Product Law bulletin

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The Law and Autonomous Vehicles

On 18 August 2020, the UK government took another step towards allowing automated vehicles on the UK's roads, with the Department for Transport requesting industry's views on the use of Automated Lane Keeping Systems technology. But what impact are such technologies likely to have on the law and insurance market?

What are autonomous vehicles?

Autonomous vehicles can be divided into 5 categories, ranging from Level 1 Driver Assistance (hands on), encompassing technologies such as cruise control and parking assistance, through to Level 5 Complete Automation where no human interaction is needed at all. Some industry experts believe that the UK roads could see Level 5 cars by as soon as 2022.

How is the law adapting?

The Government is preparing for the increased use of autonomous vehicles by the introduction of the Automated and Electric Vehicles Act 2018. The Act received Royal Asset in July 2018, but its commencement has not yet been triggered, with further changes to its terms having recently been proposed.

The current law for motor insurance insures the driver of a vehicle against personal liability, rather than the vehicle itself. However, where a vehicle is self-driving it follows that accidents that occur with them may arise as a result of flaws in the developing technology, for example from automatic brakes failing entirely or braking unnecessarily. Section 2 of the 2018 Act introduces the notion that where an injury (or other loss) is caused by an automated vehicle when driving itself on a road, and the vehicle is insured at the time of the accident, the insurer will be liable for the damage caused. Thereafter, if the accident were caused by a defect in the technology, the insurer could seek to recover damages from the manufacturer.

This is intended to simplify the process for Claimants by negating the need to bring claims against several parties (most obviously the driver and the manufacturer) under different legal bases (negligence and product liability), and to stop parties getting drawn into complicated causation arguments, when it may well be plain that they are entitled to compensation from at least one of the parties, if not both. The Act also now allows for drivers of such vehicles to claim against the insurance policy.

The insurers' overarching liability is subject to several caveats. Notably, Section 2(1) includes the criterion that the car must be "driving itself". On the face of it, this will prevent drivers of Level 1 to Level 3 cars from using the Act to absolve themselves of potential liability.

Section 3 of the Act clarifies that where the damage was caused to any extent by the "injured party", the Law Reform (Contributory Negligence) Act 1945 will apply, to enable apportionment of liability. The Section further clarifies that where a user is injured as a result of using the automated mode when inappropriate to do so, neither the insurer nor the owner will be liable.

Section 4 of the Act applies where an accident results from unauthorised software alterations and/or failure to update software. The Act sets out that an insurer may seek to limit their liability when prohibited alterations or made by the insured (or with the insured's knowledge) or they fail to install safety-critical updates that they know (or ought reasonably to know) are safety-critical.

Potential difficulties

Although the Act is yet to be come into force, there are already many potentially problematic areas under debate.

First, although the Act seeks to streamline the procedure for innocent third parties, it has potential to create complex liability disputes. For example, in cases where the driver fails to override the vehicle to prevent it from doing something incorrectly, both the manufacturing and driver are likely to blame each other. Where an insurer seeks to rely on Section 4 as a result of the Insured's failure to install safety-critical updates, there is also likely to be dispute over what constitutes "safety-critical".

It has been suggested that other third parties, such as software engineers or mechanics who service the vehicles, may be blamed, again potentially creating a difficult and technical dispute. Due to the lack of performance information about the new technology in the vehicles, such disputes are likely to require extensive (and expensive) expert evidence.

Similarly, there are cyber concerns, namely that automated vehicles are vulnerable to the threat of malicious attacks, system outages, glitches and bugs. Were a vehicle involved in an accident as a result of one of these problems, understandably insurers may be reluctant to pay out in the envisaged streamlined manner. In cases of malicious attacks that cannot be traced, there would be a significant risk that a blameless Claimant would be left without recourse. It remains to be seen whether insurers would be required to pay out in these cases, or whether compensation could be sought through a third party, for example, the Motor Insurers' Bureau.

What might be the impact on the insurance market?

It is estimated that around 90-95% of road traffic accidents result from human error. As such, in removing the possibility of human error from the road, it is anticipated that the number of accidents would be likely to fall dramatically with a consequent downward effect on insurance premiums. This change is likely to be slow (but significant) as the number of autonomous vehicles and conventional vehicles on the road increase and decrease respectively.

However, it is unlikely to be a straightforward reduction. Given the expense of the new vehicles and their parts alongside the cost of expert evidence in scenarios such as those above, the potential payouts by insurers could be high, resulting in more costly premiums for consumers. Thereafter, premiums are likely to reduce as more "test cases" shape the insurance process and the technology becomes more widely used and understood, but this change will be gradual.

Another prompt towards a reduction in insurance premium costs might be that the introduction of autonomous vehicles may reduce the number of "crash for cash" or other fraudulent scams as the data available would not allow Claimants to exaggerate or lie about the cause of accidents.

As such, whilst a downward trend in the cost of insurance premiums is expected, this is likely to be slow and the need for insurance will continue, albeit in a revised form.

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OPSS provides guidance on the use of non-disclosure clauses in settlement agreements

Manufacturers are understandably keen to avoid any negative publicity in relation to their products, especially if their product is linked to the injury of a consumer.

One way to limit exposure to bad publicity is the use of a non-disclosure clause in a settlement agreement, which may be entered into between a manufacturer and an injured party.

Whilst the ability to enter into such agreements is important because settlement of claims can avoid lengthy and costly court proceedings, there is a concern that such a clause could have the effect of making consumers wary of raising genuine concerns about the safety of products with regulators.

With a view to maintaining consumer safety and confidence, the Office for Product Safety and Standards (OPSS) published on 31 July 2020 best practice guidance for businesses when using non-disclosure clauses in compensation settlement agreements where product safety is a factor.

The key points of the guidance are that:

- In some circumstances, settlement agreements may be appropriate and beneficial to both parties
- Non-disclosure clauses should not be used as an attempt to prevent a consumer from speaking to a regulator about a product in relation to a product safety concern
- OPSS recommend that where they are used by a business in product safety matters, it should be made clear to consumers that they can still report a safety concern or incident to a regulator
- Where a product is subject to corrective action that requires consumer participation, non-disclosure clauses should not prevent the consumer sharing that they had a product subject to the recall where it is in the public interest and may increase the effectiveness of the corrective action.

The OPSS best practice guide for the drafting of non-disclosure clauses is as follows:

- Ensure the wording is in plain English
- Be clear and specific about what can and cannot be shared and with whom;
- Avoid overly broad phrases, which are unlikely to be enforceable eg “You cannot discuss this with anyone, without exception”
- Avoid clauses that could give the impression to the consumer that they cannot discuss the case with appropriate public authorities
- Avoid any verbal or written implication or say that the claimant cannot discuss the case with the appropriate authorities
- Make the claimant aware that the non-disclosure clause does not prevent them from speaking with appropriate public authorities about the issue
- Avoid clauses that would prevent consumers from passing on information about a corrective action or recall programme that is likely to be in the public interest.

Whilst the guidance is not legally binding, careful consideration should be given to it if using a non-disclosure clause as part of a settlement agreement.

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AstraZeneca to receive an indemnity from liability claims for Covid-19 vaccine

AstraZeneca has been granted protection from future product liability claims related to its COVID-19 vaccine by most of the countries with which it has struck supply agreements, a senior executive told Reuters.

AstraZeneca, Britain's second-largest drug manufacturer, has pledged to supply a total of more than 2 billion doses, at no profit, in agreements with the United States, Britain and European countries, among other nations and organisations.

The United States already has a law to exclude tort claims from products that help control a public-health crisis in the form of the 2005 Public Readiness and Emergency Preparedness Act (PREP). PREP declarations have been used many times before in the US.

Obtaining an indemnity has been crucial for AstraZeneca in negotiating their trade agreements as the company "*simply cannot take the risk if in…four years the vaccine is showing side effects*" Ruud Dobber, a member of AstraZeneca's senior executive team, told Reuters.

"*In the contracts we have in place, we are asking for indemnification. For most countries it is acceptable to take that risk on their shoulders because it is in their national interest,*" he said, adding that AstraZeneca and regulators were making safety and tolerability a top priority. Mr Dobber did not name the countries.

On 14 August the European Commission revealed that they had reached a first agreement with AstraZeneca to purchase the potential vaccine against COVID-19 as well as to donate to lower and middle income countries or re-direct to other European countries.

Once the vaccine has proven to be safe and effective against COVID-19, the Commission has agreed the basis for a contractual framework for the purchase of 300 million doses of the AstraZeneca vaccine, with an option to purchase 100 million more, on behalf of EU Member States. The Commission continues discussing similar agreements with other vaccine manufacturers.

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Fake goods and online marketplaces

Since May this year 35 people have been prosecuted and convicted in China for producing and selling counterfeit Dyson hair dryers with prison sentences ranging between 18 months and 6 years. This follows a raid at factory premises said to have produced more than 19,000 counterfeit hair dryers.

Simon Forrester, Group IP director at Dyson, said: "*We welcome this verdict which should serve as an extremely powerful deterrent to other counterfeiters who are risking the safety of consumers with potentially dangerous, inferior copies.*"

Counterfeit goods pose serious problems. Not only do they infringe on trademarks, but they can also involve quality issues that put consumers at risk.

One issue for consumers is that many counterfeit products can be found for sale online, with it often being difficult to tell the difference between a fake and a genuine product.

Research undertaken by Which? found large numbers of unsafe consumer products being sold via sellers on online marketplaces.

Which? advise that many people assume that online marketplaces are responsible for ensuring that the products sold on their platforms are safe, removing unsafe products from sale, and notifying customers when something goes wrong. However, this is not the case. Legally it is the sellers that consumers have to rely on to assure safety.

A Which? survey of online marketplace shoppers in September 2019 found that only 21% were aware that online marketplaces have no legal responsibility for overseeing product safety on their sites. Online marketplaces, examples of which include Amazon Marketplace, Facebook Marketplace and eBay, are exempt from liability unless they are aware of illegality. This leaves consumers potentially vulnerable, particularly when many of the sellers and products originate outside the UK.

However, the position may be changing.

A Californian state appeals court ruled recently that Amazon can be held liable like other traditional retailers for injuries from defective products sold via its online marketplace.

Historically, Amazon has successfully defended such claims on the basis that they only serve as an intermediary between buyers and their third-party sellers. They are not a supplier.

In its ruling, however, the appeals court said Amazon was central to the sale. "*Whatever term we use to describe Amazon's role, be it 'retailer,' 'distributor,' or merely 'facilitator,' it was pivotal in bringing the product here to the consumer,*" it was said in the judgment. Amazon should be liable if a product on its website is defective, the court added.

Which? is campaigning for regulations to be implemented in the UK to strengthen the legal responsibilities of online marketplaces and to ensure that public authorities have adequate powers, tools, and resources to require action from marketplaces when consumers are put at risk.

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