and granted the defendant's motion. Any photographs on the plaintiff's Facebook page were obviously "documents" for the purpose of the rules of civil procedure, and to the extent that they related to any matter in issue, their existence had to be disclosed. Unless privileged, they had to be produced for inspection. The court held that the photos could be relevant, not only in impugning the plaintiff's credibility, but in respect of properly assessing the plaintiff's claim for damages.

The court also dealt with the relevance and privacy concerns at issue in the production of social networking website evidence. It first addressed a concern as to whether the defendant's request for production of the Facebook webpage constituted a "fishing expedition" because there existed merely the possibility, rather than a certainty, of relevant material. The court held that this concern was answered in this case because it was likely that there would be relevant photographs on the webpage. The court found this to be the case because Facebook was a social networking site on which a large number of photos were typically deposited by its users. Second, given

that the public site used by the plaintiff had included relevant photos, it seemed reasonable to conclude that the private site would as well. The court inferred that relevant information would be found on the Facebook page despite the lack of any direct evidence to this effect.

The court then analyzed the privacy issues raised by the defendant's motion for production. It noted that the courts retained jurisdiction to refuse disclosure where the information was of minimal importance to the litigation but could constitute a serious invasion of privacy, even when, strictly speaking, there was no privilege applicable to the documents in question. The court stated that the test was whether the particular invasion of privacy was necessary to the proper administration of justice, and if so, whether terms were appropriate to limit that invasion. The court had to weigh the competing interests of ensuring that those with valid claims not be driven away from the legal process by a fear of unwarranted disclosure against the concern that defendants ought not to be deprived of a fair assessment of the loss based on all relevant evidence. The court considered these competing interests and concluded that production was in order. The invasion of privacy in this case was minimal given that the plaintiff had granted access to her Facebook page to 366 people. She could not, therefore, have a serious expectation of privacy in the information on the webpage. The court accordingly ordered production of copies of all the web pages posted at the plaintiff's private Facebook profile.

Leduc v. Roman, [2009] O.J. No. 681 (Ont. S.C.J.) is a very recent decision that followed

Murphy. The case involved a plaintiff claiming to have been injured in a motor vehicle accident which resulted in a reduction in his enjoyment of life and caused limitations in his personal life. He had advised medical professionals that he was not able to engage in sporting activities that he had enjoyed prior to the accident. The plaintiff filed an affidavit of documents without including any Facebook pages, and Examinations for Discovery proceeded without any questions on the topic. It was subsequently discovered that the plaintiff had a Facebook page that was not accessible to the public, but only to those the plaintiff had "friended" on the site. The only information about the Facebook page available to the defendant was the plaintiff's name, picture and city of residence. The defendant applied to the court for orders for the interim preservation of all information contained on the plaintiff's Facebook profile, production of all information on the plaintiff's Facebook webpage, and production of a sworn Supplementary Affidavit of Documents, which would include the information on the webpage.

The Master considering the defendant's request in the first instance denied the application on the basis that the defendant, having no access to the webpages, had no specific evidence that relevant information was indeed to be found on the pages. Speculation on what was to be found on a typical Facebook site was insufficient, and the defendant's production request amounted to a fishing expedition, held the Master.

The Court reversed the Master's decision.

The Court held that under the usual rules of

production, the Facebook pages constituted producible “documents”, and held that any party to an action therefore had an obligation to identify and produce any Facebook postings relevant to the issues in the lawsuit.

The Superior Court agreed with the Master’s holding that the *Rules of Court* required actual evidence, and not just speculation, that a party had omitted relevant documents for an application for further disclosure and production to be granted. However, the Court stated that the level of proof required should take into account the fact that one party had access to the Facebook documents that the other lacked. The Court said that it might not be possible to determine the extent of depth of the production to be ordered until preliminary questions on the documents had been answered or a preliminary level of production of the documents had been made. On the application before it, the Court acknowledged that the only evidence that relevant information may exist on the plaintiff’s Facebook profile included general evidence as to Facebook itself, such as the type of content which users could post on Facebook, and limited evidence as to the plaintiff’s Facebook profile, which included his picture, name, and city of residence.

Nonetheless, the Court held that this was a sufficient evidentiary basis for ordering production. The Court held that where a party makes extensive postings of personal information on a publicly-accessible Facebook page, few production issues arise, as any relevant public postings would be producible. The Court cited *Murphy* in holding that where, in addition to maintaining a publicly-available

profile, a party maintains a private profile only viewable by those identified as “friends”, it was reasonable to infer from the presence of relevant content on the party’s public profile that similar content also likely exists on the private profile. On this basis, a court could order production of relevant postings on the private profile.

Even where, as in the case before the Court, a party maintained only a private Facebook profile, a Court could still infer merely from the social networking purpose of Facebook that the party intended to take advantage of Facebook’s applications to make personal information available to others. By their nature, Facebook profiles were devices through which users shared information about themselves with others. On this basis, it was reasonable to infer that the plaintiff’s private Facebook profile likely contained some content relevant to the issue of how the plaintiff had led his life since the accident. The Court also held, however, that mere proof of the existence of a Facebook profile would not entitle a party to gain access to all material placed on the site. Rather, a party was only entitled to production of information relevant to the lawsuit.

As to the procedures applicable to the production of Facebook pages, the Court held that the appropriate process would usually be to question a party about his Facebook profile at Examination for Discovery. Where a party’s answers to such questions revealed that he had a Facebook page that contained content that may relate to the issues in an action, production could be ordered of the relevant content. In this case, the defendant had only

learned of the plaintiff's Facebook page after examinations had already occurred, and therefore had not asked any questions on the topic. In such a case, said the Court, fairness dictated that the defendant be given some opportunity to ascertain and test whether the profile contained any relevant content. To this end, the plaintiff was ordered to preserve and print out the posted material, and to swear a supplementary affidavit of documents identifying any relevant Facebook documents. If few or no documents were disclosed in the supplementary affidavit, the defendant would be entitled to cross-examine the plaintiff on the affidavit in order to ascertain what content was posted on the site.

The Court concluded by stating as follows:

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.

CONCLUSION

Thus, the law as to production of a party's postings made to a social networking website appears to be developing in accordance with the usual rules of civil procedure dealing with production of documents. If relevant, the pages are producible. In *Murphy*, the Court inferred relevance based on the fact that Facebook is generally used to post information that could be relevant in a personal injury lawsuit and based on the fact that the

particular plaintiff in that case had posted relevant information on another website. The Court ordered production of copies of all the webpages. The Court considered the plaintiff's argument to a privacy interest against disclosure, but concluded that such a privacy interest was minimal as the plaintiff had granted access to the material to 366 friends.

In *Leduc*, the Court provided a broad statement seemingly disclaiming that one who posted information on a social networking website could have any privacy interest in it strong enough to deny production. However, the scope of the Court's order, merely demanding production of relevant information, implicitly dealt with the privacy concerns at issue. That is, by limiting its order to production of only relevant information from the webpages, and not all of the plaintiff's webpages, as was the case in *Murphy*, the Court was reducing the risk of unnecessary disclosure of personal information of no import to the lawsuit.

It appears that the law is developing towards the conclusion that the usual rules of production will apply to mandate production of all relevant social networking website information, and that arguments pointing to special privacy interests and a lack of specific evidence as to relevance have so far not been accepted to restrict production. In all likelihood, the Jane Does of the world will have to produce the relevant portions of their Facebook pages.

For more information on the production of information on social networking webpages, please contact Susan E. Remmer (sremmer@parlee.com) or any member of our Insurance Litigation Practice Group.

This legal alert is intended to provide general information concerning developments in the law and is not intended to provide legal advice in respect of any particular situation.