Stewarts’ Response to the Law Commission Consultation on Autonomous Vehicles
18 February 2019

About Stewarts

Stewarts is an international litigation firm specialising in complex high value disputes. Our practice areas include Personal Injury, Clinical Negligence, International Injury and Aviation. Within these practice areas, the claims we undertake exclusively relate to injuries of the utmost severity or death. Our specialisms are recognised by top-tier rankings in the leading legal directories, Chambers, the Legal 500 and the Times.

Whilst there are many firms of solicitors which do some complex and high-value personal injury litigation, we are one of very few firms in the UK that exclusively specialise in such claims and do not conduct claims relating to non-disabling injuries (aside from the rare scenario when there are secondary claimants involved in the same incident as a claimant with severe injuries).

Introduction

Stewarts 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 ensuring access to justice for our seriously injured clients.

We are concerned regarding the limited scope of the strict liability regime detailed in the Automated and Electric Vehicles Act 2018, which does not extend to semi-automated vehicles, nor to accidents which occur beyond roads or public places in Great Britain. Where an innocent victim is injured in an accident with a vehicle driving in semi-autonomous mode, we do not support the assumption that they be required to pursue costly and complex claims against the technology manufacturers, in order to access compensation. Even for accidents involving vehicles driving themselves, that fall under the AEV Act, we are concerned that true strict liability will not be achieved if the victim has to prove the vehicle caused the accident. We also point out below that, unless the Act is amended, the autonomous vehicle would need to be designed to stop in a safe place if the “user in charge” (if any) did not respond at all or in time to a request from the vehicle to hand over controls. A sustained public education campaign, alongside the appropriate technology, is essential.
A new role in driving automation: the “user-in-charge”

Consultation 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?

Yes.

The AEV Act 2018 relates to vehicles that are ‘capable, in at least some circumstances or situations, of safely driving themselves’ \(^1\) (s(1)). It should be acknowledged that there would only be a need for a ‘user in charge’ when the vehicle is not capable of driving itself, including for a level 4 vehicle, where it can only drive itself for part of the journey (within an ODD).

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.

A sustained public education campaign will be required alongside the appropriate technology (including the monitoring of the user in charge, and appropriate training (see Q13). Predictions have been made of vehicles that, for instance, take themselves off to a charge point or for a service/software update, without any human occupants/user.

(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?

Yes. However, clear laws and guidance are required as to the user in charge taking over controls (including what controls, whether these are limited to braking or steering or simply stopping). It would be reasonable to assume this can be when the AV is no longer driving itself under the AEV Act. It will be important to define when and what controls the user in charge should take. For instance he may be able to brake, but not steer, for example; is that sufficient to assess that the vehicle is no longer driving itself, when the AV is still partly doing so. It is envisaged that at the lower levels (i.e. SAE levels 1-3) the vehicle will not be authorised to operate without a user in charge who remains sufficiently alert to take over the controls. Level 4 & 5 vehicles should not rely on the user in charge taking control and must be able to perform a safe place stop.

However, if (b) is to apply and the user in charge is not deemed to be a ‘driver’ within the meaning of civil and criminal law while the autonomous system is engaged, we would suggest that the terminology needs to be considered and revised, or the Road Traffic Act 1988 completely overhauled.

If the user in charge is deemed not to be in control at the time of the accident, the strict liability provision of the AEV Act as against the insurer of the AV, should apply for victims of

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\(^1\) The Act refers to such vehicles throughout as capable of ‘driving itself’ and the Act confirms in s8) Interpretation that a vehicle is “driving itself” if it is operating in a mode in which it is not being controlled, and does not need to be monitored, by an individual s(8)(1)(a).
accidents in those circumstances. The occupants of the vehicle, including any user in charge, could be undertaking a secondary activity. So unless the Act is amended, the AV would need to be designed to stop in a safe place if the user in charge (if any) did not respond at all or in time to a request from the vehicle to hand over controls. Liability must remain with the AV insurer under the Act unless and until a user in charge has positively and unequivocally taken control of the vehicle. We therefore agree in principle with the draft Uniform State Laws that the automated driving system continues to perform the entire dynamic driving task ‘until a human driver or operator terminates the performance’.

The AV insurer should have the right to recover their outlay to the victim from the vehicle manufacturer or “user in charge” if they can show fault on the part of either, but the victim ought not to be dragged into such disputes.

(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.

Yes. Victims of such accidents should be compensated without being subjected to liability arguments about whether the user in charge could or should have prevented the accident. If the user in charge is injured, they should be afforded the same protection as a third party victim, as is the intention under the AEV Act, subject to any contributory negligence arguments against him/her.

Consultation Question 2

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

Yes.

Consultation 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.

Yes, but only if it is apparent to the user in charge that the vehicle is malfunctioning. There is a danger here that placing a broader criminal liability on the shoulders of users in charge may cause them to try to intervene in a manner that is more dangerous than leaving the AV to deal with the situation. This risk is heightened by the fact that they may not have been paying full attention in the moments leading up to the situation in question.

If the user is aware of a malfunction creating a risk of serious injury, then that user should take steps to avert it. However, there will no doubt be circumstances when the user did not know or could not have known the severity of a potential incident and in the same way such cases are decided today, the court or jury should assess the awareness of the user in charge.

This is a finely balanced concept as to how serious any failure was; what is the threshold by which any action should have been taken to be judged? Is the standard one of the reasonable ‘driver’ in the conventional sense? There is likely to be a difference between users of level 3 vehicles (who may be required to monitor and take control of the vehicle), as distinct from users of level 4 and 5 vehicles who were not, in the run up to the accident, required to monitor the AV’s driving and hence may require a greater reaction time.

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2 Para 3.43 of the Law Commission Paper
When would a user-in-charge not be necessary?

Consultation Question 4

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

High levels of safety testing and approval will be required before level 5 vehicles can be authorised for use without a user in charge. More dialogue is required between manufacturers and regulators as to how automated driving systems can operate safely and effectively without a user in charge.

Weather conditions and diversions are noted in the consultation paper as ‘challenges’ to automated driving, and we suggest that if these two factors cannot be recognised and dealt with by the vehicle alone, they cannot be operated without a user in charge. The same would apply to a whole raft of other hazards (e.g. animals and objects in the road) that can and do arise on the roads.

Consultation 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. The Secretary of State is required to keep a list of vehicles which are capable of driving themselves, this can only be in fully autonomous mode. If the car is considered to be ‘fully’ autonomous, has been rigorously safety tested, approved and deemed fit for the road, such vehicles should be on the register and therefore able to operate without a user in charge.

When should secondary activities be permitted?

Consultation Question 6

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.

Consultation 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?

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.

CHAPTER 4: REGULATING VEHICLE STANDARDS PRE-PLACEMENT

A new safety assurance scheme

Consultation 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?

Yes, in principle.

Consultation 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, every automated vehicle should be authorised at either international or national level\(^3\). Such a system has potential to minimise disputes between manufacturer and developer, or importer and effectively agreed to assume ongoing responsibility for the AV system. If public confidence is going to increase, such schemes would assist.

\(^3\) Para 4.105 of the Law Commission Consultation Paper
Consultation 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 express a view on this question.

Consultation 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 express a view on this question.

CHAPTER 5: REGULATING SAFETY ON THE ROADS

A new organisational structure?

Consultation 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 same organisation should also have responsibilities for monitoring the safety of driver assistance systems (at SAE level 2) as well as highly automated vehicles driving themselves. It is possible that a driver assist system may not be able to act in the same way a human driver might, for example, where changing lanes; can they anticipate very fast moving traffic, or an object falling from another vehicle, in time to ‘decide’ not to make the manoeuvre? If the vehicles are marketed as able to take this kind of decision (rather than the human) they should be monitored for safety levels once they are on the roads.

Driver training

Consultation 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?

Yes, especially for level 2 and 3 vehicles due to the 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.

The Highway Code should be amended to require drivers to fully familiarise themselves with any automated systems they use (whether intentionally or inadvertently). The driving test
should be amended over time to address any generic issues, including how human drivers can expect driverless vehicles to behave (e.g. potentially performing “safe-stops”, driving closer to the kerb and other vehicles, very rapidly braking to avoid collisions etc.).

**Accident investigation**

**Consultation 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 support the inception of a new investigation unit specialist to road accidents. Whilst we appreciate that may appear costly, it will be difficult and perhaps just as costly for each regional police force to develop the necessary expertise, as there will be a limited number of AV accidents in their area. A new AIB for AV accidents would also help develop and maintain public confidence. They should, as the AAIB does for air accidents, have the power and remit to make public safety recommendations following their investigations that should then prompt action by manufacturers and the regulator that will reduce the chances of further similar accidents.

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 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.

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

**Setting and monitoring a safety standard**

**Consultation 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.

We agree a new safety agency should monitor and report on accident rates for all levels of AV.

**The technical challenges of monitoring accident rates**

**Consultation Question 16**

(1) What are the challenges of comparing the accident rates of automated driving systems with that of human drivers?

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8 [2014] EWCA Civ 257 that a report produced by the Air Accident Investigation Branch for the DoT was admissible as evidence in a negligence action brought against the pilot of an aircraft which had crashed
(2) Are existing sources of data sufficient to allow meaningful comparisons? Alternatively, are new obligations to report accidents needed?

Manufacturers and Insurers would have access to the accident data and they should be required to share it with the new safety agency and the new AV AIB. 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.

CHAPTER 6: CIVIL LIABILITY

Is there a need for further review?

Consultation 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?

There are clear parallels between the Consumer Protection Act 1987 and the AEV Act 2018 in relation to strict liability, with a provision for a defence of contributory negligence. s2(1) states that the AV insurer is liable where an accident is ‘caused’ by an AV, which is confirmed in s8(3) to include accidents partly caused by an AV. It would be clearer if section 2(1) were revised to confirm that insurers are when the damage is partly caused by an AV.

Sections 3(1) and section 6(3) of the Act are clear insofar as confirming that the usual rules of contributory negligence would apply, i.e. if the injured party is partly at fault for the damage, they should bear some contributory negligence. However, there is confusion caused by the reference to the applicability of contributory negligence in the manner as ‘if the behaviour of the AV were the fault of the person made liable for the damage by s2 of this Act’ in section 6(3), suggesting that the Court would have to assess the behaviour of the AV in the way it would assess a human in a conventional vehicle.

Contributory negligence involves apportioning blameworthiness and the causative potency of the acts or omissions of the parties. The approach of the courts tends to be protective of the more vulnerable party5 and the Act should not inhibit the ability of the Court to continue that approach. This issue was considered in Eagle v Chambers [2004] EWCA Civ 1033, approved by the Supreme Court in Jackson v Murray6 that ‘the court had consistently imposed a high burden upon the drivers of cars, to reflect the potentially dangerous nature of driving’. It could be said that an AV that has been marketed as having certain safety features, that do not work in the way advertised, may be viewed as more blameworthy or having more causative potency than a human driver who had made a simple human error.

A related issue is that pedestrians and other vulnerable road users may be caught out by certain features or functions of AVs. For instance the silence of electric cars can create an enhanced risk of vulnerable road users not noticing their approach, particularly if they have a visual impairment. A further conundrum would be if a pedestrian thought that eye contact with the user in charge, who it transpires was not driving, meant it was safe to cross.

5 Eagles v Chambers referenced in Paper
6 [2015] UKSC 15
For the avoidance of doubt we do not consider a 100% contributory negligence finding could validly be made.\(^7\)

(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?

There is a need for guidance as too many claims will be prolonged in the absence of further guidance and injured parties should not be put to the cost and challenge of proving causation.

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 is not clear what standard of care is required of the autonomous vehicle; can it be one of a 'reasonably careful driver' where the driver is not necessarily engaged with the driving task? If there is a software malfunction, where does that leave the innocent victim on compensation if the insurer refuses to indemnify the claim due to a contributory negligence argument, against driver or victim?

The wording of s3(2) poses several liability conundrums. We consider there needs to be further guidance particularly on when it is ‘not appropriate’ to allow a car to ‘drive itself’ to ensure user in charge of AV's understand their responsibilities and so injured victims are afforded sufficient protection. As referred to in answer to question 1, level 4 and 5 vehicles must be capable of performing a safe stop without the intervention of the user in charge. That applies even if at that moment in time it had become inappropriate for the vehicle to continue to drive itself.

Further risks arise for single vehicle accidents; for example, the car is driving itself but fails to recognise an obstacle in the road and does not avoid it, causing the ‘driver’ injury. Is it right to assume that the car should not have been driving itself, when it would normally have been appropriate to do so? Should the driver or the AV be to blame for this? ‘Drivers’ of AVs in particular would be at risk of delayed compensation if they cannot show the vehicle itself was at fault.

This provision of the Act purports to only relate to scenarios when it was inappropriate to allow the AV to begin driving itself. Hopefully that will be construed as not applying in the above scenarios that develop mid journey. We would point out that the manufacturers, regulators and safety agency really ought to be able to ensure that level 4 and 5 vehicles simply could not begin driving themselves when it was not safe to do so (e.g. level 4 automation could only be engaged in designated areas).

It would be prudent for victims and insurers to have clear guidance on whether any accident involving an AV should be dealt with by the AV insurer, which seems to be suggested by the AEV Act itself and would be a true system of strict liability.

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\(^7\) See Anderson v Newham College [2002] EWCA Civ 505 where the CA found there could not be a finding of 100% contributory negligence, and Boyle v Kodak [1969] 1 WLR 661 where the total blame fell upon the Claimant, there was no liability on the Defendant that could be apportioned.
We endorse APIL’s comments on motor insurance under s152 RTA and voidable policies and ask the Commission give due consideration to this aspect.

(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?

It is essential that insurers and manufacturers retain and share that accident data with each other, the victim and the new AV AIB. We agree that makes sense to standardise the format of the data on event data recorders to ensure it covers a minimum data set which can be easily downloaded. Accident related data must be capable of being identified and stored in a manner distinct from the usual data created by an AV in the general course of its journeys. The AV AIB should be involved in setting the parameters of such accident related data. Given the ultimate aim of AVs on the roads is to reduce accidents; the volume of retained data should reduce over time.

Notification to the police/AV AIB is a good starting point, though we would question the procedure for victims thereafter obtaining that data. At present, this is a lengthy process.

It would be reasonable to expect insurers and manufacturers to keep the data for 3 years from the date of accident, being the limitation period for bringing a personal injury claim, as a minimum. It should be noted however, that limitation periods can be longer than 3 years (for children and those lacking mental capacity) and this should be considered.

It would be unfair to place the responsibility for reporting an accident upon the victim or for there to be an absolute requirement for the victim to do so in order to bring a claim; it would be an impingement to their civil rights and access to justice. The current law requires drivers to report an accident to police, and we see no reason why this should not apply to the ‘user in charge’ where possible. It should be a criminal offence for anyone to delete or tamper with that accident related data or any systems to upload it to the authorities. As part of the authorisation process, manufacturers should be required to demonstrate that their AVs can and will download the accident related data to the AV AIB.

Civil liability of manufacturers and retailers: Implications

Consultation 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?

The Consumer Protection Act 1987 imposes a heavily caveated form of strict liability on defective products. Whilst disputes will likely take place between manufacturers, insurers and retailers, they should not be of concern to the injured victim, who should retain their direct right of action as against the insurer under Part 2 of the AEV Act. It is surely a decision for the AV insurer as to whether, and how, to pursue a CPA claim. Such a claim should not be required of the innocent victim where insurer and software manufacturer dispute the safety of the software.

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8 Para 6.55 of Law Commission paper
The motor insurance industry, together with the requisite manufacturers should make appropriate arrangements as to how liability/recovery issues may be dealt with between them, save the manufacturer confirming it might take responsibility for all accidents involving its software (in the manner Volvo has done).

**Consultation 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?**

There is a serious gap in the AEV Act where it fails to deal with semi-autonomous features of an AV. This will create complex liability disputes and result in injustice in some cases. The existing law may allow insurers to suggest that the blame for an incident or injury lies with the manufacturer, or whoever performed the last service in failing to calibrate sensors or update software. The victim may be required to consider a highly technical Consumer Protection Act claim for product defect in tandem with negligence claims against both the driver and the servicer; so incurring costs and risk of pursuing three or more defendants. These are serious considerations for injured parties, particularly in the period where AVs are on the roads, but the AEV Act does not apply as the vehicle is question is not fully autonomous.

Consumers will need to be given appropriate information about using an AV, whether as a driver or passenger. For example, safety critical software updates need to be installed how will the owner be informed about this? Will the vehicles work if they are not updated? Public confidence may be improved with sufficient information given to consumers on the capacity of the AV – can it fully ‘drive itself’, is ‘autopilot’ really what it says, can the human effectively be a passenger in this vehicle and if so, in what circumstances? The manufacturers should be absolutely clear on the capabilities of the vehicle and indeed any risk in not updating the relevant software.

We refer to Dr Nicholas Bevan’s comments on some of these issues in his NLJ Article 'Driverless Vehicles: A future perfect?’ in November 2018.

**CHAPTER 7: CRIMINAL LIABILITY**

**Offences incompatible with automated driving**

**Consultation 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.

We do not express a view on this question.

**Consultation Question 21**

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

We do not express a view on this question.

**Offences relating to the way a vehicle is driven**

**Consultation 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
Consultation 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, in principle. We refer to our answer to Q3 in relation to the requirements of a user in charge.

Consultation 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?

We do not express a view on this question.

Responsibilities of “users-in-charge”

Consultation 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?

Yes. Please see our answer to Q1.
Consultation 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. Though we again would 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, in line with the current similar law in relation to conventional vehicles. 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.

Responsibilities for other offences

Consultation 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?

Yes. Though we acknowledge that the Law Commission confirm that where automated vehicles are able to drive themselves without a user in charge, new solutions must be found.

Consultation 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.

Yes

Obligations that pose challenges for automated driving systems

Consultation 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?

Yes.

Consultation 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.
We accept there is difficulty in covering the above factors when no human driver or user in charge is in the vehicle at the time of the accident. We would tentatively suggest that the factors must be incorporated in to the vehicle technology. i.e. the vehicle will not move where children are not wearing appropriate restraints, the vehicle is programmed to stop at the scene of an accident, and potentially display insurance details within the vehicle for police or witnesses to take. One potential idea would be for there to be an ‘accident mode’ whereby the vehicle can be controlled by attending police or investigators. We would defer to the developers in this regard, but suggest a further consultation would need to be undertaken on these points when the issues are clearer and fully autonomous driving a near reality.

**Consultation Question 31**

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

We do not express a view on this question.

**Aggravated offences**

**Consultation 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.

**Consultation 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.

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\(^9\).

**CHAPTER 8: INTERFERING WITH AUTOMATED VEHICLES**

**Consultation 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?

We express no view on this question.

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\(^9\) Para 7.123 of the Paper
Tampering with vehicles

Consultation 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. 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.

Unauthorised vehicle taking

Consultation 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?

There are several issues around making laws drafted in a completely different time (1968) or like the Road Traffic Act 1988 mentioned below given that the laws were drafted in a time in which autonomous vehicles were not anticipated. These laws are simply incompatible with the advent of autonomous technology. We do not consider they should be extended/re-drafted, but more likely require a full scale overhaul.

The ideal scenario would be for legislation such as the Theft Act and RTA to be redrafted to take account of this new age of technology, with which our current legislation simply cannot keep pace.

Causing danger to road users

Consultation 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 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?

We express no view on this question.

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

Rules and standards

Consultation Question 38

We seek views on how regulators can best collaborate with developers to create roadrules which are sufficiently determinate to be formulated in digital code.
We express no view on this question.

**Should automated vehicles ever mount the pavement?**

**Consultation 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?

Autonomous vehicles should be programmed to deal with various scenarios whereby mounting a pavement would be required, as per the above. If the vehicle is programmed to never mount a pavement, it will unlikely be able to share roads easily with conventional vehicles, and importantly, emergency vehicles. The technology should be such that if there is a pedestrian or obstacle on the pavement, the vehicle should be able to select the next safest place to do so, if required, much like a conventional human driver would do.

**Consultation Question 40**

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

No. See our answer to Q39 above.

**Should highly automated vehicles ever exceed speed limits?**

**Consultation 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.

This is a matter of government policy. Owners of AVs would expect to be able to drive their vehicles in a manner similar to that of which they would drive their usual vehicle, however, it is accepted that driver attitudes to speed differ, and whether a driver is ‘dangerous’ is something dealt with by the courts. Whilst it is not anticipated that AVs will mirror human bad habits, the reality on the roads is that sometimes exceeding the speed limit is necessary, for example, to help traffic flow.

There are certain scenarios in which exceeding the speed limit may avoid an accident, or allow an emergency vehicle to pass.

It is for the government to set a framework on speed in which AVs can function, and ultimately prosper, with reference to what the standard for AVs should be; one which is better than a human driver, or equivalent to it.

**Edging through pedestrians**

**Consultation 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?

We appreciate concerns that an obstacle might cause an AV to stop, potentially hindering progress if a series of crowds are in its path, or pedestrians jump in front of an AV on purpose. The suggestion of a human taking control in such scenarios is not a realistic one in level 5 driving; the vehicle should be able to take the appropriate action or decision to avoid casualties. In any event some AVs with advanced sensors may be much more capable of dealing with this scenario than a human driver. If a pedestrian fails to get out of the path of the vehicle, the pedestrian risks injury in the same manner it would as against a conventional vehicle. An AV should have appropriate programming and functions (e.g. emitting sounds/audible warnings) to deal with such instances. It is not practical for AVs to avoid crowds of people, for example, groups of children crossing a road, exiting a sports stadium with crowds showing in most directions and therefore not avoidable. We would suggest the AV would have to be capable of edging, but perhaps different programming is required to ensure minimal risk of injury whilst allowing the vehicle to continue its journey.

Avoiding bias in the behaviour of automated driving systems

Consultation 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?

We note the concepts of ethical decision making noted in the Law Commission Paper and the related concern as to how programmers will weight up competing interests, when they may be forced to make life or death decisions. We would agree that any datasets would need to cover a broad range of drivers, and road users generally to enable all relevant groups to be considered regardless of gender, race or other protected characteristics.

Transparency

Consultation 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)?

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).

Consultation Question 45

What other information should be made available?

Future work and next steps

Consultation 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 we consider to be 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 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 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 uninsured 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.