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Court declines to order production of years of text messages between plaintiff and late spouse *(Howell, McDonnell v. Freire, Aviva Insurance, Echelon Insurance)*

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In *Howell, McDonnell v. Freire, Aviva Insurance, Echelon Insurance*, 2024 ONSC 586, the Superior Court of Justice of Ontario declined to order production of years of text messages between the plaintiff and his late spouse.

The plaintiff's late spouse died in a motor vehicle accident in 2020. The defendant driver was impaired and speeding when she crossed the centre line and struck the spouse's vehicle. She later pled guilty to impaired driving and is, at present, serving a prison sentence.

The plaintiff brought an action for $2.5 million in damages pursuant to section 61 of the *Family Law Act*, R.S.O. 1990, c. F.3 (the "*Act*"). This is colloquially known as a "*Family Law* claim" and allows for an injured or deceased person's spouse, children, siblings, parents, grandchildren and/or grandparents to commence a claim for recovery for losses resulting from the injury or death, if it is caused by someone's neglect or fault.

The defendant driver argued that the plaintiff did not meet the definition of "spouse" under the *Act*, and therefore, had no basis for his claim. Under the *Act*, a spouse means two people who are married to each other, or two people who are not married but have cohabitated continuously for a period of not less than three years.

The plaintiff and the deceased were not married, and the defendant driver argued that they had not cohabited, or lived together, for three years by the time of the accident in May 2020. In order to determine the date of when they first started living together, the defendant brought a motion for production of *all* messages between the couple from December 2016 to May 2017. This included communications sent by text, email, WhatsApp, and Snapchat. The initial request was for all messages spanning a period of three years and five months. At the hearing, the request was reduced to all messages sent over a period of five months.

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Under Rule 30.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, every document relevant to an issue in an action must be disclosed, whether or not privilege is claimed. In determining whether a party must produce particular documents, the court needs to consider the factors set out in Rule 29.2.03, and consider whether:

- The time required to produce the documents would be unreasonable
- The expense associated with production would be unjustified
- There would be potential prejudice in ordering the production
- There is an excessive volume of documents to be produced
- The production would have probative value

The plaintiff argued that even if the scope of the messages was limited to five months, this would still result in a large volume of messages to be processed and produced. Additionally, the messages would have little probative value.

In seeking production, the defendant driver hoped that the messages would reveal a "concrete timeline" of the couple's relationship. However, the court held that the plaintiff was able to prove the relationship timeline without relying on the messages. In that regard, the plaintiff had produced the following documentation to confirm his common-law status with the deceased and in support of his argument that they had begun living together by at least April 2017:

- A tenancy agreement signed by both men dated April 1, 2017;
- A letter from their landlord confirming that they lived together since the start of their rental agreement;
- A letter from their roommate confirming that the two were common law partners and living together;
- A copy of their property insurance policy listing them both as insureds;
- Income tax and benefit returns indicating that they listed one another as common-law spouses;
- A Statutory Declaration of Common-Law Union signed by the plaintiff and provided to Service Canada; and
- The death certificate of the deceased listing the plaintiff as his common-law husband.

The court held that absolute evidence is not required to establish the cohabitation element required by the *Act* (*Stephen v. Stawecki*, 2006 CanLII 20225 (Ont. C.A.), at paragraph 4). It was difficult to imagine that information could be found in the text messages that would be more compelling than the jointly signed tenancy agreement and their landlord's verification of the couple's residency. The court found that the potential time commitment and expenses from ordering production was exceedingly difficult to justify in the face of all the other evidence presented, and in the context of the law interpreting the term "cohabited".

Additionally, there would be enormous prejudice to the plaintiff.

The court held that this was a request for private messages, not messages that are publicly shared such as Facebook posts or pictures. The request was for messages sent between two partners that carry an extremely high expectation of privacy, on platforms or applications that are designed to be private. The Supreme Court of Canada has held that while litigants must accept intrusions upon their privacy to allow a judge

or jury to reach the truth, this does not grant opposing parties a licence to delve into private aspects of their lives which do not need to be probed to reach the truth (*M. (A.) v. Ryan*, 1997 CanLII 403 (SCC), [1997] 1 S.C.R. 157, at paragraph 38).

The court also noted the potential emotional consequences of ordering production of the messages.

A plaintiff must usually be prepared to bear some upsetting moments while pursuing a lawsuit. But the defendant's request was "shockingly intrusive". The idea that other litigants and their lawyers should be able to read through the written evidence of the couple's private life was impossible to justify in the circumstances of this case, especially given the strength of the other evidence available. It could not be anything less than "emotionally wrenching" for the plaintiff to have the person who killed his spouse read over his private messages.

In the result, the court dismissed the motion, holding that a proper weighing of the factors under Rule 29.2.03 results in any probative value of the messages being far outweighed by the cost, time, and prejudice that would occur if the messages were produced. The decision demonstrates that a court will balance a litigant's right to privacy of some otherwise potentially relevant documents with the general obligation to produce what is relevant in a lawsuit.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact Isabel Yoo, at 416.865.6655 or iyoo@grllp.com.

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