How Highly Automated Vehicles Will Drive Legal Change

By Jason McCarter and Tracey Ledbetter

Law360, New York (August 2, 2017, 12:51 PM EDT) -- Imagine you’re driving along the road, minding your own business (and the traffic laws), when suddenly a car comes out of nowhere and hits you, or the car in the next lane merges into you, or the car behind you doesn’t notice that you’ve stopped at the light. These days, one of the thoughts that might pass through your head as you’re looking at the dents in your car and massaging your aching neck is, “That wouldn't have happened if we had self-driving cars.”

Those watching the automated vehicle industry expect a shift in the next few decades from humans driving cars with some automated functions to fully or near-fully autonomous vehicles that need limited or no human driver involvement. When highly automated vehicles are prevalent on the road, the legal risks associated with manufacturing cars and driving them will naturally be allocated differently than they are today. But what will those changes look like, and what can be done to prepare? There will be at least three major areas in which risk allocation associated with automobiles will change: litigation, contracting and regulation.

Litigation

Along with advantages such as more free time, the real promise of automated vehicles is fewer auto accidents. With computers rather than humans at the wheel of a car, the roads are expected to become safer. In fact, experts at KPMG predict that accident frequency might decrease by 90 percent by 2050.[1] One might expect this trend to signal the end (or at least the curtailment) of lawsuits arising from auto accidents. But as long as there are auto accidents, lawsuits will not disappear altogether; rather, the type of litigation that follows auto accidents will change. Once automobiles become self-driving, the vehicle itself rather than the driver will be “at fault” for any accident. The purpose of litigation will likely be to determine what defect in the programming or manufacture of the vehicle led to it being involved in an accident. And the focus will shift from the human driver to the vehicle itself — in other words, from personal fault and liability to product liability.

Today, when you’re involved in an auto accident and need to recover for medical expenses, repair costs or other damages, you (or your insurer) will generally make demand to and, if necessary, sue the at-fault
driver. In 20 years, if an automated vehicle hits your car, there will not be a driver to sue; rather, you (or your insurer) might sue the manufacturer of the vehicle or, just as likely, the company that designed the software and driving algorithm. After all, it will have been a product design choice, if not a defect, rather than a negligent driver, that caused the accident. But this will create a new complication for litigation over car accidents: determining what caused the accident and, by extension, which entity in the product chain must bear the cost of it. Absent some type of no-fault insurance model, trials over auto accidents will focus on product liability — a manufacturer’s liability for defects in component parts, liability for software design defects, and so on. In a symposium recently hosted by Eversheds Sutherland, University of Michigan law professor Kyle Logue suggested that these questions can likely be answered through existing tort doctrines.[2]

One possibility is that manufacturers of fully automated vehicles will be subject to strict liability, as in other product defect cases. In other words, the fact that an accident occurred will be sufficient to allow an injured party to recover. That type of liability regime would be beneficial for consumers; without it, consumers would find it difficult and expensive to prove exactly which component failed. But for manufacturers and suppliers, this regime would create new challenges. In the event that courts impose strict product liability for auto accidents, then the risk allocation among the various parties involved in the supply chain will become increasingly important. Absent a prenegotiated agreement on those points, the bulk of litigation after an accident will involve the parties in the supply chain — which, after all, have more information about their technology and components, and how they work — attempting to determine the allocation of liability, and therefore damages, for the accident.

Different liability regimes will need to fill the gap until fully automated vehicles come to market. In five years, if you are involved in an accident with a semi-autonomous car, you (or your insurer) may have to sue both the driver and the manufacturer, because it will be unclear who was at fault for the accident. Proving liability in those cases might be extremely difficult. Was the person or the car driving? What if the other driver was in semi-autonomous mode but turned off a safety feature before the accident? (At a certain point, perhaps it will be considered negligent per se to drive one’s own car, given how much safer an automated vehicle would be.)

The shift to automated vehicles may also lead to more frequent class actions arising out of auto accidents. The owner of the automated vehicle that hit your car may attempt to bring claims on behalf of a class for any design or manufacturing defects that caused the accident. After all, if the accident was caused by a defect in the car, then other cars of the same type, or with the same software, will be at risk of having the same defect — and the same accident. Again, it is likely that existing class action doctrines will address many of the issues arising from automated vehicle accidents.

In addition to new types of litigation, different types of evidence will likely become relevant in lawsuits over autonomous vehicle accidents. For example, new types of expert testimony may be needed to untangle questions about how software design interacts with component parts, and how the two are incorporated into the vehicle as a whole by the manufacturer. Absent a strict liability regime, costly expert testimony may become more common in run-of-the-mill auto accident cases, as well, since liability will be a matter of complex product design and manufacture, rather than a question of whether a driver was negligent.

Contracts

As liability for accidents shifts from drivers to vehicles, allocation of risk will become a major issue. Parties within a vehicle supply chain — manufacturers, parts suppliers and software designers — will
need to consider how to handle liability claims. In most cases, the manufacturer will attempt to push liability down the chain, through indemnification agreements and otherwise. But as large technology companies become major providers of software and other technology for automated vehicles, they may push back on such contractual risk-shifting.

Given the likelihood of class litigation, manufacturers should continue to consider including class action waivers and arbitration agreements in their sales contracts as another risk-shifting mechanism. One wrinkle, of course, is that many states do not permit manufacturers to sell cars directly to consumers. Although manufacturers may be able to require franchise dealers to include class action waivers in their sales contracts, once automated vehicles enter the used car market, it is not clear how manufacturers would be able to put such waivers in front of the people who purchase their vehicles. In addition, manufacturers will need to take into account federal and state law on the enforceability of class action waivers.[3]

Finally, the most common contractual risk-shifting mechanism is insurance. Manufacturers and other participants in the supply chain will need to obtain product liability insurance. Manufacturers may become more involved in providing insurance to their customers, as well. For example, Tesla has experimented with including insurance in the price of its cars in Asia. Further, before vehicles become fully autonomous, regulators may require specialized insurance. In the U.K., for example, owners of autonomous vehicles in the future may be required to take out “two in one” insurance that covers the driver and the vehicle in driverless mode. This type of insurance would allow an accident victim to recover under the owner’s insurance coverage without having to prove whether the owner was driving or not.

Regulation

The last piece of the puzzle is what laws and regulations will control the development and rollout of autonomous vehicles. Traditionally, vehicle safety has been within the purview of the federal government, which has established federal motor vehicle safety standards, while states have regulated drivers and traffic laws. Over the past few years, however, states have begun to pass regulations affecting automated vehicles. Several states, including California, Michigan and Texas, have passed laws or proposed regulations that would allow development of driverless vehicles in the state. Nearly half of the states have passed legislation or seen executive orders relating to autonomous vehicles. But many still have laws restricting development of driverless technology — for example, by requiring a driver to be in control of the vehicle.

It remains to be seen whether inconsistent state regulations of automated vehicles will be struck down by the courts as unconstitutional under the dormant commerce clause. It is settled doctrine that, in light of the significant effect that state highway safety regulations have on interstate commerce, such regulations may be struck down as unconstitutional if the burden on interstate commerce outweighs the minor safety benefits of the law.[4] State laws on autonomous vehicles could also be affected by federal regulation or legislation. Last year, the National Highway Traffic Safety Administration released guidelines for the regulation of autonomous vehicles; earlier this year, the current administration indicated that it was reviewing and would be revising those guidelines. Congress is also expected to take up a bill this fall that governs the development of autonomous vehicles and preempts conflicting state laws.

Conclusion
Even while eliminating many accidents and saving lives, the adoption of autonomous vehicles will create new legal risks for their owners (and for other drivers), manufacturers and suppliers. In some areas, new frameworks for regulation and contractual risk allocation will need to be created. In other areas, existing frameworks will need to evolve to address changing technology.

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[3] To the extent manufacturers offer financing to consumers, they will also need to consider the recent Consumer Financial Protection Bureau rule on class action waivers (unless it is invalidated by Congress).


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