House of Commons Public Bill Committee

Vehicle Technology & Aviation Bill

Call for Evidence

Kennedys’ response to specific questions relating to:

- Listing of automated vehicles
- Liability of insurers

22 March 2017
Legal advice in black and white

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Preamble

Kennedys shares the Government’s desire to ensure that the UK is at the forefront of emerging automated vehicle technology - both with regard to the improved safety aspects that such technology can bring, as well as the commercial advantages to business. To that end, we agree that investment in this technology should be embraced and championed.

In the midst of domestic and international political upheaval, we are pleased that the UK Government is maintaining momentum with its domestic policy agenda with regard to autonomous vehicles. In doing so, it is demonstrating the UK’s capability for innovation and policy leadership, which is to be encouraged.

The UK has a robust and extensive regulatory system that is agile enough to be able to respond to new innovation and lead the way in providing a suitable regulatory framework. This will support the UK to maintain its position as a global leader - something of particular importance in light of the UK’s impending departure from the EU.

**Regulatory reform**

Regulation should support technological advancement rather than hinder it, whilst maintaining the safety of vehicle users or those who may be affected by a vehicle’s use. Taking a sensible approach to regulatory reform is vital - too much, too soon could be damaging.

We support wholeheartedly the Government’s intention to keep regulatory reform under constant review as the technology evolves. Providing for an ongoing and agile regulatory review means that, as far as is possible, long-term technological change is anticipated. This will ensure that future regulatory change is seamless and occurs only when necessary to reflect a major leap in technological advancement.

We understand the complexities involved in the drafting of the Vehicle Technology and Aviation Bill and the challenges that this presents. However, having examined the Bill in great detail we believe that further explanation and overall clarity would enhance the Bill and its impact and set out our views in this submission.
FURTHER INFORMATION

Any enquiries about the response or requests for further information should be addressed, in the first instance, to:

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Kennedys written evidence submission to the House of Commons Public Bill Committee on Part 1 of the Vehicle Technology & Aviation Bill

Executive Summary

- Clause 1: The list of motor vehicles covered by the Bill needs to anticipate that some conventional vehicles may be modified to become an autonomous vehicle. A minimum period for revising the list may be sensible.

- Clauses 2, 3 and 5: Given that this Bill moves towards the adoption of a single insurer model the Government’s intention needs clarifying to ensure that the Bill appropriately reflects Government’s intentions as to how they envisage insurers’ liability operating in practice. The operation of the Bill would benefit from scenario testing.

- Guidelines are needed as to the circumstances in which it would not be appropriate for the person in charge of the vehicle to allow the vehicle to drive itself.

- Other issues that still need further consideration and regulation in relation to autonomous vehicles sooner rather than later include cyber/hacking and consequent data protection concerns.

Clause 1: Listing of automated vehicles by the Secretary of State

We recognise that this Bill is designed to regulate the insurance provisions relating to fully automated vehicles commonly known as stage 4 or 5 vehicles, which are not currently available on the open market for purchase. For that reason there are no transitional provisions.

However, we can envisage a situation whereby an existing conventional vehicle might be modified to become an autonomous vehicle, with the technology being retro-fitted to the vehicle. The list of motor vehicles covered by the Bill needs to anticipate that possibility.
We also suggest including a minimum revision period for the list, given the pace at which the applicable vehicles might come onto the market.

Clause 2: Liability of insurers etc where accident caused by automated vehicle; Clause 3: Contributory negligence etc and Clause 5: Right of insurer etc to claim against person responsible for accident

Clause 2 talks of the “vehicle” rather than the “driver” being insured. What about the situation where a vehicle has been adapted for autonomous use. In that situation the driver of the vehicle may already hold conventional motor insurance. As soon as the adaptation was installed, the “vehicle” would need the insurance envisaged under this Bill. There is currently no provision to require the registered keeper to ensure appropriate insurance for the vehicle whilst operating as an autonomous vehicle. Arguably s. 143 of the Road Traffic Act 1988 might need further amendment.

We consider that Clause 2.1 requires further clarification in terms of strict liability. Is the intention here to establish some form of strict liability on the part of the ‘fault’ insurer of the autonomous vehicle or is it rather simply to set out a statutory liability on the part of that same insurer to meet any civil judgment against the owner or driver of that same vehicle or indeed the insurer themselves?

It would be prudent for insurers’ liability to only trigger once liability for the accident as between the injured party (contributory negligence as envisaged by clause 3), the autonomous vehicle and any other vehicles involved had been determined. The insurer would then only be liable for that element of the claim directly attributable to the operation of the autonomous vehicle, paving the way to make a recovery claim against an at-fault manufacturer or software supplier (under clause 5).

The Bill does contemplate, in its definitions at clause 7, the concept of the insurer of an autonomous vehicle only partly ‘causing’ an accident and leaves open the possibility of another person being liable for the accident (Clause 2(7)). However, the operation of clauses 2, 3 and 5 arguably suggest that where an automated vehicle is involved in an accident the insurer of that vehicle is liable to the injured party (subject only to contributory negligence on the part of the injured party) notwithstanding that another person or vehicle may be responsible for the
The wording of clause 5 then provides the insurer with the right of recovery against any other responsible person (apart from the injured party) i.e. another person, another vehicle or the manufacturer / software provider etc. This places a significant administrative and financial burden on insurers; organisations already facing the financial brunt of the recent discount rate changes.

If some form of strict liability is intended, how will this apply to where two or more autonomous vehicles are involved and, arguably, more than one of those vehicles ‘caused’ the accident and resultant loss? How would strict liability be shared between the insurers of more than one autonomous vehicle causing the accident?

In this context, how is ‘caused’ defined? Is it enough to simply identify an autonomous vehicle and a collision then resulting in loss and the insurer of the autonomous vehicle be strictly liable? Or is there some measure of how the autonomous vehicle has behaved and whether that materially contributed to the ensuing accident first?

Again, if strict liability, is it intended that the insurer of an autonomous vehicle bear strict liability in all and any circumstances? For example, imagine a pedestrian stepping out into the front nearside quarter of a passing autonomous vehicle and sustaining injury - notwithstanding the autonomous vehicle is behaving on the road to at least the safety standards of a reasonable motorist and could not have avoided that pedestrian - is it intended that the insurer of the same autonomous vehicle be strictly liable? Which legal person is strictly liable, if any, beyond the insurer of the autonomous vehicle? If the liability attaches vicariously to someone in the vehicle, then who? What if there is no driver of the vehicle? What if there are just children in the vehicle and no adult?

Taking the example of strict liability for motor accidents in Germany, is a similar model intended here for autonomous vehicles? If so, the German system has mechanisms for attributing the proportional losses and injuries between motorists, dependent upon how much of the loss their actions have caused? Is a similar system intended here between autonomous and other vehicles?

Is there a risk here of a disparity developing between how the civil and criminal courts treat drivers of non-autonomous vehicles and how they treat autonomous vehicles (and the background insurers of those vehicles)? If autonomous vehicles are largely found at fault in civil cases, notwithstanding the perhaps de facto
negligent driving of other road users involved, will this encourage bad driving - particularly when road users are in close proximity to autonomous vehicles?

If no form of strict liability is intended, is the intention to measure the behaviours of the autonomous vehicle against those of a reasonable motorist in all the circumstances and superimpose an assessment of liability (or otherwise) in negligence against the vehicle itself? If not, who or what is being assessed, against what measure and against which legal person?

As a side point, Clause 3(2) excludes liability where the accident was wholly due to the person in charge of the vehicle allowing the vehicle to drive itself when it was not appropriate to do so. Will guidelines be issued setting out when it would not be appropriate for the vehicle to drive itself?

Clause 4: Accident resulting from unauthorised alterations or failure to update software

It seems that the Bill envisages that where the software or systems of an autonomous vehicle have been tampered with knowingly by the driver or user or where that same driver or user has misapplied those same systems, the background insurer may exclude or limit the insurers’ liability. Does that effect that insurer’s standard RTA statutory liability? If it does, and only the user or driver is then in those circumstances liable to third party non-fault road users for their injury and loss, is it intended that the Uninsured Drivers Agreement then apply? If it arguably would not apply, aside from current breaches of European motor directives, we can envisage situations where the victims of an accident involving a modified autonomous vehicle have no viable person to recover damages from i.e. where the owner of the autonomous vehicle then has insufficient funds to meet those claims personally.

Terminology

The Bill refers to the “vehicle owner”. Section 144 of the Road Traffic Act 1988 refers to the “registered keeper” rather than the owner as committing the offence for failing to have the requisite insurance. It would make sense for the terminology in the present Bill to be consistent. If the intention is to give those who are injured
as a result of an autonomous vehicle clarity over who to pursue a claim against, then registered keeper is easier to identify - just as the insurer is identifiable through the insurer database. Identifying the “owner” might require an injured person to undertake unnecessary and lengthy investigations as the “owner” may not necessarily be the registered keeper.

Additional comments

Aside from the content within the Bill, we also consider there are other issues that have been neglected and need to be addressed, namely the impact of cyber/hacking and consequent data protection concerns/issues. In effect, there may be scenarios where neither the manufacturer is liable nor the insurer of the vehicle is liable and the owner is impecunious.

The Government should also be alive to and explore now the discussion point as to whether claims involving autonomous vehicles are suitable to go through the online Claims Portal, which facilities the process of low value personal injury claims covered by the Ministry of Justice’s pre action protocols.

As the Government is aware, there are costs benefits of claims remaining in the Claims Portal. However, based on the experience to date, and despite best (and ongoing) efforts to achieve a proportionate and fair claims process, we anticipate that claimant solicitors will look to keep automated vehicle road traffic accident (RTA) claims out of the Claims Portal for cost-building purposes. Claimant firms will pursue claims on the basis that they do not contain solely a negligence issue vis a vis the defendant and there could be issues of product liability, allegations of potential defects with the vehicle which would (under the current Rules) render these types of claims as complex and, therefore, not fit for the Claims Portal.

In our view, as a defendant firm, there is no reason why claims involving vehicles that make use of automated vehicle technology cannot remain within the RTA Claims Portal. The defendant’s default positon would be that the Portal should continue to apply to all low value RTA claims (up to £25,000) unless the claimant suggests otherwise, i.e. an allegation of defective product.
Product liability cases are notoriously expensive. Typically, expert engineering evidence would be necessary. Therefore, one consideration to highlight now would be to amend the protocol to ensure the claimant’s claim for damages remains in the Claims Portal and the product liability aspect be left out - with a subrogated claim being brought against the relevant manufacturer/producer of the product (similar to the way credit hire claims are currently dealt with). This would not represent a significant amendment. The wider context and objective to continue to seek ways to drive out bad behaviours should, however, remain an integral part of the Government’s ongoing regulatory review and discussion with industry.

**Conclusion**

Following last year’s consultation, the Government seemed to suggest that drivers would be expected to purchase a combination of compulsory motor insurance and top-up product liability cover. Given that this Bill moves towards the adoption of a single insurer model the Government’s intention needs clarifying to ensure that the Bill appropriately reflects Government’s intentions as to how they envisage insurers’ liability operating in practice.

Insurance practitioners are used to the concept of scenario testing, whereby insurers, brokers and corporate policyholders discuss how the policy will operate in particular scenarios. This enables a swift understanding on the part of all involved in the insurance contract exactly what is covered and in what situation. From discussion with Iain Forbes with the CCAV we are aware that they would welcome such scenario testing and are happy to assist with that from a legal liability perspective.

We have long maintained that a working group comprised of insurers, regulators and manufacturers/software providers should be set up to co-ordinate the UK’s activities in this sector. Such a group would be ideally placed to conduct the scenario testing. In our view such scenario testing should be undertaken on the Bill in its present form to ensure that all foreseeable scenarios have been “stress tested” under the current wording.