SUPREME COURT OF NOVA SCOTIA
Citation: *Laushway v. Messervey*, 2013 NSSC 47

Date: 20130208
Docket: Hfx. No. 284264
Registry: Halifax

Between:

Peter Laushway

Plaintiff

v.

Albert Messervey and Sobeys Group Inc.

Defendants

Judge:	The Honourable Justice Heather M. Robertson
Heard:	June 11 and November 6, 2012, in Halifax, Nova Scotia
Decision:	February 8, 2013
Counsel:	Nicolle A. Snow, for the plaintiff C. Patricia Mitchell, Nancy I. Murray, Q.C. and Tipper McEwan, for the defendants

Robertson, J.:

[1] The plaintiff was injured in a motor vehicle accident in December 2005. He is a self-employed business man selling health products in a multi-level marketing operation over the internet. He started the business in 2000. The plaintiff claims that as the result of the accident the amount of time he was able to devout his internet business was much reduced as he was only be able to sit at his computer for short periods. As a result he says he has suffered financial loss.

[2] The defendant seeks an order for a copy of the plaintiff's computer hard drive to conduct a metadata analysis to determine computer usage patterns. The analysis is proposed to be conducted by ESI Specialists Inc. ("ESI") a company with litigation support expertise in forensic assessment of this nature. ESI's plan of information recovery is set out in the affidavit of Megan Ritchie, who also gave evidence before me.

[3] Her affidavit sets out in detail the process for copying metadata, the scope of the information reviewed, the methods of dealing with privacy screening issues and the ultimate objective of determining the frequency of use of the computer by the plaintiff, in light of the assertion that others also use the computer.

[4] The plaintiff resists the application saying this requirement for disclosure, if granted, would be overly intrusive, effect the plaintiff's privacy rights, yield little useful information and amount to a mere fishing expedition.

[5] The plaintiff's response to the application is supported by the affidavit of Gregory Jewett (who testified as well), an electronics engineering technologist, who expressed the opinion that little useful information could possibly be retrieved by the proposed metadata analysis.

[6] In particular he raised the points that the software Internet Explorer version 7 ("IE7") does not clock the browser from sharing some personal data with third-party websites (largely relating to commercial online purchasing habits raising privacy concerns about banking information) and further that the metadata may show web traffic to sites never actually visited by the browser.

[7] He also deposed that the plaintiff had a virus attack in 2011 that wiped out all the browsing history which could possibly effect actual metadata stored.

[8] He pointed out that there are as many as four email accounts on IE7 and G-Mail, raising third-party privacy concerns. He noted the presence of documents and communications that are the subject of solicitor-client privilege.

[9] He expressed other concerns based on various website access points relating to what information is actually tracked and logged.

[10] Mr. Jewett has been in the computer business for 35 years and demonstrated a broad and comprehensive knowledge of computer systems generally. Although he had no personal experience or expertise in the use of forensic software and retrieval procedure referenced by Ms. Ritchie.

[11] As a preliminary matter, I will say that having heard the cross-examination of these witnesses and reviewed their affidavits and credentials, I am satisfied that Ms. Ritchie met the challenges and objections raised by plaintiff counsel and Mr. Jewett.

[12] The defendant seeks information about the plaintiff's hours of usage through metadata analysis. The defendant does not seek access to the content on the plaintiff's computer. The defendant does not seek permission to read the plaintiff's emails, the private information of clients, or correspondence or documents of solicitor-client privilege. They do not seek a list of websites visited. This alleviates many of the privacy concerns raised.

[13] I am satisfied that metadata showing the plaintiff's active use of the computer can be compiled and that third-party use can be distinguished. In any event, it will be a trial judge who ultimately decides the quality of evidence.

[14] At this stage the defendant seeks to test the plaintiff's claim that he is only able to work at his computer two to three hours a day. By providing passwords, or login numbers for separate users, by providing information as to the times when others used his computer (some of this information has now already been provided in the plaintiff's discovery evidence), his use of the computer can be narrowed down. Evidence by others as to their use of the plaintiff's computer would also be

a useful filter. At trial the plaintiff would have the opportunity to address this issue of third-party usage.

[15] *Rule* 16 of our *Civil Procedure Rule*s governs Disclosure of Electronic Information.

[16] *Rule* 16.02 provides for the preservation of electronic information after a proceeding has been started.

[17] Metadata is included in the definition of electronic information. *Rule* 14.02 Interpretation in Part 5(1).

[18] The courts authority to order production of electronic information is set out in *Rule* 14.12 (1) to (4):

> (1) A judge may order a person to deliver a copy of a relevant document or relevant electronic information to a party or at the trial or hearing of a proceeding.
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> (2) A judge may order a person to produce the original of a relevant document, or provide access to an original source of relevant electronic information, to a party or at the trial or hearing.
>
> (3) A judge who orders a person to provide access to an original source of relevant electronic information may include in the order terms under which the access is to be exercised, including terms on any of the following:
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> (a) a requirement that a person assist the party in obtaining temporary access to the source;
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> (b) permission for a person to take temporary control of a computer, part of a computer, or a storage medium;
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> (c) appointment of an independent person to exercise the access;
>
> (d) appointment of a lawyer to advise the independent person and supervise the access;
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> (e) payment of the independent person and the person's lawyer;

(f) protection of privileged information that may be found when the access is exercised;

(g) protection of the privacy of irrelevant information that may be found when the access is exercised;

(h) identification and disclosure of relevant information, or information that could lead to relevant information;

(i) reporting to the other party on relevant electronic information found during the access.

(4) A judge who is satisfied that the requirement is disproportionate under Rule 14.08 may limit a requirement to produce a copy of a document, to produce exactly copied electronic information, or to provide access to electronic information.

[19] The relevance of the metadata in this case is directly related to the amounts of time that the plaintiff spends using his computer and is directly related to the general damages and income loss components of his claim. This information is both relevant and probative.

[20] The issue before the Court in this application is the balancing of relevance against privacy interests of the plaintiff and potential third parties. As well there is the concern that an overly intrusive investigation may yield little of relevance at considerable expense and necessitate expert witnesses in this field.

[21] The plaintiff relies on *Frangione v. Vandongen*, [2010] O. J. No. 2337. The Court ordered that all material on the plaintiff's Facebook website, including postings, correspondence and photos be preserved but determined that the proposed forensic examination of the entire hard drive was too broad in the search for specific documents allegedly omitted from the plaintiff's affidavit of documents. Privacy interests outweighed the possibility of the defendant finding a relevant document. *Frangione, supra.,* at paras. 71, 72, 73 and 74.

[22] The plaintiff also relies on the *Desgagne v. Yuen*, [2006] B.C.J. No. 1418, a case in which the plaintiff claimed a brain injury after being struck by a motor vehicle when riding her bicycle. The application for metadata analysis on her

computer, for the purpose of determining her computer functionality after the accident, was dismissed as the Court found the probative value lacking in relation to what evidence the data could provide (paras. 26-34 of the decision).

[23] Similarly, in *Ireland v. Low*, [2006] B.C.J. No. 1592, the Court recognized the plaintiff's privacy interests over the possible probative value of the metadata stored, also noting the significant forensic costs involved in such an analysis and the further need for such experts to testify.

[24] In *Park v. Mullin*, [2005] B.C.J. No. 2855, another claim of brain injury, the plaintiff's extent of intellectual functionality was sought to be determined by a computer metadata analysis. The Court also found the invasion of privacy to be significant and that there was no evidence adduced to show how the documents requested could objectively measure the plaintiff's cognitive functioning. The Court raised s. 7 of the *Charter of Rights and Freedoms* and noted at para. 21:

> That the issue of privacy is a robust and real issue should be taken into account on an application such as this. In *A.M. v. Ryan, supra*, McLachlin J. commented on a party's privacy interests in the context of an application for third party clinical records under Rule 26(11). In determining whether the records at issue were privileged, McLachlin J. stated the following at para. 30:
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> > ... the common law must develop in a way that reflects emerging Charter values ... One such value is the interest affirmed by s. 8 of the Charter of each person in privacy. ...
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> And further at para. 38:
>
> > ... I accept that a litigant must accept such intrusions upon her privacy as are necessary to enable the judge or jury to get to the truth and render a just verdict. But I do not accept that by claiming such damages as the law allows, a litigant grants her opponent a licence to delve into private aspects of her life which need not be probed for the proper disposition of the litigation.
>
> In my view, similar privacy concerns should be considered in a determination under Rule 26(10) where the order sought is so broad it has the potential to unnecessarily "delve into private aspects" of the opposing party's life.

[25] In *Pritchard v. Crosfield*, [2005] B.C.J. No. 3032, the Court found the requested production of certain business records on the plaintiff's home computer appropriate, but stopped short on approving the production of private emails and internal searches, as being an unjustified invasion of privacy (paras. 9 - 17).

[26] I agree with the defendant's counsel that these cases are quite distinct, in the information sought and the purpose for which the information was sought, compared to this case.

[27] In *Frangione, supra.,* the Court commented that the evidence of multiple users is an evidentiary issue for trial (para. 57).

[28] In *Carter v. Connors*, 2009 NBQB 317, a case relied on by the defendant, the Court commented:

> The Respondent has also posited that the relevancy, from a probative value standpoint, of the use data records that could be generated has been unacceptably compromised by other users who have shared the Internet account while visiting the Plaintiff. That argument is one more properly made at trial in the event the evidence of account use is admitted as part of the Defendant's case. See, to the same effect, *Bishop v. Michichiello (supra)* at paragraph 54.

[29] In *Bishop (Litigation guardian of) v. Minichiello*, 2009 BCSC 358, 2009 BCCA 555, the Court granted an order to allow the family computer hard drive to be analysed to determine the plaintiff's time spent on Facebook, also determining that other family usage is an evidentiary issue for trial, para. 54 reads:

> Examination for discovery evidence of the plaintiff's mother confirms that the plaintiff is the only person in the family using the family computer between those hours. The plaintiff suggests that, at times, friends may use the computer once he logs onto Facebook. But that is an evidentiary issue for trial. The issues of privacy and solicitor-client privilege are basically resolved as only the plaintiff has the password to his Facebook account and he has not used this account to converse with his counsel.

[30] Unlike *Frangione, supra.,* the defendant does not seek to review specific documents in this case, only establish usage patterns through the analysis of metadata. *Frangione, supra.,* did find that metadata was relevant to the plaintiff's case:

> 66 The defendant's position is that the metadata from the plaintiffs computer is directly relevant to an assessment of damages for loss of enjoyment of life and his ability to work. This is so because the metadata will quantify the plaintiffs computer usage on a daily basis.
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> 67 In my view, if there is a document that reveals information relative to the plaintiffs testimony about the amount of time he spends on his computer, then that document is relevant to the issues in the action. To use my own analogy, metadata stands in no different light than a record of employment, also known as a pay stub, when it comes to demonstrative evidence. For example, where a plaintiff testifies that he only worked two out of the last six months, the plaintiff would routinely produce his record of employment or pay stubs as documentary proof of his testimony. The pay stubs may contain information about the number of days worked, specific days works and hourly rate similar to metadata that contains, for example, information about dates and times when an e-mail was created and sent, or dates and times when, a website was accessed.
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> 68 I have concluded that the metadata of the plaintiffs hard drive is relevant to the issues identified by the defendant. I cone to this conclusion for the reasons set out above as well as a consideration of the plaintiffs young age at the time of the accidents and the resultant effect on the quantum of future wage loss if so found, allegations regarding the extent of his injuries and his inability to ever work again, as well as the opinions of his Medical assessors including the finding of catastrophic impairment.

[31] The record of employment, pay stub analogy is a good one in this case. The plaintiff's computer usage directly relates to how he does and can work.

[32] I also agree that the cases of *Desgagne, supra., Park, supra.,* and *Pritchard, supra.,* are distinguished on the issue of probative value relating to intellectual functioning. These are all brain injury or cognitive defect cases, not the mere direct inquiry of time spent at work on the computer, a strictly quantative inquiry. This is logically relevant to the plaintiff's claim for loss of income and loss of earning capacity.

[33] At this stage of the trial proceeding all relevant information should be disclosed. The disclosure of the metadata does not, in my view, amount to an unreasonable infringement of the plaintiff's privacy and the Court ought not to exercise its discretion in this direction.

[34] I am also satisfied that the protocols and screens that will be in place as described by Ms. Ritchie will protect the plaintiff's privacy interests. For example, no reference will be made to actual websites visited by the plaintiff. There can therefore be no "profiling" of the plaintiff, nor is it the defendant's intention to do so.

[35] As to the issue of proportionality, this is not a concern as the defendant has agreed to bear the costs of this investigation.

[36] As to the implementation of Ms. Ritchie's analysis the plaintiff will have to provide further disclosure, as has been requested in the past and refused (Ms. Mitchell's correspondence of January 25, 2012).

[37] This information will facilitate a supplementary metadata analysis report intended to exclude certain irrelevant materials from review, as contemplated in para. 7 of the defendant's draft order.

[38] I am prepared to grant the order requested and also seek the parties' views on the amount of costs of this application which in my view should be paid in the cause.

Justice M. Heather Robertson