

Law Commission and Scottish Law Commission:

Automated Vehicles: A joint preliminary consultation paper

Response from the Motor Accident Solicitors Society

February 2019

This response is prepared on behalf of the Motor Accident Solicitors Society (MASS) and submitted by the Chairman, Paul Nicholls.

MASS is a Society of solicitors acting for the victims of motor accidents, including those involving personal injury (PI). MASS has 110 solicitor firm Members, representing approximately 2000 claims handlers. We estimate that member firms conduct in the region of 400,000 PI motor accident claims annually on behalf of the victims of those accidents. The Society's membership is spread throughout the United Kingdom.

The objective of the Society is to promote the best interests of the motor accident victim. This is central, and core to our activity. We seek to promote only those policy and other objectives which are consistent with the best interests of the accident victim. We seek to set aside any self interest in promoting these arguments, recognising that we are in a position of trust, and best placed to observe the best interests of motor accident PI victims first hand. We are a not for profit organisation, which requires specialism in motor accident claimant work as a pre-requisite for membership. We also have a Code of Conduct which member firms are required to abide by, which is directed to the best interests of the motor accident victim.

Contact:

If you have any queries or would like further information, please contact at first instance - Jane Loney at:

MASS
19-20 St Augustines Parade
Bristol. BS1 4UL

Tel: 0117 925 9604
Email: jane@mass.org.uk
www.mass.org.uk

Consultation Questions and Responses

CHAPTER 3: HUMAN FACTORS

A new role in driving automation: the “user-in-charge”

Question 1

Do you agree that:

(1) All vehicles which "drive themselves" within the meaning of the Automated and Electric Vehicles Act 2018 should have a user-in-charge in a position to operate the controls, unless the vehicle is specifically authorised as able to function safely without one?

(2) The user-in-charge: (a) must be qualified and fit to drive; (b) would not be a driver for purposes of civil and criminal law while the automated driving system is engaged; but (c) would assume the responsibilities of a driver after confirming that they are taking over the controls, subject to the exception in (3) below?

(3) If the user-in-charge takes control to mitigate a 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.

- 1 Yes.
- 2 Yes.
- 3 Yes.

Question 2

We seek views on whether the label “user-in-charge” conveys its intended meaning.

Yes, we think it does.

Question 3

We seek views on whether it should be a criminal offence for a user-in-charge who is subjectively aware of a risk of serious injury to fail to take reasonable steps to avert that risk.

We agree that it appears compatible with broader principles of criminal law for it to be a criminal offence.

When would a user-in-charge not be necessary?

Question 4

We seek views on how automated driving systems can operate safely and effectively in the absence of a user-in-charge.

We agree with the concerns expressed in the consultation that complex issues will arise, and it is difficult at this relatively early stage of development of fully automated technologies to predict what rules will be required.

Question 5

Do you agree that powers should be made available to approve automated vehicles as able to operate without a user-in-charge?

Yes.

When should secondary activities be permitted?

Question 6

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

Question 7

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

It is very difficult to give a definitive answer in the abstract. The issue seems to be by what mechanism the vehicle alerts the driver to the need for intervention and how successful that would be. If SAE Level 3 is safe except where the need for driver intervention arises and the means of alerting the driver to this is sufficient to ensure that the driver's attention is attracted if he is checking email, texting or emailing on his smartphone, or having a nap. The German approach seems sensible. In practice it is going to be very difficult to prevent drivers from engaging in other activities if they do not perceive any need to give attention to what the vehicle is doing.

CHAPTER 4: REGULATING VEHICLE STANDARDS PRE-PLACEMENT

A new safety assurance scheme

Question 8

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; or (b) in vehicles manufactured in limited numbers (a "small series")?

(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?

1 Yes.

2 Yes.

3 Yes.

Question 9

Do you agree that every automated driving system (ADS) should be backed by an entity (ADSE) which takes responsibility for the safety of the system?

Yes.

Question 10

We seek views on how far should a new safety assurance system be based on accrediting the developers' own systems, and how far should it involve third party testing.

We do not have any expertise in vehicle testing. We can see that the requirement for pre-market approval in every case could be resource intensive and could limit innovation. Perhaps a system involving accreditation and the pre-market third party testing only where the relevant government agency had concerns and felt that testing was necessary.

Question 11

We seek views on how the safety assurance scheme could best work with local agencies to ensure that is sensitive to local conditions.

We do not have enough knowledge about how local highway authorities currently operate to comment.

CHAPTER 5: REGULATING SAFETY ON THE ROADS

A new organisational structure?

Question 12

If there is to be a new safety assurance scheme to authorise automated driving systems before they are allowed onto the roads, should the agency also have responsibilities for safety of these systems following deployment? If so, should the organisation have responsibilities for:

- (1) regulating consumer and marketing materials?
- (2) market surveillance
- (3) roadworthiness tests?

We seek views on whether the agency's responsibilities in these three areas should extend to advanced driver assistance systems.

Yes, the safety assurance scheme should have responsibility for safety following deployment and for regulating consumer and market materials, for market surveillance and for roadworthiness tests.

Driver training

Question 13

Is there a need to provide drivers with additional training on advanced driver assistance systems?

If so, can this be met on a voluntary basis, through incentives offered by insurers?

It is extremely difficult to answer this question in general terms. Some advanced systems might be sufficiently complex to warrant training, others not. We do not think that there is a general need for additional training but it would make sense for some features for manufacturers and insurers to offer training and perhaps for cheaper insurance to be offered to those who have undergone training.

Accident investigation

Question 14

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 setting up an AIB independent of the police would be a sensible approach.

Setting and monitoring a safety standard

Question 15

- (1) Do you agree that the new safety agency should monitor the accident rate of highly automated vehicles which drive themselves, compared with human drivers?
- (2) We seek views on whether there is also a need to monitor the accident rates of advanced driver assistance systems.

- 1 Yes.
- 2 Yes.

The technical challenges of monitoring accident rates

Question 16

- (1) What are the challenges of comparing the accident rates of automated driving systems with that of human drivers?
- (2) Are existing sources of data sufficient to allow meaningful comparisons? Alternatively, are new obligations to report accidents needed?

We believe there does need to be new obligations on drivers/operators and insurers to notify all collisions to a central database. In order to draw meaningful conclusions from the MI, the information collected needs to be as specific as possible as to the nature and cause of collisions as well as consequences.

CHAPTER 6: CIVIL LIABILITY

Is there a need for further review?

Question 17

We seek views on whether there is a need for further guidance or clarification on Part 1 of Automated and Electric Vehicles Act 2018 in the following areas:

- (1) Are sections 3(1) and 6(3) on contributory negligence sufficiently clear?
- (2) Do you agree that the issue of causation can be left to the courts, or is there a need for guidance on the meaning of causation in section 2?
- (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 or the insurer about the alleged incident within a set period, so that data can be preserved?
 - (b) how long should that period be?

- (1) Sections 3(1) and 6(3) are quite convoluted but we feel the intention is clear and would enable the courts to draw reasonable parallels under existing contributory negligence case law.
- (2) We agree that it can be left to the courts.
- (3) We would be opposed to any attempt to impose a different limitation period on claimants injured by automated vehicles. The responsibility to store relevant data should lie with the operators and insurers for the vehicle. We accept that this could cause evidential problems in the very small percentage of cases where a valid claim is brought towards the end of a limitation period, but the victim of the accident should not be penalised.

Civil liability of manufacturers and retailers: Implications

Question 18

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?

Yes.

Question 19

Do any other issues concerned with the law of product or retailer liability need to be addressed to ensure the safe deployment of driving automation?

The report appears to cover all the issues.

CHAPTER 7: CRIMINAL LIABILITY

Offences incompatible with automated driving

Question 20

We seek views on whether regulation 107 of the Road Vehicles (Construction and Use) Regulations 1986 should be amended, to exempt vehicles which are controlled by an authorised automated driving system.

Yes.

Question 21

Do other offences need amendment because they are incompatible with automated driving?

Not that we can identify.

Offences relating to the way a vehicle is driven

Question 22

Do you agree that where a vehicle is:
(1) listed as capable of driving itself under section 1 of the Automated and Electric Vehicles Act 2018; and
(2) has its automated driving system correctly engaged; the law should provide that the human user is not a driver for the purposes of criminal offences arising from the dynamic driving task?

Yes.

Question 23

Do you agree that, rather than being considered to be a driver, a user-in-charge should be subject to specific criminal offences? (These offences might include, for example, the requirement to take reasonable steps to avoid an accident, where the user-in-charge is subjectively aware of the risk of serious injury (as discussed in paragraphs 3.47 to 3.57)).

Yes.

Question 24

Do you agree that:

(1) a registered keeper who receives a notice of intended prosecution should be required to state if the vehicle was driving itself at the time and (if so) to authorise data to be provided to the police?

(2) where the problem appears to lie with the automated driving system (ADS) the police should refer the matter to the regulatory authority for investigation?

(3) where the ADS has acted in a way which would be a criminal offence if done by a human driver, the regulatory authority should be able to apply a range of regulatory sanctions to the entity behind the ADS?

(4) the regulatory sanctions should include improvement notices, fines and suspension or withdrawal of ADS approval?

1. Yes.
2. Yes.
3. Yes.
4. Yes.

Responsibilities of “users-in-charge”

Question 25

Do you agree that where a vehicle is listed as only safe to drive itself with a user-in-charge, it should be a criminal offence for the person able to operate the controls (“the user-in-charge”):

(1) not to hold a driving licence for the vehicle;

(2) to be disqualified from driving; (3) to have eyesight which fails to comply with the prescribed requirements for driving;

(4) to hold a licence where the application included a declaration regarding a disability which the user knew to be false; (5) to be unfit to drive through drink or drugs; or (6) to have alcohol levels over the prescribed limits?

1. Yes.
2. Yes – dependant on the offence, where disqualification is an appropriate sanction.
3. Yes.
4. Yes.
5. Yes.
6. Yes.

Question 26

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, on the premise the person who is carried is aware of the limitation.

Responsibilities for other offences

Question 27

Do you agree that legislation should be amended to clarify that users-in-charge: (1) Are “users” for the purposes of insurance and roadworthiness offences; and (2) Are responsible

for removing vehicles that are stopped in prohibited places, and would commit a criminal offence if they fail to do so?

1. Yes.
2. Yes.

Question 28

We seek views on whether the offences of driving in a prohibited place should be extended to those who set the controls and thus require an automated vehicle to undertake the route.

The question does not provide a definitive parameter. Presumably if a vehicle drives in a prohibited place, an offence may well be committed. What if the prohibited place is unknown, only recently fixed or changed, or temporarily imposed, so that the user may not be aware? A sanction may well be too prescriptive in this regard.

Obligations that pose challenges for automated driving systems

Question 29

Do you agree that legislation should be amended to state that the user-in-charge is responsible for:

- (1) duties following an accident;
- (2) complying with the directions of a police or traffic officer; and
- (3) ensuring that children wear appropriate restraints

1. Yes.
2. Yes.
3. Yes.

Question 30

In the absence of a user-in-charge, we welcome views on how the following duties might be complied with:

- (1) duties following an accident;
- (2) complying with the directions of a police or traffic officer; and
- (3) ensuring that children wear appropriate restraints.

1,2 & 3 are all very difficult to answer, as the circumstances surrounding an accident may well render a vehicle inoperable, or immobile. How would an absent user in charge be in a position to take direction from a police officer? Perhaps an extension of any imposed duty could be 'so far as is reasonably practicable'.

Possibly, a person physically with a child may well ensure correct restraints are fitted, and a duty of guardian imposed for the journey?

Question 31

We seek views on whether there is a need to reform the law in these areas as part of this review.

Yes, a working party should be established to include appropriate stakeholders – insurers, lawyers etc.

Question 32

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, as the law does not presently envisage this scenario – again, a working party would be beneficial.

Question 33

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.

Yes, as the law does not account for such an offence.

CHAPTER 8: INTERFERING WITH AUTOMATED VEHICLES**Question 34**

We seek views on whether the criminal law is adequate to deter interference with automated vehicles. In particular:

- (1) Are any new criminal offences required to cover interference with automated vehicles?
- (2) Even if behaviours are already criminal, are there any advantages to re-enacting the law, so as to clearly label offences of interfering with automated vehicles?

Yes, the current law would provide some limited assistance in terms of criminal damage etc, but clearly, the introduction of automated vehicles would bring to the fore a whole host of unimagined consequences by those previously drafting legislation.

Tampering with vehicles**Question 35**

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. One can imagine that an unspecified offence may well fall into a lacuna, not envisaged by previous drafting. Put simply, any ambiguity will be found quite quickly, and clarification could well be expensive, technical, and lengthy to conclude.

Unauthorised vehicle taking**Question 36**

In England and Wales, section 12 of the Theft Act 1968 covers "joyriding" or taking a conveyance without authority, but does not apply to vehicles which cannot carry a person. This contrasts with the law in Scotland, where the offence of taking and driving away without consent applies to any motor vehicle. Should section 12 of the Theft Act 1968 be extended to any motor vehicle, even those without driving seats?

Yes, again, any ambiguity would need to be cleared.

Causing danger to road users

Question 37

In England and Wales, section 22A(1) of the Road Traffic Act 1988 covers a broad range of interference with vehicles or traffic signs in a way which is obviously dangerous. In Scotland, section 100 of the Roads (Scotland) Act 1984 covers depositing anything on a road, or inscribing or affixing something on a traffic sign. However, it does not cover interfering with other vehicles or moving traffic signs, even if this would raise safety concerns. Should section 22A of the Road Traffic Act 1988 be extended to Scotland?

Please see answer to Q36.

CHAPTER 9: “MACHINE FACTORS” – ADAPTING ROAD RULES FOR ARTIFICIAL INTELLIGENCE DECISION-MAKING

Rules and standards

Question 38

We seek views on how regulators can best collaborate with developers to create road rules which are sufficiently determinate to be formulated in digital code.

A wide forum / pool of development experts should work with both regulators and lawyers. One can only imagine that there will be numerous problems that occur only when matters and scenarios are discussed in detail, and stress tested.

Should automated vehicles ever mount the pavement?

Question 39

We seek views on whether a highly automated vehicle should be programmed so as to allow it to mount the pavement if necessary:

- (1) to avoid collisions;
- (2) to allow emergency vehicles to pass;
- (3) to enable traffic flow;
- (4) in any other circumstances?

Again the ‘so far as is only reasonably practicable’ element should be considered. There are far too many instances where a simple binary rule would be inappropriate. Quite how that would play out in terms of programming, coding, or rule would be a weighty job for a team to consider. The only answer to this is the fact that a reasonable human response would be the best answer - and that any action was reasonable in all the circumstances. We are, however, clearly unqualified to comment on AI programming. Again, quite apart from what could be achieved, the next question to consider is breach of the law – that again may be justified in exceptional circumstances, much depends on the scenario and as to whether a reasonable judgement call was made.

Question 40

We seek views on whether it would be acceptable for a highly automated vehicle to be programmed never to mount the pavement.

Please see our response to Q39. A best and reasonable human response, or simulated response is really the only answer.

Should highly automated vehicles ever exceed speed limits?

Question 41

We seek views on whether there are any circumstances in which an automated driving system should be permitted to exceed the speed limit within current accepted tolerances.

Please see our response to Q39 – there cannot and must not be a simple binary response to this. What happens, for instance, if it was an acceptable explanation that excessive speed was required to miss a fatal collision, or if the occupant of the vehicle were gravely ill?

Edging through pedestrians

Question 42

We seek views on whether it would ever be acceptable for a highly automated vehicle to be programmed to “edge through” pedestrians, so that a pedestrian who does not move faces some chance of being injured. If so, what could be done to ensure that this is done only in appropriate circumstances?

Please see our response to Q39. Again, there is probably not a binary answer – there is not a definitive answer to a question of conjecture.

Avoiding bias in the behaviour of automated driving systems

Question 43

To reduce the risk of bias in the behaviours of automated driving systems, should there be audits of datasets used to train automated driving systems?

Yes, there should be continual audit and monitoring – the system will inevitably take time to bed in, and problems identified and addressed. Technological advancements will also evolve that will need continuous monitoring.

Transparency

Question 44

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

One would expect this to be standard – it would certainly be called for in disclosure in court process if the issue were tried.

Question 45

What other information should be made available?

All monitoring, testing, development notes and policies. Essentially an audit trail.

Future work and next steps

Question 46

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

The subject matter is so ground-breaking and new, that there are bound to be issues that are identified along the way. On the premise that is correct, these should be catalogued and dealt with as they arise.