

Feature

The road ahead: product liability and motor insurance implications of the Automated and Electric Vehicles Act 2018

The Automated and Electric Vehicles Act (the “Act”), which received Royal Assent on 19 July 2018, is an important step towards the UK Government meeting its target to have fully self-driving vehicles on UK roads by 2021. Its passage offers a fresh opportunity to consider the challenges and opportunities that lie ahead for manufacturers, software developers and insurers interested in the automated vehicles space. Full implementation of the Act is expected through a series of statutory instruments during the next couple of years.

The Act – A New Approach To Motor Insurance

Traditional motor insurance covers damage caused by the fault of the driver. However, liability in an accident involving an automated vehicle is more likely to arise due to a fault with the vehicle (on the basis the vehicle is the driver). A primary purpose of the Act is to make sure that all victims of an accident caused by a fault with an automated vehicle will be compensated.

To this end, the Act extends compulsory motor vehicle insurance to cover the use of automated vehicles in automated mode. Where an accident is caused by an automated vehicle while that vehicle is driving itself and the “driver”, or any other person, suffers injury or damage as a result of that accident, the Act puts first instance liability with the insurer of the automated vehicle. To recover from the insurer, a claimant must prove only that the automated vehicle was at fault.

The idea is to help individuals receive compensation for damage (to themselves or their vehicle) without having to go through the long and costly process of bringing a claim against the manufacturer of the automated vehicle at fault. Instead, the burden of compensation in the first instance falls on the insurer. However, the Act grants insurers the right to subsequently claim against any other person liable to the injured party in respect of the accident (e.g. the vehicle manufacturer or software developer).

The Act defines automated vehicles by reference to a list which will be produced and maintained by the Secretary of State. The list has not yet been produced, but the Act prescribes that it will include motor vehicles that are “designed or adapted to be capable, in at least some circumstances or situations, of safely driving themselves”.

Implications For Manufacturers

Under the Act, manufacturers and software developers are out of the immediate firing line where an accident is caused by an automated vehicle. However, manufacturers and software developers do not escape liability; it is just that they will face claims from insurers, rather than individuals. Therefore, manufacturers should prepare to face claimant insurance companies that are more experienced, more sophisticated and better funded than an individual consumer. From a PR perspective, a manufacturer that disputes a claim may find it more palatable to continue in litigation in a dispute with an insurer, as compared to an injured consumer.

Under the Act, an insurer cannot initiate a claim against an implicated manufacturer or software developer until the insurer has settled and paid the claim by the injured party or parties. For manufacturers or software developers, this means there may be a longer time after an accident has occurred before facing a claim. If a manufacturer is unaware of the accident and the original claim against the insurer, they may also find themselves ignorant of a product issue for some time. This could lead to a delay in its analysis of an issue and, consequently, any corrective measures required, which could potentially allow a number of claims to accumulate against them. This further emphasises the need for manufacturers to have robust, proactive post-market surveillance systems in place, to give themselves as much time as possible to investigate and understand any issues.

To protect themselves against possible claims from insurers, manufacturers and software developers should consider taking out specialised product liability insurance to cover any such claims. A big advantage of the Act for the manufacturer is that the insurers are limited in what they can recover from third parties to

the amount paid to the original claimant(s). As well as limiting the potential value of a manufacturer's liability, this also gives a manufacturer foresight of the value of a claim being brought against them.

A further advantage for manufacturers relates to qualified one-way costs shifting ("QOCS"). In a personal injury claim brought against a manufacturer by an individual claimant, QOCS would protect the unsuccessful individual claimant from being ordered to pay the costs of a successful manufacturer defendant. By way of contrast, an unsuccessful insurer claimant would not benefit from QOCS protection (since they are bringing a subrogated claim). It is therefore much more likely that a manufacturer defendant would be able to recover their costs from an insurer claimant than an individual claimant.

Implications For Insurers

There is no doubt that the increased use of automated vehicles in the UK will have far-reaching consequences for the motor insurance industry. For decades, liability for accidents has rested with the individual driver at fault. The move to driverless technology presents interesting conceptual and practical challenges for insurers. The Act is helpful in that it begins to provide a statutory response to this shifting insurance landscape.

By making them the direct port of call for claimants who have suffered injury or damage from an automated vehicle accident, the Act places a fairly onerous obligation on insurers. The burden is squarely on insurers to pursue any further claims against manufacturers, software developers or other parties deemed to be at fault. This places insurers in the unenviable position of having to pay out to claimants first for 100% of the claim, before facing potentially lengthy legal battles to recover from third parties their share of the loss. However, one potentially bright spot for insurers is that the Act permits them to exclude or limit their liability for damage suffered as a result of prohibited software alterations or failure to install safety-critical software updates.

In the medium to long term, the arrival of automated vehicles presents significant opportunities for insurers. While the need for individual motor insurance policies

for drivers is likely to decrease over time, the need for individual policies for automated vehicles is likely to increase; indeed the whole landscape of compulsory motor insurance is likely to change significantly. There may also be increasing opportunity to offer combined policies, covering an individual driver when that driver is in control of an automated vehicle, and covering the vehicle itself when it is driving in automated mode. Traditional motor insurers may, however, need to be prepared for competition from manufacturers, who are likely to see an opportunity to develop new forms of automated vehicle insurance and promote their own insurance products as part of the sale of an automated vehicle.

The large scale use of automated vehicles will also give scope for new lines of insurance cover. For example, specialised forms of cyber insurance may be required since in time automated vehicles will be able to communicate with each other (vehicle-to-vehicle communication) and these networks will be vulnerable to hacking by sophisticated cybercriminals or even cyberterrorists. Another expected area of growth is in large scale product liability insurance for manufacturers and software developers, who will want to protect themselves against the risk of defective automated vehicle parts or software.

But What Is An Automated Vehicle?

The Act defines automated vehicles by reference to a list that will be maintained by the Secretary of State. Adopting a "list" approach helpfully removes the element of self-assessment for interested parties – their vehicle is either on the list and the legislation applies to them, or it isn't – but there are several issues with the Act's approach.

First, maintaining and updating the list will be a burdensome and time-consuming task. There is a real risk that automated vehicle technology will move faster than the Secretary of State will be able to update the list. If an automated vehicle makes it into circulation before the list has been updated, any consequential claims for an accident involving that vehicle would not fall within the scope of the Act.

Second, because the list has not yet been published it remains unclear what level of automation the Government hopes to capture with this Act. An increasing number of vehicles already have automated features such as the ability to self-park or adaptive cruise control: will vehicles with these capabilities be included on the Secretary of State's list? Clearly, the wider the scope of the Act's definition of 'automated vehicle' the more far-reaching the implications for manufacturers, insurers and end-consumers will be.

Comment

The Act indicates the Government's current thinking on how to tackle the liability issues posed by the rapid development of automated vehicle technology. End-consumers should be reassured by the consumer protection focus of the legislation. Meanwhile, manufacturers, software developers and motor insurers should take note of the direction of travel. They should position themselves to make the most of new opportunities brought by this changing landscape, while also avoiding possible pitfalls. For example, manufacturers should be looking for appropriate ways to engage with consumers to find out about any potential product issues as soon as possible and traditional motor insurers should be looking to develop new motor policy products ahead of time.



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