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Facebook and Insurance Litigation

The best defence that an insurer has in a personal injury case is capturing the claimant in live picture doing something that he claims he cannot do. Historically surveillance has been the best and only means of achieving this. Yet surveillance revolves around the chance opportunity that you capture the claimant on that particular day doing something significant. The advent of the popular social phenomenon Facebook and other social media sites has given the insurer a new tool to take a peek into the private life of a claimant. If the private photographs posted by a claimant on their Facebook page can be used against him at trial, this would be hugely damaging to his case. The key question is whether an insurer is entitled to access these Facebook photos.

A prime example as to the successful use of Facebook photos at trial is found in the decision of *Kourtesis v. Joris* (2007). In that case the claimant testified that following the motor vehicle accident that her social life had been ruined. In midst of trial the defence discovered, (and by way of motion gained access to), her Facebook website. The private profile pages contained numerous damaging visual evidence including pictures of her brother hoisting her up during a vacation in Greece, partying three months before trial on St. Patrick's Day, and 32 further pictures of her having fun. When questioned about these pictures at trial she provided detailed and thorough explanations for each. Rather then helping her case, the Court found that this called into question her allegations of memory loss. At the conclusion of trial the Judge found that the claimant had not crossed the threshold and part of his reasoning was on the basis that the photos were "completely at odds, even if inadvertently so, from the balance of evidence of the plaintiff".

It is important for an adjuster to understand the law with respect to the production of a private Facebook profile in order to provide direction to their counsel and to conduct their own investigations.

Entitlement to Facebook Profiles in Tort Cases

There have been quite a few somewhat conflicting cases that have addressed the entitlement to a claimant's Facebook; none of which coming from the Court of Appeal. This means that Judges still appear to have free reign to decide whether to order the production of a Facebook account and in what circumstances. In *Stewart v. Kempster* (2012) the defence discovered that the claimant had a Facebook account but did not know the contents of same; and sought to find out by way of motion. In an interesting twist, claimant counsel swore an affidavit that the Facebook account did not reveal the claimant doing anything substantial and then filed the pictures in a sealed envelope for the Judge to take a look at to decide for himself. The Judge looked at the pictures, (defence was not allowed to see them), and agreed with the Plaintiff that there was nothing of substance in the pictures and that they need not be produced.

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The Judge explained that the Defence was obligated to prove that the pictures are "relevant to any matter in issue" and that it had failed to do so. He found that "an injured person and a perfectly healthy person are equally capable to sitting by a pool in Mexico with a pina colada in hand. A photograph of such an activity has no probative value". Further, the Court found that there was a real privacy interest in the content of her Facebook account and that the claimant had permitted "only" 139 people to view her private content.

Although the insurer lost its motion for the production of the Facebook account, it is clear that the Court was making a decision based on the evidence at hand. Had the sealed photographs revealed the claimant actively participating in activities then perhaps the Court would have ordered them to be produced. In those circumstances there would have been a judicial decision that the photographs were significant and this could have been used at trial against the claimant.

In *Leduc v. Roman* (2009) the Court took a more liberal approach to the production of the Facebook account. Similar to the *Stewart* case, the defence only knew that the claimant had a Facebook website but nothing about the contents. Unlike in *Stewart*, the Court found that the mere existence of the Facebook website is enough to warrant the production of the photographs:

"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 in issue in an action…It is reasonable to infer that his social networking site likely contains some content relevant to the issue of how Mr. Leduc has been able to lead his life since the accident.

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."

The Court found that it is reasonable to infer that the claimant had posted pictures of himself engaged in social activities on his Facebook site and determined that these need to be produced. This decision has been followed in many cases such as *McDonnell v. Levine* (2011) and *Parsniak v. Pendanathen* (2010).

In *Murphy v. Berger* (2007) the claimant had posted pictures of herself on her public Facebook profile and was intending on relying at trial of pre-accident pictures of herself. In response, the defence wanted access to her private Facebook profile and the claimant refused. The Court reasoned that there likely are pictures of the claimant in her private profile and these are produceable in light of the fact that the claimant is relying on her own pictures. In response to the concerns about privacy the Judge found as follows:

> "I have concluded that any invasion of privacy is minimal and is outweighed by the defendant's need to have the photographs in order to access the case. The plaintiff could not have a serious expectation of privacy given that 366 people have been granted access to the private site."

Entitlement to Facebook Profiles in Accident Benefits Cases

The entitlement to a claimant's Facebook site is a little more difficult to access in the accident benefits world. In *Rakosi v. State Farm* (2012) the Director's Delegate points out that there must be a reasonable, rational relationship between the records sought and the dispute being arbitrated. For instance, if a claim is only being made for medical and rehabilitation benefits it would be more challenging to prove the entitlement to a Facebook account as compared to where there is a claim for non-earner benefits.

The Director's Delegate indicated that there are inherent privacy concerns for a claimant that must be considered and that a legal entitlement to such information must be established. In contrast to the Court's decision in *Leduc*, the Director's Delegate found that the mere existence of a Facebook account is insufficient for a production order.

With that being said, the Facebook account was ordered to be produced in this case. The claimant had posted pictures of himself zip lining on a publically accessible Hi5 social network site and these pictures were deemed relevant with respect to the claimant's alleged limitations. It was found that, "I see no error in extending the inference from unrestricted access documents on one site to restricted access documents on a similar site". The claimant had not provided any evidence of the sensitivity or specific prejudice of the photographs in the private profile.

In *Prete v. State Farm* (2010), the Arbitrator found that the existence of a Facebook profile alone is not sufficient grounds for the production of the contents contained therein. The production requirements found in the Rules of Civil Procedure for matters commenced in litigation are not the same as the Dispute Resolution Procedures for

matters commenced in Arbitration. While as the court decisions of *Murphy* and *Leduc* revolved around the production of an affidavit of documents, no such requirement is found in Arbitration.

The Arbitrator found that the public profile page did not show anything relevant to the issues in dispute; namely income replacement benefits and housekeeping. As such, the Arbitrator concluded that the insurer has failed to establish a reasonable relationship between the images on the claimant's restricted portion of his Facebook account and the issues to be arbitrated. Issues were also raised as to the procedural quagmire to set guidelines for preservation/ production of the photographs and sensitivity concerns.

On the other hand, in the decision of *Wice v. The Dominion of Canada* (2009) the Court, (the claim was in litigation not arbitration), followed more closely the more liberal decision of *Leduc* and allowed the accident benefits insurer to obtain access to the claimant's Facebook page. The Court found that the "claimant's ability to function in a wide range of social situations may be circumstantial evidence from which a trier of fact could draw an inference about his ability to function in the defined circumstances in issue". The insurer had demonstrated that there are relevant photographs of the Plaintiff participating in social activities posted on his Facebook profile. The court inferred that the private Facebook account may also include relevant photographs and ordered it to be produced.

Preventing a Claimant From Deleting the Facebook Profile

One of the challenging aspects of gaining access to a claimant's Facebook page is the concern that he will delete the account to prevent it from being produced. In *Schuster v. Royal & Sun Alliance Insurance* (2009) the defence took the unique approach by bringing a motion for the preservation and production of the Facebook photos without notifying the Plaintiff of the motion. The point of taking such action was to preserve the private account without alerting the Plaintiff that they were coming after him. The Court refused to produce the records or preserve the private site. First, the Court disagreed with the reasoning in *Leduc* that the mere existence of a Facebook page is evidence that it contains information relevant to the claim. Second, the Court did not agree that bringing a motion without notice to the Plaintiff was appropriate. The Court found that there was no evidence to suggest that the Plaintiff was likely to delete content from her Facebook profile pending trial.

Perhaps a different Judge would be more receptive to the relief sought by an insurer comparable to the case in *Schuster*.

What remains to be litigated at this stage is determining if a Plaintiff has deleted pictures from his Facebook page. This would be the most helpful of all. If a defendant were to gain access to pictures that the plaintiff had deleted from his Facebook page that showed him engaging in high level activities then this would be highly damaging for two reasons. First, it would show him being active and second the plaintiff would be caught attempting to destroy evidence that he knew was hurtful to his case. There may very well be technological means of determining if pictures have been deleted and giving re-birth to same.

Conclusion

The case law is still in flux regarding what an insurer needs to prove in order to gain access to a claimant's private Facebook page. Some cases have indicated that the mere existence of a Facebook account warrants the production of the pictures, while as others suggest that an insurer must somehow establish that there is likely something relevant contained within. Some Judges have found that there are privacy concerns that trump the probative value and others found the opposite. It is more onerous to obtain production of the Facebook account in an accident benefits case that has proceeded in arbitration as opposed to one that has proceeded in litigation. It is easier to obtain the production of a Facebook account in a tort claim then in an accident benefits case.

If an insurer obtains internet pictures of the claimant engaged in functional activity by way of a public site, then this will be very influential in securing access to a private Facebook site. The theory is that if a claimant posts pictures of himself publicly that his private site likely contains something similar. When adjusting a claim an insurer should on a routine basis turn their mind towards running a internet search on its claimants. Not only should we check to determine if the claimant has a Facebook site (public or private), but whether there are any internet related stories, information, or pictures that allow us to know more about the claimant.

It is improper for an insurer, (or an agent of an insurer such as an investigator), to become Facebook "friends" with the claimant after the loss in order to gain access to a private account. However, if the insured (in a tort claim) was already Facebook "friends" pre and post loss with the claimant then I believe that an insurer is entitled to have the insured print off the relevant pictures.

Plaintiffs are now routinely advised by their counsel that an insurer may seek the production of their Facebook site. Public sites are becoming private and damaging pictures are being deleted. Your lawyers should be advised not only to ask about the existence of a

Facebook, (or other social media sites), but whether anything has been deleted from the site post loss. A claimant's verbal response or body language may insinuate that they have something to hide. This simple intimation may clue in to the insurer that the claimant may be more active they he lets on; and lead to significant credibility issues.

If we are able to use the claimant's own vanity of projecting his life into pictures against him, then he deserves what is coming. Just like third party surveillance is an invaluable tool to defend a case, so too is the surveillance that a Plaintiff takes of himself.

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