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Twitter is facing a lawsuit over ISIS use of its network. Image sourced from www.shutterstock.com

Twitter, terror and liability: who gets to pay?

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If ISIS and its supporters use Twitter to facilitate terrorist action or merely spread propaganda, is the social network liable?

A lawsuit against Twitter in the United States in which a family is seeking compensation for the death of family member in an ISIS terrorist attack, may test this. The results will have implications for social networks and other businesses such as BT, Telstra, Facebook, Verizon and Google.

We do not expect postal services, the phone company, the ISP or other network operators to check, and endorse, every message or parcel. In the United States, Australia, United Kingdom and most other countries electronic network businesses are broadly immunised from liability regarding activity of which they are unaware.

However this immunity is conditional. It diminishes or disappears if the business becomes aware that a use of the network is illegal but does nothing and thereby endorses it.

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More broadly, network operators and users have considerable leeway regarding political speech (especially in the US), including expressions that are abhorrent or provocative but do not involve violence. That leeway is the sometimes uncomfortable price we pay for a flourishing liberal democratic society.

The lawsuit in the US District Court in Northern California (home of Twitter and other social networks) centres on the claim that:

“For years, Twitter has knowingly permitted the terrorist group ISIS to use its social network as a tool for spreading extremist propaganda, raising funds, and attracting new recruits. This material support has been instrumental to the rise of ISIS and has enabled it to carry out numerous terrorist attacks, including the November 9, 2015 shooting attack in Amman, Jordan in which Lloyd ‘Carl’ Fields, Jr. was killed.”

Field’s family wants compensation. It presumably wants to send a strong message to a range of network businesses that they must exclude terrorists and other criminals.

The lawsuit is based on section 2333 of the federal code (aka the AntiTerrorism Act), which states

“Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney’s fees.”

The legislation does not specify *who* can be sued. It is concerned with injury, rather than perpetrators. Just as importantly, it indicates that defendants can provide little guidance on what classifies as liability.

We are therefore going to see the US courts grappling with dilemmas about the extent to which network businesses should be held responsible for what happens on or as a result of their networks. How closely should they be monitoring uses of the network? How diligently should they exclude potential or actual customers who voice support for a terrorist organisation or use the network to plan terrorist activity?

Overall, law has concentrated on criminalising particular uses rather than punishing the network operator. It attempts to criminalise the consumer – for example the person who publishes child porn or engages in blackmail or hate-speech or fraud - rather than the network.

Twitter, with strong support from Google, Facebook and other social network operators, will presumably argue that the lawsuit should go nowhere. It will claim that it is not a terrorist organisation in terms of US law. Importantly, it will argue that it has not provided ‘material support’ to ISIS or other terrorist entities in terms of US law ... it has simply provided a lawful communication mechanism used by millions of people. Just like other networks (including The Conversation), it has excluded offenders for misbehaviour.

What makes the lawsuit particularly interesting is that the plaintiffs will apparently draw on unrelated US court decisions. In the past US citizens have sued banks for knowingly providing funds transferring funds to terrorists, for example through charities that appear to act as front organisations.

Justice Richard Posner, a prominent federal judge, commented that although transferring money is not a violent act, "Giving money to Hamas, like giving a loaded gun to a child (which also is not a violent act), is an 'act dangerous to human life'." The wilful negligent bank should accordingly pay for the harms caused by its terrorist customers.

There is no point suing ISIS: it is located outside US, UK and Australian law. We are however seeing litigation claiming compensation from the US and UK arms of Middle Eastern businesses that tacitly provide substantial support to the associates of terrorist organisations.

If we are concerned about responsibility we should look more broadly at liability. Rather than punishing your local connectivity provider or publisher, it is time for some hard questions about the willingness of some states to either directly fund terrorist organisations or turn a blind eye to funding by their citizens through ostensibly philanthropic bodies.