The Legal Implications of AI Hallucinations

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Background

A recent decision from the Supreme Court of British Columbia confirms that legal professionals must ensure the accuracy of their AI generated work products. In *Zhang v. Chen,*[1] two cases that were invented by ChatGPT were submitted in a notice of application. Costs were sought by the opposing party due to the time and expense incurred before discovering that the cases did not exist. The court commented on the risks associated with AI driven tools and held counsel personally responsible for the costs incurred as a result of the insertion of the fake cases. This decision is a reminder of the unique challenges posed by AI systems that reinforce the duty of care owed by legal professionals.

Zhang v. Chen

An application was submitted to the court to permit parenting time abroad. The application contained two non-existent cases that were the result of ChatGPT "hallucinations". Opposing counsel requested copies of the cases when they could not locate them using their citations. Counsel later objected to the inclusion of the new cases in the application and continued to demand copies of same. Eventually, a legal researcher was retained to assist but could not find the cases either. The opposing party subsequently received an apology letter from the lawyer advising that the two cases were invented by AI and erroneous. The cases were withdrawn before the hearing and were not relied upon when the matter was heard. Nonetheless, the opposing party argued that they had incurred expenses while attempting to find the two cases before determining that they were invented by ChatGPT.

The court held that special costs were appropriate for serious abuses of the judicial system or deliberate, dishonest or malicious misconduct, not mere mistakes or negligence. Despite finding counsel's actions alarming, the court did not find an intent to deceive. Instead, it noted her lack of awareness of the risks associated with ChatGPT and similar tools. Although the court dismissed the request for special costs, it recognized that counsel's use of non-existent cases necessitated additional effort and expense by opposing counsel. Therefore, the court found counsel personally liable for the costs incurred due to her conduct.

Given the increasing prevalence of AI, this decision sets a legal precedent that could influence future cases involving similar issues regarding the duty of care owed to clients and liability for lawyers using chatbots.

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[1] *Zhang v. Chen,* 2024 BCSC 285.

The speed and scale of AI technology promises significant economic benefits. This promise contributes to its growth within various realms, including the practice of law. However, there are concerns about its reliability and accuracy. ChatGPT and other AI chatbots rely on an algorithm to process input and create output. The output is not always accurate. Accordingly, the chatbot cautions users to check important information.

A Legal Framework for AI

In the absence of a legal framework for governing AI, Canadian courts are left with interpreting existing laws to determine liability and accountability in such disputes. Due to the complexity of this technology, interpretation of traditional contract and torts law can present a challenge in addressing the harms caused by it. Implementing new AI laws can improve accountability, transparency, and due diligence among all of its users.

The European Union approved the EU *AI Act* (the "Act") in March 2024, marking the first comprehensive regulatory guidance addressing the development and use of AI systems. The proposed framework adopts a risk-based methodology by classifying AI systems into four tiers: unacceptable risk (such as emotion recognition at work, schools, social scoring, etc.), high-risk, medium-risk, and low-risk. The level of requirements and constraints escalates with the risk level. For high-risk AI systems, such as AI used to profile individuals (work performance, economic situation, health, preferences, interest reliability) more rigorous obligations are imposed, including the use of high-quality data, transparency provisions, and conformity assessments. Furthermore, the Act mandates transparency, necessitating that AI systems such as chatbots and deepfakes explicitly identify themselves as such during interactions with humans, unless their nature is already evident.

Breaches of the Act could result in fines of up to €15 million or 3% of annual global turnover for most violations. Violations related to prohibited AI systems, such as employing AI-enabled manipulative, subliminal, or deceptive techniques to distort behavior or using biometric categorization data to infer private information, could incur penalties as high as €35 million or 7% of annual global turnover.

The EU *AI Act* emphasizes some of the key concerns surrounding this technology. As Canada moves towards developing its own legislation and filling the legal void, it is important to heed the widespread calls for exercising caution while making use of AI generated content or tools in a professional capacity. While AI may offer time and cost savings for legal professionals and their clients, if left unchecked, it can lead to inadvertent harm.