



Emerging Risks: Motor Insurance

KEY DATES:

- **December 2020**
DfT consultation on Automated Lane Keeping System
Law Commissions' 3rd (and final) consultation on automated vehicles
- **April 2021**
Automated & Electric Vehicles Act 2018 expected to enter into force
Whiplash reforms expected to enter into force
- **July 2021**
e-scooter trials conclude

What are the emerging risks?

- **Automated Vehicles (AV)**
The *Automated & Electric Vehicles Act 2018* (AEVA), which received Royal Assent on 19 July 2018, is expected to enter into force in **April 2021**.

AEVA will impose liability upon motor insurers, under s. 2, where *"an accident is caused by an automated vehicle when driving itself on a road or other public place in Great Britain"*.

s. 8(1)(a) clarifies that *"a vehicle is 'driving itself' if it is operating in a mode in which it is not being controlled, and does not need to be monitored, by an individual"*.

We understand that, following an initial call for evidence on the Safe Use of Automated Lane Keeping System (ALKS) by the Department for Transport's (DfT) Centre for Connected and Autonomous Vehicles (CCAV), a new consultation on ALKS is expected in **December 2020**.

This comes, in part, because of opposition to the DfT's initial call for evidence in which it first proposed treating ALKS as automated, thereby triggering an insurer's liability under AEVA (opposition adopted by BLM in its own response paper).

In **December 2020**, the Law Commission of England and Wales, and the Scottish Law Commission, are expected to jointly publish their third and final consultation on automated driving.

The Law Commissions' final recommendations on a future framework for regulating automated vehicles – based upon their three-year project – are expected to report with final recommendations in 2021.

- **Vehicle Data**
In January 2020, the European Data Protection Board (EDPB) issued [Guidelines](#) on protecting personal data in connected vehicles (and mobility related applications), confirming:

"[28] Much of the data that is generated by a connected vehicle relate to a natural person that is identified or identifiable and thus constitute personal data... Indirectly identifiable data such as the details of journeys made, the vehicle usage data (e.g., data relating to driving style or the distance covered), or the vehicle's technical data (e.g., data relating to the wear and tear on vehicle parts), which, by cross-referencing with other files and especially the vehicle identification number (VIN), can be related to a natural person."

*"[59] ... Certain data generated by connected vehicles may also warrant special attention given their sensitivity and/or potential impact on the rights and interests of data subjects. At present, the EDPB has identified three categories of personal data warranting special attention, by vehicle and equipment manufacturers, service providers and other data controllers:
[i] location data;*

[ii] biometric data (and any special category of data as defined in art. 9 GDPR); and

[iii] data that could reveal offences or traffic violations.”

“[76] If data must leave the vehicle, consideration should be given to anonymize them before being transmitted...

Once a dataset is truly anonymised and individuals are no longer identifiable, European data protection law no longer applies.

As a consequence, anonymization, where relevant, may be a good strategy to keep the benefits and to mitigate the risks in relation to connected vehicles.”

We consider it unworkable for liability to be imposed upon motor insurers – under the s. 2 of AEVA – in the absence of a legislative framework governing the transmission and retention of critical collision data. Accordingly, we continue to advocate the development of legislation, which facilitates and regulates automatic access by interested parties including insurers, and affords them the opportunity to capture or intervene subsequently in the claims process.

Irrespective of the UK’s departure from the European Union and expiry of the Implementation Period on 31 December 2020, these issues seem likely to be resolved at a European, rather than a domestic, level.

- **Micro-mobility: e-scooters**

How, if at all, to permit and effectively regulate the use of e-scooters in public has taken on particular significance since the COVID-19 pandemic.

Accidents will invariably give rise to claims, raising new questions such as the appropriate standard of care to be expected of users, or the relevance of the *ex turpi causa* defence in circumstances where their use – outside of authorised trials – remains illegal.

Other important factual elements when considering blameworthiness will include:

- whether or not the rider was wearing a safety helmet;
- the visibility of the e-scooter to other road users (i.e. the use of lights and/or high visibility clothing);
- the rider’s blood-alcohol level.

On 1 July 2020, the Government set out the changes in the law required for e-scooter trials, via the Electric Scooter Trials and Traffic Signs (Coronavirus) Regulations and General Directions 2020.

Their road use is currently limited to authorised hire schemes only, and it appears the insurance arrangements require fleet-level motor insurance, rather than cover by way of individual policies. Privately bought and owned e-scooters remain illegal for road use, at least for the time being.

The outcome of a recent DfT [consultation](#) was published on 30 June 2020 and is very clear that “*the proposals are designed to enable effective trials of e-scooters to be run, and therefore apply only to and for the duration of the trials. They do not predict what regulations for e-scooters may be in the future and any future regulations may differ from what we have proposed here.*”

Ultimately, a policy choice will need to be made about whether the use of e-scooters should come within the scope of (a) compulsory motor insurance, (b) as an extension to private public liability policies, (c) whether a levy might be charged at the point of sale to fund schemes akin to the Motor Insurers’ Bureau’s uninsured and untraced scheme(s), or (d) whether e-scooters ought – as is the case for electrically assisted pedal cycles (EAPC) or e-bikes – not to be the subject of compulsory insurance at all.

Whatever the outcome of these trials, insurers will very likely need to consider how to price risk in a relatively novel field, together with how best to implement cover viable distribution models.

- **The whiplash reforms**

A package of measures designed to “reform the personal injury claims process and dis-incentivise minor, exaggerated and fraudulent road traffic accident related soft tissue injury claims”.

The package of measures – intended to apply to road traffic accidents occurring on or after **April 2021** (rather than claims made on or after that date) – comprises:

1. A (discounted) tariff of general damage awards for whiplash injuries, and minor psychological injuries, with a prognosis period of up to 24 months.
On [18 November](#), the Parliamentary Under-Secretary at the Ministry of Justice confirmed that “a consultation is currently underway with the Lord Chief Justice... and [the Government] will publish details of the [updated] tariff of damages [within regulations]”, we presume, imminently.
2. A regulatory ban on settlement without appropriate medical evidence, i.e. a fixed cost medical report from an accredited medical expert selected via the MedCo Portal.
3. An increase in the Small Claims Track limit to £5,000 (for road traffic accident related personal injury claims);
4. A new portal, known as “Official Injury Claim” (OIC), to enable claimants to progress their claims with or without legal representation;
5. A new Pre-Action Protocol, albeit details from the Ministry of Justice and the Civil Procedure Rules Committee remain awaited at the time of writing.

The Government’s [Impact Assessment dated January 2019](#) states “[5.18] Data from the [Claims Outcome Advisor and Collosus] datasets [who develop systems for insurance companies... to minimise pay-out variance] suggest that around 96% of RTA financially settled claims are soft tissue [whiplash claims]...”

However, the absence of any Alternative Dispute Resolution (ADR) is expected to disrupt claims settlement, particularly where insurers cannot – for whatever reason – admit liability within the (yet unknown) protocol period.

Usefully, *Foresight* – BLM’s liability tool – deploys explainable Artificial Intelligence (AI) into the decision making process by recommending a particular course of action based on defined parameters. Through early decision making, insurers’ indemnity spend and cycle times are controlled and reduced, respectively. *Foresight* offers an effective liability solution for the OIC portal. Meanwhile, BLM continues to develop a range of AI products designed to streamline the claims process.

Preparing for the future

For further information, or to discuss any matters arising, please do not hesitate to get in touch with Kerris Dale, or your usual contact within BLM’s motor practice.



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