



2019 Annual Conference

March 13 -15 2019

Orlando, FL

Ethical Conundrum: Can Artificial Intelligence Truly Make the “Critical Decision?”

I. **Artificial Intelligence – Causing an Unseen Change in Liability**

This topic is best introduced by considering a scenario from the past and predicting what it may look like in the future based upon the use of artificial intelligence (AI).

Spring boarding From the Past Into The Future: A Scenario Of The Past

A real estate developer decides to construct a high-rise building. The project is conceptualized and designed by a team of seasoned architects and engineers; while the construction is completed with conventional materials including concrete, steel, and masonry by a general contractor and subcontractors. A couple years after the project is completed, litigation is filed due to water intrusion, faulty workmanship, and allegations of additional construction defects. The parties involved are known – from the developer to the design team to the contractors involved. Laws and statutes governing construction defect litigation are well known and established, following a typical start-to-end scenario – a trickle down from the developer through to the subcontractors. [ALSO THINK WE CAN MODIFY THIS TO BE A JOBSITE INJURY SCENARIO WHICH MAY HIGHLIGHT THE AI COMPONENT OF THE CLAIMS HANDLING PROCESS BETTER]

Spring boarding From the Past Into The Future: A Scenario Of The Future

A real estate developer decides to construct a high-rise building. The project is conceptualized and designed by a team of seasoned architects and engineers using the latest technology including predictive design and specifications for 3D printing of architectural features. The construction team includes a general contractor and subcontractors, as well as specialty subcontractors utilizing drones and 3D printers for construction, as well as autonomous vehicles in preparing the site; the construction is completed at a cost and time savings when compared to conventional construction. A couple years after the project is completed, litigation is filed due to water intrusion, faulty workmanship, and allegations of additional construction defects. However, under this scenario, the parties are a little less clear – manufacturers and AI software developers may be included within the scope of relevant parties.

Current AI Applications and Predicting Where It May Go from Here

The most rapidly evolving area of AI development relates to autonomous vehicles. However, this is not limited to personal vehicles – it includes a shift towards automating the entire transportation process from taxis to public transit to delivery services. As the world around us evolves, so too will the uses of AI in the transportation industry, manufacturing industry, construction industry, customer service industry, cyber-security industry, and virtually every other area of industry and daily life. All of these areas will inevitably become relevant to the audience by way of liability claims and automation in the claims-handling and claims evaluation process.

Exemplar Scenario Highlighting Issues That Can Arise Surrounding AI in Insurance and Litigation

In the above-scenario, there are numerous questions which highlight some of the issues that face the insurance industry and litigation professionals in analyzing the potential chain of liability. Specifically related to the use of predictive design, 3D printing in the construction and manufacturing industry, drones, and autonomous vehicles, questions arise as to who the liable party is. An AI-driven product or service goes through its own design, including the development of the software, the system, and subsequent testing. Subsequently, the product or service requires preparation for implementation; the implementation would include the actual construction and/or means and methods.

Where does the line of liability end? As the automation of industry and daily life progresses, determining the liable party may not be as simple to determine as was possible in the past. The potential traceability and liability concerns demonstrate the difficulty in properly predicting, accounting for, and defending against claims where AI-driven industries, products, and services are involved.

Ethical Implications Underlying AI in Insurance and Litigation

In the construction example, if an alleged defect is confirmed to be a result of improper construction of a structural wall, the liability may shift when it is learned that the wall was constructed with a 3D printer. Questions that arise from the use of 3D printers currently include whether the printers are a product or a service – with each having their own legal connotations. Who is liable for defective work? The programmer who created the printer, the design professional that prepared the printer's blueprint, the human who placed the printer on site, or the contractor who oversaw the printer printing the wall? Who made the "critical decision" with regards to the identified construction defect? The ethics question is naturally introduced here given a computer programmer who created a 3D printer may have no construction or materials engineering. The construction foreman likely has no computer programming background to know the right/wrong. And with that, ethics come into play.

The analyses of these questions are underpinned by some critical ethical considerations. Once a lawsuit is filed, what are the ethical bounds of an attorney in seeking to enforce or deny indemnity obligations related to their clients? What ethical considerations must be considered

when using AI-driven legal technologies such as automated document review or legal research? What, if any, automation in the claims process requires a human element of review? And how do you deal with the intangible considerations, such as sympathy, with an automated claims handling process? These are all important questions that cannot necessarily be answered but must be considered by claims and litigation professionals from the outset of a liability claim.

II. Legal Implications of AI – From an Ethical Viewpoint

Theories of Liability

There are three main areas of potential exposure related to the use of AI-driven technology. The first is tort-law. That is, what constitutes reasonable care when AI is utilized. The required level of reasonable care may change from circumstance to circumstance, rather than being a uniformly accepted standard. One of these circumstantial changes may include whether a particular person's or entity's reliance on AI-driven technology was reasonable. And even then, such level of reasonable care may vary among various parties involved in the same litigation. For example, in the construction example posed above, it may be reasonable for a general contractor to rely on the use of automated machinery to perform certain tasks, but the same potentially reasonable reliance may not be reasonable as to the subcontractor that contracted to perform the task. Additionally, if the issue becomes a worksite injury rather than a construction defect, the same reliance by the general contractor on the automated machinery may not be reasonable. There may be differing levels of acceptable risks which comply with business ethics, but a jury may view those ethically-compliant risks differently.

The second area of liability arises out of strict liability, most commonly associated with product liability. The analysis of which parties are strictly liable is not established or clearly defined in the areas of AI driven technology. Strict liability is born out of the desire to protect the public from potentially unavoidable dangers. As AI technology is applied across the manufacturing industry, engineers are bound by their code of ethics. However, the same code of ethics may not govern the person that designed the AI-driven product or manufacturing process. When an injury caused by the product or manufacturing process occurs, the ethical obligations of the parties up and down the potential chain of liability varies. Accounting for these variations during litigation must be considered by claims professionals and litigation counsel, as well as the ethical considerations of the viability of risk-transferring opportunities.

The third area of liability arises out of contractual liability, centering primarily on contracts for the supply of goods and services either utilizing AI technology or manufactured using AI technology. Contractual indemnification and waivers of contractual liability are present in virtually all commercial contracts. However, there is a void of case law and regulation interpreting and applying how these provisions may be applied to suppliers, manufacturers, and others that utilize AI technologies. Given that case law and governmental regulation typically establishes the acceptable bounds for reasonable behavior and the bounds of the freedoms to contract, considerations, some of which are ethical, must be weighed.

Traceability and Scope of Liability

As can be seen, the traceability and scope of potential liability can quickly escape reasonable bounds if not tailored down. It is necessary to consider from the outset of a claim or litigation

what the reasonable and ethical bounds of that potential chain of liability are, and the long-term impacts it may have on insureds. While risk-transference may save the day for the insured on a single claim, it may also doom the insured or set a dangerous precedent for others which can ripple through an industry. Ethically evaluating the chain of liability requires critical discussions and evaluations of the long-term impacts on the insured by claims professionals and defense counsel.

Use of AI in Claims Handling and Legal Field

Just as AI is permeating throughout other industries, the use of AI is evolving in the claims handling and legal industries. Colossus was intended to revolutionize and standardize the claims evaluation process and eliminate some of the potentially subjective human analysis involved in the claims process. However, it fell short when it was utilized without some necessary human oversight. Automated claims handling is coming and can provide a valuable tool to assist insurers. However, when used in isolation, it can detrimentally affect the claims handling process.

Two emerging trends in the litigation field include automated document review and automated legal research. Automated legal drafting and legal analysis are looming on the horizon. However, the law is struggling to keep up with the ethical obligations a lawyer owes to his or her clients. Nor are there concrete and established ethical guidelines for when the use of these AI-driven technologies are acceptable.

Potential Ethical Implications of AI Use in Claims Handling and Legal Field

Utilizing AI technologies in the claims process can assist in providing better outputs to the insured if used in conjunction with human oversight to ensure a fair and ethical outcome. This could be referred to as the sniff-test – whether the outcome of a claim “feels” ok may require a circumstantial evaluation of reasonableness that cannot necessarily be provided solely by AI-driven analysis.

On the legal side, a lawyer must not bill their client unreasonable fees for the provision of legal services. This may mean utilizing AI-driven legal research. However, a lawyer owes the same client the duty of competence and advocacy. This may mean double-checking any automated tasks being utilized. Or it may mean digging into the methodology employed by the automation process and obtaining assurances that such automation complies with a lawyer’s ethical obligations. And where there is an area of developing law, such as AI-related injuries, automated legal research may not recognize to draw upon potentially unrelated areas of law for policy considerations which can support thorough legal analysis. All parties involved in the litigation process, from the clients to the lawyers to the claims professionals, must understand the potential conflicts inherent in the use of automated legal services. Further, obtaining informed consent by the client and carrier, and/or documenting the scope of use of automated legal services may be necessary – or at least wise.

IV. Educational Case Study

Autonomous Vehicles

In 2018 SECURA Insurance Company engaged in a multiple-division project studying the status of autonomous vehicle progress and the implications of future advances in autonomy on its insurance business. The main foci of the final report were the adoption rate of future autonomous features, the potential impacts on products and coverage, and the potential impact on liability and claims frequency/severity.

Based on our research, we predict levels 4 and 5 of autonomy will not be fully introduced until sometime in the range of 2025 to 2045. Even then, the average public adoption timeline for new vehicular technology is 20 to 25 years. These timelines may be adversely affected by accidents involving autonomous vehicles, as we saw earlier this year in the Arizona autonomous Uber fatality matter causing Uber to halt autonomous vehicle testing.

While some insurance carriers have begun filing potential policy forms and discounts, these remain vague and general. It is clear that automobile insurance in its current form will greatly change and potentially eventually disappear. Insurers must therefore have to foresight to develop new policy coverages, such as with respect to cyber security.

With regard to motor vehicle accident liability law, we conclude change will be drastic as vehicles with more autonomy become more widespread in use. Courts and legislatures will be forced to determine whether to adhere to the current common law comparative negligence model, or switch to products liability, no fault, or damage caps as more accidents involve conditionally to fully autonomous vehicles.

There is certainly little data regarding how the frequency and severity of auto claims will change when autonomous vehicles become more common, particularly considering the interplay between autonomous vehicles and traditional vehicles sharing the road. Most forecasters predict frequency will drop as autonomous vehicles eliminate a portion of the human-caused crashes we see today, while severity of claims will increase due to higher costs of repairing vehicles due to autonomous technology.

Ethical Implications

All new technologies require new ethical considerations, and autonomous vehicle technology is no different. From an insurance perspective, there is the ethical quandary of how and when to use information gleaned from autonomous technology.

For instance, should an insurer require its insured to allow the insurance company access to all data created by the insured's autonomous vehicle? Or should it limit the data required, and to what specific data?

Obviously, the autonomous vehicle will generate not only data about accidents in which it is involved, but also about the insured's driving habits and abilities, "near accidents", locations to which the insured travels, who the insured transports, and potentially more personal information. Can the insurer increase rates if it determines the insured was almost involved in multiple accidents but for autonomous technology intervention? If an insurer happens to receive data that the insured frequently travels to a doctor that specializes in treating a specific malady, can the insurer use that information when considering whether to renew or grant new coverages, or when the insured claims injury from an accident? What if the auto insurer also

has a health or life insurance policy – may it use autonomous vehicle data to rate those coverages and grant or deny coverage?

In this age of data breaches, what is the ethical (not to mention legal) requirement of the insurer to guard and protect data it may obtain from its insureds' autonomous vehicles? The sheer volume of data to which an insurer may be privy from an autonomous vehicle would require massive safeguards against hackers. If the insurer is then subject to a security breach of that data, what are its ethical duties to alert its insurer and remedy the breach?

During the middle stages of autonomy, the insurer's ethical quandaries may be at their most difficult, as the insurer must choose how to contemplate its insured independent of the technology in his/her vehicle. Or must the insured take into account the autonomous features when underwriting the driver? If the insured drives a semi-autonomous vehicle sometimes, but a non-autonomous vehicle other times, how may the insurer ethically deal with the insured in determining what coverage to write? And if an accident occurs in a semi-autonomous vehicle, may the insurer ethically raise the premium, or must it account for the fact that the autonomous features were engaged or not engaged?

V. Real-World Case Studies

Uber and Tesla Vehicle Crashes/Fatalities

When Tesla's Auto-Drive feature was released, it was seen as a tool to help avoid collisions and lessen the impact of human error. However, there have been catastrophic injuries arising from consumers' use of the Auto-Drive feature. Similarly, Uber is experimenting and developing autonomous cars to serve its customers. There have been great developments which may help to lessen the impact of human errors, and as AI technologies become more advanced, these developments will only quicken. However, imagine the scenario where a self-driving car can save its passenger at the expense of injuring others by veering onto a sidewalk. Who is liable? The driver did not make a choice to injure the passengers. Does liability fall to the manufacturer? The software developer? And how are these risks responsibly underwritten? Allowing a never-ending chain of liability makes risk-allocation impossible and greatly increases the costs of litigation. Can coverages be ethically limited to certain amounts per accident?

AI Robotic Injury

In Michigan, a lawsuit arose out of an automated manufacturing robot that killed a man during manufacturing operations. The man allegedly noticed a defect in the raw material being utilized and stepped in to attempt to observe the material close-up. The manufacturing robot was supposed to have programmed fail-safes to prevent human injuries on the manufacturing line. Rather than automatically stop the manufacturing process, the robot ended up crushing and killing the man. The case was resolved out of Court. The ethical considerations underlying the lawsuit by the man's family are easy to see. What duties did the manufacturer owe to provide safeguards? Who was responsible for establishing those safeguards? In analyzing and litigating the claims, does attempting to risk-share up and down the chain of the robot's development comply with the ethical duties of the attorney? What input from a human is needed on the claims handling side of the evaluation to balance the insurer's duties to the clients and the

claimants? If AI-driven analysis is utilized in the claims handling process, can an insurer ethically and reasonably rely on a computer to decide the value of the man's life?

Predictive Engineering Design Failure

Arbitration involving the failure of a parking garage structure being constructed. The engineer was utilizing software to help aid in the sizing of structural members, and an offset on one of the beams led to an incorrect load path assumption. This created a structural weak spot in the parking garage structural system, and the garage slab ended up punching through the column at that location due to inadequate structural strength. Does liability run to the engineer due to code of ethics he or she is bound by? Is some liability borne by the programmer of the software that never agreed to the engineer's code of ethics? What level of reliance can an engineer place on automated design software?