

# A long road ahead for automated vehicles?

Lucie Clinch provides a guide to the Law Commissions' report on automated vehicles and next steps for road traffic law

## IN BRIEF

► Covers Law Commissions' report on automated vehicles.

► Looks at issues of data retention, safety and liability.

The Law Commission (England and Wales) and the Scottish Law Commission released their final joint report on automated vehicles in January. The report, 'Automated Vehicles', spans issues related to the safe and responsible introduction of automated vehicles (AVs) in Great Britain (see *bit.ly/3wpnuDT*).

This article considers how the report's proposals might influence the future of civil liability, as well as several unanswered questions. We now wait to see if the government accepts the report's recommendations, and introduces necessary legislation to support them.

## 'User-in-charge' & immunity

One of the most important recommendations is the proposal to remove blame from the human in the car. This person is a new legal actor named 'user in charge' (UIC).

Once the self-driving feature is engaged, the driver becomes a 'user in charge' who has immunity from driving-related offences. UIC immunity from any criminal offence or civil penalty is central to the report's recommendations. The Commissions suggest the Automated Driving System (ADS) should not be capable of operating outside its intended domain. The UIC would not be immune if they have overridden or altered the system to engage when it is not designed to, or if they deliberately cause the ADS to malfunction.

Criminal liability will face a major shift as there will not be a 'person' to face 'blame' through the court system. That blame will now rest with a machine. The authorised self-driving entity (ASDE), ie the manufacturer or body which obtained safety authorisation for the vehicle, would

face regulatory sanction. The UIC would still be responsible for non-dynamic tasks such as insurance, maintenance, parking, reporting accidents and ensuring children wear seatbelts.

## What is 'self-driving'?

The Commissions' report has proposed that a 'self-driving' vehicle is responsible for the dynamic driving task, ie how the car drives and operates. This is consistent with the Automated and Electric Vehicles Act 2018 (AEVA 2018), which defines a vehicle as 'driving itself' if it is 'operating in a mode in which it is not being controlled, and does not need to be monitored by an individual'. Autonomous vehicle users may not be expected to 'drive' the car or 'monitor' it, but they are expected to respond promptly and effectively to transition demands.

In case of emergency, the 'transition demand' system in the vehicle would alert the UIC with multisensory signals, giving them enough time to take back control and regain situational awareness. Ideally this would happen within 10 seconds, although this period remains under review. Once the transition demand is issued and accepted, the 'handover' is completed from vehicle to UIC, the UIC becomes the 'driver' who would then be subject to the usual responsibilities of a human driver, measured against a reasonable and competent standard. Mitigation against risk of injury or damage if the UIC fails to take over when requested would need to be assessed by the regulatory body, but in a worst-case scenario, the vehicle should be able to come to a 'controlled stop' in lane.

## Self-driving & liability

The report states that AEVA is 'good enough for now' save that section 1 should be replaced by a new proposed authorisation procedure within a new regime. The AEVA allows a direct right of action against an insurer (s 2(1)) in an accident caused by an automated vehicle driving itself on a road or other public place in Great Britain.

The report is clear that victims will not have to prove that anyone was at fault, and the insurer will compensate the victim directly. AEVA 2018 allows for defences based on contributory negligence or where the insured has failed to install safety updates they know or ought to have known were safety critical. It is unclear whether insurers will automatically pay compensation without evidence of fault, evidence which will largely be held by the Authorised Self Driving Entity (ASDE).

I have written previously about the complexities of contributory negligence under AEVA 2018, which leaves the issue to the courts. AEVA 2018 requires the court to treat a claim as having been brought against a person other than the insurer or vehicle owner, rendering the insurer at fault because of the AV's behaviour (s 6(3)). Stewarts suggested in its consultation responses that statutory clarification should be given on how contributory negligence would apply, as the alternative would leave many injured victims fighting lengthy and costly legal battles where contributory negligence is alleged.

Despite a clear split in respondent opinions, the report found legislative intervention was not a priority (para 13.22). Unfortunately for injured claimants, litigation on this point might be expected, but the government will need to review legislation if disputes delay compensation or prevent insurers pricing policies. This is unlikely to be a priority unless numerous cases are fought.

AEVA 2018 also does not cover uninsured AVs. Users may fail to insure or to include a 'self-driving' addition in their insurance policy. In an incident involving an uninsured AV, there would be no easy route to compensation as the direct right of action against the insurer would not apply. The Motor Insurers' Bureau (MIB) stand as insurer of last resort but as acknowledged by the report, MIB agreements cannot apply without an untraced or uninsured 'driver' and AEVA 2018 excludes claims against an insurer where there is no policy in place (s 2(1)). The

report recommends these issues are resolved before self-driving vehicles are authorised.

### How safe do AVs need to be?

Described by the Law Commissions' report as a 'political decision', how safe an AV should be while driving itself depends on whether risks are acceptable to the public. When and how this decision will be made is unclear.

Divergence of opinion in consultation responses demonstrates that this is not a clear-cut issue. The report recommends a safety regulator evaluate safety compared with conventional driving, investigate road traffic infractions, and ensure ASDEs provide necessary information to users. It is not currently clear whether these ideas will reduce accidents or increase safety, particularly in the short term.

### Data retention

The report deals at length with data control, use and retention, and recommends introducing a statutory duty to share data between ADSEs and insurers. Insurers will need access to vehicle data when claims are raised, but it is unclear how this data will be shared or accessed. There is some concern that ADSEs would be hesitant to release relevant data, particularly if they anticipate the insurer bringing a claim.

The Law Commission initially proposed that accident data be retained for three years, aligned with the usual limitation period, which they admit proved 'controversial'. Respondents were split as to whether three years was too long or short. Given the extended limitation period for child claimants, a three-year retention period is unlikely to be sufficient and will not be welcomed by claimant groups.

The new report proposes 39 months of data retention, with the onus on the insurer to act quickly to get hold of the data. It is unlikely this period would be sufficient in all injury cases.

As a minimum, the Commissions propose data retention relating to: a detected collision; location; time stamps; whether the system is activated or deactivated; and whether a transition demand is issued.

The report also recommends that insurers and manufacturers share data into a neutral server, rather than by requirements written into legislation. Data controllers should be under a duty to disclose required data to insurers. It remains to be seen how workable any proposed protocols may be.

### The road ahead

The report's recommendations are a good start. It is essential any AV driving regime is clear who or what is liable in certain

scenarios. It is not clear whether proposed updates to the Highway Code can deal with such a shift in public perception. Users in charge need to know when they need to take control, and when they can 'safely' take a break in the knowledge that the car will not only keep them safe, but that the insurer will deal with any claim for loss or damage.

There is still an uneven playing field in data access, with the onus on manufacturers and insurers when assessing liability in an AV accident. AEVA 2018 has laid the groundwork, but the 315-page report by the Law Commissions shows there is much more to be done to refine the law around AVs and deal with legal accountability in both the criminal and civil landscape.

The report also fails to deal with some issues around AVs at home, working within the restrictions of the now out-of-date Road Traffic Act 1988 (RTA 1988), and does not resolve how owners, drivers or users in charge can deal with accidents abroad. There are still no signs of this being considered, let alone resolved, any time soon. Claimants might still face plenty of complications in their quest for compensation after an accident. **NLJ**

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