

## **SOCIAL MEDIA AND THE LAW**

**Justice Margaret Beazley AO, President, NSW Court of Appeal<sup>1</sup>**

### **Introduction: a clash of old and new**

- 1 Social media is a complex and fast evolving phenomenon. It empowers individuals to broadcast their lives, opinions and identities in a way not previously possible. It facilitates communication between friends, strangers or the public at large. Its boundaries are set by technology, but also by human creativity and our capacity to devise new ways to put technology to use. And although many in this audience will have grown up with social media, it is still relatively novel - the now ubiquitous Facebook, with 1.4 billion active users, was launched only eleven years ago, a mere drop in the ocean of the long history of the common law legal system.
  
- 2 If you look around this room, you will see portraits of former Chief Justices of New South Wales, dating back to the first Chief Justice of New South Wales, Sir Francis Forbes, who served from 1823 to 1837. Even today, every judge of the Supreme Court has a set of robes and a wig that look almost identical to the ones worn in those portraits - we still sometimes dress as though we have just stepped out of the 19<sup>th</sup> century. The laws that we apply often have similarly long histories. If a legal dispute is governed by the common law, we will be applying rules and principles with origins that can be traced back to 19<sup>th</sup> century England which in turn has at least some of its origins in Roman law.
  
- 3 Is law keeping pace with this rapid technological development? Or, perhaps the better question, as students in this audience have in fact asked: how does the law deal it?

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<sup>1</sup> I express my thanks to my researcher, Kathleen Heath, for her extensive research and valuable assistance in the preparation of this paper.

- 4 You will hear some answers to that question this morning and to the others you have asked. It is important in considering those questions to understand that underlying the concepts that we will talk about are the fundamentals of the rule of law: concepts such as procedural fairness, and certainty and coherence in the law.
- 5 For that reason, the principles that will be applied to the legal issues thrown up by social media, as one only of many new forms of technology in society, will be existing principles of contract law, defamation and criminal law, to take some well-known examples. Indeed, the genius of the common law is its adaptability.
- 6 Sometimes, new answers are required and that will be dealt with by statute, passed by the Parliament, in response to particular issues for which there is no existing answer, or where a new answer is needed. This may be after an extensive law reform enquiry, or as a result of a government department advising that change is required, or sometimes in response to a political imperative.

### **Old law, new facts**

- 7 My presentation this morning focusses on three common aspects of the law – service of documents, employment law and rights to digital assets when a person dies. As you can see they are not earth shattering nor particularly exciting topics. I will leave it to my colleagues to talk to you about the juicy parts of the law. But I wish to set the scene for you so as to give you a fundamental understanding as to how the law operates in ordinary situations, bearing in mind what I said at the outset – we live in a society governed by the rule of law with its notions of procedural fairness, certainty and coherence.

### *Service of Legal Documents*

- 8 The service of legal documents on parties through social media sites such as Facebook provides an example of how existing legal rules can be applied to new factual scenarios.

9 If you commence legal proceedings against anyone the law requires that the other person be informed of that. In brief, if you sue someone, you have to tell them. The procedural court rules require that the person being sued, the defendant is served personally with the originating process.<sup>2</sup> An “originating process” is the document that officially commences legal proceedings, such as a statement of claim. It sets out what the claim is against the defendant, and provides a time by which they need to file a defence.<sup>3</sup> Personal service occurs when the document is physically handed to the person, or put down in front of them with an explanation of the nature of the document.<sup>4</sup>

10 The object of service is notice. As the Court of Queen’s Bench explained in 1854, in the context of a discussion of exceptions to personal service:

“The object of all service is of course only to give notice to the party on whom it is made, so that he may be made aware of and may be able to resist that which is sought against him; and when that has been substantially done, so that the Court may feel perfectly confident that service has reached him, everything has been done that is required.”

11 The need to give notice is an aspect of procedural fairness and due process, sometimes described by reference to the concept of natural justice. As the US Supreme Court explained in *Mullane v Central Hanover Bank & Trust Co*:

“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer*, 311 U. S. 457; *Grannis v. Ordean*, 234 U. S. 385; *Priest v. Las Vegas*, 232 U. S. 604; *Roller v. Holly*, 176 U. S. 398. The notice must be of such nature as reasonably to convey the required information, *Grannis v. Ordean*, supra, and it must afford a reasonable time for those interested to make their appearance, *Roller v. Holly*, supra, and cf. *Goodrich v. Ferris*, 214 U. S. 71. But if, with due regard for the practicalities and peculiarities of the case, these conditions are reasonably met, the constitutional requirements are satisfied.”

12 Sometimes, personal service is impossible or impractical, especially if a defendant is evading service. In such a case, the court may order that

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<sup>2</sup> Uniform Civil Procedure Rules (UCPR), r 6.2.

<sup>3</sup> UCPR, r 6.13.

<sup>4</sup> UCPR, r 10.21.

substitute steps be taken to make a defendant aware of proceedings.<sup>5</sup> This is known as “*substituted service*”. To make an order for substituted service, the court needs to be satisfied of two matters:

- (1) That service cannot practicably be effected;
- (2) It is reasonably likely that the proposed method of substituted service will bring the proceedings to the defendant's attention.

13 A typical order for substituted service may involve sending a letter by registered mail to the person's last known address and placing an advertisement in a newspaper.

14 Can substituted service be effected through social media?

15 Last year the Court of Appeal was required to consider this matter.<sup>6</sup> The case concerned American rap artist Flo Rida who didn't front at the “Fat as Butter” music festival in Newcastle as he had contracted to do. The festival organiser, Mothership Music Pty Ltd, brought proceedings for breach of contract. All attempts at personal service failed, mostly because he had a very effective entourage around him.

16 Mothership Music sought an order for substituted service. The primary judge made the order, permitting service to take place by sending Flo Rida an email and a private Facebook message.

17 The Court of Appeal overturned that order as Flo Rida had left the country the day after the order was made and would not be made aware of the legal proceedings before he left the jurisdiction.

18 The Court did not suggest that there was anything in principle wrong with service by Facebook. Rather, in accordance with existing principle, the Court had to be satisfied by evidence that the Facebook page was in fact Flo Rida's

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<sup>5</sup> UCPR, r 10.14

<sup>6</sup> *Flo Rida v Mothership Music Pty Ltd* [2013] NSWCA 268.

and that posting on it was likely to bring the proceedings to his attention in a timely fashion.

- 19 So the existing legal framework for service of documents was applied to a new form of communication.

*Employment law*

- 20 Another example of existing legal principles accommodating novel factual situations is in employment law. Can an employer dismiss an employee without notice because of inappropriate comments on their personal Facebook account?

- 21 The Fair Work Commission, the tribunal which oversees the *Fair Work Act 2009*, dealt with such a matter in the case of *Cameron Little v Credit Corp Group Limited*.<sup>7</sup> Mr Little was dismissed after his employer, Credit Corp Group Ltd (Credit Corp), learned of two inappropriate comments made using Facebook. First, Mr Little had written a post on the Facebook page of a charity called Christians Against Poverty. Credit Corp and Christians Against Poverty did business together. Using his account, he had written on their page:

“For reals bro, you should put a little more of funding into educating consumers on how the world works rather than just weaselling them out of debt, blah blah blah, give a man a fish/teach a man to fish.”

- 22 In the second Facebook posting, he made inappropriate sexual comments directed at a new employee of the Credit Corp Group.
- 23 Mr Little had not identified his employer on his Facebook page. Instead, he listed his employment as “*Dinosaur Wrangler*” at “*Jurassic Park*”. However, there was sufficient information on his Facebook page to identify him as an employee of Credit Corp. The day after the posts came to the attention of Credit Corp, he was called to a meeting where his employment was terminated.

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<sup>7</sup> [2013] FWC 9642.

24 The Commission was required to determine whether his dismissal was “*harsh, unjust or unreasonable*” under s 385(b) of the *Fair Work Act*. If it met this description, it would be an unfair dismissal and Mr Little would be entitled to reinstatement or compensation.<sup>8</sup>

25 Deputy President Sams of the Commission stated in his decision that:

“[i]t was inevitable with the seismic shift to the phenomenon of social media as a means of widespread instantaneous communication, that it would lead to new issues in the workplace.”

26 Notwithstanding that these issues were new, the meaning of the words “*harsh, unjust or unreasonable*” were the subject of settled law. In its judgment, the Commission quoted from a 1995 decision of the High Court in *Byrne & Frew v Australian Airlines Ltd*<sup>9</sup> as to the meaning of the words. It also drew on a 1933 High Court case to analyse when summary dismissal could be justified at common law.<sup>10</sup> The Commission concluded that Mr Little’s employment had been validly terminated, as he had damaged Credit Corp’s relationship with him, the Christians Against Poverty group, and potentially with the new employee.

27 Two points should be emphasised. First, while the situation was relatively novel, the law to be applied was not. Secondly, the wide discretion given to judges to interpret broad and evaluative words such as “*harsh, unjust or unreasonable*” creates flexibility and adaptability in the law.

### **When new problems need new answers**

#### *Digital Assets*

28 Some interesting questions are beginning to arise in relation to digital assets. For example, what happens to a person’s email inboxes and social media profiles after they die? Can the next of kin access the deceased’s accounts? Are they entitled to terminate a Facebook page to prevent others from posting

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<sup>8</sup> *Fair Work Act 2009*, ss 391 and 392.

<sup>9</sup> [1995] HCA 24.

<sup>10</sup> *Blyth Chemicals v Bushnell* (1933) 49 CLR 66 at 81.

or commenting on it? What if a family wants to retrieve a loved one's photos which they have stored on the Cloud? Does a deceased person have a right to privacy? And what can a person do before their death to pre-empt these problems and have their wishes respected?

29 The answer, like many answers in law, is "*it depends.*" In particular, it depends on the Terms of Service that users agree to when signing up to an online social media platform. This is an application of contract law, although privacy, copyright and other statutes may also apply.

30 Yahoo! has one of the stricter policies, with its terms of service stating:

"No Right of Survivorship and Non-Transferability. You agree that your Yahoo account is non-transferable and any rights to your Yahoo ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted."

31 Some companies have developed options for an individual to take control over their content. Google has created an "Inactive Account Manager" tool, allowing a user to provide a set of instructions to Google about sharing or deleting their data if their account falls inactive for a set period of time. For example, a user could provide that if their account was inactive for 12 months, all their YouTube data and Google Drive documents be sent to a trusted love one, and all their Gmail data deleted.

32 Facebook has a service by which a relative of a deceased person can request that the deceased's profile to be "*memorialised*". No one has access to the account, but the content that the user made public will still be available and it will be made clear that the account is there in remembrance of the deceased. In the US, there is also provision for the appointing of a "*legacy contact*" who can post on the account, change profile pictures and respond to friend requests.

33 While many estate planning services are beginning to recommend that loved ones provide a list of username and passwords to the executor of their estate,

sharing passwords or accessing an account other than your own may be a breach of the company's Terms of Service. This is the case with Facebook, as an example.

34 Users will generally have very little knowledge of, or capacity to negotiate, changes to the Terms of Service. And in many cases, the legal position is unclear – a company may neglect to make any provision for what happens in the event of death in their terms and conditions.

35 A number of high profile cases of families attempting to access the data or “*digital estate*” of their loved ones prompted calls for law reform in the US. In July 2014, the US Uniform Law Commission<sup>11</sup> released a draft Uniform Fiduciary Access to Digital Assets Act. The key aspects of the Fiduciary Access to Digital Assets Act are:

- An executor of an estate may manage the deceased's digital assets with the same right of access as the account holder himself;
- If a company has a terms of service agreement that limits access to the deceased's digital assets or accounts, the relevant provisions will be void as against public policy;
- A user can, in their will or other legal document, prohibit such access – effectively, they can “opt out” of the scheme created by the Act.

36 So far, Delaware is the only State in the US to adopt the Act. The reaction to it has been mixed. Industry groups in particular have suggested that the legislation encroaches on the privacy rights of the deceased. Bill Ashworth, Yahoo's Senior Legal Director for Public Policy, stated in a blog that the legislation operates on the “*faulty presumption that the [deceased person]*

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<sup>11</sup> The Uniform Law Commission is a US law reform agency.



*would have wanted the trustee to have access to his or her communications.”<sup>12</sup>*

- 37 These matters are examples of how social media and other online information storage programs can create new social and policy dilemmas for the law. The extent to which access should be granted to the deceased's next of kin, and conversely the extent to which a person's right to privacy should continue after death, raise difficult questions that are not resolved by the law as it stands.
- 38 These and other questions demonstrate the important role played by law reform agencies, public interest groups and parliamentarians in adapting the law to modern contingencies when the existing law does not have a ready – or the best – answer.

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<sup>12</sup> See <http://yahoopolicy.tumblr.com/post/97570901633/your-digital-will-your-choice>.