



THE APPLICATION OF STRICT PRODUCT LIABILITY PRINCIPLES TO ACCIDENTS CAUSED BY ARTIFICIAL INTELLIGENCE

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INTRODUCTION

The year is 2020. A global pandemic, killer wasps, and now ...killer robots? At this point, it is hard not to believe all of these are true. In fact, the reality is that all of these are truths. While killer robots sound like the plotline to 2004 science fiction film *I, Robot* (which ironically was set in 2020), artificial intelligence advancements have made these robots more than science fiction. Today, machines and robots have elite and sophis-

ticated programming that make them both extremely helpful and potentially dangerous.

While the global pandemic has put a pause on many aspects of life, the progress and advancements in the artificial intelligence realm continues. Many industries are responding to this new norm and trying to understand the risks in this new and exciting field. One major question is how do we determine who is responsible when a machine utilizing artificial intelligence fails?

WHAT IS ARTIFICIAL INTELLIGENCE

Artificial Intelligence, or AI, is any computer system or program that is able to recognize an event or situation, and decide to do, or not do, something. These programs “think” and behave in a manner that mirrors that of a person, without the risk of fatigue or exhaustion. Efficiency is the goal for most companies and people in their daily life. AI robots provide an efficiency that humans simply cannot.

Manufacturing industries are utilizing AI to boost efficiency and production numbers. Assembly lines and machines can be programmed to move and perform at levels far beyond that of a person. This capability allows for much greater production. Everyday we utilize a form of AI to make life easier.

We dictate our texts to Siri, and our phones contain and control everything from finances to how we arrive to work. We can lock our doors and set our alarms from hundreds of miles away with the press of a button. Alexa can wake us up, start the coffee maker, and order more pandemic snacks without us lifting a finger. Once upon a time, cruise control was the most our cars could do, now our cars can drive themselves.

The question is what do we do when these machines we have programmed to behave intelligently begin to “think” outside of the programming and capabilities we thought they were capable. After all, intelligence is the ability to acquire and apply knowledge and skills. It is not unrealistic to expect AI to learn and adapt as needed.

So, what happens when the AI expands beyond its programming and “malfunctions” to the point of causing an accident? Who is responsible? The manufacturer, designer, programmer, owner or operator? The unknown of AI makes the actual implementation of laws and regulations a difficult path to determine, but one of great importance. If AI is capable of causing damage to persons and property, someone (or something) will be held accountable. But should these claims be governed under a traditional product liability framework?

IS AI A PRODUCT OR A SERVICE?

In order to determine whether product liability principles will apply in the field of AI claims, the initial question that must be answered is whether the courts will consider AI to be a product or a service.

Software has not traditionally been considered a “product” for product liability purposes, under either the Restatement Second or Third of Torts. And although the designation of whether AI should be considered a product is not fully defined, one court has recently waded into the issue. In *Rodgers v. Christie*, 795 Fed. Appx. 878 (3d Cir. 2020), the Third Circuit Court of Appeals applied the definition of a product contained in the Restatement (Third) of Torts, in holding that a multifactor risk estimation software program, used in evaluating the risk to the community of prisoners considered for release, was not a product for purposes of a strict liability claim brought by the family of a man murdered by a recently released prisoner. The court relied upon the Restatement

Third of Torts, which defines a “product” as “tangible personal property distributed commercially for use or consumption.” The court declined to deem the software system a product because it was “neither tangible personal property” nor “analogous to” it. Instead, it was an “algorithm” or “formula” that analyzed various factors to estimate the risk of an offender to the community. The court further found that the risk estimation software would not be deemed a “product” because “information, guidance, ideas, and recommendations” could not qualify as a product under the Restatement.

Notwithstanding the Restatement Third definition, the ultimate designation of AI as a product or service is far from settled. Resolution of this issue is extremely important, however, because if AI is a product, strict liability principles apply; if AI is a service, it will not.

STRICT LIABILITY

Strict liability claims fall into one of three categories: Defective design, defective manufacturing, and failure to warn. Some commentators argue that strict liability is the best response to the growing AI industry as these intelligent machines pose an increased risk of harm to individuals. If AI causes an injury or spontaneously malfunctions, negligence will not have to be proven, and an innocent party will not bear the financial burden of such an accident.

It is not yet clear how these principles will be applied in more concrete applications such as self-driving cars. Self-driving cars are a convenience that appeal to many consumers. Even if the car is not fully autonomous, the smart systems in place allow the car to do a lot for the operator. These cars can stop themselves to avoid an accident or parallel park with only the press of a button. However, once the car takes control, is the operator still at fault? If the car is programmed to think and react, one might assume the operator can rely on this intelligence. This may seem true, however, the car is still a car.

With regard to partially autonomous vehicles, strict products liability may not be the best liability structure because an operator should still have ultimate control and responsibility over the vehicle. Of course, the product should be provided with full and adequate warnings and instructions about the limitations of the AI and the role of the operator.

In contrast, some argue the application of strict liability principles to accidents involving fully autonomous vehicles is fair because the manufacturer has implicitly promised to provide a fully autonomous vehicle that does not need human intervention to safely operate. But what is the standard to apply in determining whether a defect exists in the

AI? Some jurisdictions apply the consumer expectations test to product liability claims. Arguably in those jurisdictions a plaintiff could argue they reasonably expected the vehicle to avoid collisions as a matter of course. But many jurisdictions apply the risk utility analysis to determine whether a product is defectively designed, asking whether the product creates such a risk of an accident that an ordinarily prudent manufacturer would not have put it on the market. How do you determine whether a defect in the AI exists under this standard? Should you compare the accident incident rate of the autonomous vehicle with that of a human driver? Surely, the autonomous vehicle will have a significantly lower accident rate than human driver. If this is the standard, how are injured persons expected to recover?

An interesting proposal in the AI world is to offer insurance to drivers for accidents involving fully autonomous vehicles. The policy would be used to offset the damages caused by accidents related to AI malfunctions. States could require this insurance for autonomous vehicles. Similar to a warranty with a product, this insurance would provide some protection to the victim, the owner, the manufacturer, and those responsible for designing the AI.

CONCLUSION

The technological advancements we have made with regard to AI are vast and profound. The AI industry is thriving. But in order for this industry to continue to advance we will need to determine how to allocate the risk of loss when things go wrong. Product liability principles seem to provide an obvious framework for determining liability, but as shown above, it is not always that simple and we still have a way to go.



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