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Eastern Suburbs Law Society, Annual Lawyers Learning for Charity Seminar 2017

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#stayawayfromtheselfie

#selfiesruinedmylife #addictedtothefeed

#retweetatyourownperil

#stopthestatusupdate

#bewareafriendwhotags

#blessed #liveloughlove

Social Media and Insurance Claims

I am very pleased to have been invited to speak about social media. Just short of ruining lives, or indeed taking lives, social media can literally ruin an otherwise well-packaged personal injury insurance claim with a click of a button. If the ease and power of social media terrifies lawyers, it should.

What is social media? Some of you, no doubt, will be surreptitiously browsing your social media accounts at this very moment. For those who were unfortunate to be born before 1980s, I'm going to start with a social media 101. Here are a few key terms and media platforms.

Instagram

Instagram is an online mobile photo-sharing, video-sharing, and social networking service that enables its users to take pictures and videos, and share them either publicly or privately on the app, as well as through a variety of other social networking platforms, such as Facebook, Twitter, Tumblr, and Flickr.

Facebook

Facebook is a popular free social networking website that allows registered users to create profiles, upload photos and video, send messages and keep in touch with friends, family and colleagues. Within each member's personal profile, there are several key networking components. The most popular is arguably the Wall, which is essentially a virtual bulletin board. Messages left on a member's Wall can be text, video or photos. Another popular component is the virtual

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Photo Album. Photos can be uploaded from the desktop or directly from a smartphone camera. Facebook offers a range of privacy options to its members. A member can make all his or her communications visible to everyone, he or she can block specific connections or he or she can keep all his or her communications private. Members can choose whether or not to be searchable, decide which parts of their profile are public, decide what not to put in their news feed and determine exactly who can see their posts.

Twitter

Twitter is a free social networking microblogging service that allows registered members to broadcast short posts called “tweets”. Twitter members can broadcast tweets and follow other users' tweets by using for example, their smartphone, desktop or by posting at the [Twitter.com](https://www.twitter.com) website.

The default settings for Twitter are public. Unlike Facebook or LinkedIn, where members need to approve social connections, anyone can follow anyone on publicTwitter.

Tweet

A tweet is a post on Twitter in which users post 140 character updates of what is going on in their lives along with links to things they think are interesting, funny, or useful to their followers (“following” being essentially what “friending” is on other sites). A tweet can be “retweeted” by someone else who follows you.

Selfie

I propose to start with the “selfie”. A “selfie” is a photograph that one has taken of oneself, typically one taken with a smartphone or webcam and shared via social media.

The American Psychiatric Association has now officially added ‘Taking Selfies’ to their list of mental disorders.

This often painful and ultimately debilitating first world problem is now in the same league as Schizophrenia, Bi-Polar Disorder, and Autism. Selfitis is defined as:

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...the obsessive compulsive desire to take photos of one's self and post them on social media as a way to make up for the lack of self-esteem and to fill a gap in intimacy.

Hashtag

Hashtags are a way to label tweets so that other users can see tweets on the same topic. Hashtags contain no spaces or punctuation and begin with a “#” symbol. Many times at events like conferences or concerts, the organizers will tell attendees to add a particular hash tag to their tweets to gather opinions about the event and unite people at the same event.

Tagging

When you tag someone, you create a link to their profile. The post you tag the person in may also be added to that person's feed or timeline. For example, on Facebook you can tag a photo to show who's in the photo or post a status update and say who you're with. If you tag a friend in your status update, anyone who sees that update can click on your friend's name and go to their profile. Your status update may also show up on that friend's Timeline.

Status Update

A Facebook status is an update feature, which allows users to discuss their thoughts, whereabouts, or important information with their friends. Similar to a tweet on the social networking site Twitter, a status is usually short and generally gives information like a person's thoughts, feelings, a location, who they are with and what they are doing.

Gramming

Gramming is posting pictures in Instagram.

LinkedIn

LinkedIn is a social networking site designed specifically for the business community. The goal of the site is to allow registered members to establish and document networks of people they know and trust professionally.

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A LinkedIn member's profile page, which emphasizes skills, employment history and education, has professional network news feeds which can contain updates, much like business motivated Facebook posts. Network members are called "connections." Unlike other free social networking sites like Facebook or Twitter, LinkedIn requires connections to have a pre-existing relationship.

Statistics

Everyone in this room will already have one form of social media site or app, or at least heard of one, whether it be LinkedIn, Facebook, Instagram, Snapchat, Twitter.

In 2016, there were over 1.5 billion active users on Facebook alone. It is currently the world's most popular social networking website, even without access to the enormous Chinese market. In Australia alone there are around 15 million active monthly users of Facebook,¹ the social network launched by Mark Zuckerberg when he was a Harvard undergrad looking for newer, better and more misogynistic ways to rank the female students in his cohort.

If you think Facebook, with all its friend-adding and liking and posting and sharing, is overwhelming enough, consider Twitter, the platform that allows people to post from their phones short updates and usually about things that make them angry, like road rage and Australian politics. On Twitter alone, over such 7,000 'tweets', i.e. comments, thoughts and conversations with less than 120 characters are sent out every single second.²

I am sure some of you will also be familiar with Instagram, which enables endless posting of photos and 'selfies'. This is a favourite for celebrities to share pictures with their millions of followers, bypassing the paparazzi to create intimate moments with their fans.

¹ Sensis, 'Sensis Social Media Report May 2015: How Australian people and businesses are using social media', available at <https://www.sensis.com.au/assets/PDFdirectory/Sensis_Social_Media_Report_2015.pdf>.

² <<http://www.internetlivestats.com/one-second/#tweets-band>>.

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As for Snapchat, that most ephemeral of social media platforms where teens send each other photos that conveniently disappear after a few seconds, the millennial generation's favourite app has amassed such power that over 100 million active users send at least one 'snap' a day.³

These platforms are slowly overtaking the way people interact; the beauty lies not only how they are all interlinked, but they also completely overhaul how people communicate and share deeply personal information, thoughts and feelings. Think back to how often have you 'checked in' to a location to let everyone know what you're doing? How many photos have you uploaded onto Instagram of your latest holiday? On a more insidious level, how familiar are you with your privacy and location settings on social media?

The Chief Justice of the Supreme Court of New South Wales, Chief Justice Bathurst, in a paper on the compellability of social media has also touched on an important aspect of comments made on various social online contexts being vulnerable to misinterpretation, quoting commentator Bruce Boydon:

'users can share tasteless jokes, updates on their love lives, poignant reminiscences, business successes, petty complaints, party photographs, news about their children, or anything else they choose to disclose. Facebook and its ilk allow an individual to self-report a more or less permanent record of daily activities and thoughts. ... [t]hese thoughts are often unfiltered, since they are intended only for 'friends', and the idiom for social-networking posts seems to encourage sarcasm, humour, cynicism, or anger, none of which translate well into other contexts.'⁴

The fickle nature of social media brings me to the risk that it bears to any personal injury claims that are not watertight.

³ Craig Smith, 'By the Numbers: 80 Amazing Snapchat Statistics' (22 July 2016) available at <<http://expandedramblings.com/index.php/snapchat-statistics/>>.

⁴ Bruce E Boyden, 'Oversharing: Facebook Discovery and the Unbearable Sameness of Internet Law' (2012) 65 *Arkansas Law Review* 39.

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What is the risk?

Picture a client who has come to you after a car accident with a claim for a classic lower back injury. They have severe pain that prevents them from walking or standing for long periods of time. They tell you it robs them not only the basic daily activities around the house but also the chance to play with their children and continue the hobbies that give them most pleasure. As a result they say they are now anxious, irritable and anti-social. They have not been able to see their friends or hang out with family in the same way, and they claim secondary depression. But a quick survey of their social media accounts, perhaps set carelessly to 'public', reveals a different story. You find photos of them bouncing on the trampoline with their kids, or even boasting about their time after a half-marathon. You see that they've been busy organizing a hens' night party and attending music festivals. Either way, it is entirely possible for insurers to take that evidence to show that aspects of the claim have been stretched or entirely fabricated.

It may not be on their feed that they love is being spread, it might be on the feed of their friends, or a partner who is keen to make all their post public so that the "ex" knows just how much fun they are having since they split.

The risks arise for two reasons: unwitting claimants being reckless or unaware of social media impacts on their claims, and savvy insurance companies developing increasingly sophisticated techniques to catch out fraudulent claims.

'Desktop investigations' are regularly the first port of call; it's the insurer's version of doing their own due diligence. Whole departments of special investigators are dedicated to ensuring that fraudulent claims do not slip through. The slightest indication of a discrepancy between an injury stated and portrayals online will more than likely be picked up, especially where there is a digital footprint that will never be fully erasable. Seemingly innocuous posts about 'feeling great today' or 'just beat my 4 year old at soccer' can be fatal to a claim that alleges depression or immobility. On a broader industry level, companies have started practicing their own forms of vigilantism, by

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‘mapping out’ the types of activities and areas where fraudulent claims are most likely to be filed, and circulating the data among themselves.

As it happens, you and are just as adept as these teams of investigators to conduct these investigations for yourself.

Compellability and discoverability

The problem is that these are legitimate and proportionate actions taken by insurance companies. Although some are going to the questionable and possibly unlawful lengths of creating fake profiles and adding customers as ‘friends’ to keep tabs of otherwise careful users, gathering information from publically available sources is entirely permissible and justified. According to the Insurance Council of Australia, insurance fraud can cost companies upwards of \$2 billion each year.⁵ Given the high cost and relative ease of opportunistic fraud – the exaggeration of personal claims – it is little wonder that insurers are fighting back with every technological tool available to them. This is especially the case when it comes to seeking a subpoena on social media account postings. Careless comments and incriminating photos on social media may be discoverable if they are considered relevant to the facts in issue. Subpoenas can be issued

Be aware that subpoenas can be issued even if material subpoenaed goes only to credit. Brereton J in *Liristis v Gadelrabb*⁶ made a distinction between trawling/fishing applications and considered that, if there was no reasonable basis for inferring that there was a document and it would alone impugn credit, then a subpoena seeking production of such a document would be bad, but that where there was known evidence it would be appropriate for leave to issue a subpoena even if it only went to credit. This is where “friends” whose profile is public tagging you can be dangerous.

Under the NSW regime for discovery of documents, it is sufficient that the ‘document’ refers to a ‘record of information’.⁷ Fortunately, there have been sufficient attempts by careless claimants to embellish the

⁵ Insurance Council of Australia, ‘Insurance Fraud’, *Insurance Fraud Bureau of Australia* (2015), available at <<http://www.ifbaintelligence.com/#aboutifba>>.

⁶

⁷ *Evidence Act 1995* (NSW) Dictionary; *Supreme Court Rules 1970* (NSW) r 1.8.

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nature and extent of their injuries to set an established precedent for the production of social media in court.

In *Frost v Kourouche*,⁸ the NSW Court of Appeal was met with evidence clearly contradicting the claimant's alleged psychological injury from a car accident. Ms Kourouche's Facebook and Twitter accounts indicated that 'she had read books, attended events, had gone out with friends and had gone away',⁹ including on a recent holiday and had presented a paper for International Women's Day. This was at odds with her statement that she had not been able to speak in public after the collision.

Likewise in the Victorian case of *Munday v Court*,¹⁰ a personal injury claim was similarly defeated when the claimant had alleged brain injury and depression as part of her personal injury case but the Court of Appeal found the evidence of her 'active engagement on social media', which included evidence of socializing without physical difficulties and engaging in 'prolific conversations' to be likely inconsistent with her claims.

The lesson is that lawyers need to be aware of both client-induced liabilities and aggressive insurers looking to protect pay-outs at all costs - literally.

Poor or suspicious timing of claims may also be a thorn in the side of lawyers and claimants alike. In many instances the client may have come to you a certain amount of time after the injury first occurred. In one particular UK case, the claimant waited over two months before seeking medical attention for what was supposedly whiplash with a nine-month prognosis, in which time he completed a 10km run despite alleged neck and back pain.¹¹ In this case, it is all the more important to investigate the claimant's social media activity.

⁸ [2014] NSWCA 39; 86 NSWLR 214.

⁹ [2014] NSWCA 39, [17].

¹⁰ [2013] VSCA 279; 65 MVR 251 at [15], [38].

¹¹ Shane Hickey, 'Insurance cheats discover social media is the real pain in the neck' *The Guardian* (18 July 2016), <<https://www.theguardian.com/money/2016/jul/18/insurance-cheats-social-media-whiplash-false-claimants>>.

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How can we mitigate the risk?

Ideally, clients would stay offline to avoid any semblance of incriminating evidence that could be used against them. But it is easier said than done, and this does not address the problem of friends and family posting online.

A more pragmatic approach would be simply to advise that less is better. Clients should be prompt in seeking medical diagnoses and opinions, and from the moment of the injury refrain from posting on social media. If they must, clients should imagine that the insurer can see everything that is being posted, regardless of how secure their privacy settings may be.