

Stewarts response to the Law Commission Consultation on Automated Vehicles: Passenger Services and Public Transport

Introduction

Stewarts is the UK's largest litigation only solicitors' firm and specialises in high value and complex disputes. The firm acts for both corporate and individual clients and has leading and specialist departments in aviation and travel, clinical negligence, commercial litigation, competition litigation, divorce and family, employment, international arbitration, investor protection litigation, personal injury, tax litigation and trust and probate litigation.

Stewarts has strategic partnerships in place with other specialist solicitors' firms across the world, enabling its clients to take a global approach to litigation. The firm is top ranked in both the Legal 500 and Chambers and Partners, the leading guides to the legal profession in the United Kingdom.

Stewarts welcomes the opportunity to respond to the Law Commission Consultation (2) on Automated Vehicles: Passenger Services and Public Transport.

HARPS present a need and an opportunity to legislate for the first time on issues that have not previously been considered by parliament or the judiciary. Whilst we accept that current legislation can provide some guidance on a broad basis for the use of passenger vehicles, it is essential that brand new legislation is implemented to deal with the technological advances and new issues presented by the advent of fully autonomous driving. Legislation and regulation of HARPS in relation to those with disabilities should be considered with particular care in order so as not to reduce confidence in HARPS and to have the undesired effect of a decrease in mobility for vulnerable users. We question the appropriateness of the Road Traffic Act (RTA) 1988 when looking at the use of HARPS. As stated in our response to consultation 1, consider the RTA unfit for purpose and in need of an overhaul if we are to suitably address the reality of autonomous driving on our roads. In addition, public education remains crucial to the successful implementation of AVs in the UK.

Our response is limited to the below consultation questions:

Chapter 9: Consultation Questions

CHAPTER 3: OPERATOR LICENSING – A SINGLE NATIONAL SYSTEM

A single national scheme

Consultation Question 1 (Paragraph 3.82): Do you agree that Highly Automated Road Passenger Services (HARPS) should be subject to a single national system of operator licensing?

Yes and any such regulation must be standardised as far as possible across the various passenger vehicle types. Given the assumption that passengers will be travelling in any type of HARPS, without a 'driver' or 'user in charge', a single system is essential to avoid confusion and delays in accessing compensation for victims of accidents where a HARPS vehicle is involved.

It is sensible that one organisation is responsible for regulating and overseeing the updating, insuring and maintenance of these vehicles. We discuss these issues further below in the relevant chapter.

Consultation Question 2 (Paragraph 3.86): Do you agree that there should be a national scheme of basic safety standards for operating a HARPS?

Yes.

CHAPTER 4: OPERATOR LICENSING – SCOPE AND CONTENT

Scope of the new scheme

Consultation Question 3 (Paragraph 4.33):

Do you agree that a HARPS operator licence should be required by any business which:

(1) carries passengers for hire or reward;

(2) using highly automated vehicles;

(3) on a road;

(4) without a human driver or user-in-charge in the vehicle (or in line of sight of the vehicle)?

Yes.

The Consultation paper splits out the various terms (at items (1) – (4)) in this definition; however, we are concerned about the restrictions regarding the definition of a 'road' which is to follow the definition in the Road Traffic Act 1988 (RTA). Whilst we accept that HARPS will only be operating in an ODD, without human supervision (and therefore without any human with legal responsibility for the passengers' safety), provision should be made for the future and/or a time when the vehicles are able to operate on a wider scale.

For the purposes of HARPS, the Law Commission has elected to use the definition of the narrower category of road as defined in the RTA which states that a road as 'any highway or other road to which the public has access, and includes bridges over which a road passes'. Whilst the Law Commission state that most places where HARPS will drive will be roads¹, adoption of this narrower definition will cause confusion and dispute for those injured when travelling in a HARPS outside those places covered by this definition. It must be foreseeable that HARPS will in the future sometimes operate outside of a 'road' as defined here. We suggest the definition should be wider, and more in line with the 'roads and public places' RTA definition which seems to have been discounted by the Law Commission, for reasons which are unclear². The wider definition brings its own difficulties in relation to what constitutes a 'road' for the purposes of national (as opposed to EU) legislation, and we would therefore suggest that the EU principles should be more closely referenced given more recent jurisprudence including the case of *Vnuk*³ as to use and location⁴. Notwithstanding the future of the Motor Insurers Directive⁵ following Brexit, and in light of the fact that the RTA needs amending to

¹ Para 4.29 of the Consultation Paper

² Para 4.16 of the Consultation Paper

³ *Damijan Vnuk v Zavarovalnic Triglav C-162/13 and Torreiro, C-334/16*

⁴ The European Court of Justice has clarified that motor vehicles are intended normally to serve as means of transport, irrespective of such vehicle's characteristics, and it has clarified that the use of such vehicles covers any use of a vehicle consistent with its normal function as a means of transport, **irrespective of the terrain** on which the motor vehicle is used and of whether it is stationary or in motion.

⁵ Directive 2009/103/EC

bring it in line with European law⁶ we do not consider that restrictions should be placed on either use or location of HARPS. The limitation to 'road' as determined in the paper, will likely cause more disputes in the future and require reassessment or updating to bring the law up to date with the use of the vehicles it is intended to cover.

We also suggest that HARPS could operate in rural areas /on private land, for example when collecting or dropping off passengers, and these areas should be appropriately covered by the legislation if HARPS are to have the desired impact on accessibility and social mobility.

Consultation Question 4 (Paragraph 4.34): Is the concept of "carrying passengers for hire or reward" sufficiently clear?

Yes.

Operator requirements

Consultation Question 7 (Paragraph 4.72):

Do you agree that applicants for a HARPS operator licence should show that they:

- (1) are of good repute;**
- (2) have appropriate financial standing;**
- (3) have suitable premises, including a stable establishment in Great Britain; and**
- (4) have a suitable transport manager to oversee operations?**

Yes and have unlimited insurance as required under the RTA.

Adequate arrangements for maintenance

Consultation Question 9 (Paragraph 4.89):

Do you agree that HARPS operators should:

- (1) be under a legal obligation to ensure roadworthiness; and**
- (2) demonstrate "adequate facilities or arrangements" for maintaining vehicles and operating systems "in a fit and serviceable condition"?**

Yes. It would clearly be inappropriate to place HARPS on our roads to transport passengers without a clear person/body responsible for roadworthiness and maintenance of operating systems. We agree with the proposal to require maintenance of such vehicles to be subject to statutory guidance, and suggest HARPS should not be permitted on the roads until such time as the maintenance structure is in place. This issue is one that is important to owners, operators, manufacturers, insurers and passengers alike. We agree that the requirements which are currently in place for PSVs will need to be updated to deal with the technology within HARPS and due consideration given to whether any 'responsibility' might be taken by the technology itself for maintenance/reporting faults to the appropriate body.

In relation to safety critical updates required for AVs in general, the Autonomous and Electric Vehicles Act 2019 (AEVA) states that safety critical updates must be implemented in a vehicle

and any failure to implement can render a 'driver' liable for any accident. As suggested in our earlier response dated 18 February 2019, question 13⁷, it would make sense for an AV not to be able to start its journey without such updates installed. There are also wider issues around whether such 'safety critical' updates should be the responsibility of the manufacturer or service provider. The operator or owner will therefore need to be responsible within HARPS.

The current framework around PSVs should be updated to cater for technological advances and software requirements for HARPS, but the principles of roadworthiness and maintenance should broadly remain in place with these updates, to ensure protection of passengers and vulnerable road users.

Consultation Question 10 (Paragraph 4.90):

Do you agree that legislation should be amended to clarify that HARPS operators are "users" for the purposes of insurance and roadworthiness offences?

Yes. We would suggest public confidence in HARPS would be increased if legislation is amended in this respect. Without such clarity, it would be difficult for victims of accidents involving HARPS to pursue compensation swiftly and it would not be clear who is then responsible for purposes of insurance and roadworthiness offences. Clarity should also provide comfort to insurers and manufacturers where a secondary action is pursued following an accident. More certainty would allow passengers to use HARPS without serious concern that any accident would lead to long running and costly legal disputes over who would be deemed the appropriate 'user' for liability purposes.

Compliance with the law

Consultation Question 11 (Paragraph 4.124):

Do you agree that HARPS operators should have a legal duty to:

(1) insure vehicles;

(2) supervise vehicles;

(3) report accidents; and

(4) take reasonable steps to safeguard passengers from assault, abuse or harassment?

Yes, particularly as HARPS are intended to transport passengers without a human driver. It remains unclear as to whether remote supervisors would supervise vehicles from a distance, and what will be required of any such supervisor. If a 'user in charge' is to be expected to respond in certain circumstances when 'driving' an AV in the conventional sense, a similar safety net should be in place where there is no such user in charge. Serious consideration will need to be given to how many vehicles a remote 'supervisor' will be responsible for and whether that supervisor could be 'contributory negligent' should an accident occur and that supervisor has failed to intervene in a reasonable way (if intervention is a proposed duty of the supervisor). The AEVA is not currently drafted for this scenario, i.e. one of remote operation. Staff would need significant training on what steps were required in differing scenarios, together with education on the nature of supervision required. The government must consider how the supervisors are to respond when a vehicle has come to a stop and is 'unable to make

⁷ <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2019/06/AV152-Stewarts-Law.pdf>

a decision on the available data⁸ and cannot move. For example, how should the remote supervisors consider and respond to multiple accidents? At what point should a call be escalated to a manager, supervisor, or technology provider? Should they contact the accident investigators immediately? What if the vehicle has simply broken down suffering a technology failure? How should the vehicle be moved and how would passenger safety be assured? All of these issues need to be considered fully before remote supervision becomes an option for fully automated passenger vehicles or HARPS.

Detailed lessons must be learned from the introduction of Smart Motorways, which has seen an increase in near misses⁹ and a number of deaths on the motorways involved. Radar technology via Stopped Vehicle Detection¹⁰, uses radars to detect a stationary vehicle and this must be fully implemented across all areas of HARPS use, to ensure that a failure of the AV/HARPS does not endanger its passengers or other road users and enables supervisors to act appropriately to ensure the vehicle is moved, the lane is closed and/or other drivers are alerted to the presence of a stationary vehicle.

The paper states that supervision should include as a minimum, response to collisions and breakdowns including reassuring passengers. If this is the case, legislation and guidance on that role must be clear before implementation (see above regards smart motorways). Strict liability should fall to the HARPS operator or insurer, where there is failure to appropriately supervise (including an inadequate ratio of supervisors to vehicles), depending on whom is given responsibility to place these vehicles on the roads. Further thought must also be given to how accidents will be reported by a HARPS vehicle where no driver is present and what role the supervision should take in that respect. We suggest supervisors be given the ability to report accidents to the authorities in such circumstances, but also that any supervision regime can appropriately respond and that the roads have sufficient amounts of emergency refuges (bays) for the vehicles to be safely moved into as required

We agree that reporting standards should be standardised. As detailed in our first response in relation to an independent accident investigation branch¹¹, such investigations would only be helped by vehicles/operators which can directly report accidents together with any road conditions, or weather conditions which may have impacted on the accident circumstances. It should not be for the passenger to report accidents where a driver is not present, and we agree such responsibility should lie with the operator and/or insurer via a clear reporting structure.

We note and accept there may be occasions when a passive driver ('steward') may be in the vehicle, particularly where children, elderly or vulnerable passengers are present. It is important that passengers are protected insofar as possible by a remote operator. We note the paper suggests taking 'reasonable steps' and suggest that further guidance on those steps will be necessary once the nature of HARPS and their implementation is clearer.

A simple statement that HARPS should be 'adequately supervised' will leave many uncertainties around safety within HARPS for passengers and other road users alike. We would suggest that statutory guidance (which is to be drafted) deals with the nature of what 'adequate' supervision looks like, and imposes strict liability for any failure to do so, absent which there would be a lack of public confidence in HARPS and inevitable legal disputes in the event of a collision or failure of the vehicle. The HARPS or the supervisor should be required to report accidents directly to the newly proposed accident investigation branch.

⁸ Para 4.95 of the Paper

⁹ Near-misses on the M25 London ring road went up by 20 times after the introduction of "smart running", according to a freedom information request by the Panorama programme in January 2020

¹⁰ Only minimally implemented on Smart motorways at 6% of the roads in use

¹¹ Question 14 response <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2019/06/AV152-Stewarts-Law.pdf>

Consultation Question 12 (Paragraph 4.125):

Do you agree that HARPS operators should be subject to additional duties to report untoward events, together with background information about miles travelled (to put these events in context)?

Yes but only insofar as such reporting would allow an investigation to be completed more efficiently, including accident circumstances, where the distance and other intervening factors could be relevant. PSV drivers and operators are obliged to report accidents currently¹² and we agree that HARPS should have capability to extend reporting to near misses or hazards in the roadway. Monitoring untoward events and accident rates between automated vehicles and human drivers is essential to safe deployment generally, as was also noted in relation to the proposed new safety scheme in consultation 1.

Consultation Question 13 (Paragraph 4.128)

Do you agree that the legislation should set out broad duties, with a power to issue statutory guidance to supplement these obligations?

Yes, but on proviso those duties are not so broad so as to cause confusion to HARPS operators as to what their obligations are.

Allocating responsibility for a privately-owned passenger-only vehicle: placing responsibilities on keepers

Consultation Question 18 (Paragraph 5.40): Do you agree that where a passenger-only vehicle is not operated as a HARPS, the person who keeps the vehicle should be responsible for:

- (1) insuring the vehicle;**
- (2) keeping the vehicle roadworthy;**
- (3) installing safety-critical updates;**
- (4) reporting accidents; and**
- (5) removing the vehicle if it causes an obstruction or is left in a prohibited place?**

Yes in principle and on the basis that clear guidance and education is required on any regulation or requirements of AVs where they are privately owned. However, items 3 and 4 in the question need not be the keeper's responsibility, if the manufacturers and software developers confirm standards around which software updates will take place. For example, if the car is driving in fully autonomous mode, with no driver, but, with say, a passenger who is not the registered keeper – it would seem sensible to require accident reporting to come directly from the vehicle itself, unless the vehicle is damaged to such a degree this is not possible. However, it seems that there is a real risk of accidents not being promptly reported where the vehicles are dramatically damaged, and any humans involved are injured. It may be some time post-accident, before a registered keeper becomes aware of an accident, if they

¹² Para 4.112 of the Paper

were not present at the time, depending on what the technology in place is and the use and location of the vehicle involved. Any person injured by a HARPS should be able to assume the incident has been promptly reported, whether by use of technology or otherwise. Whilst it is sensible that such responsibility rests with the owner/keeper, it should be appreciated that in some circumstances where the accident is of utmost severity, it will only be possible for witnesses to voluntarily report or for there to be a requirement for supervisors to report accidents.

Where the individual owner/keeper has responsibility for all of the above areas, sustained public education is essential; it would not be right to assume purchasing of such a vehicle alone will be sufficient for awareness of all of the listed responsibilities of that person. Also to be considered are situations where a parent or third party is the 'registered keeper' but the car is mainly used by another person for private use and the registered keeper is aware of their duties. It is incumbent on the developers to ensure the vehicle technology is capable of suitable alerts and notifications in relation to accident reporting or maintenance requirements in any event.

Consultation Question 19 (Paragraph 5.41): Do you agree that there should be a statutory presumption that the registered keeper is the person who keeps the vehicle?

Yes.

Peer-to-peer lending

Consultation Question 22 (Paragraph 5.53): We welcome views on whether peer-to-peer lending and group arrangements relating to passenger-only vehicles might create any loopholes in our proposed system of regulation.

As long as the system of regulation is clear, lending should not cause too many issues. The terms of any peer to peer lending may have an impact, but if ultimate responsibility is to lie with the registered keeper, then that will provide clarity. The paper mentions the example of a group of parents buying an automated mini bus to take their children to school, with the registered keeper assuming responsibility for maintenance, insurance, installation and reporting accidents. It is imperative that passengers in these scenarios remain protected and retain a right of recovery against the registered keeper, noting that this is not an arrangement of hire and reward with no HARPS licence required. Insurers should be notified of the lending taking place, in the same way as you might insure another person on a vehicle. We consider that there may need to be distinction between occasional lending to friends and family, and true peer to peer schemes. Whilst neither, on the face of it, would fall within the definition of HARPS, we agree that it will be important for those engaging in peer to peer lending to agree that where peer to peer lending is offered for a charge, this would fall within the definition of HARPS and should require a HARPS operator licence.

Protecting consumers from high ongoing costs

Consultation Question 23 (Paragraph 5.60): We seek views on whether the safety assurance agency proposed in Consultation Paper 1 should be under a duty to ensure that consumers are given the information they need to take informed decisions about the ongoing costs of owning automated vehicles.

Yes. Public confidence is essential to the safe implementation of AVs generally, but without public education and information, consumers will not be able to make informed decisions regarding the cost of owning an AV. The costs involved in owning an AV may not be clear initially and monitoring should therefore be undertaken until such time as the market is wide enough to deal with costs at a lower level with increased ownership. In addition to

transparency on costs, the duty of those owners in relation to maintenance, safety and roadworthiness and the costs of those duties (if to be borne by the owner) must be made clear.

CHAPTER 6: ACCESSIBILITY

What we want to achieve

Consultation Question 24 (Paragraph 6.11): We seek views on how regulation can best promote the accessibility of Highly Automated Road Passenger Services (HARPS)? In particular, we seek views on the key benefits and concerns that regulation should address.

Core obligations under equality legislation

Consultation Question 25 (Paragraph 6.31): We provisionally propose that the protections against discrimination and duties to make reasonable adjustments that apply to land transport service providers under section 29 of the Equality Act 2010 should be extended to operators of HARPS. Do you agree?

Yes.

Specific accessibility outcomes

Consultation Question 26 (Paragraph 6.106): We seek views on how regulation could address the challenges posed by the absence of a driver, and the crucial role drivers play in order to deliver safe and accessible journeys. For example, should provision be made for:

(1) Ensuring passengers can board and alight vehicles?

(2) Requiring reassurance when there is disruption and accessible information?

(3) Expansion of support at designated points of departure and arrival?

It is our view that all of the above factors should be appropriately addressed by the manufacturers of these vehicles. If AVs and HARPS are to truly provide more accessibility and social mobility, it is essential that those with disabilities can suitably access, board and alight the vehicles. Reassurance should come from 'supervisors' or remote operators at the very least, as such vehicles should be available to all users. It may be that stewards must be present in vehicles where assistance is required, beyond that which the car itself can give. However, manufacturers must aim for vehicles which will allow safe and accessible journeys for all, as it will be more costly to add provision to these vehicles later. It is reasonable to accept that someone with serious disabilities who has their own carer or support worker may be able to access HARPS where there is no 'steward' or 'driver' to provide assistance, however, those who do not have their own carer may need assistance in getting to, into and out of the vehicle and so would be isolated without support from a steward/driver.

The discussion within the paper notes difficulties in setting requirements for those with physical disability or mental disability, both of which can render individuals unable to leave home. It is also accepted that where assistance is required and provided by the vehicle or steward, difficulties with the individual's ongoing journey need to be addressed. HARPS present an opportunity to increase accessibility and mobility, but if incorrect or half measures are adapted, it will reduce engagement and potentially increase the lack of accessibility for people to make journeys outside their home. A minimum standard of accessibility is essential as to

different levels and types of disability. In terms of the needs of individuals, detailed consultations with those groups will need to take place.

Developing national minimum accessibility standards for HARPS

Consultation Question 27 (Paragraph 6.109): We seek views on whether national minimum standards of accessibility for HARPS should be developed and what such standards should cover.

Yes. The minimum standard must address differences in requirements of those with differing levels of disability and in consideration of whether impairment is physical or mental. As noted above, detailed discussions are required with stake holders, such as those ongoing between relevant charities and software developers.

Enforcement mechanisms and feedback loops

Consultation Question 28 (Paragraph 6.124): We seek views on whether operators of HARPS should have data reporting requirements regarding usage by older and disabled people, and what type of data may be required.

If AVs are to be accessible to all, including the elderly and disabled passengers, it would be sensible to report data of usage and ownership in the early years of AVs and HARPS. As mentioned above, if social mobility is to be achieved, such statistics can assist stakeholders in analysing whether this is the case and if not, put in place measures to address any discrepancy. There is an obvious risk in that elderly users or passengers require human help in getting in and out of vehicles and if this is the case, there remains a clear need for human intervention, which, if not supported by the vehicle technology, will decrease mobility for some.

3 February 2020

Stewarts