Potential Complications that Artificial Intelligence Usage Within the NHS May Pose to the Current Legal Framework of Tortious Liability

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Introduction

The NHS has already decided to use AI Systems (AIS) to deliver healthcare. This will raise questions regarding tortious liability when a patient will suffer harm through an NHS service that involves AI.

Aim

Exploration of how integrating AI in patient diagnosis and treatment decisions could necessitate reforming certain legal thresholds pertaining to the liability of certain stakeholders:

1) Individual Doctors
2) The NHS, through Vicarious Liability
3) The NHS, for Deploying Unsafe AI
4) The AI Producer

This will be explored in two scenarios:

A) The AIS acting as an Assistive Tool for Doctors
B) The AIS acting as an Autonomous System

Method

- Theoretical approach applying existing case law, legislation, and secondary literature to the scenario of AIS usage
- Analysis of how AIS usage may disturb the current system of establishing required thresholds for establishing liability

Results

A - The AIS acting as an Assistive Tool for Doctors

1) Individual Doctor

- To satisfy their duty of care, doctors may need to convey specific information about the AIS
- To satisfy their duty of care, doctors may need to verify when AIS gives different recommendations than those to be expected from an average human doctor or other medical device
- ”Practice accepted as proper” , and the court's approach might need adaptation due to the possibility of more off-standard AIS recommendations as healthcare becomes more personalised

2) NHS Trust in Vicarious Liability

- The complications are the ones stemming from establishing the liability of individual doctors

3) The NHS Trust for Deploying Unsafe AI

- The opaque nature of AIS may make it difficult to establish causation
- This can be circumvented by an automatic assumption of negligence or completely removing the negligence threshold
- However, this may clash with the NHS’s autonomy over resource allocation

4) The Producer of the AIS

- Consumer Protection Act 1987 needs heavy reform pertaining to:
  - Definition of “Product”
  - Definition of “Defect”
  - Establishment of Causation

B - The AIS acting as an Autonomous System

Can an AIS have legal obligations and thus be sued directly?

- No. It is unnecessary, can lead to liability shifting, and may cause compensation issues
- All claims should be directed to NHS Trust or Producer

Conclusion

- When applying current thresholds, complications may arise in: attaining informed consent, acting on different AIS recommendations, and the establishing of causation
- The current product liability system is inadequate in protecting customers against faulty AIS
- AIS, however autonomous, should be considered as mere products (legally)