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# INSURE UPDATES

IN THIS ISSUE



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## Implications of Social Media in Personal Injury Lawsuits

By *Morgan Martin*, DWF Toronto, Email: mmartin@dolden.com and *Suneal Khemraj*, DWF Toronto, Email: skhemraj@dolden.com

The Ontario Superior Court continues to address the relevance of social media postings in personal injury actions. In *Isacov v. Schwartzberg*, 2018 ONSC 5933 the defendant, Schwartzberg, drove over the plaintiff's right foot resulting in personal injury to the plaintiff. A trial date was scheduled for November 26, 2018. In May of 2018, Schwartzberg's lawyer obtained Instagram evidence of the plaintiff socializing and dancing in high heels at a number of locations. The photographs were from the account of a close friend of the plaintiff named Yuri and contained comments from what appeared to be the plaintiff's Instagram account. The defence brought a motion on the eve of trial, for the disclosure of the social media content on the Internet contained in accounts of the plaintiff. The court was required to determine the appropriate approach to the disclosure of a plaintiff's social media accounts in such a case.

In the statement of claim, the plaintiff alleged that the accident negatively affected her social enjoyment of life and her ability to perform certain activities and tasks. For instance, she claimed that she lost her desire to go out with friends and asserted that she would never be able to wear shoes with heels.

The court found that the plaintiff had put her social enjoyment of life at issue in the litigation and, therefore, photographs of her social life and activities, before and after the accident, were producible as having some semblance of relevance.

The court considered the application of Rule 30.06 of the *Rules of Civil Procedure* which requires the moving party to present some evidence demonstrating that a relevant document has been omitted in another party's Affidavit of Documents before the court may order its production. It was concluded that based on the relevant content found on her friend's account, it was reasonable to infer that similar content likely existed on the plaintiff's private profile.

The court agreed with the prior decision of *Leduc v. Roman*, [2009] OJ No 681, in finding that a plaintiff's social media account may be producible regardless of whether it is maintained as a private, limited access, or publicly available account.

Ultimately, the court held that the plaintiff was required to produce electronic or paper copies of photographs on her known social media account, Facebook and Instagram, for the period running from three years prior to the date of the accident to the date of trial.

**Take Away**

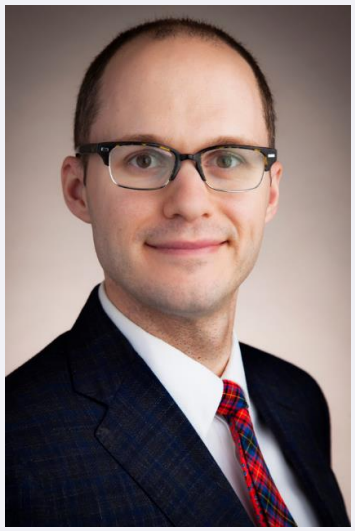
In the present technological environment, all parties ought to be required to produce in the appropriate schedules of their Affidavit of Documents, all online data (including social media accounts) relevant to the matters at issue in the litigation. It is well-known that social media platforms such as Facebook and Instagram are often used to share with others, personal information about the account holder such as, what they like, what they do, and where they go. As such, these accounts are

particularly important to defendants in personal injury matters where plaintiffs put into question their social enjoyment of life and/or their ability to participate in certain activities. In such cases, defence counsel should insist on the production of the content on any known social media accounts, regardless of whether it is maintained as a "private" or "public" account.

## Vicarious Liability of Institutions and Employers for Sexual Abuse

By *Janis McAfee*, DWF Kelowna, Email: jmcafee@dolden.com and, *Robert Smith*, DWF Toronto, Email: rsmith@dolden.com

In the recent case of *Ivic* v. *Lakovic*, the Ontario Court of Appeal refused to impose vicarious liability on a taxi company for acts of sexual abuse performed by an independent contractor who drove a cab under the company's name. In doing so, the Court followed a long and evolving line of cases that have held that vicarious liability can be imposed on entities for the acts of their employees, agents, servants, or contractors if there is a risk of sexual abuse that arises from the activities of those entities. Recall that vicarious liability does not require tortious conduct on the part of the person or entity held liable. This makes vicarious liability a serious concern for the insurers of high risk enterprises.



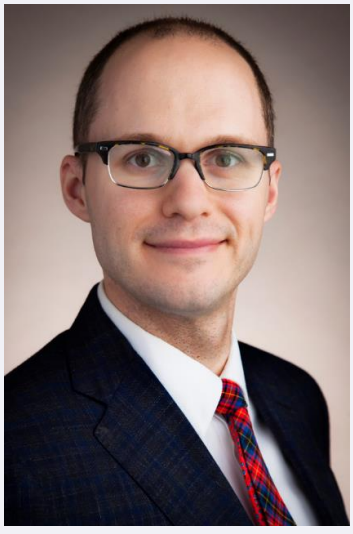
This line of cases began with the Supreme Court of Canada's decision in *Bazley* v. *Curry* and *Jacobi* v. *Griffiths*. Since that time, courts have generally examined whether the enterprise has given its employee or agent the authority to be with vulnerable persons (such as children or the elderly), whether that authority extends to an expectation of physical or psychological intimacy between the employee and vulnerable persons and whether there are inherent power imbalances within those relationships. These are key indicators that courts examine in order to determine if vicarious liability will be imposed.

Vicarious liability exposures on government entities, for-profit and not-for-profit enterprises, related to sexual abuse claims, will

continue to pose a significant risk to commercial insurers. The very nature of these claims presupposes that the complainants will come forward years after the fact when the factual matrix is difficult to assemble and witness evidence may be lost. An appreciation of the legal analysis that our courts will undertake when assessing vicarious liability will at least assist those in the insurance industry to embark on a more thorough risk analysis. Below is a partial list of the enterprises that have been sued in recent years for vicarious liability stemming from sexual abuse:

- Religious organizations
- Educational organizations, such as summer camps, boarding schools, and daycares
- Sports organizations, such as hockey leagues, swimming leagues, or other organizations that provide coaching to child athletes
- Corporations being sued for the wrongful acts of their managers or other senior employees on junior employees (for example, bar managers and servers)
- Ultrasound clinics and other medical practitioners

Janis McAfee and Robert Smith recently discussed the development of the law of vicarious liability for sexual abuse, which can be viewed on our website.



## NBCA reiterates the test for breach of contract claims arising from wrongful denials of coverage

*Robert Smith*, DWF Toronto, Email: rsmith@dolden.com

The Court of Appeal of New Brunswick ("NBCA") recently reiterated and clarified the law that governs the consequences arising from an insured's settlement of claims made against it in a situation where its insurer has wrongfully denied coverage. In *Aviva Insurance Company of Canada v. L'Évêque Cathlique Romain de Bathurst*, 2018 NBCA 64, the NBCA held that an insurer, by its

wrongful denial, is deemed to have vitiated the contract with its insured and can be liable to pay damages to the insured for the amount paid by the insured to settle the claims, so long as the settlement was reasonable in the circumstances.

Twenty-six priests belonging to the Roman Catholic Diocese of Bathurst were identified as having committed acts of sexual abuse over the course of many years. During much of this time, the Diocese had general liability insurance policies in place. Each of these policies had the following wording in their coverage grants: "*To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon the Insured by law*".

In 2002, the Diocese received notice that claims were being made against it by survivors of sexual abuse at the hands of its priests. The Diocese alerted the insurer to the claims, but the insurer denied coverage for a number of reasons. In response, the Diocese retained former Supreme Court of Canada Justice Bastarache to help it institute a reconciliation process. Part of the reconciliation process involved the payment of money to victims. In total, the Diocese paid $4,284,000 to victims through the reconciliation process. The insurer refused to reimburse the Diocese for the funds paid to victims through the reconciliation process because it argued those payments were voluntary and were not "*imposed upon the Insured by law*." The Diocese sued the Insurer for breach of its insurance policy.

The trial judge found against the insurer's denial of coverage, but also found that the payments made by the insured in the reconciliation process were voluntary and were not imposed by law.

The NBCA reversed the trial judge's decision with respect to the reconciliation payments. The NBCA held that the insurer did not fulfill its obligations under the contract of insurance and, as such, could not argue that the Diocese made the reconciliation payments were made voluntarily and were not imposed by law. The insurer was obliged to defend the Diocese and could not escape liability merely because the Diocese had paid the claims.

In essence, the NBCA held that the insurer could not have its cake (deny coverage) and eat it too (rely on the policy provisions).

The NBCA held that the test to be applied in a situation of a breach of contract for wrongful denial of coverage is whether the insured, acted reasonably in the resolution of the claims that should have been defended by the insurer, and for which the insured would have been indemnified if it were found the insured was at law liable for the damages claimed. The NBCA went on to hold that the "*reasonableness*" analysis must be made by reference to all of the surrounding circumstances and can take into account settlements that were made in similar situations.

**Take Away**

Insurance professionals should be aware of this area of the law when assessing the strength of denials of coverage. A wrongful denial that forces the insured to take steps to avoid liability can come back to bite the denying insurer in the form of a claim for breach of contract. This new decision of the NBCA reiterates that the insurer will likely not be able to challenge the insured's settlement after the fact.

## An Intoxicated Passenger's Responsibility: No Duty of Care for Cab Drivers to Ensure Passenger's Are Seat Belted During Travel

By *Raya Sidhu*, DWF Toronto, Email: rsidhu@dolden.com

Recently, the Ontario Superior Court held that there is no duty of care on a driver to ensure that an intoxicated passenger is wearing a seatbelt. In *Stewart et al. v. The Corporation of the Township of Douro-Dummer*, 2018 ONsc 4009, the plaintiff was an intoxicated passenger in a taxi which was involved in a t-bone collision, when another driver failed to stop at a stop sign. The taxi driver was not at fault for the collision. At the time of the collision, the plaintiff was not wearing his seatbelt, which in turn resulted in him sustaining serious injuries.

The OPCF-44 insurer, argued that the court should recognize that a driver has a positive duty of care to ensure the intoxicated passenger was wearing a seat belt. It was argued that the plaintiff's state of intoxication made him vulnerable and unable to care for himself.

The Court considered jurisprudence from the United Kingdom, United Stated and Australia, and found that none of these jurisdictions recognized such a duty. The Court reviewed the Supreme Court of Canada decision of *Galaske v. O'Donnell,* [1994] 1 SCR 670, which established the duty of a driver to ensure passengers under the age of 16 are belted during travel due to their vulnerability as a minor. The insurer relied on *Galaske* to argue that a *prima facie* duty of care was owed to intoxicated passengers, as a state of intoxication makes an individual vulnerable. The Court rejected this argument.

While the insurer was successful in establishing that it is reasonably foreseeable that an adult passenger who is not wearing a seat belt might be injured in a collision, it was not sufficient enough to recognize the suggested positive duty of care.

The insurer did not establish that there was a sufficiently proximate relationship between the taxi driver and the passenger. There was no evidence before the Court to demonstrate that the taxi driver assumed the responsibility of ensuring an adult passenger wore a seat belt by accepting the fare. Further, there was no reasonable basis for the plaintiff to expect that the taxi driver would ensure that he wore his seatbelt. In fact, the jurisprudence in Canada holds that every adult passenger has a duty to buckle his or her own seat belt, and that the failure to do so results in an assessment of contributory negligence. A taxi driver cannot force an adult passenger to wear a seat belt, if the passenger chooses not to do so.

The court recognized a number of public policy considerations to reject the suggested duty. There would be an adverse effect on taxi drivers if such a duty were to be recognized, as they would be more inclined to reject intoxicated passengers. Further, there

was no valid societal reason to transfer the duty of care to wear a seat belt from an adult passenger, who willingly assumed the risk of becoming intoxicated, to the driver. The court stated that such a duty would be difficult, dangerous and unmanageable for taxi drivers.

**Take Away**

While Canadian courts have traditionally recognized expansive duties of care in relation to intoxicated persons, this decision offers a new perspective that an individual's mere intoxication will not create a duty of care on another.

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