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SUPERIOR COURT OF JUSTICE – ONTARIO

BETWEEN:

MAYA ISACOV and HAVA ISACOV

Plaintiffs

- and-

EVAN SCHWARTZBERG

Defendant

BEFORE: MASTER D. E. SHORT

COUNSEL:

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REASONS RELEASED: October 11, 2018

Endorsement Re Social Media

I. Background: *The Times They Are A-Changin'*

> *"Before the dawn of the Internet age, people often communicated by writing personal letters to each other. It could be said that such letters served to keep friends and family connected, and provided a medium in which people would share information with each other about what matters to them. They might even discuss the state of their health, if they happened to have suffered a traumatic event such as a motor vehicle accident in the recent past. However, it is unimaginable that a defendant would have demanded that a plaintiff disclose copies of all personal letters written since the accident, in the hope that there might be some information contained therein relevant to the plaintiff's claim for non-pecuniary damages. The shocking intrusiveness of such a request is obvious. The defendants' demand for disclosure of the entire contents of the plaintiff's Facebook account is the digital equivalent of doing so."*

Stewart v. Kempster, 114 O.R. (3d) 151, para 29

[1] The above extract is from a decision of Regional Senior Justice Heeney, which was delivered in December of 2012.

[2] Coincidentally, also in 2012, the plaintiff Maya Isacov, as a pedestrian, was involved in a motor vehicle accident which caused her various injuries which gave rise to this action. According to the Motor Vehicle Accident Report, the Defendant's vehicle ran over the Plaintiff Maya Isacov's right foot.

[3] The Statement of Claim in this action was issued on December 18, 2012. Maya is seeking, amongst other things, general damages in the amount of $1,000,000 and special damages in the amount of $2,000,000.

[4] A trial for this action was originally scheduled for the June 2018 sittings, but was put over by the Court and has now been fixed to commence on November 26, 2018.

[5] In May of 2018 the defendant's counsel obtained a private investigator's report with respect to the ability of the plaintiff to deal with the various injuries alleged in this action.

[6] That report contained screen captures from the Instagram account of an apparently close friend of the plaintiff. The photographs appear, *inter alia* to show the plaintiff on dance floors and in shoes with high heels

[7] As a consequence, now on the virtual eve of trial, the Defendant moves for the social media content on the Internet contained in accounts of the plaintiff for the period running from three years prior to the date of the accident to the date of trial.

[8] The plaintiffs assert that leave was required to bring this motion at this point in the proceeding and that leave should be denied.

[9] In part, my task is to determine the appropriate approach in late 2018 to the disclosure of a plaintiff's social media accounts in a case such as this.

II. Alleged Injuries and Consequences

[10] The factum filed on this motion by counsel for the defendant submits in part:

> 5 During her assessment with Orthopaedic Surgeon Dr. Getahun with respect to the accident, the Plaintiff Maya Isacova reported that she, "cannot run or wear heels as a result of her foot dysfunction."
>
> 6. During her assessment with Psychologist … Isacova reported that:
>
> > (a) "... she was seen by an orthopaedic surgeon 8 months after the accident. She recalled that the surgeon advised her to wear orthopaedic shoes. She stated that she has been advised that she "will never again be able to wear shoes with heels."
> >
> > (b) " ... before the accident, she had a great deal of energy and was generally able to engage in activities with no difficulties. Since the accident, her energy level has decreased considerable and she is unable to do things that she used to. She described her current level of energy as low. She finds that she tired very easily since the accident. Ms. Isacova explained that it is very hard for her to get up

> in the morning, and that everything now requires a lot of effort."
> (c) " ... prior to the accident, she was a professional ballroom dancer. She indicated that she had planned to continue ballroom dancing in Canada but she is no longer permitted to wear high heeled shoes. She discussed the tremendous devastation that she is experiencing around her inability to continue ballroom dancing. Furthermore, Ms. Isacova added that she is now very self-conscious because her right shoulder is "disfigured" as a result of the accident. .. Ms. Isacova discussed that she had always wanted to be a ballroom dancer. She feels that she has now lost that opportunity."
> (d) " ... she has lost interest in the things she used to enjoy. For example, she has no desire to go out. She related that her pain, physical limitations and poor mood state render her incapable of deriving pleasure from previously enjoyed activities."

[11] During her further assessment with this Psychologist the Plaintiff apparently reported that she has lost interest in the things she used to enjoy. She explained that she used to enjoy going out with friends, going shopping, "now everything is different. I'd rather stay home and watch something that would get my mind off everything."

III Social Media

[12] The affidavit of a partner in the Defendant's law firm deposes that there are photographs on the Facebook and lnstagram accounts of an individual named Yuri that appear to depict the Plaintiff, amongst other things, socializing and wearing high heeled shoes in a number of locations.

[13] The moving party asserts that there are entries of comments on some of the photographs on this Instagram account identified in part with what appears to be a portion on the Plaintiff's surname. For example, there is a comment "Baby I love you" on a photograph depicting only the Plaintiff Maya Isacova and Yuri.

[14] Counsel for the Plaintiffs has refused the Defendant's request for production of the Plaintiff's social media pages, including Facebook and Instagram for 3 years pre-Accident to present. On the motion there was neither an admission nor a denial that the plaintiff had any such accounts.

[15] It would appear that neither counsel was able to find a case where an Ontario court has ordered production in circumstances where there has been no acknowledgement that the plaintiff even was such accounts.

IV. Social Media Use in Flux

[16] In *Murphy v. Perger*, [2007] O.J. No. 5511, 67 C.P.C. (6th) 245 (S.C.J.), Rady J. ordered production of photographs that were posted on the private portion of the plaintiff's

Facebook account. In that case her Honour took into consideration the fact that the plaintiff had served, and would be relying on, pre-accident photographs to assist in proving the impact of the accident on the plaintiff's lifestyle. The court reasoned that if the plaintiff felt that pre-accident photographs met the relevance test, post-accident photographs would be similarly relevant.

[17] Rady J. dealt with the issue of the privacy interests of the plaintiff in the photographs, and referred to the decision of the British Columbia Court of Appeal in *M. (A.) v. Ryan*, [1994] B.C.J. No. 2313, 98 B.C.L.R. (2d) 1 (C.A.), affd [1997] 1 S.C.R. 157, [1997] S.C.J. No. 13. At para. 19, her decision she stated:

> Turning to the privacy issue raised here, I was referred to British Columbia authority for the proposition that a court retains jurisdiction to refuse disclosure where the information is of minimal importance to the litigation but may constitute a serious invasion of privacy: *United Services Funds v. Carter* (1986), 5 B.C.L.R. (2d) 222 (B.C.S.C.); leave to appeal dismissed (1996), 5 B.C.L.R. (2d) 379 (B.C.C.A.) and M.(A.) v. Ryan (1994), 98 B.C.L.R. (2d) 1 B.C.C.A.; affd [1997] 1 S.C.R. 157. In the latter case, at the British Columbia Court of Appeal, Southin J.A. dealt with a psychiatrist's appeal of an order for production of her records of visits with the plaintiff, her patient. The court had this to say:
>
> In considering whether to make an order compelling disclosure of private documents, whether in possession of a party or a non-party, the Court ought to ask itself whether the particular invasion of privacy is necessary to the proper administration of justice and, if so, whether some terms are appropriate to limit that invasion. There need not be a privilege against testimony in the classic sense for this to be a relevant question. By "private documents" I mean documents which are not public documents. I do not limit this question to what might be thought of as personally embarrassing documents.
>
> On the one hand, a person who has been injured by the tort or breach of fiduciary duty of another ought not to be driven from the judgment seat by fear of unwarranted disclosure a sort of blackmail by legal process. If such a thing were to happen, the injured person would be twice a victim.
>
> But, on the other hand, a defendant ought not to be deprived of an assessment of the loss he actually caused, founded on all relevant evidence. It would be as much a miscarriage of justice for him to be ordered to pay a million dollars when, if all the relevant evidence were before the court, the award would be for one-tenth that sum, as it would be for the injured person to feel compelled to retire from the field of battle because of a demand for documents containing intensely personal matters of little relevance.

[18] In the result The B.C. Court of Appeal allowed the appeal in *M. (A.) v. Ryan* and overruled the blanket disclosure order of patient/psychiatrist records that had been made in the courts below. Some records were ordered to be disclosed, but were subject to strict conditions.

[19] When *M. (A.)* reached the Supreme Court of Canada, the majority arrived at the same

result as the B.C. Court of Appeal, but did so by applying the four-part Wigmore test with respect to privilege, as opposed to finding that the court had a residual discretion to refuse to order disclosure on the basis of privacy considerations. However, McLachlin J. (as she then was) recognized that the common law with respect to disclosure must reflect *Canadian Charter of Rights and Freedoms* values such as privacy. She said this, at para. 30:

> As noted, the common law must develop in a way that reflects emerging Charter values. It follows that the factors balanced under the fourth part of the test for privilege should be updated to reflect relevant Charter values. One such value is the interest affirmed by s. 8 of the Charter of each person in privacy.

[20] In 2012 in *Stewart v. Kempster*, 114 O.R. (3d) 151,(*supra*) RSJ Heeney made these observations on the Supreme Court's judgment:

> [21] Justice McLachlin drew a parallel with the disclosure rules that had been developed in the criminal law in *R. v. O'Connor*, [1995] 4 S.C.R. 411, [1995] S.C.J. No. 98. She said the following, at para. 36:
>
> > Just as justice requires that the accused in a criminal case be permitted to answer the Crown's case, so justice requires that a defendant in a civil suit be permitted to answer the plaintiff's case. In deciding whether he or she is entitled to production of confidential documents, this requirement must be balanced against the privacy interest of the complainant. This said, the interest in disclosure of a defendant in a civil suit may be less compelling than the parallel interest of an accused charged with a crime. The defendant in a civil suit stands to lose money and repute; the accused in a criminal proceeding stands to lose his or her very liberty. As a consequence, the balance between the interest in disclosure and the complainant's interest in privacy may be struck at a different level in the civil and criminal case; documents produced in a criminal case may not always be producible in a civil case, where the privacy interest of the complainant may more easily outweigh the defendant's interest in production.

[21] Significantly at para.38 of her decision, McLachlin J. firmly rejected the suggestion that just by coming to court and suing for damages, a litigant thereby gives up her right to privacy:

> 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.

[22] In 2007 in *Murphy*, Rady J. concluded that any invasion of privacy was minimal and was outweighed by the defendant's need to have the photographs in order to assess the case. Rady J. noted that the plaintiff could not have had a serious expectation of privacy given that 366 people have been granted access to the private site.

[23] D.M. Brown J., as he then was, dealt with an appeal by defendant from judgment reported at *Leduc v. Roman* (2008), 2008 CarswellOnt 8652 (Ont. Master), dismissing a motion to compel production of plaintiffs Facebook account.

[24] The Master's decision was reversed in reasons found at 2009 CarswellOnt 843, [2009] 0.J. No. 681, 175 A.C.W.S. (3d) 449, 308 D.L.R. (4th) 353, 73 C.P.C. (6th) 323.

[25] There Justice Brown opened his reasons with this, already somewhat dated, description:

> Over the past few years Canadian popular culture has embraced www.facebook.com ("Facebook"), a social networking website, as a means by which to reveal one's personal life to other members of the community - one's "Facebook friends". In this motor vehicle action the defendant, Janice Roman, appeals from the decision of Master Dash made August 14, 2008, dismissing her motion to compel production from the plaintiff, John Leduc, of all pages on his Facebook webpage (also called a Facebook profile).

[26] His review of the Master's ruling contains these observations:

> 27 Although web-based social networking sites such as Facebook and MySpace are recent phenomena, their posted content constitutes "data and information in electronic form" producible as "documents" under the Rules of Civil Procedure. Facebook's Terms of Use and Principles make it clear that a person's postings fall under that party's control or power since the account user may post or remove content. If a party to an action posts on Facebook content that "relates to any matter in issue in an action", that party must identify such content in his affidavit of documents. Master Dash re-iterated this obligation in his reasons.
>
> 28 The Rules of Civil Procedure also impose an obligation on a party's counsel to certify that he has explained to the deponent of an affidavit of documents "what kinds of documents are likely to be relevant to the allegations in the pleadings": Rule 30.03(4). Given the pervasive use of Facebook and the large volume of photographs typically posted on Facebook sites, it is now incumbent on a party's counsel to explain to the client, in appropriate cases, that documents posted on the party's Facebook profile may be relevant to allegations made in the pleadings.
>
> 29 Where a party makes extensive postings of personal information on his publicly-accessible Facebook profile, few production issues arise. Any relevant public postings by a party are producible. An opposite party who discovers and downloads postings from another's public profile also operates subject to the disclosure and production obligations imposed by the Rules.
>
> 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. From the general evidence about Facebook filed on this motion it is clear that Facebook is not used as a means by which account holders carry on monologues with themselves; it is a device by which users share with others information about who they are, what they like, what they do, and where they go, in varying degrees of detail. Facebook profiles are not designed to function as diaries; they enable users to construct personal networks or communities of "friends" with whom they can share information about themselves, and on which "friends" can post information about the user.
>
> 32 **A party who maintains a private, or limited access, Facebook profile stands in no different position than one who sets up a publicly-available profile. Both are obliged to identify and produce any postings that relate to any matter in issue in an action. Master Dash characterized the defendant's request for content from Mr. Leduc's private profile as "a fishing expedition", and he was not prepared to grant production merely by proving the existence of the plaintiffs Facebook page. 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.** [my emphasis]

[27] Justice Brown agreed 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. Some material may relate to matters in issue; some may not. Rule 30.06 requires the presentation of some evidence that a party possesses a relevant document before a court can order production.

[28] In *Leduc* the defendant did not ask Mr. Leduc any questions about his Facebook profile on his November, 2006 discovery; the defence only learned about the existence of the profile following a medical examination of the plaintiff. His Honour held that other circumstances may arise where a party learns of the existence of another's Facebook profile:

> "In such cases trial fairness dictates that the party who discovers the Facebook profile should enjoy some opportunity to ascertain and test whether the Facebook profile contains content relevant to any matter in issue in an action. One way to ensure this opportunity is to require

> the Facebook user to preserve and print-out the posted material, swear a supplementary affidavit of documents identifying any relevant Facebook documents and, where few or no documents are disclosed, permit the opposite party to cross-examine on the affidavit of documents in order to ascertain what content is posted on the site. Where the parties do not consent to following this process, recourse to the courts may be made."

[29] Justice Brown held that although the Master correctly interpreted Rule 30.06 as requiring some evidence from a moving party pointing to the omission of a relevant document in the other's affidavit of documents, in his view the learned Master erred in exercising his discretion under that rule without applying the principle articulated by Rady J. in *Murphy v. Perger* that a court can infer, from the nature of the Facebook service, the likely existence of relevant documents on a limited-access Facebook profile.

[30] As well he noted that:

> 25 Rady J. discounted that any significant privacy concerns arose in the circumstances before her:
>
> > 20 Having considered these competing interests, I have concluded that any invasion of privacy is minimal and is outweighed by the defendant's need to have the photographs in order to assess the case. The plaintiff could not have a serious expectation of privacy given that 366 people have been granted access to the private site.
>
> Rady J. ordered the plaintiff to produce copies of the web pages posted on her private site, subject to the ability of plaintiff's counsel to make future submissions in the event that any of the photographs personally embarrassed the plaintiff.

[31] I agree with and adopt the approach of Justice Arrell in *McDonnell v. Levie* ,2011 CarswellOnt 15142;2011 ONSC 7151, 211 A.C.W.S. (3d) 520; 38 C.P.C. (7th) 355 There Arrell J. considered earlier cases and held:

> 15 I agree with the analysis in *Parsniak,* [*Parsniak v. Pendanathu*, 2010 ONSC 4111] and *Leduc*, *supra* that where the plaintiff puts her social enjoyment of life in issue and alleges various activities that she is unable to do then photographs of her social life and activities, before and after the alleged trauma, which she concedes are on her Facebook account, are produceable as having some semblance of relevance and should be part of her Affidavit of Documents. Whether they are ultimately produceable at trial will be a determination made by the trial judge.
>
> 16 The plaintiff argues that privacy concerns should be sufficient to prevent production. I disagree. The plaintiff has put her social life in issue as well as her ability to do certain activities being negatively affected by her injuries from the accident These issues because of this law suit are therefore now part of the public domain. She has also posted photographs of herself, before and after the accident, on her Facebook account to others-how many is not known and is not really

> relevant since it was clearly more than one. Under these circumstances the privacy argument has little weight.

[32] Earlier this year in L.C. Leitch J. in *Jones v. I.F. Propco Holdings (Ontario) 31 Ltd.*, 2018 ONSC 23 had occasion to review the applicable law in a somewhat similar case. There she observed:

> 39 In *Murphy*, Rady J. concluded that any invasion of privacy was minimal and was outweighed by the defendant's need to have the photographs in order to assess the case. Rady J. noted that the plaintiff could not have had a serious expectation of privacy given that 366 people have been granted access to the private site.
>
> 40 However, even though Heeney J. did not have to decide the issue of disclosing the Facebook photos in *Stewart*, because he found there was no evidence of relevance, he noted that the matter of privacy could viewed from the opposite direction as that taken by Rady J. He noted the following at para. 24:
>
> > 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.
>
> 41 The conclusion that users have a privacy interest in the private portions of their Facebook accounts is more persuasive than the conclusion that they do not because they shared the account with a number of their Facebook "friends". Users have the option of keeping their Facebook accounts entirely public. The plaintiff in this case did not. As noted by Heeney J., the plaintiff excluded more than one billion people from accessing her account, suggesting that she does have an interest in protecting her privacy.

[33] Ultimately Justice Leitch concludes:

> 42 On this motion I have concluded that there is no evidence that the posts are relevant because the activities depicted in the photographs are not relevant to the extent of the plaintiff's physical limitations since the accident. In other words I am not satisfied that the photographs on her public Facebook page are relevant and that by inference the posts on her private Facebook page must be relevant. Therefore, I need not assess the privacy interests of the plaintiff against any probative value obtained from the disclosure.

[34] I feel the decision in Jones can be distinguished from the present case where the alleged activities of the plaintiff would clearly be potentially relevant to the determining the plaintiff's physical limitations.

[35] In that regard I feel the present case is closer to that addressed by my colleague Master L.S. Abrams in *Papamichalopoulos v. Greenwood*, 2018 ONSC 2743. There in April of this year she found:

> [9] With there being no reference to social media pages in the plaintiffs affidavit of documents and with plaintiff's counsel having refused, at discovery, to review social media pages for relevant content, the defendant's investigator searched for and reproduced social media pages for the plaintiff and his wife. Photographs of the plaintiff that were publicly posted and retrieved include photographs of the plaintiff riding a jet-ski, bending over at pronounced angles while lifting his spouse, driving, and holding up his then 2-year old son-all without any visible signs of discomfort. These photographs depict a physically strong and active plaintiff and, as such, are relevant and open up line(s) of inquiry.
>
> [10] Given the nature of the plaintiff's allegations (the severity of the injuries he says he suffered and their alleged permanence) and the depictions set out in the photos found (depictions which, on their face, appear to be at odds with the plaintiffs allegations), photographs of the plaintiff, both before and after the trauma that he alleges having suffered, are relevant. Photographs taken after the alleged incident are relevant to the effect (and its evolution) of the injuries on the plaintiff's enjoyment of life; and photographs taken before are relevant for comparison (see: *Morabito v. Dilorenzo* ; 2011 ONSC 7379, at para. 5).
>
> [11] "Where, [as here], 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" (*Leduc v. Roman*, 2009 CarswellOnt 843, at para. 30).

[36] I am satisfied that in the present technological environment there is a need to include Facebook and similar on line data relevant to matters in issue in personal injury litigation in the appropriate schedules of each party's Affidavit of Documents.

V. Is Leave Required?

[37] Theoretically, the setting of a civil case down for trial means that all steps have been taken in a proceeding and that the matter is ready to proceed to trial. However the reality is that circumstances often alter cases such that there is a significant gap between theory and practice.

[38] The test which was to be applied on a motion under r. 48.04(1) was that there should exist a substantial and unexpected change in circumstances to the extent that to refuse the order would be manifestly unjust.[*Machado v. Pratt & Whitney Canada Inc.*, 16 O.R (3d) 250; 23 C.P.C. (3d) 115].

[39] The reality is that the relevant principles to be considered in respect of the exercise of the discretion contained in rrule 48.04(1) will vary and will depend on the nature of the leave requested and the circumstances of the case. An interlocutory matter that can be raised before the trial judge is to be distinguished from serious matters affecting substantive rights. Once the trial date is set, the test of substantial and unexpected change makes sense for routine interlocutory

matters. Where substantive rights are affected, the merits of the requested relief become a fundamental consideration to ensure that the case is fully canvassed at trial. At the same time, full consideration should be given to any prejudice to the party opposing the motion that cannot be compensated by costs.[*Tanner v. Clark*, [1999] O.J. No. 581, 30 C.P.C. (4th) 358]

[40] In *Manuel v. Fernandes*, [1996] O.J. No. 2004; 2 C.P.C. (4th) 72 (Ont.Gen. Div.) the court observed that before leave is granted to bring a motion after the action has been set down for trial, the court should consider:

> (1) the facts known to the parties as of the date the action was set down;
> (2) whether there has been an important change in. the circumstances since then;
> (3) the object of the request for leave;
> (4) whether the motion would likely be granted; and
> (5) the likelihood that the trial will be delayed if the motion is granted.

[41] Taking into account all the circumstances of this case I am satisfied that an approach similar to that used for motions seeking defence medicals after the case has been set down, is appropriate. Defence medicals are not part of the formal discovery process. They are a separate process with specific considerations. Rule 48.04 therefore does not act as a bar to a request for a defence medical after the proceeding has been. Here given the failure to include in her affidavit of documents to any reference to on line data that the plaintiff has not asserted does not exist; I am satisfied that in this case it would be manifestly unjust to deny access to the sources sought. If they are nonexistent then there will be no content that could harm the plaintiff's case. However if there is photographic evidence that may potentially undermine the Plaintiff's claim, there will be an opportunity to provide an explanation at trial.

VI. Disposition

[42] The Defendant's motion sought:

> "An Order compelling the Plaintiff Maya lsacov to produce to the Defendant copies of all of her social media pages, including Facebook and Instagram, for 3 years pre-accident to present."

[43] There was no evidence of any accounts other than Facebook and Instagram being potentially in existence. This close to trial I am limiting production to electronic or paper copies of photographs on any of the plaintiff's Facebook and Instagram accounts.

[44] As the plaintiff has been aware of this motion for some time I see no reason why production should not be made within ten days and so order.

[45] The failure to seek such documentation until this stage of the proceeding, has added expenses to both sides that could have been avoided if appropriate questions were asked at the discovery of the plaintiff or prior to the mediation.

[46] I feel as a consequence it would be appropriate to make no order as to costs on this motion.

Released: October 11, 2018

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Master D. E. Short

DS/ **R238**