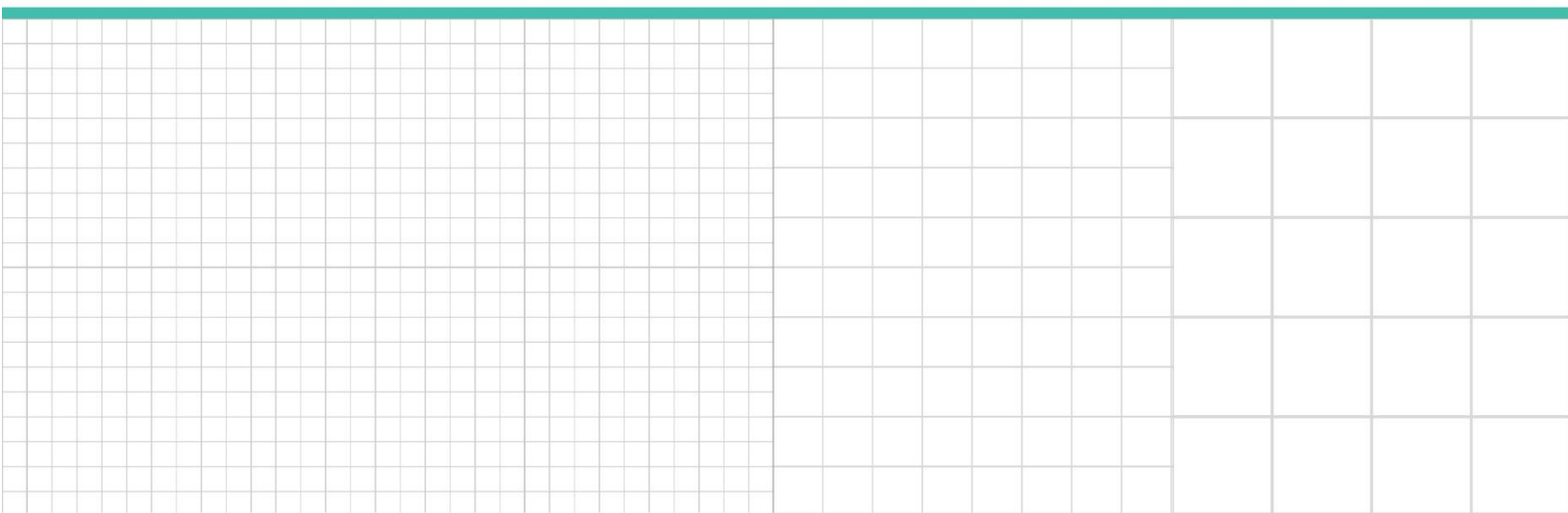


Professional Perspective

The Litigation Landscape for Autonomous Vehicle Crash Liability, Part 3: A Look Ahead

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In Part 2, we concluded that as vehicles become less reliant on human drivers, the claims of accident victims will depend more on product liability and less on the potential negligence of the driver. The potential contributory negligence of the plaintiffs, however, will remain a key determinant in apportioning liability.

Vehicle manufacturers and component suppliers can expect product liability claims alleging software malfunction involving both design and manufacturing defects. Other claims could arise from failure to warn consumers about the inherent danger of autonomous vehicles or failure to instruct them properly on the use and limitations of the technology. Subject to state law variations, plaintiffs who want to pursue strict liability against manufacturers will need to prove:

- The autonomous vehicle or its components or software was defective by virtue of (1) its design; (2) failure to follow manufacturing specifications, or (3) a lack of adequate warnings;
- The defect caused injury to the plaintiff; and
- The autonomous vehicle operator was using the product as it was intended.

[For additional information, see Gary E. Marchant and Rachel A. Lindor, *The Coming Collision Between Autonomous Vehicles and the Liability System*, 52 Santa Clara L. Rev. 1321, 1326-27 (2012).]

These claims will present new legal challenges for vehicle manufacturers and component suppliers, especially as many manufacturers have acquired self-driving technology and brought the production chain fully in-house. State of the art as a defense or element of the claim will be a significant battleground.

It is also likely that defending a personal injury case involving an autonomous vehicle will become more expensive as self-driving technology advances. Because autonomous vehicles depend on cameras and LIDAR systems to "see" their surroundings, and as these systems are constantly recording useful information for post-crash investigations, analyzing the available data will require expert witnesses and significant costs for both plaintiffs and defense.

Vehicle systems will need to "learn from experience" and navigate in multiple environments as humans do, making machine learning or artificial intelligence crucial to the advancement of self-driving technology. The use of AI tools raises issues around the vehicle's expected capabilities and the determination as to when human intervention is necessary. These issues will require a host of expert witnesses, again increasing the cost of litigation.

The high cost of expert assessments could make product liability litigation prohibitively expensive for individual plaintiffs, who may instead attempt to rely on negligence theories. If the high cost of litigation threatens to insulate vehicle manufacturers and suppliers from an upsurge in product liability suits, the plaintiffs' bar will need to strategize a response.

Mitigating manufacturers' liability for accidents involving self-driving vehicles will likely depend on creating realistic consumer expectations of the technology. For the immediate future, accurate marketing campaigns that frame autonomous functions as assistive technology, not as a replacement for human drivers, will help ensure consumer safety and protect car manufacturers from extended liability. Effective audio-visual reminders for drivers to remain attentive, even while using autopilot, should also help achieve these goals. Vehicle manufacturers must make sure that safety instructions and warnings keep pace with technological development, instead of over-selling it.

New Role for Insurance Providers

Insurers and manufacturers continue to study and develop approaches to these three broad liability and coverage questions:

- Who will insure self-driving cars?
- Who is liable in a ride-sharing accident scenario?
- As vehicle fleets replace individual ownership, who should carry the coverage necessary to pay medical bills, repair costs and other losses in case of a crash?

In theory, as vehicles become more autonomous and driving potentially becomes safer, liability insurance for individual drivers could become obsolete. At the least, individual liability insurance premiums should eventually fall for those who choose to invest in their own autonomous vehicle. Before that happens, insurance companies may charge individuals higher premiums until they have sufficient safety and accident data on particular vehicles to assess risk.

There are already insurance products in development designed to address this issue. For example, California entrepreneur Dan Peate has created Avineer, which will offer an “insurance product [that] will monitor drivers’ use of autonomous features on cars made by companies including Tesla, Nissan, Ford and Cadillac, determining discounts based on how the feature is used.” (See Paul Tullis, *Self-driving Cars Might Kill Auto Insurance As We Know It*, Bloomberg (Feb. 19, 2019), <https://www.bloomberg.com/news/articles/2019-02-19/autonomous-vehicles-may-one-day-kill-car-insurance-as-we-know-it>).

Risk assessment based on the level of self-driving capabilities and human participation necessary to operate individual vehicles safely will present challenging issues for liability insurers for years to come. As industry expert Tom Hammond observes, “[s]eeing how these cars handle bad roads, inclement weather and similar challenges is essential to understanding whether they’ll really replace human drivers—and how to insure them if they do.” (See *Will Technology Kill Auto Insurance?*, Ins. Thought Leadership (Sept. 21, 2018), <http://insurancethoughtleadership.com/will-technology-insurance-industry>).

Insurance for physical damage caused by weather, road debris, theft and vandalism will continue to be necessary. And until autonomous vehicles become pervasive, the cost to repair damaged components of a self-driving system or the entire vehicle may be substantial, due to their complexity and limited availability.

Academics who study autonomous vehicle coverage and liability issues predict a shift from offering less coverage to the consumer to offering more coverage to companies that manufacture and license the technology that drives autonomous vehicles. Some solutions to the technology coverage question have been offered. Mr. Hammond reports that Volvo has announced that it will “accept ‘full liability’ for any losses occurring when a Volvo vehicle was in full autonomous mode, indicating a future in which liability coverage for self-driving vehicles is a question of product liability, not driver behavior.” In Asia, he adds, Tesla is testing “insurance and maintenance included” vehicles with pricing that “incorporates Tesla’s data about the car’s safety features, including its autopilot system.” And in the United Kingdom, he says, insurer Adrian Flux introduced “the first-ever auto insurance policy for driverless vehicles,” which covers conventional and “autonomous-vehicle-specific topics like software updates, satellite or navigation system failure and loss or damage from hacking.”

Consumers hesitant to become individual owners of this complex new technology may nevertheless find themselves utilizing it through mobility services that maintain and operate fleets. Such self-driving fleet services are in development and testing at several companies. The proliferation of driverless vehicle fleets that provide transportation and delivery services to consumers will be a new frontier for insurance providers to navigate. Fleet owners will need insurance, and the human operators of the fleet vehicles will need coverage until there are actual self-driving vehicles. When the day comes that driverless vehicles for individual consumers are available and consumers are ready to become individual owners, Paul Tullis observes, they will presumably need to “insure [their] safety as a passenger.”