Facebook Defence Strikes Again in Personal Injury Lawsuits – Part 3

You enjoy keeping in touch with family and friends on Facebook. It is an easy way to stay current with old acquaintances.

Then you are involved in a car accident or slip and fall accident. You are badly hurt. Eventually you go to see a lawyer to help you start a lawsuit, as you are unable to work and earn an income. Your ongoing pain and need to seek medical treatment convinces you that your injuries may be long-term.

You start a lawsuit. There are so many issues to remember and think about, including giving your lawyer important information about your past, including your work history, your medical history and other numerous details.

Add one more issue to discuss with your lawyer – your internet presence in terms of Facebook or other social networking sites.

The problem that more and more plaintiffs face in their personal injury lawsuits is that insurance companies and their defence lawyers are well aware of the prominence of social networking sites and have been seeking, for the past several years, production of your entire Facebook profile.

This means that defence lawyers will go to Court, seeking an Order requiring you to produce your Facebook site – including your photos, messages from and to "friends" on your site, and personal detailed information that you have posted.

The purpose is for the insurance company to review this potential evidence and to test it against the claims that you are making in your personal injury lawsuit, in which you are seeking damages for income loss, health care and out of pocket expenses and pain and suffering damages.

In the 2010 Ontario Superior Court of Justice decision of **Frangione v. Vendongen**, the Court allowed fairly broad disclosure of the plaintiff's Facebook identity.

The plaintiff had been hurt, as a 23 year old, in a car accident about 7 years prior to this Facebook motion for disclosure. At the time of the motion, he was 30 years old and living with his Mother. Significantly, he had been designated as having catastrophic injuries (CAT) pursuant to the Statutory Accident Benefits System (SABS) prior to this motion.

The plaintiff had approximately 200 "friends" on Facebook and had designated most of his site as "private". There was a small portion of his site which was available to the public, which was disclosed to the defendant.

The defence sought production of the Facebook account, as well as further disclosure of various computer records, in order to test the plaintiff's claims – despite the Catastrophic designation – including to attempt to gauge his level of activity for a four year period (from 2004 to 2008) and also to test his claims that he could only sit for approximately 15 minutes at a time prior to feeling discomfort.

In a detailed analysis, Master Pope allowed the motion for the plaintiff to preserve and produce his Facebook account and stated the following:

> *[34] It is now beyond controversy that a person's Facebook profile may contain documents relevant to the issues in an action. Brown J. in Leduc, supra, at paragraph 23, cited numerous cases in which photographs of parties posted to their Facebook profiles were admitted as evidence relevant to demonstrating a party's ability to engage in sports and other recreational activities where the plaintiff put enjoyment of life or ability to work in issue.*
>
> *[35] It is also good law that a court can infer from the nature of the Facebook service the likely existence of relevant documents on a limited-access Facebook profile. (Murphy, supra; Leduc, supra at para. 36)*
>
> *[36] The Facebook productions made to date by the plaintiff are admittedly relevant to the issues in this action. Thus I can safely infer having reviewed the photographs of the plaintiff interacting with presumably friends at a wedding and other public places, as well as his communications with friends, that it is likely his privately-accessed Facebook site contains similar relevant documents. Although it is possible that the contents of his Facebook site may be used by the defendant to impeach the plaintiff's credibility, I am satisfied based on*

my review of the plaintiff's productions to date that its primary use will be to assess his damages for loss of enjoyment of life and his ability to work.

[37] *On the issue of privacy, the plaintiff relies on the British Columbia case of Park v. Mullin, [2005] B.C.J. No. 2855. In that case the plaintiff claimed to have sustained a head injury and brain damage as a result of a motor vehicle accident. Prior to the accident, the plaintiff had been self-employed as a human resources consultant and she continued to work in that capacity since the accident. On the assumption that the plaintiff used her computer for both work and personal use, the defendant wanted access to all of the plaintiff's computer documents because arguably they were relevant both to the loss of earning capacity claim and to the assessment of the plaintiff's pre and post accident level of functioning. That court rejected the defendant's request for inspection of the plaintiff's computer because the order sought was too broad and in the nature of an authorization to search. The court took into consideration the plaintiff's privacy concerns to both her private records and those of others who used the computer. The court found that the defendant offered no plausible evidence relating to how the types of documents requested would be used by the trier of fact, and that any evidence of the plaintiff's level of cognitive functioning would be gained by an assessment of the plaintiff by experts in the field or by the examination at trial of witnesses, including the plaintiff. It was ultimately found that the types of documents requested had little if any probative value.*

[38] *The plaintiff's testimony on discovery was that he maintained privacy over communications with his friends that numbered approximately 200 although only five of them were close friends. In other words, he permits some 200 "friends" to view what he now asserts is private. This is a preposterous assertion especially given his testimony that only five of the 200 are close friends. In my view, there would be little or no invasion of the plaintiff's privacy if the plaintiff were ordered to produce all portions of his Facebook site.*

[39] *On the issue of privilege, the plaintiff did not refer to any case that cited privilege as a consideration on motions for production of Facebook documents. Further, there is no evidence that the plaintiff had communications with his counsel either pre or post commencement of this action through his Facebook site. The letter in evidence from Mr. Odinocki stated that the plaintiff's communications with third parties were privileged. As the plaintiff failed to state the basis for a claim of privilege in his supplemental affidavit of documents, I fail to see how either solicitor and client privilege or litigation privilege would apply. However, the plaintiff is permitted to return to the court for a ruling on this issue once he delivers a further and better affidavit of documents.*

[40] *The plaintiff argues that from a proportionality standpoint, given the abundance of medical evidence regarding the plaintiff's injuries, the plaintiff's computer documents are*

> *unnecessary and irrelevant. I would be extremely hesitant to exclude a body of evidence such as computer documents including photographs and communications such as are typically found on a person's Facebook site merely because there is another more credible body of evidence such as medical reports that will be called into evidence at trial on the same issue. Firstly, this motion is not brought at the trial stage – it is still in the discovery stage. Secondly, despite a production order made at the discovery stage, a trial judge will ultimately decide the relevancy of a document at a time when all of the evidence is before the court.*
>
> *[41] For the reasons above, the plaintiff shall preserve all material on his Facebook website until further order of this court and produce all material contained on his Facebook website including any postings, correspondence and photographs up to and including the date this order is made.*

For more information, readers can read our previous blog posts, including **our May 14, 2009 Facebook blog concerning the Terry v. Mullowney decision from Newfoundland** and **our February 27, 2009 Facebook blog concerning the Leduc v. Roman decision from Ontario.**

Gregory Chang
Toronto Insurance Lawyer