SUPREME COURT OF NOVA SCOTIA
Citation: Conrod v. Caverley, 2014 NSSC 35

Date: 20140128
Docket: Hfx No. 372504
Registry: Halifax

Between:

Joanne Marlene Conrod

Plaintiff

v.

David Andrew Caverley and Allterrain Contracting Ltd.

Defendants

Judge: The Honourable Justice Glen G. McDougall

Heard: August 8 and October 4, 2013, in Halifax, Nova Scotia

Counsel: Nicolle Snow, for the plaintiff
Michelle Kelly, for the defendants

By the Court:

INTRODUCTION

[1] This is a motion by the Defendants pursuant to **Civil Procedure Rule** 14.12 for an order requiring the Plaintiff to produce the following documents:

(1) A complete printed copy of the Plaintiff's Facebook profile, including the information and photographs that she has restricted by privacy settings to be visible to her "friends" only; and,

(2) A printed copy of her Facebook usage history indicating her login and logout information.

BACKGROUND

[2] This action arises out of a motor vehicle accident. On the evening of August 18, 2011, Joanne Conrod was travelling across the MacKay Bridge on her way to Dartmouth. Her rush hour commute came to an abrupt end when a dump truck entered her lane and collided with her vehicle.

[3] Ms. Conrod says that the injuries she suffered in the collision have left her with severe neck, back, arm and leg pain. She has not returned to work in any capacity and claims that her ability to participate in recreational and social activities has been compromised. She complains of problems with concentration and focus that limit the time she is able to spend using websites like Facebook. According to Ms. Conrod, these physical and cognitive limitations have resulted in a loss of enjoyment of life.

[4] The Defendants are David Caverley, the driver of the dump truck, and Allterrain Contracting Ltd., the truck's registered owner. They contend that Ms. Conrod has placed her ability to participate in recreational and social activities in issue and that it will be a critical component of her claim for general damages and loss of enjoyment of life. Based on the information available on Ms. Conrod's public Facebook profile, they say it is reasonable to infer that the contents of the private profile will be relevant in assessing that portion of the claim. The Facebook usage history will be relevant to Ms. Conrod's claim that her concentration has been affected by the accident.

[5] Ms. Conrod, on the other hand, says the contents of her Facebook profile and her Facebook usage history are not relevant to her claim and opposes the motion.

THE RULES

[6] The 1972 **Civil Procedure Rules** governing pre-trial disclosure required litigants to disclose all documents relating to every matter in question in the proceeding. When a production dispute arose, the Chambers judge ordered disclosure where he or she was satisfied that the document bore a "semblance of relevancy" to the matters in issue. The basis for the adoption of a broad relevancy test was "the handicap of a Chambers judge when assessing relevancy at an early stage, without the benefit of the knowledge of issues and facts enjoyed by a trial

judge": **Brown v. Cape Breton (Regional Municipality)**, 2011 NSCA 32 at para. 10.

[7] With the introduction of the 2009 **Civil Procedure Rules**, the semblance of relevancy test was abandoned as part of an effort to reduce the high costs of litigation. Disclosure obligations were narrowed to encompass only "relevant" documents and information. Rule 14.01(1) defines "relevant" as having the same meaning as at the trial of an action. In other words, relevancy is to be determined in accordance with its ordinary meaning in evidence law.

[8] The adoption of the more onerous standard of relevancy at the pre-trial stage "fundamentally altered" the approach to be taken on a motion for production: **Saturley v. CIBC World Markets Inc.**, 2011 NSSC 4 at para. 9. The Chambers judge must now assess relevancy from the vantage of a trial judge entertaining a request to admit evidence. This shift to a more stringent test of relevancy, however, "does not mean a retreat from the broad or liberal approach to disclosure and discovery of relevant information that has prevailed in this province since 1972": **Brown** at para. 13; **Saturley** at para. 47.

[9] The burden is on the Defendants to satisfy the court that the material sought meets the standard of trial relevancy. If they are successful, I may grant an order for production pursuant to Rule 14.12.

PRODUCTION OF THE PRIVATE FACEBOOK PROFILE

[10] Over the last decade, social networking websites like Facebook have become a part of daily life for many people in Canada and around the world. We have reached a point in history where those of us without a Facebook profile seem to be in the minority.

[11] In view of social media's widespread popularity, it is not surprising that the relevance of Facebook-related evidence to personal injury claims has arisen in other jurisdictions. The relevance of private Facebook postings in particular has been considered numerous times, primarily by Ontario courts. The parties rely on **Leduc v. Roman**, [2009] OJ No 681 and **Schuster v. Royal & Sun Alliance Co**, [2009] OJ No 4518.

[12] In **Leduc**, the plaintiff commenced an action for loss of enjoyment of life due to injuries suffered in a motor vehicle accident. The defendant moved for production of the plaintiff's Facebook profile.

[13] Mr. Leduc was not asked during his discovery examination whether he had a Facebook account. At some point thereafter, defence counsel conducted a Facebook search and learned that Mr. Leduc did in fact maintain a profile on the site. Due to the account's privacy settings, counsel was only able to view Mr. Leduc's name and profile picture. All other content was restricted to his "Facebook friends". The defendant wanted a copy of the entire profile. The motion was heard by Master Dash, who refused to grant the order. The defendant appealed the Master's decision.

[14] On appeal, Justice Brown observed that although Facebook photographs had been admitted as evidence in many cases where a plaintiff claimed a loss of enjoyment of life, only the decision in **Murphy v. Perger**, [2007] OJ No 5511 (SCJ) involved a request for production of the private portion of a plaintiff's Facebook profile.

[15] The plaintiff in **Murphy** was injured in a motor vehicle accident and claimed a loss of enjoyment of life. The public portion of the plaintiff's Facebook profile contained photographs showing her engaged in various social activities. The defendant was not able to view the private portion of the profile. On a motion by the defendant for production, Rady, J. stated:

> 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.
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> As to the privacy concerns advanced by the plaintiff, Rady, J. was satisfied that they were minimal and outweighed by the need of the defendant to use the photographs to assess the plaintiff's claim.

[16] The **Murphy** decision was considered by Master Dash, but he declined to follow the principle set down therein that the court could infer, by the nature of Facebook, the likely existence of photographs on the plaintiff's private profile. In his

view, any inference as to the content of the plaintiff's Facebook based on the contents of a "typical" Facebook profile would be entirely speculative.

[17] After reviewing Master Dash's decision, Justice Brown agreed with him that "mere proof of the existence of a Facebook profile does not entitle a party to gain access to all material placed on that site": para. 33. The moving party must present evidence that the other party possesses a relevant document that has been omitted from its affidavit of documents before the court will order production. However, Justice Brown went on to adopt the following principles from Murphy:

> 30 Where, in addition to a publicly-accessible profile, a party maintains a private Facebook profile viewable only by the party's "friends", I agree with Rady J. that it is reasonable to infer from the presence of content on the party's public profile that similar content likely exists on the private profile. A court then can order the production of relevant postings on the private profile.
>
> 31 Where, as in the present case, a party maintains only a private Facebook profile and his public page posts nothing other than information about the user's identity, I also agree with Rady J. that a court can infer from the social networking purpose of Facebook, and the applications it offers to users such as the posting of photographs, that users intend to take advantage of Facebook's applications to make personal information available to others. …
>
> 32 … 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.

[18] Although he was prepared to infer that Mr. Leduc's Facebook account likely contained photographs and information about his life, Justice Brown chose not to order production of the profile on the basis of that inference alone. Instead, he ordered that the defendant be permitted to cross-examine Mr. Leduc on his supplementary affidavit of documents to learn what relevant content, if any, was posted on Mr. Leduc's Facebook profile.

[19] In **Schuster**, the plaintiff was suing her insurer to recover for injuries suffered in a motor vehicle accident. She alleged that she was no longer able to work or participate in social and recreational activities. The defendant insurer wanted access to the plaintiff's private Facebook account and brought an ex parte motion for an

injunction to prevent her from deleting any of its content. This motion was to be followed by a second motion, with notice, for production of the profile.

[20] On the motion for injunctive relief, the defendant filed an affidavit containing three photos of the plaintiff from her private Facebook account, obtained by the law firm from one of the plaintiff's "Facebook friends". The two photos taken after the collision showed the plaintiff sitting or reclining alone on a floor.

[21] In considering whether to grant the injunction, Justice Price referred to the **Murphy** decision:

> 37 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**.
>
> **[Emphasis added]**

[22] Without photos showing the plaintiff engaging in social activities, Justice Price was not willing to infer that her Facebook profile contained relevant information:

> 39 I do not regard the mere nature of Facebook as a social networking platform or the fact that the Plaintiff possesses a Facebook account as evidence that it contains information relevant to her claim or that she has omitted relevant documents from her Affidavit of Documents. The photographs that the Defendant has obtained from the Plaintiff's account in the present case do not appear, on their face, to be relevant.

[23] While Justice Price declined to make the preservation order, he did grant leave to the defendants to cross-examine the plaintiff on her affidavit of documents to ensure that she had complied with her obligations in relation to it.

[24] Both **Leduc** and **Schuster** confirm that where, as here, a person maintains a public and a private portion of their Facebook profile, the court is entitled to infer that the contents of the private portion will be similar to the contents of the public portion. It follows that if the public profile contains relevant photographs or information, it is reasonable to infer that the private profile will contain similar relevant evidence.

[25] Although the decisions in **Leduc** and **Schuster** were decided on the semblance of relevancy standard, more recent cases have considered whether to order production of the private portion of a Facebook profile on the more stringent trial relevancy standard: **Frangione v. Vandongen**, 2010 ONSC 2823; **Stewart v. Kempster**, 2012 ONSC 7236; **Morabito v. DiLorenzo**, 2011 ONSC 7379; and **Garacci v. Ross**, 2013 ONSC 5627. Consistent with Justice Price's comments in **Schuster**, the deciding factor in each of these cases was whether the public portion of the Facebook profile contained photographs or information relevant to the issues between the parties.

[26] Whether the contents of a public Facebook profile will be relevant will depend on the nature of the claims advanced by the profile's owner. In **Frangione**, for example, the plaintiff alleged that his injuries severely impacted his social life. He said that he spent his time "doing nothing" and that he did not want to go out, had no friends and no girlfriend. For this reason, the photographs of him on his public profile interacting with friends at a wedding and in other public places were held to be relevant.

[27] In **Garacci**, on the other hand, the plaintiff's alleged limitations were much less significant. The plaintiff had been struck by the defendant's vehicle while walking on the side of the road and claimed to have suffered permanent injuries to her left leg and ankle. During discovery examination, she testified as to her inability to participate in activities she used to enjoy like soccer, competitive dancing and snowboarding. She did not claim to be totally disabled, however, and admitted to swimming, going to the gym, traveling to Mexico, and attending concerts.

[28] On a motion for production, the defendant filed twelve pictures obtained from the plaintiff's public Facebook profile showing her socializing with friends, having dinner and drinks, kneeling on the ground, climbing a tree, and wrestling a friend to the ground. In the defendant's view, if the public profile contained these kinds of images, it was reasonable to assume that the private section of the profile contained similar pictures. On this issue, Master Muir concluded:

> 6 While that proposition may be true, the difficulty I have with the defendant's position is that I do not view the public photographs obtained by the defendant as having any real relevance to the matters in issue in this action. Despite the description of Christina's activities in the defendant's supporting affidavit, it is my view that none of the public photographs actually show Christina engaged in any kind of significant physical activity. For the most part she appears to be socializing with friends and

> having a good time. In my view, the public photographs are completely consistent with her evidence at discovery.

[29] I will now review the evidence offered by the Defendants to support this motion.

THE EVIDENCE

[30] Discovery examinations in this matter took place on June 25, 2012. After questioning Ms. Conrod about her physical limitations since the accident, defence counsel asked whether she had a profile on Facebook. The Court was not provided with a transcript of Ms. Conrod's discovery evidence on this point and, perhaps unsurprisingly, the respective recollections of counsel differ as to the content of her testimony. What is undisputed, however, is that Ms. Conrod admitted to having a Facebook account that she used before and after the accident. Defence counsel requested that Ms. Conrod undertake to produce a complete copy of the account. That undertaking was refused.

[31] At some point thereafter, defence counsel attempted to access the contents of the Facebook profile by searching the website for Ms. Conrod's name. The search yielded access to the public portion of the profile which included several wall posts authored by Ms. Conrod and several photographs.

[32] From the information available on the public portion of the profile, it was clear that Ms. Conrod also maintained a private portion containing photo albums and information accessible only to her "Facebook friends".

[33] In addition to black and white printouts of the public portion of Ms. Conrod's Facebook profile, the Defendants also filed a copy of a report prepared by Dr. Dianne MacDonald. Dr. MacDonald conducted an independent medical evaluation of Ms. Conrod on February 14, 2013 at the request of her Section B insurer. In the report, Dr. MacDonald summarizes Ms. Conrod's reporting of her condition and makes observations and recommendations. According to the report, Ms. Conrod says she has back, neck and leg pain, and has difficulty doing anything that requires the use of her arms.

[34] The report makes reference to Ms. Conrod's use of Facebook at page 4:

> She describes problems with concentration and focus and states that she can use her computer occasionally, but only spends about five or ten minutes at a time on Facebook. She does watch some TV and is able to follow the storyline.

[35] On the issue of Ms. Conrod's recreational and social limitations, Dr. MacDonald states at page 6:

> Ms. Conrod describes being very physically active in the past - roller skating, ice skating, bowling and dancing, plus social interaction with friends. She stated that at the time of assessment, even walking any distance causes her discomfort and she has decreased her social interaction, but does acknowledge that occasionally friends come to the house to visit her.

[36] According to this report, Ms. Conrod describes a dramatic change in the quality of her life as a result of her injuries. She has gone from being a very physically active and social person to someone who is often in pain, is unable to walk without discomfort and has difficulty using her arms. Her social interaction has been reduced to seeing friends only occasionally when they come to her house to visit. In view of these claims, photographs showing Ms. Conrod socializing outside of her home or engaging in physical activities would be relevant to the issues in this action. Wall posts discussing social events she had attended or planned to attend may also be relevant.

[37] The screenshot printouts of Ms. Conrod's public Facebook profile filed by the Defendants show that nine photographs are visible to the public. The black and white thumbnail versions of the photos visible on the printouts are approximately three-quarters of an inch by three-quarters of an inch in size. Defence counsel has not filed larger versions of these photos.

[38] From the thumbnail versions filed with the court, it appears that Ms. Conrod is not pictured in several of the photos. Although the remaining photos depict Ms. Conrod in the presence of other individuals, the poor quality and small size of the images make it impossible to discern where these photos were taken. Nor am I able to determine the date on which the photos were taken or posted to Facebook. Photos taken before the accident or depicting Ms. Conrod socializing inside her home would not be inconsistent with her statements to Dr. MacDonald. In the absence of larger, better quality versions of the images and some information as to when they were

taken or posted, I am not satisfied that Ms. Conrod's public Facebook profile contains relevant photographs.

[39] The only other potentially relevant evidence on Ms. Conrod's public profile is a wall-post she made stating as follows:

> Tonight is the Night The SeaHorse Tavern in Halifax Party time People

[40] If this post made reference to a social event that Ms. Conrod had attended, I would have no difficulty concluding that it was relevant to the issues between the parties. According to a supplementary affidavit filed by Ms. Conrod, however, that is not the case. Ms. Conrod's affidavit indicates that she wrote this particular post to support a friend who was performing that night at the SeaHorse Tavern. She says she did not attend the event and has never been to the SeaHorse Tavern. Without other relevant postings, I cannot conclude that the contents of Ms. Conrod's private Facebook profile should be produced.

[41] My decision on this issue does not prevent the Defendants from bringing a similar motion in the future, should they obtain further and better evidence to support a production order.

FACEBOOK USAGE HISTORY

[42] When the Defendants initially filed this motion for production of the Facebook usage history, they were seeking an order directing the Plaintiff to provide an undertaking to have her internet service provider disclose the history of her internet usage with respect to her Facebook account from January of 2011 to the present.

[43] Between the filing of the motion and its hearing, defence counsel determined that the Facebook log-in/log-out usage history could be downloaded and printed by Ms. Conrod herself from the Facebook website, without the need for the extraction of that evidence by a third party. As a result, most of the case law initially submitted by the parties considering more onerous requests for production of metadata or computer hard drives for forensic analysis, and the associated privacy implications, is now of limited assistance. That being said, some of the decisions have considered the limited issue of the relevance of computer or Facebook usage data and are instructive.

[44] In **Bishop v. Minichiello**, 2009 BCSC 358, the plaintiff claimed to have suffered a brain injury and that ongoing fatigue prevented him from seeking employment. The defendant brought a motion for production of the hard drive in order to determine the period of time the plaintiff spent on Facebook between eleven at night and five in the morning each day.

[45] The plaintiff raised numerous objections to production including that a hard drive was the equivalent of a filing cabinet and therefore was not producible, that his privacy interests outweighed the defendant's need for the information, and that more compelling expert evidence was available.

[46] Justice Melnick ordered production of the hard drive for the following reasons:

> 57 The information sought by the defence in this case may have significant probative value in relation to the plaintiff's past and future wage loss, and the value of production is not outweighed by competing interests such as confidentiality and the time and expense required for the party to produce the documents. Additionally, privacy concerns are not at issue because the order sought is so narrow that it does not have the potential to unnecessarily delve into private aspects of the plaintiff's life.
> …

[47] An application for leave to appeal was dismissed: 2009 BCCA 555.

[48] In **Carter v. Connors**, 2009 NBQB 317, the defendant brought a motion for an order that the plaintiff provide an undertaking to have her internet service provider Bell Aliant, disclose the history of her Internet use at her home from the date of a motor vehicle accident in 2004 until the date of the motion. The defendant was also requesting that the internet service provider segregate the time spent on Facebook as a discrete record.

[49] Before the accident, the plaintiff was a full time administrative clerk at the local hospital. She attempted to return to work several times but was able to do so only for short periods of time. The plaintiff said this was due in part to the soft tissue injuries she suffered in the accident. On discovery, the plaintiff admitted to having a Facebook account. Defence counsel asked for an undertaking by the plaintiff to obtain her Internet usage records, including a separate record of her Facebook usage. The plaintiff refused on the advice of counsel.

[50] In reaching a decision, Justice Ferguson noted that the applicable standard was one of a semblance of relevancy. He then discussed whether an individual has a right to privacy with respect to general internet use records and social network use records at the discovery stage. He reviewed a number of authorities considering requests for metadata, computer hard drives, and Facebook profiles before concluding as follows:

> 38 In this instance I believe that the probative value of the information requested is of such a level that its disclosure will not infringe upon a reasonable expectation of privacy. That is so because the information sought is not, at least at this stage of proceedings, information that could qualify as revealing very personal information over which most right thinking Canadians would expect a reasonable expectation of privacy. Put another way, it does not reveal: "intimate details of the lifestyle and personal choices of the individual."

[51] Justice Ferguson proceeded to order the plaintiff to obtain and disclose the requested records.

[52] Finally, in **Laushway v. Messervey**, 2013 NSSC 47, Justice Robertson considered a motion by the defendants for an order for production of the plaintiff's hard drive in order to conduct a metadata analysis to determine computer usage patterns. The plaintiff was injured in a motor vehicle accident in 2005. Five years earlier, he had started his own online business selling health products. In his action against the defendants, the plaintiff claimed that the injuries he suffered in the accident reduced the time that he could devote to his internet business because he was only able to sit at his computer for two to three hours a day. As a result, he claimed to have suffered financial loss. The plaintiff resisted the motion for production on the basis that it would violate his privacy rights, yield little useful information, and amount to a fishing expedition.

[53] Justice Robertson reviewed the same authorities cited by counsel on this motion but concluded that those cases were "quite distinct" from the one before her. She noted that the defendants were not seeking to review specific documents, but rather sought only to establish usage patterns through the analysis of metadata. She likened metadata/usage records to pay stubs containing information about the number of days and hours worked by an employee. In Justice Robertson's opinion, "[t]he plaintiff's computer usage directly relates to how he does and can work": para. 31. Granting the order, she stated:

> 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.

[54] The decision in **Laushway** has been appealed. The appeal was heard and the decision reserved in September.

[55] I am satisfied that the Facebook usage data requested by the Defendants is relevant to whether Ms. Conrod's injuries have affected her ability to concentrate and the information should be produced. The privacy interests implicated in this case are far less significant than in **Laushway** and **Bishop** where production of a party's entire hard drive was ordered so that evidence could be extracted by a third party. The usage records sought by the Defendants can be easily obtained by Ms. Conrod and the contents will not reveal any potentially sensitive personal information about her internet activity such as websites she visits or private conversations she participates in on the internet.

[56] Any argument Ms. Conrod may wish to make that the usage records do not accurately reflect the time she spends using Facebook, perhaps because other family members use her computer or she leaves Facebook open while she does other things, is more properly made at trial: see **Carter** at para. 43; **Bishop** at para. 54; **Laushway** at paras. 27-28.

CONCLUSION

[57] The Defendants have not satisfied me that the public portion of Ms. Conrod's Facebook profile contains relevant information. I am therefore unable to infer that the private portion is likely to contain relevant information. Ms. Conrod is not required to produce the Facebook profile.

[58] I find that Ms. Conrod's Facebook usage records are relevant to Ms. Conrod's claim of a reduced ability to concentrate due to the accident and must be produced.

[59] If counsel are unable to agree on costs, they may file written submissions within thirty days of release of this decision.

McDougall, J.