Artificial intelligence in healthcare and its challenges to liability law: is no-fault insurance the key?

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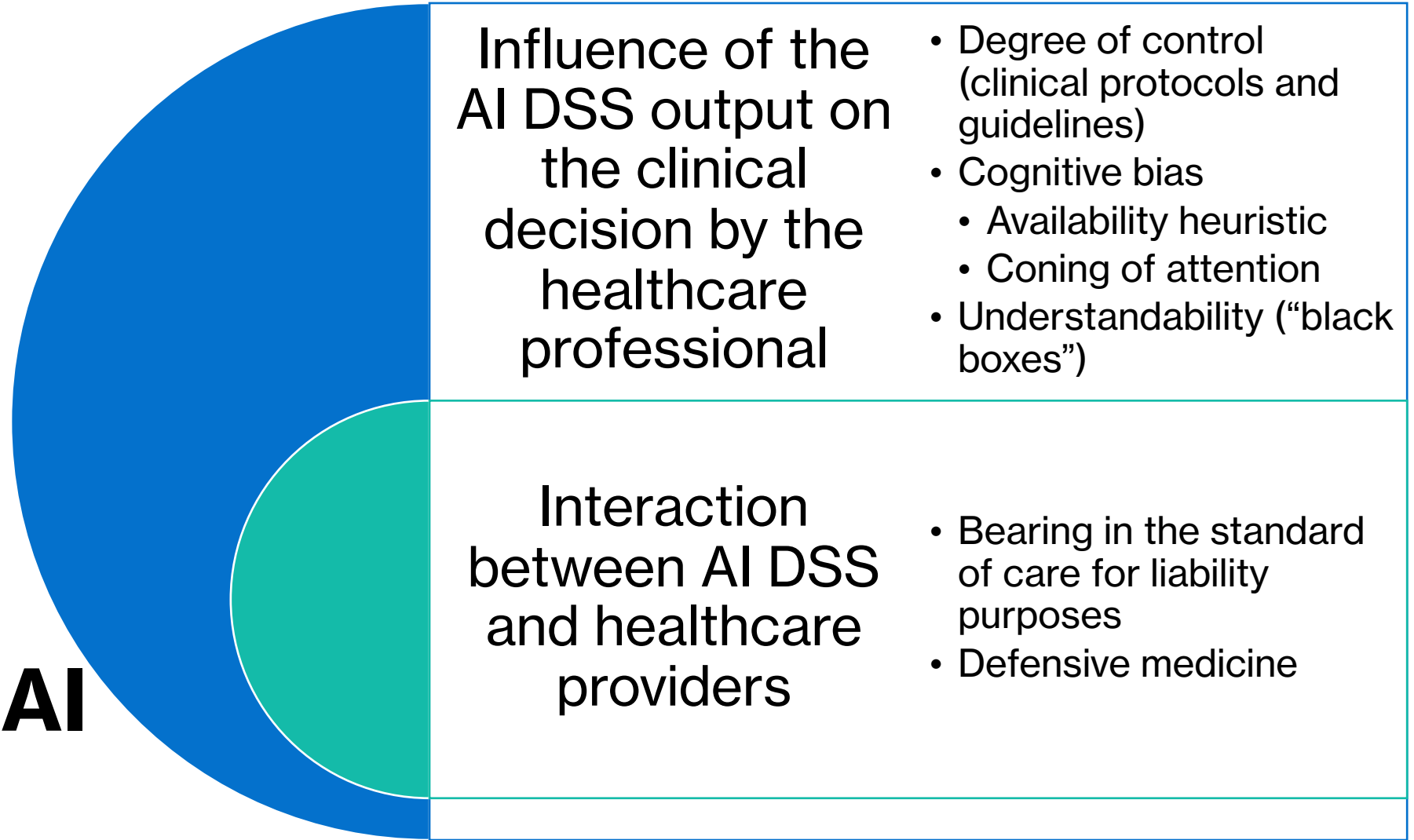
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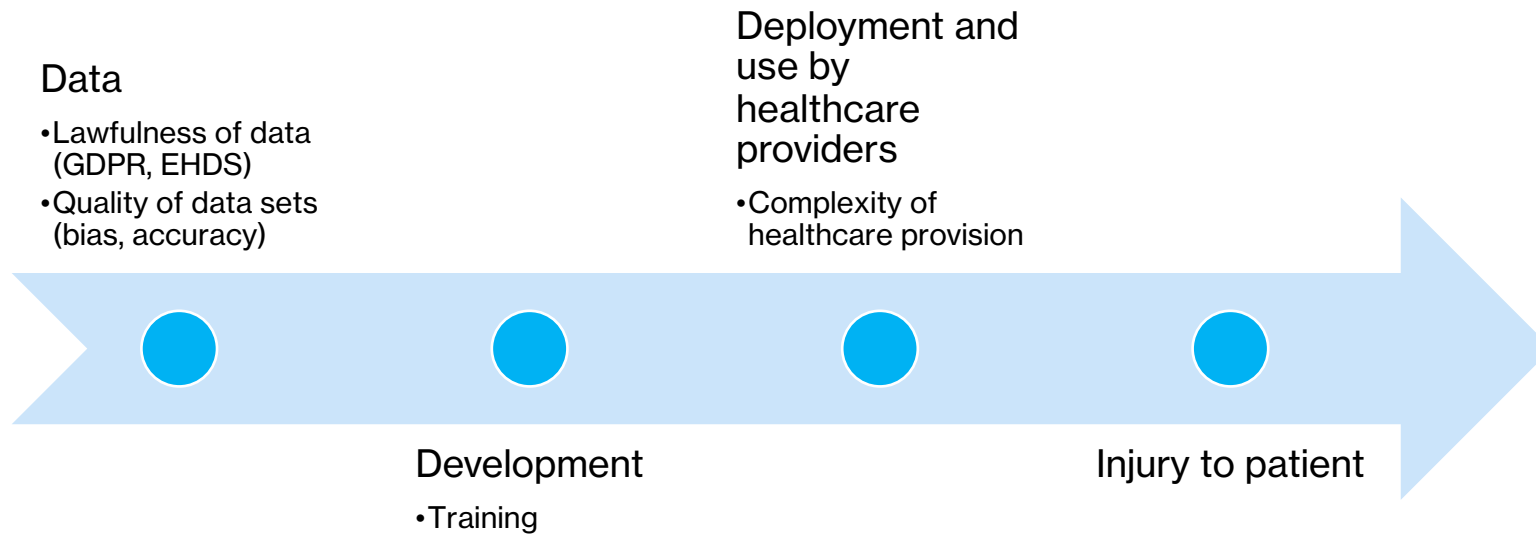UNIVERSIDADE LUSÓFONA

AI in healthcare: liability issues

Ashgarian et. al. MDPI Robotics 2022 11 (6) 127

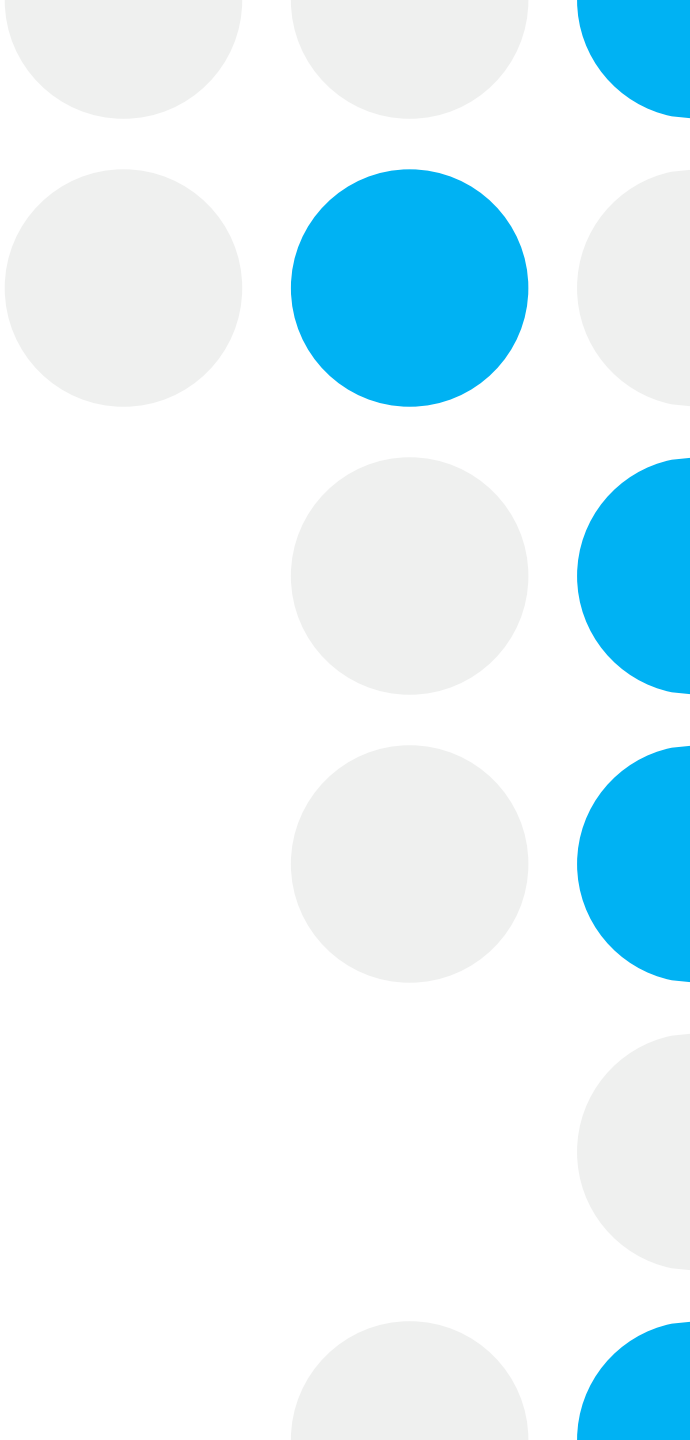# AI-based decision support systems (AI DSS)

Influence of the AI DSS output on the clinical decision by the healthcare professional

- Degree of control (clinical protocols and guidelines)
- Cognitive bias
  - Availability heuristic
  - Coning of attention
- Understandability ("black boxes")

Interaction between AI DSS and healthcare providers

- Bearing in the standard of care for liability purposes
- Defensive medicine

The accident trajectory

Data
- Lawfulness of data (GDPR, EHDS)
- Quality of data sets (bias, accuracy)

Deployment and use by healthcare providers
- Complexity of healthcare provision

Development
- Training

Injury to patient

Reason (1990) *Human Error*

The challenges

Allocating liability

Adjudicating liability
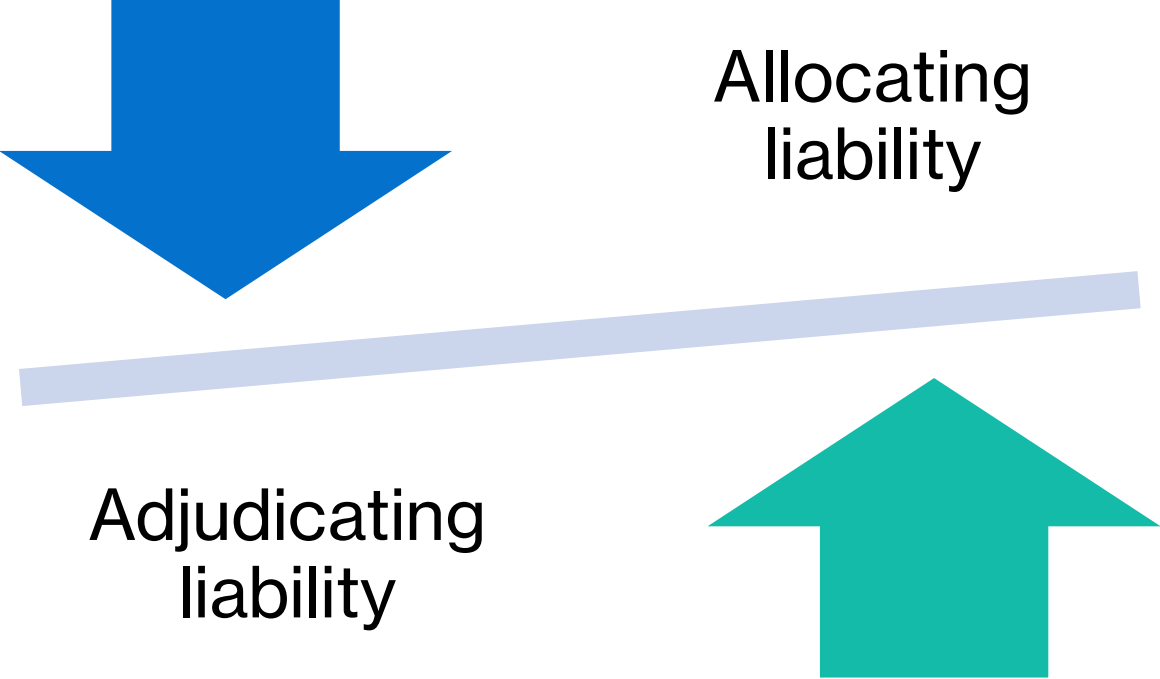
Allocating liability

In fault-based systems it is necessary to identify who should be held liable (and on what grounds)

Complexity increases when AI-based decision support systems are employed in healthcare

Allocating liability

- Who should be held liable?
    - AI developer
    - AI trainer
    - AI distributor/supplier
    - Healthcare provider (institutional)
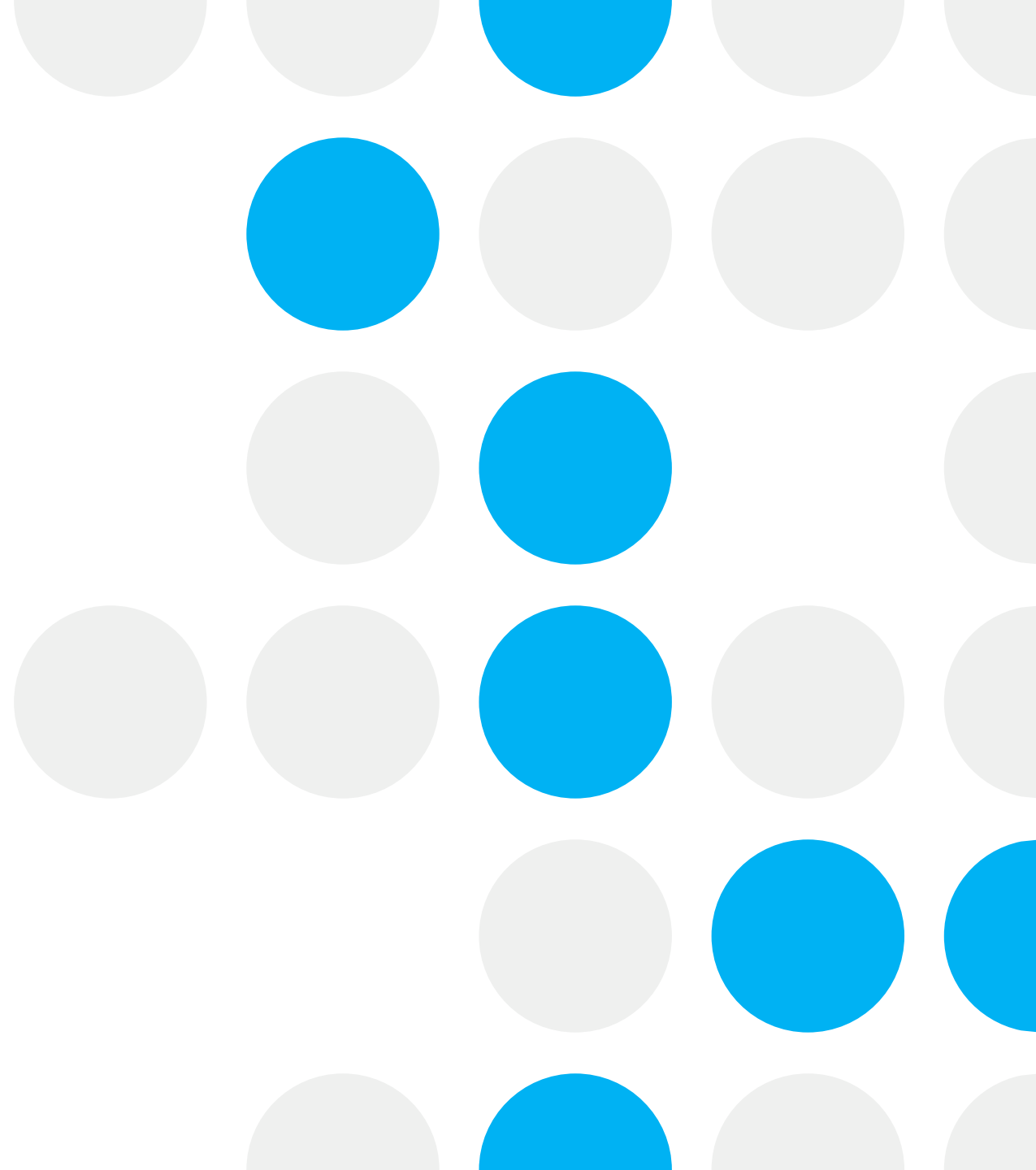   - Healthcare professional

Adjudicating liability

Patient will normally need to prove

Negligence/breach of standard of care

Causation

Damage

Adjudicating liability

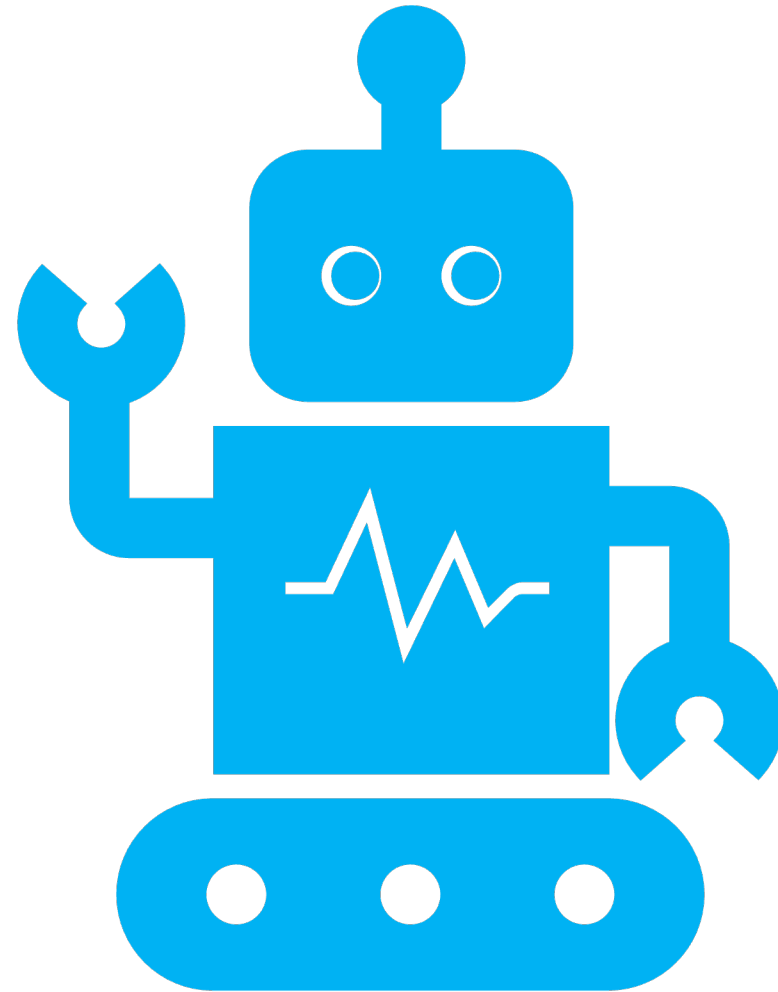| Adversarial procedure	A "Damages Lottery"? Atiyah (1997)
	High overhead costs
	Burden of proof
	Expertise
	Length of proceedings

Adjudicating liability

"Litigation in medical disputes (...) is by nature an expensive, protracted obstacle course where the injured party must try to pursue the stronger, fitter one and convince a judge that his injury was caused by negligence. The parties are usually locked into a struggle for many years at enormous cost (...) In the result, few injured patients receive compensation, and those who do have to wait for many yearsbecoming more and more embittered with the system that produces such unfairness"
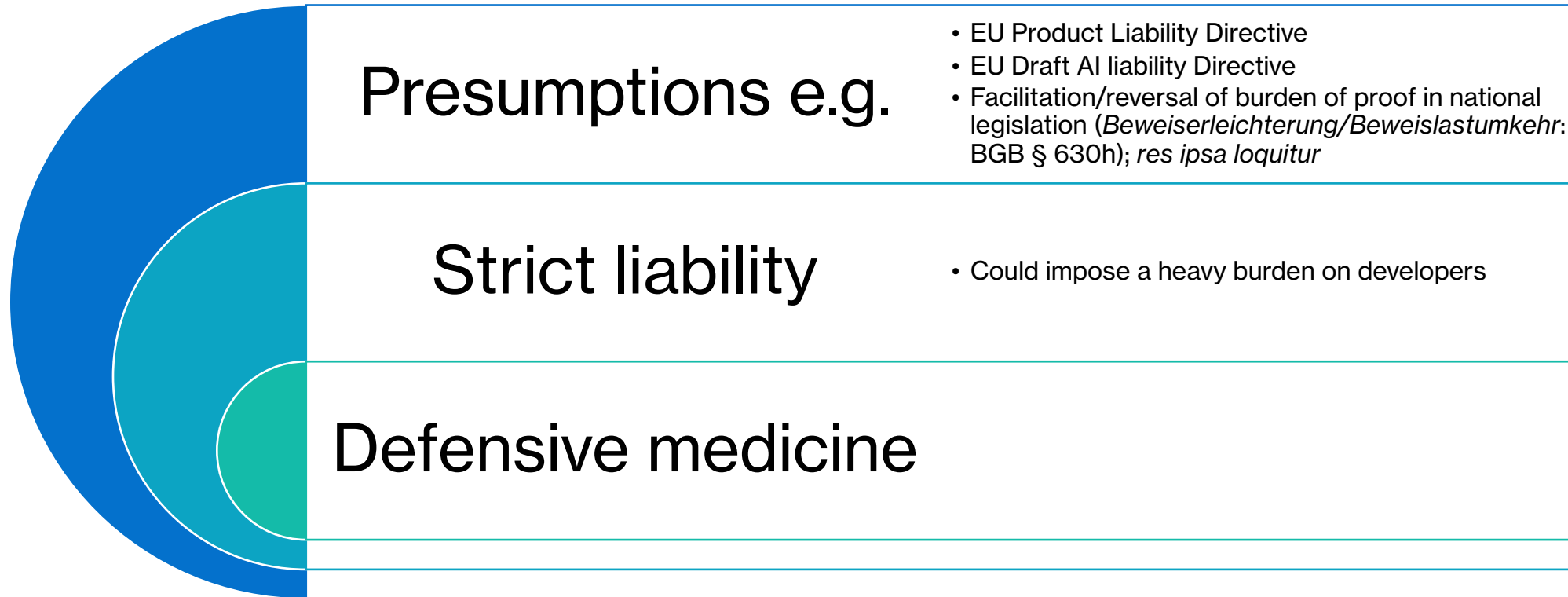
Brahams (1989)
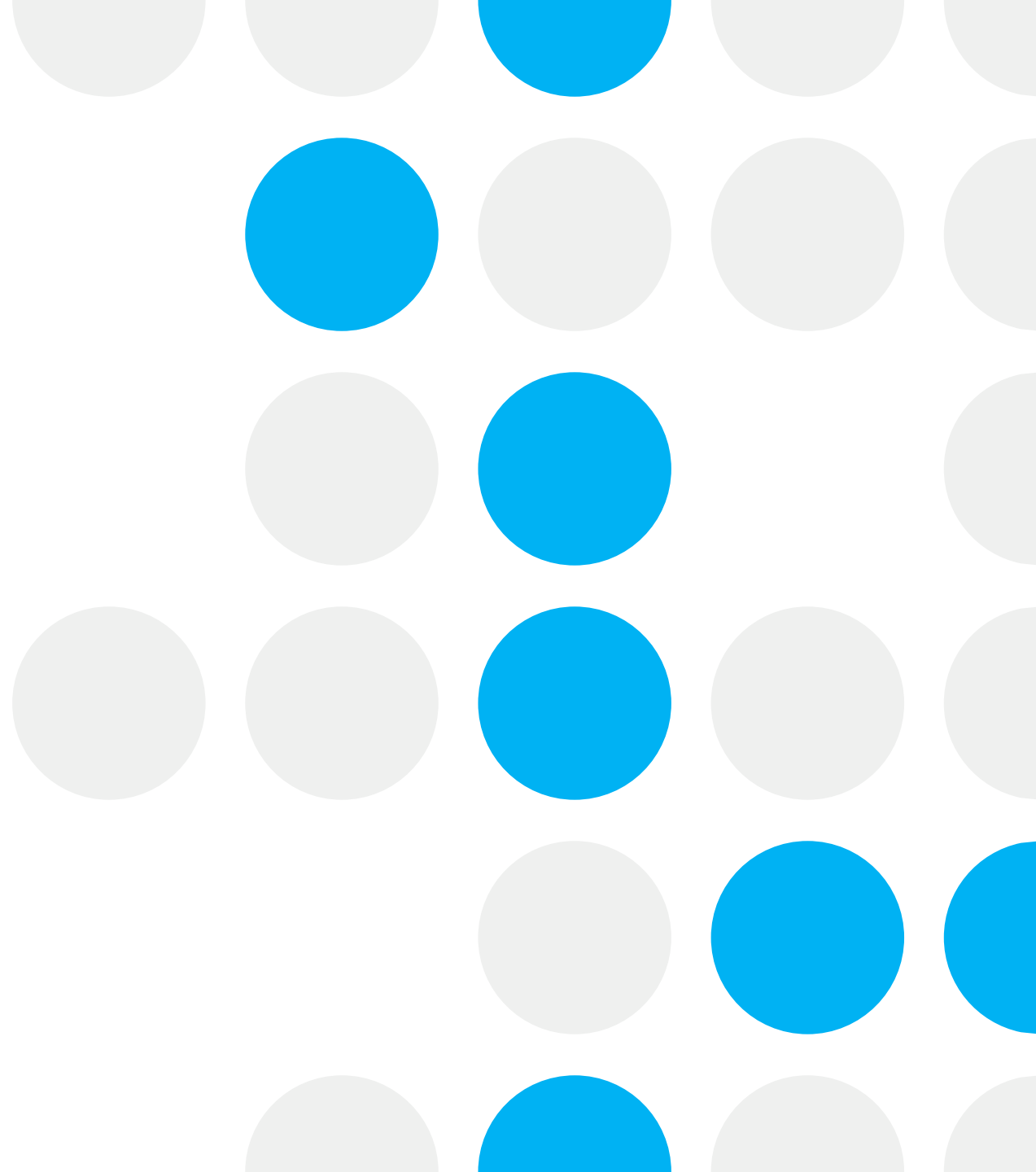
Adjudicating liability

- Specific issues when AI-based decision support systems are employed in healthcare
  - Transparency (black boxes)
  - Complexity

Troubleshooting liability law?

Presumptions e.g.

- EU Product Liability Directive
- EU Draft AI liability Directive
- Facilitation/reversal of burden of proof in national legislation (*Beweiserleichterung/Beweislastumkehr*: BGB § 630h); *res ipsa loquitur*

Strict liability

- Could impose a heavy burden on developers

Defensive medicine

# Or a potentially more efficient way to compensate patients?
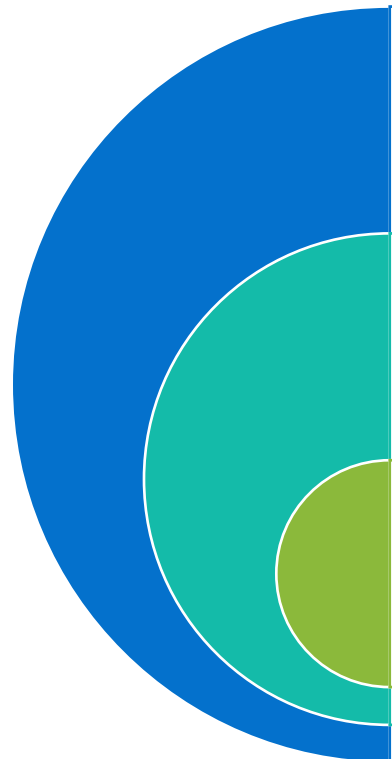
No-fault insurance compensation

- In a no-fault system, the patient can be compensated for serious, preventable or unendurable treatment related injury, throughout a swift, inexpensive non-adversarial claim settlement procedure

- ≠ Strict liability

No-fault insurance compensation

New Zealand

Sweden

Finland

Denmark

Norway

Iceland

France, Belgium
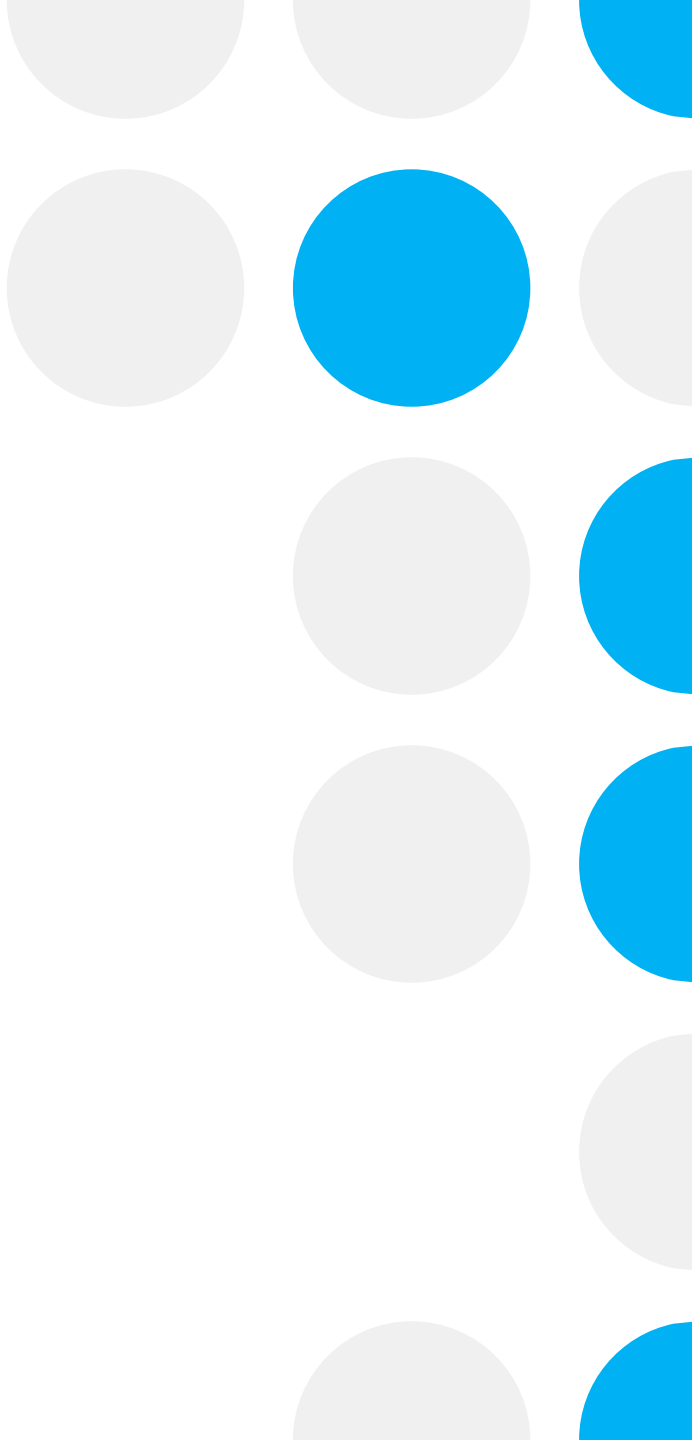
No-fault insurance compensation

New Zealand has abolished the tort of negligence action related to personal injury	• No-fault compensation by ACC (Accident Compensation Corporation)
Nordic nations compensate aggrieved patients under the Patient Insurance Schemes	• The "Equipment" rule
In France there's a mixed fault/no-fault based compensation system	• Compensation by ONIAM • *Principe de la Solidarieté Nationale*

No-fault insurance compensation

Patient files claim

Administrative decision by a panel of experts by on eligibility to compensation

Judicial review

Non-adversarial procedure

Patient is compensated

No-fault insurance compensation: advantages

- Compensation through insurance (Strahl 1959)
- Lower overhead (administrative costs)
- Time efficiency
- Patient satisfaction
  - More patients are compensated, more quickly and with lower costs
- Predictability
  - It potentially prevents defensive medicine
  - Beneficial to AI developers

No-fault insurance compensation: caveats or misunderstandigs?

- Moral hazard?

- Anxiety about operational costs and financing

- Resistance by some sectors (legal services, insurance market, etc.)

- Corrective/retributive justice function diluted

- Thresholds, caps, other limitations on damages

- Availability of judicial review of administrative decisions (art. 13 ECHR; 47 CFREU)

Thank you for your attention!
In Hamburg sagt man Tschüss - das heißt auf Wiedersehen!