

First fatal accident with a connected car

Part I: Drivers' liability and first insurance specific to a connected car

Ainara Rentería Tazo

Senior Associate, Gómez Acebo & Pombo

Below follows an analysis, from the point of view of a driver's liability and the cover of existing insurance policies of motor vehicles in Spain, of the first fatal accident owing to the failure of an autopilot system fitted into a vehicle, of which we had news last 1 July 2016. Recall that the car in question was being driven on autopilot mode along a highway and the object detection system failed, resulting in a collision against a truck. This happened in Florida, USA, and the outcome was the death of the driver-owner of the connected car and, most probably, although not specifically reported, injuries and material damage being sustained by the truck driver.

In Spain legislation has been enacted to carry out on-road tests with autonomous vehicles and, since January of this year, there is an Instrument (*Instrucción*) of the Directorate-General for Traffic concerning remote control self-parking, but it is not yet possible for vehicles to be driven on autopilot at a level of automation similar to that commented on.

1. Liability of the vehicle driver-owner:

Note that the third-party liability that would attach to the driver-owner of the vehicle or his insurance company for damage caused by the vehicle may, in turn, be passed on to the vehicle manufacturers or distributors. Equally so, the former may have cause of action to bring against the latter other liability actions; for example, defective product liability claims, tort liability claims and even contractual liability claims (all of which will be examined in Part II).

a) Civil liability legislation concerning motor vehicle traffic

Renders the driver's liability strict in the event of accident, at least in terms of personal injury. In accordance with the rules applicable to injury cases, the driver of the vehicle (here, depending on the circumstances, his heirs) will only be released from liability to the injured party (here the truck driver) if it is established that the harm was exclusively owing to the injured party's fault - the truck driver - or force majeure unrelated to the driving or the vehicle's operation. In this regard, it is expressly provided that vehicle defects or the breakage or breakdown of any of its parts or mechanisms shall not be regarded as events of force majeure. Therefore, in this case there would be liability on the part of the vehicle driver.

Judges are required to apply a statutory scale when quantifying compensation for personal injuries resulting from road accidents. This scale covers the pecuniary and non-pecuniary losses in a single compensatory payment and can be reduced by the Court in the event of fault or pre-existing injury being present in the victim.

b) Tort liability for damage.

As for the damage sustained by the truck driver not covered by the rule of strict liability

of the vehicle driver for the personal injury discussed in the previous section a) - for example, with regards to material damage - the truck driver could seek to make the vehicle driver (heirs) liable in tort, in which case he would have to prove: (1) the damage - injury or other damage suffered in his person and property; (2) the causal link between the causer's action or omission and the damage - that is, that such damage was caused by the vehicle's collision with the truck; and (3) the vehicle driver's intent or negligence (where the driver could have carried out some overriding action to avert the accident).

2. Compulsory motor vehicle insurance:

Civil liability legislation concerning motor vehicle traffic requires the same to be covered by civil liability insurance.

It should be noted that in our country, the motor vehicle insurance policies are designed to cover only the risks/claims described therein. It is a system based on the specificity of the risk (as opposed to the universality of risks found in other countries or industries, such as the maritime industry). Moreover, usual risk cover is linked to 'normal' driving (racing in rallies, for instance, is excepted) by a 'driver'.

The circumstances here analysed, involving the automated driving of the vehicle, would most assuredly not be covered by present-day motor vehicle insurance policies or, at most, if the aforementioned automatic function requires driver supervision (for override), one would have to determine to what extent the share of liability attachable to the driver for his own conduct would be covered by the policy.

In our system, where a victim suffers damage, such victim may claim directly against the driver's insurer (direct action) and the insurer will only be released from the obligation to pay compensation if it proves that the event did not give rise to liability of the vehicle driver or owner.

There is harmonising legislation in the EU on compulsory motor vehicle insurance which prescribes minimum third-party liability cover in EU countries, introduces a mechanism to compensate local victims of accidents caused by vehicles from another EU country and

requires the quick settlement of claims arising from accidents occurring outside the victim's EU country of residence ('visiting victims'). Since the civil liability covered by current motor insurance of many Member States may not cover cases involving automatic system failures, a legislative change on this issue is likely at the European level to expressly lay down the need for minimum amounts of cover for third-party damage owing to connectivity and automatic system failures.

Things being so, in the UK insurance policies are starting to be sold specifically covering failures in the autonomous features of vehicles and connectivity failures thereof. The first policy of this kind has been marketed, including cover for various risks:

- a) First, failure for any reason of the manufacture's software or any other authorised software installed in the vehicle, including satellite failures or other failures that may affect the navigation system fitted into the vehicle, are covered. Such terms would cover, for instance, the case we have analysed, where for some reason the autopilot system fails.
- b) Second, loss or damage caused to the vehicle and third parties as a result of hacking or attempted hacking of its operating system or other software. Cybersecurity and the manufacturer's liability in respect of the same is one of the greatest legal challenges faced by the automation of vehicles. Consider, for example, the case we have discussed, but where the reason for the detection failure is caused by the hacking of the system. Some liability claims in the US against automakers on the basis of evidence of possible hacking have not been upheld, but then there was no damage because there was no real hacking, only of the experimental kind).
- c) Third, this new insurance policy concerning the connected and autonomous vehicle also covers two aspects of interest to the extent of their import in the event of concurrent fault of the driver-owner of an autonomous vehicle and said vehicle's manufacturer. This is so because to what extent can the owner of a connected vehicle be liable if the failure can be traced back to software not being properly updated when so required by the automaker?

In this regard, the aforementioned insurance policy also covers loss or damage arising from the driver-owner's failure to update the vehicle's operating system software once 24 hours have elapsed since notice of such update by the manufacturer.

- d) Fifth and last, the driver-owner's potential liability where, notwithstanding the possibility of

performing a manual override, said driver-owner failed to take manual control of the vehicle.

To conclude, it is expected that the marketing of this specific type of insurance policies will increase in the short-term, alongside new Community legislation aimed at harmonising the risks and minimum cover of the same in connection with vehicle connectivity and automation.

For further information please visit our website at www.gomezacebo-pombo.com or send us an e-mail to: info@gomezacebo-pombo.com.

Barcelona | Bilbao | Madrid | Valencia | Vigo | Brussels | Lisbon | London | New York