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Social Media

Implications for liability insurance

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A talk of two halves

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- Two elements of social media to explore:
  1. The US Litigation against major social media companies
     - The different strands of that litigation
     - The factual and legal basis of the allegations being pursued against the main social media platforms
     - Implications for litigation and potential liability in England and Wales
  2. Other aspects of the use of social media which may give rise to liability
     - Liability for statements (or misstatements) about products or services
     - Liability for rogue employees
     - Liability for inadvertent data breaches

The US Litigation

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- Two different branches of litigation

1. Claims by private individuals – in particular the trial in California earlier this year: Jury award in March 2026

2. Claims by several states and public bodies brought in State and the federal Courts

- Will consider both, but it is the former which is of greatest interest in terms of informing potential liabilities in England and Wales

The California Litigation: KGM v Meta et al

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- A “bellweather” trial brought by a 20 year old known as Kaley
- Defendants Meta (Instagram, Facebook, Whatsapp) and Google (YouTube)
- Awarded $6m in damages by a jury ($3m compensatory, $3m punitive – split 70/30 between Meta and Google)
- Meta and Google have filed notices of appeal
- Wider context:
  - The “Master Complaint” also makes allegations against Snap (Snapchat) and Bytedance (TikTok)
  - Broadly analogous to a Generic Particulars of Claim in English litigation
  - Can expect further trials of individual cases, perhaps involving different nuances to the KGM action

The California Litigation: detail of the allegations

- The factual allegations:
  - Kayley began using:
    - YouTube when she was 6
    - Instagram at 8
    - TikTok at 10
    - Snapchat at 11
  - Alleged that she had become compulsively engaged with the apps/sites
  - Features of the sites were designed to broaden her engagement
    - “Infinite Scrolling”
    - Alerts and push notifications
    - Targeted content (including adverts)
  - Contended that as a result she had developed anxiety, depression and various psychiatric injuries including body dysmorphia.

The California Litigation: the legal framework

- The allegations in the Master Complaint:
  - Each Defendant owed the Plaintiff a general duty of care
  - Each Defendant had a special relationship with the Plaintiff because she was a child, and the Defendants had specifically marketed their products at children
  - Both as a facet of strict liability and negligence, each platform was “defectively designed” to addict minors and young adults such that they were unsafe for use, and failed to implement safety measures to counter addiction
  - There was a failure to warn of:
    - The physical and mental health risks posed by the different platforms
    - The signs of social media addiction
    - That usage data was tracked, allowing advertisers to profile and target the Plaintiff
    - The risk of sexual exploitation through the platforms
    - How the platforms should be used safely
  - General allegation in negligence of a failure to take reasonable care to design the platforms in a way which avoided injury (including addition, compulsive use, sleep deprivation, depression)
  - Negligent failure to implement effective age verification

The California Litigation: the legal framework

- The allegations (continued):
  - Violation of Californian consumer protection laws by engaging in unfair practices (representing that the platforms had characteristics which they do not have, misrepresentation and fraud)
  - Negligent concealment and misrepresentation (Meta only)
  - Breaches of various statutory provisions in relation to sexual content
- Focus of the *KGM v Meta* action itself was on the allegations in negligence and addictive design

The California Litigation: the outcome

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- Jury award – no reasoned judgment
- Jury was not unanimous (10-2)
- Difficult to obtain jury questionnaire, but reportedly:
  - Was Meta/YouTube negligent in the design or operation of Instagram/YouTube? *Yes*
  - Did Meta/YouTube know or should it reasonably have known that the design or operation of Instagram/YouTube was dangerous or was likely to be dangerous when used by a minor in a reasonably foreseeable manner? *Yes*
  - Was Meta/YouTube's negligence a substantial factor in causing harm to KGM? *Yes*
  - Did Meta/YouTube know or should it reasonably have known that users would not realise the danger? *Yes*
  - Did Meta/YouTube fail to adequately warn of the danger? *Yes*
  - Would a reasonable platform designer or operator under the same or similar circumstances have warned of the danger or instructed on the safe use of the platform? *Yes*
  - Was Meta/YouTube's failure to adequately warn or instruct a substantial factor in causing harm to KGM? *Yes*

The California Litigation: can it be transposed to England?

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- Law firms have started advertising for claimants to join these claims.
- England and Wales a world-renowned centre for Group Litigation:
  - Established structures, tested in a range of cases.
  - Fair and competent judiciary.
  - (Reasonably) rapid judicial process.
  - Favourable litigation funding regime.
- Litigation underway in other common law jurisdictions, such as Australia.
- Clear prospect that claims may be brought here.

The California Litigation: can it be transposed to England?

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- Types of factual allegations to be anticipated
- Potential bases for claims:
  - Negligence
    - Very flexible field of law.
    - Allegations of failure to warn will be familiar to anyone involved in claims arising out of negligence liability.
    - Precedent for claims based on addiction: *Calvert v William Hill Credit Ltd* [2008] EWCA Civ 1427
  - Consumer Protection Act 1987?
  - Exemplary damages

The other US Litigation involving social media

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- The second strand of the litigation in the US concerns claims by various public bodies against social media platforms
- These tend to be framed in public nuisance or for breaching legislation concerning unfair practices
- Two central examples:
  - $375m award by a Court in New Mexico in March 2026 against Meta in response to na action brought by the state of New Mexico for violating New Mexico's Unfair Practices Act
  - Claim against Meta by 48 States (plus DC) and three US territories for causing harm to children through their use of Instagram and Facebook. Resulted in widely reported settlement of £18bn, together with various steps to limit children’s access to these platforms
- More difficult to see how these types of actions would be likely to be brought in England and Wales

Worldwide social media litigation: what next

- The appeal in *KGM v Meta* and determination of further ‘bellweather’ trials.

- A shift in focus to other platforms:
  - Video games?
  - Dating apps?
  - Sites operating on a subscription model?

Liability for Social Media: wider issues for insurers

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- Typical forms of social media use by businesses:
  - Marketing
  - Customer Services
  - Rogue use by employees
- Principal implications on liability insurance:
  - Liability for (negligent) misstatements
  - Liability for defamatory statements
  - Liability for data breaches

Liability for Social Media: liability for misstatements

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- Negligent <u>advice</u> given on social media
  - Advice to a customer
  - Advice given informally to a wider class of people

- Advice to a customer likely to be governed by well-established principles in relation to liability for advice given in person, over the telephone or by email:
  - May be framed as an aspect of breach of a contract
  - May be framed as an allegation in negligence
  - Context likely to be critical in ascertaining whether the advice was given in such a way that it could be foreseen that it would be relied upon

Liability for Social Media: liability for misstatements

- Advice given to a wider class of people:
  - For example:
    - Advice given in a video posted on TikTok
    - Advice given in a post on X which is seen by a wide class of people
  - Untested waters.
  - The fact that advice is given freely does not preclude a claim in tort: *Lejonvarn v Burgess* [2017] EWCA 254.
  - But may be difficulties in establishing a duty of care to a wide class of people: *McLean v Thornhill* [2023] EWCA Civ 466.
  - The context of the advice and any disclaimer is likely to be relevant.

Liability for Social Media: liability for misstatements

- Marketing materials or information about a product or service
- Scenario:
  - Marketing material promulgated via adverts on Facebook/YouTube
  - Or via questions and answers by a customer services representative (or AI Bot) on Facebook or X
  - Or perhaps via an influencer endorsed or funded by the business.
- To what extent can such statements give rise to a liability?
- Contract
  - Well-established that representations can be incorporated into a contract
  - They may become a specific term of a contract
  - Advertising, marketing and pre-contractual statements may go to assessing whether a product is of satisfactory quality (or fit for purpose) under the various statutorily implied terms (Sale of Goods Act 1972; Supply of Goods and Services Act ; Consumer Rights Act 2015).
- A *mis*representation may provide a basis for seeking rescission, damages or specific performance

Liability for Social Media: liability for misstatements

- Consumer Protection Act 1987
  - S.3 – liability for defective products, where the standard of safety is not such as persons generally are entitled to expect
  - S.3(2) in assessing what persons generally are entitled to expect, the Court is entitled to take into account *"the manner in which, and purposes for which, the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product"*
  - Arguably includes:
    - Warnings and Instructions for use by producers
    - But also express statements by producers as to the suitability of a product for a particular purpose
    - Or express/implied statements about the characteristics of a product – from material characteristics to longevity.

Liability for Social Media: the rogue employee

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- Employees will have access to social media both as part of, and ancillary to, their jobs
- Risk of a rogue employee:
  - Posting something offensive or defamatory on a business's social media accounts
  - Posting something similar in their own right on their own social media account
- First step: is the content defamatory
  - No straightforward test: but in general terms, would the words tend to lower the claimant in the estimation of right-thinking members of society generally
  - Social media may introduce different considerations
    - Lord McAlpine of West Green v Bercow [2013] EWHC 1342 (QB): an otherwise innocuous question on X became defamatory where readers were aware of particular background facts
    - Stocker v Stocker [2019] UKSC 17: a Facebook post regarding the conduct of an ex-partner was alleged to be defamatory, but the Supreme Court ruled that the casual nature of a Facebook post should be taken into account when determining whether a statement was defamatory

Liability for Social Media: the rogue employee

- The next issue is that of vicarious liability
- The Catholic Child Welfare Society v Various Claimants [2012] UKSC 56:
  - Will include relationships which are ‘akin to employment’
  - Must be a sufficient connection that links the relationship between the employer and employee with the act or omission of the employee
- The latter element is likely to be fundamental
  - To what extent is the rogue employee’s act sufficiently connected with their role
  - E.g. was it in the context of an interaction with a customer as part of their role or did it occur as a result of unauthorised use of a business social media account

Liability for Social Media: the rogue employee

- Employment Appeal Tribunal:
  - Forbes v LHR Airports Ltd UKEAT/0174/18/BA
  - Employer not vicariously liable for racist post made by employee on a personal Facebook account

Liability for Social Media: data breaches

- Scenario:
  - Material which is protected under the Data Protection Act 2018/General Data Protection Regulation is wrongfully made public through social media
- In principle, a claim lies against the data controller under Article 82 of the GDPR.
- A wide provision: covers both material damage and non-material damage
- *Farley v. Paymaster (Equiniti)* [2025] EWCA Civ 1117
  - No minimum threshold of seriousness
  - Includes damages for distress or an objectively well founded fear of misuse (e.g. identity theft)

Implications for insurers

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- On one level, social media is nothing new – just a further method of communication
- Many analogies can be drawn by reference to print advertising or email/telephone conversations
- Potential differences:
  - The immediacy with which social media provides contact with a wider audience
  - A perception that social media is more ‘informal’ and a risk that less care is taken when posting
  - More limited extent of internal controls/risk management on the use of social media
- Need to ensure that insureds have a robust policy in place surrounding what goes onto social media and proper training of employees around social media use
- Particularly important where there is direct interaction between an employee and existing/future customers e.g. on Facebook or X
- Complicated further by AI Bots – a topic for another day, and developing legislation!