

Law Commission and Scottish Law Commission

**Automated Vehicles – a joint preliminary consultation
paper**



A response by the Association of Personal Injury Lawyers

February 2019

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a history of over 25 years of working to help injured people gain access to justice they need and deserve. We have around 3,500 members committed to supporting the association's aims and all of which sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, governments and devolved assemblies across the UK with a view to achieving the association's aims, which are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

Any enquiries in respect of this response should be addressed, in the first instance, to:

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Introduction

APIL welcomes the opportunity to respond to the Law Commissions' joint consultation on the law relating to automated vehicles. We respond to this consultation from the perspective of personal injury lawyers, and ensuring that injured people can access justice. Our main concern is that there is a loophole in the Automated and Electric Vehicles Act 2018 which means that the strict liability scheme does not cover vehicles featuring partial automation, which are on the road currently. Those injured by automated vehicles currently on the roads will be required to pursue costly and complex product liability claims.

General comments on which our response is based

The Automated and Electric Vehicles Act 2018 introduces strict liability for accidents involving automated vehicles. APIL welcomes that those who are injured by automated vehicles will not be required to pursue a complex and costly claim against the manufacturer of the vehicle, and will instead be able to bring a claim against the insurer. We are concerned, however, that while the Act provides a welcome solution for the future, at present, there are cars being driven that have aspects of automation, but which do not fall within the remit of the Act. These types of car – with automated technology but falling outside of the Act, will only grow in popularity over the next few years. If a person is injured by one of these vehicles, they will not be able to access the strict liability regime as set out in the Act, and will be forced (most likely unsuccessfully) to pursue a complex and costly claim against the manufacturer. We suggest that the scope of the 2018 Act must be broadened, to take account of all vehicles with automated features, including those where there must be a human monitoring the vehicle in automated mode. This is even more important when considering the risks of partial automation and the known impact that automation has on the ability of the human user/driver to intervene if there is a hazard. The individual will first need to realise that the car is not going to react to the hazard as it should, and then they need time to intervene – therefore their reaction time will be slower.

Q1) Do you agree that all vehicles which drive themselves should have a “user in charge” in a position to safely operate the controls, unless the vehicle is specifically authorised as able to function safely without one? The user in charge must be fit to drive, qualified, would not be the driver for purposes of civil and criminal law while the automated driving system is engaged but would assume the responsibilities of a driver after confirming that they are taking over the controls.

If the user takes control to mitigate the risk of accident caused by the automated driving system, the vehicle should still be considered to be driving itself if the user in charge fails to prevent the accident?

We agree that there should be a user in charge in a position to safely operate the controls, unless the vehicle is specifically authorised as able to function safely without one. The user in charge should be fit to drive and qualified to do so.

We also agree that UK law should mirror US law, where an automated operation is deemed to continue until the crash hazard is no longer present. The presumption of strict liability, where providing that there is insurance in place, the insurer of the vehicle will pay out compensation for the injury and damage, and then seek to recoup back later from the manufacturer, should apply where the operation is deemed to be continuing. It would be highly unfair for the user in charge to be held responsible in these circumstances, as it must be recognised that there needs to be time to realise that the car itself is not going to avoid the crash, and then to take action. The user in charge cannot be expected to react within the same timeframe as if they were the driver of the car.

Q2) We seek views on whether the label “user-in-charge” conveys its intended meaning.

We agree that “user in charge” conveys the correct meaning.

Q3) Should it be a criminal offence for the user in charge who is subjectively aware of the risk of serious injury to fail to take reasonable steps to avert that risk?

We believe that it should only be a criminal offence for the user in charge to fail to take reasonable steps to avert serious risk of injury if that failure is “gross”. It is important that there is a high threshold, because if too many requirements are put on the person in the car to intervene, this will potentially cause more accidents than if there was no intervention. The criminal law should not encourage dangerous or unnecessary interventions which would make the situation worse. This is particularly so given that the user in charge will not be required to monitor their environment, so any interventions will be “spur of the moment”.

Q8) Do you agree that:

- (1) A new safety assurance scheme should be established to authorise automated driving systems which are installed:
 - (a) As modifications to registered vehicles**
 - (b) In vehicles manufactured in limited numbers****
- (2) Unauthorised automated driving systems should be prohibited**
- (3) The safety assurance agency should also have powers to make special vehicle orders for highly automated vehicles, so as to authorise design changes which would otherwise breach construction and use regulations?**

We agree that a new safety assurance scheme should be set up. The agency should be independent, and should be responsible for regulation of the sector.

Q9) Do you agree that every automated driving system should be backed by an entity which takes responsibility for the safety of the system?

We agree.

Q12) If there is to be a new safety assurance scheme to authorise automated driving systems before they are allowed on the roads, should the agency also have responsibilities for the safety of those systems following deployment?

Yes. This oversight by the agency is particularly needed as, currently, transitional levels of automation are not covered by the Automated and Electric Vehicles Act 2018.

Q13) Is there a need to provide drivers with additional training on advanced driver assistance systems?

We agree that drivers should be trained on advanced driver assistance systems. As above, at question one, the user in charge must be fit and qualified to drive the car, and this requirement must be codified. Consideration should be given to driving tests including the use of driver assistance systems, similar to the way that the test now includes use of “sat nav”. There should also be an amendment to the Highway Code to provide that a driver using advanced assistance systems must be competent to do so.

Q14) We seek views on how accidents involving driving automation should be investigated. We seek views on whether an Accident Investigation Branch should investigate high profile accidents involving automated vehicles. Alternatively, should specialist expertise be provided to police forces?

We believe that an Accident Investigation Branch should be established as the umbrella body overseeing accidents involving automated vehicles. The Branch could provide the specialist expertise required to investigate these accidents, and serve police forces locally.

In a collision involving an automated vehicle, the police will have to be involved in the investigation initially and, perhaps with the exception of examining the automated vehicle, will currently be responsible for obtaining all the other evidence of the event together with interviewing witnesses and potential defendants. As the technology involved in driver automation is relatively new, there is no doubt that it is likely to be outside the knowledge of most, if not all, police collision investigators at this time. It is a highly technical area and needs to be investigated by those who understand the technology, and who can identify risks and failings if and when they occur. There will also need to be detailed reconstruction of the data recording the accident, and there is a role for an overarching centre of expertise, to assist the police.

Additionally, given the new and complex nature of this technology, having central co-ordination of accident investigations will be important. There must be a way to share information and learn from accidents – as is the case for air accidents, and the role of the Air Accident Investigation Branch in investigating and sharing findings, to ensure that lessons are learnt and accidents are not repeated.

Q15 Do you agree that the new safety agency should monitor the accident rate of highly automated vehicles which drive themselves, compared with human driver? Is there a need to monitor the accident rates of advanced driver assistance systems? What are the challenges of comparing the accident rates of automated driving systems with that of human drivers?

The safety assurance agency should require the entities backing automated driving systems to collect and publish safety data from the operation of their autonomous systems. The agency should commission research to monitor the relative safety of autonomous systems as against non-autonomous vehicles. As this new technology emerges, the data should demonstrate a rise in safety. If this is not the case, the pace of technological change could be slowed, or additional restrictions should be considered. If the data demonstrates an increase in safety and a reduction in injury collisions, this can inform a change in policy.

Q16) Are existing sources of data sufficient to allow meaningful comparisons? Alternatively, are new obligations to report accidents needed?

With automated technology, the potential causation factors for collisions could be outside the scope of the current STATS19 form and therefore at the very least the form needs to be changed to address this. The STATS19 form is only used by the police for injury collisions. Vehicle automation is an evolving technology and, certainly at this stage, we should not wait for injuries to occur before reporting and investigating collisions that occur with automated vehicles. That may delay the identification of faults and trends that mean there could be a delay in introducing changes that would provide additional safety benefits. It is suggested that all collisions involving automated vehicles should be reported to police and a modified STATS19 form completed.

Q17) Is there a need for further guidance or clarification on Part 1 of the Automated and Electric Vehicles Act 2018 in the following areas:

- **Are sections 3(1) and 6(3) on contributory negligence sufficiently clear?**
- **Should the issue of causation be left to the courts, or is there a need for guidance on the meaning of causation in section 2?**

The Automated and Electric Vehicles Act 2018 is a very similar piece of legislation to the Consumer Protection Act 1987. Both make provision for strict liability and then confer a right to raise a defence of contributory negligence. However, where s 2(1) of the Consumer Protection Act provides for liability on the producer/supplier where any damage is “wholly or partly caused” by a defect, s 2 of the Automated and Electric Vehicles Act does not make it clear that the insurer will be liable for damage partly caused by the vehicle. S 2(1) of the Automated and Electric Vehicles Act merely provides that where an accident is caused by an automated vehicle...the insurer is liable for that damage” [emphasis added]. It appears to be the intention of the Act that the insurer should be liable if damage is partly caused by the vehicle, as section 8(3) provides that “a reference to an accident caused by an automated vehicle includes a reference to an accident that is partly caused by an automated vehicle. We suggest that there should be clarity at s 2(1), that insurers are still liable where damage is partly caused by the vehicle.

It would be preferable if the legislation was more specific about how the test of contributory negligence should be applied by the courts, rather than allowing it to be deferred to the court as to how it should apply in practice. When the courts are considering contributory negligence, there must be a weighing up of the contribution of the parties, taking into account their causative potency. This was set out by (then) Lady Justice Hale in the case of *Eagle v Chambers*, and unanimously approved by the Supreme Court in *Jackson v Murray and others* [2015] UKSC 15:

It was noted by Hale LJ in *Eagle* that there were two aspects to apportioning liability between the claimant and defendant, namely the respective causative potency of what they had done, and their respective blameworthiness...The court had consistently imposed a high burden upon the drivers of cars, to reflect the potentially dangerous nature of driving.

In relation to automated vehicles, causative potency must take into account that manufacturers are introducing a potential hazard to the road using environment. A driverless car could be analogous to a very heavy guided missile. Its potential to cause harm is high, and thus the causative potency for any manufacturing or software defect should reflect this. This is particularly so given the known effects of automation on a human driver can be detrimental on the driver’s level of attention and the appropriateness of any reaction¹.

A further issue is that it is unclear whether the standard of care for the automated system is that of a reasonably careful driver, or reasonably careful software. Nowhere in the Act is this specified, and we do not believe that this should be left to the courts. Leaving such an issue to be determined by the courts will cause difficulties for litigants, who will be required to go through appeals to clarify the law. The law should be clear and comprehensive from the outset, with no need to rely on the courts to make decisions on the interpretation of the Act.

Further comments on Section 2 Automated and Electric Vehicles Act 2018

In ordinary motor insurance policy cases, if insurers have been misled by the assured, they can apply under the Road Traffic Act 152 for the policy to be voided.

Although s 2(6) of the 2018 Act provides “Except as provided by section 4, liability under this section may not be limited or excluded by a term of an insurance policy or in any other way”, it is unclear whether the phrase “any other way” provides an absolute stop on insurers

¹ Paragraph 3.55 Law Commission consultation document

avoiding liability if they have issued a policy. It is unclear whether it precludes an insurer from applying under s 152 RTA 1988 for a declaration that the policy is void *ab initio* if an assured makes an actionable misrepresentation to the insurer.

There is a risk that without clarification, insurers will argue that strict liability does not apply, because strict liability under the Act only applies if insurance is in place. In this circumstance, insurance will not be in place because the policy holder deliberately misled the insurer, voiding the policy as if it never existed. Insurers can and do regularly raise these defences to evade liability under s 151 of the Road Traffic Act². Although this is prohibited under European law³, these rulings have not been implemented/followed, and so in the absence of any UK precedent, their influence is set to be lost on Brexit, along with the EU law doctrine of direct effect. As such, it is even more vital that there is clarification as to whether, under s2(6), insurers are precluded from applying under s 152 RTA for a declaration that the policy is void, thus avoiding liability.

Do any potential problems arise from the need to retain data to deal with insurance claims? If so:

- **To make a claim against an automated vehicle's insurer, should the injured person be required to notify the police of the insurer about the alleged incident within a set period, so that data can be preserved?**
- **How long should that period be?**

An accident should not be required to be notified in order for data to be retained. Where there has been an accident, the person involved should be required to download and keep that data – similar to the requirement in s170 of the Road Traffic Act that the driver must stop and provide their details if there is an accident. Consideration should be given to making it a criminal offence to destroy data arising out of an accident. In the event that a notification is made and the data cannot be recovered because it was destroyed, the courts should be permitted to draw an inference that that person was guilty of a driving offence.

While it should be advisable to notify the claim within a certain period of time, there should not be an absolute requirement for the injured person to notify the police and their insurer about the alleged incident within a set period. To introduce such a provision would effectively shorten the limitation period for these claims, which is contrary to access to justice. The limitation period was set at three years after the balance of prejudices between the claimant and defendant were carefully considered. To effectively introduce a different limitation period for one type of claim, caused by one type of vehicle, would be wholly inappropriate, and will lead to huge injustices, causing confusion and difficulties for claimants. There might be good reasons why a claimant does not notify police or their insurer within a set period. They may not have the capacity to do so. They might be under a mistaken belief the injury was not serious, only to find out later that it was life changing. If there was no notification and the data from the car was deleted, this might be a reason for the court to refuse permission under s 33 to proceed out of time due to prejudice. However, there should be no additional barrier to injured people bringing a claim. The law already provides for limitation.

Q18) Is there a need to review the way in which product liability under the Consumer Protection Act 1987 applies to defective software installed into automated vehicles?

² see *EUI v Bristol Alliance Limited Partnership* [2012] EWCA

³ see *Case C-287/16 Katja Candolin and others* [2005] and *Case C-537/03 Fidelidade-Companhia de Seguros SA* [2017]

Our concern is that because the Automated and Electric Vehicles Act only relates to automated vehicles, there will be a loophole whereby those injured by a partially automated vehicle will be required to pursue a claim through the Consumer Protection Act 1987. The Consumer Protection Act 1987 is problematic, and the claims against manufacturers will be hugely complex for the injured person to pursue. Substantial resources are required to investigate and challenge any defences brought under the 1987 Act. It would be disproportionately costly for the claimant to bring a claim under the 1987 Act if the injury arising is a “low value” injury.

While there are issues with the Consumer Protection Act 1987, we do not believe that now, with the uncertainty of Brexit already making this area vulnerable, is the correct time to conduct a wholesale review of the Act. However, we suggest that the Automated and Electric Vehicles Act should be amended to incorporate a wider range of automated driving vehicles, to enable those involved in accidents in partially automated vehicles to make a strict liability claim against their insurer. The Act as it stands only deals with a level of automation where the car can safely drive itself without human monitoring⁴, which is something that will be attainable in the future but is not applicable now. The Act covers automated driving, but does not cover driver assistance systems.

The 2018 Act is therefore inadequate for vehicles already on the road, which have automated features such as the enhanced autopilot system on the Tesla model S. Anyone injured due to the defective nature of these products would be forced to conduct a hugely complex product liability claim under the Consumer Protection Act, against the manufacturer. For example, if a car can reach the speed limit by itself, and then maintain this speed, but then fails to brake when there is a hazard in front and ends up crashing into the rear end of another car, this would likely not be covered by the 2018 Act. The only recourse for those injured because of the defect with the software would be to pursue a costly and complex claim against the manufacturer of the vehicle under the Consumer Protection Act 1987. These vehicles are fallible – there have been a series of accidents in China and America⁵ involving vehicles on “auto-pilot” failing to stop/detect hazards. A video produced for BBC News highlighted the problems with partial automation⁶. There must be protection for those injured by these cars, aside from reliance on the CPA, as the issue is only going to grow. As these technologies increase in popularity, there will be more cars on the road with automated features. The 2018 Act should be amended so that the definition of an “automated” vehicle is broader, to cover those cars driving themselves, but being monitored by humans. As above, this broader scope is important as research shows that when people are not actively engaged in a task, they find passive monitoring extremely difficult. There must be caution, and the benefit of the doubt must be given to the injured person in these claims.

Q39) Should a highly automated vehicle be programmed to allow it to mount the pavement if necessary?

The principles on which the car is coded should be transparent and clear, and available to anyone who wants to read them.

⁴ The Act sets out that an automated vehicle is a vehicle which is capable of “driving itself”, and s 8(1)(a) defines a vehicle as “driving itself” if it is operating in a mode which is not being controlled and does not need to be monitored by an individual.

⁵<https://www.nytimes.com/2016/07/01/business/self-driving-tesla-fatal-crash-investigation.html?module=inline>

⁶ <https://www.bbc.co.uk/news/av/business-44460980/this-car-is-on-autopilot-what-happens-next>

We believe that cars should be able to mount pavements to avoid injury – as a person driving a car would. There is also a concern that limiting where a fully automated vehicle can go – i.e. not on a pavement, would limit the usefulness of this technology. It is envisaged that these cars will be able to go on to private roads, up to house doors to collect the elderly or incapacitated or deliver packages directly to someone's door. More thought must be given to how automated vehicles can reach their potential safely.

We believe that automated vehicles should be able to exceed the speed limit if this would avoid the high risk of a collision. There are certain situations where a driver just putting their foot down will avoid an injury. This would be preferable to simply applying a bar on exceeding the speed limit.

Edging through pedestrians

We suggest that cars should be permitted to edge through pedestrians, provided that the risk of injury would be minimal. Geo-sensing and traffic alert technology should be utilised so that in certain places for example a school playground, and/or at certain times, such as where there are large volumes of pedestrians, edging would not be possible, and the car would be shown a different route to avoid that hazard.

- Ends -

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