

The Relevancy of Social Media – Who Should Decide?

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A recent decision of Master Jolley in *Smith v. Jarnell*, 2020 ONSC 6433, serves as an important reminder to counsel of the nature of questions required to establish the relevance of a plaintiff's social media page in the context of a personal injury action.

In *Smith*, the onus was on the defendant to establish that the plaintiff's social media accounts had relevant information. The simple existence of a social media account, like Facebook, did not meet the test of relevance.

This case arose from a motor vehicle accident where the plaintiff alleged to have suffered permanent and serious injuries which interfere with all aspects of his daily life, including his ability to work and to participate in household, recreational, social and athletic activities.

During his examination for discovery, the plaintiff refused to produce his Facebook page (including all posts and photos that involved activities that he had done or trips that he had taken since the accident). He did, however, undertake to preserve his Facebook page.

On a refusals motion, the moving defendant sought production of the page and put before the court the plaintiff's answers to questions on examination for discovery about his social media use, as well as the real time sharing of the plaintiff's public Facebook account via Zoom's screen sharing function during the virtual motion.

However, with respect to the latter, the moving defendant did not include the plaintiff's public Facebook account in the motion materials and so that evidence was not properly before the court. Master Jolley thus refused to consider the content of the plaintiff's public Facebook account to establish the relevance of his private account.

Master Jolley did however consider the specific questions put to the plaintiff on examination, and the related answers, in order to determine the relevancy of the private

Facebook page. When asked whether he posted pictures of himself and his activities on Facebook, the plaintiff advised that he did not post a lot and the one post he could recall was with family. The plaintiff was not asked anything else about the content of his Facebook page.

Ultimately, Master Jolley refused to order disclosure of the plaintiff's private Facebook page because the defendant did not specifically ask whether any of the postings would be of activity relevant to limitations the plaintiff alleges he has experienced since the accident or any of his accident-related complaints. The limited questions asked were insufficient to establish that the plaintiff's social media pages contain information relevant to the matters in issue.

Lessons Learned

On examinations for discovery, the defendant should fully explore a plaintiff's use of social media in order to establish relevance, as follows:

- Ask questions about what the account is used for, whether they message friends, post comments, post pictures/videos, and are tagged by others in photos/videos.
- Ask specifically what photographs posted since the accident show, whether the accounts includes photos of vacations, significant life events, and daily activities generally, and what the content of any such posts show.
- If the plaintiff refuses to disclose the content, ensure that the information is preserved by requesting that the plaintiff preserve, not delete, any content from the social media page.

On a motion, the moving party should ensure that all evidence is properly before the court, even if that evidence should not be a surprise to the plaintiff.

Looking Forward

This decision has caused me to think of what I would do if faced with a situation where a plaintiff has admitted to having an active Facebook page, but denies that that page includes any information relevant to the issues in the case. Following Master Jolley's ruling, I can foresee a risk that my client might not obtain disclosure of same, even if the pertinent questions had been asked during examinations for discovery.

Relevancy is a subjective consideration. What the plaintiff considers relevant may be very different from what my client considers relevant.

Moreover, and considering the dominant purpose of Facebook and other similar social media pages is to share content about one's life, and in a case such as *Smith v. Jarnell*

where a plaintiff has arguably put his entire life in issue, it is not far-fetched to suggest that the plaintiff's social media might have relevant information.

There should be an ability to test the plaintiff's evidence that the page does not show relevant information, particularly where there is available a document (page download) that is in the exclusive power and control of the plaintiff. All relevant evidence should be put before the jury and, given the purpose of social media pages such as Facebook, it should not lay solely with the plaintiff to determine relevancy.

If I were in a similar situation (and while this may be old news to some who have dealt with this situation), I would seek (as alternative relief) an order for the Facebook page to be produced to the court under seal and request that the court consider the content of the Facebook page itself to determine relevancy.

This is permitted under rule 30.06 of the *Rules of Civil Procedure*, which provides that, where the court is satisfied by any evidence that a relevant document in a party's possession, control or power may have been omitted from the party's affidavit of documents, the court may inspect the document for the purpose of determining its relevance.

This approach was used by the court in [Stewart v. Kempster](#), 2012 ONSC 7236. A sealed envelope containing photographs of the plaintiff was filed for the court's inspection for a determination of whether the photographs were relevant.

Such an approach seems to be the most equitable. Since "relevance" can have different meanings to different people, the best way to determine relevance is for the court to examine the documents in question.