



USING SOCIAL MEDIA IN CIVIL LITIGATION

Hon. Justice Stephen Estcourt QC

Introduction

With 1.7 billion active users of Facebook as at the second quarter of this year, civil litigators can no longer ignore the phenomenon as a source of evidence in cases involving personal injury claims.

I will deal with Facebook in this brief tour of social media in litigation because it is the largest of all of the many applications, including the Chinese answer to Twitter – Weibo – or “micro-blog”.

At a relatively high level of abstraction though, what I say in this paper is applicable to other social media websites and services.

In the USA what is called the “Ultimate Social Media Website Interrogatory” asks plaintiffs about 154 individually named possibilities from “About me” through to “Yfrog”, with the question “for each of the websites and/or services listed below identify your username, the email address associated with the account and the approximate date you joined the website or service. If you have not joined a listed website or service, expressly state that you have never joined that particular website or service.”

I note however that the ultimate interrogatory does not list eHarmony or its equivalents. I would have thought that such dating sites would be a rich source of exaggeration.

With Facebook having commenced in 2004, and MySpace the year before in 2003, I would also have thought that the law would by now have been more richly developed in Australia as to its use and misuse. Surprisingly it is not, and, equally surprisingly, the best source of reported judicial consideration of Facebook is Canada.

In this short paper I can only touch briefly on some aspects of Facebook and litigation so I have selected as topics: Facebook as a passive source of evidence; Facebook as an active means of “surveillance”; Obtaining and withholding discovery of Facebook posts, and Proving Facebook posts in court or tribunal proceedings.

A passive source of evidence

I would recommend that you should start considering Facebook as a potential source of evidence in workers’ compensation or industrial accident claims as soon as you receive instructions. Possibly your insurer client might have done so even before you were instructed, in which case you would not be concerned with any ethical issues. Once you receive the instructions though, you will be ethically restrained in what you can do. However, once that file arrives on your desk it will be you who will fail in your duty if you do not properly advise your client as to the availability of publicly accessible material that may cast doubt on the claimant’s veracity as to his or her disabilities arising from any relevant injury.

Obviously the very first thing to check would be whether the claimant has a Facebook account. It is amazing how many people simply fail to turn off the setting “Do you want search engines outside of Facebook to link to your Profile?” When that setting is on, search engines may link to their profile in search results. However, even when this setting is off, while search engines will stop linking to the person’s profile, that may take some time and in any event the public profile can always be found on Facebook in every case if people search for the individual’s name.

Now I am no expert on Facebook security but two things arise out of my last observation. The first is that the world is full of people who know less about security than me, and the second is you should search swiftly before a claimant can be advised by his lawyers to limit his public profile and maximise security settings. I think many people would be surprised that they have settings that allow “everyone” to see their entire page. If they have of course, you could potentially “follow” them without “friending” them. However the only advantage of doing that is that as a follower their posts will show up in your news feed. The down side is that as a follower you can be detected.

If you find an unprotected account you should immediately take accurate and comprehensive screenshots, making sure to save the images with time and date tags. It goes without saying that you should only be looking and not making comments of any description.

This can be as simple as using <print screen> and <paste> functions on your computer, or you could use something like Microsoft Paint (a standard application included in all Windows operating systems) so that each web page can then be preserved into a separate image file that can then be converted to a PDF. Whichever method you use you should have a weather eye to the trial and give thought to the best and clearest way to present the evidence to the court. Preferably that should be done on a large screen with a laser pointer and not by way of a myriad of scraps of paper.

You should also bear in mind that the metadata in images can provide useful information. Modern digital cameras encode a lot of such data. This stored data is called “EXIF Data” and it is comprised of a range of information which includes not only things such as ISO speed, shutter speed, aperture, etc, but also the date and time the photograph was taken and the name of the capturing device (normally the user). Those latter details could be important to negate a particular assertion by a claimant. So too could be general account traffic metadata if a person’s location or habits are contentious.

Facebook used to leave the metadata in photographs but now it is routinely stripped when an image is downloaded. Other social media sites leave the metadata intact. You can look at this, when it is present, on a PC by right clicking the file and selecting <Properties> then <Details>, and on a Mac using <Preview> <Tools> <Inspector>. Alternatively there is an online EXIF viewer available at <http://imgops.com>.

Next, if the information on the Facebook account is of particular importance, you

might consider applying to the court for an order for its preservation pursuant to r 437 of the *Supreme Court Rules 2000*. This is a powerful tool.

Alternatively, but less effectively, you could write to your opponent requesting the preservation of the information and pointing out the consequences of what the American attorneys call "spoliation".

Spoliation, or the destruction of evidence by a party, is arguably a crime contrary to s 99 of the *Criminal Code* which provides that "any person who, with intent to mislead any tribunal in any judicial proceeding, or to pervert or defeat the course of justice, wilfully destroys, alters, or conceals any evidence, or anything likely to be required as evidence in any judicial proceeding, is guilty of a crime".

Alternatively, the destruction of evidence can be a ground for an application to permanently stay or strike out a claimant's claim. In *Palavi v Queensland Newspapers Pty Ltd* (2012) 84 NSWLR 523 the plaintiff's claim was struck out in defamation proceedings in circumstances where she had produced her Facebook records, but admitted destroying her mobile phone, which had contained relevant material. See also *Palavi v ZUE Sydney Pty Ltd* [2001] NSWCA 264.

It is appropriate for me here to mention the ethics of advising the deliberate deletion of Facebook material. The Queensland Law Society published in *Proctor* – March - 2012 an article written by Stafford Sheppard entitled "*Dirty Laundry*" in which it was noted that legal practitioners should not advise their clients to "clean up" their Facebook or social media pages where there was a likelihood that such material might be required in legal proceedings.

Be aware though that it would not, in my view, having regard to various USA Bar Association rulings, be unethical for a claimant's lawyers to advise him or her to restrict their privacy settings to the absolute minimum, or to logout of the account or deactivate it. And it would not be unethical to advise the claimant to take down social media provided that the material was fully preserved. I am sure everyone knows that even if you de-activate a Facebook account it does not go away anyway and that all that is required to re-activate it is to log in using the associated email address and password. But beware that printing out the pages and deleting the account would not preserve the metadata that could show more than just the date and time of photographs. Websites cache metadata and actual data so even once deleted it may still be searchable on the World Wide Web. This is why it is advisable not to "like" or "comment" on anything that is "public view" as identified by the Earth symbol. This comes up in your friends' newsfeed and can be traced by metadata.

An active means of surveillance

If the claimant has left his or her privacy setting as to who may view their posts as "everyone", or even sometimes just "friends of friends", you may be able to view ongoing text and images without difficulty. The more common scenario though is likely to be that you have been able to see profile material publicly displayed but cannot see existing and ongoing posts in the private section of the account. All Facebook "cover page" photographs are "public view" irrespective of your security settings. This is the Facebook default. Hence, even if an individual has locked down their account as far as is possible, friends can "like" and "comment" on your cover photo and anyone can right click and open the photo and see the likes and comments and then view the profiles of those people on which the individual may appear.

If it is the case that you have been able to see profile material publicly displayed but cannot see existing and ongoing posts in the private section of the account then you will need to make a case for discovery of the private part of the account based on what you have from the public section. I will deal with that shortly.

Next there arises the question of active surveillance by you or your staff, or by a commercial inquiry agent.

Now, leaving aside a consideration of hacking and potential breaches of Commonwealth telecommunication laws which are beyond the scope of this paper, there are no State laws of which I am aware that would prevent you simply "friending" the claimant or a "friend of a friend" of the claimant.

I doubt that s 13A of the *Police Offences Act 1935* could have relevant application, given the mischief at which that section is obviously directed. That section provides that a person who observes or visually records another person, in circumstances where a reasonable person would expect to be afforded privacy, without the other person's consent; and when the other person is in a private place or is engaging in a private act and the observation or visual recording is made for the purpose of observing or visually recording a private act, is guilty of an offence.

Equally, simply observing another person's Facebook posts is hardly likely, without more, to offend s 22(1) of the *Security and Investigations Agents Act 2002* which provides that the holder of a licence must not engage in harassment while undertaking any activity under the licence.

However, the relevant consideration is that of your ethical obligations as a legal practitioner.

Rule 4.1.2 of the *Legal Profession Uniform Law Australian Solicitors Conduct Rules 2015*, by way of example, provides that a solicitor must be honest in all dealings

in the course of legal practice. It would plainly be dishonest and unethical to "friend" a claimant or a claimant's friend under a false name.

Doing the same under a real identity throws up a more difficult consideration. Rule 22.4 provides that a solicitor must not confer or deal with any party represented by or to the knowledge of the solicitor indemnified by an insurer, unless the party and the insurer have signified willingness to that course.

The local Tasmanian ethical ruling was recently promulgated in Practice Guideline No 3 which states that a practitioner who is acting on behalf of a party in any contentious matter must not communicate or confer directly with an opponent's client, except in certain specified circumstances that are not relevant for present purposes.

In my view that does not leave room for a friend request, either by you or by your agent at your request.

The Philadelphia lawyer would be expected to know the answer to the ethical dilemma surely? Well the Philadelphia Bar Association considers it necessary to disclose the true identity and purpose or intent of the requestor.

The New York Bar Association on the other hand considers the disclosing of the true identity of the requestor is all that is necessary, and the fact that that person is, in essence, the agent for the opposing litigant need not be disclosed. The ruling is "while there are ethical boundaries to such 'friending' in our view they are not crossed when an attorney or investigator uses only truthful information to obtain access to a website, subject to compliance with all other ethical requirements".

I doubt that the Legal Profession Board in Tasmania would take a similar view to the New York Bar Association, but the question obviously remains unsettled.

In a recent ethical ruling, the Philadelphia Bar Association Professional Guidance Committee addressed the issue of whether an attorney could direct an investigator to friend a claimant. The Committee concluded that doing so would be inherently deceitful and unethical, even if the investigator used his or her own name.

The Committee rejected the contention that obtaining access to a Facebook page was no different to conducting surveillance, saying:

"In the video situation, the videographer simply follows the subject and films him as he presents to the public. The videographer does not have to enter a private area to make the video."

The Committee noted that it would be clearly improper for the videographer to pose as a utility worker to gain access to someone's home.

Obtaining discovery

Rule 5 of the *Supreme Court Rules* unhelpfully defines the word “document” as any process, pleading, notice, order, application or other document or written communication.

The *Acts Interpretation Act* 1931, equally unhelpfully, does not contain a definition of the word “document”. However some assistance might be gained from the definition of the word in s 3 of the *Evidence Act* 2001. That definition is as follows:

“document means any record of information and includes —

- (a) anything on which there is writing; or
- (b) anything on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; or
- (c) anything from which sounds, images or writings can be reproduced with or without the aid of anything else; or
- (d) any map, plan, drawing or photograph ...”

I doubt that anyone would seriously argue that a Facebook page on a computer containing writing and images and sounds was not a document. The real question is how do you go about obtaining discovery of the images and text in the private profile of a claimant's Facebook page?

Since the *Peruvian Guano* test for discovery was replaced by the direct relevance test in r 382(1) of the Rules, you would need to show that the claimant's private page contained documents “that are directly relevant to the issues raised by the pleadings”. To qualify under r 382(2) you would also need to show, relevantly, that “the documents adversely affect another party's case”.

In a claim for damages for personal injuries the sequelae of the injury would be a pleaded issue bookended by the particulars of damage, but how do you show that photographs you have not seen adversely affect the claimant's claims of disability?

There are at least two possibilities that might rebut a suggestion of “fishing” (not phishing).

The stronger argument is where you have been able to locate relevant photographs on the claimant's public profile. In *Murphy v Perger* [2007] OJ No 5511 (Ont SCJ), Rady J ordered production of the plaintiff's entire Facebook page one month before trial on the following basis:

“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.”

The other possibility which arguably was endorsed by Brown J in *Leduc v Roman* (2009) 308 DLR (4th) Ontario Superior Court, relying on *Murphy v Perger*, is the contention that general evidence about how Facebook works and the nature of the service it offers is sufficient to allow a court to infer the likely existence of relevant photographs on the claimant's private profile.

In support of such an argument the proposition could be advanced that Facebook, given its all-pervading presence in the lives of 1.7 billion humans, makes it an especially important class of material to personal injury litigation.

In *Nucci v Target Corp* 2015 WL 71726 Fla Dist Ct App Jan 7, 2015, the Appeals Court, Gross J said at 7:

“In a personal injury case where the plaintiff is seeking intangible damages, the fact-finder is required to examine the quality of the plaintiff's life before and after the accident to determine the extent of the loss. From testimony alone, it is often difficult for the fact-finder to grasp what a plaintiff's life was like prior to an accident. It would take a great novelist, a Tolstoy, a Dickens, or a Hemingway, to use words to summarize the totality of a prior life. If a photograph is worth a thousand words, there is no better portrayal of what an individual's life was like than those photographs the individual has chosen to share through social media



Image: Shutterstock

before the occurrence of an accident causing injury. Such photographs are the equivalent of a 'day in the life' slide show produced by the plaintiff before the existence of any motive to manipulate reality. The photographs sought here are thus powerfully relevant to the damage issues in the lawsuit."

In other words the argument is that the claimant's life as depicted on Facebook, both before and after the work injury, is as important as his or her evidence at trial as to his or her activities of daily living and, given that the claimant could be cross-examined as to his or her Facebook posts and called upon to produce them during the trial, fairness dictates that pre-trial discovery should be ordered.

If all else fails I see no reason why discovery on oath cannot be obtained and then an application made to cross-examine the claimant on his or her affidavit. If a Facebook account is not discovered the claimant could be cross-examined as to whether he or she has an account, and if the answer is "yes", then the claimant could be cross-examined as to why it was not discovered and then cross-examined as to the existence of discoverable photographs depicting relevant activities.

Alternatively, interrogatories could be delivered pursuant to r 405 of the Rules and, given that the broader test for relevance still applies by reason of r 406, the claimant could be interrogated about a class or classes of images he or she may maintain on a Facebook account. Discovery is of course a continuing obligation pursuant to r 382, so if the answers to interrogatories prove fruitful then further discovery could be required in the form of screenshots of the relevant images. *Nucci* (above) is a helpful case in relation to the framing of interrogatories and the tailoring of associated requests for discovery.

Withholding discovery

If you have obtained screenshots of images that are damaging to the claimant's case without that party's knowledge then, just as with telling video surveillance footage, you will not want to lose the element of surprise at trial. Yet, as you know, r 396 of the Rules provides that a document is not to be received in evidence unless it has been disclosed to the opposing party. It is no answer of course that the documents are already in the possession of that party.

The answer is no different to that which it has always been in relation to video surveillance footage. The key words in r 396 are the commencing words to the rule, namely, "unless the Court or a judge otherwise orders" a document is not to be received in evidence unless it has been disclosed.

What you would do is make an ex-parte

interlocutory application seeking relief from your client's obligation to discover. The application should be supported by an affidavit, not just stating that you want to preserve the element of surprise at trial, but carefully explaining the relevance and importance of the material and relating it to the issues and the claimant's claims of particular disabilities. Go on to point out the obvious, namely that disclosure would afford the claimant the luxury of time to "manipulate reality" by concocting innocent explanations for the activities or events depicted in the photographs. If you have answers to interrogatories that relate, then annex them to your affidavit. Similarly, annex any lists of documents that fail to disclose the existence of a Facebook account as evidence of bad faith.

When filing the application and supporting material ask the Registrar to ensure that the application not be included in the daily court list on the day of the hearing, and ensure that the fact of the listing cannot be discovered by your opponent searching the court file.

On the hearing seek an order that the application and affidavit and all supporting material and judge's notes be placed in a sealed envelope and marked "not to be opened without the order of the Court or a judge".

Proving Facebook posts

The last issue I wish to deal with is often considered the most difficult. In truth it is pure simplicity.

Facebook evidence is successfully used every day in civil trials around the country in order to disprove claimants' accounts of their ongoing disabilities. The cases are rarely reported of course. A couple of examples that have found their way into the reports are *Frost v Kourouche* (2014) 86 NSWLR 214 and *Munday v Court* (2013) 65 MVR 251.

How do you prove a document which comprises a screenshot of a Facebook post or page? You tender it.

In a pre-trial ruling in a criminal case in 2012, which is unreported and was published to the parties only, Porter J, having carefully considered the matter, was not satisfied that a Facebook post self-authenticated to the extent necessary, and on the basis only that it was sought to be tendered in its own right, and without more, his Honour ruled that it was inadmissible.

On the day following the hearing of that matter, Perram J published his reasons for judgment in *Australian Competition and Consumer Commission v Air New Zealand Ltd (No 1)* [2012] FCA 1355. The case was not concerned with Facebook posts but with business records. However his Honour's decision at [92]–[93] is, with respect, a masterpiece of judicial logic. It is a lengthy passage but it warrants

setting out in full. His Honour said:

"92 It is useful to begin with some basic propositions:

1. There is no provision of the *Evidence Act* which requires that only authentic documents be admitted into evidence. The requirement for admissibility under the Act is that evidence be relevant, not that it be authentic. On some occasions, the fact that a document is not authentic will be what makes it relevant, ie, in a forgery prosecution. In other cases, there may be a debate as to whether a particular document is or is not authentic, for example, a contested grant of probate where it said that the testator's signature is not genuine.
2. In cases of that kind, the issue of authenticity will be for the tribunal of fact to determine. In cases heard by a judge alone, this will be by the judge at the time that judgment is delivered and the facts found. In cases with a jury, it will be the jury.
3. The question of what evidence will be admitted is a question of law for the tribunal of law, which will be the Court.
4. Since authenticity is not a ground of admissibility under the *Evidence Act*, the issue of authenticity does not directly arise for the tribunal of law's consideration at the level of objections to evidence.
5. What does arise for its consideration is the question of relevance under s 55. If the evidence is relevant it is admissible: s 56. It will be relevant under s 55 if the evidence is such that 'if it were accepted, [it] could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue'.
6. The question of a document's authenticity is relevant only to the tribunal of law's consideration of relevance under s 55. It has no other role.
7. In that inquiry, the question for the tribunal of law is not whether the document is authentic but whether receipt of the document could, to paraphrase s 55, rationally affect the assessment of the probability of a fact.
8. If there is raised a question about the authenticity of a document (and assuming that, if authentic, it would otherwise be relevant to an issue) then there will be an issue in the proceedings about its authenticity. This will be a question for the tribunal of fact to resolve, if the document is admitted.
9. The question for the tribunal of law, by contrast, will be whether

the document is relevant to a fact in issue under s 55. That is, the question will be whether the document can rationally affect the assessment of the probabilities of the fact, including its authenticity.

10. What materials may be examined in answering this question? The answer is provided by s 58:

58 Inferences as to relevance

- (1) If a question arises as to the relevance of a document or thing, the court may examine it and may draw any reasonable inference from it, including an inference as to its authenticity or identity.
 - (2) Subsection (1) does not limit the matters from which inferences may properly be drawn.
11. The position then is clear. In answering the only question before the tribunal of law – relevance – the tribunal may examine the document to see what may be reasonably inferred from it (s 58(1)). It may also examine other material (s 58(2)).
12. The tribunal of law does not find that the document is authentic. It finds that there is, or there is not, a reasonable inference to that effect and hence that the document is, or is not, relevant. If there is a reasonable inference that the receipt of the document will rationally affect the probability of a finding of fact, then the matter may go to the tribunal of fact which will then determine at the end of the trial whether the document is authentic and whether the fact is proved.
13. At no time does the tribunal of law determine that the document is or is not authentic because this is not a question for it. It may, however, determine that no reasonable inference to that effect is open and thereby conclude that it is not relevant. In a jury context, that will be similar to taking the question of authenticity away from the jury. Analytically, it will be the same where the tribunal of fact is a judge.
14. In deciding relevance (ie whether the tribunal of fact could reasonably infer that the document (otherwise relevant) was authentic), the tribunal of law is explicitly authorised by s 58(1) to ask what inferences as to authenticity are available from the document itself. That is what s 58(1) says.
- 93 It will follow that AirNZ's submission that 'no inference as to authenticity can be drawn from the face of these documents' ought to be rejected. In

determining a relevance objection, that is precisely what s 58(1) permits."

In a nutshell, when you tender the Facebook screenshot no question as to its authenticity arises as a threshold question. The only question is relevance. At no time does the judge in a jury trial determine that the document is or is not authentic because that is not a question for him or her.

He or she may, however, determine that, on examining it, no reasonable inference as to authenticity is open, and thereby conclude that it is not relevant. Analytically, the exercise is the same where the tribunal of fact is a judge. As an extreme example, if the asserted Facebook post looks more like a family photo album of someone else's family, then no reasonable inference as to authenticity will be open and the document therefore is not relevant.

In deciding relevance, that is, in deciding whether the tribunal of fact could reasonably infer that the otherwise relevant document was authentic, the tribunal of law is explicitly authorised by s 58(1) to ask what inferences as to authenticity are available from the face of the document itself. If it looks like a duck and it walks like a duck and it quacks like a duck then it is sufficiently authentic to be relevant, and thus admissible as a duck.

So, you could in theory tender the screenshot in opening your case by handing it up. If it looks like a Facebook page in the claimant's name containing the claimant's photograph as a profile picture or cover photo, then that should be enough to have it admitted.

If the claimant in his or her evidence denies that the post is his or hers, and is not genuine, then the issue will play out like any other disputed issue of fact. If the claimant denies he or she posted it, then that claim will be tested by cross-examination. "Who had access to your account? How was your account hacked? Who knew your password? When was it hacked? What about the posts either side of that post?" If the tribunal is a judge alone, then he or she will reserve the question of authenticity or the weight to be given to it, or if you have a jury, then it will be told how to consider those questions.

On the other hand, if you seek to tender it through the claimant in the ordinary course of cross-examination, then the claimant's denials could possibly be ruled on during the trial if there is an objection based on a total lack of authenticity robbing the document of relevance. However, the question is never one of you somehow having to formally prove the document. It is, in effect, akin to a reverse onus situation

or a shifting of the burden of proof. You produce the screenshot and, unless the claimant can satisfy the judge that the material is not genuine, then it will go into evidence.

Happy hunting.

**THE HONOURABLE JUSTICE
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Judge, Supreme Court of Tasmania

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