

Thursday, February 24, 2011

Page | 1

Facebook Defence – Give Me Access! - Personal Injury Lawsuits – Part 4

One of the earlier Ontario cases dealing with disclosure of a plaintiff's Facebook account profile was the 2007 Ontario Superior Court of Justice case of Murphy v. Perger (2007) 67 C.P.C. (6th) 245, in which Madam Justice Rady ordered production of a plaintiff's Facebook account profile, which was marked as a "private" account but had 366 Facebook "friends" attached.

The defendant, in this productions motion, did not seek access to the email communications contained on the plaintiff's Facebook account.

The plaintiff solicitor had, prior to this motion, produced pictures of the plaintiff showing her pre-accident activities, in support of her claim post-accident of suffering from fibromyalgia and TMJ (temporomandibular joint) disorder.

As a result, the defendant sought to test the plaintiff's claims and accessed the publicly available portion of the plaintiff's Facebook profile. This motion was brought to force disclosure of the "private" portion of that same Facebook account.

Madam Justice Rady ordered production of the Facebook account profile and wrote:

- 2** *The plaintiff claims damages for personal injuries that she alleges that she sustained in a motor vehicle accident that occurred on January 22, 2003. She is advancing a claim for general damages for pain and suffering and loss of enjoyment of life. She has served certain expert reports, including a report respecting future economic loss. The trial is scheduled to proceed later this month. The plaintiffs physicians have diagnosed her as suffering from temporomandibular joint dysfunction and fibromyalgia.*

- 3** *Mr. Mays has served photographs showing Ms. Murphy participating in various forms of activities pre-accident. Ms. Murphy and other witnesses to be called at trial will testify about the detrimental impact that the accident has had on her enjoyment of life and her ability to participate in avocational and social activities.*

- 4** *The defendant has had access to a publicly accessible site called "The Jill Murphy Fan Club" that contains photographs of her engaged in various social activities. However, the defendant wishes access to the private site, which was created by Ms. Murphy's sister but over which Mr. Mays, with his usual candor, conceded Ms. Murphy has control.*
- 5** *The defendant submits that this information is relevant to the assessment of the plaintiff's claim; there is no or very little prejudice given that 366 people have been given permission by Ms. Murphy to access the site; and the information would be shielded from disclosure in future by virtue of the implied undertaking rule.*

ANALYSIS

- 9** *The photographs are, of course, documents: Rule 30.01(1)(a); to the extent that they relate to any matter in issue, their existence must be disclosed: Rule 30.02(1); and they shall be produced for inspection if requested, unless privilege is claimed Rule 30.02(2).*

....

- 16** *So here, the issue is whether if the defendant's assertion rises no higher than there may be photographs of the plaintiff on the website and whether they are likely to be relevant.*
- 17** *It seems reasonable to conclude that there are likely to be relevant photographs on the site for two reasons. First, www.facebook.com is a social networking site where I understand a very large number of photographs are deposited by its audience. Second, given that the public site includes photographs, it seems reasonable to conclude the private site would as well.*
- 18** *On the issue of relevancy, in this case, clearly the plaintiff must consider that some photographs are relevant to her claim because she has served photographs of her prior to the accident, notwithstanding that they are only "snapshots in time".*

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Page | 3

20 *Having considered these competing interests, 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 assess the case. The plaintiff could not have a serious expectation of privacy given that 366 people have been granted access to the private site.*

21 *As a result, the defence is to be provided with copies of the web pages posted at the plaintiff's private site. If there are concerns, however, respecting the contents of any photographs (in the sense that they are personally embarrassing to the subject) counsel may arrange to speak to me.*

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.](#)

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