April 10, 2018

Privacy and Social Media â€“ Not Just a Numbers Game

In an age where individuals catalogue almost every aspect of their lives on some form of social media, the obligation to disclose all relevant documents in the context of civil litigation can seem both onerous and invasive. Courts have grappled with how disclosure obligations should be balanced with privacy rights.

The Ontario Superior Court considered these competing values recently in the context of a refusals motion in *Jones v IF Propco* , 2018 ONSC 23. In that decision, Justice Leitch vindicated privacy interests that have been given insufficient attention in many cases.

The Plaintiff claimed she was hit by ice that fell from the Defendant's property. She sought $2,400,000 in general and special damages, alleging a number of injuries and losses, including a loss of enjoyment of life and a reduced capacity to participate in various activities.

While the Plaintiff had already produced the public portion of her Facebook page as part of her discovery obligations, the Defendant sought production of the Plaintiff's Facebook account activity, including profile posts and comments from February 18, 2009—roughly five years before the incident giving rise to the litigation—to the present.

The Defendant argued that because the Plaintiff claimed damages in relation to her reduced capacity to participate in various activities, information relating to pre- and post-incident activity of the Plaintiff were relevant to the litigation. On the Defendant's view, the portions of the Facebook profile page already provided by the Plaintiff revealed that she used Facebook in relation to social, family, leisure, and volunteer activities. This supported an inference that the private portion of the Plaintiff's Facebook profile would also contain information relevant to the litigation.

In order to compel further production, a party must satisfy the court that relevant information exists that has not been disclosed. While Justice Leitch accepted that relevant information on the public portion of a Facebook profile supports the inference that relevant information is contained in the private portion of a Facebook profile, she disagreed with the Defendant that any such inference was warranted in the

circumstances.

Justice Leitch also noted that a court could nonetheless refuse to compel disclosure where the information sought is of minimal importance to the litigation and if disclosed, would constitute a serious invasion of privacy.

Justice Leitch ultimately held that the Plaintiff's Facebook messages and comments need not be disclosed.

This case raises the further question of how a privacy interest in one's social media content is assessed and weighed. Canadian courts have taken different approaches, affording different levels of protection to privacy interests.

For example, in *Murphy v Perger*, Justice Rady noted that a serious privacy interest could not exist where an individual shared photographs on a private site with 366 people, effectively suggesting that privacy interests in social media will be minimal.

In contrast, Justice Heeney's decision in *Stewart v Kempster* favoured a more content-sensitive approach. Justice Leitch quoted Heeney J. in her decision:

> At present, Facebook has about one billion users. Out of those, the plaintiff in the present case has permitted only 139 people to view her private content. That means that she has excluded roughly one billion people from doing so, including the defendants. That supports, in my view, the conclusion that she has a real privacy interest in the content of her Facebook account.

Justice Leitch noted that the "conclusion that users have a privacy interest in the private portions of their Facebook account is more persuasive than the conclusion that they do not because they shared the account with a number of their Facebook 'friends'." Given that users have the option of keeping their Facebook profiles entirely public, the choice to restrict access to one's social media content is indicative of an individual's privacy interest.

Cross-sharing technology allows individuals to simultaneously share the same content to Facebook, Instagram and Twitter. If privacy interests in social media are determined by how and with whom we share, and the privacy options available on various social media platforms, this raises questions about how the same content is to be treated when shared across different platforms. If one simultaneously shares a photograph on their private Facebook profile, and their publicly accessible Instagram account, does this undermine any privacy interest the individual might have in the Facebook content?

How we answer these questions will have a significant impact on the extent of an individual's disclosure obligations, and on the level of protection afforded to privacy interests.