Facebook Defence – 1,500 Pages Sought - Personal Injury Lawsuits – Part 5

Three separate plaintiffs suing for damages arising from a dog attack, pursuant to Ontario's Dog Owner's Liability Act, had three different Facebook and MySpace accounts containing approximately 1,500 pages of photographs, blogs and emails.

In the 2009 Ontario Superior Court of Justice decision of Kent v. Laverdiere, Master Haberman extensively reviewed the merits of the defendant's motion for production of the three separate plaintiffs and their social networking profiles, totaling more than 1,500 pages.

The main issue concerning this motion was the extensive nature of production sought (and the number of hours required to properly produce this information) versus the imminent Trial date, set for four weeks after this subject motion.

At issue was why the defendant waited until the last moment, before Trial, to seek production of this information; whether parts of this information was or should have been known to the defendant at an earlier date; and whether the type of information sought on could have been obtained, in part at least, by the defendant in another manner.

Master Haberman dismissed the defendant's motion and refused production of the Facebook and MySpace accounts, as to order otherwise would likely result in adjourning the Trial – from this dog attack which had occurred 5 ½ years prior.

In an extensive analysis, Master Haberman states:

> ***Approaching Trial Date***
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> *This matter is scheduled to proceed to a 15-day trial commencing on May 4, less than 4 weeks from the date the motion was heard. I note that this is not the first trial date scheduled for this 2003 action - the initial date of November 17, 2008 was lost as a result of an issue involving another defendant.*

As a Master, I lack jurisdiction to make any order that could interfere with a fixed trial date. In this case, it is highly likely that any order I make in favour of the moving party would have precisely that effect. On this basis, alone, I am precluded from making the order sought.

Here is the problem. The plaintiffs' evidence indicates that there are approximately 600-700 pages of documents on Facebook for Shelly Low; about the same number on Facebook for Jynnie Kent and a further 200 pages for Jyssie Kent on her MySpace site. These pages include blogs and e-mails entirely authored by third parties who are not involved in this litigation, which, in some cases, pertain exclusively to their own lives. Photos of these unrelated individuals are also included among the materials sought.

As these "third party" materials raise privacy issues, all the documents would have to be carefully reviewed to ensure that only relevant materials were produced and that the privacy rights of these third parties was respected. The plaintiffs estimate that it would take a minimum of 75 hours to review, isolate and redact the relevant documents and to then list them in a supplementary affidavit of documents.

The plaintiffs anticipate that there is likely to be some dispute between counsel regarding what is and what is not relevant. That is a reasonable assumption in the context of the history of this litigation, which I have gleaned from a review of the Case History. As a result, after service of the supplementary affidavit of documents, the parties would be bound to follow the protocol established by Brown J. in Leduc v. Roman (2009) CanLII. This provides that the moving party would have a right to cross-examine on the affidavit of documents. Upon completion of that exercise, the parties would then return to court, to argue over the documents in dispute.

Each of these steps takes time. In view of the number of documents involved and the time required to simply vet and list them, getting through cross examinations and completing a likely return trip to this court for rulings on a document by document basis, bearing in mind the time it takes to get into motions court, it is simply not possible to complete the process before the scheduled trial date. As a result, any order made in the defendant's favour would very likely delay this trial so I am precluded from ruling in Uxbridge's favour.

There are, however, additional reasons for my decision. I have also determined that, had the motion been brought earlier, I would not have granted the requisite leave to have it heard. Finally, had leave been granted, I would have dismissed the motion on it merits with respect to two of the plaintiffs.

Leave

In view of the timing of this motion, leave to bring it is required and in the circumstances, I am not prepared to grant leave.

This action arises from a dog attack on the plaintiff, Jynnie Kent, which occurred in October 2003, more than 5 1/2 years ago. The claim was issued in November 2003 and the action was subject to case management under the direction of one of my now retired colleagues. The remaining plaintiffs bring their claims under the Family Law Act (Jyssie also sues for mental shock).

Examinations for discovery of the plaintiffs were conducted in June 2004, more than four years ago. This defendant's motion for undertakings and refusals was heard in April 2005. By that time, internet websites such as MySpace were already a prominent feature in the lives of many young people. No questions were asked at discovery, in the context of the refusals motion, or at any time thereafter until very recently about whether Jynnie or any of her co-plaintiffs used such sites.

It is also important to bear in mind that, while Facebook and MySpace may be relatively recent additions to some of our lives, photographs of plaintiffs, both before and after accidents, have long been around, and it is photographs that defendants are generally after in personal injury actions when they ask for Facebook pages. The fact that these photos are now mounted on a site that can be viewed by certain pre-determined individuals where a plaintiff maintains a private Facebook account does not make these photos any more relevant than they were before the existence of Facebook or, arguably, more public. Again, there is no suggestion that questions were asked about photos of any of the plaintiffs at discoveries.

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As a result, leave to bring a motion of this kind after setting the action down for trial (or agreeing to that step) should only be granted when there has been a "substantial or unexpected change" in circumstances since the action was set down (see Hill, supra.). As MacDonald J. stated in Hill:

> *The authorities make it clear that setting a matter down for trial is not a mere technicality of procedure. Before it can be vacated to permit further discovery or other interlocutory proceedings, there must be a substantial or unexpected change in circumstances such that a refusal to make an order under Section 48.04(1) would be manifestly unjust.*

In this case, Uxbridge has failed to satisfy that test. They provided no evidence of a change, substantial, unexpected or otherwise, and have not addressed the issue of whether or not it would be unjust to proceed to trial in the absence of further documentary discovery. In fact, Uxbridge provided no evidence at all to explain this late in the day motion.

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The merits

Before Leduc can be invoked, there must be something to suggest at least some possible connection between the matters in issue and the documents sought.

The claims of Jyssie and Shelley are both brought pursuant to the provisions of the Family Law Act. They seek damages for the loss of care, comfort, guidance, support and companionship that Jynnie would have afforded them but for her injuries. They also claim for out of pocket expenses and loss of income. In addition, Jyssie claims damages for nervous shock.

There is nothing in the pleading or in evidence to suggest that there could possibly be anything in the Facebook or MySpace pages of either of these plaintiffs that could possibly be relevant to the matters in issue and Uxbridge has not come forward with any suggestion as to what these sites may contain. Accordingly, the clams of these two plaintiffs would have been dismissed had I dealt with this matter on its merits.

> *As for Jynnie, however, I would have reached a different conclusion, in view of the boiler plate pleading at paragraph 17, where this plaintiff asserts that the accident has lessened her enjoyment of life; disfigured her; affected her ability to find romantic companionship and a spouse and to earn income. If there are photos on this website showing Jynnie as a healthy, happy adolescent, enjoying life they would certainly be relevant. If there are photos of her with a beau or reference to the fact that she is dating and socially active, this, too, would meet the current threshold of semblance of relevance.*
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> *In view of the earlier part of my reasons, however, I must dismiss the motion in its entirety. Prejudice to Uxbridge has not been alleged nor would such an assertion, had it been made, succeed. Much of the kind of information sought from Facebook would have been equally available by way of surveillance, a common practice utilized by defence counsel in personal injury actions in an effort to test a plaintiff's assertions.*
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> *Here, Uxbridge counsel was unable to say whether surveillance of Jynnie had been conducted or, if it had, whether it had been productive.*

For more information, readers can read our previous blog posts of Facebook disclosure, including our:

- May 14, 2009 Facebook blog concerning the Terry v. Mullowney decision from Newfoundland;
- our February 27, 2009 Facebook blog concerning the Leduc v. Roman decision from Ontario; and
- Our February 22, 2011 Facebook blog concerning the Frangione v. Vendongen decision from Ontario.
- Our February 24, 2011 Facebook blog concerning the Murphy v. Perger decision from Ontario.

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