
# The Forum of Complex Injury Solicitors (FOCIS)

# Response to Law Commission Consultation on the law relating to autonomous vehicles

## Februarv 2019

**About Us**

FOCIS members act for seriously injured Claimants with complex personal injury and clinical negligence claims, including group actions. The objectives of FOCIS are to:-

1. Promote high standards of representation of Claimant personal injury and medical negligence clients,

2. Share knowledge and information among members of the Forum,

3. Further better understanding in the wider community of issues which arise for those who suffer serious injury,

4. Use members' expertise to promote improvements to the legal process and to inform debate,

5. Develop fellowship among members.

See further www.focis.org.uk.

Membership of FOCIS is intended to be at the most senior level of the profession, currently standing at 22 members. The only formal requirement for membership of FOCIS is that members should have achieved a pre-eminence in their personal injury field. Seven of the past presidents of APIL are members or Emeritus members of FOCIS. Firms represented by FOCIS members include:

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|---|---|
| Anthony Gold | Hugh James |
| Atherton Godfrey | Irwin Mitchell |
| Ashtons | Kingsley Napley |
| Bolt Burdon Kemp | Leigh Day |
| Dean Wilson | Potter Rees Dolan |
| Digby Brown | Prince Evans |
| Fieldfisher | Slater & Gordon Lawyers |
| Fletchers | Stewarts |
| Freeths | Thompsons NI |
| Hodge Jones & Allen | |

FOCIS has been the name of the organisation since 2007, formerly known as the Richard Grand Society (founded in 1997 based on the concept of the American 'Inner Circle of Advocates' which had been formed in 1972 by Arizona and San Francisco Attorney Richard Grand).

FOCIS members act for seriously injured Claimants with complex personal injury and clinical negligence claims. In line with the remit of our organisation, we restrict our responses relating to our members experience, practices and procedures relating to complex injury claims only. We will defer to others to respond on the impact relating to other classes of case.

## Introduction

FOCIS 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 working with the most seriously injured clients, and ensuring that those seriously injured clients have access to justice. Our submission broadly endorses the submissions of APIL, but we have updated or inserted FOCIS specific points in blue text for clarity.

As noted by APIL, an area of serious 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 which are on the road currently, which feature partial automation. Those injured by automated vehicles where there is no evidence of fault on the part of a driver currently on the roads will be required to pursue costly and complex product liability claims. It may still be that litigation will involve both driver and manufacturer either because the claimant has to be cautious or indeed the driver or their insurers wish to blame the manufacturer of the car or indeed the software involved leading to lengthy, complex and expensive litigation.

## General comments

The Automated and Electric Vehicles Act 2018 introduces strict liability for accidents involving automated vehicles. Along with APIL, we welcome 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 agree with APIL's suggestion 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.

The AEV Act 2018 does not apply to vehicles which are not driving themselves (i.e. those with semi-autonomous features, ADS driving, or driver monitoring) and by extension they clearly require a user in charge, or a driver if they are incapable of doing a safe stop.

We also agree that the 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)**

Yes.

**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".

**Q6) Under what circumstances should a driver be permitted to undertake secondary activities when an automated driving system is engaged?**

It should not be permitted for a 'driver' to undertake secondary activities. A 'user in charge' could be permitted to undertake secondary activities only if travelling in a level 5 vehicle with the AV systems engaged, or in a level 4 vehicle that was driving itself in a designated area. In that later example it remains crucial that, as set out in answer to Q1, the vehicle could reliably perform a safe stop in all scenarios. The user in charge should not be permitted to undertake secondary activities if they have positively taken control of the vehicle (one or more of the core AV systems) and hence become a driver.

**Q7) Conditionally automated driving systems require a human driver to act as a fallback when the automated driving system is engaged. If such systems are authorised at an international level:**

**(1) Should the fallback be permitted to undertake other activities?**

We repeat our comments in Qs 1, 2 and 6 above. Conditional automation refers to SAE level 3 and 4 within the paper. It is acknowledged that a crucial question is 'whether the automated driving system can achieve minimal risk condition without human intervention, or whether it needs human intervention to ensure safety'. Any requirement

for a human to intervene would make it impermissible to allow the driver to undertake other activities.

The boundaries between what levels of automation which require a human monitor need to be clarified and indeed adhered to by manufacturers and regulators. There will need to be a sustained public information campaign on what is expected of users in charge / fall-back drivers notably of level 3 vehicles as they will naturally get used to relying on the automated features increasing the risk that they are unable to react in time to an incident.

Manufacturers and regulators should develop and test systems that constantly monitor the user in charge and issue regular reminders or prompts to continue to watch the road.

**(2) if so, what should those activities be?**

We do not agree there should be a difference between the fallback driver being able to access in car screens, rather than their own mobile phones or read a newspaper. If travelling as what is essentially a passenger in a fully authorised AV that is genuinely driving itself (as envisaged by the AEV Act) they should be able to undertake whatever activities they like in the knowledge they will not need to take immediate action in driving the vehicle at any stage.

**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?**

Yes.

**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.

**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.

For level 2 and 3 vehicles there is a real danger or overreliance or a misunderstanding of the limitations of those systems. We do not consider it safe to assume this will simply happen by users choosing to read a lengthy vehicle manual. Manufacturers are able, through the vehicles software, to effectively force users to watch safety critical information before the vehicle can be driven. That could involve simulated static tests of control being switched between the driver and vehicle.

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.

The interim and final reports of the AV AIB should be admissible as evidence in civil proceedings, as confirmed in Rogers v Hoyle[2014] EWCA Civ 257.

It is crucial that a new AV AIB is well funded to ensure it can conduct its investigations at a very high standard and in a timely fashion. They should be required to publish any interim findings within 28 days of any serious accident, to not inform those affected and reduce the scope for delays to the provision of interim funding by the insurers who may otherwise reserve their position as to their liability under the AEV Act. A new AIB for AV accidents would also help develop and maintain public confidence.

**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.

The public may not be wholly convinced or reassured by a comparison between automated driving systems and human drivers. The automated driving systems should also be compared against each other. Over time the expectation is that automated driving systems should prove much safer than human drivers, so caution should be applied to setting the current high level of accidents involving human drivers as the benchmark.

**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:**

**(1) Are sections 3(1) and 6(3) on contributory negligence sufficiently clear?**
**(2) 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 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.

Section 2 of the AEV Act should be redrafted to ensure it provides true strict liability. The current reference to 'caused by' including 'partly caused by', by interpretation in s8, leaves scope for insurers to argue against compensating victims on the grounds that the accident was unavoidable by the AV. It also, by default, requires the victim to prove

causation, which could be difficult and costly in an AV context. Similar challenges have defeated numerous product liability claims under the notoriously difficult "strict liability" regime of the Consumer Protection Act 1987. We suggest "caused by" within s2 of the Act, be replaced by "involving" or at the very least the burden of proof be reversed to require the insurer to prove the accident was wholly caused by the injured party, if applicable.

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 reaction[1].

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 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

[1] Paragraph 3.55 Law Commission consultation document

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 Act[2]. Although this is prohibited under European law[3], 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.

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

a) **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?**
b) **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?**

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 (CPA). The Consumer Protection Act 1987 is problematic, and the claims against manufacturers will be hugely complex for the injured person to pursue.

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[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]*

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.

There are significant issues with the Consumer Protection Act 1987 and its repeated failure to provide the remedy for injured consumers to which it was intended. However so long as the UK remains part of the EU then change is very limited. The EU has recently completed its third review of the Product Liability Directive[4] from which the CPA was derived. There is no intention to change the Directive. Instead the EU is looking to produce guidance on the Directive. Of course if Brexit follows, then the CPA will remain a UK statute and the ability to amend or repeal this remains possible but unlikely, and certainly not for a considerable time to come. At the time of making these submissions the European Union's Expert Working Groups on Product Liability and Liability and New Technologies: Product Liability Formation are considering their final draft submissions for the guidance. They have specifically considered the application of the Directive in new technology and it is clear that liability is far from straightforward.

The Directive is silent on the question of whether a product needs to be tangible and the European Court of Justice has not yet ruled on this particular issue. In some cases, national legislation transposing the Directive specifies that a product needs to be tangible. The fact that electricity is expressly included in the scope of products is understood, by some, as precluding all other forms of intangible items to be products in the sense of the Directive. A large number of tangible products nowadays only function through the use of software and/or make use of software, algorithms or data in their different forms be it embedded or non-embedded. Software can also be supplied separately from the product but used with it, to enable the use of the product as intended. The supplier of a software update could, conceptually, be considered in the same position under the Directive, if that software can be considered movable.

In determining whether software could give rise to claims under the product liability legislation the original goals of the Directive considered including the risk of defect and the need to protect consumers. Other questions surrounded whether the software drives the main functions of the hardware. Thus while software steering the operations of a tangible product could be considered part or component of that product, other forms of software could be more difficult to classify.

Even a brief consideration of this debate above demonstrates the difficulties facing an injured road consumer in pursuing their claim for compensation as well as the prospect of yet further litigation including the car driver insurer, car manufacturer and software manufacturer.

We agree with APIL and 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 monitoring[5], 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.

[4] 85/374/EEC

[5] 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.

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 and/or the manufacturer of the software under the Consumer Protection Act 1987. An obvious defence to such a claim will be the so called "development risk defence"[6]:

"*the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control".*

The development risk defence foresees that a producer is not liable for a defective product if state of the art technical knowledge at the time of putting the product into circulation was not such as to enable him to be aware of the defect. This defence was originally introduced to encourage producers to put innovative products into circulation

Producers are not liable for defects that come into being after the product has been placed on the market. Given that products containing new technologies may evolve over time, through machine learning or simply through software updates, the question arises to what extent producers should or could be held liable for such changes. So this is yet another hurdle for the injured claimant to overcome.

These vehicles are fallible – there have been a series of accidents in China and America[7] involving vehicles on "auto-pilot" failing to stop/detect hazards. A video produced for BBC News highlighted the problems with partial automation[8]. 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.

**Q26) Where a vehicle is listed as only safe to drive itself with a user-in-charge, should it be a criminal offence to be carried in the vehicle if there is no person able to operate the controls?**

Yes. We would, however, point out the importance of user awareness. i.e. if the vehicle is only safe to drive itself with a user in charge, the question arises as to whether a potential 'passenger' 'knew' or ought to have known this to be the case. We envisage the technology exists or soon will exist to overcome this issue. Through finger print or eye recognition these vehicles should not begin to drive until they have identified a user in charge who has undergone the compulsory training referred to in answer to Q13.

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[6] s.4(1)(e) and also Article 7 of the Product Liability Directive

[7] https://www.nytimes.com/2016/07/01/business/self-driving-tesla-fatal-crash-investigation.html?module=inline

[8] https://www.bbc.co.uk/news/av/business-44460980/this-car-is-on-autopilot-what-happens-next

**Q32) We seek views on whether there should be a new offence of causing death or serious injury by wrongful interference with vehicles, roads or traffic equipment, contrary to section 22A of the Road Traffic Act 1988, where the chain of causation involves an automated vehicle.**

Yes.

**Q33) We seek views on whether the Law Commissions should review the possibility of one or more new corporate offences, where wrongs by a developer of automated driving systems result in death or serious injury.**

We would agree that steps should be taken to minimise any risks taken by developers which jeopardise user safety within an AV and to punish those who are demonstrated to have knowingly done so. We would agree a further consultation would likely be required if the Law Commission proposes to consider a new offence.

**Q35) Under section 25 of the Road Traffic Act 1988, it is an offence to tamper with a vehicle's brakes "or other mechanism" without lawful authority or reasonable cause. Is it necessary to clarify that "other mechanism" includes sensors?**

Yes. However, the clarification may need to be broader than this to cover a range of AV technologies. We defer to the developers on this point, but would suggest the RTA 1988 will ultimately need to be overhauled completely to deal with this and its many other deficiencies.

**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.

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.

**Q42) 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.

An AV should have appropriate programming and functions (e.g. emitting sounds/audible warnings) to deal with such instances.

**Q44) We seek views on whether there should be a requirement for developers to publish their ethics policies (including any value allocated to human lives)?**

Yes, but this issue should be considered in more detail once guidelines are issued by the Centre for Data Ethics and Innovation following consultation with expert bodies. The public confidence in AVs will be damaged if there is a lack of transparency on this issue. Manufacturers should be capable of being called to account if they knowingly produce vehicles that make driving decisions that are not in the public interest (e.g. prioritising the safety of the occupants over other road users).

**Question 46) Is there any other issue within our terms of reference which we should be considering in the course of this review?**

**The wording of the AEV Act s1**

The terms of reference are to consider whether there may be gaps or uncertainty in the law, and what reforms are necessary to ensure the regulatory framework is fit for purpose. A key issue within section 2(1) of the AEV Act 2018 is that its scope is limited to accidents on 'road or other public place in Great Britain'. It was expressly confirmed during the debates on the Bill that this wording was required to bring the AEV Act in line with the Road Traffic Act 1988, which is deficient.

The wording restricts the rights of victims injured in AV accidents on private land and also UK citizens injured in accidents abroad, potentially travelling in their UK registered AV. The wording contravenes the MID Directive (2009/103/EC) and recent jurisprudence in the CJEU. The case of Vnuk v Triglav 14 September 2014 (C-162/2013) confirmed that that the requirement for insurance cover exists regardless of the place where the vehicle is used for its normal function, this can be on private land.

Rodrigues de Andrade 28 November 2017 (C-514/16) confirmed that only the "normal use of the vehicle as means of transport" and "irrespective of the terrain" should be covered by MTPL insurance. The CJEU found that accidents caused during the normal use of a vehicle for the purpose of transportation, including its use on private properties, remain within the scope of the Directive. We refer to our comments at qs1, 25 and 36 above that the RTA 1988 can no longer be fit for purpose with the advent of AV technology, and restricting the applicability of the AEV Act is in clear contravention of the 2009 EU Directive.

We urge the Law Commission to consider these deficiencies within their review.

**Untraced/Uninsured Claims**

There is a lack of clarity where the human driver in an AV is uninsured. Is the intention for the MIB to deal with such claims? The wording of section 2(1) suggests that the AV insurer is liable, potentially with no recourse for recovery against the MIB. It should be noted that the MIB has recently revised Article 75 to cover vehicles used in an act of terrorism, but it remains unclear whether they will act as the insurer of last resort in relation to an accident involving an AV.

The MIB has been held to be directly liable for injuries caused by the use of an uninsured vehicle on private land (Lewis v Tindale & Ors [2018] EWHC 2376 (QB) by virtue of direct effect of the 2009 Directive, thereby confirming that the MIB was an emanation of the state.

We note the Law Commission's statement at paras 6.18 & 6.19 and given that the liability under s2 of the AEV Act cannot apply where the vehicle is uninsured, it is crucial

that the MIB agree to provide cover for victims injured when an AV is driving itself while uninsured. We also note that the Lewis decision awaits an appeal in the Court of Appeal.

We await the outcome of the discussions and confirmation on the position relating to both uninsured vehicles, and those being 'used' on private or other land, as it is possible a further review is needed once that is confirmed.