



## ARTIFICIAL INTELLIGENCE: THE APPLICATION OF THE DOCTRINE OF VICARIOUS LIABILITY

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### Abstract

*The rapid advancement and integration of Artificial Intelligence (AI) technologies in various disciplines have brought significant changes to the world, including Nigeria. However, the expansion of AI systems raises critical concerns regarding the potential negligence and responsibility for any harm caused by these intelligent machines and the Nigerian Legal System has not addressed AI-related negligence and vicarious liability. It is against this backdrop that this work examined the negligence of artificial intelligence and the application of the doctrine of vicarious liability in Nigeria. The work revealed that the application of AI technology is expanding across sectors such as healthcare, transportation, finance, law and medical professions. Negligence in the context of AI can arise from several factors, including design flaws, programming errors, inadequate training data, biased algorithms, or insufficient testing and the doctrine of vicarious liability becomes crucial in determining who should bear responsibility for AI-related harm. The work concluded that due to the dearth of a legal framework for AI in Nigeria, most of these breaches have remained unresolved. To address this, this work made a number of recommendations which include the need for a legal framework to address the liability of AI, There is need for Standards and Guidelines: Industry-specific standards and guidelines should be developed for AI systems to ensure their safe and responsible deployment, need for training and awareness for medical practitioners, legal practitioners, judges, policymakers, and other stakeholders to enhance their understanding of AI technologies and their implications for negligence and vicarious liability, among others.*

**Keywords:** Artificial Intelligence, Vicarious Liability, Negligence, Doctrine and Legal framework

### 1.0 INTRODUCTION

Artificial intelligence (AI) has transformed our lives and continues to be a huge part of our daily lives.<sup>1</sup> It can be seen in several aspects of our lives, ranging from

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research, entertainment, medical care, transportation, agricultural sector and recently in the legal field.<sup>2</sup> With its increasing presence and influence, the legal implications surrounding AI have become a subject of significant concern to researchers and legal scholars alike. One of the attendant issues is that, as AI becomes more refined, it is increasingly capable of errors and resulting in injury. This however begs the question that, in the event of an AI-caused injury, who is liable? Will the manufacturer that developed the AI be held liable for the actions of the AI based on the doctrine of vicarious liability and what yardstick will be used to determine whether the AI system is acting within its desired scope of operation and employment?. These are the questions this paper seeks to answer. It is against this backdrop that this work examines the application of the doctrine of vicarious liability to AI's negligence.

## 2.0 CONCEPTUAL CLARIFICATION

For clarity, it is important to define some concepts used in this paper.

### **Negligence**

According to the Garner<sup>3</sup>, he defined negligence as:

The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly or wilfully disregarding of others right.<sup>4</sup>

Negligence in law ranges from inadvertence that is hardly more than accidental to sinful disregard for the safety of others.<sup>5</sup>

### **Artificial intelligence**

Unlike the natural intelligence exhibited by natural humans and other natural animals, AI is intelligence demonstrated by machines (unnatural creation). Artificial intelligence has been defined as the study of intelligent agents, that is, any object that can sense the world around it and take actions to increase the likelihood that it will be successful in accomplishing its goals.<sup>6</sup> According to John McCarthy (the father of AI), Artificial Intelligence is defined as “...*the science and engineering of making intelligent machines, especially intelligent computer programs. It is related to the similar task of using computers to understand human intelligence, but AI does not have to confine itself to methods that are biologically*

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<sup>1</sup> R. George Cross and G. Cary Debessonnet, ‘An Artificial Intelligence Application in the Law: CCLIPS, A Computer Program that Processes Legal Information’ *High Tech. L. J.* (1986) 329

<sup>2</sup> N Udin, ‘The Potential and Impact of Artificial Intelligence (AI) in Our Lives and Work’ (2023) <[https://www.researchgate.net/publication/367328118\\_The\\_Potential\\_and\\_Impact\\_of\\_Artificial\\_Intelligence\\_AI\\_in\\_Our\\_Lives\\_and\\_Work](https://www.researchgate.net/publication/367328118_The_Potential_and_Impact_of_Artificial_Intelligence_AI_in_Our_Lives_and_Work)> accessed 17 January 2024

<sup>3</sup> Garner B A, *Black's Law Dictionary* (9<sup>th</sup> edn West Publishers, United States, 2007)

<sup>4</sup> Ibid

<sup>5</sup> Ibid

<sup>6</sup> What is artificial intelligence. <<https://www.ibm.com/topics/artificial-intelligence>> accessed 7 January 2024

observable.”<sup>7</sup> In literature, artificial Intelligence may sometimes be used interchangeably with the term, Automated Decision System (ADS).<sup>8</sup>

### **Vicarious liability**

The doctrine of vicarious responsibility is central to all common law tort systems. It is a rule of responsibility that holds the defendant liable for the torts committed by another.<sup>9</sup> The concept of vicarious liability has been given judicial interpretation by the courts. In *Launchdury v Morgans*<sup>10</sup>, the Court stated that vicarious liability occurs when one person assumes the liability of another. Also, in the Nigerian case of *Sharon Paint & Chemical Co. Ltd v Ezenwa*,<sup>11</sup> the Court concluded that vicarious liability is an indirect legal obligation, such as an employer's culpability for an employee's act or a principal's liability for an agent's torts. The master must be held accountable for the servant's action. It cannot be otherwise since the law cannot work in reverse.<sup>12</sup>

### **3.0 INJURIES ASSOCIATED WITH THE DEPLOYEMENT OF ARTIFICIAL INTELLIGENCE**

The injuries that may be caused by AI are broadly classified into:

- (i) Personal injury and death;
- (ii) Loss of dignity and reputation; and
- (iii) Damage to property.

#### **Personal injury and death**

AI is used widely in certain professions like law, medical profession and industries which are likely to increase leaps and bounds. The use of AI is employed in the medical profession during medical treatment and diagnosis.<sup>13</sup> It is also used in dangerous environments such as mines or factories, in controlling aircraft, vessels and drones, in traffic control; in manufacturing; and in the design of commercial and residential buildings.<sup>14</sup> The personal injury and death that is likely to occur here, is more of mere negligence liability based on proof of fault. In the context of personal injury, therefore, it will be argued that it should be strict. Since product liability is strict, and AI remains a product liability suit, there can be no justification for excluding it in AI claims.<sup>15</sup> Many personal injuries have arisen from the use of AI such as in facial recognition to identify peaceful protesters and track movement during the ENDSARS period in 2020,<sup>16</sup> allegation of illegal

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<sup>7</sup> John McCarthy, WHAT IS ARTIFICIAL INTELLIGENCE? Computer Science Department, Stanford University Stanford, <http://www-formal.stanford.edu/jmc/2007> accessed 7 January 2024

<sup>8</sup> <https://link.springer.com/article/10.1007/s11023-022-09612-y> accessed 7 January 2024

<sup>9</sup> What is vicarious liability? <https://www.cambridge.org/core/books/abs/vicarious-liability-in-tort/what-is-vicarious-liability/0A9745E929A46D577EB8A36CE61DF006>

<sup>10</sup> *Launchdury v Morgans* (1973) AC.122 at 135, per Lord Denning

<sup>11</sup> *Sharon Paint & Chemical Co. Ltd v Ezenwa* (2001) FWLR (pt.43) 290 at 312 and *Nduka v Ezenwaku* (2006) 6 NWLR (pt.809) 494

<sup>12</sup> See *Sharon Paint & Chemical Co. Ltd v Ezenwa* (supra) at 312

<sup>13</sup> B Soyer ‘Artificial intelligence and civil liability—do we need a new regime?’ (2022) 30(4) *International Journal of Law and Information Technology*, 385–397

<sup>14</sup> *Ibid*, 397

<sup>15</sup> See Duncan Fairgrieve and Richard S Goldberg, *Product Liability* (3<sup>rd</sup> edn, OUP 2020), 13-38.

<sup>16</sup> J Uba ‘Nigeria: Artificial Intelligence (AI) Goes Wrong: Real-Life Cases And Regulatory Implications Of The Negative Effects of Artificial Intelligence (AI) In Nigeria’ <https://www.mondaq.com/nigeria/newtechnology/1309544/artificial-intelligence-ai-goes->

accessing of customers bank accounts' data by Nigerian Fintech Company in 2021,<sup>17</sup> processing and collection of customers data without their consent by Opay Digital Services Ltd in 2021,<sup>18</sup> these are private breaches of right to privacy<sup>19</sup> with the use of AI.

### Loss of dignity and reputation

Interference with the reputation of a natural human being is another area that must be carefully looked into. AI may injure a person's reputation in a number of ways. A misdiagnosis of cancer or dementia that is powered by AI, for example, could affect dignity and well-being in a big way quite apart from any actual injury. It is also in the same vein that data controlled by AI can affect reputation, where falsehoods about individuals could be released to news outlets or a subject's personal acquaintances by AI contained in a company's press office among others.

The use of AI as employed in the legal profession may result to loss of dignity and reputation when the AI produces a fake case law for the legal practitioner who engages in the use of AI system to search for case laws. Recently, A New York Attorney who made used of ChatGpt to write a legal brief was misled by the artificial intelligent chatbox into citing wrong case laws. In this situation, the Attorney had engaged the AI to search for legal authorities but he got completely fabricated cases.<sup>20</sup>

### Damage to property

Physical damage to property is another area where liability of AI is likely to occur as a result of AI deployment. But it is perfectly possible where AI used in a construction project goes wrong, or where a factory process controlled by AI malfunctions, causing an explosion damaging nearby premises and vehicles. Traditionally, property damage and personal injury are always lumped together but this is arguably more from traditional point of view.<sup>21</sup> There are number of reasons to consider a property damage claimant less deserving than a case of personal injury. Most times, business losses are consequential on property damage, it can also be lumped up with person injury if the owner so wishes.<sup>22</sup>

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[wrong-real-life-cases-and-regulatory-implications-of-the-negative-effects-of-artificial-intelligence-ai-in-nigeria](#)> accessed 7 January 2023

<sup>17</sup> Ibid

<sup>18</sup> Ibid

<sup>19</sup> See Section 37, Constitution of the Federal Republic of Nigeria, 1999 as amended.

<sup>20</sup> C Unini 'Humiliated NY Lawyer Who Used ChatGpt For Bogus Court Doc Profusely Apologizes' <<https://thenigerialawyer.com/humiliated-ny-lawyer-who-used-chatgpt-for-bogus-court-doc-profusely-apologizes>> accessed 11 January 2024

<sup>21</sup> 'Personal injury versus property damage claims' <[<sup>22</sup> A Tettenborn, 'Property Damage and Economic Loss: Should Claims by Property Owners Themselves Be Limited' \(2005\) 34 \*CLWR\* 128.](https://www.klampelawfirm.com/blog/2022/11/personal-injury-versus-property-damage-claims/#:~:text=Personal%20injury%20and%20property%20damage%20claims%20are%20dealt,while%20virtually%20every%20collision%20results%20in%20property%20damage.></a> accessed 10 January 2024</p></div><div data-bbox=)

#### 4.0 ARTIFICIAL INTELLIGENCE: THE APPLICATION OF VICARIOUS LIABILITY

Natural persons and legal persons (such as corporations, organizations, or government bodies) are legal entities. AI systems, on the other hand, do not possess legal personality, as they are not human beings and do not have the capacity to hold rights or fulfil legal responsibilities therefore may not be responsible for their own actions.<sup>23</sup> AI like any other human construct, is not without flaws.<sup>24</sup> Hence, these flaws have the potential to cause damage or harm to third parties, raising crucial considerations about culpability and responsibility. In this context, the vicarious liability of the manufacturer of AI shall be considered.

The concept of vicarious liability is peculiar to the common law system of tort law.<sup>25</sup> The common example is that of employer and employee where the master is strictly liable for the torts committed by his servants, when they are committed in the course of the wrongdoer's employment.<sup>26</sup> In such circumstances, liability is imposed on the master, not because of his own wrongful act, but due to his relationship with the wrongdoer.<sup>27</sup>

Vicarious liability arises in employment, partnership and limited liability partnership typically but may also be implied by law, outside the context of an employment relationship, particularly where the servant carries on activities as an integral part of the activities of the master and for the master's benefit, and where the commission of the wrongful act is a risk created by the master by assigning those activities to the servant.<sup>28</sup>

AI is an innovation installed in the system by somebody.<sup>29</sup> AI systems can produce teaching materials which can be used to teach and examine students across disciplines. AI products are becoming experts at predicting events and seeing patterns in them, thus allowing them to invade the human privacy.<sup>30</sup> The major challenge is how to identify the master, particularly where many parties are involved. For instance, where a system provides wrong information to a pilot and prevents it from landing and the passengers suffer personal injury or financial loss as a result, the question that arises from the scenario is who will be vicariously liable? There is no clear answer to this, but it can be answered depending on the circumstance. There are certain factors that may be considered before arriving at a logical conclusion. The factors include the person with the greatest level of involvement, monitoring and supervision of the AI system, or the person who has

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<sup>23</sup> J D Gary 'Direct Foreign Investment and Contractual Relations in the People's Republic of China' (1994) 6 *DePaul Business Law Journal DePaul Bus. L.J.* 331.

<sup>24</sup> J Dewey 'The Historic Background of Corporate Legal Personality' (1926) 35(6) *Yale Law Journal* 655.

<sup>25</sup> P Gilika, 'Vicarious Liability in Tort A Comparative Perspective'(2010) <<https://www.cambridge.org/core/books/abs/vicarious-liability-in-tort/what-is-vicarious-liability/0A9745E929A46D577EB8A36CE61DF006>> accessed 6<sup>th</sup> January 2024

<sup>26</sup> *Steamco ltd v. Mark & Ors* (2018) LPELR-45947(CA)

<sup>27</sup> Ibid

<sup>28</sup> See the case of *Obi vs. Biwater Shellabear (Nig) Ltd* (1997) 1 NWLR (Pt. 484) 722

<sup>29</sup> Coleman et all, *Theories of the Common Law of Torts, Stanford Encyclopedia of Philosophy* (Spring, 2022); Edward Zalta (ed.) <<https://plato.stanford.edu/archives/spr2022/entries/tort-theories/>> accessed 11 January 2024

<sup>30</sup> B Soyer and B Tetterborn, 'Artificial intelligence and civil liability: Do we need a new regime?' (2022) 30(4) *International Journal of Law and Information Technology*, 385–397 <<https://doi.org/10.1093/ijlit/eaad001>> accessed 6<sup>th</sup> January 2024

the control or influence of the actions of the AI system. Where the masters are numerous, it be logically concluded that all the principals may be severally and jointly held and severally liable.<sup>31</sup>

The Supreme Court of Nigeria highlighted the conditions for vicarious liability in *Chukwu v Soleh Boneh Ltd*,<sup>32</sup> where the apex Court held that for a claim of vicarious liability to succeed, he must establish the existence of three elements, to wit (i) that the wrongdoer is liable for the tort (ii) that the wrongdoer is the servant of the master and (iii) that the wrongdoer acted in the course of his employment with the master.

The conditions stated by the apex court are emphatic on the application of vicarious liability to a master and servant relationship but some persons have argued that AIs should be treated as servants of their masters or manufacturers, depending on the case.<sup>33</sup> The human master should be held vicariously liable for damage caused by the AI (servant). The rationale behind this is that AI is designed to accomplish goals specified by and receive instructions from a human being.<sup>34</sup> A servant is employed under a contract of service and subject to the control of the master. The level of control involved determines the liability. If a master is in a position to tell the person who is engaged, how to do his job, then the person doing the work is a servant.<sup>35</sup> Therefore, the manufacturer will be liable for the error and/or omission caused by the AI system resulting from the defect of its installation or programming.

## **5.0 LEGAL FRAMEWORK FOR THE LIABILITY OF ARTIFICIAL INTELLIGENCE IN NIGERIA**

The legal regime surrounding artificial intelligence (AI) is indeed in its early stages of development in Nigeria. Developing a legal framework for the liability of AI or its manufacturer or operator is necessary to reduce the flaws of AI. While AI systems themselves are not legal entities and thus cannot be held directly liable, the liability of those who create, operate, or control AI systems depends on various factors, including the level of control and the existence of an agency relationship. Due to dearth of a legal framework for AI in Nigeria, most of these breaches have remained unresolved. Related legal framework and policies on the liability of AI shall be examined:

- i) Nigeria is in the process of developing a national AI policy. The National AI Policy is expected to address a number of issues, including the regulation of AI, the development of AI, the use of AI and the liability of AI or its manufacturer. The Nigerian government through the National Information Technology Development Agency (NITDA) is formulating policies on Artificial Intelligence.

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<sup>31</sup> Santhakumar Raja 'Independence and Joint Tortfeasors' <<https://theteche.com/joint-tortfeasors-law-of-torts-independent-tortfeasors/#:~:text=The%20liability%20of%20joint%20tortfeasors%20is%20joint%20and.and%20the%20agent%20are%20jointly%20and%20severally%20liable>> accessed 10 January 2024

<sup>32</sup> *Chukwu v Soleh Boneh Ltd* pt.27) 2046 at 2065, Per Ogundare, JSC

<sup>33</sup> B Soyer and B Tetterborn 'Artificial intelligence and civil liability: Do we need a new regime?' (2022) 30(4) *International Journal of Law and Information Technology*, 385–397 <<https://doi.org/10.1093/ijlit/eaad001>> accessed 6 January 2024

<sup>34</sup> <<https://brainly.in/question/29544896#:~:text=Artificial%20intelligence%20A%20task%20that%20a%20humans%20or,a%20specific%20goal%20is%20known%20as%20artificial%20intelligence.>> accessed 10 January 2024

<sup>35</sup> Ese Malemi, *Law of Tort* (Princeton Publishing Co, Lagos, 2013)

It is reported that this policy aims to guide the development and deployment of AI in Nigeria and to also take into human concerns such as bias, privacy violation, as well as job displacement.<sup>36</sup>

- ii) The Federal Competition and Consumer Protection Act (FCCP Act) encompasses provisions that ensure the rights of consumers to obtain goods of satisfactory quality, in proper working order, and free from any defects. It establishes a framework wherein suppliers bear the responsibility for any damage arising from the use of faulty goods or the provision of inadequate services. This comprehensive legislation covers both tangible products and intangible services, which means that it extends its protective measures to various aspects of consumer transactions. In light of these provisions, it becomes evident that the FCCP Act may be extended to encompass AI products. Therefore, where an AI product is found to be defective and consequently causes harm or damage, the supplier can potentially be held accountable for such consequences under the purview of the Act. Thus, the legislation not only safeguards consumer rights but also establishes a clear liability framework for suppliers, encouraging responsible manufacturing and provision of AI products in the market.<sup>37</sup>
- iii) Law Reform (Torts) Law of Lagos State, manufacturers of defective products bear strict liability. The Law imposes strict liability on manufacturers of defective products and stipulates that a manufacturer or producer, importer, supplier or retailer is liable for damage caused by a defective product.<sup>38</sup> In other words, if a product is found to be faulty or unsafe, those involved in its production or distribution can be held liable for any harm or losses resulting from its use.<sup>39</sup>

Despite the provisions of these laws on vicarious liability, there are a few legal challenges. The Federal Competition and Consumer Protection Act (FCCP Act) and Law Reform (Torts) Law of Lagos State did not contemplate AI. The definition of goods under the Federal Competition and Consumer Protection Act may be argued to accommodate automated versions of ship, aircraft, and vehicle. While, the interpretation of the Act to ‘service’ under the Act is flexible enough to cover AI services, but it may be difficult to determine who the supplier is because many parties are involved in AI system. They include software developers, hardware engineers, data providers, programmers, designers, manufacturers, users, etc. The Federal Competition and Consumer Protection Act did not define ‘defect’ which poses a major challenge to the classification of AI as a product liability. There is therefore the need for a specific law on the liability of Artificial Intelligence in Nigeria.

## 6.0 CONCLUSION AND RECOMMENDATIONS

AI like any other human construct, is not without flaws. Therefore, vicarious liability for the AI's manufacturer or operator is necessary to reduce the flaws of the AI's manufacturers, operator. While AI systems themselves are not legal entities and thus cannot be held directly liable, the liability of those who create, operate, or control AI systems depends on various factors, including the level of control and the existence of an agency relationship. Due to the dearth of a legal

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<sup>36</sup> <<https://sciencenigeria.com/fg-finalises-policy-on-ai-commends-volunteers-for-contributions/>> accessed 10 January 2024

<sup>37</sup> Section 167 of the Federal Competition and Consumer Protection Act, 2018

<sup>38</sup> Chapter L82 of the Laws of Lagos State 2015.

<sup>39</sup> Ibid

framework for AI in Nigeria, most of these breaches have remained unresolved. The Nigeria Government should enact comprehensive legislation or regulations specifically addressing AI and its potential for negligence. Such legislation could outline the responsibilities of AI developers, users, and owners, as well as establish liability frameworks and standards of care for AI systems.

Similarly, liability of AI system has become an important discussion, to improve the functioning of the system; there is need for it to have a well laid down rules with the involvement in torts and adequate remedies for torts and criminal offences committed by AI entities. There is also need for the courts to strengthen the application of the doctrine of vicarious liability in cases involving AI negligence

There is need for a legal framework to address the liability of AI. Nigeria should consider enacting comprehensive legislation or regulations specifically addressing AI and its potential for negligence. Such legislation could outline the responsibilities of AI developers, users, and owners, as well as establish liability frameworks and standards of care for AI systems.

There is need for Standards and Guidelines: Industry-specific standards and guidelines should be developed for AI systems to ensure their safe and responsible deployment. These standards could cover areas such as data protection, cyber security, bias mitigation, explainability, and transparency.

There is need to conduct thorough risk Assessment and Due Diligence before the implementation of AI technologies. This includes evaluating the capabilities, limitations, and potential risks associated with the AI system, as well as verifying the trustworthiness and track record of the AI developer or provider.

There is need for training and Awareness for medical practitioners, legal professionals, judges, policymakers, and other stakeholders to enhance their understanding of AI technologies and their implications for negligence and vicarious liability. This can help ensure that legal decisions and policy developments keep pace with the rapidly evolving AI background.

There is need to for the courts to strengthen their application of the doctrine of vicarious liability in cases involving AI negligence. In the context of AI, this could extend liability to organizations or individuals who have control or oversight over the AI system, such as the developers, manufacturers, or operators.

There is need for AI's insurance coverage. Organizations and individuals should be encouraged to utilize AI systems to obtain appropriate insurance coverage that addresses potential liabilities arising from AI-related negligence. Insurance providers can develop policies that cater for the risks associated with AI technologies.