THE IMPACT OF ARTIFICIAL INTELLIGENCE ON DUTY AND STANDARD OF CARE IN LEGAL PRACTICE: A 'DISRUPTING MOMENT' FOR LAWS THAT PROTECT CONSUMERS FROM ECONOMIC HARM?

CATHERINE BROWN, SHARON CHRISTENSEN,* BRYDON WANG,† AMANDA STICKLEY,* TRENT CANDY‡ AND ROUHSHI LOW*

The increasing integration of artificial intelligence ('AI') into legal practice introduces a spectrum of automation goals, ranging from systems that merely assist lawyers in decision-making to those that aim to provide fully autonomous legal advice. In particular, the rise of generative conversational artificial intelligence ('GenAI'), such as ChatGPT, is fundamentally changing the nature of legal practice and expanding the spectrum of potential automation of tasks in legal practice. While the legal profession has been, for some years, considering the disruptive nature of technology and AI, its focus has been directed primarily towards the risks and potential harms of autonomous systems and AI in areas such as personal injury, privacy, discrimination, and the interaction and interference of such technologies with human rights. This paper investigates the shifting sources of liability for economic harm across different points on this spectrum by examining examples of AI currently being used by the legal profession, and considers how the degree of AI involvement in the generation of legal advice influences the allocation of liability between legal practitioners, AI system developers and other stakeholders for economic loss arising from negligent or inaccurate legal advice. We focus on understanding how existing liability frameworks respond to cases where consumers suffer economic loss as a result of AI-generated legal advice. In doing so, we argue that the level of autonomy granted to AI systems has a direct impact on both the legal standard of care and the attribution of liability. The paper highlights the need for a nuanced regulatory approach to account for varying levels of human input and AI autonomy in legal practice, ensuring adequate consumer protection against economic harm.

* Queensland University of Technology (QUT), Australia.

† KPMG Australia; University of Queensland (UQ), Australia.

‡ Corrs Chambers Westgarth, Australia.

The authors wish to acknowledge the support provided by the QUT Faculty of Business and Law Humans Technology Law Centre (https://research.qut.edu.au/htlc/) for this project.

I INTRODUCTION

Advances in technologies aimed at improving or replicating human decision-making processes have paved the way for data-focused technologies to play an increasingly significant role in various sectors of society. These technologies, and the emergence of ever new iterations, have created an emergent market ripe with opportunities that promise greater efficiencies and accuracy in decision-making across the sectors of health, education, energy, and the environment.[1] Similarly, the legal profession is undergoing significant transformation, as it gradually overcomes its initial hesitancy and scepticism towards the adoption of automated technologies. Indeed, it is uncontroversial to assert that the legal profession is 'undergoing change at a pace never experienced and in ways most lawyers would have found hard to predict at the beginning of the 21st century.'[2]

At the heart of this technological revolution is the rise of artificial intelligence ('AI'). The development of AI has progressed through three distinct stages (or 'waves'):[3] the first wave in the 1950s which is sometimes referred to as 'weak' or 'narrow' AI and is predominantly focussed on performing pre-programmed tasks; the second wave in the 1980s which can be categorised as the era of expert systems that learn through data and the use of algorithms, and which encompasses generative AI and Large Language Models ('LLMs') like ChatGPT; and finally the third wave, being the phase where AI becomes a more autonomous entity and adopts a more human-like intelligence. Of course, these stages are not always clearly defined. For example, in the context of automated decision making, Zalnieriute, Moses and Williams simply draw a distinction between systems that are based on a series of pre-programmed rules (equating to the first wave) and systems that operate 'on the basis of rules learnt from patterns and correlations in historic data' (equating to the second wave).[4] Regardless of the precise definition, we argue that the rapid development of AI in recent years has had a significant impact on the delivery of legal services.

While the disruptive potential of AI-enabled systems to deliver legal services has been widely

---

[1] Executive Office of the President, National Science and Technology Council Committee on Technology, 'Preparing for the Future of Artificial Intelligence' (Web Page, October 2016) 1 <https://obamawhitehouse.archives.gov/sites/default/files/whitehouse_files/microsites/ostp/NSTC/preparing_for_the_future_of_ai.pdf>.

[2] NSW Law Society, 'The Future of Law and Innovation in the Profession Report' (Report, 2017) 2 <https://www.lawsociety.com.au/sites/default/files/2018-03/1272952.pdf>.

[3] Judith Bennett et al, 'Current State of Automated Legal Advice Tools' (Discussion Paper No 1, University of Melbourne Networked Society Institute, April 2018) 11 <https://apo.org.au/sites/default/files/resource-files/2018-05/apo-nid143431.pdf>.

[4] Monika Zalnieriute, Lyria Bennett Moses and George Williams, 'The Rule of Law and Automation of Government Decision-Making' (2019) 82(3) *Modern Law Review* 425, 432–3.

recognised,[5] much of the existing research has focused on personal injury,[6] interference with privacy,[7] discrimination,[8] and human rights infringements.[9] In contrast, this article focuses on how the law should respond to economic harm that may arise when consumers of legal services receive inaccurate legal information or negligent legal advice that has been, partly or wholly, provided by an AI-enabled system. Specifically, we investigate how current legal frameworks address economic loss caused by AI-generated legal advice, and whether these frameworks are adequate in their current form or require reform.

Our analysis contributes to the ongoing academic and policy debate by focusing on the varying levels of AI autonomy and their impact on the allocation of liability. Rather than generalise the effects of AI on the legal profession, we concentrate on the spectrum of automation, which ranges from systems that augment human decision-making to fully autonomous systems that could arguably replace lawyers in providing legal advice.[10] This paper begins by providing a short background on how AI is shaping

[5] See, eg, Michael Legg and Felicity Bell, 'Artificial Intelligence and the Legal Profession: Becoming the AI-Enhanced Lawyer' (2019) 38(2) *University of Tasmania Law Review* 34, 34–59; Francesco Contini, 'Artificial Intelligence and the Transformation of Humans, Law and Technology Interactions in Judicial Proceedings' (2020) 2(1) *Law, Technology and Humans* 4; Kate Galloway et al, 'The Legal Academy's Engagements with LawTech: Technology Narratives and Archetypes as Drivers of Change' (2019) 1(1) *Law, Technology and Humans* 27; Dan Hunter, 'The Death of the Legal Profession and the Future of Law' (2020) 43(4) *UNSW Law Journal* 1199; John Morison, and Adam Harkens, 'Re-Engineering Justice? Robot Judges, Computerized Courts and (Semi) Automated Legal Decision-Making' (2019) 39(4) *Legal Studies* 618; Michael Guihot, 'New Technology, The Death of the BigLaw Monopoly and the Evolution of the Computer Professional' (2019) 20(3) *North Carolina Journal of Law & Technology* 405.

[6] See, eg, Richard Epstein, 'Liability Rules for Autonomous Vehicles' (2021) 10(2) *Journal of Entrepreneurship and Public Policy* 218; Stephen Wu, 'Autonomous Vehicles, Trolley Problems, and the Law' (2020) 22(1) *Ethics and Informational Technology* 1; Lisa Collingwood, 'Privacy Implications and Liability Issues of Autonomous Vehicles' (2017) 26(1) *Information & Communications Technology Law* 32, 32–45.

[7] Jade Andrews, 'Maintaining Privacy in Artificial Intelligence-Driven Bioinformatics: An Inquiry into the Suitability of Australia's Laws' (2020) 28(1) *Journal of Law and Medicine* 179.

[8] The 'Robodebt' scandal in Australia is one prominent example of these issues, see Michael D'Rosario and Carlene D'Rosario, 'Beyond RoboDebt: The Future of Robotic Process Automation' (2020) 11(2) *International Journal of Strategic Decision Sciences* 1. Separately, see also, John Guenther, Ben Smede and Metta Young, 'Digital Inclusion in Central Australia: What is it and What Makes it Different?' (2020) 29(3) *Rural Society* 154; Frederik Borgesius, 'Strengthening Legal Protection Against Discrimination by Algorithms and Artificial Intelligence' (2022) 24(10) *International Journal of Human Rights* 1572; Bert Heinrichs, 'Discrimination in the Age of Artificial Intelligence' (2022) 37(1) *AI & Society* 143.

[9] See, eg, Amanda Sharkey, 'Robots and Human Dignity: A Consideration of the Effects of Robot Care on the Dignity of Older People' (2014) 16(1) *Ethics and Information Technology* 63.

[10] Richard Susskind, *The Future of Law: Facing the Challenges of Information Technology* (Clarendon Press, New York, 1996); Hunter (n 5).

the provision of legal services. We then propose two categories of AI-enabled legal advice systems based on the degree of human input: *Decision Assistance AI Systems* ('Category 1 systems'), which support the lawyer in providing advice; and *Decision-Making AI Systems* ('Category 2 systems'), which substitute the lawyer entirely. Each of these categories can be further categorised based on the complexity and autonomy of the AI model involved, from systems that follow pre-defined instructions to those that employ advanced machine learning algorithms capable of self-learning.

Following this, we consider specific applications of AI in the provision of legal services (referred to as 'use cases'), as relevant to both categories, and evaluate the extent to which the Australian legal system is able to respond to economic loss suffered from reliance on, or use of, AI-generated legal information or legal advice. Specifically, our evaluation considers whether the law is sufficiently nuanced to differentiate between human and machine error in the provision of negligent legal advice. Additionally, we examine the challenges posed by 'black box' problems where the inner workings of AI systems are opaque, making it difficult for consumers to prove causation. We close with a brief consideration of the Australian Consumer Law and regulatory approaches taken by the European Union ('EU'), Canada and United States ('US').

Ultimately, this paper seeks to assess the extent to which the current liability framework can effectively respond to the risks posed by AI-enabled systems, particularly in the context of economic harm arising in each of the categories. We aim to identify the gaps in the liability framework and highlight areas that require further consideration by policymakers and regulators, ensuring that consumer protection is maintained as AI continues to reshape legal practice.

II HOW AI IS SHAPING THE PROVISION OF LEGAL SERVICES

The development of AI in legal practice began in the 1980s with the introduction of automated decision-making systems, primarily focused on expert systems driven by pre-programmed algorithms.[11] These early systems were rule-based, and designed to address repetitive, domain-specific problems with deterministic outputs aimed at achieving pre-defined goals.[12] Over the past four decades, these technologies have found widespread use across industries such as airlines, retail, financial services, insurance, and pharmaceuticals.[13] In the legal sector, this first wave of AI innovation brought about automated legal advice tools ('ALATs'), which automated the generation of legal advice by combining

[11] Zalnieriute, Moses and Williams (n 4) 432.

[12] Kate Devitt, 'Trustworthiness of Autonomous Systems' in Hussein Abbass, Jason Scholz and Darryn Reid (eds), *Foundations of Trusted Autonomy* (Springer Open, 2018) 161, 162.

[13] Jeanne G Harris and Thomas H Davenport, 'Automated Decision Making Comes of Age' 2005 46(4) *MIT Sloan Management Review* 83, 84-5. See also Zalnieriute, Moses and Williams (n 4) 425.

legal analysis, reasoning, and prediction. [14]

In 1996, Richard Susskind's seminal work — *The Future of Law* — predicted that technology would radically disrupt legal practice, not only through automation but by re-engineering the entire process.[15] He argued that as technology advanced, the market for legal services would prioritise cost-efficiency, leading to increased reliance on individuals relying on sophisticated AI systems in order to carry out tasks like advising, drafting, researching, and problem-solving.

Since the 1990s, AI development has evolved significantly, leveraging advancements in computing power and storage, data collection, and more sophisticated algorithms. The current wave of AI technology, particularly automated decision-making systems ('ADS'), relies on machine learning and algorithmic rules to draw connections between data points gathered from patterns and correlations in the training data, making predictions that can be continually refined against specific goals.[16] However, unlike the expert systems, which could provide clear reasons for the decisions, this new generation of second-wave AI systems is more opaque. For instance, deep neural networks generate decisions that are difficult to explain in 'human-crafted logic', raising concerns about the comprehensibility and accountability of these AI systems.[17]

An example of this shift can be seen in Australia, where Woodside Energy partnered with IBM's cognitive computing platform, Watson, to enhance engineers' decision-making by drawing on Woodside Energy's extensive body of knowledge captured in documentation produced by its engineers and other consultants.[18] Watson has been used to augment the abilities of Woodside Energy engineers in solving design challenges and the corpus of knowledge to administer construction contracts.[19] Consequently, IBM's Watson and other systems with similar machine learning abilities offer a means of using an existing body of contract-administration outcomes on similar past projects to improve the interpretation of ambiguous legal terms in construction contracts. Despite the lack of transparency in some AI processes, systems like Watson are reshaping how expert advice is delivered, with predictions

[14] Bennett et al (n 3) 7; see also Zalnieriute, Moses and Williams (n 4) 433.

[15] Susskind (n 10).

[16] Zalnieriute, Moses and Williams (n 4) 433.

[17] Ibid 433–434.

[18] David Godkin, 'Mining's Next Frontier: Harnessing Artificial Intelligence to Revolutionize Mining' (2017) 138(4) *Canadian Mining Journal* 14, 14.

[19] Paul Smith, 'Woodside Expands IBM Watson Artificial Intelligence as Tech Takes Centre Stage' *Australian Financial Review* (Sydney, 26 April 2016) <https://www.afr.com/technology/enterprise-it/woodside-expands-ibm-watson-artificial-intelligence-as-tech-takes-centre-stage-20160422-gocq5i>.

that machines will increasingly fulfil roles traditionally held by legal experts.[20]

With the rise of generative conversational AI, such as OpenAI's ChatGPT, legal practice is entering yet another stage of AI development. LLMs operate autoregressively, predicting sequences of words in response to input text.[21] The rapid evolution of these models is evident in OpenAI's progression from GPT-1 (with 117 million parameters) to GPT-3 (with 175 billion parameters) in just one year.[22] Trained on vast corpora of text and refined using reinforcement learning from human feedback ('RLHF'),[23] these models are capable of engaging in general conversation, providing answers, and performing tasks such as legal research and contract drafting.

The speed of adoption of these models is impacting the way we approach problem-solving (and conversational AI), from how we carry out online searches — for example, the integration of GPT in Bing — to the way information is presented as 'truth' in an unverified way. However, one major concern is the phenomenon of hallucination[24] — where the AI generates nonsensical or inaccurate information due to dataset noise or bias, presenting it as factual. Similarly, the concept of stochastic parrots highlights how AI systems might repeat patterns from training data without being able to give any real meaning to the language used and produced. [25] A separate phenomenon of infection, where legal concepts from a foreign jurisdiction are imported into responses to input text and presented as the position at law within the local jurisdiction are also of concern.[26] These three phenomena should give legal practitioners pause because they present clear risks to the accurate and reliable provision of legal advice that comes with the potential for economic harm. As such, even as researchers are actively exploring how these AI

[20] Richard Susskind and Daniel Susskind, *The Future of the Professions: How Technology will Transform the Work of Human Experts* (Oxford University Press, 2016), 1.

[21] Brydon Wang, 'Prompts and Large Language Models: A New Tool for Drafting, Reviewing and Interpreting Contracts?' (2024) 6(2) *Law, Technology and Humans* 88, 89.

[22] Priya Shree, 'The Journey of Open AI GPT Models', *MEDIUM* (Web Page, 10 November 2020) https://medium.com/walmartglobaltech/the-journey-of-open-ai-gptmodels-32d95b7b7fb2, cited in Jonathan H Choi et al, 'ChatGPT Goes to Law School' (2022) 71(3) *Journal of Legal Education* 387, 388.

[23] See Paul F Christiano et al, 'Deep Reinforcement Learning from Human Preferences' (Conference Paper, Conference on Neural Information Processing Systems, February 2023), cited in Choi et al (n 22) 2.

[24] Ziwei Ji et al, 'Survey of Hallucination in Natural Language Generation' (2023) 55(12) *ACM Computing Surveys* 1.

[25] E M Bender et al, 'On the Dangers of Stochastic Parrots' (2021), *Proceedings of the 2021 ACM Conference on Fairness, Accountability, and Transparency* 610, 616–7 <https://dl.acm.org/doi/10.1145/3442188.3445922>.

[26] Wang (n 21) 91.

systems can demonstrate the ability to pass the American bar exam,[27] construct a law journal article,[28] aid in contract drafting, eDiscovery and due diligence,[29] pass a law school exam,[30] or serve as a legal academic[31] (with assistance of a human user with no legal experience), these advancements demand caution as errors in AI-generated legal advice can have significant consequences for clients.

While the impact of AI on the legal profession is undeniable, it is far from the 'death of the legal profession' predicted by early commentators like Susskind and other academics.[32] AI's disruption of legal services, particularly within judicial contexts, is accelerating, with governments such as the Queensland State Government allocating significant funds to digitise court processes and, more generally, investing in AI-driven technologies.[33] For example, the 2022–2023 Queensland State Budget included '$126.9 million over 5 years to digitise Queensland Courts and the Queensland Civil and Administrative Tribunal'.[34] Beyond court systems, AI's impact on legal practice is most evident in the development of tools that assist lawyers with tasks such as discovery,[35] drafting of 'boilerplate' contractual provisions,[36] and even legal analytics tools which operate as 'a digital platform that allows

[27] Michael Bommarito and Daniel Martin Katz, 'GPT Takes the Bar Exam' (Working Paper, Cornell University, December 2022).

[28] Andrew Perlman, 'The Implications of ChatGPT for Legal Services and Society', *Harvard Law School Center on the Legal Profession, The Practice – March/April 2023* (Website Newsletter, December 5, 2022). <https://clp.law.harvard.edu/knowledge-hub/magazine/issues/generative-ai-in-the-legal-profession/the-implications-of-chatgpt-for-legal-services-and-society/>.

[29] See generally Wang (n 21).

[30] Choi et al (n 22).

[31] Tammy Pettinato Oltz, 'ChatGPT, Professor of Law' (2023) 2023(1) *University of Illinois Journal of Law, Technology & Policy* 207.

[32] Hunter (n 5) 1202–1203.

[33] See generally 'Our Thriving Digital Future: Queensland's Digital Economy Strategy', *Queensland Government* (Web Page) <https://www.qld.gov.au/about/how-government-works/strategies-and-initiatives/digital-economy-strategy>; 'Our Thriving Digital Future: 2023–2026 Action Plan', *Queensland Government* (Web Page) <https://www.qld.gov.au/about/how-government-works/strategies-and-initiatives/digital-economy-strategy/action-plan>.

[34] Queensland Government (Queensland Treasury), *'Budget Strategy and Outlook 2022–23'* (Budget Paper No 2, 2022) 24 <https://s3.treasury.qld.gov.au/files/Budget_2022-23_Strategy_Outlook.pdf>.

[35] This is hardly a new phenomenon. In *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd (No 1)* (2016) 51 VR 421, Vickery J at [36] ordered the use of 'predictive coding' technology for document review because manual review would be too time-consuming and expensive. Two large eDiscovery platforms are 'Ringtail' and 'Relativity'; see <https://www.nuix.com/products/nuix-discover> and <https://www.relativity.com/>.

[36] For example, 'Smarter Drafter' is a company which provides document automation services to over 200 Australian law firms. See Smarter Drafter, 'Taking the Pain out of Drafting Legal Documents' (Web Page, 2022) <https://smarterdrafter.com.au/>.

people to progress through dispute resolution…entirely online.'[37] While these systems have been in use for a number of years, their uptake was accelerated by the reliance on technology during the COVID-19 pandemic, which required an increased reliance on remote work and technology-driven solutions to maintain legal operations. For example, legal software platforms like 'Smarter Drafter' allow users to automate the drafting of over 120 legal documents by responding to dynamic online questionnaires.[38] 'Definely' helps lawyers to more easily access defined terms and references in documents by providing a 360 degree 'one click' solution to drafting and reviewing documents.[39] Similarly, 'Luminance'[40] and 'Donna'[41] assist lawyers in reviewing documents and managing complex legal workflows. Luminance further provides AI-powered legal process automation. American firms such as LegalZoom[42] and Rocket Lawyer[43] have developed service offerings which include automated advice and document creation tools.[44] From a dispute resolution perspective, AI systems are also playing a role in predictive analytics, with platforms such as 'SettleIndex'[45] and 'Eperoto'[46] providing decision-making support in litigation by analysing patterns and risks to inform legal strategy.

In addition to improving efficiency, AI systems are seen as potential solutions to the growing accessibility challenges in the legal sector. The high cost of legal services remains a significant barrier to justice, with the Law Council of Australia's Justice Project reporting that while 14% of Australians live below the poverty line, only 8% are able to access legal aid.[47] AI-enabled systems can reduce the cost and complexity of legal tasks and thus offer the potential to make legal services more accessible to those

[37] Peter Cashman and Eliza Ginnivan, 'Digital Justice: Online Resolution of Minor Civil Disputes and the Use of Digital Technology in Complex Litigation and Class Actions' (2019) 19 *Macquarie Law Journal* 39, 41.

[38] Smarter Drafter (n 36); see also 'Draftwise', which helps transactional attorneys use their firm's best language to draft and negotiate complex agreements directly inside Microsoft Word; DraftWise, 'Supercharge your Drafting and Negotiation' (Web Page, 2022) <https://www.draftwise.com/product>.

[39] 'Our Story' *Definely* (Web Page, 2022) <https://www.definely.com/>.

[40] See Luminance (Web Page, 2022) <https://www.luminance.com/overview.html>.

[41] 'Product', *Donna* (Web Page, 2022) <https://justdonna.ai/>.

[42] 'LegalZoom', *LegalZoom* (Web Page, 2022) <https://www.legalzoom.com/country/au>.

[43] 'RocketLawyer', *RocketLawyer* (Web Page, 2022) <https://www.rocketlawyer.com/>.

[44] Hunter (n 5) 1202–3.

[45] 'Financial Modelling and Risk Analysis for Litigation', *SettleIndex* (Web Page) <https://settleindex.com/>.

[46] 'Value and Evaluate Your Legal Disputes', *Eperoto* (Web Page, 2022) <https://eperoto.com/>.

[47] Law Council of Australia, 'The Justice Project Final Report' (Report, August 2018) 39 <https://lawcouncil.au/files/web-pdf/Justice%20Project/Final%20Report/Justice%20Project%20_%20Final%20Report%20in%20full.pdf>; Law Council of Australia, 'Access to justice requires major boost to legal assistance service funding' (Web Page, November 2023) <https://lawcouncil.au/media/media-releases/access-to-justice-requires-major-boost-to-legal-assistance-service-funding>.

who cannot afford traditional representations.[48] For example, 'DoNotPay', currently available in the United Kingdom and United States claims to be 'the world's first robot lawyer' and promotes giving users the ability to 'fight corporations, beat bureaucracy and sue anyone at the press of a button'.[49] However, these chatbots and apps are for 'single issue' legal problems, such as how to dispute a parking fine, complete paperwork for a divorce,[50] or plead guilty to a minor criminal offence.[51] Concurrently, there have been developments in AI-enabled online dispute resolution ('ODR') platforms to allow more people to progress through the various stages of dispute resolution more efficiently.[52] For example, the first stage of the dispute resolution process under British Colombia's Civil Resolution Tribunal, 'Solution Explorer', leverages AI to provide parties with tailored information and tools based on information provided by the disputants upon commencing a claim.[53] In June 2022, Solution Explorer handled a total of 2,411 matters.[54] By comparison, the Magistrates Courts of Queensland, which service a similar population and jurisdiction, dealt with an average of 1,179 civil claims per month.[55] These numbers suggest that AI systems will be able to significantly increase access to justice.

Developers are also seeking to use deep learning algorithms to perform complex cognitive tasks within the law. One view is that this type of system has the potential to replace lawyers for part, or even all, of the legal process. Tools like the former ROSS Intelligence, Westlaw Precision Australia and Lexis+ AI are legal research software programs which are specifically trained on legal documents and can assess the intent and meaning of a lawyer's research query, rather than merely responding to keywords.[56]

---

[48] Ibid.

[49] 'The World's First Robot Lawyer', *DoNotPay* (Web Page, 2022) <https://donotpay.com/>.

[50] For example, 'Family Property' is the first platform specifically built for family law professionals that simplifies the manual, time consuming and repetitive aspects of managing family property matters. See 'Separation Simplified', Family Property (Web Page, 2022) <https://www.familyproperty.com.au/>.

[51] 'Robot Lawyers' provides free legal advice for those appearing for themselves and pleading guilty in criminal Courts in Australia. See 'Robot Lawyers is Free, Easy and Confidential', *Robot Lawyers* (Web Page, 2022) <https://www.robot-lawyers.com.au/>.

[52] Cashman and Ginnivan (n 37) 41.

[53] Shannon Salter, 'Online Dispute Resolution and Justice System Integration: British Colombia's Civil Resolution Tribunal' (2017) 34 *Windsor Yearbook of Access to Justice* 112, 120.

[54] 'CRT Statistics Snapshot - June 2022', *Civil Resolution Tribunal* (Blog Post, 7 July 2022) <https://civilresolutionbc.ca/blog/statistics-snapshot-june-2022/>.

[55] The number of claims lodged in 2020–1 was 14,150, being a monthly average of 1,179: Queensland Courts, *Magistrates Court of Queensland Annual Report 2020–2021* (Report, 27 October 2021) 27.

[56] 'What is AI', *ROSS Intelligence* (Web Page, 2022) <https://www.rossintelligence.com/what-is-ai>; 'AI for legal research' *Thomson Reuters Australia* (Web Page) <https://www.thomsonreuters.com.au/en-au/c/ai-for-legal-

As legal service providers face increasing pressure from policy, societal and market forces to adopt modern technologies, the profession must navigate these changes while ensuring that the legal frameworks governing liability and consumer protection keep pace with technological advancements.[57] However, we contend that the allocation of liability and thus the object of regulation must be guided by the level of human involvement in the AI-generated advice. As outlined above, the examples of AI deployment in legal practice show the diversity of AI systems in use by lawyers. These systems range from those which assist and augment legal tasks, supervision or review by lawyers, to those which are capable of giving legal advice directly to clients or aiding in resolving disputes without the input of lawyers altogether.[58] As such, prior to our examination of the question of liability for AI-generated legal advice, we set out a novel taxonomy of AI-enabled systems below.

III CATEGORISING AI SYSTEMS AND THE LIABILITY FRAMEWORK

In this section we examine the circumstances in which AI might be used trigger inaccurate advice being given to clients (the consumer of legal advice) and the extent to which the existing liability framework is able to ascribe liability. First, it is instructive to categorise AI systems in the context of the level of human involvement with the system, and second, we provide a broad overview of the Australian liability framework for inaccurate legal advice.

A *Classification of AI Systems*

We classify the provision of legal advice through AI applications into two broad categories based on use and level of human involvement as follows:[59]

Category 1: *Decision Assistance AI Systems*

This category of AI systems arises when the legal advisor uses the AI as a tool to assist in either the giving of advice or the undertaking of a legal task. The client does not deal with the AI directly. 'The AI applications perform tasks using either a combination of pre-coded causal rules and automated reasoning, or machine learning, or both. As such, some of these Category 1 systems will be capable of self-learning.'

Category 2: *Decision-Making AI Systems*

---

research.html?cid=4532388&chl=eb>; 'The Legal Industry in the Age of AI', *Lexis Nexis* (Web Page) <https://www.lexisnexis.com.au/en/insights-and-analysis/artificial-intelligence>.

[57] Galloway et al (n 5).

[58] Bennett et al (n 3) 25.

[59] In contrast, the authors in Bennett et al (n 3) provide a classification of automated legal advice tools (ALAT) technologies at [4.1] based on legal advice functions and by technology.

In this category, the AI system provides the legal advice without any intervention by the legal advisor. We further categorise this group of systems into two sub-categories based on technology.

The first sub-category ('**Category 2A**') consists of AI systems that are programmed by a human and, as such, make or recommend decisions based on rules programmed by humans. These AI systems are not capable of self-learning; rather they simply execute pre-defined instructions.[60]

The second sub-category ('**Category 2B'**) are AI systems that have the capacity to learn or adapt to new experiences or stimuli.[61] Unlike the first sub-category, these AI applications do not make decisions based on pre-set rules programmed into AI. These AI applications use machine learning algorithms and sophisticated technologies that can 'parse text, learn causations and correlations from data, and reason about these to make predictions'.[62] This means they are capable of self-learning from data using statistical reasoning.

Having categorised AI systems, we now turn to a brief overview of the existing liability framework for lawyers where a consumer suffers economic loss as a result of legal advice, before considering its application to the situation where AI-enabled tools may be to blame.

B *Existing Liability Framework.*

It is pertinent to briefly outline the existing liability framework for solicitors, which consists of causes of action based in both common law and statute/regulations. By way of example, pursuant to the obligations imposed on solicitors in Queensland, a legal practitioner may be subject to an action in relation to the following causes of action:

- breach of a fiduciary duty[63] (eg breach of confidence, conflict of interest);
- breach of a common law duty[64] (eg breach of contract/retainer or negligence);
- disciplinary proceedings following a breach of the *Australian Solicitors' Conduct Rules 2023* ('*ASCR*') pursuant to the *Legal Profession Act 2007* (Qld) ('*LPA*');[65]

---

[60] Bennett et al (n 3) 13.

[61] Select Committee on Artificial Intelligence, *AI in the UK: Ready, Willing and Able?* (House of Lords Paper No 100, Session 2017–9) [11].

[62] Bennett et al (n 3) 23.

[63] The lawyer-client relationship attracts fiduciary duties: see *Re Morris Fletcher & Cross' Bill of Costs* [1997] 2 Qd R 228. Sanctions seek to reinforce the high standards which the law of equity imposes on fiduciaries.

[64] As to the existence of the duty of care owed by lawyers, see *Hill v Van Erp* (1997) 188 CLR 159 ('*Hill v Van Erp*').

[65] Sanctions under the *Australian Solicitors' Conduct Rules 2023* ('*ASCR*') or *Legal Profession Act 2007* (Qld) ('*LPA*') are to protect the public by reinforcing professional standards and communicating to the public the role of discipline.

- criminal proceedings following a breach of the *LPA* provisions regarding trust money;[66] and
- contravention of the Australian Consumer Law which applies to all law practices, solicitors and barristers, whether they are incorporated legal practices, partnerships or sole practitioners.[67]

Of primary relevance for present purposes is the breach of a common law duty because the remedy in this instance (specifically, an award of damages) is designed to compensate a consumer of legal services, the client, for actual loss suffered. As tort has largely superseded contractual claims where consumers suffer economic loss arising from the reliance or use of the advice or information, on account of 'the test of remoteness in tort [being] much less demanding than in contract',[68] it will form the basis of the following discussion. Furthermore, the focus of our analysis is how the principles governing the duty of care owed by legal advisors to their client apply when a legal advisor uses AI either to assist in providing advice or as the advice provider.

Under Australian law, a legal advisor will breach their duty of care to a client if they fail to perform to the required standard. It is accepted that to satisfy their duty of care a legal advisor is required to perform to the standard expected of a reasonably competent and diligent solicitor having regard to the standards normally adopted in the profession.[69] In *Hill v Van Erp*, Brennan CJ stated that 'a solicitor's duty is owed … to the client subject to the rules and standards of the profession. That is because that solicitor's duty is to exercise professional knowledge and skill in the … transaction in which the solicitor is retained'.[70]

Whether a legal advisor has met the expected standard of care is measured against the conduct of a reasonably competent advisor having regard to the type of transaction, the circumstances of the client and the retainer. [71] This means that the steps required to meet the standard will vary in each case

---

The ACSR replaced the Legal Profession (Solicitors) Rule 2007 on 1 June 2012 and applies to Australian jurisdictions pursuant to the *Legal Profession Uniform Law*.

[66] In theory, these are the only sanctions specifically designed (at least in part) as punishment: see generally *Penalties and Sentences Act 1992* (Qld) s 3.

[67] See, eg, *Competition and Consumer Act 2010* (Cth) sch 2, ('*Australian Consumer Law*") ('ACL').

[68] *Brickhill v Cooke* [1984] 3 NSWLR 396, 400 (Glass JA).

[69] *Midland Bank Trust Co Ltd v Hett Stubbs and Kemp (a firm)* [1979] Ch 384, 403 ('*Midland*'); *Simmons v Pennington & Son (as firm)* [1955] 1 All ER 240.

[70] *Hill v Van Erp* (n 64) 167.

[71] *Heydon v NRMA Ltd* (2000) 51 NSWLR 1, 117 ('*Heydon v NRMA*').

depending upon the existence of accepted professional standards and evidence of other practitioners concerning the ordinary practice in the circumstances.[72]

A solicitor will be liable for negligence where a plaintiff succeeds in establishing the elements of negligence: the existence of a duty of care, a breach of the standard of that duty, and that damage was caused by the breach of that standard of care.

Where a solicitor has a contractual relationship with a client through a retainer, and where the matter in issue arises within the scope of the retainer, there will be no difference between the duty of care imposed by the retainer and that in negligence.[73] Generally speaking, the tortious standard of care expected of a person with some special skill or competence is that of the ordinary skilled person exercising and professing to have that special skill.[74] The application of this standard to solicitors is well accepted in Australia. It follows that the standard of care is that of a reasonably competent and diligent practitioner having regard to the type of transaction, and the circumstances of the client and of the retainer.[75]

In *Hawkins v Clayton*, Deane J said:

> The relationship of solicitor and client ... is a relationship of proximity of a kind which may well give rise to a duty of care on the part of the solicitor which requires the taking of positive steps, beyond the specifically agreed professional task or function, to avoid a real and foreseeable risk of economic loss being sustained by the client. Whether the solicitor-client relationship does give rise to a duty of care requiring the taking of such positive steps will depend upon the nature of the particular professional task or function which is involved and the circumstances of the case.[76]

Evidently then, the content of a lawyer's duty is flexible and largely depends upon the existence of accepted professional standards and on the evidence of other practitioners concerning the ordinary practice in the circumstances.[77] However, what remains largely unresolved is the extent to which the application of technologies such as AI to legal practice, particularly those in Category 2 described above, impact the scope of a lawyer's duty to their client.

The various state and territory *Civil Liability Acts* ('*CLA*') set out the three elements for a breach of the duty of care, being that the risk was foreseeable, not insignificant, and, in the circumstances, a

---

[72] The standard of care may be higher if the legal advisor claims to have expertise in a particular area: see *Yates Property Corporation Pty Ltd (in liq) v Boland* (1999) 74 ALJR 209, 142 ('*Yates v Boland* ').

[73] See *Astley v Austrust Ltd* (1999) 197 CLR 1.

[74] *Voli v Inglewood Shire Council* (1963) 110 CLR 74 (Windeyer J).

[75] *Hill v Van Erp* (n 64). See also *Heydon v NRMA* (n 71) 117.

[76] *Hawkins v Clayton* (1988) 164 CLR 539, 579 ('*Hawkins v Clayton*').

[77] The standard of care may be higher if the legal advisor claims to have expertise in a particular area. See, eg, *Yates v Boland* (n 72) 105.

reasonable person in the position of the person would have taken the precautions.[78] Generally, it is accepted that a legal advisor will have a duty to warn a client of foreseeable risks inherent in the transaction and take all reasonable steps to protect the client from foreseeable loss. Although evidence of accepted practice is presented to a court, ultimately it is a question of fact for the court to determine whether the legal advisor has met the expected standard. As part of this deliberation, a court may take into account policy considerations including whether use of AI was widespread in the area of the legal advice provided. For example, if the generally accepted standard is that a particular AI tool is employed for a certain type of task and the advisor retained by the consumer fails to use the AI tool, then this could be a determinative factor in determining a breach of duty of care.

Whether a legal advisor has met the relevant standard is assessed objectively,[79] having regard to:

1) the scope of the retainer and any relevant exclusions from the work to be performed; and
2) what a reasonable legal advisor would have done in the same circumstances in response to the foreseeable and not insignificant risk.[80]

Once breach of the standard is established, the next question is whether the breach caused the loss.[81] The civil liability legislation in Australia requires that factual causation be established, as well as the breach falling within the defendant's scope of liability.[82] The legislation provides that the negligence must be a necessary condition of the occurrence of the harm, which has been described as the 'statutory statement of the "but for" test of causation'.[83]

Factual causation is established if 'but for' the breach, the client would not have suffered loss. The advisor's breach need not be the only cause of loss, but it must be 'present for the occurrence of the harm'.[84] This opens the door for multiple causes of the loss and joint wrongdoers. For example, if a claim was pursued under the Qld *CLA*, the claimant would be under a statutory obligation to make their

[78] See, eg, *Civil Liability Act 2003* (Qld) s 9(1).

[79] *Heydon v NRMA* (n 71) 117.

[80] See *Civil Law (Wrongs) Act 2002* (ACT) s 43; *Civil Liability Act 2002* (NSW) s 5B; *Civil Liability Act 2003* (Qld) s 9 ('Qld *CLA*'); *Civil Liability Act 1936* (SA) s 32*; Civil Liability Act 2002* (Tas) s 11; *Wrongs Act 1958* (Vic) s 48; *Civil Liability Act 2002* (WA) s 5B. There is no equivalent provision in the Northern Territory legislation.

[81] *Williams v Milotin* (1957) 97 CLR 465, 474.

[82] See *Civil Law (Wrongs) Act 2002* (ACT) s 45; *Civil Liability Act 2002* (NSW) s 5D; *Civil Liability Act 2003* (Qld) s 11; *Wrongs Act 1936* (SA) s 34; *Civil Liability Act 2002* (Tas) s 13; *Wrongs Act 1958* (Vic) s 51; *Civil Liability Act 2002* (WA) s 5C. There is no equivalent in the Northern Territory legislation.

[83] *Strong v Woolworths Ltd* (2012) 246 CLR 182, 190 [18] ('*Strong v Woolworths*'); *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, 443 [55] ('*Adeels Palace v Moubarak*').

[84] *Strong v Woolworths* (n 83) [20].

claim against all persons they believe may be liable for the loss or damage.[85] Further, pursuant to section 32 of the Qld *CLA*, a concurrent wrongdoer — such as the solicitor and/or law firm — must give the claimant any information in relation to a claim that is apportionable:

a) that is likely to help the claimant to identify and locate any other person who they have reasonable grounds to believe is also a concurrent wrongdoer in relation to the claim; and
b) about the circumstances that make the concurrent wrongdoer believe the other person is or may be a concurrent wrongdoer in relation to the claim.[86]

The scope of liability is referred to as legal causation, and takes into account normative considerations such as whether the type of loss suffered was reasonably foreseeable and whether any intervening act or conduct subsequent to the breach of duty broke the chain of causation.

It is important to note that there is a carve-out in the Qld *CLA* that applies when the professional acts in a way that is widely accepted by peer professional opinion.'[87] What will constitute professional opinion in the context of AI remains to be seen.

The final element in the negligence framework, damage, is relatively straightforward where the actual loss suffered is readily quantifiable.[88]

IV WHAT IS THE LEGAL RESPONSE TO HUMAN ERROR IN GIVING ADVICE?

Having established categories of legal advice in the context of AI and a broad framework of liability for professional negligence, we now consider the position where AI-enabled systems are used in the provision of legal advice through two user case studies. For simplicity, the case studies are analysed in the context of the Queensland legislative provisions.[89]

[85] Qld *CLA* (n 80) s 32(1).

[86] Ibid s 32(2).

[87] See, eg, ibid s 22.

[88] For example, where a person fails to inherit a specific amount under a will due to the solicitor's negligence in drafting the will, or where money is lost during a transaction which proceeded on the basis of negligent advice from the solicitor. Where what is 'lost' is a mere possibility, the general formula for calculating damages is by reference to the degree of probability that an event has occurred. See *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332, 349–50 (Mason CJ, Dawson, Toohey and Gaudron JJ) citing *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638.

[89] Qld *CLA* (n 80); *Legal Profession Act 2007* (Qld).

A *Case Study 1 – Category 1 AI-enabled System Used to Assist Solicitor*

The first case study involves the situation where an Australian property law solicitor uses an AI-enabled document creation tool to assist a client in the purchase of a property. The lawyer uses AI to read and assess various documents and extract information relevant to the purchase.[90] The AI fails to flag a document that identifies an easement over the property. The lawyer does not conduct separate due diligence and advises the client that there is no easement. On this advice, the consumer buys the property and subsequently incurs an economic loss.

The following analysis proceeds on the basis that the consumer pursues an action for negligence against the solicitor, who, as discussed above, would be held to the standard of a reasonably competent property solicitor and owes the client a duty of care to carry out the conveyance with reasonable diligence and skill.[91] It would be put to the solicitor that they breached their duty of care to the client by failing to advise of the easement, which subsequently led to an economic loss. In accordance with the requirements of section 32 of the Qld *CLA* described above, the claimant (likely via information received from the solicitor or law firm) would ultimately add the software vendor to the claim.[92] This raises the question as to how liability would be apportioned between the solicitor and the software vendor.

Turning first to the considerations under section 9 of the Qld *CLA*, there is a foreseeable and significant risk of harm to the client should the solicitor fail to advise of an easement.[93] However, less clear is whether the solicitor failed to adopt reasonable precautions to avoid the harm. The following would likely be relevant factors:

- evidence of the probability of harm (ie how often the AI-enabled system fails to identify relevant information);
- the seriousness of the harm likely to result; and
- what precautions the solicitor did take or could have taken to avoid the harm, including reference to the customary practice of conveyancing solicitors using AI-enabled systems of this nature.[94]

In this regard, we suggest an analogy might be drawn to a solicitor relying on a paralegal to perform the relevant searches without exercising their own judgment or reviewing the results. Given

[90] This is just one example. Other equivalent situations include where the lawyer uses an AI-enabled tool to conduct document review for litigation, or automated contract review as part of due diligence.

[91] Qld *CLA* (n 80) s 22.

[92] Ibid s 32.

[93] Ibid s 9.

[94] See *Midland* (n 69).

both the probability of a paralegal making a mistake and the high likelihood that serious harm would result, a reasonable precaution would be to review the results of the search. The solicitor would likely be found to have breached their duty of care if they programmed the AI-enabled system to perform the task and then either did not identify flaws in the approach undertaken by the system or failed to review the end product before advising the client.

It is worth noting this analogy has been raised academically in the American context,[95] and the *ASCR* similarly provide that lawyers must exercise 'reasonable supervision over solicitors and all other employees engaged in the provision of legal services' regarding a matter over which they have designated responsibility for.[96] We posit that a practical approach to reform in this area would be to extend this supervisory duty to the use of all AI-enabled systems or tools in legal practice. However, Rogers and Bell are quick to highlight that it is an 'undeniably different' situation if lawyers cannot independently evaluate the functioning of AI systems.[97]

Returning to Case Study 1, the apportionment of liability in this situation would require a consideration of causation. The claimant would need to prove that 'but for' the solicitor's breach, they would not have suffered loss in accordance with the principles of the Qld *CLA* outlined above.[98] If it can be established that the solicitor incorrectly programmed the AI, then a breach of duty is likely to be proven. If it was the AI that produced the error, then it is arguable the claimant would have difficulty establishing that the solicitor was negligent, particularly if there is nothing on the facts to indicate that the solicitor should have been aware of the AI's failure to identify the easement. In the latter scenario, liability may be apportioned between the solicitor and the AI vendor.

Conversely, if the AI failed to detect the easement due to faulty programming by the lawyer, then this causal link may be evident. Turning then to the scope of liability, where the lawyer incorrectly programmed the AI, it is arguable that the loss to the client is reasonably foreseeable. However, where the AI is self-learning, this may break the chain of causation.

To summarise, where lawyers use AI tools to assist them to make a legal decision as part of their advice to a client, such as undertaking contract review, analysing large data sets for discovery, undertaking contract drafting or legal research, the advisor is using the AI to inform their advice to the client. Where the incorrect advice is generated either because:

---

[95] Katherine Medianik, 'Artificially Intelligent Lawyers: Updating the Model Rules of Professional Conduct in Accordance with the New Technological Era' (2018) 39(4) *Cardozo Law Review* 1497, 1523.

[96] *Legal Profession (Australian Solicitors' Conduct Rules) Notice 2012* (Qld) r 37.1.

[97] Justine Rogers and Felicity Bell, 'The Ethical AI Lawyer: What is Required of Lawyers When They Use Automated Systems?' (2019) 1(1) *Law, Technology and Humans* 80, 93.

[98] Qld *CLA* (n 80) s 11(1).

- the advisor inputs the incorrect information into the AI;
- the advisor fails to consult the AI application where it is shown that it is customary practice to use such AI applications; or
- the advisor incorrectly interprets the results generated by the AI,

the existing framework applies to impose liability on the lawyers.

On this basis, we argue that in the in the context of Category 1 AI-enabled systems, the duty of lawyers to deliver legal services competently and diligently does not change, and indeed the professional negligence framework can adequately deal with the risks presented. Notwithstanding this, it also seems clear that a solicitor who elects to use AI-enabled systems in pursuit of operational efficiencies is required to have some understanding of the system in order to supervise its operation and review its output before providing advice to a client.[99]

Table 1, below, summarises how the current liability framework will apportion liability. Consistent with the above conclusion, we suggest there is little uncertainty with respect to how the framework would operate to apportion liability to Category 1 use cases.

[99] See Qld *CLA* (n 80) s 22.

Cause of inaccurate advice	**Allocation of liability: Contract**	**Allocation of liability: Tort**	**Existing framework applies**
Lawyer inputting incorrect information into the AI	Lawyer	Lawyer	Yes
Lawyer incorrectly interpreting AI result	Lawyer	Lawyer	Yes
Lawyer not using AI	Lawyer unless lawyer informed client that AI would not be used and gave an adequate disclaimer	Lawyer if shown customary practice to use AI	Yes
Lawyer used AI but ignored AI findings	Lawyer	Lawyer	Yes
Lawyer responsible for reviewing the data set makes an error in this review, leading to incorrect advice generated by the AI	Lawyer	Lawyer	Yes
AI incorrectly programmed by AI vendor due to incorrect analysis of data	Lawyer with contribution from AI vendor OR AI vendor	Lawyer with contribution from AI vendor	Yes
AI vendor given incorrect data to analyse leading to incorrect programming of the AI	Lawyer with contribution from the entity providing the data OR data provider	Lawyer with contribution from the entity providing the data OR data provider	Yes
Uncertain why the error was made	Possibly still lawyer but possible contribution from AI vendor	Possibly still lawyer but possible contribution from AI vendor	Unclear

Table 1: Apportionment of Liability when using Category 1 AI-enabled Systems

B *Case Study 2: Category 2 AI-enabled System Led by Human Input*

In Case Study 2, we consider the first sub-category of Category 2 systems raised above which encapsulates AI-enabled systems that make or recommend decisions based on rules that have been pre-programmed by humans. In this category, systems shift from merely a productivity aid to being capable of providing advice. This is evident in the following example.

Case Study 2 involves a situation whereby an individual has consulted an AI-enabled website associated with a local law firm for assistance drafting a will.[100] The AI-enabled system, which has been pre-coded by solicitors at the firm, captures all relevant data by guiding the individual through an online questionnaire, and, upon payment of a relatively cheap fee, emails the user a boilerplate will which has not been reviewed by the firm, within minutes. Subsequently, it becomes apparent that the will generated by the AI-enabled system contains errors which cause a beneficiary to be denied a portion of the estate intended for their benefit. The estate then incurs significant fees in seeking to rectify the situation. The beneficiaries seek recourse against the firm associated with the AI-enabled system, and, as discussed above, likely include the software vendor in the action by virtue of section 32 of the Qld *CLA*.[101]

We have discussed the existence and scope of the duty of care owed by lawyers above.[102] The alleged damage suffered in this instance would be readily quantifiable as the lost benefit under the will as well as the fees incurred in remedying the situation. As to whether a breach of duty can be established, there is a foreseeable and significant risk of harm to the beneficiaries under a will — and indeed, the estate itself, if the will suffers from a defect which prevents its execution.[103] In terms of whether reasonable precautions were taken to avoid the harm, it is uncontroversial to suggest that this would depend on the source of the error.

If the error is proven to be the result of incorrect programming by the solicitor, then we suggest the causal link is readily established in the event the lawyer did not have the requisite knowledge or skill. However, given that programming skills do not generally form part of an undergraduate law degree, and is likely not an area of study currently undertaken by lawyers, the more likely scenario is that the law firm has purchased an 'off the shelf' AI-enabled system and the error was generated because the software vendor incorrectly analysed the dataset, leading to incorrect programming of the AI.[104] If the

[100] This is merely an example. As is evident from the above discussion, the 'Will' in this Case Study could be substituted for most boilerplate legal documents (ie a non-disclosure agreement).

[101] Qld *CLA* (n 80) s 32.

[102] See the discussion of Windeyer J in *Voli v Inglewood Shire Council* (1963) 110 CLR 74, 80.

[103] Qld *CLA* (n 80) s 9.

[104] Although an in-depth discussion is beyond the scope of the present paper, the impact of biases in data sets should not be ignored as a contributing factor.

lawyer did their due diligence in checking the performance of the AI-enabled system, then it would be difficult to establish any breach of duty.[105] However, even where due diligence is not carried out, it may be arguable that in holding the service out as capable of providing the relevant legal advice, regardless of whether the advice is prepared with the assistance of AI, the associated solicitor or firm is, in fact, liable.

Where the legal advisor is not liable for the inaccurate programming of the system, the claimant may turn to pursuing the AI vendor. The issue is then whether the AI vendor owes the client a novel duty of care.[106] As will be discussed later, a potential claimant may have greater prospects of success pursuing the vendor under the Australian Consumer Law ('ACL').[107] If, however, the lawyer was found to have breached their duty, it stands to reason that as in Case Study 1, they would seek to apportion liability to the software vendor.

Overall, we suggest that in the majority of instances, the contractual and tortious liability frameworks are capable of handling claims arising from the use of systems which fall into the first sub-category of Category 2 systems identified above. However, we posit that the framework remains largely untested where either the AI-enabled system itself, or non-lawyer programmers employed by the software vendor, are at fault.

C *Case Study 3: Category 2 AI-enabled System Advises Autonomously*

For Case Study 3, we consider a slight extension to the above scenario. In this case study, the AI-enabled software, still associated with a law firm, does not require any pre-coding from solicitors and uses machine learning to offer the following services to potential claimants:

- responding to dynamic, unstructured queries by producing short research memorandums on almost any area of law; and
- drafting bespoke documents after engaging in a text conversation with the client.[108]

Consider now, that an in-house counsel seeking to cut external legal costs consults this AI-enabled system to provide a research memorandum and bespoke non-disclosure agreement. Rather than guiding the user through a decision-tree-style questionnaire or responding to keywords, the system uses advanced AI to assess the intent and meaning of the in-house counsel queries. After exchanging a text conversation with the user, the AI-enabled system produces a research memorandum and an

[105] Qld *CLA* (n 80) s 11.

[106] This is as opposed to the established categories of duty of care, such as lawyer and client. See, eg, *Midland* (n 69); *Hill v Van Erp* (n 64); *Heydon v NRMA* (n 71); *Hawkins v Clayton* (n 76).

[107] *ACL* (n 67).

[108] Cf a pre-determined question tree.

accompanying bespoke non-disclosure agreement without any involvement from a lawyer beyond that of the responsible solicitor being copied to the final email. Due to a misunderstanding, the non-disclosure agreement contains errors to the detriment of the person consulting the AI, and they ultimately suffer an economic loss.

Without repeating the requirements of a claim for negligence,[109] the immediate issue a potential claimant (or ultimately, decision maker) would encounter is that the AI-enabled system would likely be so opaque that it may not be possible to identify the source of the error to establish the requisite causal link. As John Buyers, Partner at UK-based law firm, Osborne Clarke states, these systems 'present new challenges for our existing models of liability which are largely causative based. Where it is unclear why a machine has behaved in a particular manner due to its innate complexity or learned behaviours, how are we to determine attribution of "fault" or "defect" for liability purposes?'[110] This opacity is commonly referred to as 'the black box problem', where, in 'automated decision-making systems, every input and most outputs are encapsulated in the box too: the information sources representing inputs are not observable'.[111]

Thus, unlike Sub-category 1 AI-enabled systems, in Sub-category 2, establishing the causal link will inherently be more difficult as it is unclear how one would determine why the inaccurate advice was given in reference to the capacity of the AI-enabled system.

As noted by Buyers:

> [W]hat happens when the 'defect' is inexplicable, or an event cannot in fact be traced back to a defect or a fault or a directly related human error? As intelligent machines and AI systems 'learn' for themselves, their behaviours are increasingly less and less directly attributable to human programming. These machines are not acting on a prescriptive instruction set, but a system of rules that may not have anticipated the precise circumstances under which the machine should act…[112]

In response to this, many jurisdictions have commissioned studies or reports into the issues surrounding AI, including liability,[113] with the EU Parliament going a step further through the adoption on 16 February 2017 of a resolution with recommendations to the EU Commission on Civil Law Rules

---

[109] See the above discussion; and Qld *CLA* (n 80) ss 9, 11.

[110] John Buyers, 'Liability Issues in Autonomous and Semi-Autonomous Systems', *Osborne Clarke* (Web Page, January 2015) <http://www.osborneclarke.com/media/filer_public/c9/73/c973bc5c-cef0-4e45-8554-f6f90f396256/itech_law.pdf>.

[111] Dominique Hogan-Doran, 'Computer Says "No": Automation, Algorithms and Artificial Intelligence in Government Decision-Making' (2017) 13(3) *The Judicial Review* 345, 375.

[112] Buyers (n 110).

[113] See, eg, European Parliament Directorate-General for Internal Policies, Nathalie Nevejans, *European Civil Law Rules in Robotics: Study for the JURI Committee*, October 2016 <http://www.europarl.europa.eu/RegData/etudes/STUD/2016/571379/IPOL_STU(2016)571379_EN.pdf>.

on Robotics.[114]

As noted by Paul Clarke in his witness statement to the House of Lords Select Committee:

> AI definitely raises all sorts of new questions to do with accountability. Is it the person or people who provided the data who are accountable, the person who built the AI, the person who validated it, the company which operates it? I am sure much time will be taken up in courts deciding on a case-by-case basis until legal precedence is established. It is not clear. In this area this is definitely a new world, and we are going to have to come up with some new answers regarding accountability.[115]

As it stands in Australia, liability will ultimately be determined by the existing legal framework described above, but how this will work in practice is a matter of conjecture. From a practical perspective, under the current regime the individual(s) or entities responsible for the holding out of the AI-enabled system as a provider of legal services might ultimately be held responsible. However, as AI develops, it is unlikely that a claim would succeed against a legal advisor using more autonomous AI systems in the absence of something more to establish the 'but for' test of causation.

A final consideration for further research is the notion of these advanced AI-enabled systems as their own entities 'by virtue of their intelligence, capacities or appearance'.[116] While at first blush this may sound farfetched, in October 2016, now some six years ago, Saudi Arabia became the first country to grant citizenship to a robot named 'Sophia'.[117] Further, the 'Shibuya Mirai' robot was granted a residence permit by Japan.[118] As flagged above, there are already several companies claiming to have created 'robot lawyers'. Applying tortious liability framework to AI raises many questions, including:

- whether AI can be regarded as an entity;
- whether an AI owes the client a duty of care to ensure the information is accurate; and
- what the standard of care for an AI is.

These issues currently remain unresolved and any reform body should be ambitious in setting a path to dealing with these issues should they arise in the future.

---

[114] European Parliament, *European Civil Law Rules in Robotics*, Doc A8-0005/2017, 16 February 2017.

[115] Select Committee on Artificial Intelligence, *AI in the UK: Ready, Willing and Able?* (House of Lords Paper No 100, Session 2017–19) [310].

[116] Hin-Yan Liu et al, 'Artificial Intelligence and Legal Disruption: A New Model for Analysis' 2020 12(2) *Law, Innovation and Technology* 205, 215.

[117] Viony Kresna Sumantri, 'Legal Responsibility on Errors of the Artificial Intelligence-Based Robots' (2019) 6(2) *Lentera Hukum (Online)* 331.

[118] Ibid.

V AN ANTIDOTE IN THE FORM OF THE AUSTRALIAN CONSUMER LAW?

While a detailed discussion of remedies available under the ACL is beyond the scope of the present analysis, we consider it nevertheless warrants mention. We posit that it may be possible for the client to utilise the consumer guarantees framework under the ACL as a recovery option against either the supplier or manufacturer of the AI-enabled system.[119] As a starting point, it should be noted that the provision of legal advice by a person who is not a legal practitioner, for example by an AI-enabled system operating outside a legal practice, is prohibited and subject to penalties.[120] If a person receiving legal advice is the client of a legal practitioner who is using the AI-enabled system to prepare that legal advice, then it is arguable the client will be regarded as a consumer,[121] and potentially owed guarantees relating to the exercise of due care and skill,[122] as well as fitness for purpose.[123]

The next question to consider is whether the AI-enabled system would be classed as goods or services. To this point, recent litigation between the Australian Competition and Consumer Commission ('ACCC') and Washington State-based 'Valve Corporation' is potentially instructive. Valve Corporation operates the 'Steam' game distribution platform and has over 2 million Australian subscribers.[124] In 2016, the Federal Court found that Valve had engaged in misleading or deceptive conduct and made false or misleading representations.[125] The Court subsequently ordered Valve to pay penalties totalling $3 million.

At [134]-[135], the Full Court of the Federal Court held:

> If the respondent is based overseas and has a relationship with customers in Australia, it is likely that representations addressed to those customers will be taken to have been made in Australia, being the place where the customer accesses and reads the representations on his or her computer. This is likely to be the case even if the representations are available to be accessed by consumers in other countries around the world.
>
> …In circumstances where Valve had a direct relationship with a large number of Australian consumers, and Valve required consumers to agree to the SSA before they could open an account and purchase a game, the first, second and third representations were made in Australia when consumers in

[119] See, eg, the guarantees that exist under *ACL* (n 67) ss 60, 61.

[120] See, eg, *Legal Profession Act* (n 90) s 24. Similar provisions apply in other states and territories of Australia.

[121] See *ACL* (n 67) s 3.

[122] Ibid s 60.

[123] Ibid s 61.

[124] Australian Competition and Consumer Commission, 'Full Federal Court Confirms that Valve Misled Gamers' (Media Release MR 260/17, 22 December 2017) <https://www.accc.gov.au/media-release/full-federal-court-confirms-that-valve-misled-gamers>.

[125] *Australian Competition and Consumer Commission v Valve Corp (No 3)* (2016) 337 ALR 647.

> Australia accessed and read the SSA on their computers. This is where, in substance, for the purposes of ss 18 and 29(1)(m), the representations were made.[126]

In essence, this decision emphasised that overseas-based online businesses must comply with the ACL when selling digital goods to Australian customers. Applying this to the present context, it is arguable that a foreign, AI-enabled 'robot lawyer' that had subscribers in Australia could be deemed to have engaged in the supply of goods or services to Australian consumers. Extrapolating this hypothetical, it would follow that the company would be liable under the ACL if there was a supply of goods or services by the AI-enabled system and the advice provided was incorrect, resulting in loss. The prospects of such a hypothetical claim are beyond the scope of the present analysis and warrant further consideration in future research.

VI THE INTERNATIONAL APPROACH – HARDENING OF LAWS PERTAINING TO AI DEVELOPERS

In recent years, the EU, Canada, and the US have implemented, or attempted to implement, regulatory approaches in an attempt to ensure that AI developers are liable for the products that cause harm — economic or otherwise.[127] The general approach taken in these jurisdictions is to regulate AI models based on potential use and impact on society, rather than seeking to regulate based on a static definition of what is within the scope of harmful AI.[128] This regulatory approach parallels existing approaches aimed at addressing liability for economic harm. For example, drawing from the above discussion of the ACL, when the ACL regulates the supply of goods or services by an AI-enabled system that causes economic harm, it is, in effect, regulating the AI system by reference to its use and impact on consumers. This section provides a brief summary of the approaches taken in these jurisdictions.

The EU passed its Artificial Intelligence Act ('EU AI Act') in March 2024, and aims to safeguard fundamental rights while fostering innovation and maintaining the EU's position as a global leader in ethical AI governance.[129] The AI Act adopts a risk-based approach, classifying AI systems into four

---

[126] *Valve Corp v Australian Competition and Consumer Commission* (2017) 258 FCR 190, 230 [134]–[135] (Dowsett, McKerracher and Moshinsky JJ).

[127] See, eg, European Commission, *Proposal for a Regulation Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts* COM/2021/206 (13 March 2024) ('*EU AI Act*'); Government of Canada, *Directive on Automated Decision-Making*, 2019 (amended 24 June 2025).

[128] It should be noted that while the approach is to regulate the impact of AI, there have been steps to harmonise the definition of AI between the Organisation for Economic Co-operation and Development (OECD), the US, and the EU.

[129] *EU AI Act* (n 127).

categories: prohibited, high-risk, limited risk, and minimal risk. High-risk AI systems,[130] such as those used in law enforcement, border control, and healthcare, face stringent requirements including (among others) implementing a risk management system, [131] transparency, [132] and human oversight. [133] Additionally, the EU AI Act sets out prohibitions for certain systems deemed to pose 'unacceptable' risks; for example, those involving the manipulation of behaviours, exploitation of human vulnerabilities, untargeted scraping, social scoring, and real-time biometric identification in public spaces.[134]

In Canada, the *Directive on Automated Decision-Making* ('the Directive') applies to automated decision systems developed or procured after 1 April 2020, requiring full compliance with the regulatory regime by 24 June 2026.[135] Appendix B of the Directive sets out the four levels of risk for AI systems based on their potential impact on individuals' rights and well-being as measured by severity, but also by how easily its impact can be reversed.[136] Appendix C of the Directive mandates the compliance requirements associated with each level of risk, including algorithmic impact assessments, transparency obligations that include public disclosures, documentation of design decisions and the release of source codes, and human oversight in the form of audits by independent experts.[137] Canada's regulatory approach also requires an impact assessment of gender-based uses of AI.

The US has taken a different, and arguably ineffective, approach. While comprehensive AI legislation, such as the *Algorithmic Accountability Act 2019* (US), has failed to pass the US Congress a number of times, the former Biden administration attempted to regulate AI by issuing the *Executive Order on Safe, Secure, and Trustworthy AI* in late October 2023.[138] This executive order outlined a regulatory framework that prioritised transparency, fairness, and accountability in government use of AI. However, this regulatory mechanism was rescinded in January 2025 by President Trump, and replaced with the Executive Order titled *Removing Barriers to American Leadership in Artificial Intelligence*, with the aim being 'to

[130] Ibid ch 1 art 3(1).

[131] Ibid art 9.

[132] Ibid art 13.

[133] Ibid art 14.

[134] Ibid art 6.

[135] *Directive on Automated Decision-Making* (n 127) r 1.2.

[136] Ibid app B.

[137] Ibid app C.

[138] *Safe, Secure, and Trustworthy AI,* Executive Order 14110 of 30 October 2023, 88 FR 75191.

sustain and enhance America's global AI dominance in order to promote human flourishing, economic competitiveness, and national security.'[139]

Australia is still in the early stages of AI regulation. The Department of Industry, Science, and Resources issued *Australia's AI Ethics Principles* in 2020.[140] Unlike the EU AI Act, these principles are voluntary in nature and do not offer the same clarity and coherence of the legal obligations set out in the EU AI Act or the Canadian Directive. Furthermore, they do not specifically address the liability that arises when a legal practitioner provides advice that is negligent.

VII WHERE TO FROM HERE?

The analysis above shows that the existing tort and contractual liability frameworks are capable of extending to AI-enabled systems where:

1) it is clear a duty is owed; and
2) it is clear which party caused the loss.

For Category 1 AI-enabled systems, whether self-learning or making decisions primarily on pre-determined rules, it is likely that the lawyer will be the responsible party. Where the AI-enabled system is not capable of self-learning, we suggest liability would be attributed to the lawyer because:

- there is a high degree of expertise by the advice provider (the lawyer is dealing directly with the client);
- there is a high degree of assumption of responsibility;
- there is a high degree of human cognitive input; and
- there is a low level of AI autonomy.

Even where the AI-enabled system is capable of self-learning, we suggest that the lawyer would still ultimately be held responsible because the high degree of expertise and corresponding assumption of responsibility would outweigh the relatively low human cognitive input. It stands to reason that this position is also true for those systems which fall within the first sub-category of 'Category 2' AI-enabled systems.

However, the systems which fall within the second sub-category of 'Category 2' prove troublesome for these frameworks because of the difficulty in determining the causal link. As discussed,

---

[139] *Removing Barriers to American Leadership in Artificial Intelligence*, Executive Order 14179 of 23 January 2025, 90 FR 8741.

[140] Department of Industry, Science and Resources (Cth), 'Australia's AI Ethics Principles', *Australia's Artificial Intelligence Ethics Framework* (Web Page, 26 May 2024) <https://www.industry.gov.au/publications/australias-artificial-intelligence-ethics-framework/australias-ai-ethics-principles>.

this issue is primarily due to the capability of advanced AI and correspondingly high levels of autonomy as well as the opacity of functioning, not to mention the added complication that these AI applications are capable of dealing directly with the consumer. In this instance, the AI (cf the responsible lawyer) could be said to be holding itself out as having the relevant expertise, albeit prohibitions against such conduct, as outlined above.

Regarding appropriate responses to the legal disruption caused by AI, the model developed by Liu et al could be used as a basis to undertake further research.[141] According to Liu et al, there are various responses to disruptive moments — development, displacement and destruction:

> Turning to the three primary channels of the framework, a relatively sharp divide can be drawn between Legal Development on the one hand, and Displacement or Destruction on the other. This division pivots upon whether the disruptive moment signals a recommitment to the dominant regulatory paradigm, or whether it precipitates a significant departure from the status *ex ante*, leading to reliance upon other modalities of regulation (Displacement); towards other goals and objectives than those sought through the dominant regulatory paradigm; or even towards a decline or rupture of the components of the extant legal framework (Destruction). In other words, Development seeks to retain, through rebalance, the core features and aims of the contemporary legal order while both Displacement and Destruction seek to achieve regulatory objectives through different means and/or pursue different purposes than those sought by law and regulation at present.[142]

Indeed, these advanced AI-enabled systems represent a new way of delivering legal advice which both legal and non-legal professionals are able to take advantage of. The use of AI therefore acts as a disrupter to the current provision of legal advice to consumers and similarly disrupts the ability of current frameworks to respond to economic loss. It is this context in which further analysis is required to determine the extent of reform required, if any, to the existing tort and contractual frameworks. One option is to implement a strict liability framework for the use of systems which fall within the second sub-category of AI-enabled systems. Another issue raised above which will undoubtedly command further consideration is whether the AI itself could be held liable where it effectively holds itself out as a provider of expert advice. Although statutory reform would clearly be the most immediate solution, there is perhaps some merit in allowing the common law to naturally evolve over time. The above analysis of the ACCC litigation demonstrates that the common law is capable of evolution to keep pace with technology. In such a fast-paced area, incremental reform over time may be preferred, even with an inherent time-lag.

---

[141] Liu et al (n 116).

[142] Ibid 233.

VIII CONCLUSION

As technology continues to evolve, profit-driven businesses such as law firms will undoubtedly seize the opportunity to improve business practices and to develop innovative ways of engaging the public. In relation to the provision of legal advice, the use of AI has seen the proliferation of AI-enabled systems by both legal and non-legal users. Currently, in Australia, professional liability is allocated on the basis of a person having expertise and that accordingly, it is reasonable to rely on that person who holds themselves out as having such expertise. When legal advice is provided by AI-enabled systems, the question arises as to how the law should and will respond to impose professional liability where the advice is flawed. In this paper, we have argued that the use of AI adds two complicating factors to the current liability taxonomy: the degree of AI autonomy and the degree of human cognitive input.

In the preceding analysis we have sought to agitate discussion regarding this area of research by setting out the applicable framework in Australia where a consumer of legal services, provided either in part or entirely via an AI-enabled system, suffers economic loss. Through real world case studies, we have sought to hypothetically apply the framework to three categories of AI-enabled systems along the 'AI autonomy — human cognitive input' spectrum. In doing so, we suggest that the existing framework is capable of dealing with the use of Category 1 and the first sub-category of Category 2 systems where there remains a relatively high degree of human cognitive input. In essence, the prominent role of a human holding themselves out as the expert and assuming the corresponding responsibility means it is easier to establish the requisite causal link. The position differs with respect to the second sub-category of Category 2 systems because their high level of autonomy, compounded by greater opacity, means that establishing the causal link is far less clear.

Given predictions that the demand for AI applications in the legal sector will continue to grow,[143] it is timely to examine the emerging legal risks associated with the use of AI in the provision of legal advice. A better understanding of the legal risks will assist in informing the legal profession about the choice and use of different technologies in the course of legal work. More importantly, this understanding will contribute to the necessary policy debate about whether existing liability frameworks are capable of evolving as AI-enabled systems become more autonomous, or whether regulatory intervention is required, and if so, in what form.

[143] Law Society of New South Wales, *The Future of Law and Innovation in the Profession* (Commission of Inquiry Report, 2017) 41.