

## University of Southampton Insurance Law Research Group<sup>308</sup> – Written evidence (AUV0031)

### **Executive Summary**

- *Public perception of these vehicles is crucial. When the motor car was originally introduced, poor safety and the absence of sufficient compensation adversely affected public perception.*
- *Insurance of vehicles is crucial for society as victims of accidents need to be compensated when accidents occur.*
- *The current system of regulation of conventional vehicles does not fit with driverless cars and therefore new regulation is needed. Regulation needs to be continuously reviewed to keep up with legislation.*
- *Motor Insurance Law should also be amended for conventional vehicles to ensure parity between victims although this is not an immediate concern.*
- *The priority is to ensure that the third party victim is properly compensated.*

### **Options for Reform**

- *There are four options for reform of insurance/liability of driverless cars:*
  - 1) *Amendment of Road Traffic Act and Motor Insurance to include driverless cars*
  - 2) *Introduction of Product Liability System*
  - 3) *Introduction of First Party Insurance System*
  - 4) *State intervention and Central Fund*
- *Each system has significant benefits and detriments and each one should be studied in depth. There is no “right” answer and therefore the final choice is a political decision*
- *Significant amendments would need to be made to the Motor Insurers’ Bureau (MIB) agreements.*

### **Public Attitude to Autonomous Vehicles and Legislation**

[1] For people to consider the vehicles as safe they must also be trustworthy and reliable.<sup>309</sup> Another factor in helping with trust of an autonomous vehicle is the human qualities it possesses. Consequently, the more familiar and ‘human’ a car feels, the greater the trust of the public.<sup>310</sup>

[2] In general, it has been argued that factors that would discourage the introduction of new technology can outweigh factors in favour of the introduction.<sup>311</sup> It is thought that

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<sup>308</sup> Matthew Channon, Hannah Stones, Professor James Davey, Dr Johanna Hjalmarsson, Robert Veal

<sup>309</sup> Jae-Gil Lee, Ki Joon Kim, Sangwon Lee, and Dong-Hee Sin, ‘Can autonomous vehicles be safe and trustworthy? Effects of appearance and autonomy of unmanned driving systems’ [2015] 31 Intl. Journal of Human-Computer Interaction 682, 682.

<sup>310</sup> Ibid, 688

<sup>311</sup> J. Li, M. J. Cho, X. Zhao, W. Ju, and B. F. Malle, ‘From trolley to autonomous vehicle: perceptions of responsibility and moral norms in traffic accidents with self-driving cars’ presented at Society of Automotive Engineers World Congress, 12-14 April 2016, Detroit, USA, p1.

uncertainty over liability for accidents involving self-driving cars could discourage motorists from adopting the new technology. When cars were first introduced there were very few accidents, but the unfamiliarity of cars and absence of compensation meant that when there was an accident, it caused a far greater reaction than it might have done.<sup>312</sup> This then led to calls to ban cars.<sup>313</sup> Of course, it is likely that the use of driverless vehicles will be used in a commercial way by business at the beginning, however, trust is crucial for the vehicles to become more widespread.

[3] Incidents have been rare so far, but those that have occurred have created national headlines and raised significant concern over the safety of these vehicles (even though it is a development in motoring rather than a completely new form of transportation). For instance, when the first death occurred it caused a lot of concern, yet other deaths in conventional cars do not.<sup>314</sup>

[4] To reduce these concerns, as well as ensuring that driverless cars are thoroughly tested with significant checks in place, it is important that compensation is available to those with the misfortune of being in an accident. For conventional motor vehicles, people injured before 1934 were too often left with little or no compensation, causing substantial hardship and often leading to negative press coverage

#### **Amendment to Insurance Legislation**

[5] Technology is accelerating at a rapid pace and driverless cars are already being trialled on the road. The protection and compensation of the third party victim in cases of accidents from both conventional and driverless cars is essential. The current system for conventional motor vehicles provides some protection for the third party victim and the insurer will most likely be required to pay compensation. There are currently only limited defences available to the insurer<sup>315</sup> and the insurer holds a duty to satisfy claims<sup>316</sup>. The Motor Insurers' Bureau will pay compensation to the victims of uninsured and untraced drivers and extra assistance is provided by the state through public bodies such as the NHS.

[6] This system of insurance would not work with driverless cars as it currently stands, currently it is the driver or anyone who 'uses' the vehicle who is required to be covered by insurance and not the vehicle itself<sup>317</sup>. Some alteration to the law will ensure that there is an insurance system which fits with driverless cars and provides the third party with the compensation needed.

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<sup>312</sup> J. R. Spencer, 'Motor-cars and the rule in *Rylands v. Fletcher*: a chapter of accidents in the history of law and motoring' [1983] 42(1) Cambridge Law Journal 65, 73.

<sup>313</sup> Ibid

<sup>314</sup> Sam Levin and Nicky Woolf, 'Tesla driver killed while using autopilot was watching Harry Potter, witness says' (The Guardian, 1 July 2016) <https://www.theguardian.com/technology/2016/jul/01/tesla-driver-killed-autopilot-self-driving-car-harry-potter> accessed 13 October 2016.

<sup>315</sup> For example the Insurer is limited as to exclusion clauses they can use (Section 148 Road Traffic Act 1988) and their use of utmost good faith (Section 152).

<sup>316</sup> Section 151, Road Traffic Act 1988.

<sup>317</sup> See cases such as *Charlton v Fisher* [2001] EWCA Civ 112 and the judgment of Laws LJ.

[7] There are lessons to be learned from past mistakes. Compulsory third party motor insurance was introduced in 1930, and it contained significant loopholes allowing insurers to repudiate liability, causing significant hardship to third party victims. Not enough attention was paid to ensuring the victim was compensated for their injuries. As a result, the legislation required significant amendments within a few short years. Thorough consultation is needed for driverless vehicles and all knowledge bases questioned to ensure balanced legislation.

[8] It is crucial that there is parity in the laws of motor Insurance and driverless cars insurance so that the victim of an accident would get the same treatment and access to compensation across both forms of transportation. Of course there is nothing to prevent different systems of insurance existing in parallel, as long as the end result is that the victim receives the same amount of compensation for their injuries or damage caused to their property.

[9] Therefore, there undoubtedly needs to be significant reform to the current motor insurance regime, which does not provide adequate protection to the third party victim. Significant differences exist between the UK legislation in the **Road Traffic Act 1988** and EU regulation in the **Sixth Consolidated Motor Insurance Directive**, including where the vehicle should be insured, with the Directive providing much greater protection than UK law. Limiting the protection available for accidents involving automated vehicles to that currently applicable to conventional vehicles would significantly undermine public confidence and therefore to ensure parity, the protection given to accident victims of conventional vehicles needs to be significantly increased.

#### **Four Options for Reform**

##### **Extending Motor Insurance**

[10] This was not mentioned in the DfT consultation which is the ‘single policy’ approach favoured in particular by the ABI.<sup>318</sup> This would involve having one policy which covers automated driving and conventional driving without the need for product liability (PL) insurance for manufacturers. This is certainly the most simplistic approach and one which would need the least adaptation by the insurance industry and therefore it could be cheaper than PL with less liability disputes.

[11] This system seems to fall in with the Motor Insurance Directives which require the policy to cover for ‘any use’ consistent with the ‘normal function of that vehicle’,<sup>319</sup> and in fact it is clear from the recent European Commission Impact Assessment<sup>320</sup> that automated vehicles fall within this definition.

[12] Difficulties exist with this, however, especially as the current motor insurance regime is significantly outdated having been only slightly amended in 80 years. For an extension of

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<sup>318</sup> [https://www.abi.org.uk/~media/Files/Documents/Consultation%20papers/2016/09/090916\\_ABI\\_Thatcham\\_response\\_CCAV\\_Automated\\_Driving\\_Consultation.pdf](https://www.abi.org.uk/~media/Files/Documents/Consultation%20papers/2016/09/090916_ABI_Thatcham_response_CCAV_Automated_Driving_Consultation.pdf)

<sup>319</sup> Expounded in recent case of *Damijan Vnuk v Zavarovalnica Triglav* (C-162/13) [2016] R.T.R. 10

<sup>320</sup> European Commission, “Adaptation of the scope of Directive 2009/103/EC on motor insurance” [http://ec.europa.eu/smart-regulation/roadmaps/docs/2016\\_fisma\\_030\\_motor\\_insurance\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_fisma_030_motor_insurance_en.pdf)

motor insurance to work, motor insurance for conventional vehicles would need to be significantly reformed as a priority. Furthermore, liability disputes could still arise even under a single policy.

### **Product Liability**

[13] Extension of motor insurance to include product liability seems to be the most popular solution. Making manufacturers strictly liable for a defect in their vehicle ensures a high standard of production (giving the manufacturer greater incentive to prevent themselves from being sued) and further ensures that the third party is compensated for an accident attributable to the technology.

[14]As Lanoue notes it is important to have consistency in the system:

“Increasingly, computers are being used in devices like automobiles. It would be undesirable to permit an injured consumer to collect under strict products liability for a defective steering mechanism, but not for a defective computer program in the car which may have caused the same injuries.”<sup>321</sup>

[15] PL will equalise the availability of compensation between autonomous vehicles and those that are not. In shipping, where strict liability applies (e.g. a shipping incident on passenger ferry) it would also be inequitable for people on autonomous ships to not get the benefit of strict liability when they would otherwise – it is important that the types of liability and availability of compensation are equal.

[16] However product liability is also extremely complex and will not prove an easy fit. The greatest challenge is in the interaction between drivers’ and manufacturers’ insurers in the early stages of limited automation, especially when it is not clear as to who or what is at fault for a particular accident. There is the potential that the courts become clogged up with liability disputes between manufacturers’ and drivers’ insurers.

[17] Furthermore, product liability, as it currently stands, does not confer as much protection as is required for vehicle accidents. Defences available to the manufacturer such as the ‘state of the art’ defence, where the manufacturer could prove that they could not have known about a potential defect, should not be used against an innocent third party or first party.

[18] Finally there are other issues such as limits of damages, control of policy terms, and lifespans, which would need to be resolved and adjusted for a product liability system to fit. Moreover, complex issues surround the interaction between the Motor Insurance Directives and the Product Liability Directives which would cause further complexity.

### **Central Fund**

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<sup>321</sup> Susan Lanoue, ‘Computer software and strict products liability’ [1982-3] 20 San Diego L. Rev. 439, 449.

[19] A central fund<sup>322</sup> is a possible alternative and one which has not been properly examined. The fund would work through levies paid on fuel/cost of the vehicle and would then compensate victims of accidents on a no-fault basis. This would remove any liability issues which would consequently lower litigation costs. Therefore, it is envisaged that the cost of this system would be cheaper.

[20] There are a number of negative implications also, as it would not be popular amongst the insurance industry due to loss of profits. It would also provide little incentive to manufacturers to ensure the safety of their vehicles as they would not be liable for any defaults. Moreover, the management of such a fund would bring complexities and costs to ensure proper management. Finally, it would introduce an unintended benefit for those vehicles which enter the UK without paying into the central fund, even if these drivers were required to purchase insurance, managing this system would be complex.

[21] It is unlikely that this system will be introduced especially as it was not mentioned in recent DfT Consultation. However, it is worth examining whether a scheme such as this could be used in the long run. A comparison could be made with the New Zealand system for conventional vehicles managed by the Accident Compensation Corporation which provides “comprehensive, no-fault personal injury cover for all New Zealand.”<sup>323</sup>. Central funds are often used in shipping law such as in relation to oil pollution so further comparison could be made there.

### **First Party Insurance**

[22] A first party insurance model would bypass some of the liability issues in relation to the product liability system by allowing a claim to the insurers of vehicle which caused the accident with liability issues determined later. This would speed up the claims process although would not remove liability disputes.

[23] A first party model would be a major diversion from the current system for conventional vehicles and would require the insurance industry to make a significant adjustment. This would most likely cost more than the other proposed systems which would be disproportionate to the number of automated vehicles on the road currently.

[24] Another significant disadvantage of this system is the imposition of a substantial burden on pedestrians and cyclists who would not normally be insured, but would be potential victims.

[24] This is a system which could be introduced at a later stage if other systems are deemed inadequate, however, for the short to medium term, it is submitted that this system would be too complex and costly without providing enough benefits.

### **Amending MIB Agreements**

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<sup>322</sup> Central fund idea was examined in Matthew Channon and Lucy McCormick, “Look, no Hands!” New Law Journal 2016, 166(7708), 12-13 also in Matthew Channon, “How will self-driving cars affect your insurance?” The Conversation, August 22nd 2016 <https://theconversation.com/how-will-self-driving-cars-affect-your-insurance-64253>

<sup>323</sup> <http://www.acc.co.nz/>

[25] For three of the above systems<sup>324</sup> there would need to be measures in place to ensure victims of uninsured/untraced vehicles would be compensated. It is envisaged that the MIB in the UK would undertake this role by extending its Agreements to involve uninsured and untraced drivers.

[26] The Uninsured Drivers Agreement was recently significantly reformed in 2015.<sup>325</sup> The new Agreement has increased third party protection by removing a number of procedural restrictions and unlawful exclusions of liability. However, the Agreement would need further reform to be effective for automated vehicles.

[27] For example Clause 9 which excludes MIB liability for acts of terrorism is of particular concern. There is greater potential for automated vehicles to be used for these purposes especially as it would not involve the potential death of the person responsible. Therefore, excluding liability for acts of terrorism would significantly undermine trust in these vehicles.

### **Conclusion**

Public trust is crucial for the widespread adoption of automated vehicles and the absence of a suitable means of compensation could severely damage this. It is clear that there is not one perfect solution, with the four mooted systems having significant advantages and disadvantages. It is also clear that the rights of victims for conventional vehicles need to be substantially improved to ensure that there is parity.

*25 October 2016*

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<sup>324</sup> Product Liability, Extension of Motor Insurance and First Party System

<sup>325</sup> For an examination of reforms see Matthew Channon, "The new Uninsured Drivers Agreement: An analysis" British Insurance Law Association Journal, Issue 128.