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Blame and Fault: The Legal Response to AI

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AI In the UK: Ready, Willing and Able (HL, 2018)

- “A serious issue which witnesses brought to our attention was who should be held accountable for decisions made or informed by artificial intelligence. This could be a decision about receiving a mortgage, in diagnosing illness, or a decision taken by an automated vehicle on the road. (HL Report, para 306)
- “legal liability is often stated as a major societal hurdle to overcome before widespread adoption of AI becomes a reality” (Royal College of Radiologists, para 308)

A Typology of Blame

(1) The Perpetration-via-Another Liability Model

(2) The Natural-Probable-Consequence Liability Model

(3) The Direct Liability Model

Gabriel Hallevy, "The Criminal Liability of Artificial Intelligence Entities - From Science Fiction to Legal Social Control" (2010) Akron Intellectual Property Journal 171

“Broadly, the problem of validating AI algorithms is a problem in three parts. First, as mentioned, AI is often opaque, so it is difficult to fully examine its outputs. If we are to validate such devices, much of the validation may have to hang on its accuracy alone. Second, future uses might include highly personalised predictions or recommendations ... Third, the accuracy and reliability of these algorithms shifts according to the data it swallows. Given this, AI may often constitute more of a moving target to validate than more static algorithms. All considered, these problems are certainly not unique to AI, yet it is clear that the growing use of AI for health might challenge traditional methods of testing medical technology.”

Johan Ordish, “AI for Health: Is there a Regulatory Gap?” *Digital Health Legal*, 5th June 2018

“If there has not been a clear malfunction of the software, but rather the occurrence of a situation where, based on its learning, the AI decided that it needed to operate on the healthy organ in the example above, would this amount to a breach of duty?”

L. Torne, P. Caldato and M. Tanna, ‘Liability for Erroneous AI: Who is to Blame When Things Go Wrong?’ *Elexica* Oct 2018

AI Exceptionalism?

- “The law will find a solution. If we have a liability claim, the law will find somebody liable or not liable” (Prof Chris Reed)
- “not think that our existing conceptions of the liability and responsibility have yet adapted” and “that if it comes to court the courts will have to find a solution, but somebody will have been harmed already” (Prof Karen Yeung)

“Public hospital medicine has always been organised so that young doctors and nurses learn on the job. If the hospitals abstained from using inexperienced people, they could not staff their wards and theatres, and the junior staff could never learn. The longer-term interests of patients as a whole are best served by maintaining the present system, even if this may diminish the legal rights of the individual patient”

“it would be a false step to subordinate the legitimate expectation of the patient that he will receive from each person concerned with his care a degree of skill appropriate to the task which he undertakes to an understandable wish to minimise the psychological and financial pressures on hard-pressed young doctors.”

Wilsher v Essex AHA [1986] 3 All ER 801

Thank You Very Much