



BEARDWINTER LLP

Defender

Vol.1 | Issue 6
December, 2007

“FACEBOOK” and Insurance Litigation: Shooting Yourself in the Foot

Question: In what way has this accident affected the type of social and recreational activities that you performed pre-accident?

Answer: My life is now in ruins. I do not feel like socializing anymore, I cannot engage in the same form of recreational activities I enjoyed pre-accident, and I am always depressed.

The aforementioned question and answer responses are typical of the evidence given by a Plaintiff at the vast majority of examinations for discovery. Traditionally, one effective means of challenging this contention is to obtain surveillance evidence that shows the claimant performing functional activities that she testified that she was unable to do. Unfortunately, surveillance is only somewhat useful as you are banking on being lucky that the claimant will be active on the particular days that you have paid someone to watch her. If she is active, then the common retort is that she pushed herself on this day, but that she suffered increased pain for the next few days afterwards. The advent of the internet, digital cameras, and personal websites such as “facebook” offer a modernized form of surveillance that augments the traditional means used in the past.

In *Kourtesis v. Joris* (2007), defence counsel was able to introduce pictures posted by the claimant on her personal “facebook” page as

evidence at trial that significantly contradicted her earlier testimony. The Judge in part relied on this evidence during a threshold motion to conclude that the claimant had not suffered compensable general damages. Indeed, this is even after a Jury came back with a verdict in favour of the claimant for general damages in the amount of \$45,000.00 (Bill 59 case).

In that case, the claimant and her brother testified that she did not have a social life at all post accident. The Facebook photographs gave rise to a different perspective. The photos showed the brother hoisting-up the claimant during a vacation in Greece, showed her partying during St. Patrick’s Day three months prior to trial, and other such 32 pictures mostly of a celebratory type nature. The Judge found that the photos were “completely at odds, even if inadvertently so, from the balance of the evidence on behalf of the plaintiff”. When questioned about these photos, the Plaintiff gave animated and detailed account of the times and places of the events depicted. Interestingly, the Judge found that the response by the claimant “was in contrast to other evidence of memory and concentration problems”. Accordingly, the Plaintiff shot herself in the foot twice by: (1) posting revealing photos that caught her engaged in social activities and, (2) providing detailed explanations for each of the photos which called into question her alleged cognitive deficits.



Cary Schneider is a partner at Beard Winter LLP specializing in insurance and civil litigation matters including the growing area of cyber and privacy law. He is a member of the International Association of Privacy Professionals (IAPP), is in the process of being certified as a Certified Information Privacy Professional/Canada (CIPP/C), and studies cyber security at Harvard University. Cary advises insurers on breach and coverage situations, as well as assists businesses in preparing pre-breach data plans and post breach responses.

Your comments are appreciated and if there are any commercial or insurance related topics that you would be interested in reading about, please feel free to email us and we will certainly explore the possibility of writing an article. Contact: defender@beardwinter.com

Legally, gaining access to the webpage is problematic. If the claimant has counsel, you are prohibited from contacting him whether in person, telephone, or electronically. So, if you request to be added as "friend" to his web page (which you are obligated to do the majority of times in order to view the pictures) you are inappropriately making contact in law. If you do gain access then it is likely that a Judge may rule the pictures inadmissible and any information that you obtained as result will also likely be deemed inadmissible as being, "fruit obtained from the poisonous tree".

In the *Kourtesis* case, counsel for the defendant got in through the back door what he could not through the front. The defendant gained access to the Plaintiff's cousin's "facebook" page in the midst of trial and found four pictures of the Plaintiff partying a few months prior to trial. There is no privity in a witness and accordingly there is nothing preventing you from contacting a friend or relative of a claimant. Defence counsel then brought a motion for the production of the Plaintiff's entire "facebook" webpage after it was determined that she had her own such page. The Judge ruled that "the photos by themselves have a minimal probative value but they do relate to a material issue, namely assessing damages for loss of enjoyment of life".

In *Murphy v. Berger* (2007) the Court also ordered production of Facebook photographs by way of a motion. In that case, the claimant served pre-accident photographs of herself on the defendant with the intention on relying upon same at trial to document her life. The defence conducted a search of the claimant and came across both a publicly accessible site called "The Jill Murphy Fan Club" which contained photographs of her engaged in various social activities and the private "facebook" site which was inaccessible. The Judge ruled that the Facebook photographs are relevant and producible due to the fact that the claimant served photographs of herself prior to the accident.

One problem with attempting to gain access to a claimant's "facebook" page is that one day it is here and the next day it may be gone. If a claimant is concerned that the webpage may be produced then he may choose to delete his page; otherwise known as "committing suicide". However, information posted on the internet rarely ever truly dies. With the assistance of a good computer technician, or a non-party motion against "facebook" itself, you may be able to thwart the Plaintiff's suicide attempt and revive the webpage. In the alternative, you may be able to get a ruling from the Court at trial that the Plaintiff has purposely destroyed evidence and that an adverse inference ought to be drawn on account of his actions. This means that the Judge or Jury are directed to consider the fact that the Plaintiff destroyed potentially damaging evidence

when rendering a decision. This certainly will not reflect well on his credibility.

Conducting internet searches of publicly accessible web pages is also a highly effective tool in gathering information on claimants. In one case that I have, the claimant testified at discovery that he does very little on a day-to-day basis and rarely socializes. A simple internet search of the claimant revealed that he is on the board of directors of a brain injury clinic and that he is an active executive on a number of volunteer organizations. The claimant failed to mention any of this at the discovery and also appeared to tailor his evidence to attempt to support a claim for cognitive injuries.

There is nothing more effective when negotiating claims, or at trial, then showing visual evidence of a claimant doing something that he swore under oath that he could not. A picture speaks louder than a thousand words. This is even more effective when you are using a picture that a claimant posted on the internet himself against his own interests. The use of the internet is a highly effective means of challenging the credibility of a claimant and debunking questionable claims.

Contact us at: defender@beardwinter.com

Disclaimer: The contents of this issue are provided for interest only and are not to be considered as, in any way providing legal advice to the readers by Beard Winter LLP or the individual authors of articles contained herein. All readers are strongly advised to obtain independent legal advice on any issue of concern to them from competent legal counsel in Ontario.

Subscribe To The Beard Winter Defender
CLICK HERE
(to receive The Defender by email)

