

Thompsons Solicitors are the most experienced personal injury law firm in the UK and have almost 100 years of experience of running claims for injured parties, including claims for those injured in road-traffic accidents. As a matter of principle we have only ever acted for injured people and never for insurers.

We look at this consultation only from the perspective of the injured party, the claimant, whether that is the driver, passenger, cyclist or pedestrian.

It is our experience that the reaction of insurers to other new liabilities has been to enter into lengthy technical and expensive litigation, potentially for years. Given that we start from the premise that insurers will seek to avoid liability by exploiting any potential loopholes, we therefore welcome that section 2 of the Automated and Electric Vehicles Act 2018 makes an insurer automatically liable for damage caused by an automated vehicle (AV).

We believe that it is entirely appropriate that where an accident occurs involving an AV, whether being driven or monitored remotely, there should be a presumption of liability. We would be very concerned should the Law Commission's recommendations or future legislation move away from what is in effect an imposition of strict liability.

Q1.

Yes but:

1. There is reference to the 'user in charge' being outside the vehicle. Where this is the case we can see even greater opportunity for disputes on liability.
2. We note that, following handover, the 'user-in-charge' becomes the driver and the proposal is that the UK adopts the US legal position that, if a human driver takes over to mitigate a crash hazard caused by the automated driving system, automated operation continues until the crash hazard is no longer present.

We would suggest that:

- There should be specific pre-established criteria for when a user-in-charge can be determined to have "taken over" the driving system.
- There should also be pre-established criteria for what comprises 'confirmation' that the user-in-charge, the 'human driver' has "taken over" the driving system? Is it oral confirmation? Is it as soon as a human touches a control? Is it the point at which a human action affects the vehicle's movement or trajectory? We suggest it could be any of the three.
- Only an independent government authority should be able to authorise a vehicle as able to function without a 'user in charge' and only then following published criteria.

Q2.

Yes, but:

It is more than 'simply a label' and where any dispute about who was the 'user' or whether they were 'in charge' that might impact on the injured party then it should always be decided in the claimant's favour.

Q3.

Yes, but:

The paragraphs in the Consultation Paper that lead to this question make assumptions about technology capabilities which are not yet known.

We note that the then CEO of Nissan/Renault commented in 2016 that "The [driverless] car is confused by [cyclists] because from time to time they behave like pedestrians and from time to time they behave like cars". Significantly the first pedestrian to be killed by a car in AV mode was a woman wheeling her bicycle¹.

AV technology failures are likely to have played a role in the Uber and Tesla crashes that occurred in 2018² and we think the Law Commission runs the risk of buying into manufacturer hype about the responsiveness of AV technology when it says that humans are 'not critical to safety in AV-operated vehicles.'

Noting that the question refers to a user in charge who '...is *subjectively aware*...' of a risk of 'serious injury' we say, that:

1. If in "highly automated vehicles humans are not critical to safety" then there is no need to include the word 'subjectively' at all.
2. If however there is to be allowance for subjectivity then the words should be amended to read 'is or should be subjectively aware'
3. The word 'serious' should be omitted given that the 'user in charge' will not at the point of deciding to take steps to avert a risk be able to determine what the level of risk is, particularly given that an injury may be 'more serious' for some individuals than for others – the elderly as opposed to the fit and able bodied say.

¹ cyclinguk.org, February/March 2019, Cycling Magazine

² <https://www.theguardian.com/technology/2018/mar/31/tesla-car-crash-autopilot-mountain-view>
<https://www.reuters.com/article/us-tesla-crash/tesla-says-crashed-vehicle-had-been-on-autopilot-prior-to-accident-idUSKBN1H7023>
<https://www.bbc.co.uk/news/technology-46552604>

Q4 – 7.

It is stated that with 'sophisticated Level 3 systems' the user-in-charge should be 'encouraged' to engage in secondary activities, such as checking emails so as not to daydream or fall asleep. The driver, it is said, should remain alert but not so engrossed as to make it difficult for them to resume driving, reference is made to an "infotainment" system.

We are extremely concerned at the ramifications of this and would note/comment as follows:

1. It is currently an offence for drivers to use their phones other than on hands free when driving, let alone email.
2. In most other monotonous but dangerous jobs, say working heavy machinery or on meat cutting production lines the answer is not distraction, in fact quite the reverse – the emphasis is on concentration with (sometimes) breaks from and/or rotation of tasks.
3. The distraction or boredom issue potentially faced by AV drivers must have some similarity to that faced by intercity train drivers. Has the Law Commission looked into what distractions there are there for them and what studies have been done on them?
4. Who will determine what is to be available on the infotainment system which is sufficient to keep the driver alert but not deemed so engrossing as to make the return to driving 'difficult'?
5. Who, if the return to driving from the 'appropriately demanding task' is 'difficult', will be liable for any delay and injury caused to a 3rd party as a result - the driver? The provider of the task? The designer of the task? The manufacturer of the vehicle?
6. Does the Law Commission envisage requiring the user-in-charge to keep their hands on the steering wheel when the vehicle is driving themselves?³
7. There is a failure to consider the civil liability ramifications if a driver opts not to use the infotainment system and falls asleep or becomes otherwise distracted.
8. It is stated that in the event of a take-over request, secondary activities will 'terminate automatically' but we would ask, how quickly will this occur? What testing will there be of what level of secondary activity a human can switch from and how quickly?

Q8.

1.
 - a) Yes
 - b) Yes
2. Yes
3. Yes

³ <https://www.bbc.co.uk/news/av/business-44460980/this-car-is-on-autopilot-what-happens-next>

Reference is made to EU approval authorities and the UK's Vehicle Certification Agency. What is unclear is what impact leaving the EU have upon any proposed legislation. We suggest that it is essential for there to be governmental commitment to maintain pace with EU standards and to adopt EU protocols during and after any Brexit transition period.

In chapter 4 and 5 there are assumptions made about the capacity for and funding of local and national agencies responsible for road safety. However, whilst the law provides public authorities with extensive power to regulate road safety there is no discussion of and no commitment to the funding needed to ensure that public authorities have the means to regulate road safety. Given the cuts that have taken place in local authority and central government funding we find this particularly worrying and suggest that any proposals for duties to be placed on any local or national government authorities should be made contingent on sufficient funding being guaranteed.

Q9-12.

No response.

Q13.

Yes.

Drivers should have additional training and qualifications consequent upon that training and no it shouldn't be voluntary.

We submit that, if the training is delivered on a voluntary basis, drivers may not take it up regardless of any incentives offered by insurers. Advance Driving courses and the Pass Plus both have potential incentives of lower insurance premiums but neither have a significant uptake.

Experience shows that some drivers continue to engage in dangerous activities (such as driving over the alcohol limit), despite numerous advertising campaigns highlighting the dangers of such behaviour. The training must therefore be mandatory and DVLA-regulated.

If, despite the obvious pitfalls, the Government opts for voluntary training, clarification of the "incentives" to be offered by insurers must be given and the incentives must be mandatory.

Q14/Q15/Q16.

In properly operated health and safety systems within a workplace and as required by law in certain circumstances, near misses are required to be reported and records maintained. We say as a minimum that should be the case with AV. There is a role for the equivalent of the Health and Safety Executive so that national statistics are maintained and reported on.

Q17.

We note that one of the aims of the legislation is to provide a “quick and smooth” path to compensation for death, personal injury or property damage caused by an automated vehicle and that, once an insurer has settled a claim with the injured party, it may then reclaim damages from other parties liable for the accident, such as the manufacturer of the vehicle.

Experience has shown that personal injury claims are rarely quick and smooth when blame can be apportioned between multiple parties, as insurers often use this as a way to delay settlement whilst actively pushing the injured party to claim against other party (or parties).

We are very concerned about the lower courts’ ability to determine causation when insurers inevitably raise causation arguments requiring technical evidence about the capability and/or functionality of AV. Inevitably, there will be appeals.

We are concerned about the possibility that injured parties will have less time to bring a claim than is provided under the Limitation Act 1980, despite the fact that AV is a new industry and safety concerns have not yet been fully addressed. This would place undue pressure on the injured party and deny them access to justice. Thus our answer to Q17(3)(a) is “no”.

Issues relating to data retention must be for the manufacturer and/or insurer and should not be a consideration for the injured party.

Q18/Q19.

From the perspective of the injured party we would query why product or retailer liability would need to be addressed if the injured party is only required to sue the insurer in order to recover compensation for their injuries.

Additional matters

In our view all cases involving AV operated vehicles should be automatically precluded from the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents given the potential need for expert evidence and complex arguments relating to causation.

We submit that all cases involving AV should be excluded from the small claims limit.

The Consultation envisages that all AV will be insured; however, experience shows that many people continue to drive without insurance. Provisions need to be made for amending the Motor Insurance Bureau’s Uninsured Drivers Scheme to take account of such cases. Alternatively, the legislation should be updated so that it applies to any accident caused by AV being used in a manner consistent with its normal function when driving itself in Great Britain or any accident that is caused by AV when driving itself in Great Britain including on a road or other public place.

The legislation relates to AV accidents on public roads; however, it does not currently deal with accidents on private property. Provisions need to be made for amending the same so that it applies to any accident caused by AV being used in a manner consistent with its normal function

when driving itself in Great Britain or any accident that is caused by AV when driving itself including on a road or other place in Great Britain.

There is no reference that we can find in the consultation paper to the possibility that cybersecurity may become an issue with AV and we would suggest that the consequences of malfunctioning or hacking should at least be anticipated. Given, say, the TSB IT meltdown or the hacking of the Pentagon, the possibility that systems in an AV such as the brakes could be vulnerable to remote interference cannot be ignored.

The Consultation refers to pedestrians and/or motorists injured by an AV, however what of injury suffered by AV drivers when a vehicle they are operating cannot avoid a collision?

Acting on behalf of train drivers who are left severely traumatised after having no choice but to witness a suicide and for the vehicle they are in control of to be part cause of the death, we objected when the 2012 CICA scheme excluded injury resulting from suicide or attempted suicide unless the suicidal person acted with intent to cause injury to another person (section 4 (1) (a)). AVs may offer another target for those looking to commit suicide especially given the suggestion that the user in charge may be using an infotainment system or be emailing to seek to ensure they don't daydream. We would suggest that when considering the ramifications of AV the CICA exclusion should be looked at again given the very real psychological impact on wholly innocent drivers of seeing and hearing a suicide involving a vehicle of which they are in charge.

Q20.

Yes.

Q21.

Yes.

The Road Traffic Act 1988 should be amended but see below.

Q22.

Yes.

It would be unjust for a human user to be considered a driver for the purposes of criminal offences when the vehicle was at the time being operated in automated driving mode without any engagement from the human user.

Q23.

Yes.

Q24.

Yes.

Q25.

Yes.

Q26.

Yes.

It should be a criminal offence to be carried in the vehicle if there is no person able to operate the controls. The paper is silent as to what extra qualifications would be required of the user-in-charge but see our comments re qualifications in answer to Q13.

Q27, 28 and 29.

Yes

Q30.

All AV's should be sufficiently marked with contact details and registered to a company.

An AV should not be on the road if it is incapable of responding to police orders.

Ensuring that children wear proper restraints should be the responsibility of any adult non driving passenger or of the adult who puts a child into the AV but doesn't travel with them. If children are to travel alone the vehicle technology should be able to ensure that any child being carried cannot release the restraints whilst travelling

Q31.

Yes.

Q32.

Yes.

See our comments above regarding cybersecurity.

Q33.

Yes.

However we note that the present legislation on corporate responsibility covers only causing a person's death not serious injury and any legislation would need to be amended to ensure parity between offences.

For further information please contact:

Gerard Stilliard
Head of Personal Injury Strategy, Thompsons Solicitors
GerardStilliard@thompsons.law.co.uk