

Tea and tech: autonomous vehicles with Leah Grolman

The first May tea and tech session considered autonomous vehicles and product liability and was led by Leah Groman of CMS with introductory questions posed by David Chaplin.

What are autonomous vehicles?

It is important to consider both connected and autonomous vehicles, which are different. There are many connected vehicles on the roads already with functions which aid with drivers' decision-making.

The Automated and Electric Vehicles Act 2018 effectively defines autonomous vehicles as a vehicle that is driving itself at least part of the time. It is not the same as a vehicle which has certain features such as cruise control, collision avoidance technology or parking assistance.

The Society of Automotive Engineers has a five level system for defining the level of "driving itself" a vehicle is doing. Level one might include lane assistance. Level two might include parking assistance. Level 4 might be where there are autonomous features performing a wide range of driving tasks. In the later discussion it was argued that we are not beyond level 3 at the moment.

The levels matter in law because of the point at which the car is in control and at fault for an incident, rather than a driver.

What are the UK government's plans?

The government has had a rolling programme of reform since 2016. It is currently carrying out the [Future of Transport Review](#) which is open for consultation until 3 July. It is taking a very broad look at transport issues including Mobility as a Service.

The government is also interested in so-called HARPS - "highly automated road passenger services" - there is currently an ongoing trial in Phoenix.

Law Commission activities

The Law Commission and Scottish Law Commissions are collaborating on research in this area and have a three part approach, covering preliminary issues, [HARPS](#) and a third strand to be confirmed.

Leah pointed out that the Law Commissions [could have used the project to consider if software is a product](#), but they have decided to wait for the EU work in the area. However, they have a 2021 deadline to consider liability and highway rules. After that it is expected that the 2018 Act will come into force with compulsory insurance for drivers and for the cars.

EU activities

Leah pointed out that the EU is very busy and it is difficult to keep up with all the projects. It is reviewing the product liability directives in the wider context of emerging and digital technologies and produced a key report on [liability for AI and other emerging technologies](#) in December 2019. The key issue is making it easy for consumers to obtain compensation and reverse the burden of proof.

In February 2020 the EU published three other documents including a [white paper on AI](#), a [European strategy for data and liability for AI](#).

Product liability

Under current law a product needs to be a good or electricity. It has been judicially decided in other contexts, that software is not a good, as goods must generally be tangible. The most recent case was [Computer Associates \(UK\) Ltd v The Software Incubator Ltd](#) which arose in the context of the Commercial Agency regulations and has been referred to the European Court of Justice. A decision is not expected until next year.

The providers of software-only are insulated from liability, but if you produce hardware (ie the physical car) as well, you will be liable. There is some argument that software is a service but it is not easy to claim under product liability legislation.

A question was asked as to what software manufacturers could do to prepare. Leah suggested that they should treat themselves as if they do fall within the product liability regime. In any event they will still fall within negligence law and arguably have a duty of care. They need to test products using a wide enough data set and scenarios, give advice and risk warnings, test products properly and make sure they meet expected safety standards. It is not required to show what caused a defect, only what damage the defect caused. The fact that cars will have black boxes should help with finding out what has gone wrong.

Is the single insurer model the right one?

It is a starting point and deals quickly with the allocation of risk. However, it does not go far enough because it does not say how existing law will apply – we will have to wait for case law, so there is not much certainty at the moment.

The role of the driver – what are the expectations?

Leah pointed out that contributory negligence principles are preserved. From a non-legal perspective it is interesting to consider research which shows that it takes 2-3 seconds for a driver to take control back, and this is when they are in a test situation and know that they are being watched.

In the Google case a car ran over a person wheeling a bike along a road. The driver had six seconds to avoid the accident but was reading a book.

In the Boeing crashes the qualified pilots had around two minutes each to avert crashes but failed to do so.

So drivers are taking longer to take back control and Ford has gone so far as to say that it is “unfair” to expect drivers to intervene. The fair “handover time” is likely to be hotly debated in court.

What can UK and EU lawyers learn from the US?

In the US courts have held that software can be a product, but they have a similar test for defectiveness. Claims have pleaded the behaviour of the car rather than the software – eg a car should not drive into a concrete barrier by itself.

Law proposals -when and what are we likely to see?

Leah said that the technology is moving at a pace which requires legislation within the next 3-5 years. Insurance reform is required. She said that the UK is likely to accept some of the EU proposals, but it proposes to remove some of the manufacturer defences which the UK will probably want to keep.

Are we heading to truly driverless cars?

Probably not, or only in the younger SCL members’ lifetimes. It is relatively easy to have a driverless car on a motorway but handling smaller roads and farm tracks is a different issue.