

WHAT IF WHAT WAS PUBLISHED ON FACEBOOK WAS ADMISSIBLE AS EVIDENCE?

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THE ADVENT OF SOCIAL NETWORKS SUCH AS MYSPACE, FACEBOOK, DIASPORA, PHOTOBUCKET, TWITTER, YOU TUBE AND OTHERS HAS BROUGHT SIGNIFICANT CHANGES TO SOCIAL RELATIONSHIPS. IN QUEBEC ALONE, MORE THAN 3,250,000 PERSONS¹ HAVE A PROFILE ON FACEBOOK. IN 2010, THE USE OF SOCIAL MEDIA INTENSIFIED IN QUEBEC; INDEED, MORE THAN THREE QUARTERS OF NETSURFERS IN QUEBEC VISITED AT LEAST ONE SOCIAL MEDIUM OR CONTRIBUTED TO ITS CONTENT.² A CENSUS SHOWED THAT, IN 2010, 40% OF QUEBECERS HAD A PROFILE ON A SOCIAL NETWORK. IN ADDITION, THE FREQUENCY OF VISITS TO SOCIAL NETWORKS VARIES ACCORDING TO AGE. MORE THAN 56% OF PERSONS AGED BETWEEN 18 AND 34 VISIT SOCIAL NETWORKS DAILY AS COMPARED TO 52% OF THOSE AGED 35 TO 44, 38% OF THOSE AGED 45 TO 54 AND 23% OF THOSE AGED 55 TO 64.

What is the attraction of social networks? According to studies³, socializing with friends and re-establishing or keeping contact with old friends are the principal motivations. Social media are also used to search for and share information as well as to post photographs and videos.

The great popularity and use of social media lead to the following question: are photographs and other information published on Facebook or other social media admissible as evidence before our courts?

THE JUDGMENTS RENDERED IN CANADA

The first decision rendered in Canada on this subject came from the Superior Court of Justice of Ontario, which had to rule on the admissibility as evidence of photographs published on Facebook.⁴ The Plaintiff had instituted an action relating to bodily injuries suffered in an automobile accident and alleged that the consequences of her accident were loss of enjoyment of life, a reduction in her activities and that her social life had suffered greatly in view of her pain. Although the Plaintiff's Facebook profile had not been discussed during the examination for discovery, the defence lawyer had accessed photographs published on the Facebook site of a cousin of the Plaintiff. The photographs showed a person having a lot of fun and who did not appear to be suffering or to be limited in her activities, thus contradicting her claims.

The judge admitted the photographs from the Facebook profile of the third party into evidence. Without the admissibility as evidence of these photographs found on the Facebook site, there would not have been any evidence contradicting the allegations and testimony of the Plaintiff concerning her loss of enjoyment of life. Thus, the impact of the admissibility of the Facebook items was important.

¹ Absolunet.com/blogue/2010/09/07/Facebook-au-Canada

² <http://cefrio.qc.ca/fileadmin/documents/Publication/NETendances-Voll-1.pdf>

³ <http://cefrio.qc.ca/fileadmin/documents/Publication/NETendances-Voll-1.pdf>

⁴ *Kourtesis v. Joris*, [2007] O.J. No. 2677.

Another key decision was also rendered by the Superior Court of Justice of Ontario in 2007 in the case of *Murphy v. Perger*⁵. This judgment was the first to rule on the admissibility as evidence of photographs found in the private section of a Facebook user's profile. In this case, the Plaintiff was claiming damages for bodily injuries suffered in an automobile accident, in particular for the suffering and loss of enjoyment of life. In support of her claim, the Plaintiff had filed travel and sports activity photographs taken before the accident in the Court's file. However, before the trial, the Defendant learned that the Plaintiff had published photographs on her private Facebook profile, which was limited to 366 "friends."

The Court was of the opinion that the admission of the Plaintiff's Facebook profile as evidence was possible and that it was not a fishing expedition. Since the photographs were already accessible to 366 persons, the judge was also of the opinion that there was no infringement of the right to privacy and that the Plaintiff could not have significant expectations concerning the protection of her private life.

The admissibility of photographs published on Facebook as evidence has also had rather harmful consequences on the credibility of plaintiffs in other cases.

For example, a Plaintiff⁶ claimed damages for bodily injuries suffered from two car accidents and claimed that he no longer had a social life. However, during cross-examination, the Defendant's lawyer asked him about pages from his public Facebook profile, which the lawyer had printed. The Court was of the opinion that the Facebook evidence contradicted the Plaintiff's claims since they revealed that the Plaintiff had a very active social life, that he attended parties and organized them, went to chalets on weekends, drank alcohol and smoked marijuana and seemed to have a number of good friends with whom he communicated and socialized on a regular basis. Following the cross-examination, the Plaintiff even closed his Facebook profile so that there would be no more incriminating items that could be used as evidence.

The Supreme Court of British Columbia as well has expressed its opinion on the admissibility into evidence of photographs published on a Facebook site,⁷ in the context of an action also instituted due to bodily injuries suffered in an automobile accident. In support of their defence, the Defendants wanted to file as evidence 273 photographs obtained from the Facebook "walls" of friends of the Plaintiff. Those photographs showed the Plaintiff in social gatherings and even drinking alcohol with his friends. The Court refused to admit into evidence the photographs that did not show the Plaintiff in the course of activities she claimed to have difficulty doing. Consequently, only 69 photographs were admitted into evidence, which showed the Plaintiff in climbing, dancing and even bending down. However, the Court was of the opinion that the photographs did not undermine the Plaintiff's credibility because she was not claiming that she could not carry on with her activities but rather that she suffered pain after doing them.

WHAT'S HAPPENING IN QUEBEC?

Although the admissibility into evidence of items coming from Facebook or other social media has been discussed in Quebec, fewer judges have had to rule on the issue than in the rest of Canada and there has not yet been a real open debate on this issue.

The general rules governing the admissibility of evidence apply to the content of social media. More particularly, sections 2857 and 2858 of the C.C.Q. should guide the courts. Section 2857 of the C.C.Q. provides that any evidence must be relevant in order for it to be admissible and section 2858 of the C.C.Q. can be invoked in the event of a breach of privacy; it states that:

"2858. The court shall, even of its own motion, reject any evidence obtained under such circumstances that fundamental rights and freedoms are breached and that its use would tend to bring the administration of justice into disrepute.

(...)"

⁵ [2007] O.J. No. 5511.

⁶ *Terry v. Mallowney*, [2009] M.J. No. 86 (T.D.).

⁷ *Mayenburg v. Lu*, 2009 BCSC 1308.

CIVIL LAW COURTS IN QUEBEC

Civil law courts have ruled a few times and have admitted evidence coming from Facebook. However, it should be noted that these elements were admitted without a real debate on their admissibility.

First, in a motion, to annul an alimentary pension,⁸ a man wanting to annul his pension payments made for his child testified about the deterioration of his relationship with his child, who is now of age. The evidence showed that the child's comments concerning her mother's former spouse were disparaging. For example, she had even stated on her Facebook site that she detested him.

The Superior Court also admitted into evidence the Facebook site of a woman who stated that she would be drunk from December 1st to January 4th. The Superior Court ruled that because the evidence was not contradicted (the woman was neither present nor represented at the hearing), the situation was such that the woman was threatening the safety of her daughter by her irresponsible conduct and the Court concluded that her access rights should be supervised.⁹

COMMISSION DES LÉSIONS PROFESSIONNELLES

The Commission des lésions professionnelles has also admitted information taken from the Facebook site as evidence. In the case of *Brisindi et STM (Réseau des autobus)*¹⁰, a bus driver claimed to have injured himself while carrying out an inspection of a bus before starting his shift. He had been off work for three weeks and subsequently returned to work on a progressive basis. He testified before the Commission des lésions professionnelles that he experienced intense pain that prevented him from carrying out activities and performing his work as a bus driver. He had consulted an occupational therapist and a physiotherapist and the report prepared by his occupational therapist toward the end of his time off work stated that he had not tried to resume swimming or cycling outside. However, by doing a search on his Facebook site, his employer discovered that he had participated in biathlons and triathlons during his time off work and the period during which he returned to work on a progressive basis.

Thus the documents coming from the worker's Facebook site contradicted his testimony and version of the facts. The Commission des lésions professionnelles was of the opinion that he had not suffered an employment injury and therefore was not entitled to the compensation provided for by law.

In another decision¹¹, the Commission des lésions professionnelles took into consideration an exchange of communications on Facebook and concluded that what the worker said was the cause of an employment injury did not relate to work but rather was exclusively of personal nature. Thus, this evidence contradicted the worker and helped the Commission des lésions professionnelles to arrive at its decision.

Lastly, in a subsequent decision of the Commission des lésions professionnelles (*M.C. and Compagnie A*)¹², it also admitted into evidence extracts from a Facebook account that supported the worker's position that she had been a victim of sexual harassment and suffered an employment injury.

ADMISSIBLE OR INADMISSIBLE?

Probably, more and more lawyers will attempt to submit information from the Internet sites of social networks such as Facebook as evidence to support their positions. Indeed, as certain sections of Facebook profiles are public, any person has access to them through his computer. So, it may be tempting to look there for information that may be favourable to one's position. However, one must always keep in mind that the potential evidence must be relevant to the dispute and must also consider the possibility of infringing the right to privacy in certain circumstances.

⁸ Droit de la famille-093011, 2009 QCCS 5718.

⁹ Droit de la famille-11446, 2011 QCCS 805.

¹⁰ 2010 QCCLP 4158.

¹¹ *Lévesque et les Jardins Roussillon*, 2011 QCCLP 3890.

¹² 2011 QCCLP 2615.

We believe that a procedure should be established for the submission of information from social media sites as evidence. Such information cannot be submitted without having previously paved the way. Indeed, in the context of an examination for discovery before filing a defence, it may be opportune to ask questions concerning the use of social media by a plaintiff. The rules concerning objections now being more flexible, it would be wise to ask questions if deemed relevant. Since the courts are currently giving a broad interpretation to relevance during examinations for discovery, there are good opportunities to obtain information. Not only would it be possible to have information on the public profile of a user admitted as evidence, but perhaps even information on his private profile. Indeed, by asking the right questions, it may be possible to learn about certain information, such as photographs, existing on a private profile. Should this information be relevant, it may enable one to contradict a plaintiff's version of his activities, his limitations and/or his social life. Furthermore, it is important to realize that information obtained through a social medium is personal information generally dealing with a person's private life. The gathering and use of such information must be carried out within the rules.

CONCLUSION

We believe that information published on Facebook or any other social medium will be submitted as evidence more and more often, all the more so as the social media craze continues to grow. These tools may enable an insurer to assemble more comprehensive evidence in certain files such as claims involving disability insurance, life insurance and bodily injuries. It may be possible to know much more about the activities of a plaintiff while at the same time reducing reliance on surveillance by tailing. However, one must be careful not to pursue a fishing expedition and limit oneself to information relevant to the dispute.

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