TEMPLARS

LIABILITY FOR DAMAGE CAUSED BY ARTIFICAL INTELLIGENCE

1.0. Introduction

The age of artificial intelligence ("AI") is here.[1] Welcome tomorrow! For those who have not noticed AI's pervasive presence in our everyday life, here is a short select list of AIs to ponder over; autonomous vehicles, digital assistants[2], Google maps, ride-hailing applications, face detection and recognition, text editors/autocorrect, search and recommendation algorithms, chatbots, and robots, prominent among which is Saudi Arabia's humanoid robot, Sophia - the first robot to receive citizenship of any country, etc.[1]

Like every other thing created by humans, AI comes with its own imperfections - from a design, programming or manufacturing defect, or improper use,[2] or inadequate warning label, all of which could cause damage to third parties, raising serious questions about who should bear liability arising from such damage.[3] There are presently various divided schools of thought on the issue of liability. The division of opinion stems from the inability to agree on the nature of AI, whether it is a "thing" or "product" that has no legal personality and cannot be personally responsible for its actions or a "person" or "e-person" that has legal personality and can be personally liable for its actions.[4] In the absence of international regulation, recourse would be had to national laws and decisions of courts of each country to determine liability for injuries or to resolve disputes.

This Article explores the recondite legal issues in determining, from a Nigerian law perspective, who should bear liability for damage caused by AI ("**AI Liability**"). This Article explores the practical difficulties associated with situating AI Liability within the product liability and vicarious liability regimes and advocates the creation of a legal framework for AI Liability.

[1]PwC projects that AI will have an immense impact on the following industries: healthcare; automotive; financial services; retail and consumer; technology, communications and, entertainment; manufacturing; energy; and transport and logistics. See: https://www.pwc.com/gx/en/issues/data-and-analytics/publications/artificial-intelligencestudy.html#explorer.

[2]Uber's Verge - is recorded as the world's first self-driving robot car that was involved in an accident which resulted in the death of the victim (a 49-year-old woman), although it seems to have been as a result of human error. The safety driver in the car did not monitor the driving environment and the operation of the vehicle but was more focused on her phone. See also the second case involving a self-driving car, Nilsson v. General Motors LLC 1/2018, pp. 2-3 and Silverman – Wilson – Goggans 2018, pp. 57-58. In this lawsuit, a motorcyclist claimed that he suffered neck and shoulder injuries after a 2016 Chevrolet Bolt knocked him to the ground while travelling on a San Francisco street. A driver was in the front seat, but he was "driving" the car in self-driving mode with his hands off the steering wheel.

[3]According to Tractica, the worldwide revenue of AI software will grow from $1.4 billion in 2016 to almost $60 billion by 2025. See: https://tractica.omdia.com/newsroom/press-releases/artificial-intelligence-software-revenue-to-reach-59-8-billion-worldwide-by-2025/. The implication is that as the number of AI products grow significantly, AI liability issues will also grow in the same proportion. The European Parliament's "Report on the safety and liability implications of Artificial Intelligence, the Internet of Things and robotics", has accordingly admonished that it is essential that victims of AI-accidents have the same level of protection compared to similar other products and services. See European Commission 2020, p. 13.

[4]As a general rule, only juristic persons have the inherent right and/or power to sue and be sued in their names. Non legal persons or entities may neither sue nor be sued except where such right to sue or be sued is created and/or vested by or under a statute. The categories of juristic persons who may sue or be sued under Nigerian law include:- (a) natural persons, that is to say, human beings; (b) companies incorporated under the Companies Act; (c) corporations aggregate and corporations sole with perpetual succession; (d) certain unincorporated associations granted the status of legal personae by law such as:- (i) registered Trade Unions; (ii) partnerships; and (iii) friendly societies or sole proprietorships. See Fawehinmi v. Nigerian Bar Association (No.2) (1989) 2 NWLR (Pt.105) 558; Iyke Med. Merch. v. Pfizer (2001) 10 NWLR (Pt. 722) 540.

2.0 Legal Basis for Liability for Damage Caused by AI

Anyone that has suffered loss or injury as a result of AI has several options for asserting claims for compensation against the manufacturer, owner, keeper, user, network provider, software provider, etc., under general torts law, contracts and statutes as the case may permit. A fundamental principle of law, underlying these claims is enshrined in the Latin maxim "*ubi jus ibi remedium*" (meaning, "where there is a wrong there is a remedy"). The Nigerian courts have held severally that "the maxim is so fundamental to the administration of justice that where there is no remedy provided by common law or statutes, the courts have been urged to create one. The court cannot therefore be deterred by the novelty of an action."[5]

3.0 Product Liability

Product liability has been advocated as a liability regime for situating AI Liability. Product liability clams can be pursued under the general law of contracts or torts or under extant consumer protection statute. The first threshold to cross in product liability claims is to determine if the claimant qualifies as a consumer of the product. It would appear from the authorities that the courts are minded to take a liberal view in defining a consumer to include a user of the product or purchaser of the service, barring any contrary statutory definition of the term.[7]

The common law principle enunciated in *Donoghue v Stevenson*[8] applied by the Nigerian Supreme Court in *Nigerian Bottling Company Limited v. Ngonadi*[9] postulates that where a party has suffered injury as a result of a breach of duty of care owed by a manufacturer, the manufacturer may be liable to compensate the injured party if the injury is a reasonably foreseeable consequence of the act of the manufacturer. The limitation with product liability claim of this nature is that it only provides compensation in damages against the manufacturer but does not attach liability to the owner, keeper, user, network provider, software provider, etc. of the AI.

From a statutory standpoint, the Law Reform (Torts) Law of Lagos State[10] creates a statutory cause of action by imposing strict liability on manufacturers of defective products and stipulates that a manufacturer or producer, importer, supplier or retailer is liable for damage caused wholly or partly by a defective product.

The Federal Competition and Consumer Protection Act 2018 ("**FCCPA**")[11] guarantees the right of a consumer to receive goods that are of good quality, in good working order and free of defects.[12] The FCCPA also imposes liability on the supplier where damage is caused by defective goods or the supply of a service.[13] "Products" under the FCCPA include goods and services.[14] This suggests that where an AI product is defective and causes damage, the supplier may be held liable under the FCCPA.

However, there are a few legal challenges with relying on the FCCPA. The definition of "goods" in the FCCPA appears not to contemplate AI. It is arguable that the definition may be stretched to apply to automated versions of "ship, aircraft, vehicles". Again, although the definition of "service" under the FCCPA appears flexible and broad enough to be stretched to include AI, the challenge with stretching this definition to include AI is that, in the context of AI, it may be difficult to determine who the supplier is because typically, many parties are involved in AI. These parties may include software developers, data providers, designers, manufacturers, hardware engineers, programmers, users, etc. Furthermore, the absence of a definition of "defect" in the FCCPA presents further practical difficulties with situating AI Liability within product liability.

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[5] See CIL Risk & Asset Mgt. Ltd. v. Ekiti State Government (2020) 12 NWLR (Pt. 1738) 203; Bello v. A.-G., Oyo State (1986) 5 NWLR (Pt. 45) 828 Orianzi v. A.-G., Rivers State (2017) 6 NWLR (Pt.1561) 224; Omoyinmi v. Ogunsiji (2008) 3 NWLR (Pt. 1075) 471 .

[6] Product liability or manufacturer's liability refers to the liability of a manufacturer or supplier of a product for damage caused by a defect in such product.

[7] Amadi v. Essien (1994) 7 NWLR (Pt. 354) 91; Mekwunye v. Emirates Airlines (2019) 9 NWLR (Pt. 1677) 191

[8] (1932) AC 562

[9] [1985] 1 NWLR (Pt 4) 739

[10] Chapter L82 of the Laws of Lagos State 2015.

[11] Section 167 FCCPA.

[12] Section 131(1)(b) FCCPA.

[13] Section 136(1) FCCPA.

[14] Section 167 FCCPA.

Thus, an amendment of the relevant provisions of the FCCPA is necessary, in order to ensure that AI Liability is aptly captured.

Another key issue to consider is that the FCCPA does not introduce a product liability regime which may be relied on by a claimant seeking damages for loss or injury caused by AI. Put differently, while the regulator may impose fines and penalties against the manufacturer of a defective good or supplier of defective service, the FCCPA does not prescribe damages or compensation payable to the victim. The FCCPA simply criminalizes any contravention of a consumer's right (including the right to receive non- defective goods) and prescribes a penalty of fine and/or imprisonment. Thus, any claim for damages would have to be situated under the general law.

4.0 Vicarious Liability

Another liability regime which has been advocated for situating AI Liability is vicarious liability. Although vicarious liability typically arises in employment, partnership and limited liability partnership scenarios, vicarious liability may also be implied by law, outside the context of an employment relationship, particularly where the agent carries on activities as an integral part of the activities of the principal and for the principal's benefit, and where the commission of the wrongful act is a risk created by the principal by assigning those activities to the agent.

Some persons have argued that AIs should be treated as agents of their owners or manufacturers, depending on the scenario, and that the human principal should be held vicariously liable for damage caused by the AI. The reasoning behind this is that AI is designed to accomplish goals specified by, and receive tasks/directions from a human being. Thus, it has been suggested that vicarious liability may be applied to hold the human principal liable for the damages caused by the AI agent. One of the commonly cited examples of this is the case of robots and autonomous vehicles. Thus, where, for instance, a robot is designed to perform roles in a company that would ordinarily be performed by a human being (an employee) and damage occurs as a result, it has been advocated that the company, being the "employer" of the robot, should be held vicariously liable.

This approach, however, presents practical difficulties, foremost of which is the fact that it is not in all AI scenarios that the concept of agency can be deemed to apply. Furthermore, while it may appear convenient to regard AI as an agent of a human principal, it must be borne in mind that the concept of vicarious liability, as it currently exists, contemplates a human agent. Therefore, unless the law is modified to make vicarious liability applicable to non-human agents, it is impossible to situate AI Liability within vicarious liability.

Another practical difficulty is the issue of identifying the principal, particularly where many parties are involved. For instance, where a chatbot provides wrong information to a customer and the customer suffers personal injury or financial loss as a result, a pertinent question that arises is "which of the chatbot's owners or data providers or designers should be liable?" While there is no clear answer to this question, it is clear that the answer will depend on the circumstances of each case. Certain factors may need to be considered, such as the person with the greatest level of involvement, monitoring and supervision of the AI, or the person with the highest capacity and capability to control or influence the actions of the AI. Where there are multiple principals, it may be possible to hold all the principals jointly and severally liable for the damage.

5.0 Conclusion

The fact that AI has pervaded everyday life in the modern world necessitates the entrenching of a legal framework for addressing the question of AI Liability. This becomes paramount as advancements are being made in the deployment of AI technology. The dearth of an authoritative statutory framework and judicial precedent on AI Liability in Nigeria make it impossible to identify a precise liability regime for damage caused by AI. It, therefore, remains to be seen, how the court will handle this issue if it becomes a subject of litigation before the Nigerian courts.

[11] Section 155 FCCPA.
[12] Vicarious liability entails the imposition of liability on one person for a tort committed by another person, based on a relationship between the two persons. It is an indirect or imputed legal responsibility for the acts of another as in the liability of an employer for the acts of an employee, or a principal for the conduct of an agent. See NEPA v. Obiese (1999) 10 NWLR (Pt. 623) 478.
[13] E v English Province of Our Lady of Charity [2012] EWCA Civ 938.