

# Artificial Intelligence and its Liability in English Tort Law

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## Introduction

AI starts to make decisions on its own, and consequently, the application of vicarious liability and negligence in the context is questionable. In the case of an AI system malfunction, resulting in a wrong medical diagnosis or accident which causes injuries, the questions of responsibility and liability arise the most. Who should be held responsible? In 2024, the EU with its AI Act, classifying AI into high-risk and low-risk, and imposing stricter regulations on the developers of high-risk AI, tried to clarify the matter. Meanwhile, the Law Commission UK in its 2022 report, suggested that if a self-driving car caused an accident, it would be unfair to put the blame on the driver and therefore, the manufacturer should be the one held responsible. The reality is that the existing tort law framework is inadequate when it comes to dealing with AI systems that have autonomous decision-making capabilities. The law has to be updated as to the constantly increasing level of AI to be lawful. The main debate is about the conflict between moral and legal responsibilities. The big question of whether tort law is about finding the guilty ones or simply ensuring that the victims are compensated remains unanswered. That is the crux of the issue, the accountability of AI as the world progresses.

## Who Is Responsible When AI Makes a Mistake?

AI is not only behind closed doors in science laboratories anymore. We see it in cars (Tesla, Waymo), in the doctor (DeepMind, Watson Health) and our mobile phones with a voice assistant (Google Assistant, Alexa, ChatGPT). Contrary to the previous technology, AI will view the data, detect patterns and have the

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ability to make its own decisions. The statute has previously been forced to match the technology such as the strict-liability regulations of the damaged products in the wake of the industrialization era<sup>3</sup>. Something like this may be required when it comes to AI. One of these is that in the case of high-risk AI (medical devices, driverless cars), the makers would automatically be liable since such AI is involved in high-risk, whereas normal tort law applies in the case of lower-risk AI (chatbots).<sup>4</sup> That is why tech does not get caught in legal purgatory, and Tesla, DeepMind, and OpenAI are already making courts determine who should rightfully take the blame. Vicarious liability and carelessness are traditional ideas of English Law that concern people. AI poses the question of who bears responsibility when it malfunctions - should a medical AI misdiagnose a patient, or should a driverless car have an accident. Is it the programmer, the enabler, the consumer or the AI? <sup>5</sup>The EU AI Act that will take effect in 2024 desires to seal these loopholes. Liability in the AI age will be influenced by how the UK courts will process tech cases. Even a 2022 Law Commission report argues that makers, but not drivers, should support self-driving cars, demonstrating that the existing tort law in the UK does not apply to a machine making choices in its own right. Tort law tends to associate harm with anticipated dangers and with individuals capable of altering this status, and AI collides with such ancient regulations. The Commission discusses the idea of distributing the risk and it begs the question whether tort law is about payment or blame. <sup>6</sup>In short it is a question of who pays and not who is at fault. However, moral guilt, rather than money, is still a part of tort law. It links the victim and the perpetrator and makes that individual culpable. The Commission opinion abandons the causal relationship by stating that the maker is not the problem, the AI is not a person under the law and the user of this non-person under law is not the cause of the issue.

## **Negligence and the Foreseeability Problem**

UK law pays a lot of attention to negligence. The defendant might receive compensation when the claimant had a duty of care towards him or her and

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<sup>3</sup> The Product Liability Directive 85/374/EEC

<sup>4</sup> The EU AI Act: a summary of its significance and scope by Ms. Lilian Edwards, Professor of Law, Innovation and Society, Newcastle University

<sup>5</sup> Policy Brief No. 177 — July 2023 on Addressing the Liability Gap in AI Accidents by Ms. Amrita Vasudevan

<sup>6</sup> Policy Department for Justice, Civil Liberties and Institutional Affairs Directorate-General for Citizens' Rights, Justice and Institutional Affairs PE 776.426 - July 2025

he/she had breached said duty of care and earned a loss that could have been foreseen. The success of that concept began with *Donoghue v. Stevenson* (1932) with the neighbour principle, which is that you are in control, and you can foresee.<sup>7</sup> But we should witness how that will work in the event that an AI causes harm. The three primary competitors include the creator of the AI, the manufacture of the product, and the user. Developers tend to be beyond the reach of harm since they are upstream. The issuance of evaluation to the upstream actors is often reluctant in the courts due to the liabilities. Clearly manufacturers are targets, yet as product liability goes, its liability is negligence. And because AI is not fixed, it is not known whether there is a flaw in manufacturing. Finally, users are not in full control and may not know all about AI, and it is a dangerous factor to accuse them of harm.

One of the aspects of negligence is foreseeability. AI complicates that since you do not always know what AI will do even the developer can not predict it. The machine learning outputs are black-box and cannot be described by code writers. By making foreseeability easier, courts may be undermining the negligence criterion.<sup>8</sup> The Consumer Protection Act 1987 appears to be a more promising regime and may be detrimental to the principles of negligence. The Act provides that bad products are subject to stringent accountability. The question is whether AI is regarded as a product in the Act. It encompasses products and electricity; it has been prolonged to physical media software sales by the courts. That is not how AI is commonly disseminated. It can be connected, updated, or in the cloud, and its (the purpose) can change.<sup>9</sup> A medical AI is not a static product, but a dynamic product, should it alter its diagnostic process according to new data<sup>10</sup>. Due to this loophole, the European Commission revised the Product Liability Directive and proposed amendments to the AI Liability Directive. Following Brexit, English law was left with no choice but to either adhere to the EU or go it alone. The treatment of AI as an ordinary product can be counterproductive to the concept.<sup>11</sup> Manufacturers may claim that additional education relieves them of responsibility. With that

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<sup>7</sup> <https://www.scottishlawreports.org.uk/resources/donoghue-v-stevenson/case-report/>

<sup>8</sup> Consumer Protection Act 1987, UK Public General Acts

<sup>9</sup> Oxford Business Law Blog, Autonomous Vehicles, Software and Product Liability: Have the Law Commissions Missed an Opportunity? Posted: 14 October 2019

<sup>10</sup> BioSlice Blog: Is change on the horizon for the UK product liability regime? By Libby Amos-Stone on August 6, 2025

<sup>11</sup> Directive (EU) 2024/2853 (the revised Product Liability Directive)

occurring, the innovation would be punished by the liability since it appears infinite.

If the latter, liability discourages innovation because it may seem countless and neverending. The problem of what makes a flaw presents another difficult question. If the safety of the product is not what people are generally able to expect, then the product is defective, according to CPA s. 3. However, the public's view on AI is uneven, between extreme doubt and excitement. As a result, while product liability presents a strict-responsibility concept, its legal categories fail under AI's effect. Reform seems unavoidable, whether through judicial or legal changes. Even when duty and defect are found, liability is based on causation problems. Plaintiffs must prove both legal (harm was not too remote) and factual (harm would not have happened without the defendant) causation. AI may present challenges in both cases. With AI, the causal chain may be unclear when an algorithm rejects a loan, an AI makes an autonomous choice, or a self-driving car swerves. Developers say that the system's new decision cannot be tied to any obvious flaw or carelessness.

This is similar to what happens when there are possible reasons in medical cases (*Wilsher v Essex AHA [1988] AC 1074*). According to *Fairchild v. Glenhaven Funeral Services [2002] UKHL 22*, courts have occasionally loosened the standard in some cases, allowing liability when defendants raised the risk<sup>12</sup>. Is it possible that AI will follow, with developers held responsible when they increase the chance of harm even when the exact cause is not known? The problem is made worse by AI's secrecy. Even in cases where the causal process is unclear, expert knowledge in medicine can often help. Even AI developers may not know how the algorithm is choosing. Without explainability, the burden of proof placed on claims may be too costly. One possible answer is to invert the burden and make defendants prove their system was not causally liable. However, such a change may push law closer to strict responsibility again.

As per the ruling of *The Waggon Mound (No 1) [1961] AC 388*, the harm must be very close for legal causation. With AI, harms that are hard to foresee are many since bias in algorithms can grow discrimination and autonomous systems may experience edge cases that designers never expected. Victims may be

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<sup>12</sup> House of Lords - Fairchild (suing on her own behalf) etc. v. Glenhaven Funeral Services Ltd and others etc

denied repayment if these harms are seen as too far away, treating them as expected may go too far. In short, causality theories weaken established norms or change to strict liability, which may present problems with negligence. The black box problem shows the shortcomings of tort law's belief that human actions can be recreated and causally assigned later, which makes litigation more hard. AI disagrees with that belief.

## **Product Liability and the Dynamic Nature of AI**

<sup>13</sup>Vicarious liability doctrine holds employers responsible for employee torts committed during employment. It is based on the idea that employers control employees, benefit from their work, and can spread risk. Could this apply to AI systems used in business? AI systems do work once done by humans, so could they be treated as employees for liability purposes? If a delivery company uses an autonomous vehicle that causes an accident, vicarious liability could make the company pay rather than leaving victims uncompensated. But the comparison fails. Employees are legal people who can commit torts.

<sup>14</sup>AI systems are not legal people. To hold an employer responsible for an AI's tort may be a mistake. One might instead see the AI as a tool of the employer, such as a dangerous machine. But this collapses vicarious liability into direct liability, meaning the employer is liable as the owner of a hazardous tool, not the master of a servant. Vicarious liability is based on control, since employers can instruct and monitor employees. But control is reduced in AI systems. Autonomous algorithms may act without warning, weakening the idea of control. Risk distribution is still possible since employers can cover AI risks, but this also applies to product liability. Why keep fiction of vicarious liability when strict liability models already exist? Some people suggest extending vicarious liability into a wider principle of enterprise liability: businesses that gain from using AI should pay for harms it causes. This would recast vicarious liability not as an extension but as a way of redistribution. Yet such a change may be more than a modification for tort law. Vicarious liability doctrine allows an employer to be held liable for the torts of employees who committed torts during their employment. In conclusion, negligence cannot deal with

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<sup>13</sup> Harvard Journal of Law & Technology, Volume 31, Number 2 Spring 2018

<sup>14</sup> Law Commission of England and Wales Law Commission No 404

Scottish Law Commission Scottish Law Commission No 258

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unforeseeable harms without weakening its foreseeability standard since product liability struggles to see systems as static products, causation is hard due to black box secrecy, and vicarious liability is designed for human actors and loses its meaning when applied for non-human systems.

<sup>15</sup>English law, as seen in the Law Commission report, tends to expand categories to avoid liability gaps. This strategy, however, may have negative impact due to negligence, product liability, causation, and vicarious liability demonstrate that English tort law has parts that are useful but there is no complete plan for AI-caused harm. Each doctrine works well in a human-centered situation but fails when faced with autonomous systems that do not fit into categories of fault, product, or agency. This calls for a principled re-examination of liability.

## **Strict Liability**

Strict liability reflects the logic of enterprise risk, and those who gain from dangerous activities should take on their costs, despite fault. When applied to AI, victims may be repaid despite uncertain causation or unprovable carelessness, scenarios that will be more common as algorithms grow in secrecy and hard to predict since developers and deployers can spread risk through insurance and safety. Also, strict liability avoids the black box paradox: when an AI becomes more autonomous, it becomes harder to assign fault, and victims are likely left uncompensated. Strict liability sets up incentives for safe design and prevents accountability problems. There may be concerns, since strict liability may over deter, stopping innovation by having start-ups and big businesses have open-ended liability. Also, it may remove the connection between wrong, responsibility, and fix. Tort law is not just distributive but corrective, since it holds wrongdoers responsible to victims. A world of strict liability would make tort into insurance. The challenge, therefore, is to design a system that balances fairness, efficiency, and innovation. For example, English law could move towards statutory strict liability for high-risk AI like autonomous vehicles, diagnostic AI, and financial algorithms should be in a high-risk category, subject to strict liability and insurance, mirroring the EU AI Liability Directive. Negligence could be kept for low-risk AI, such as in consumer chatbots, predictive text, or recommender systems where the relational, fault-based model remains useful. Supplementary no-fault schemes

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<sup>15</sup> **Law Commission of England & Wales & Scottish Law Commission**, *Automated Vehicles: Joint Report* (Law Com No. 404, 26 January 2022), ch. 3.

may apply for catastrophic harms where causation is unknown, with a public fund to provide repayment. This system accepts that AI is a spectrum of risk, requiring different liability tools. Even these reforms do not solve the deeper juristic problem tort law is anthropocentric. It believes in agents with duties, foreseeability, and human-like causal chains. AI unsettles this idea. The 2022 report from the Law Commission on autonomous vehicles acknowledged this, transferring liability to insurers since tort law could not clarify it. Usually, consent in tort law acts as a form of defense. If a risk is accepted, the defendant might not be responsible. For instance, consent safeguards physicians in medical situations, even when negative outcomes arise.<sup>16</sup> Yet, AI complicates this. When technologies like Tesla's Autopilot or Google DeepMind's diagnostic systems make specific choices, can users or patients truly provide consent that relieves developers or operators of responsibility?

In tort law, valid consent needs the person to know the risks. But AI works a black box, since developers cannot explain them. For example, Tesla drivers may consent to using Autopilot by agreeing to warnings in the manual. However, can this consent be seen as informed if the user cannot understand the risks set by machine learning? A patient who accepts an AI tool may not know that the AI may inherit biases from data. Without knowledge, consent in AI risks becoming an idea of a legal one. Tort law has long limited its scope, even with consent being taken since one cannot consent to negligence, and courts might treat it as outside lawful consent. Nonetheless, entirely abandoning the concept of consent and imposing strict liability on businesses that utilize it represents a different strategy for high-risk AI systems. An autonomous vehicle or healthcare AI may face liability for damages incurred by firms such as Tesla, even with user agreement. In this model, consent may be useful morally but would not prevent companies from legal responsibility. However, critics say users should keep the power to consent to AI risks, just as they do in sports or medical treatments when Tesla drivers use Autopilot after having read the disclaimers, and patients choosing diagnostics may be seen as assuming risks. This view sees consent as protecting freedom and preventing a huge load on innovation.

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<sup>16</sup> Kannan, K., 'Consent', *Medicine and the Law* (Delhi, 2014; online edn, Oxford Academic, 16 Apr. 2014), <https://doi.org/10.1093/acprof:oso/9780198082880.003.0004>, accessed 1 Nov. 2025.

## **Consent and the Question of Knowledge**

Consent has long worked as a defense in law, but AI's secret behavior makes old thoughts of consent not right. In certain AI applications (e.g Tesla, DeepMind), users may agree to terms but lack enough knowledge of the risks. Tort law may need to change its plan. While consent should stay, it cannot remove companies from responsibility for harms that are not fully viewed by a user. A hybrid model, one that recognizes consent but places strict liability for high-risk AI, may balance freedom, fairness, and accountability.

This raises a bigger question: should the law stretch or admit AI needs new structures? One idea is to reconceptualise liability through system responsibility. Another is to adopt functional comparisons, treating AI as an employee or product to keep practical responsibility.

## **Towards a Hybrid Liability Model**

English law offers foundations but not answers. Negligence, and vicarious liability show parts of the AI problem but fail to create a sensible whole. The way forward is reform that adopts a liability model that joins strict liability for high-risk AI with fault-based principles, accompanied by schemes for opacity. This way would save law by acknowledging challenges. The future is in this balance: ensure, principled, and visionary.