

Law Commission

Remote driving

A response by the Association of Personal Injury Lawyers

August 2022



Introduction

APIL welcomes the opportunity to respond to the Law Commission's consultation on the law relating to remote driving. We represent individuals who have suffered personal injury resulting from another's negligence and/or where the law provides for strict liability. Our response focuses on injured people's interests and ensuring they maintain access to the compensation they deserve.

We recognise the need for the law to adapt to new technological advancements, it is crucial that it is not left to fall behind given that these vehicles are already being used in off-road environments and being tested on the road. APIL acknowledges that technology has the ability to reduce collisions and improve safety. APIL therefore strongly supports such technologies as and when they are proven to reduce death and injury and considers any barriers to the introduction of the technologies should be minimised. We also welcome the introduction of these new technologies due to their potential to help those who have difficulties driving, and the improvements in safety that they can offer to drivers in off-road hazardous environments. Nevertheless, it is essential that appropriate changes to the law are in place to guarantee that injured people can continue to get the redress they need quickly, simply, fairly and at proportionate cost.

There are risks that these new technologies could significantly change the nature of civil claims. If the law does not adapt there is a danger that those injured by a vehicle driven remotely might have to pursue complex product liability claims against manufacturers of software and/or hardware. Product liability claims are extremely complex, difficult for consumers to pursue and extremely expensive. This will become problematic from a consumer's point of view in trying to obtain redress due to issues surrounding software or design defects, latent defects, connectivity or other hardware or software defect in the vehicle or its operating system. We believe that it is critical that those who have sustained injuries following a collision can access compensation to put them back into the position they were in prior to the collision, as far as possible.

APIL's response is based on two main arguments regarding civil liability. Firstly, we believe that the solution to the safety concerns and other uncertainties described in the issues paper is that there should be a wide form of strict liability on the motor insurer that applies to remotely driven vehicles. It is essential that there is a strict liability regime that allows injured people to bring a claim against the insurer or the Motor Insurer's Bureau (MIB) (for uninsured vehicles) and receive compensation even if the collision was caused by a fault in the vehicle. The motor insurer could (if so advised) then pursue a second claim against the manufacturer or any other party who caused and/or contributed to the collision for an indemnity and/or contribution. Secondly, the requirement for compulsory insurance for all motor vehicles should remain and include remotely driven vehicles.

The current legal regimen for compensation in lower value injury claims now requires the use of a web portal and/or fixes costs at a low level which is intended for straightforward road traffic collision cases where there is generally a low level of complexity in determining

liability. The advent of new technologies envisaged in this paper means that existing structures for determining redress may no longer be fit for purpose unless strict liability is introduced. It is essential that the law changes prior to the introduction of the technologies so that a consumer who has a modest injury from a collision (e.g., worth £2,000 in total) is still able to obtain redress, even where the fundamental cause of the collision was a defect in the design or manufacture of the vehicle rather than the driving. If the legal environment does not adapt to the new technology, that consumer may find themselves having to bring a product liability claim against a manufacturer of a vehicle which could potentially cost tens of thousands of pounds to pursue. Absent the required change to the framework of legal liability, redress would not be available to such consumers as the costs of a claim would be wholly disproportionate to the loss to be recovered. APIL urges the Law Commission to ensure the legal framework changes urgently to get ahead of the changing technologies before this situation becomes an acute problem.

General comments

We have not responded to all the questions posed by the Law Commission. We would ask that consideration is given to two further important points, namely compulsory insurance for remote vehicles and the introduction of strict liability.

We recommend that all vehicles capable of remote driving should have compulsory third-party motor insurance as set out in Part 6 of the Road Traffic Act 1988. Considering liability, we believe that a strict liability regime would be the solution to the problems in obtaining compensation described in the issues paper. We recommend that in circumstances where a collision involves a vehicle with remote driving technology, the injured party should bring a claim against the motor insurer in the usual way and be compensated under the normal motor insurance policy on a strict liability basis. It will then be up to the well-resourced insurer to recoup damages from the manufacturer in the relevant circumstances. We suggest that the model should mirror the Employers' Liability (Defective Equipment) Act 1969, which provides that there is strict liability on the employer to compensate the employee where they are injured as a result of defective equipment regardless of fault, and then the employer can claim an indemnity or contribution against the manufacturer if so advised.

The Automated and Electric Vehicles Act 2018 introduced strict liability for autonomous vehicles. The act states that "Where (a) an accident is caused by an automated vehicle when driving itself on a road or other public place in Great Britain, (b) the vehicle is insured at the time of the accident, and (c) an insured person or any other person suffers damage as a result of the accident, the insurer is liable for that damage." Unfortunately, the provisions of the act are still not effective because the Secretary of State has not yet listed any vehicle capable of being driven autonomously. Thus, no vehicles currently have the benefit of strict liability under the act.

We recommend that the liability provisions in the Automated and Electric Vehicles Act 2018 should be extended to remote driving, or that similar new legislation is enacted so that vehicles capable of remote driving are under a strict liability regime. Pursuing a claim against the motor insurer is far preferable to requiring a claimant to bring their claim under the Consumer Protection Act 1987 against the manufacturer. We believe that any other way of pursuing a claim involving a remotely driven vehicle would be extremely unfair to the injured party and might make it impossible for innocent but injured persons to obtain redress.

The issues paper recognises that the complexities of product liability claims would be aggravated in the context of remote driving if there was a latent defect and the vehicle's features were designed by one organisation and operated by another. The injured party would need to bring an action against both the manufacturer and the operator, both with better resources to pursue long and complex claims. Product liability claims often result in the claimant being unsuccessful in securing compensation for their injuries due to the manufacturers' ability to fund expensive and complicated litigation both of which create an unlevelled playing field resulting in the claim being unviable for the individual claimant to pursue. It is well documented that early access to rehabilitation therapies improves recovery outcomes for people who have been injured. Complex product liability claims where liability can take often more than a year to be established will hinder access to rehabilitation. For the reasons stated, product liability claims would make it challenging for claimants to be compensated for their injuries which were sustained through no fault of their own. 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. This could defeat claims and undermine access to justice.

Furthermore, the Office for Product Safety and Standards has recognised in a call for evidence response¹ that the current product liability provisions have been unchanged for over 30 years. Thus, the law does not reflect new technologies such as internet-enabled devices, which are complicating how liability can be attributed when something goes wrong. It was also mentioned in the paper that the increasing use of software and emerging technologies in consumer products could make claims even more complex and challenging for consumers to understand. Remote driving is only possible through the use of technology that enables the driver to control the vehicle and receive the transmission of the vehicle's position and view of the road. We believe that the lack of development in product liability law regarding new technology is problematic and, along with the issues described above, could seriously impact injured people's access to compensation.

Another issue raised in the consultation document is cyber-attack. It would be difficult to show that the cyber-attack was a result of the remote driving organisation's negligence. The organisation could argue that they have taken all necessary steps by having cyber security software. Once again, this could result in the injured party having to pursue action against both the organisation and the software company. This would cause further difficulties in practice that we believe would not exist in a strict liability regime. The injured party would receive compensation through the normal route by pursuing a claim against the insurer. It should then be up to the insurance company, with the resources to do so, to recoup costs from the at-fault party.

We believe that a claim made under a motor insurance policy will ensure that all those who suffer injury from a vehicle being driven remotely are adequately protected, including off-road and in-road situations, and encourage consumer and business confidence in emerging technology. As long as there is a strict liability regime the safety concerns related to remote driving would be addressed. Without a strict liability regime, establishing liability would be more complicated and require complex and expensive investigation and data on the collision. It would be very hard for consumers and their personal injury lawyers to have access to data that would prove who was at fault at the time of the collision or whether it was a culpable hardware/software failure or connection problem. The manufacturer or insurer

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1035917/uk-product-safety-review-call-for-evidence-response2.pdf

would always be in a better position to access data than the injured person that has the burden of proving the guilt of the other party. We believe that strict liability is an effective way to correct the imbalance, as well as prevent disputes about whether the remote driver or the system failed at the time of the incident. The insurer should be liable to any victim in a collision caused by a remotely driven vehicle. It should be down to the insurers to get the data on the collision and pursue a second claim against the manufacturer or any other party liable for the collision, after settling the strict liability claim with the injured party.

Furthermore, we suggest that the introduction of new technologies is an important opportunity to secure no-fault strict liability in all road traffic collisions in the UK. This no-fault strict liability regime is already in place in France through the *Loi Badinter*². The general principle is that there is a presumption that each victim of a collision has a fundamental right to full damage compensation. It is sufficient if certain objective conditions are met to allow for damage compensation under traffic law. Once these conditions are established, the victim has a right to compensation. The injured person reports the damage directly to their vehicle liability insurer and is indemnified by them. Every injured person except for the vehicle driver that caused the collision reserves the right to compensation in full (passengers, pedestrians, cyclists).

From our members' experience, proving liability in road traffic collisions can take a lot of time and cause undue delay in obtaining compensation while in no-fault strict liability regimes compensation is awarded if certain objective conditions are established. We believe that the introduction of a similar provision in the UK would be a valuable change in road traffic collisions. If there is a strict liability regime for remote driving and automated vehicles only, there would be two different processes running side by side, which could become quite complicated in collisions with more than a vehicle. For instance, in a collision involving a normal motor vehicle and a remotely driven vehicle, the strict liability regime would only apply to the second. Moreover, the legal system has introduced several low-value portals with fixed tariffs based on the assumption that liability is straightforward. With the introduction of new technologies, these portals will not work if the claim is made against manufacturers to prove that the software/hardware was defective. There are fundamental problems with the existing justice process that without a strict liability regime for new vehicles, or all road traffic collisions, will make claims impossible to pursue.

If our recommendations for a strict liability regime are not implemented, we suggest that there should be special protections for vulnerable road users and lower value claims up to £25,000. Vulnerable road users are in a particularly fragile situation as they are not generally insured, and it would be cost disproportionate to pursue a product liability claim. Further, without strict liability, we believe that the police should be able to access the vehicle's data (and other relevant computerised retained data) as a matter of course. However, the UK police are not currently funded and/or resourced to be able to retrieve, store and interpret such data from multiple manufacturers all with different systems. A strict liability regimen would reduce the enormous cost burden of the police which will otherwise arise from the need to preserve data. The regional nature of the police and its devolved structure means that resources to recover such data would be duplicated across the country and be a significant cost burden. While this information will be important in all potential investigations to show whether there was a system failure at the time of the collision or whether the driver was responsible in some way, a strict liability regimen would reduce the need for such expensive resources to be maintained. APIL members handling road traffic collision claims where Event Data Recorders are present, report numerous difficulties in accessing the data

² https://www.biiicl.org/files/733_compensation_-_traffic_road_accidents_.pdf

from police. In light of the above, absent a strict liability regiment, it is crucial that all the data should be accessible to anyone who is properly interested (such as someone who has suffered an injury in a collision). Where a collision has occurred and a civil claim is being contemplated, without a strict liability regimen, data will be crucial to obtain compensation, and it should be an offence for a driver who is responsible for a collision to destroy the data. In addition, there should be a provision within the Data Protection Act 2018 to allow third parties to access the data free of charge. This may be useful for a third party to use in their investigation and litigation if they are involved in a collision with another vehicle.

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