

THE LAWYERS WEEKLY

Working with Facebook in personal injury actions

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Facebook pictures, in the context of a disability claim, made the evening news a few weeks ago. A woman from Quebec, who was receiving disability benefits, went public when her benefits were terminated by her disability insurer. She alleged that photographs on her Facebook account of a birthday party and a beach vacation were the reason for terminating benefits.

The year 2009 has been one of significant developments for the use of Facebook documents in personal injury actions. Interest in this topic is not limited to the legal community - public awareness of the potential use of these documents is growing.

For personal injury lawyers, the question for some is "how has Facebook been used?" while the question for others is "where is the use of social media in litigation going?" Case law can answer the former question, but the latter has no concrete answers. The history does, however, help us understand where future cases may lead.



[Sukmaraga / Dreamstime.com]

Facebook in 2009

In *Leduc v. Roman*, [2009] O.J. No. 681, the court required documents from a "private" Facebook account to be produced by a plaintiff. The following comment by the court provides a stark alert for personal injury counsel: "it is now incumbent on a party's counsel to explain to the client, in appropriate cases, that documents posted on a party's Facebook profile may be relevant to the allegations made in the pleadings."

Leduc, and similar decisions regarding Facebook accounts, have made lawyers well aware that online information has successfully been obtained in litigation. Seeking production and preservation of Facebook accounts is, or should now be, part of every defence practice through appropriate discovery processes. Lawyers acting for plaintiffs have also adapted their practices to address these issues early on with their clients.

Incorporating these issues into practice is essential due to the significant impact these documents may have on trial awards. This was evident in *Terry v. Mallowney*, [2009] N.J. No. 86, which states:

"Counsel for the defendants confronted Mr. Terry on cross-examination with printout excerpts from the internet social interaction website known as Facebook on which Mr. Terry had an account..."

While not getting into the details of these excerpts, they convince me that Mr. Terry (at least in the few months just prior to his testimony in Court recorded on Facebook) had a rather full and active social life... I find it incredible that Mr. Terry's social life miraculously improved in the few months he was communicating on Facebook and that for the remainder of the time from 2001 to 2007 he essentially had no or little social life.

Without this evidence, I would have been left with a very different impression of Mr. Terry's social life."

In *Knott v. Sutherland*, (Feb. 5, 2009), Edmonton 0803 02267 (Alta. Q.B.M.), Master Walter Breitzkreuz allowed delivery to a defendant's Facebook profile as one method of substitutional service.

Future developments

The most anticipated development in this area is how the existing cases will be used to seek production of, and rely on, other social media sources at trial.

Facebook is not the sole source of information. Blogs, Twitter, MySpace, LinkedIn, Bebo, YouTube, Flickr and other online sources are all areas defence lawyers must consider using for information. Lawyers for plaintiffs must be prepared to address information on these websites with clients.

As with any document used at trial, it must work with the theory of the case. For example, a picture of someone relaxing on vacation may not demonstrate a person does not suffer from anxiety; however, pictures of athletic abilities may be very effective in an injury claim.

With the expanding popularity of these websites as forms of communication, future orders for service of legal documents and notices should be anticipated. These sources can be used to serve people who are difficult to reach for legitimate reasons, as well as those who attempt to avoid documents being served on them in person.

Changes to the format and rules for litigation may also impact the existing law. In B.C., for example, new Supreme Court Civil Rules will come into effect on July 1, 2010. These rules will alter which documents must be produced from those "relating to any matter in question in the action" to documents which "could prove or disprove a material fact." The language in *Terry*, and other decisions where Facebook documents have impacted damages, supports the argument these documents can prove or disprove material facts.

Counsel must be conscious of social media use in all forms of litigation. These websites cannot be ignored. The area of personal injury tackled some of the issues this year, but the future will bring new changes and challenges.

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