Personal Injury FOCUS

Disclosure of Facebook information

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The 'relevance' of a personal injury plaintiff's Facebook page

Whether the contents of a personal injury plaintiff's Facebook page must be disclosed in an affidavit of documents is a contentious issue that has yet to be conclusively decided by the Ontario courts in accordance with the new higher disclosure standard of 'relevance.'

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Under the old *Rules of Civil Procedure*, documents that were "relating to" matters in issue were to be disclosed. To make that determination the court applied a "semblance of relevance" test.

Because of this low relevance standard, the Ontario courts were generally inclined to order Facebook production requests under the old Rules whenever defence counsel laid the foundation for such a request. Practically speaking, laying a foundation for a Facebook production request was not difficult in the least given that most personal injury statements of claim allege broad accident-related impacts, such as like loss of enjoyment of life and an inability to participate in normal recreational, household and occupational activities. Accordingly, defence counsel could set the foundation for a Facebook production request by simply confirming the claimant's use of Facebook and getting some sense of the purpose for which it was being used by the claimant.

However, changes were made to the *Rules of Civil Procedure* close to two years ago (effective January 1, 2010). The changes were made after consideration was given to the Civil Justice Reform Project and specifically the comments by the Honourable Justice Coulter Osborne. Justice Osborne had commented that the "semblance of relevance" test for discovery and production was much broader and looser than the relevancy test at trial and that the application of the lower test had led to "trial by avalanche" in an effort to avoid "trial by ambush."

Justice Osborne therefore suggested a stricter test of "relevance" for discovery purposes. That recommendation was adopted in new Rule 30.02(1) which raises the disclosure standard to documents that are "relevant to" any matter in issue. As well, other new Rules have been added to focus the litigation and make it more efficient, such as the introduction of the principle of proportionality in discovery and a seven hour time limit for discovery by a party.

In the litigation context, Facebook acts as a form of online 'self-surveillance.' Facebook is a living repository website that replaces what used to be known as letters, emails, postcards, school yearbooks, photo albums and home videos, while at the same time keeping an ongoing log of one's entire life activities. Notably the Facebook page of an active Facebook user could easily list more than a thousand 'friends' and could contain hundreds of photos, dozens of videos and thousands of status updates, wall posts and other communications.

Obviously in the context of a personal injury claim, one's daily life activities are typically front and centre in the litigation, but this reality should not lead to the conclusion that every photograph and video taken of the plaintiff is producible in the litigation.

While a personal injury plaintiff's Facebook information may arguably qualify as having a 'semblance of relevance' to matters in issue in their personal injury lawsuit, the information posted is not relevant nor material in the true sense of being important and of value and, most importantly, its disclosure is not necessary for the fair disposition of the claim.

Because of the possibility that the courts may continue to allow Facebook production requests, most plaintiff's personal injury lawyers advise personal injury clients at the outset that they should either stop using Facebook altogether or at least work on the assumption that everything that gets posted will eventually have to be produced to defence counsel. Clients are also asked to revise their privacy settings to prevent access by the public.

However, since many personal injury accident victims rely on social networking services, like Facebook, as their primary means of communication, often because their injuries have impacted their mobility such that online communication is the easiest and preferred option, discouraging Facebook use out of fear of 'self-surveillance' may lead to further isolation post-accident and may not be in the client's best emotional and psychological interests.

No doubt the courts will soon weigh in on this contentious issue. Hopefully the outcome will allow accident victims to actively participate in social networking sites without feeling like they are conducting self-surveillance for the defendant who may already have them under actual surveillance. ■

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