Forum of Insurance Lawyers (FOIL) – Written evidence (AUV0065)

FOIL (The Forum of Insurance Lawyers) exists to provide a forum for communication and the exchange of information between lawyers acting predominantly or exclusively for insurance clients (except legal expenses insurers) within firms of solicitors, as barristers, or as in-house lawyers for insurers or self-insurers. FOIL is an active lobbying organisation on matters concerning insurance litigation.

FOIL represents over 8000 members. It is the only organisation which represents solicitors who act for defendants in civil proceedings.

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Introduction
FOIL member firms are involved in the handling of claims on behalf of insurers following road traffic accidents. Their expertise is therefore limited to some of the questions raised in the Call for Evidence and, as the Committee indicates is acceptable, it will limit its response to those issues:

Question 13: Are further revisions needed to insurance, regulation and legislation in the UK to create an enabling environment for autonomous vehicles?
A road traffic environment which includes autonomous vehicles will create much more complicated liability issues than at present. Under current law compulsory motor insurance obligations are placed on the user of the vehicle, with liability being established on the basis of negligence by that user. In the new environment responsibility for the accident could still rest with the user of the vehicle but may rest elsewhere:

- On a manufacturer – a vehicle with Advanced Driver Assist Systems (ADAS), which help a driver with some of the functions of driving, or a fully autonomous vehicle, may be defective as a result of a manufacturing fault.
- A supplier – a component may be defective.
- A repairer – FOIL notes that at a recent Roundtable event arranged by Insurance Post to discuss issues around the repair of automated vehicles it was recognised that recalibration of an ADAS system is a key issue. Most ADAS systems operate through sensors and cameras inside the windscreen, making windscreen replacement much more technically challenging than at present. As the report of the Roundtable event states, “Even a 1˚ misalignment can cause the system to misjudge braking distances or where the edge of a motorway lane is, with potentially serious consequences for the driver and other road users.”
• The registered keeper – adequate repair, including updating of software to both operate the vehicle and protect it from hackers, will potentially be of much greater significance in an ADAS or a fully autonomous vehicle than at present.
• A hacker – a vehicle may be the target of malicious interference.

Some of these complications already arise with conventional cars. Accidents can occur as a result of defective vehicles or defective repair. These circumstances are relatively rare: the Government has indicated that at present over 90% of road traffic collision are caused by human error. Richard Cuerden, chief scientist at the Transport Research Laboratory, has stated that 4% are linked to vehicle defects. In practice, FOIL members report that it is very unusual to have a situation where an insurer is considering seeking recovery of its losses from a negligent third party.

In future, accidents resulting from a cause other than driver negligence are likely to be much more common. As ADAS become more sophisticated and truly autonomous vehicles are introduced, the majority of accidents are likely to be the result of a problem with the vehicle, whether caused by a manufacturing defect, defective repair, or inadequate maintenance and updating.

It is essential that the insurance arrangements for automated vehicles are as simple and straightforward as possible, making it easy for those injured in an accident to bring a claim against an easily identified insurer. The situation, however, is complex. Even in an environment where all vehicles are fully automated, and where it might be thought that a manufacturer will be responsible for any accident, circumstances are likely to arise where a user programming the system; a registered keeper maintaining and updating the system; a garage charged with repairing and checking the vehicle; or a hacker, may in fact be responsible for causing the accident.

The Government proposed in its consultation paper, ‘Pathway to Driverless Cars’, that appropriate insurance arrangements can be put in place by simply adding into the Road Traffic Act 1988, an obligation on a user to have product liability cover in place to cover a manufacturing defect.

For FOIL, the proposal raises a number of issues:

Product liability law

Product liability under the Consumer Protection Act 1987 is subject to a strict statutory regime:

1. There is strict liability under the Act for a defective product, meaning that there is no need to prove that the manufacturer was negligent, although it is necessary to show that there was a “defect”, meaning that “the safety of the product is not such as persons generally are entitled to expect” - a definition that may prove difficult in a field that is as cutting edge and complex as autonomous vehicles.
2. The supplier of a component which proves to be defective will have a defence under Section 4 if the defect was “wholly attributable to the design of the subsequent product or to compliance by the producer of the product in question with instructions given by the producer of the subsequent product”

3. Under Section 5(2) of the 1987 Act, a producer is not liable for damage to the product itself, in this case, the vehicle.

4. Under the Limitation Act 1980, different rules apply to product liability claims. Non-personal injury claims must be brought within 10 years of the supply of the defective product; with personal injury claims required to be brought within three years, subject to a long stop of 10 years from date of supply. This would have the effect of preventing claims for accidents caused by vehicles more than 10 years old.

The effect of this statutory regime creates a liability very different from that which arises under a traditional motor policy. That very different regime, and the insurance products which have grown up to cover claims arising under it, make it difficult to see how product liability and motor liability can be bolted together under a single policy.

The need for dual cover will create complexities for motorists required to obtain cover under two policies. The limitations of product liability law and product liability insurance cover will not provide the same watertight coverage that exists under a motor policy, designed to meet the requirements of the compulsory motor insurance regime.

The decision of the European Court of Justice in Vnuk v Zavarovalnica Triglav d.d. [2014] CJEU C-162/13 raises a further legal complication. In that case the Court held that a tractor being used for agricultural purposes on private land was still within the compulsory motor insurance requirements, ensuring compensation could be paid in the event of an accident. The case made it clear that the Motor Directives require a motor policy to be in place to cover “any use of a vehicle that is consistent with the normal function of that vehicle”. As the automated features will be the normal function of an ADAS or AVT vehicle, European law would appear to require that a motor policy is in place to cover the risk arising, not a product liability policy.

_Breadth of coverage_

As indicated above, there is the potential for a much wider range of potential defendants to arise in relation to the use of a vehicle with ADAS or fully autonomous vehicle. The potential liability of repairers is of particular concern. With the diagnosis of problems with ADAS and automated systems, and recalibration of the systems after an incident, likely to present challenges as the new technologies are introduced, will the law of negligence be adequate to establish liability, to enable an insurer to recover where appropriate?

_Insurance obtained by the user_
Under the proposals it would appear that the user of the vehicle will be responsible for buying cover which is most likely to be required to cover the product liability of a manufacturer, or negligence of a repairer. If separate product liability cover is required, it will not be protecting against a claim which can arise against the user. Is it considered acceptable that a motorist will be required to buy cover which can only benefit a manufacturer?

**Question 15: What does the proposed Modern Transport Bill need to deliver?**

**Liability**

FOIL understands from the consultation paper, ‘Pathway to Driverless Cars’, that the Government is “not currently proposing any significant change in our rules on liability in road traffic accidents to reflect the introduction of automated cars. We still think a fault based approach combined with existing product liability law, rather than a strict liability regime, is the best approach for our legal system. We think that the existing common law on negligence should largely be able to adapt to this new technology.”

FOIL believes that the use of automated vehicles raises issues of liability that should be looked at afresh rather than the common law automatically being considered adequate. Complex issues arise around maintenance and the updating of software and in these circumstances it is unclear who is to be considered responsible: the driver, the registered keeper or the owner? It would be more appropriate for these issues to be considered and included within the Modern Transport Bill, rather than being left to be dealt with by litigation.

**Classification**

As the Government is proposing currently to adopt a gradual approach to insurance reform, introducing changes that will only apply to those buying automated vehicles, there is a need for a classification system for vehicles to enable purchasers, whether or new or second-hand cars, to be able to identify the automation within the car. This will have several benefits:

- Allowing insureds to buy the right type of insurance for their vehicle.
- Allowing insurers to assess risk appropriately.
- Ensuring that owners and registered keepers of vehicles can take account of the technology within the vehicle when undertaking repairs, for example, when windscreen replacement is required.

**A Standard Data Set**

It is inevitable that in incidents involving autonomous vehicles, data will be required to determine whether the driver or the vehicle was responsible for any collision, to provide evidence, for example, on who was in control at the time of the incident.
The format and the detail of the data should be subject to regulation, to enable it to be relied upon both in a criminal and a civil context.

It would be useful to consider whether Sections 170 and 172 of the Road Traffic Act 1988 should be amended, to require the disclosure of data to any person having reasonable grounds; and to allow for the request of details of whether the driver was in full control of the vehicle at the time of the incident.

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