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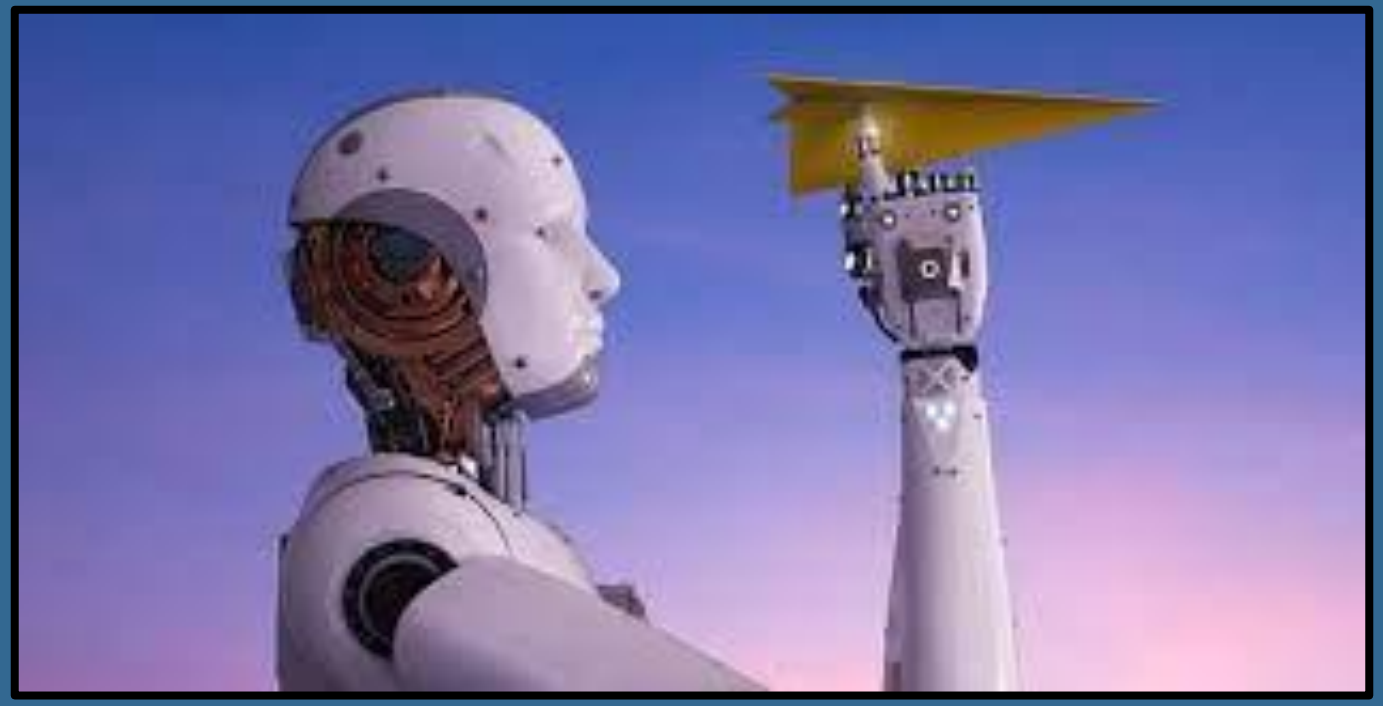
Artificial Intelligence And Product Liability



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Learning objectives:

- AI: What is it?
- Application of product liability law to AI
- Defenses
- Benefits & risks
- AI & damages
- Best practices

ARTIFICIAL INTELLIGENCE (AI) DEFINED

- The simulation of human intelligence processes by machines.
- Focuses on the use of data and algorithms to imitate the way that humans learn, gradually improving accuracy (adaptive versus locked).
- Using large amounts of data and high processing speeds, AI can train itself to make decisions based on past experience and data analytics.

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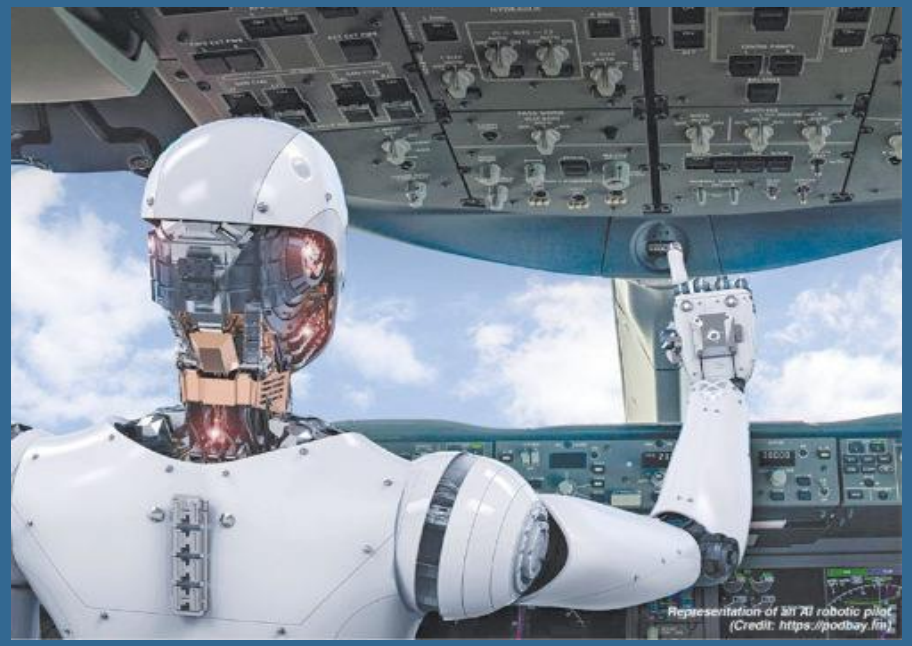
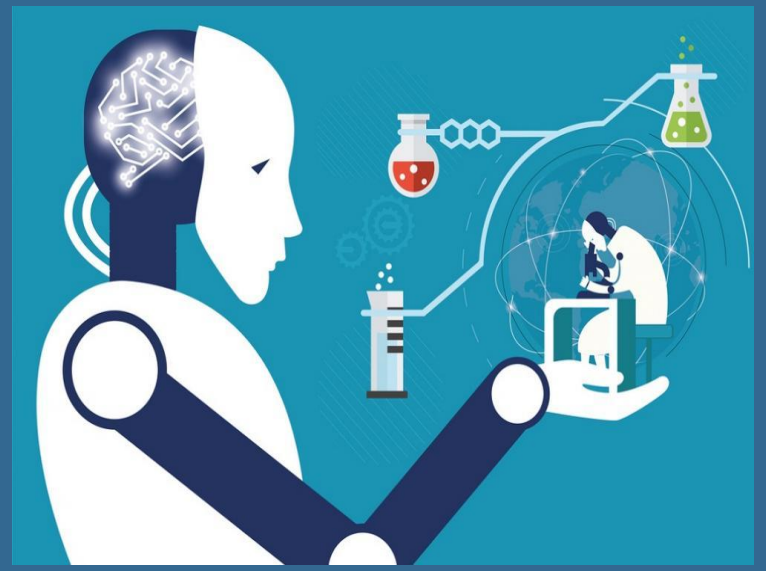
AI APPLICATIONS

- Transportation
- Medicine
- Insurance
- Investment





to name a few …

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A BALANCING ACT: BENEFITS & RISKS OF AI

- Benefits: more efficient, safer, competitive advantage
- Risk: AI lacks reasoning and contextual knowledge of humans
  - Complex ethical dilemmas pose a challenge.
  - EX: Should a self-driving car prioritize safety of a child that runs into the street over safety of its passengers?
  - Engineers and philosophers are designing algorithms to address these concerns.

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A BALANCING ACT: BENEFITS & RISKS OF AI

- Risk: AI lacks the visual intelligence of humans
  - Is a small object on the road a trivial object (i.e., soda can) or does it require driver to slam on the brakes?
  - In May 2016, Tesla's autopilot failed to detect an 18-wheeler due to the truck's height and a glare, causing fatality.
  - Researchers at Princeton and Stanford launched ImageNet: a repository of 14 million categorized images to improve the "vision" of autonomous cars.
  - BUT, still far from the visual intelligence of humans.

A BALANCING ACT: BENEFITS & RISKS

- **Risk: AI can be unpredictable**
  - "Adaptive" algorithms are designed to change based on evolving data
  - As algorithms learn and improve (ML), they become more autonomous and less comprehensible to users
  - Even programmers can be surprised by decisions made by AI
  - *EX: Gaak the robot escaped the Magna Science Adventure Center in England, and crept into traffic.*

WHO IS LIABLE IF AI-CONTROLLED PRODUCT CAUSES HARM?

- Strict liability can arise from a product defect that causes harm
- Condition of the product is on trial
  - Only question is “Did a defect in the product cause harm?”
  - Unlike negligence, which looks at the conduct of the manufacturer
  - Chain of distribution

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PRODUCT DEFECT DEFINED

- A defect is an unexpected condition which causes injury
  - *Design defect*
  - *Manufacturing defect*
  - *Failure to warn (of danger)*
  - *Failure to instruct (of proper use)*

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WHEN IS AI "DEFECTIVE?"

- Design defect → Faulty algorithm caused product to malfunction and/or cause injury (risk/benefit test)
- Design defect → Product used AI that was not capable of the visual intelligence or reasoning necessary for the application
- Failure to warn/instruct → User was not properly informed of limitations of product's AI
  - *Hudson v. Tesla:* Lawsuit alleges Tesla duped consumers into believing that autopilot program was safer and required less oversight than it actually required.

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AI's DEFENSES TO STRICT LIABILITY

- AI not defective at the time of manufacture
  - Proving a manufacturing defect requires a plaintiff to show that the product deviated from the manufacturer's intended result when it left the manufacturer's possession.
  - AI's distinct adaptive qualities and independent decision-making capabilities make it difficult to prove a defect was present at the time of manufacturing.

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AI's DEFENSES TO STRICT LIABILITY

- AI may not fall within the traditional definition of a product

- *Rodgers v. Christie (2020)*
  - Algorithm was not a product, and New Jersey could not be held strictly liable for a product defect

    - (1) Risk-assessment tool was not distributed commercially
    - (2) the tool was not tangible personal property nor comparable to it.

  - The Court acknowledged that "information, guidance, ideas, and recommendations" are <u>not</u> products.

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AI's DEFENSES TO STRICT LIABILITY

- AI's independent decision-making capability is not a defect, but a defining feature
- AI may make a "bad" decision based on machine learning that cannot be attributed to defect in algorithm
- Difficult to prove a "defect" in this scenario

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ALTERNATIVE AVENUES OF LIABILITY

- Negligence
- Breach of Warranty (Express/Implied)
- Misrepresentation (Negligent/Intentional)

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NEGLIGENT AI

- Traditional test: Did the actor fail to act as a reasonable person, and was the resulting harm foreseeable?
- Application to AI: Can AI be held to a "reasonable computer" standard?
- Hypothetical: AI caused vehicle to collide with a pedestrian to avoid an oncoming vehicle. What would a "reasonable computer" do in such a circumstance?
- Limitations:
  - Overly complex expert evidence required
  - Industry standards that are non-existent or outdated
  - AI does not have legal personhood

NEGLIGENT PROGRAMMER/USER/SUPPLY CHAIN

- Programmer/Designer: Proving foreseeability difficult, especially if AI's decision is based on adaptive algorithms
- User: Human/AI interface difficult to predict

  Requires anticipating assumptions and decisions of human/AI interaction

- Apportioning blame upstream or downstream the supply chain

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NEGLIGENT PROGRAMMER/USER/SUPPLY CHAIN

- <u>Potential Issues:</u>
  - Chilling of innovation
  - Overly complex expert evidence required
  - Industry standards that are non-existent or outdated

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BREACH OF WARRANTY

- Express breach of warranty: where a seller breaches a promise he or she made during negotiations
- Implied breach of warranty: where a seller breaches an implied guarantee as it relates to the product
- <u>Limitations</u>:
  - Only applies to goods or products – may not apply to AI
  - Claim can only be brought by a purchaser of the product
  - *EX: rare for patients to recover for breach of warranty in the AI/ML-based medical device context because it is typically the healthcare provider that purchased the medical device from the manufacturer or supplier*

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THINKING OUTSIDE THE BOX

- Clear that risks associated with AI do not fall neatly within traditional liability principles
- Alternative: Expert Panel
  - Centralized body of AI experts continuously monitoring AI behavior and establishing clear safety standards: FDA for algorithms
  - A new regulatory paradigm could provide redress to victims of AI-related injuries while avoiding the "chilling" effects of unlimited liability upon programmers/designers, etc.

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AI & THE JURY SYSTEM

- Lack of information/unknowns
- Complex – expert intensive
- Jury distrust & bias
- Resentment & concern

BEST PRACTICES

- Allocate liability up and down the supply chains
    - Ensure the proper indemnities, limitations of liability, and warranties are provided for in contracts
- Invest in testing and simulation campaigns, and in tracking of real-world data
- Transparency and warnings regarding limitations of AI

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What we have covered:

- AI/What it is & Applications
- Benefits (efficiency/accuracy) vs. Risks (still evolving, unpredictable, accidents)
- Challenge of applying AI-accidents into product liability framework
- The incongruity between AI's independent thinking capability and proving product defect
- Does not meet definition of product
- Who is to blame: AI/programmer/user/supply chain
- Juries & Best Practices

Questions?

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