

Social media no friend to insurance litigants

Companies actively looking for online evidence of plaintiffs' activities

BY JUDY VAN RHIJN
For Law Times

As technology advances, the ability of insurers to mine social media sites for information about how people live their lives is expanding dramatically. In light of its usefulness as a tool for risk assessment, fraud management, and evidence in litigation, the courts are facing the challenge of balancing relevance and the public interest against a reasonable expectation of privacy.

Roger Foisy, a personal injury lawyer in Mississauga, Ont., says that the use of social media by the insurance industry is a relatively new phenomenon. "It has sparked up in the last two to three years. I personally believe it's part of the underwriting process now."

Foisy has found that many people don't take the insurance application form too seriously. "They may have slipped up inadvertently in some aspects of their lives. If there's a photo of you smoking a cigar on the golf course and you said in your application that you've never smoked or don't smoke, that's an easy way for the insurance company to produce information otherwise."

Foisy is absolutely sure that

insurers are mining social media after the claim as part of their investigation strategies. "Adjusters have led me to believe or advised me outright that they have been following my client on social media sites," he says, adding he's concerned that insurers can take the information they find out of context.

"One adjuster told me that they had learned through information linked to a social media site that my client was selling items on Kijiji. The adjuster therefore claimed that the client was running a business when he had said he was not. When I looked into it, he was just trying to survive, selling off his personal items because the insurer had cut his benefits. I believe insurance companies are looking and even bidding on some items to determine if the clients are actually selling."

Foisy also sees the data being used in claims adjudication. "I advise clients right upfront that if they have a Twitter or Facebook account to expect that the insurance company will be searching to see if they can locate it. If they want to keep using it, they must be selective in what they are sharing with the general public."

Foisy notes that access to the information has gone beyond

what the insurance company has found. "If they get relevant answers at examinations on discovery that lead them to believe that your social life has not been curtailed in the manner that you say it has, they can place a motion before the court seeking an order that the insured person produce more than the profile disclosed, he says, adding that defence lawyers are having some success with those applications.

"Courts will support insurance companies with an order to Facebook to release all information. There's no hiding behind it."

It's at this juncture that people bring up privacy arguments, usually to no avail. "If you enter into litigation, you end up opening up your life to scrutiny," says Foisy. "Any document relating to any matter in an action that you possess or have possessed may be relevant."

Jamie Macdonald, a litigation lawyer at Norton Rose Canada's Ottawa office, has seen this very issue come up in the context of insurance defence work. "There has been an arising interest in privacy issues in the last few years because of social media and technology law. They seem to go hand in hand together, but the same rules apply to the use of Facebook as to any other

evidence, namely relevance and proportionality."

When Macdonald gets a new claim, the first thing he does is search the Internet, and not just for social media. "Personal information is scattered far and wide. Everyone who has been in a marathon has their results posted on the Internet. If I get a catastrophic impairment claim and six months later the claimant has completed a marathon in a better time than I would, I'll find it."

Macdonald doesn't see this accessibility as prejudicing the claimant. "This information would be disclosed during the discovery process anyway if you've asked the right questions," he says.

In fact, Macdonald has always found the privacy debate in relation to social media to be "a bit curious."

"In any action brought by the plaintiff, they will have to produce doctors' notes, OHIP summaries, and prescription summaries — all inherently very private documents — but they balk at producing photos that they've sent online to 200 of their closest friends. I don't know if it's the novelty of Facebook. People didn't expect it to be relevant."

Macdonald stresses that if an item is relevant in a non-Face-

book format, it'll be relevant if it's on a social media site. "On a bad vacation claim, if the plaintiff has snapshots and a photo album at the house, you'd want them to produce it. In a loss of enjoyment of life, if you learned they had kept a detailed journal of their moods every day and social engagements, you'd want it produced. If they kept it in an online medium, why is it any different?"

Foisy confirms that in the last two years, clients have been asked if they're on any social media site on every examination he has attended. "The insurance industry is particularly interested to see what type of photographs you're posting. If it's a vacation injury, they might say you shouldn't be vacationing when you're injured or look happier than you're claiming to be.

"My job is to advise clients ahead of time that the photographs and information will become part of the litigation and that they should maintain as much privacy as possible. I don't specifically tell them to take it down because that would be wrong in law but I advise them that if they continue to use it, they must be very careful. For people involved in litigation, I'm not sure social media is going to be your friend." **LT**