

CHICAGO LAWYER®

CLIFFORD'S NOTES

The rise of technology has impacted all areas of life including the practice of law. Perhaps it is more apparent in cases involving personal injury and wrongful death.

Look no further than headlines telling the story of where tort law is heading: "LG Chem Unit Must Face Exploding Battery Suit in NJ"; "Amazon Sued over Crashes by Drivers Rushing to Make Deliveries"; and "Jury Awards \$9.7 Million in Case Over Botched Brain Surgery."

These cases from around the United States demonstrate how artificial intelligence is making decisions and carrying out procedures in place of humans. So who is to blame when something goes wrong? Defendants try to blame AI or turn it into a product liability case. But one person or group of people are behind the creation of AI — algorithms and techno-talk can't become an "out" for liable parties.

For example, a potential client comes to a lawyer claiming injury by a driverless car while a pedestrian in a crosswalk. Is the defendant the car owner? The manufacturer? The software/hardware company that programmed the car to drive? All three? There is a possible supply chain that may go even further back.

If it turns into a product liability claim, how does that impact the suit in terms of approach and costs? Legislators in the United Kingdom have attempted to solve this problem by requiring owners of driverless cars to be covered by compulsory motor insurance, even if they are not driving a vehicle.

Despite the upside of driverless cars potentially reducing the number of crashes caused by drunk, driving-impaired or distracted drivers, driverless cars are reported to have a risk of 9.1 accidents-per-million miles driven compared to 4.1 accidents-per-million miles for conventional cars. Obviously, the use of dashcam video footage, now on many cars including Ubers, commercial trucks and public service vehicles, is a technology that can offer valuable evidence that is superior to conflicting eyewitness testimony. But what if the car's technology is hacked or a computer virus takes hold? Cybersecurity issues move to the forefront.

Zurich Insurance, one of the largest insurance companies, reportedly has started using AI to assist in assessing personal injury claims. Fukoku Mutual Life Insurance, a Japanese insurance company, reportedly is using AI from IBM to analyze images, thousands of medical documents, reports and motor vehicle accident reports to calculate claim payouts.



TOUGH CALLS ON AI

Who is to blame in claims against driverless car crashes

By **BOB CLIFFORD**

Medical malpractice is another area in which innovative medical devices have changed the healthcare landscape. A threshold question may be whether the FDA regulated the device or the software at issue. When these devices fail or when AI is used as part of an inaccurate diagnosis or intervention, a complex chain of events must be unraveled to determine how and why the mistakes occurred. Inputting data, algorithms and interpretation of the output decisions will have to be traced, perhaps with tech experts having a say in substantiating or debunking the physician's medical judgment in reliance on other factors.

Is space the next PI frontier? As billionaires use their corporations to launch vessels carrying private individuals into the stratosphere, what if there are tragic injuries or death? Even if the company requires passengers to sign a release that they are fully liable for one's own safety, what is the likelihood it will hold up in a U.S. court?

Last July, The New York Times reported these moguls are looking into insurance coverage. It reports that Lloyd's of London estimates that the space insurance market has averaged \$500 million in annual premium payments over the past decade for policies covering satellites and other nonhuman cargo in distinction from humans.

The acceptance and adoption of new technologies became more evident in the litigation process

itself during the COVID pandemic when nearly all legal workers suddenly became completely dependent upon computers, smart technology and AI. This new world is here to stay and has risen to new heights with digital file management, DocuSign, Zoom hearings and 3D printing for exhibits at trial. Wearable gadgets and tech devices that can track a person's movements, locations, contacts and other private information can become invaluable pieces of evidence.

Lawyers must educate themselves, as required by the Illinois Rules of Professional Conduct (Rule 1.1, Comment 8) that imposes a duty of technological competence. They must understand confidentiality and other client needs for emails, document transfer, discovery requests, social media sites and cloud-based mechanisms for data storage. They also need to know the risks associated with using mobile devices and basic data security issues, the use of technology to enforce document retention policies, basic legal research tools and services and metadata within documents.

These innovations are evolving to make practicing law more efficient and user-friendly. The profession can only expect it to grow exponentially. **CL**

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