

The Law Commission publishes Automated Vehicles report

By Lucy McCormick

On 26 January 2022, the Law Commission published a joint report with the Scottish Law Commission with recommendations for legal reform to enable the safe introduction of autonomous vehicles. The proposals reveal a shift from the human driver as the principle focus of accountability for road safety, towards new systems of safety assurance suitable for automated vehicles. Lucy McCormick – a co-author of the Bar Council’s most recent response to the consultation – considers the report.

WHAT IS THE BACKGROUND TO THE REPORT?

1. Many driver support features are currently available to help a human driver by, for example, maintaining a safe distance from vehicles ahead. It is anticipated that these features will develop to a point where commercially available vehicles will be able to drive themselves, without a human paying attention to the road. For example, a car may be able to drive itself on a motorway, or a shuttle bus may be able to navigate a particular route.
2. Against this background, in 2018 the Centre for Connected and Autonomous Vehicles (CCAV) asked the Law Commission of England and Wales and the Scottish Law Commission to undertake a far-reaching review to enable the safe and responsible introduction of automated vehicles on the roads and public places of Great Britain. By automated vehicles, they refer to vehicles that are

capable of driving themselves without being controlled or monitored by an individual for at least part of a journey.

3. The project has involved three rounds of consultation, focusing on different issues. Between November 2018 and December 2020, three consultation papers were published. This final joint report came out on 26 January 2022, with recommendations for a new Automated Vehicle Act.

WHAT ARE THE KEY RECOMMENDATIONS?

4. The proposals reveal a shift from the human driver as the principle focus of accountability for road safety, towards new systems of safety assurance. They cover initial approval and authorisation of such vehicles, ongoing monitoring of their performance while they are on the road, misleading marketing, and both criminal and civil liability. Key points include:
 - a. The recommendation of a clear legal distinction between driver assistance features (which require ongoing human monitoring) and true ‘self-driving’ features (which do not). The report engages with the ‘problem of passivity’; that is to say that there is a robust body of research showing that people find it more difficult to monitor a task passively than to be actively engaged in it. The report suggests the need for a clearcut distinction setting out when the user is no longer responsible for the driving task.
 - b. Accordingly, the report recommends a new authorisation scheme to decide whether any given ADS feature is or is not self-driving as a matter of law. This will distinguish between good (possibly very good) driver assistance features and those which are safe enough to allow the vehicle to drive itself.
 - c. Once a vehicle is authorised as having ‘self-driving’ features, and that feature is engaged, the system of legal accountability would change. In particular, the person in the driving seat would no longer be a driver but

would become a “*user-in-charge*”. They would have immunity from a wide range of offences related to the way the vehicle drives, ranging from dangerous or careless driving, to exceeding the speed limit or running a red light. However, the user-in-charge would retain other driver duties, such as arranging insurance and checking loads.

- d. The vehicle would be backed by an Authorised Self-Driving Entity (or ASDE). If the self-driving feature causes the vehicle to drive in a way which would be criminal if performed by a human driver, this would be dealt with as a regulatory matter.
- e. Some self-driving features may be authorised for use without a user-in-charge. These will be referred to as “*no user-in-charge*” (NUIC) features. Here any occupants of the vehicle would simply be passengers, and responsibilities for overseeing the journey would be undertaken by a licensed NUIC operator organisation.
- f. Many drivers are currently confused about the boundary between driver assistance and self-driving technologies, and this problem can be aggravated by misleading marketing. To combat this, the report proposes new offences restricting use of the terms “*self-drive*”, “*self-driving*”, “*drive itself*”, “*driverless*” and “*automated vehicle*”, and other commercial practices creating a likelihood of confusion over whether the technology needs to be monitored.
- g. For purposes of civil liability, the provisions of the Automated and Electric Vehicles Act 2018 will apply. Broadly speaking, victims who suffer injury or damage will not need to prove that anyone was at fault, and the insurer will compensate the victim directly.

WHAT DOES THAT MEAN FOR THE SECTOR?

5. Increased legal certainty in this area will be good news for everyone: road users, developers and insurers alike.

6. The restrictions on misleading advertising are particularly welcome. Tesla has faced criticism for the branding of its “*Autopilot*” suite of features, which in fact require monitoring by a fully attentive driver who has their hands on the wheel and is prepared to take over at any moment. Marketing is something which can be taken into account in a product liability context – the definition of defective under the Consumer Protection Act 1987 includes at Section 3(2)(a) consideration of *‘the manner in which, and purposes for which, the product has been marketed.’* Sensible marketing and instructions can render products with potential dangers safe, whilst poor marketing and inadequate warnings can be reasons to find a product unsafe. However, the creation of new offences are likely to concentrate the minds of developers and their marketing arms.
7. However, many have been disappointed by the failure to propose measures to clarify two notoriously ambiguous provisions in the Automated and Electric Vehicles Act 2018:
 - a. Contributory negligence: Under section 3(1) of the AEV Act, where an accident is to any extent the fault of the injured party, the normal principles of contributory negligence will apply. This means that compensation will be reduced to the extent that the court thinks is just and equitable. However, the way in which the AEV Act achieves this result is complex. It requires the court to imagine two counter-factual situations: first, they must treat the claim as if it had been brought against a person other than the insurer or vehicle owner under the law of tort, and secondly that the insurer is at fault because of the behaviour of the AV. Many feel that more guidance would be welcome.
 - b. Causation: Under section 2 of the AEV Act the accident must be “*caused*” by an AV when driving itself. It is unclear how far this implies an element of fault. For example, if an AV were to stop unexpectedly, and the car behind were to be struck by a third car behind it, there is uncertainty about how far this collision could be said to be “*caused*” by the AV.

8. Most insurers felt that there was a need for guidance on these issues, to allow them to price the risk. Some claimant lawyers took a similar view, foreseeing their clients having to fight lengthy and costly legal battles. However, the report concluded that the way the AEV Act deals with them was “*good enough for now*”, and could be reconsidered after AVs have been deployed, so that decision-makers can take account of practical experience.

WHAT HAPPENS NEXT?

9. The Automated Vehicles joint report has been laid before Parliament and the Scottish Parliament. The UK, Scottish and Welsh Governments will decide whether to accept our recommendations and introduce legislation to bring them into effect.
10. The report recommended that the government should review product liability law (including the Consumer Protection Act 1987) to take account of the challenges of emerging technologies. The review should cover product liability as a whole, rather than be confined to automated vehicles. It may be that this will be announced as a new project shortly.

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In 2021, Lucy co-drafted the most recent [Bar Council response to the Law Commission Automated Vehicle Consultation](#). She also recently contributed to [The Law of Artificial Intelligence](#) (Sweet & Maxwell, 2020), having previously co-authored [The Law and Autonomous Vehicles](#) (Routledge, 2019). She tweets from [@LawofDriverless](#).