

SOCIAL MEDIA AND THE COURTS: SERVICE OF PROCESS

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- 1 Social media has been described by a seemingly endless variety of epithets, ranging from the “*agent of change*” in what has become known as the Arab Spring, to causing the Chief Justice of New South Wales to question whether it represents “*the end of civilisation?*”¹
- 2 Whichever description is most accurate or appealing, its one immutable characteristic is the speed in which social media has positioned itself as a means of communication across social relationships, industry, employment and police investigative work, to name but a few of the more obvious ones. The issue for discussion at this forum is its impact on the law and the judicial system and the extent to which courts should embrace or resist the incursion. There can be no question of boycott.
- 3 Social media and the internet have opened up new domains in which both the civil and criminal law function. In the civil sphere, an obvious example is defamation as comments made on *twitter* and *facebook* have been, and

[♦] I express my thanks to my Researcher, Myles Pulsford, for his extensive research and invaluable assistance in the preparation of this paper.

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¹ TF Bathurst, ‘Social Media: The End of Civilisation’, *Warrane Lecture* (21 November 2012) http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/_assets/supremecourt/m67000113/bathurst211112.pdf accessed 4 June 2014.

will continue to be, the subject of defamation proceedings.² Credit card fraud and identity theft are well known examples of criminal activity using the medium of the internet. Child sexual grooming and enticement and child pornography are other crimes perpetuated by the use of social media by the ugly side of humanity.

- 4 Social media has also presented significant challenges to court processes. In the criminal law, for example, serious questions arise as to the impact of social media on the court's ability to ensure a fair trial of accused persons through issues such as pre-trial publicity³ and juror misconduct.⁴ The same technology has facilitated the effective and efficient conduct of various court processes, including the hearing of bail applications via video link.
- 5 The impact of social media and internet technology has had a significant impact on the administration of justice. The United States Supreme Court and the United Kingdom Supreme Court have official *twitter* accounts, having approximately 72,000 and 83,000 followers respectively. In December 2013, the Supreme Court of New South Wales joined *twitter* and currently has approximately 1,500 followers. The Court has utilised its *twitter* account, not for the purpose of seeking the community's response to its 'core business', that is, the determination of disputes in published reasons, but as a means of informing the community of the work which it undertakes. This is achieved by hyperlinking the tweet to a readable

² See eg *Mickle v Farley* [2013] NSWDC 295; *Cairns v Modi* [2012] EWHC 756 (QB). See also Jennifer Ireland, "Defamation 2.0: Facebook and Twitter" (2012) 17 *Media and Arts Law Review* 53.

³ See, for example, IF Buckley "Pre-trial publicity, social media and the 'fair trial'; Protecting Impartiality in the Queensland Criminal Justice System" (2013) 33(1) *The Queensland Lawyer* 38; PD Shulz, "Trial by Tweet? Social media innovation or degradation? The future and challenge of change for courts" (2012) 22(1) *Journal of Judicial Administration* 29.

⁴ See P Lowe, "Challenges for the Jury System and a Fair Trial in the Twenty-First Century" (2011) *Journal of Commonwealth Criminal Law* 175; R Burd and J Horan "Protecting the right to a fair trial in the 21st century: has trial by jury been caught in the world wide web?" (2012) 36(2) *Criminal Law Journal* 103; E Greene and J O'Leary "Ensuring a Fair Trial for an Accused in a Digital Era: Lessons for Australia" in *The Courts and the Media: Challenges in the Era of Digital and Social Media*, Patrick Keyzer, Jane Johnston and Mark Pearson (eds) (2007, Halstead Press); and J Johnston, P Keyzer, G Holland, M Pearson, S Rodrick and A, Wallace, *Juries and Social Media: A report prepared for the Victorian Department of Justice*, (2013)

summary of the case, of approximately a page in length. The thinking underlying this approach is that the more accessible the work of the Court is and the better informed the community is, the more likely that respect for the institutional role of the Court will be maintained. Such *twitter* accounts represent a fairly rapid adoption of technology by institutions that historically have been slow on the technological uptake. For example, justices of the United States Supreme Court used carbon paper to exchange draft judgments until as late as 1969.⁵

6 Whilst social media provides a unique opportunity to promote the fundamental principle of open justice, there is the concomitant risk that the use of social media by judicial officers and courts will undermine the administration of justice and the public perception thereof. There are examples in jurisdictions across the globe where the extrajudicial conduct of judges, using social media and the internet more broadly, has brought the administration of justice into disrepute. In the United States, for example, one judge was admonished for maintaining sexually explicit material that was publicly searchable.⁶ Another judge was publicly reprimanded for becoming friends, and communicating about a case, with a lawyer in an ongoing trial.⁷

7 The challenges for courts and judges in the use of social media have led to the introduction of judicial guidelines to assist judges navigate the dangers that are likely to arise from indiscriminate use of social media. In August 2012, the *Guide to Judicial Conduct* for the Judiciary of England and Wales was amended to include the following cautionary advice:

<http://www.sclj.gov.au/agdbasev7wr/sclj/documents/pdf/juries%20and%20social%20media%20-%20final.pdf> accessed 4 June 2014.

⁵ RM Mersky and K Percy, "The Supreme Court enters the Internet Age: The Court and technology", 1 June 2000, <http://www.llrx.com/features/supremect.htm> accessed 22 April 2013. See also M Grabowski, "Are Technical Difficulties at the Supreme Court Causing a 'Disregard of Duty'" (2012) 3(1) *Journal of Law, Technology & the Internet* 93.

⁶ *In Re Complaint of Judicial Misconduct*, 575 F.3d 279, 285 (2009).

⁷ Judicial Standards Commission of North Carolina, *Public Reprimand: B. Carlton Terry, Jr District Court Judge Judicial District 22*, Inquiry No 08-234, <http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf> accessed 22 April 2013.

“Judicial office-holders should be acutely aware of the need to conduct themselves, both in and out of court, in such a way as to maintain public confidence in the impartiality of the judiciary. Blogging by members of the judiciary is not prohibited. However, judicial office-holders who blog (or who post comments on other people’s blogs) must not identify themselves as members of the judiciary. They must also avoid expressing opinions which, were it to become known that they hold judicial office, could damage public confidence in their own impartiality or in the judiciary in general.”⁸

8 The matters to which I have referred deserve further consideration. My focus for today’s topic is seemingly more prosaic: the impact of social media on the processes of the court. However, if the processes of the court are not efficient and effective, the impact on the administration of justice is likely to be profound. It has been said, almost since the dawn of time, that justice delayed is justice denied: “*Justitia non est neganda, non differenda*”.⁹ In generations to come, it may well be said that *justice as administered by the courts is irrelevant* unless courts get social media right.

9 In civil courts, and the precise subject of my talk, one of the questions that must be dealt with is whether social media is an appropriate medium for service.

Service of process

Object of service

10 The question of the appropriateness of using social media for service cannot be considered in the abstract; the discussion must be informed by the purpose of service in the court’s processes. 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:

⁸ Judiciary of England and Wales, *Guide to Judicial Conduct*, (March 2013) http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Guidance/judicial_conduct_2013.pdf accessed 4 June 2014.

“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.”¹⁰

- 11 The requirement of notice is the implementation of the jurisprudential notion 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.”¹¹

- 12 Whilst due process does not have a constitutional underpinning in all jurisdictions, courts committed to the rule of law stand on the same platform. Indeed if courts did not give full force and effect to the fundamental requirement of notice they would not be meeting the fundamental right of procedural fairness, which is a cornerstone of the administration of justice to which we adhere.

Procedural fairness: absolute or ‘near enough is good enough’?

- 13 When we, as judges, talk about affording procedural fairness as an aspect of the administration of justice, we do so in a particular context. Courts administer justice as between two or more parties who are usually intractably opposed. The court’s role is therefore not only adjudicative as

⁹ See eg *Anonymous*, 145 ER 66; (1588) Jenk 93.

¹⁰ *Hope v Hope* (1854) 43 E.R. 534, 539-540.

between the parties. Natural justice must be afforded to each individual party. Courts are also increasingly conscious that the timely delivery of an outcome in any particular dispute impacts upon the administration of justice generally. Indeed, there is legislative recognition of this imperative.¹²

- 14 As in any case where there are competing interests, fairness must extend to all interests. In the court context, this requires the development of a system of rules, with a residual discretion as to the application of the rules to a particular circumstance. In other words, what is required is the administration of individual justice within a system of justice.
- 15 Absolute rules are rarely the answer in a judicial system that honours the rule of law in the way just described. Service of process is a paradigm example. Court process usually has to be served personally. However courts have always had to accommodate the circumstance in which the prospective defendant is not amenable to personal service. Accordingly, there is a default system of substituted service. As the passage in *Mullane* quoted above demonstrates, even in the United States where there is a constitutional guarantee of due process, the requirement of actual notice is not absolute.¹³
- 16 When courts make orders for substituted service, they do so without there being any guarantee that the documents will come to the attention of the affected party. However, provided that the party seeking to rely upon substituted service complies with the court's rules and/or orders, service is taken to have been effected. This is the case in respect of personal as well as substituted service, as is apparent from the procedural rules in New South Wales (the jurisdiction in which I am a judicial officer). Personal service may be effected as follows

¹¹ *Mullane v Central Hanover Bank & Trust Co* 339 US 306, 314-315 (1950).

¹² *Civil Procedure Act 2005* (NSW), s 56.

¹³ *Mullane v Central Hanover Bank & Trust Co* 339 US 306, 314-315 (1950).

“Personal service of a document on a person is effected by leaving a copy of the document with the person or, if the person does not accept the copy, by putting the copy down in the person’s presence and telling the person the nature of the document.”¹⁴

17 Although the intention of the rule is that the person served has actual knowledge of the process, there is no rule that requires that the person pick up the document and read it. But at least the court has the benefit of knowing that the document has been given to the person in a way that makes it at least likely that the person will know that some court action is being taken. If a person served personally fails to look at the documents, it is unlikely that they would be able to successfully seek the court’s indulgence to set aside orders that have been made based on that process.

18 In New South Wales, substituted service occurs in the manner prescribed by the Uniform Civil Procedure Rules 2005 (NSW), r 10.14:

“(1) If a document that is required or permitted to be served on a person in connection with any proceedings:
(a) cannot practicably be served on the person, or
(b) cannot practicably be served on the person in the manner provided by law,
the court may, by order, direct that, instead of service, such steps be taken as are specified in the order for the purpose of bringing the document to the notice of the person concerned.

...

(4) Service in accordance with this rule is taken to constitute personal service.”

19 The court’s orders pursuant to r 10.14 and its historical antecedents rely on the notion that constructive notice is sufficient if a person is not otherwise amenable to personal service. A typical order for substituted service, amongst other means of bringing the matter to the party’s attention, requires that the plaintiff effect service by way of

¹⁴ Uniform Civil Procedure Rules 2005 (NSW), r 10.21(1).

advertisements.¹⁵ However, the court would not know whether the person ever read that particular newspaper/ publication, or indeed any newspaper or publication. The consequence may be that a person is fixed with a legal liability of which they have no actual knowledge. However, the permitted departure from a requirement of actual notice is not unlimited and would turn significantly on the requirements of the relevant rules of court. For example, in *Porter v Freudenberg* it was said that the form of substituted service authorised by the Court must be “*one which will in all reasonable probability, if not certainty, be effective to bring knowledge of the writ or the notice of the writ (as the case may be) to the defendant*”.¹⁶

Social media

20 But all of that is so last century. What is and ought be the position in a world where newspapers may not exist for much longer and where people are much more likely to communicate through email, social media networks and mobile phone texts than ‘old-fashioned’ mediums such as postal mail or facsimile.

21 Before looking at that question, it is necessary to understand what is meant when there is a discussion about social media in the court system. When the question in issue is that of service of process, what is being looked at is social media platforms. I say this at the outset to distinguish the topic of this speech from social media defined more broadly as media that is “*created, organised and distributed*” by the users of that medium.¹⁷

Social media as manner of service?

22 Courts in Australia and from around the world have made orders for substituted service through social media platforms, particularly *facebook*.

¹⁵ JP Hamilton, G Lindsay, M Moraham, C Webster, *New South Wales Civil Procedure Handbook 2013* (2013, Lawbook Co), 357.

¹⁶ *Porter v Freudenberg* (1915) 1 KB 857, 888.

Before examining the various cases, I caution that because orders for substituted service are made as interlocutory orders and are rarely the subject of reported judgments,¹⁸ the extent to which this has been occurring is difficult to identify. However, there is a deal of commentary, including from the traditional media, that provides useful resource material.

Australia

- 23 In an “*Australian and possibly world first*”,¹⁹ Master Harper, of the Australian Capital Territory Supreme Court, gave an order for substituted service via social media in *MKM Capital Pty Ltd v Corbo & Poyser*.²⁰ The case concerned a mortgagee who obtained a default judgment and writs of possession over the land registered in the name of the defaulting mortgagor.²¹ Under the rules of court in that jurisdiction, an order for substituted service could be made when the court was satisfied that it was “*impracticable*” for the document to be served in the authorised manner and an alternative way was “*reasonably likely to bring the document to the attention of the person to be served*”.²²
- 24 The first limb of this rule was satisfied by evidence of the failed attempts to effect personal service. In respect of the second limb, MKM Capital argued that service via *facebook* was reasonably likely to bring the document to the attention of the defaulting mortgagors. MKM Capital provided evidence that the *facebook* profiles it wished to serve were those of the defendants because MKM had been able to cross-reference the

¹⁷ TF Bathurst, ‘Social Media: The End of Civilisation’, *Warrane Lecture* (21 November 2012) http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/_assets/supremecourt/m67000113/bathurst211112.pdf accessed 4 June 2014.

¹⁸ College of Law Queensland Practice Papers, *Practice Paper CL403: Filing and Service of Court Documents*, G. Coveney (ed), [CL403.85].

¹⁹ R Norrie “Facebook used to serve ACT Supreme Court judgment”, *news.com.au* (online), 16 December 2008 <http://www.news.com.au/news/long-arm-of-the-law-on-facebook/story-fna7dq6e-111118330365> 4 June 2014.

²⁰ *MKM Capital Pty Ltd v Corbo & Poyser* (Supreme Court (ACT), 12 December 2008, unrep).

²¹ P Mallam and J Cheeseman, “Are you being served? Social networking sites used to serve court documents” (2009) 12(4) *Internet Law Bulletin* 61, 61.

²² Court Procedures Rules 2006 (ACT), r 6460(3).

dates of birth and the email address associated with the accounts with the defendants' details and because the two *facebook* profiles were friends.²³

25 Master Harper accepted this evidence and ordered that a copy of the court papers be sent to the defendants' email address and that there be sent a "*private message via computer to the Facebook page of the [defendants] informing the defendants of the entry and terms of the default judgment.*"²⁴

26 The requirement that the message to the defendants' *facebook* page be a private one raises another issue of importance: that of privacy. There is no common law tort of breach of privacy and there has not yet been a legislatively created cause of action. There is, however, legislation in most countries dealing with rights of privacy. An open message on a *facebook* page in terms: "*default on your mortgage, bailiffs arriving Saturday, check your emails*" could be problematic for a variety of reasons: the information provided to the court could be wrong; the mortgagor may have been out of the jurisdiction; the mortgagor's bank may not have been making the monthly payments through a fault in the bank's systems. These possibilities are not so fantastical as to be out of the norm.

27 In *Byrne v Howard* a Federal Magistrate made an order for substituted service "*by way of electronic means*", namely, through the defendant's *facebook* page.²⁵ It was held that the defendant had been properly served in circumstances where an affidavit was provided to the effect that the defendant was a regular *facebook* user, the photograph on the *facebook* profile was identified as the defendant, there was an electronic receipt of delivery to the defendant's *facebook* and the defendant took down his *facebook* page following the attempted serve him on *facebook*.²⁶

²³ P Mallam and J Cheeseman, "Are you being served? Social networking sites used to serve court documents" (2009) 12(4) *Internet Law Bulletin* 61, 61.

²⁴ *Ibid.*

²⁵ *Byrne v Howard* [2010] FMCAfam 509; 239 FLR 62, [18].

²⁶ *Ibid.*, [19]-[22].

28 In *Mothership Music Pty Ltd v Ayre* in the District Court of New South Wales, Gibson DCJ made an order for substituted service on the American rapper Flo Rider through *facebook*.²⁷ Gibson DCJ appeared to rely on earlier Australian precedents (*MKM Capital; Byrne v Howard*) and the fact that:

“... [s]ervice by email is not controversial, and ... orders for orders for substituted service via email were made in *Specsavers Pty Ltd v Buyinvite Pty Ltd* [2012] FCA 230, *Bellingen Shire Council v Lamir-Pike* [2010] NSWLEC 195 and *Re Franck ex parte Asteron Life Ltd* (2009) 19 PRNZ 446 (noting an example of additional service on Facebook in *Axe Market Gardens v Craig Axe* (CIV: 2008-485-2676, High Court Wellington, 16 March 2009, Gendall A J), at [9]).”²⁸

29 Gibson DCJ’s judgment was, however, successfully appealed to the New South Wales Court of Appeal: *Flo Rida v Mothership Music Pty Ltd*.²⁹ Macfarlan JA, with whom Ward and Gleeson JJA agreed, identified that the legislature had not granted the District Court jurisdiction based on personal service of its process outside Australia, and had “*carefully confined*” the basis for the Supreme Court’s jurisdiction.³⁰ His Honour held it would not be a “*proper use of the power conferred by r 10.14*” to use an order for substituted service to overcome this limitation on jurisdiction.³¹ In circumstances where the evidence suggested the defendant was leaving Australia on the day after the order was made or shortly thereafter, the Court allowed the appeal on the ground that the order for substituted service ought not to have been made in the absence of evidence that the means of substituted service sanctioned by the order were likely to bring service of the statement of claim to the defendant’s attention whilst he was in Australia.³² Macfarlan JA observed:

“In the absence of that confidence, the effect of the order was tantamount to ordering substituted service on a defendant who was overseas and not lawfully able to be personally served

²⁷ *Mothership Music Pty Ltd v Ayre* [2012] NSWDC 42; 14 DCLR(NSW) 118, [14].

²⁸ *Ibid*, [10]-[13].

²⁹ *Flo Rida v Mothership Music Pty Ltd* [2013] NSWCA 268.

³⁰ *Ibid*, [31].

³¹ *Ibid*.

³² *Ibid* [37].

overseas. As I have indicated, it is not permissible to make an order for substituted service in those circumstances.”³³

30 Macfarlan JA went on to comment that the evidence before the primary judge was an insufficient basis for making an order for substituted service through *facebook*. That evidence was by way of an affidavit of the plaintiff’s solicitors that she had access to Flo Rida’s *facebook* page which had been accessed from a link appearing on the website ‘www.officialflo.com’ and that she was able to post content on the *facebook* wall and send private messages.³⁴ The Court of Appeal held that that “*evidence did not establish, other than by mere assertion, that the Facebook page was in fact that of Flo Rida and did not prove that a posting on it was likely to come to his attention in a timely fashion: Chappell v Coyle (1985) 2 NSWLR 73 at 77*”.³⁵ The Court of Appeal did not, however, expressly reject social media as an appropriate method of substituted service.³⁶

31 The concerns of Macfarlan JA echoed earlier observations of Ryrie J in *Citigroup Pty Ltd v Weerakoon*,³⁷ in which an application was made for substituted service through *facebook*. Ryrie J gave an order for substituted service but declined to order service through *facebook*. Ryrie J was not satisfied that the method of service would, “*in all reasonable probability, if not certainty,*” be effective in bringing notice of the proceedings to the defendant’s attention.³⁸ Ryrie J held:

“I am not so satisfied in light of looking at the – the uncertainty of Facebook pages, the fact that anyone can create an identity that could mimic the true person’s identity and indeed some of the information that is provided there does not show me with any real force that the person who created the Facebook page might indeed be the defendant, even though practically speaking it may well indeed be the person who is the defendant.”³⁹

³³ *Ibid.*

³⁴ *Ibid* [11].

³⁵ *Ibid* [38].

³⁶ *Ibid.*

³⁷ *Citigroup Pty Ltd v Weerakoon* [2008] QDC 174.

³⁸ *Ibid.*

International Jurisdictions

- 32 Orders for substituted service through social media platforms such as *facebook* have been made throughout a number of international jurisdiction, including New Zealand, the United Kingdom, Canada, the United States and South Africa.
- 33 In the High Court of New Zealand, Gendall AJ in *Axe Market Gardens Ltd v Axe* made an order for substituted service to be effected by email and that notice that the documents had been served to that email address be sent “*to the defendant on his Facebook site, which I understand is known to the plaintiff.*”⁴⁰
- 34 In the United Kingdom, a single judge of the High Court in *Blaney v Persons Unknown* (October 2009, unreported) is reported to have ordered that an injunction be served via *twitter* in circumstances where the anonymous defendant was impersonating the plaintiff on that particular social media platform.⁴¹ The message to the defendant was reported to have “*included a link to a website on which the injunction order was displayed.*”⁴² More recently, an order for substituted service through *facebook* was made by Teare J in *AKO Capital LLP v TFS Derivatives* (unreported). Justice Teare is reported as having commented that “[*i*]f a claimant can identify the defendant from his or her photograph and establish that the Facebook account is active, this is a perfectly sensible way of serving a claim and giving the defendant the opportunity to respond.”⁴³

³⁹ *Ibid.*

⁴⁰ *Axe Market Gardens v Axe* (High Court (New Zealand), Gendall AJ, 16 March 2009, CIV: 2008-485-2676), [3].

⁴¹ M Jones, “UK court orders writ to be served via Twitter”, *Reuters* (online), 1 October 2009 <http://www.reuters.com/article/2009/10/01/us-britain-twitter-life-tech-idUSTRE5904HC20091001> accessed 20 April 2013.

⁴² *Burke v. John Doe*, 2013 BCSC 964, [16].

⁴³ A Herring, “*AKO Capital LLP & another v. TFS Derivatives & others*” (2012) 12(2) *E-Commerce Law Reports* 4, 5.

35 A number of Canadian courts, including in Alberta and Quebec, have also made orders for substituted service through facebook.⁴⁴ *Burke v John Doe*, a decision of the British Columbia Supreme Court, concerned an application for substituted service in a defamation claim regarding statements made on Internet message boards. In the context of the identity and residential addresses of the defendants not being known, the plaintiff sought an order for substituted service.⁴⁵ The proposed method of service was that the law firm acting for the plaintiff would send a private message to the defendants' message board accounts informing them that they were named as a defendant and how to access that claim and a copy of the order for substituted service which was to be located on the law firm's website.⁴⁶ After satisfying herself that personal service was impracticable,⁴⁷ Master MacNaughton found that it was "*reasonably likely, or probable, that notice of the proceedings*" would come to the defendants' attention by the proposed method.⁴⁸ Master MacNaughton placed weight on the affidavit of the plaintiff's solicitor who had provided evidence that the defendants "*regularly log into*" their message board accounts and that the message boards provided a private messaging facility.⁴⁹ Master MacNaughton made the order for substituted service but amended the form of the message to include the contact details of a solicitor at the firm from whom the defendants could obtain the notice of claim and a copy of the order and further ordered that a similar notice be published in a national newspaper.⁵⁰

36 The position in the United States has been mixed. Justice Burke of Hennepin County Minnesota is reported to have ordered substituted service of divorce documents through "*Facebook, Myspace or any other*

⁴⁴ *1280055 Alberta Ltd. v. Zaghloul*, 2012 ABQB 10, [18]; *Knott Estate v. Sutherland*, [2009] A.J. No. 1539 (Alta. Q.B.); *Boivin v Scott* [2011] QCCQ 10324, [10], [16].

⁴⁵ *Burke v. John Doe*, 2013 BCSC 964, [1], [7].

⁴⁶ *Ibid*, [2].

⁴⁷ *Ibid*, [17]-[20].

⁴⁸ *Ibid*, [21].

⁴⁹ *Ibid*, [10]-[11], [21].

⁵⁰ *Ibid*, [22].

social networking site”.⁵¹ He reportedly said: “[t]he traditional way to get service by publication is antiquated and is prohibitively expensive ... Service is critical, and technology provides a cheaper and hopefully more effective way of finding respondent”.⁵²

37 United States Federal Courts have not been so enthusiastic about service by *facebook*. In *Fortunato v Chase Bank USA*, the United States District Court for the Southern District of New York, which pursuant to the Federal Rules of Civil Procedure, r 4(e) was applying the law of New York, refused an application by the defendant to serve a party relevantly by *facebook* and email whom it had been given leave to implead.⁵³ Judge Keenan noted the need to keep in mind, in fashioning an alternative method of service, that:

“[c]onstitutional due process requires that service of process be “reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Philip Morris USA Inc. v. Veles Ltd.*, No. 06 Civ. 2988, 2007 WL 725412, at *2 (S.D.N.Y. March. 12, 2007) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)).”⁵⁴

38 Judge Keenan rejected the submission that service by private *facebook* message and email satisfied this requirement. His Honour observed that service through *facebook* was “*unorthodox to say the least, and this Court is unaware of any other court that has authorized such service.*”⁵⁵ His Honour considered that the use of email as a method of service was only approved by the Court where the applicant had provided “*some facts indicating that the person to be served would be likely to receive the summons and complaint at the given email address*”⁵⁶ (citation omitted).

⁵¹ SF Ward, “Our Pleasure to Serve You: More Lawyers Look to Social Networking Sites to Notify Defendants”, *American Bar Association Journal* (online), 1 October 2011 http://www.abajournal.com/magazine/article/our_pleasure_to_serve_lawyers_social_networking_sites_notify_defendants/ 20 April 2013, [4].

⁵² *Ibid.*, [6].

⁵³ *Fortunato v Chase Bank USA*, 2012 WL 208950, 2 (S.D.N.Y.).

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

Judge Keenan found that the applicant had not provided any evidence that “*would give the Court a degree of certainty*” that the *facebook* profile or the email address was used or maintained by the person implead.⁵⁷ His Honour then stated:

“Indeed, the Court’s understanding is that anyone can make a Facebook profile using real, fake, or incomplete information, and thus, there is no way for the Court to confirm whether the [person] the investigator found is in fact the third-party Defendant to be served.”⁵⁸

39 In a different context, the same court in *Federal Trade Commission v PCCARE247 Inc* came to a slightly different view in an application to serve defendants, who were located in India, by email and *facebook*.⁵⁹ The application must be understood in the context that under the Federal Rule of Civil Procedure, r 4(f)(3), the Court was entitled to fashion a means of service on an individual in a foreign country “*so long as the ordered means of service (1) is not prohibited by international agreement; and (2) comports with constitutional notions of due process.*’ *SEC v. Anticevic, No. 05 Civ. 6991(KMW), 2009 WL 361739, at *3 (S.D.N.Y. Feb. 13, 2009) (citations omitted).*”⁶⁰ After finding that service by email and *facebook* were not prohibited by international agreement,⁶¹ Judge Engelmayer considered whether the proposed method complied with due process. His Honour found that service by email alone “*would comport with due process*” and observed that if *facebook* was the only method proposed to serve the defendants, “*a substantial question would arise whether that service comports with due process.*”⁶² After noting the concerns articulated by Judge Keenan in *Fortunato*, his Honour distinguished *Fortunato* because the applicant “*has set forth facts that supply ample reason for confidence that the Facebook accounts identified are actually operated by defendants.*”⁶³ This evidence related to the existence of

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ *Federal Trade Commission v PCCARE247 Inc.*, 2013 WL 841037, 2 (S.D.N.Y.).

⁶⁰ Ibid.

⁶¹ Ibid, 3-4.

⁶² Ibid, 5

⁶³ Ibid.

known email addresses and job titles on some of the *facebook* profiles and the fact that a number of the defendants were friends.⁶⁴ Although Judge Engelmayer only authorised the use of *facebook* as a “*backstop*” to the service via email and did not decide whether it did comport with due process, he observed:

“... history teaches that, as technology advances and modes of communication progress, courts must be open to considering requests to authorize service via technological means of then-recent vintage, rather than dismissing them out of hand as novel” (citations omitted).⁶⁵

- 40 In *Joe Hand Promotions, Inc., v Mario Carrette, et al* Magistrate Judge O’Hara, although noting his preference for “*technological advancements in civil litigation that lower costs and improve efficiency*”, also refused an application for substituted service through *facebook*.⁶⁶ His Honour held that “[g]iven the present state of the record, the court cannot conclude that the subject Facebook profile is current, active, or authentic”.⁶⁷
- 41 South Africa has also taken the step. In *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens*, Steyn J granted an order for substituted service on the defendant’s *facebook* profile.⁶⁸ Steyn J, at [6], disagreed that substituted service was “*more symbolic than actual service*” and held that the “*aim of this type of service remains to inform the party concerned of a particular notice*.”⁶⁹ The order for substituted service was made in circumstances where the defendant’s *facebook* profiles did not contain any contact details (that is, telephone numbers or email addresses), but the court was able to satisfy itself the profile was that of the defendant through photo identification.⁷⁰ Relevantly for present purposes, Steyn J concluded with the following statement:

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Joe Hand Promotions, Inc., v Mario Carrette, et al* (United States District Court (Kansas), Magistrate Judge O’Hara, 9 July 2013, 12-2633-CM) https://ecf.ksd.uscourts.gov/cgi-bin/show_public_doc?2012cv2633-13 4 June 2014, [1].

⁶⁷ *Ibid.*, [11].

⁶⁸ *Machinery (Pty) Ltd v Pieter Odendaal Kitchens* [2012] ZAKZDHC 44; (5) SA 604 (KZD), [2].

⁶⁹ *Ibid.*, [6].

⁷⁰ *Ibid.*, [10]-[12].

“[T]his application should be understood in [its] context ... Each case will have to be decided on its own merits and on the type of document that needs to be served on the party concerned. This application has reminded me that even courts need to take cognisance of social media platforms, albeit to a limited extent, for understanding and considering applications such as the present.”⁷¹

- 42 Interestingly, Steyn J required that he be satisfied that substituted service through social media would not violate the defendant’s right to privacy. Steyn J concluded that the defendant’s right to privacy would not be because the “[t]he message would be a personal message to the Defendant in this instance and no member of the public, including those people listed as his friends, would have access to it”.⁷²

Consideration

- 43 It is necessary at this stage to return to where this paper began, namely, the purpose of the requirement that court documents be brought to the attention of those who have been made subject to the court’s processes.
- 44 There are a number of factors that commend the use of social media as a method of substituted service. The most important appears to me to be the greater potential, when compared to the traditional approaches, for this method of substituted service to actually bring the matter to the attention of the person who is sought to be served. As has been observed, service through social media whilst “*not akin to personal or domiciliary service [is] more likely to provide actual, as opposed to constructive, notice of a proceeding than service by [newspaper] publication*”.⁷³ Indeed, *facebook* has a function that allows the sender of message to ascertain whether the recipient has opened the message. Other benefits include cost, timeliness and the ability to protect the defendant’s privacy.

⁷¹ Ibid, [14].

⁷² Ibid, [13].

⁷³ Eric Michael Liddick, “You’ve been served! LOL’: Is service through Facebook really possible?” (2009) 56(5) *Louisiana Bar Journal* 338, 340.

- 45 Should a court, therefore, be confident that court processes, if served by *facebook*, have a high degree of probability of giving notice to the intended recipient? The reasons why a court should, at the least, be cautious in making an order for substituted service through *facebook*, include:
- (1) Uncertainty as to whether the profile is that of the defendant;
 - (2) Uncertainty as to the frequency of the defendant's use of the platform to ensure that the matter is "*likely to come to his attention in a timely fashion*";⁷⁴ and
 - (3) Uncertainty as to the location of the defendant and accordingly whether the order is consistent with the jurisdiction of the court making the order.
- 46 In regard to the first concern, the caselaw suggests that a court will only consider ordering service through social media when it is able to satisfy itself that the social media profile of the defendant is that of the defendant in the proceeding, by, for example, cross checking information from the *facebook* profile with known facts about the defendant. Even that is not a foolproof method of resolving identity concerns, but it may allow the court to satisfy itself under the relevant law or rules sufficiently that the defendant will receive notice.
- 47 One functionality that *facebook* does not have is an indicator of frequency of use and accordingly it may not be obvious whether service via *facebook* will ensure that the defendant will obtain timely notice. Some clue may be derived from the activity on the wall of the profile. However, if a person 'stays behind the wall', it is impossible to know whether this will be an effective means of service. There would appear to be a need for the court to satisfy itself that there is evidence that the *facebook* profile is currently in use by the defendant.

⁷⁴ *Flo Rida v Mothership Music Pty Ltd* [2013] NSWCA 268, [38].

48 Finally, as the decision of the New South Wales Court of Appeal in *Flo Rida v Mothership Music Pty* demonstrates, the jurisdiction of courts may be limited by the location of where the defendant is served. Unlike more traditional methods of substituted service, there is no guarantee as to where the defendant will receive notice of proceedings if an order for substituted service is made through *facebook* and, as Macfarlan JA noted, it would be odd if an order for substituted service within jurisdiction could be used to get around the often-tighter restrictions for international service.⁷⁵ In considering the appropriateness of allowing social media to be used to serve documents out of the jurisdiction, a Consultation Paper released by the Singapore Supreme Court noted the concern that it may be a breach of foreign law, treaty and/or international comity because “[r]esearch of the position in other Commonwealth jurisdictions has shown that service by social media is not a generally permitted form of personal service overseas although it has been allowed for substituted service in some countries.”⁷⁶ Arguably, however, service through *facebook* is likely to be more effective than service by email because the activity on the *wall* may provide an indication as to whether the defendant is within the jurisdiction of the court.

49 It must follow that as these matters indicate deficiencies in the platform, for the court to have confidence that court process will come to a person’s attention, there should be evidence sufficient to satisfy the court that service via a social media platform is appropriate in the particular circumstances of the case.

50 The Consultation Paper released by the Singapore Supreme Court on the Use and Impact of Social Media in Litigation recommends “*substituted service as the most appropriate manner of engaging social media but does not preclude the use of social media for personal service or ordinary*

⁷⁵ *Ibid*, [31].

⁷⁶ Supreme Court of Singapore, *Use and Impact of Social Media in Litigation: Consultation Paper* (August 2010), [3.20].

service in certain situations".⁷⁷ In considering the risks associated with allowing channels of instantaneous communication available on social media as a manner of personal service, the paper recognised, amongst other issues, the fact that such a development may deny defendants actual notice, "[trivialise] a fundamental step of proceedings" and "[p]otentially [open] the floodgates to a slew of setting aside applications based on irregular service".⁷⁸

51 I stated at the beginning that it is too late for a boycott of the use of social media for the purpose of effective court processes such as service. I maintain that view. Social media platforms have arrived and it would be quite foolish for courts not to understand them and use them. No means of communication is perfect or guaranteed to get the message to the recipient. And courts are used to controlling their own processes and so are in a position to implement appropriate rules and procedures to ensure the effective use of social media within the Court system.

52 However, I am not a proponent of such service replacing personal service. The courts play a fundamental and governmental institutional role. If the court's processes were reduced to a checklist of *facebook* criteria, the importance of the court's functions would, I believe, be eroded. Courts have great powers including the power to imprison, to fine, to bankrupt and to eject. These powers are far too important to entrust for their effectiveness to a web platform over which the court ultimately has no control. And given that *facebook* communications compete for priority amongst party invitations, advertisements and status updates, the use of social media as a form of personal service would potentially give the courts the same status, that is, a piece of information competing with other more enticing matters. The solemnity of the court, as reflected in its processes, is not to be underestimated in the maintenance of the court's institutional integrity, including its position as the guardian of the rule of law.

⁷⁷ Ibid, [3.2].

⁷⁸ Ibid, [3.7].