Submission To The Public Bills Committee
Re: The Vehicle Technology & Aviation Bill
21 March 2017

About BLM

We are a multi-jurisdictional UK law firm with offices in England & Wales, Northern Ireland, Scotland and Republic of Ireland. We are one of the largest providers of legal advice and services to the insurance sector, acting for major companies such as Ace, Aviva, Allianz, Axa, Ageas, Ecclesiastical, Direct Line Group, Hastings, LV=, QBE and Zurich. We also represent Lloyds Syndicates, smaller insurers, corporates and MIB.

Having already worked closely with the Association of British Insurers and various clients in relation to the Government’s Consultation on automated vehicles, we offer to the Committee our submission for consideration concerning Part 1 of the Vehicle Technology and Aviation Bill, which we hope the Committee will find helpful.

Our submission has been prepared by Nick Rogers, Partner & Head of Motor Practice Group (nick.rogers@blmlaw.com) and Alistair Kinley, Head of Policy & Government Affairs (alistair.kinley@blmlaw.com) and we shall be pleased to assist the Committee with any queries or additional matters arising.

Submission

1. Listing of automated vehicles by the Secretary of State

- It is clear that only vehicles listed by the Secretary of State will be subject to this legislation and that listing itself will be subject to the criteria in section 1(1)(b). It is assumed for these purposes that the Secretary of State will only be satisfied that vehicles should be listed if they have met stringent minimum technical criteria for automated vehicles set by subsidiary regulations.

- It is vital that an "automated vehicle" is clearly understood to be one that is capable of extended periods of self-determining operation without any human engagement and not confused with lesser levels of technology which (under the label of ADAS (“advanced driver assistance systems”) are already delivering some self-contained vehicle control functions such as adaptive cruise control, lane assist, automated braking and collision avoidance. ADAS should in no way create an environment which allows or encourages a driver to cease to be aware of their surroundings or believe that he/she is not in control at all times.

- However an automated vehicle will allow that disengagement of control to occur and it is our understanding that it is the purpose of this Bill to create a civil liability framework specifically for such vehicles only, and only when driving
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themselves.

- Accordingly the word “monitored” in section 1(1)(b) is of considerable importance both as to fact and degree. In contrast we note that at section 7 it says “… a vehicle is defined as “driving itself” if its operation is not being controlled by an individual.” [our emphasis].

- We submit this creates ambiguity as to the criteria for being self-driving and we respectfully suggest the word “controlled” should be amended to “monitored” for consistency and to avoid unintended consequences.

- Consider this example:

  o Vehicle A is not on the Secretary of State’s list; it has an “always on” collision avoidance function which will in certain circumstances take control of a vehicle by automatically applying the brakes. If it malfunctions and causes an accident while the driver is driving it the motor insurer is not automatically liable (the system either failed or took control away from the driver, the driver was not negligent) and any damage claims will be directed to the manufacturer under product liability.

  o Vehicle B is on the Secretary of State’s list because it is a far more sophisticated vehicle; however it too has the identical collision avoidance system as above which – because it is “always on” - functions independently of the technology that qualifies the vehicle for the list. If it too malfunctions and causes an accident at a time when the driver has not actually engaged the “driverless” technology and was actually driving (as with vehicle A), because by definition the operation of the vehicle was not at the critical point being “controlled by an individual”, the motor insurer arguably now has a direct/statutory liability to all injured parties even though that was not the intention of Parliament at this point.

  o Liability potentially attaches because the criteria in section 2 (1) (a) are met by the test of absence of control imported from section 7 rather than the test of absence of monitoring which allowed the vehicle onto the list.

  o Liability may not attach if section2(1)(a) is read as having 2 distinct parts (which could be separated) namely (i) the accident was caused by an automated vehicle and (ii) that vehicle was already driving itself rather than being driven.
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<th>Liability of insurers etc where accident caused by automated vehicle</th>
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<td>Clause 2 imposes liability on an insurer if three or four ostensibly simple criteria are met, with exceptions as to damage, and preserves the concurrent liability of any other party who may be responsible. It also, with the exception of a carve-out for section 4, expressly provides that this liability may not be excluded or limited contractually or in any other way.</td>
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<td>In combination with the omission of any relevant provision elsewhere in the Bill, this effectively removes the ability of any motor insurer to exclude (contractually or otherwise) liability for the consequences of acts of terrorism or cyber-crime which might occur simultaneously with multiple vehicles (an incident “surge”). The Bill does not deal with the question whether a maliciously cyber-attacked or reprogrammed vehicle which acts contrary to its original programming may or may not be defined as “driving itself”. Arguably it is being controlled by a malicious third party.</td>
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<td>This may discourage product development as the extent of the risk / loss arising from a single incident would be difficult to quantify for underwriting purposes and liability should in any event sit directly with vehicle manufacturers and those responsible for the cyber security of the mass vehicle programming (and their respective product liability insurers). Alternatively, we assume, motor insurers would have to price for this extended risk in a way they are not required to at present. We cannot however comment on pricing impacts.</td>
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<td>It is proposed below that additional wording be added to section 4 to address this very significant issue.</td>
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<td>We also recognise that clause 2(1) deals with insurer liability and clause 2(2) deals with the liability of the owner where the vehicle is not insured because (to summarise) it is a Crown vehicle. This point was developed, in part, in answers to questions 93 and 94 posed by Andy McDonald MP during the Committee’s evidence session on 14 March 2017.</td>
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<td>We believe it would be extraordinarily helpful if the Government could set out, very probably on a ‘for the avoidance of doubt’ basis - either in Explanatory Notes or in remarks in the House by the Minister - its analysis of the position of the Motor Insurers’ Bureau in respect of its obligations to meet claims arising from ‘ordinarily’ uninsured manual driving or autonomous operation of an automated vehicle which is not a Crown vehicle. We do not believe the point is properly covered in the exchange between Iain Stewart MP and Mr McDonald found at columns 133 of the Committee’s proceedings for 16 March.</td>
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2.3  
• The Bill provides that the "damage" for which the insurer shall be liable will not include damage to the automated vehicle, goods carried for hire or reward, and property in the custody or control of the insured person or person in charge of the vehicle at the time. This mirrors the Consumer Protection Act/product liability law for consumers.

• “Property in the custody or control of...” appears intended to cover possessions in the vehicle.

• As drafted though the exclusion could be applied more widely e.g. a second vehicle owned by the insured person, a caravan or boat trailer attached to it, and a house or building owned by the insured person, all of which could be damaged by a malfunctioning automated vehicle. Is this the intention?

• It cannot be said with certainty that all drivers will have home insurance or comprehensive motor insurance that would pick up these losses in the first instance. In which case an innocent party would be considerably out of pocket.

• And where an injured party does have home or property insurance that meets the claim, a subrogated claim would then arise against the vehicle manufacturer in any event but one which would be subject to a different limitation period and therefore create complexity.

• In summary, to avoid complexity, the limits of the exclusion clause should be more clearly set out.

3. Contributory negligence etc

3(1)  
• Section 3(1) rightly seeks to preserve the application of contributory negligence to a claim involving an automated vehicle.

• We think it does so satisfactorily with regard to injured persons who would otherwise ordinarily pursue a negligent driver (ie passenger, pedestrian, cyclist, other driver etc).

• There is however a concern that as worded it might remove the ability of the compensating insurer to argue contributory negligence against a disengaged driver who failed to wear a seatbelt, and has thereby wholly caused or increased the severity of an injury, because in a single vehicle accident caused by a defect in the automated vehicle, there is no person other than the insurer or vehicle owner against whom the disengaged driver can claim unless a claim is pursued under product liability law or in contract.
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|   | • We don’t believe such an argument should succeed if raised, and we assume the intention behind the wording is not to confine the application of any argument for contributory negligence in any way.  
• The question though is whether as worded the Bill creates an implicit requirement for actual identification of the “person other than...” in order for any reduction for contributory negligence to be possible or whether a hypothetical person is sufficient? What is the intention of Parliament in this respect? |
| 3(2) | • We respectfully suggest that the words “when it was not appropriate to do so” invite debate over appropriateness, when greater certainty is required. Is it not better to say “in allowing the vehicle to operate in automated mode at a time or in a location in which it was not capable of so operating or is not lawfully permitted so to operate”? |
| 4. Accident resulting from unauthorised alterations or failure to update software | • A significant omission from this section is any provision for unauthorised alterations by “persons unknown” having criminal intentions.  
• Examples range from opportunistic hacking of a single vehicle to systemic organised hacking of large number of vehicles. The question is whether the intention of Parliament is that motor insurers should have (effectively unlimited) section 2 liability for cyber-attacks? This could be a significant deterrent to the motor insurance market, particularly smaller insurers.  
• We respectfully suggest that a new subsection should be considered for addition to section 4(1) thus: “(1)(c) deliberate interference with or hacking of the vehicle’s operating system by persons unknown for the purposes of terrorism or criminal activity”, which changes would also need to be followed through in section 4(2).  
• An additional omission is any provision for a right of recovery of sums paid by an insurer from a person commissioned by the insured person to make the prohibited alterations to the operating systems.  
• Although the amount payable by the insurer is in principle recoverable from the insured person under the “with knowledge” provision, that person alone may not have the financial means to reimburse the insurer the substantial sums it may have to pay out (the consequences of such tampering are not quantifiable).  
• The insurer is consequently financially disadvantaged if the right of recovery is limited as proposed when there may be others involved with greater access to funds or even commercial insurance. The appropriate provision would not only
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offer a measure of protection but also encourage any after-market businesses engaged in provision of software upgrades to self-regulate and thereby reduce the associated risks for all road users.

- Section 4 could be amended as follows: “the amount paid by the insurer is recoverable from that person or, as the case may be, from the person who made the alterations with the insured person’s knowledge, to the extent provided for by the policy.”