



**The Forum of Complex Injury Solicitors (FOCIS)**

**Response to**

**UK Jurisdiction Taskforce Consultation on the Draft Legal Statement on Liability for AI Harms under the Private Law of England and Wales**

## About us

The Forum of Complex Injury Solicitors (FOCIS) are a group of pre-eminent solicitors who specialise in acting for seriously injured people in personal injury and clinical negligence claims. The objectives of FOCIS are to:-

- Promote the highest standards of representation for claimants with life-changing injuries;
- Increase understanding in the wider community of issues which arise for those who suffer serious injury;
- Use members' expertise to promote debate and improvements to the law and legal process; and
- Share knowledge and information among members of the Forum.

Further information is available here: <https://focis.org.uk/>

Membership of FOCIS is intended to be at the most senior level of the profession. The only formal requirement is that members are recognised by their peers as having achieved a pre-eminence in one or more specialist types of serious injury claim. We currently have 24 members, including members from England, Scotland, Wales and Northern Ireland. Nine of the past presidents of APIL are members or Emeritus members of FOCIS. Firms represented by FOCIS members include:

Anthony Gold	Hodge Jones & Allen
Ashtons Legal	Hugh James
Balfour + Manson	Irwin Mitchell
Bolt Burdon Kemp LLP	JMW Solicitors
Boyd Rice	Leigh Day
Dean Wilson LLP	Moore Barlow
Digby Brown	Osbornes Law
Fieldfisher	Slater and Gordon
Fletchers	Stewarts
Freeths	Switalskis Solicitors
Gadsby Wicks	

## **Introduction**

The Forum of Complex Injury Solicitors (“FOCIS”) welcomes the opportunity to respond to this consultation. Our members comprise solicitors from leading claimant law firms across the United Kingdom specialising in catastrophic personal injury, clinical negligence, and complex product liability litigation. Collectively, we represent individuals and families affected by the most serious forms of harm, including those arising from defective medical devices, unsafe products, and systemic failures within healthcare and transport systems.

We recognise and respect the careful and scholarly nature of the draft Legal Statement. Our observations are offered in a constructive spirit. We do not seek to challenge the internal coherence of the analysis of existing law. Rather, we consider it important to address the practical implications of that analysis for those who suffer serious injury in circumstances involving artificial intelligence.

### **1. General Observations**

The draft Legal Statement performs a clarifying function, unfortunately with no proposed solutions. It makes clear that:

- AI systems do not possess legal personality;
- liability for non-deliberate AI-related harm will, in most cases, be governed by orthodox negligence principles;
- strict liability remains confined to the limited scope of Part I of the Consumer Protection Act 1987 (“CPA 1987”);
- courts are unlikely to develop AI-specific doctrines absent legislative reform.

From the perspective of those injured by autonomous or semi-autonomous systems, the Legal Statement highlights a significant gap in effective legal protection.

### **2. The Remedial Gap**

The draft proceeds on the basis that:

- autonomy, opacity and adaptive learning do not displace established requirements of duty, breach and causation;
- strict liability under the CPA 1987 applies only where AI forms part of a “product” as defined by that Act;
- most software-based or cloud-deployed AI systems will fall outside that statutory regime.

The practical result is that where AI causes serious personal injury despite reasonable care having been exercised by clinicians, operators, manufacturers or developers, the injured person may be left without a viable cause of action.

This is not a marginal concern. It strikes at the rationale underlying the original Product Liability Directive of 1985 and its UK implementation in 1987: namely, recognition that negligence alone often fails to provide effective redress where complex technological systems cause harm.

Recent case law (including *Wilkes v DePuy International Ltd*<sup>1</sup>, *Gee v DePuy International Ltd*<sup>2</sup> and *Hastings v Finsbury Orthopaedics Ltd*<sup>3</sup>) has already demonstrated the narrowing effect of judicial interpretation on the scope of strict product liability. Regulatory approval is seen as a defence now to a claim of a defective product under the CPA, something that will appear frequently in the scope of AI and the use of software. The addition of AI-related exclusions — particularly where systems are classified as services rather than products — risks further diluting consumer protection. Whilst some will argue *A v National Blood Authority*<sup>4</sup> should no longer be the defining interpretation of the CPA, it reflects the defect not being discoverable in light of scientific and technical knowledge at the time the product was supplied as being a major defence and thus a further problem in AI cases.

### 3. Distinctions Based on Deployment Architecture

The draft correctly observes that, under current law, a distinction must be drawn between:

- AI incorporated into a tangible product; and
- AI deployed remotely or provided as a service.

From the standpoint of an injured claimant, this distinction is artificial. The safety implications of an autonomous diagnostic algorithm or control system do not depend on whether its code is embedded locally or accessed via a cloud-based infrastructure.

Two individuals harmed by functionally identical systems could therefore face entirely different legal remedies depending solely on technical deployment structure — a factor beyond their knowledge or influence.

### 4. Structural and Evidential Challenges

While the draft acknowledges evidential complexity, it ultimately preserves conventional burdens of proof (something changed in the European Union's new Product Liability Directive<sup>5</sup>).

In catastrophic injury and clinical negligence cases, claimants already face significant obstacles in establishing breach and causation. AI compounds these difficulties through:

- profound informational imbalance between claimant and defendant;
- limited access to training data, validation studies, guardrail parameters and update histories;
- multi-layered supply chains involving developers, integrators, hospital trusts and insurers;
- systems whose decision-making processes may be opaque even to their designers
- a very small pool of experts in AI software making choice of expert witness to assist a court in criticising a defendant's AI challenging.

These realities suggest that reliance on traditional negligence doctrine may, in practice, under-compensate those most seriously affected.

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<sup>1</sup> [2016] EWHC 3096 (QB)

<sup>2</sup> [2018] EWHC 208 (QB)

<sup>3</sup> [2022] UKSC 19

<sup>4</sup> [2001] 3 All ER 289

<sup>5</sup> (2024/2853)

## 5. AI in Healthcare

The rapid integration of AI into healthcare merits particular attention.

AI tools are increasingly used for diagnostic imaging, triage, clinical decision support, workload management and predictive modelling. These systems promise improvements in efficiency and diagnostic accuracy, but they also raise complex liability questions.

The professional standard of care remains governed by *Bolam v Friern Hospital Management Committee*<sup>6</sup>, refined by *Bolitho v City and Hackney Health Authority*<sup>7</sup>. As AI becomes embedded in clinical workflows, courts will need to consider:

- whether reliance on AI-generated advice is supported by a responsible body of medical opinion;
- whether such reliance is logically defensible;
- whether failure to deploy available AI technology may itself constitute a breach of duty.

Clinicians retain independent professional responsibility. However, if harm occurs despite appropriate oversight, correct data input, and adherence to professional guidance, identifying a legally responsible party may prove extremely difficult.

Potential liability may fall upon:

- individual clinicians,
- NHS trusts or private providers (for procurement and governance failures),
- AI developers (if systems are defective or misleading).

Yet the allocation of responsibility is currently uncertain. Regulatory frameworks — including the Medical Devices Regulations, GMC guidance and developing AI governance initiatives — focus primarily on oversight and safety, not civil redress. There remains no coherent civil liability framework allocating risk between developers, healthcare institutions and individual practitioners.

For patients suffering life-changing injury, this uncertainty is more than theoretical.

## 6. Legislative Context and Divergence

The Law Commission's review of product liability law is welcome but is not expected to conclude before late 2027. In contrast, the European Union has already enacted a revised Product Liability Directive, coming into force at the end of this year, expressly addressing software and digital products, alongside the phased implementation of the EU AI Act.

This divergence risks placing injured UK consumers in a comparatively weaker position during a period of rapid technological expansion.

## 7. Policy Implications

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<sup>6</sup> [1957] 1 WLR 582

<sup>7</sup> [1998] AC 232

We recognise that the UKJT does not propose legislative reform. Nevertheless, the final Legal Statement would benefit from acknowledging the broader policy consequences of its analysis, including:

- the likelihood that negligence-based models may not adequately address harms arising from autonomous AI systems;
- the increasing vulnerability of patients and other users where AI materially influences safety-critical decisions;
- the risk that responsibility may dissipate across complex supply chains;
- the importance of ensuring that civil liability aligns with regulatory oversight and public expectations of accountability.

We further suggest that Parliament may in due course need to consider:

- adaptation or extension of strict liability principles for high-risk AI applications;
- rebuttable presumptions addressing defect or causation in appropriate cases;
- strengthened disclosure and record-keeping obligations;
- insurance-backed mechanisms to ensure effective compensation for serious injury.

## **8. Conclusion**

We have set out below a fictional example of the risk that exists today. The draft Legal Statement provides a helpful and accurate description of current English private law. However, it also demonstrates that the existing framework may permit situations in which individuals suffer grave harm without effective legal remedy, solely because autonomous systems obscure identifiable human fault.

For those we represent — individuals living with serious or even catastrophic injury or bereaved families — that is a deeply concerning prospect.

We hope that these observations assist the Taskforce in refining the Legal Statement and in informing the wider policy discussion that will inevitably follow as AI becomes further embedded in safety-critical environments.

## **February 2026**

### **Example**

By way of illustration, consider a commercial aircraft equipped with AI-assisted flight management software. If an autonomous system failure causes serious passenger injury but the airline establishes that it exercised all reasonable care in certification, procurement and oversight, liability under the Montréal Convention, where applicable, may be limited to the strict first-tier threshold. The Convention's exclusivity prevents recourse in negligence against the carrier outside its terms. Where the AI system is supplied as software rather than embedded hardware, strict product liability may not apply, and proving negligence against a developer may be evidentially prohibitive. The result is that a catastrophically injured passenger may be left without full compensation, notwithstanding the absence of contributory fault.

### **The Scenario**

A commercial passenger aircraft operating a UK–US route is equipped with:

- An AI-assisted flight envelope protection system,

- A machine-learning turbulence response module,
- Cloud-updated flight optimisation software.

During cruise, the AI module misclassifies sensor inputs from pitot and angle-of-attack systems due to a previously unidentified data drift issue, a software update pushed 72 hours before the flight.

As a result, the system commands inappropriate nose-down trim inputs, overrides pilot corrections for several seconds and causes severe pitch oscillation.

The aircraft does not crash, but several passengers suffer spinal fractures, one passenger sustains catastrophic brain injury and the aircraft sustains structural damage.

No pilot negligence is identified. The airline complied with certification requirements. The manufacturer followed approved software validation procedures. The AI developer updated the system consistent with regulatory approval.

In short: no provable human fault.

The claim against the airline is governed by the Montréal Convention 1999, as implemented in the UK by the Carriage by Air Acts. It applies because there is international carriage by air and the injury occurred onboard the aircraft.

Under Article 17:

The carrier is liable for bodily injury caused by an "accident" onboard.

Under Article 21:

- Strict liability up to 128,821 SDR (approx. £135,000–£140,000)
- Unlimited liability above that, *unless the carrier proves*:
  - No negligence, or
  - Damage was solely due to third party.

This is crucial.

The airline now argues:

- The system was certified.
- The update complied with aviation regulations.
- No crew error.
- No maintenance failure.
- The AI behaved unpredictably.
- The airline was not negligent.

If the airline succeeds in proving absence of negligence, then liability above the strict threshold is avoided and the claimant is limited to the first tier.

Compensation calculated to meet the lifelong needs (including care, accommodation, aids and equipment etc) of a catastrophic brain injured claimant in England and Wales can be an eight figure sum. But under Montréal, if negligence cannot be proved against the airline and the airline proves due diligence then the claimant may be limited to the first tier amount.

They cannot sue the airline in negligence outside the Convention, nor circumvent Montréal by suing domestically.

So in this case you would need to try to sue the developer or producer of the relevant software, but this is where the AI gap bites. The passenger would need to prove there had been negligence by the developer or a defect under CPA 1987.

However, to begin with it is unlikely that the AI would fall under the definition of that act if supplied as software/service. Beyond that, proving defect will be extremely complex. Development risks defence may apply and certification compliance complicates negligence and regulatory approval is considered an almost overwhelming factor in favour of arguing that the product is not defective.

So as a comparison, with a more traditional mechanical defect, one has a tangible component, forensic investigation, traceable defect and a much clearer manufacturer liability route.

*NB It is acknowledged that whilst this fictional scenario is to give illustration to one area of concern the Law Commission was asked by the Civil Aviation Authority (CAA) and the Department for Transport (DfT) to review the UK's aviation law framework to prepare it for the advent of highly automated and autonomous aviation systems. This work forms part of the UK Research and Innovation Future Flight Challenge, reflecting the rapid development of technology such as drones, advanced air mobility vehicles (e.g., VTOLs), and autonomous aircraft operations.*

*The overarching goal is to assess whether existing law is fit for purpose when automation increasingly replaces or modifies functions traditionally performed by human pilots, controllers or operators. The review is forward-looking; it is not a policy decision on whether autonomous aviation should be developed, but on how the law should adapt to enable innovation safely and lawfully.*

*The project considers law in England and Wales and focuses on:*

- 1. Drones (UAS) – remotely piloted and autonomous aircraft that are not crewed and do not carry passengers.*
- 2. Advanced air mobility (AAM) – particularly vertical take-off and landing aircraft (VTOLs) designed for carrying people on short journeys.*
- 3. Air traffic management and air navigation services (ATM/ANS) – examined in a second consultation focusing on how autonomous systems interface with the broader aviation system.*

*The first consultation paper (Feb 2024) addressed use cases 1 and 2, and a second consultation paper (April 2025) addressed ATM/ANS and related issues. Results are being analysed with a final report and recommendations due in early 2026.*

**Ends**