AB 3172 (LOWENTHAL), THE CALIFORNIA SOCIAL MEDIA PLATFORM LIABILITY BILL, IS ABOUT NEGLIGENCE LAW, NOT SECTION 230 OR THE FIRST AMENDMENT

Under existing California law, no one is legally permitted through their carelessness to harm individuals without paying for the harm they cause. More specifically, under longstanding state law, businesses cannot act negligently in ways that hurt their customers - including children and teenagers - without having to pay damages for the harm their own negligence caused. AB 3172, authored by Assemblymember Josh Lowenthal (D-69th District), does not change any of this. It does not expand anybody’s right to sue in court for claimed injuries. It does nothing to make it easier for harmed individuals to win a case.

This bill comes against a backdrop of social media companies stubbornly and brazenly continuing to harm an entire generation of children, resisting any attempts to self-regulate or to have responsible regulations imposed on them even while they acknowledge the harms they are causing, and to make enormous profits from the practices that harm minors. AB 3172 simply seeks to prompt social media platforms to operate with the same care as every other business by making it clear there will be significant financial consequences for their negligence. The bill does this solely by adding specific statutory damages to what a company has to pay when they harm a minor – again, without changing a single thing about what a child or teenager must prove in court to be entitled to an award.

What are the Claims Being Made By Social Media Companies? Social media companies argue that legislative efforts to hold them responsible for protecting children and teens are barred by Section 230 of the federal Communications Decency Act, 47 U.S.C. § 230 (Section 230) and the First Amendment free speech provisions of the U.S. and California constitutions. They’re wrong.

AB 3172 Does Not Create nor Purport to Create Any New Liability for Social Media Companies That Does Not Already Exist. This bill seeks to motivate social media companies to be more careful when it comes to not harming children. It does this not by creating a new liability or changing how that current liability is adjudicated. AB 3172 only adds the availability of statutory damages when social media companies violate their already existing ordinary duty of ordinary care as provided by existing California negligence law, Civil Code section 1714 (Section 1714). Specifically, AB 3172 amends Section 1714 by adding statutory damages against companies that are found in court to be liable under current law for negligently causing harm to children under the age of 18. Under the bill, if a company is proven to have failed to exercise its already established duty of operating with ordinary care, the company becomes financially liable for a set amount of $5,000 per violation, up to a maximum penalty of $1M per child, or three times the amount of the child’s actual damages, whichever is applicable. This financial liability aims to incentivize platforms to proactively safeguard children against potential harm by changing how they operate their platforms.

A Negligence Theory of Liability (Under Section 1714) Can Survive Section 230 and First Amendment Challenges. While it is true that under Section 230, social media companies may be immune from liability for harms caused entirely by third-party content, two California judges have recently allowed causes of
action under existing California Section 1714, to proceed, turning aside platforms’ arguments that any harm they negligently cause to children through their platforms is preempted by Section 230.

- In one case, Social Media Cases,1 Judge Carolyn B. Kuhl wrote that Section 1714 “is the general framework for defining duty in California.” She went further to write that, Section 1714 “establishes the default rule that each person has a duty ‘to exercise, in his or her activities, reasonable care for the safety of others.”

- In another recent case, Neville v. Snap, Inc.2 Judge Lawrence P. Riff wrote that Section 1714 “establishes a general duty for ‘everyone’ to exercise ordinary care and skill in their property or person. Failure to do so imposes responsibility for resulting injury except where the injured person ... brought the injury upon himself or herself.”

Both courts concluded that, insofar as the plaintiffs sought to hold the social media companies liable for the companies’ negligence pursuant to Section 1714 based on their own invented features, tools, and design choices (as opposed to the companies’ role as publishers of third-party content), the claims are not barred by Section 230. Additionally, in Social Media Cases, Judge Kuhl determined that the negligence cause of action, pursuant to Section 1714, was not barred by the First Amendment, when the Plaintiff’s claims of harm were based on the design features of the platforms - and not based on the specific content3.

These two decisions simply concluded that Section 230 and the First Amendment do not provide social media companies with unprecedented blanket immunity from being held responsible for their own lack of ordinary care – just like every other business and individual is responsible. Instead, the courts found that whether such claims are barred will turn on the specific theories of liability and on a case-by-case basis - based on how the platforms actually operate as shown in discovery, as opposed to how they say they operate in court briefs.

Ultimately, liability will depend on whether the harms to children were caused by the social media companies’ unilateral conduct (then the claims would not be barred), or third party content of users (then the claims may be barred). But it will be left to the courts to decide. This is the law today. AB 3172 changes none of this. What it does do, in response to the damage knowingly and admittedly being done to an entire generation of children by just a handful of companies that are earning enormous profits off of children and teen users, is to use financial incentives to prompt these few companies to be more careful.

Learn more at CommonSense.org.

1 Social Media Cases, Judicial Council Coordination Case No. JCCP 5355 (Los Angeles Superior Court), October 2023.
2 Neville v. Snap, Inc., Case No. 22STCV33500 (Los Angeles Superior Court), January 2024.
3 In Neville v. Snap, Inc., the defendant did not seek dismissal based on the First Amendment, so this issue was not addressed.