'You need to be aware it's out there'

Defendant granted access to Facebook pictures

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For Law Times

The zone of privacy for plaintiffs in litigation continues to shrink after a defendant was granted access to an injured party's private Facebook pictures, according to a London, Ont. personal injury lawyer.

Maia Bent, a partner in the personal injury practice group at Lerners LLP, says the recent decision in *Papamichalopoulos v. Greenwood* was just the latest in a string of judgments in which injured plaintiffs have been ordered to turn over material despite the fact it was posted to social media behind privacy walls.

"It seems to me that the zone of privacy is getting smaller," says Bent, a former president of the Ontario Trial Lawyers Association. "Cases sometimes go in different directions, but there is definitely a trend toward production of private social media material, especially if there is some additional evidence that is not within the privacy zone."

According to the April 30 ruling by Master Linda Abrams of the Ontario Superior Court of Justice, the plaintiff made a $1.6-million claim for past and future income loss suffered as a result of his injury after claiming it prevented him from continuing in his six-figure-salary management job.

He also said that the injuries were permanent and continued to cause him grief, including stiffness, balance issues and significant pain that had "irretrievably lessened" his quality of life.

However, the decision says an investigator hired by the defendant in the case was able to find publicly available Facebook pictures of the plaintiff riding a Jet Ski, bending over while lifting his wife, driving and lifting his two-year-old child, none of which demonstrated any signs of discomfort.

"These photographs depict a physically strong and active plaintiff and, as such, are relevant and open up line(s) of inquiry," Abrams wrote, granting the defendant's motion for production of further material available only to the plaintiff's friends.

In doing so, she quoted from the 2009 decision case by then-Superior Court Justice David Brown in *Leduc v. Roman*.

"Where, in addition to a publicly-accessible profile, a party maintains a private Facebook profile . . . 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," Brown wrote.

"Essentially, if the plaintiff has left a trail of bread crumbs, the defendant will be allowed to follow it behind the closed door," Bent says. "Plaintiffs are unlikely to be able to assert privacy in situations where they themselves are putting evidence out there, so they will have to be very cautious about what they post. They can't pick and choose what evidence they make public and which they don't.

"We don't tell clients to stop using these sites if they enjoy them but just to be aware of the possible consequences," she adds.

Stephen Birman, a partner at Toronto personal injury law firm Thomson Rogers, says a social media discussion features in some of his earliest meetings with clients.

"It's a virtual certainty that the defence lawyer will ask about

Charles Gluckstein tells his clients to keep in mind the possibility that any pictures they post on social media may be shared.

social media postings at discovery, so right from the outset, I think the proper way to go about things is to have a talk with the client about what they post and the likelihood that it will one day get into the hands of the insurer or the defence side," he says.

"For the defence, it's like free surveillance," says Charles Gluckstein of Gluckstein Personal Injury Lawyers in Toronto, who tells his clients to keep in mind the possibility that any pictures they post may be shared.

"To tell the truth, very few heed the warning," he says. "People are the way they are, and they want to continue living their lives the way they did before the accident.

"Five or 10 years ago, people were more likely to be shocked by the idea that their photos would be shared, and maybe they will still find it an intrusion if they're over 40 years old, but the younger they are, the less they care. The younger generation don't think of privacy in the same way," Gluckstein adds.

Like more traditional forms of surveillance employed by insurers, Birman says, private social media posts don't necessarily have to cause problems for plaintiffs.

"You need to be aware it's out there and be prepared to answer questions at discovery," he says. "But you won't have difficulties if you're honest and forthright."

Still, Bent says, the nature of social media postings can cause issues for clients when the opposing side gets its hands on them or if they are admitted as evidence at a trial.

"Nobody is posting shots that don't depict an ideal image. The pictures that go up are the ones where you look your best and when you're engaging in active, healthy, social activities," she says. "The danger is not so much that you post pictures of yourself doing something you claim you can't do; it's more that you only post on the positive side of the equation, leaving a distorted view of reality," she says.

"Nobody sees the aftermath where you had to lie down because of the pain or how you paid for days after with migraines," Bent adds.

When the inevitable requests for social media production do come from defendants, Gluckstein says, the worst thing clients can do is try to get rid of photos or other material on their sites.

"It's important to preserve accounts, whether they're on Instagram, Facebook, Twitter or whatever. Any kind of active destruction is going to be frowned upon and will likely be read against you," he explains.

"The presumption is that it would have been helpful to the defence."

However, Birman says, there are limits on what defendants are entitled to view.

"Defence lawyers who are less familiar with how these sites work might ask for an undertaking to produce everything posted to Facebook once they find out the plaintiff has a profile, without recognizing that it's more like a filing cabinet, with all sorts of other, irrelevant stuff on there," he says.

"They don't get everything just by virtue of the fact that an account exists."

Unlike the situation in *Papamichalopoulos*, where some postings were publicly available and others were hidden to the defendant, Birman says, it's more common for a plaintiff's entire account to be closed off via privacy settings.

"What they have to do is to establish the relevance of what they're requesting, which should happen through a series of questions to find out what's on the site, and determine whether it relates to the litigation," he says.

"If the plaintiff is not able to say at discovery what is on the site because it's not top of mind, then I'll give an undertaking to review the material and provide a position regarding its relevancy."

In *Papamichalopoulos*, Bent says, it appears that the assumptions relied upon in the plaintiff's own expert report opened up the lines of enquiry that led to his Facebook pictures.

"The defendant is entitled to test the assumption proffered by the plaintiff that, *but for the plaintiff's alleged injury*," Abrams wrote, he would have continued earning a six-figure salary, and that his loss of employment "is attributable wholly or in part to his injury."

"Lawyers should be aware that the assumptions they ask their expert to make could inadvertently lead to other requests that the court is going to honour," Bent says. **LT**