
No Man is an Island

Social Media and the Law

By: Helen Pelton

Overview

This paper deals with the intersection of our centuries-old tort law with the flourishing phenomenon of on-line social networking.

Currently, the unmasking of fraudulent plaintiffs by exposure of their Facebook pages is the sport of the day for defence counsel. It cannot be too long before the tables are turned and Facebook will be used to bolster a plaintiff's case. In the meantime, the following review summarizes the present state of play.

Social Networks

No man is an island, entire of itself
every man is a piece of the continent, a part of the main
if a clod be washed away by the sea,
Europe is the less, as well as if a promontory were,
as well as if a manor of thy friends or of thine own were
any man's death diminishes me, because I am involved in mankind
and therefore never send to know for whom the bell tolls
it tolls for thee.

-- John Donne (1572-1631). *Devotions upon emergent occasions and severall steps in my sicknes - Meditation XVII*, 1624:

This is a statement about social networking. Humans are a social species. Most of us are connected to others with varying degrees of closeness and intimacy. We have close family, then close friends, more distant friends, remote relatives, and finally casual acquaintances. One could think of these as concentric circles radiating out from ourselves, positioned at the centre of our own universe.

In Donne's day, the average person would have had a relatively small pool of connections, limited by how far it was feasible to walk, or travel on horseback. In the centuries that followed, quantum leaps in human connectivity followed advances in technology. The invention of the railways, bicycles, cars, and telephones expanded our ability to reach others. However, the development of the internet, a worldwide system of linked computers, permitted the invention of e-mail and an unprecedented explosion of our ability to communicate. E-mail has been the springboard to the next giant leap – the social network.

A social network is an on-line community. It can be built around a shared interest, or it can simply be a way of reaching out to other people. At the time of writing, Facebook is the world's largest social network, with over 300 million users. MySpace is close behind with 264 million.

Upon joining a site such as Facebook, the user is asked to create a profile, which can include photos and video clips. Depending on the site, the user may be able to control who has access to the various parts of this profile. For example, on Facebook, the general public can see who has a Facebook page. Access will be possible for any "public" pages. However, other parts of the profile may be restricted to "friends". A user may invite a particular individual to become a friend, or may be approached by someone asking to be a friend. Both parties must consent for the connection to be made. The general public can see a list of each individual's friends.

This outpouring of personal information, freely volunteered, is without parallel in the course of history and is providing a treasure trove for observers of the human condition. People reveal astonishingly intimate details about themselves to perfect strangers. Things that might never be said face to face are broadcast to the world. It seems that many people perceive the internet to occupy a strange nether world – somehow separate and apart from the real world. They are genuinely shocked when actions in this twilight world cross over to

have consequences off-line. Employers may check out job candidates. College admissions offices may check out student applicants. In each case, indiscretions freely revealed on-line may disqualify the candidates. It should be no surprise then to learn that insurance companies may also check out personal injury claimants by examining postings on social media sites.

Tort Law

Here in Canada we have a flourishing tort law system based on the English common law. It is based on the fundamental principle that a person is entitled to be compensated for the damage done by another. (The tort system is separate from the criminal law, by which society punishes the wrongdoer for more serious conduct, and from contract law, where the conduct violates an agreement between the parties.) Although founded on precedent, tort law is also governed by both federal and provincial statute. For example, Ontario has the Negligence Act, the Insurance Act, the Occupiers Liability Act, the Dog Owners Liability Act, and others.

We are all here today because we are involved in one way or another in the area of tort law that deals with negligence. A person will be found liable in negligence for conduct which a reasonable person would realize is likely to harm another.

If you are a bad driver, and you run through a red light and T-bone another car, it's foreseeable that the other driver will suffer harm. Negligence law allows the accident victim to sue for damages. Insurance is the way individual drivers spread the risk of having to pay those damages.

In a negligence lawsuit, the plaintiff, namely the accident victim, is required to prove all the elements of negligence on a balance of probabilities. The victim must prove harm resulting directly from the conduct of the defendant, and show that the harm was foreseeable and not too remote. It is the "harm" part of this equation that causes most of the problems. Under Ontario's present insurance regime (Bill 198), the plaintiff must show evidence of a serious permanent impairment of an important physical, mental or psychological function. Unfortunately, because so much of the evidence is subjective, coming directly or indirectly from the mouth of the plaintiff, the system is highly vulnerable to abuse. The Insurance Bureau of Canada reports a study of insurance fraud which involved an investigation of just over 4000 closed files. The study concludes that about 26% of all files involve some degree of fraud. Alberta has the lowest incidence, while Ontario has the highest, somewhere between 21 and 31%. The economic impact of these statistics is staggering. Some of the fraud involves bogus claims, while the rest involve some degree of exaggeration. The net result is that people who don't deserve it,

Question to the Ethicist

By RANDY COHEN, Published: July 1, 2009, the New York Times Magazine

My friend is a popular eighth-grade teacher. She has a Facebook account and has been "friended" by many of her students, who make their pages available to her. Consequently, she has learned a lot about them, including the inevitable under-age drinking and drug use and occasional school-related mischief like cheating on tests or plagiarizing assignments. Must she report any of this to the school, the police or the parents? The school has no policy for dealing with this modern problem. A.S., NEW YORK

This teacher should respond to students apt to get themselves into trouble, and the most significant peril you describe may not be a little teenage drinking or recreational drug use but the public exposure of this "mischief." Your friend has a chance to teach these students about Internet privacy or the lack of it. She should *carpe that diem*. Were she simply to bust these online doofuses, she would squander a chance to convey something of lasting importance and leave them feeling that she had betrayed their trust. In short, her essential role is educator, not cop.

Strictly speaking, when these students gave her access to their Facebook pages, they waived their right to privacy. But that's not how many kids see it. To them, Facebook and the like occupy some weird twilight zone between public and private information, rather like a diary left on the kitchen table. That a photo of drunken antics might thwart a chance at a job or a scholarship is not something all kids seriously consider. This teacher can get them to think about that.

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get paid a lot of money – billions of dollars. People who do deserve it, probably get less, and have a really hard time getting paid. All of us – the driving public - pay premiums that are too high.

The outcome seems to be that the plaintiff and defence bar are locked in a curious dance. Plaintiffs’ lawyers like to paint a picture of the insurance industry that resembles The Evil Empire. This kingdom is peopled with the troll-like figures of adjusters whose mission in life is to spread misery. The accident victims are struggling through lives of chronic pain, made almost unendurable by the intrusive tactics of the trolls.

Adjusters and defence counsel see it differently. They see their office towers besieged by a sea of tricksters and charlatans in their motorized scooters, waiving their TENS machines and their orthopedic pillows. Close behind are the schools of health profession pilot fish, clamouring for a piece of the litigation pie.

Of course, neither of these extreme positions reflects reality. The truth undoubtedly lies somewhere in between. However, if the study referred to above is correct, then somewhere between a quarter and a third of the files in our offices involve fraud. Both the plaintiff and defence bar have an interest in reducing fraud, since both need the system to work well to maximize compensation for genuine cases.

At the moment, we are experiencing a period in which social media can offer a glimpse of the true state of a plaintiff’s recovery from injury. This is based on the premise that a plaintiff may have posted pictures and video clips which accurately and honestly reveal the plaintiff’s life. This is likely to be a very brief period. Firstly, some plaintiffs’ counsel are already coaching clients to take down their Facebook pages. One personal injury lawyer’s website advises as follows:

Insurance adjusters are now being trained to search social networking sites to get all the information they can on an accident claimant. All of the information which they can get publicly: or through application to the court will be used against the accident victim in their case.

What can you do to protect yourself? Take down your Facebook page! Take down your MySpace page! Don’t even give the insurer any opportunity to dig for information which can be used against you.

There is a second reason this period is likely to be brief. A few years ago there was a trend for some plaintiffs’ counsel to commission a “Day in The Life” video. These videos were designed to give a judge or jury a glimpse into the reality of the plaintiff’s life. While at first blush, this seems to be a good idea, many defence counsel argued these were self-serving pieces with little probative value. One can now predict the emergence of Facebook pages created solely for litigation purposes, the social media equivalent of the “Day in The Life”.

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She might send e-mail messages to transgressing students, noting their misdeeds and reminding them of their vulnerability. Or she could address her entire class, citing (anonymous) examples of student escapades. Or she could encourage her school to include a regular instructional session on the Internet and its pitfalls.

This is not to advocate turning a blind eye to bad behavior. It is to establish priorities. If a kid is in genuine danger, she should intervene swiftly. When students violate academic standards, she should warn them sternly — in her first e-mail message — that the lesson has been conveyed, there are no more free passes and henceforth they can expect her to respond vigorously to anything she learns online.

Your friend should also think about the boundaries she maintains between herself and her students. It is great that they can confide in her as long as she remembers that “confide in” is different from “gossip with,” and that she is their teacher, not their pal, a necessary distinction if she is to be effective as the former.

If defence counsel have gone to court to gain access, they will have to live with the consequences of stepping into the trap.

In the meantime, the following cases illustrate the present landscape.

Kourtesis v. Joris (2007), 2007 CarswellOnt 4343 (Ont. S.C.J)

In December 2000, an 18 year old woman, Fotini Kourtesis, was the driver of a car that was rear-ended. She alleged that she developed chronic pain. During the five week jury trial, both Fotini and her brother gave evidence that her social life was non-existent as a result of the accident.

Unfortunately for Fotini, she had posted pictures on Facebook that painted an entirely different picture, showing a vigorous and active social life right up to the time of trial. These pictures came to light during the trial. The judge allowed them to be admitted into evidence, but gave Fotini the opportunity to be recalled to address them. The judge took note of the fact that Fotini had control over the photographs, and she placed them on the website to present herself to those who had access. Ruling that her claim for general damages did not cross the threshold, the judge also noted that when recalled, Fotini gave an animated and detailed account of the times and places of the events depicted, in contrast to other evidence of memory and concentration problems. Fotini was awarded only \$25,000 for future financial loss, all other claims, including FLA, were dismissed.

Goodridge (Litigation Guardian of) v. King (2007), 2007 CarswellOnt 7637 (Ont. S.C.J)

Stacey Goodridge was the unbelted rear seat passenger in a Ford Bronco involved in a single vehicle roll over in July 2000. She alleged receiving a head injury and cuts and scratches, particularly resulting in a 4 inch scar on her right shoulder. Photos posted on Facebook showed her acting as a bridesmaid at a wedding, and wearing an off-the-shoulder gown. The judge took this as evidence that the scar was not serious. For this and other reasons dealing with her other injuries, Ms. Goodridge's claim was found not to cross the threshold and her claim was dismissed. (This decision does not indicate whether the Facebook pages were volunteered, or obtained on a motion.)

Murphy v. Perger (2007), 2007 CarswellOnt 9439 (Ont. S.C.J)

Jill Murphy was injured in a car accident in January 2003. Shortly before trial, Defendant's counsel learned that the plaintiff had a publicly accessible Facebook site called "The Jill Murphy Fan Club", and also found a private site created by Jill's sister, but controlled by Jill. The Defendant sought access to this site. The Plaintiff resisted, saying this was a fishing expedition, the photographs were taken by friends, thus the Plaintiff had could not control the content, the Defendant was not prejudiced because she had access to the public site, and finally the request was unfair, being made four weeks before trial.

The Defendant relied on the decision of Justice Browne in *Kourtesis* (above) who held that the photographs were analogous to surveillance, over which the plaintiff would have no control, the photographs were highly relevant, and although they had minimal probative value, they related to a material issue, namely the assessment of general damages.

The judge ruled in favour of the Defence, finding 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. The judge commented that the Plaintiff clearly considered some photographs to be relevant, having served photographs of herself taken before the accident. The Plaintiff was ordered to provide the Defence with copies of the web pages. (The case settled before trial)

Burglar leaves his Facebook page on victim's computer

MARTINSBURG - The popular online social networking site Facebook helped lead to an alleged burglar's arrest after he stopped to check his account on the victim's computer, but forgot to log out before leaving the home with two diamond rings. Jonathan G. Parker, 19, of Fort Loudoun, Pa., was arraigned Tuesday one count of felony daytime burglary.

According to court records, Deputy P.D. Ware of the Berkeley County Sheriff's Department responded on Aug. 28 to the victim's home after she reported the burglary. She told police that someone had broken into her home through a bedroom window. There were open cabinets in her garage, and other signs of a burglar. The victim later noticed that the intruder also used her computer to check his Facebook status, and his account was still open when she checked the computer.

The victim later noticed that she was missing two diamond rings from her dresser in the same room as her computer. The two rings were worth more than \$3,500, reports indicate.

During the investigation, a friend of the victim told her that he knew where Parker was staying, in the same area as the victim's house. Police then went to the home and spoke with a friend of Parker's. The man said Parker had stopped by his home occasionally, but he said the man didn't live there. He also said that the night before the burglary, Parker asked him if he wanted to help break into the victim's home but he refused.

As of Tuesday evening, Parker remained in custody at the Eastern Regional Jail on \$10,000 bail. If convicted he faces one to 10 years in prison.

POSTED: September 16, 2009

By Edward Marshall, Journal Staff Writer

Cikojevic v. Timm (2008), 2008 CarswellBC 76 (B.C. Master)

The Plaintiff was a young woman injured in a single vehicle accident in August 2002. She applied to the court for an advance payment of damages in order to fund some therapy and other expenses. The Master declined the application. Over 600 photographs on the Plaintiff's Facebook page showed her golfing, rock climbing, snowboarding, travelling and participating in other social activities, all of which had some cost. The Master also commented on her car expenses, which totaled 43% of her income

Knight v. Barrett (2008), 2008 CarswellNB 136 (N.B.Q.B.)

The trial in this matter was scheduled to start on January 16, 2008. On January 8, 2008, during resumed discovery with respect to an Amended Statement of Defence, the Defendants revealed they had obtained many pages of the Plaintiff's Facebook postings. Counsel for the Plaintiff sought to conduct discoveries on that issue, including questions about the origin and authenticity of the printout, and the purpose for which it would be used at trial. The Defendants objected, pointing out that the Plaintiff should have disclosed the Facebook page in the Affidavit of Documents. The motions judge did not fault Plaintiff's counsel for not listing the Facebook page in the Affidavit, pointing out that the concept was relatively new, and few people would have heard of it in 2004 when the action was filed. The motions judge held that it was appropriate for the Defendants to disclose information about the origin and authenticity of the Facebook printout, including how they came to have it. The judge also warned counsel about "trial by ambush", cautioning that issues could arise from that.

Leduc and Roman (2009), 2009 CarswellOnt 843 (Ont. S.C.J.)

As a result of a car accident in February 2004, John Leduc claimed to have suffered a loss of enjoyment of life. At examinations for discovery in November 2006, no questions were asked about whether he maintained a Facebook page. However, a medical report from a 2007 examination, noted that he reported having many friends on Facebook. Defence counsel viewed the site and saw that the Plaintiff had an account, the contents of which were only visible to "friends". In June 2008, the Defence moved for Orders requiring interim preservation of all information on the Plaintiff's Facebook profile, production of all information in the profile, and production of a sworn Supplementary Affidavit of Documents.

On the initial return of the motion, Master Dash ordered preservation of the material. At the further return of the motion,

the Plaintiff consented to producing a Supplementary Affidavit of Documents. Master Dash held that the Facebook profile pages were documents within the control of the Plaintiff, and “*might have some relevance to demonstrating the Plaintiff’s physical and social activities, enjoyment of life and psychological well being*”. However, Master Dash refused to order production of the pages. He held that the Defendant was required to demonstrate that there were relevant materials on the website. He said it was not sufficient simply to show the existence of the pages, finding it analogous to a photo album or a diary. He noted that the Defendant had not asked at discovery if the Plaintiff had photos demonstrative of his lifestyle. He was concerned about privacy, but felt bound by the decision in *Murphy v. Perger* (above). However, Master Dash distinguished *Murphy*, because he found that this was clearly a fishing expedition.

The Defendant appealed to the Superior Court of Justice. In a carefully reasoned decision, Justice D. M. Brown examined the structure of Facebook and analyzed the relevance of its content to the requirement to disclose documents in the litigation process. Justice Brown held “*that a person’s Facebook profile may contain documents relevant to the issues in an action is beyond controversy.*” Justice Brown went on to state that any material posted on Facebook that relates to any matter at issue in litigation must be identified in an Affidavit of Documents. He then examined the issue of public and private postings on the site, finding that public postings were obviously producible. With respect to private postings, he agreed with Justice Rady’s holding in *Murphy* (above) that it is reasonable to infer that the private postings will also contain relevant information. Even where only a private profile exists, he held that a similar inference can be drawn from the social networking purpose of Facebook. However, Justice Brown agreed with Master Dash that the mere existence of a Facebook profile does not entitle a party to access all the material on the site since not all content may be relevant. Rule 30.06 requires some evidence of relevance before a court will order production. This evidence may emerge from questions asked at discovery. However, in this case, the Defendant had not asked any such questions at discovery. Nevertheless, Justice Brown held that the Defendant should be given the opportunity to cross-examine the Plaintiff on the Supplementary Affidavit of Documents to ascertain what content is posted on the site. He held 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.

Thus Justice Brown granted leave to the Defendant to cross-examine the Plaintiff on his Supplementary Affidavit of Documents about the nature of the content of his Facebook profile.

Bishop v. Minichello (2009), 2009 CarswellBC 871

In this fascinating motion, the Defendant applied to the court for production of the hard drive of the Plaintiff’s computer. The Defendant wished to analyze the drive to determine how much time the Plaintiff spent on Facebook between eleven at night and five in the morning. It was submitted that the information was relevant to the matters at issue because the Plaintiff alleged he was unable to keep a job due to fatigue. The Plaintiff, on the other hand, raised a variety of arguments against production, namely that the hard drive itself was not a document, that the probative value was outweighed by the problem of isolating the Plaintiff’s personal use, by the limited value of the information, by privacy concerns and the existence of other alternative evidence.

The reasons for decision of Mr. Justice Melnick contain an extensive review of the law relating to the production of electronic documents. He concluded that the metadata stored on the hard drive was a document, and therefore producible. He also held that the data might have significant probative value. Thus he ordered that the hard drive be reviewed by an independent expert who would produce a report containing

the information sought. As time was critical, the judge ordered that two copies of the hard drive be deposited with the court within two weeks.

Kent v. Laverdiere (2009), 2009 CarswellOnt 1986 (Ont. Master)

Kent v. Laverdiere (2009), unreported (Ont. S.C.J.)

In this dog bite case, the Defendant brought a motion for a Supplementary Affidavit of Documents listing the current Facebook contents for all three Plaintiffs. The motion, heard in April 2009, was brought less than four weeks before the start of the three week trial. Master Haberman dismissed the motion stating she lacked the jurisdiction to make any order that interfered with a fixed trial date. In view of the amount of material involved, and the requirement to review all documents to ensure that third party privacy issues were respected, and that only relevant material was produced, she concluded this could not be accomplished before the trial date. Master Haberman was critical of Defence counsel's timing, pointing out that they had not asked questions about this issue at discovery, nor at subsequent motions for undertakings. Further, counsel had consented to placing the matter on the trial list.

The Defendant appealed to the Superior Court of Justice. The endorsement notes that on July 6, 2009, the Plaintiff, Jynnie Kent was ordered to produce a further and better Affidavit of Documents with respect to her Facebook postings by August 32, 2009. No written reasons have been provided to date.

Bagasbas v. Atwal (2009), 2009 CarswellBC 953 (B.C.S.C.)

The Plaintiff in this B.C. rear-ender agreed she had no loss of income, either past or future, and no residual injuries, but wanted \$40,000 for pain, suffering and loss of enjoyment of life. The evidence therefore focused on the activities she enjoyed both before and after the accident. The Plaintiff testified that she could no longer kayak, hike or bicycle. However, the Defendant produced photographs from the Plaintiff's Facebook page that showed her doing all these activities. Furthermore, photographs of her dancing showed arm, neck and back movements while wearing high heels. In the final analysis, she was awarded only \$3,500.00 in damages.

Terry v. Mallowney (2009), 2009 CarswellNfld 85 (NLSCTD)

The Plaintiff was involved in two accidents and claimed to have suffered soft tissue injuries to his neck and back. He also claimed that his social life had been severely curtailed. However, excerpts from his publicly accessible Facebook account revealed a full and active social life. After being confronted with this evidence, the Plaintiff shut down his Facebook account, saying "he didn't want any incriminating evidence" in court. The judge drew an adverse inference from this statement, concluding that the account he shut down, and some particular deleted messages would have damaged his claim. The Plaintiff was awarded \$40,000.00 for general damages, and nothing for any of his future loss claims.

Skusek v. Horning (2009), 2009 CarswellBC 893 (B.C.S.C.)

This plaintiff was involved in two accidents, the first occurring when she was 12 years old. She claimed damages for pain and suffering, and for the loss of a proposed nursing career. She valued the loss of earning capacity at \$225,000. Part of the evidence at trial included photographs posted on Facebook that showed the Plaintiff white-water rafting, playing on a soccer team, at a golf driving range, and rock climbing. The judge was critical of the plaintiff's evidence, finding it to be at odds with her actual condition or capacity. She was awarded \$50,000 for general damages, and \$60,000 for loss of future earning capacity.

Wice v. Dominion of Canada General Insurance Co. (2009), 2009CarswellOnt 4076 (Ont. S.C.J)

This is an accident benefits case. The Plaintiff suffered a traumatic brain injury as a result of a car accident, and claimed he needed round the clock attendant care for life. He sued his AB carrier for medical, rehabilitation and attendant care benefits. His insurer brought a motion for, among other relief, an Order requiring him to disclose and preserve the information in his Facebook profile. Evidence showed that the Plaintiff had a private Facebook profile, accessible only by his “friends”, of which he listed 110, and which included photographs of the Plaintiff participating in social activities. He was ordered to produce a further and better Affidavit of Documents, and to preserve all the information in his Facebook, and any other similar accounts, for the duration of the litigation.

Mayenburg v. Lu (2009), 2009 CarswellBC 2580 (B.C.S.C.)

This young woman claimed to have suffered soft tissue injuries in a rear end collision. Her claim included an amount for diminished earning capacity. During the trial, the Defendant sought to introduce 273 photographs obtained from the Facebook “walls” of the Plaintiff’s friends. The judge refused to admit those photographs which did not show her doing specific activities she said she had difficulty performing, since they had no probative value. This left 69 photographs which showed her hiking, dancing or bending. However, the judge ruled that even these did not undercut her credibility, since she had not said she could not do these activities, only that she would feel the consequence afterwards. However, although she was awarded \$50,000 in general damages, she received nothing for diminished earning capacity.

Conclusions

The preponderance of caselaw supports a defendant’s right to be provided with an Affidavit of Documents describing the content of any social media accounts, even when access to these accounts is restricted to “friends”. For defence counsel, it is prudent to ask questions on this topic at discovery, but failing to do so will not be fatal to a motion for a further and better Affidavit of Documents. Actual production of the information posted on the site may only be ordered once questions, either at discovery, or on cross examination on the Supplementary Affidavit of Documents, reveal relevant material.

For plaintiffs’ counsel, it is prudent to make similar inquiries of clients. It is probably unwise to instruct clients to take the pages down, since a court can draw an adverse inference from this. But this presupposes that the defence will know that this is the case. It is possible, but onerous, for defendants to make applications to Facebook, and other sites, to obtain copies of information posted. Until recently, even apparently deleted information would remain retrievable forever. In response to concerns expressed by the Privacy Commissioner of Canada, Facebook has agreed to erase information if asked to do so. However, counsel might wish to consider evidence that a site previously existed and has been taken down could be damaging to a plaintiff.

At the moment, Facebook seems to be a potent force for truth in litigation. It remains to be seen how long that will last.

Helen Pelton

November 2009