How will the new era of driverless vehicles impact the law and practice of personal injury?

Harry Lambert, a barrister specialising in product liability and personal injury at Crown Office Chambers, discusses autonomous vehicles in light of the government's recent consultation on proposed rules on the safe use of automated vehicles on roads in Great Britain.

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What is the background to the consultation to amend The Highway Code

The background, in short, is a burgeoning awareness that driverless vehicles are (a) the future and (b) not very far away. As Rachel Maclean MP, Parliamentary Under Secretary of State for Transport, puts it 'with recent technological advances, automated vehicles are no longer a far-off dream but instead a close reality'.

In particular, Automated Lane Keeping Systems (ALKS) will soon be available and, indeed, are likely to be authorised for use on British roads by the end of this year. In very broad terms, this is described as a 'traffic jam chauffeur'. It will be the first commercially available system allowing the driver to cede control of his or her vehicle—a milestone moment. With that on the horizon, in August 2020, the government's Centre for Connected and Autonomous Vehicles (CCAV) issued a 'call for evidence' on that issue, with many of the questions concerning the Highway Code. It is therefore against that background, and the long-awaited coming into force of the Automated and Electric Vehicles Act 2018 (AEVA 2018) in late April 2021, that the open consultation on rules on safe use of automated vehicles on Great British roads has just been announced.

The consultation puts forward suggested amendments to the Highway Code in light of ALKS and with a view to clearly and fairly apportioning responsibility between man and machine.

The proposed changes are fascinating and, however much we are told the technology is imminent, have a slightly futuristic/dystopian feel to them.

What are the main issues in relation to personal injury and driverless cars?

This is a very big question! Entire books have been written on this subject. I am going to focus, though, on my two main practice areas product liability and personal injury.

For me the most interesting questions will include how the courts will grapple with applying Consumer Protection Act 1987 (CPA 1987) principles to this new terrain.

For example, the fundamental test under CPA 1987, s 3 is based on what 'persons generally are entitled to expect'. Well, what on earth are persons generally entitled to expect in this context? I don't think 'persons generally' know, let alone judges! Presumably automated vehicles are not expected to be 100% safe—no product is—but then what degree of error is permissible? This question must be answered against the background that these systems will be self-learning, ie specifically designed to get better after trial and error. If a product is sold and marketed as self learning based on mistakes, can the manufacturer really be liable when it does just that?

With software now central to automotive safety, is software to be considered a 'product' under CPA 1987? The general consensus is that anything incarnate in physical matter, such as a disk or USB, would come under CPA 1987 but that, by contrast, 'pure information', such as an internet download or update, would not. There have been a few cases on this issue, but generally in the sphere of contract law, eg on what constitutes a 'good' within the meaning of the Sale of Goods Act 1979. Still, it is the best we have, and likely to be persuasive in this neighbouring context. Thus, St Albans City & District *Council v International Computers Ltd* [1996] 4 All ER 481 is essential reading, as is Computer

Associates UK Limited v Software Incubator Limited [2018] EWCA Civ 518. In the latter case, interestingly, Lady Justice Gloster acknowledged that the distinction above 'seems artificial' but essentially left it as a problem for Parliament, rather than the courts, to resolve. The decision was appealed to the Supreme Court who, in turn, referred to the ECJ the question of whether electronically supplied software constitute 'goods'. At the time of writing, the outcome is eagerly awaited. The opinion of the Advocate Generale who, contrary to the Court of Appeal, answered the question in the affirmative, was released in December 2020 and can be found here. On the question of the standard to be expected of software, see also *Saphena Computing Limited v Allied Collection Agencies Limited* [1995] FSR 616 1995. On the question of the standard to be expected of software, see also *Saphena Computing Limited v Allied Collection Agencies Limited* [1995] FSR 616 1995.

Practitioners and judges alike have a good instinctive 'feel' for how liability, in any given case, might be apportioned between drivers. It is this collective experience which often helps to settle cases. But that will be totally lacking when it comes to answering questions of causation and contributory negligence as between man and machine. We will be in unchartered waters.

Is the current legal framework equipped to deal with these issues?

The software example above tells you everything you need to know—no. To be fair to the parliamentary draughtsmen, CPA 1987 (and Product Liability Directive 1985 (85/374/EEC)) was borne of a different era. It was enacted in the aftermath of the Thalidomide tragedy, and therefore long before the recent progress in automation specifically and indeed the internet age more generally. In blunt terms, it was designed to deal with exploding fridges and drugs with catastrophic but unforeseen side effects. The last thing on anybody's mind would have been a driverless car.

Note also that CPA 1987 only applies to consumers and residential property, so if a driverless vehicle drives into a residential home, all well and good, the home-owner can recover. If the same vehicle crashes into an artisanal bakery in Greenwich village, there is no recovery under the CPA 1987.

What are your predictions for the next few years? How do you see this area developing?

Again, a big question. To an extent, it is going to make product liability lawyers of us all! Thus, what today would be a simple and inexpensive road traffic accidents (RTA) case, pleaded in negligence, against a driver, and resolved by reference to issues of fact and witness recollection might tomorrow be a fiendishly technical and expensive case, pleaded under CPA 1987, potentially against a manufacturer, and resolved by reference to expert evidence and 'black box' computer data. Those best placed to advise will be lawyers with experience in both product liability and RTA cases.

So, on any view, there is a lot of litigation on the horizon as companies, lawyers and judges 'feel their way'. In the long term, however, and especially once driverless vehicles are able to engage in information exchange, presumably there will be far fewer accidents on the road. This is of course to be welcomed and will undeniably have a profound impact on the insurance and legal sector.

Interviewed by Tom Inchley