

JUDGING THE CONSEQUENCES OF DIGITAL LIVES

Some see websites such as Twitter and Facebook as democratic forces for good, others see them as trivial and time-wasting. But their relevance to the work of judges is growing. In the first of two articles, **Barry Clarke** considers the challenges posed by social media.

JUDGES SHOULD BE INTERESTED in social media for one very simple reason: it has become part of the fabric of daily life. It reflects the friendships and conflicts we encounter. It provides raw material for the cases we are asked to decide. It has contributed to an evolution of the language we use. As one industry observer has put it, ‘social media is about sociology and psychology more than it is about technology’.¹

Social media content – that is to say, the material posted online by its users – is often criticised as banal. That is probably a fair observation; after all, the most followed person on Twitter is not philosopher Noam Chomsky but teenage pop idol Justin Bieber. For every ‘tweet’ from those involved in the so-called Arab Spring, there were doubtless hundreds about the latest celebrity hairstyle. As for time-wasting, one Google executive once observed pointedly: ‘When you’ve got five minutes to kill, Twitter is a great way to kill 35 minutes.’²

All life is there

But are our traditional methods of communication necessarily so much richer? One can no more remove platitudes, repetition and trivia from online interaction than remove them from all human conversation, where they exist in abundance. Would Tory MP Alan Clark’s diaries or poet Philip Larkin’s letters be as entertaining or informative if they were stripped of their gossip and polemic? Social media content incorporates expressions of egocentricity, anger,

stupidity, frustration, self-loathing, love, humour, satire and melancholy. In short, all of life is there: human introspection and human interaction captured in permanent and downloadable form.

Because all of life is there, we have a responsibility to try to understand better how it works. In my own judicial work in the Employment Tribunal, for example, barely a

week goes by without the factual narrative of a case involving a reference to Facebook. In some cases, the entire dispute has revolved around a Facebook comment perceived to have bullied a colleague or damaged the employer’s brand or reputation.³ In other cases, sworn testimony on a crucial point has been undermined by contemporaneous online comments or photographs posted to Facebook.

Lack of advice

In my experience, many seasoned practitioners are behind the curve

on the relevance of social media content, neglecting to mine the rich seam of evidential material that it can provide. Indeed, I suspect that many practitioners fail to advise their clients to preserve such material in the same way that all relevant evidence should be preserved. It seems likely that many parties fail to make a reasonable search for such material as part of the disclosure exercise; nothing else satisfactorily explains the very high number of late applications to rely on Facebook material made by advocates at the outset of a hearing. The explanation often provided is that one party or witness happens to

Follow on Twitter

Judges with a Twitter account may wish to follow [@JudiciaryUK](#) (the Judicial Office, with more than 12,000 followers) or [@UKSupremeCourt](#) (with about 45,000 followers), as well as numerous legal commentators.

be friends on Facebook with another party or witness and, having checked their online entries the day before, has turned up at the hearing with print-outs. This is just the material that is shown to the tribunal; it seems likely that much more goes undiscovered and undisclosed.

As judges, we should seek to avoid easy reliance on lazy stereotypes. We should avoid similar traps surrounding social media. The average age of Facebook users is not 14, but over 40. It is not the pursuit of a small minority: Facebook has 32 million active users in the UK⁴ and more than one billion globally.⁵ The average Facebook user in Britain spends almost 15 and a half hours a month using the site.⁶ Each day across the world, some 2.5 billion items of content are shared on Facebook.⁷ The social media platform most often used by businesses in the UK is Facebook, not LinkedIn. When Facebook floated on the New York Stock Exchange in May 2012, it was the third biggest public offering in US corporate history after General Motors and Visa.

Here to stay

I am not plugging Facebook in particular. It is a sobering thought that it only launched in the UK in 2006, the same year Daniel Craig first appeared on our cinema screens as James Bond. In another six years, it may go the way of Friends Reunited or Bebo and we may ask ourselves what all the fuss was about. But the concept of social media is itself here to stay, and I offer two reasons for this.

- The first is the ease of accessing the Internet. Eighty per cent of British households and 90 per cent of British businesses now have Internet access and these percentages continue to increase. More and more shops and public places offer free or discounted WiFi access

in the battle for the attention and loyalty of consumers.

- The second is in most of our pockets: the increasingly ubiquitous smartphone. Over half of Internet access is now from the gadgets that many of us use as digital Swiss Army knives. Such devices are used to access social media ‘apps’, listen to music, watch online content and play games far more frequently than they are used to make telephone calls.

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Employers took years to develop policies for keeping an eye on the private use that their employees made of Internet access provided through work, but will have a harder time keeping tab on the use they make of their own smartphones. On the other side of the coin, employees previously saw home as offering sanctuary from workplace bullying, but will now find that the bullying follows them simply because their smartphones and the social media apps uploaded to them remain with them 24 hours a day.

Personal privacy

A prominent concern about widespread social media activity is what it means for personal privacy.

The less sophisticated users of social media – and I would hazard a guess that this includes a lot of teenage participants – rarely take adequate steps to protect their privacy. Many of them ‘overshare’,⁸ broadcasting facts and opinions to the online world with scarcely a thought about their permanence and capacity to damage their reputation. It is relatively easy to harvest from public social media profiles the sort of data, such as a person’s date of birth and mother’s maiden name, used as security gateways for personal banking services. Recent research has demonstrated the uncanny accuracy with which

marketing analysts can predict a person's gender, ethnicity, sexual orientation, political beliefs and even history of drug use from their Facebook activities.⁹

The loss of privacy concerns not just what is revealed online but by how many people see it. Facebook users will 'tag' friends in photographs without pausing to reflect on who might see that image¹⁰ or how it might become viral. Very few appreciate that much of the online data processed by the likes of Facebook, Apple and Google is stored in huge centres in North Carolina, raising problems about the application of domestic principles of data protection. In the words of one industry leader: 'Privacy is dead, and social media holds the smoking gun.'¹¹

Public confidence

I am certainly not suggesting that judges should become prolific tweeters or bloggers or avid users of Facebook. Indeed, any judge who engages with social media should reflect on the relevant section in the IT and Information Security Guidance for the judiciary issued in September 2012. The current edition of the Guide to Judicial Conduct, released in March 2013, also includes a section on social networking; furthermore, Appendix 4 of the guide incorporates guidance on blogging by judicial office-holders. The collective thrust of these materials is that, while judges are not precluded from participating in social media in a personal capacity, they should take care to protect their own privacy and must not engage in conduct or express opinions that could damage public confidence in the judiciary.

I am instead suggesting that judges recognise the role that social media now plays in human interaction. Before too long, many of the people appearing before us will have grown up in a world where they access more video content from file-sharing websites than television, where they rarely use mobile devices for making telephone calls and where they never meet

many of their so-called friends. These trends are influencing the nature of the evidence before us as well as the types of dispute we are tasked with deciding.

In his collection 'The Salmon of Doubt', the late Douglas Adams formulated a set of rules to describe our reaction to new things:

'Anything that is in the world when you're born is normal and ordinary and is just a natural part of the way the world works. Anything that's invented between when you're 15 and 35 is new and exciting and revolutionary and you can probably get a career in it. Anything invented after you're 35 is against the natural order of things.'

We judges are, by and large, over the age of 35. Even though many of us may not want a digital life, we must not be oblivious to the fact that so many people do.

Barry Clarke is an Employment Judge. In his second article, he will examine in more detail how social media sites such as Facebook produce evidence relevant to judicial decision-making.

¹ Brian Solis, the principal of FutureWorks.

² Matt Cutts, head of web filtering at Google Inc.

³ As an example of alleged reputational damage, see *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch).

⁴ www.socialbakers.com/facebook-statistics

⁵ www.bbc.co.uk/news/technology-19816709

⁶ <http://socialmediatoday.com/kenburbury/276356/facebook-demographics-revisited-2011-statistics>

⁷ http://allfacebook.com/jay-parikh-big-data-project-prism_b98128

⁸ Selected by the publishers of Webster's New World Dictionary as their 'word of the year' in 2008.

⁹ See Kosinski, Stillwell and Graepel, 'Private traits and attributes are predictable from digital records of human behaviour', in Proceedings of the National Academy of Sciences, February 2013.

¹⁰ Indeed, while Facebook users who upload photographs own the IP inherent in such photographs, they grant Facebook a 'transferable, sub-licensable, royalty-free, worldwide licence' to use them.

¹¹ Pete Cashmore, CEO of news website Mashable.