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A Picture is Worth a Thousand Words

Court Orders production of Facebook and vacation photographs and associated data

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Introduction

In the recent case of *Fric v Gershman* 2012 BCSC 614, the defendant successfully obtained an order for production of a plaintiff's photographs from her Facebook site, and those taken while on vacation. Further, the plaintiff was required to provide the location, date and time the photograph was taken, if available.

In a growing number of personal injury cases digital devices, Facebook and other social networking are yielding background information regarding plaintiffs. The plaintiff's photographs and associated data are sometimes requested to be produced as relevant documents. Oftentimes, the plaintiff resists such requests.

One of the more difficult tasks we face in defending actions on behalf of insurers is assessing a person's claim of impairment in work or recreational activities. We have various means through which we make these assessments, including independent medical examinations, obtaining medical, scholastic and occupational records, interviewing witnesses, examinations for discovery and sometimes surveillance. We utilize surveillance in large part to determine if the person is being forthright as to their functional capacity. The private investigator may discover the person engaging in activities inconsistent with their records and their discovery evidence. When a person 'has their guard down', there is greater likelihood that they will engage in their everyday activities. Digital devices and social media can also provide a window into such activites.

Factual Background

The plaintiff was a law student at the time of a motor vehicle accident in November 2008. Her pleaded injuries were chronic severe headaches, injury and pain to the upper back and neck. The notice of civil claim alleged loss of mobility and loss of educational advancement, along with other more common pleas. The plaintiff claimed social withdrawal as a consequence of the accident.

Six weeks after the accident the plaintiff attended the Law Games. She testified at discovery her participation in the games was limited due to her accident related injuries. She testified that her ability to study and work were impacted by her headaches and physical injuries. Since the accident she enjoyed holidays in various places such as Thailand, Fiji, Australia, Montana, Florida, California, Seattle, Portland and Cuba.

The plaintiff maintained a Facebook site which was not publicly accessible.

The Decision

The defendant had issued a demand under rule 7-1(11) of the *Supreme Court Civil Rules*. The defendant had examined the plaintiff for discovery and found out that the plaintiff had photographs from her participation in a social and physical games weekend one month after the accident, and from various vacations. The plaintiff had refused to provide the photographs, arguing they would not provide evidence of whether the plaintiff was in pain, that the plaintiff's

right to privacy outweighed the probative value of the information sought and that the photographs were no more than “snapshots in time”.

The reasons for judgment analyse and reconcile the authorities in British Columbia and Ontario regarding when photographs and videos may be relevant, and when metadata may be ordered produced, along with how those decisions dovetail with the new document disclosure regime in B.C. The result is a framework for how to secure the necessary evidence and take the appropriate steps to ensure that relevant photographs and data can be ordered produced.

The decision draws a distinction between plaintiffs who allege purely cognitive impairments and those who allege physical impairments. When physical impairments are alleged, the relevance of photographs showing the plaintiff engaged in physical activities is clear. When social withdrawal is alleged, photographs of social occasions can be relevant.

After determining that certain of the photographs sought were relevant, the court applied a test of proportionality and what was required to ensure a fair trial on the merits to order disclosure. As the action involved an articled student who had been in a motor vehicle accident during her first year of law school, which she said resulted in ongoing neck pain, back pain and headaches impacting her studies and work, it was clear that the claim could be significant. The court confirmed a 2011 decision that an order for broader disclosure can be consistent with the proportionality objective in the new rules (*Global Pacific Concepts Inc. v Owners of Strata Plan NW* 141 2011 BCSC 1752).

The court explicitly left to the trial judge the balancing of prejudicial effect and probative value to determine admissibility. This was particularly interesting in the context of the court’s decision to relieve the plaintiff from an obligation to include commentary from her Facebook site because the probative value of the information was outweighed by the interest in protecting the privacy of the plaintiff and third parties. The court accepted that privacy rights should not be abridged without cogent reasons to do so. A defendant therefore is required to provide such reasons, but one of the important aspects of this decision is that it specifically allows defendants to cast a wider net at discovery in relation to photographs, and presumably other documents contained on digital devices, than they may be allowed to utilize as exhibits at trial.

Wider Implications

For personal injury actions, this decision clearly draws a line between cases where the major pleaded injury is a brain injury manifesting itself in cognitive complaints and other cases where physical injuries are prominent. This is a fundamental distinction defining whether or not photographs are capable of being relevant.

Also, this case specifically finds that a plea or complaint of total disability is not required in order to establish photographs may be relevant. A plaintiff who complains of a physical impairment which, for instance, restricts his or her ability to ski for longer than an hour, may still be ordered to disclose photographs of a ski trip. This is an example of where specific meta-data along with the photograph are both relevant. Photograph time stamped at 10 a.m., noon and 3 p.m. on the same day, all of that plaintiff enjoying a day skiing, would be relevant, as would

photographs on successive days all at around the same time. Such photographs are relevant to the evidence of an impairment in the extent of the ability to enjoy an activity.

For all actions in British Columbia, this case is clear authority for the wider net cast during the discovery process than at trial even under the new Supreme Court Civil Rules. The initial discovery required of a party may require primarily documents which could or will be exhibits at trial to be disclosed. The second tier of discovery, that made after a specific demand, is now authoritatively established to be wider and to include documents which may never be made exhibits at trial. This decision leaves a set of documents which must be disclosed but which a trial judge still has the discretion to omit from the trial of the action.

Some prior decisions appeared to bring that analysis back to the disclosure stage, and implicitly held that a motions judge would balance probative value against prejudice or privacy and refuse to order disclosure of a document in much the same way a trial judge might rule it inadmissible at trial.

Further, this case provides counsel a one step ability to get disclosure of documents when refusals at discovery might otherwise lead to two motions being required to obtain disclosure. The master allowed an inference from the evidence produced about the content of the photographs. If a lawyer is making refusals at discovery then it is sensible for the questioning lawyer to get as much information as will be allowed to be answered, but also press for specific refusals as to the existence and number of photographs, the content of certain photographs and where and when such photographs were taken.

Consideration should be given as to whether there is enough information in evidence about the photographs to support the motion for production, or whether the refusals were so broad and persistent that a motion should be brought on the refusals. If the latter conclusion is reached, counsel should consider whether the one motion can achieve both goals – answers to the refusals and production of the documents in question.

Fric – The Future

An increasing number of people store massive amounts of information about themselves on their smart phones. This should be the goal of most defense counsel – to establish the evidentiary basis for production of the content of a plaintiff's smart phone. It will be difficult to obtain an order allowing blanket production of all messages and images on a smart phone, but asking about the content of digital devices is expected to yield increasing amounts of evidence.

It is instructive to think broadly about a list of places that digital images and information can be stored in this modern world. Even just listing the places that a photograph can be stored provides an extensive list that few lawyers delve into during the discovery process:

1. Photo albums
2. Old School Camera film
3. Digital photo frames
4. Memory sticks

5. Attachments to email
6. Social media sites including Facebook and Twitter
7. Business media sites including Linked In
8. Smart phones like Blackberry and iphones
9. Music players like ipods
10. Digital Cameras
11. Digital Video Recorders
12. Memory Cards (which could be separate or placed in a smartphone, camera or video camera)
13. Gaming Systems (Xbox, Playstation, Wii, portable gaming systems)
14. Smart TVs
15. Tablet computers like ipads
16. Laptops (home and work)
17. Desktops (home and work)
18. External Hard Drives (home and work)
19. Servers (home and work)
20. Hard Drives in vehicles
21. Online storage (the cloud)

This list would only be expected to grow in coming years. Further, future documents would be expected to include photographs, video and audio recordings.