

GLUCKSTEIN & ASSOCIATES^{LLP}

P E R S O N A L I N J U R Y L A W Y E R S

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Personal Injury Claims & Social Networking Websites

Trail of Evidence

Surf the globe! Find friends. Expand relationships.
With social networking websites, you can:

- | express yourself.
- | stay connected with others 24/7.
- | share personal photos, details, or comments.

BTW: Insurance companies surf too . . .
photos you post on Facebook may become evidence
used to challenge your personal injury claim.



post my travel pics > 12:47 a.m. chat with Mike > 1:15 a.m. log off



With the massive popularity of social networking websites, individuals may unwittingly be generating a trail of documentary evidence about themselves that could be used at some point against them in the courtroom.

While your personal injury lawyer may be arguing your full entitlement to insurance benefits on the basis of a crippling disability,

archived records

of your social network profile may tell a different story altogether

Increasingly, insurance companies are recognizing the legal value of social networking websites in providing potentially valuable evidence in cases where insurance lawyers are seeking to challenge the benefits sought under a personal injury claim.

While your personal injury lawyer may be arguing your full entitlement to insurance benefits on the basis of a crippling disability, the archived records of your social network profile may tell a different story altogether — with records that your insurance company may very well win access to.

In the British Columbia Court of Appeal decision of *Bishop (Litigation Guardian of) v. Minichiello*, the plaintiff had brought a personal injury claim arising out of injuries suffered in a motor vehicle accident. The plaintiff argued that, as a result of the accident, he was suffering from a brain injury that caused “debilitating fatigue,” and sought full insurance benefits on that basis. The defendant insurance company filed an application to view the records of the plaintiff’s computer usage, in particular, those records on his computer that documented the log in/ log out times pertaining to his usage of the social networking site, Facebook. The insurance company argued that the plaintiff had “spent hours, late at night, on his computer using Facebook, [and] ...that this activity may account for, or contribute to, his alleged fatigue.” In other words, the lawyers for the insurance company sought to use the evidence of the plaintiff’s documented time on Facebook in order to argue that the “debilitating fatigue” was not caused by the car accident injury.

The chambers judge in that decision had granted the insurance company’s application only in regard to the Facebook records on the computer, and for no other records. The judge in that case had found the social networking records to be relevant insofar as the plaintiff had testified, at the examination for discovery, that he had spent some time on Facebook at night. With regard to other records that were on the computer, the judge determined that their relevance was speculative, and accordingly, restricted



Courts may grant your insurance company access to the private aspects of your Facebook profile — content that you had intended only for viewing by your most intimate circle of friends.

his order only to the production of the Facebook records. The Court of Appeal upheld the decision of the chambers judge.

The Ontario Superior Court of Justice decision of *Leduc v. Roman* looked into the various judicial considerations for the publicly accessible aspects of a Facebook profile, along with the private aspects of a profile available only to friends. As the Court noted:

Although web-based social networking sites such as Facebook and MySpace are recent phenomena, their posted content constitutes "data and information in electronic form" producible as "documents" under the Rules of Civil Procedure... If a party to an action posts on Facebook content that "relates to any matter in issue in an action", that party must identify such content in his affidavit of documents.

The plaintiff in *Leduc* had argued that he had suffered loss of enjoyment of life due to injuries sustained in a car accident. In response to a motion by the defendant insurance company to seek production of records from the plaintiff's private portion of his Facebook profile, the plaintiff had argued that the defendant should only have access to records from the publicly accessible profile. In response, the Court determined:

A party who maintains a private, or limited access, Facebook profile stands in no different position than one who sets up a publicly-available profile. Both are obliged to identify and produce any postings that relate to any matter in issue in an action... With respect, I do not regard the defendant's request as a fishing expedition. Mr. Leduc exercised control over a social networking and information site to which he allowed designated "friends" access. It is reasonable to infer that his social networking site likely contains some content relevant to the issue of how Mr. Leduc has been able to lead his life since the accident.

The judge in the Ontario decision of *Schuster v. Royal & Sun Alliance Insurance Co. of Canada* took issue with the above comment, noting that the mere existence of a Facebook account is not indicative of the fact that its production might be relevant to a claim. In this decision, the Court was weighing the insured's right to privacy as against the insurer's right to disclosure in a case where the insurer brought an ex parte motion for preservation of the Facebook records of the insured until the motion for the production of the records could be heard. The insurer also sought



direct access to the insured's profile by obtaining his username and password. The Court determined that the relevant Rules did not provide for an insurer to gain direct access to the insured's Facebook profile, but instead provided for the production of such records - only if deemed relevant - by way of computer print-outs.

In *Schuster*, the insured claimed that her injuries had impaired her ability to work and to enjoy recreational activities. She did not include the Facebook profile in her Affidavit of Documents, as she argued that it was not relevant. Thus, all the insurer had to go on was the photographs posted to the public portion of the profile. The Court, in this instance, ruled that the publicly available photographs did not reveal information that, on its face, seemed relevant to the claim. Under such circumstances, then, to grant production of the records from the private portion of the Facebook profile would amount to a speculative fishing expedition by the insurer. The Court noted instances where photographs posted to the public portion might very well be deemed as relevant to the claim, meriting an order for production of records from the private portion of the profile. As the Court noted:

In *Murphy v. Perger*, however, the Plaintiff posted photographs on her publicly-accessible Facebook profile showing her engaged in various social activities. I agree with Rady J. (in paragraph 17 of his decision) that where a person's public site includes photographs, it may be reasonable to conclude that the private site would as well. What is determinative, in my opinion, when drawing an inference as to whether there is relevant information in the private pages of a litigant's Facebook account is whether there is relevant information in their public profile.

In practical terms, then, the content of the photographs you choose to post on the public portion of your social network profile may have legal ramifications for you down the line when pursuing a claim of compensation against your insurance company arising out of a personal injury. So, think twice the next time you decide to publicly post photos of yourself hard at play and at work. Though you might not see the relevance, the lawyers from your insurance company may very well raise a reasonable argument that they are indeed relevant to an examination of your injury and disability claim, and on that basis, win access to the records you had only intended for viewing by your most intimate circle of friends.

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