

Autonomous vehicles and other liability issues affecting cyclists

Martin Porter QC considers all the hot issues involving cycling accidents



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On 18 March 2018 Elaine Herzberg was pushing her bicycle across a dual carriageway road in Arizona when she was run down by a self-driving car operated by the well-known taxi operator, Uber. Press reports indicate that the Arizona Police concluded within 24 hours (*San Francisco Chronicle*, 19 March 2018) that Uber was not at fault and that the blame lay with the deceased whose own actions made a collision unavoidable. Lawyers in the US are no doubt as familiar as we are in the UK with the need to go beyond the attribution of blame ascribed by the police conducting a post-collision investigation. It transpired that the vehicle's radar systems had detected Ms Herzberg and her bicycle but failed to recognise this as the emergency it clearly was with no braking or avoiding action taken prior to the impact. It further became obvious from the film footage taken from the cameras with which the car was equipped that the required human backup driver was looking down and paying no attention to the road ahead, at least until the last second before the collision. Ms Herzberg's family engaged lawyers and their claim was rapidly settled on confidential terms.

Here, the government has made clear its ambition that this country should be at the forefront of self-driving car technology with a declared objective of commercial use as soon as 2021. Meanwhile trials have been taking place in London and the Midlands to work towards this aim. It may not be long before lawyers here have to grapple with liability issues following a collision involving an

autonomous vehicle and it is probably those of us specialising in claims for cyclists that will be at the cutting edge. We will have to deal with what one peer has described as 'the legal nightmare' of vehicle liability (Lord Campbell-Savours, House of Lords debate 20 February 2018).

The relevant legislation is the Automated and Electric Vehicles Act 2018 which received royal assent in July 2018. The commencement date is in the hands of the Secretary of State. When in force, s2 will provide that where an accident is caused by an automated vehicle when driving itself on a road or other public place, then the insurer of that vehicle (or failing any insurer the owner) will be liable for any damage caused. There are exceptions but any injury to someone outside the vehicle would clearly be covered. At least since compulsory insurance was introduced for motor vehicles in 1930 the motor insurance industry has operated by issuing policies for a vehicle notwithstanding that it has hitherto been the individual driver's liability. Although we have already progressed to the availability of direct actions against insurers, the 2018 Act is rather revolutionary in cutting out the requirement of a liability on the part of a legal person. We may become more used to this as robots come to take over greater aspects of our lives.

Interesting questions may arise over whether a particular collision has been 'caused by an automated vehicle'. Automated vehicles are not persons. They do not owe duties of care and nor can they be negligent. A liability on an insurer/owner under s2 of the 2018 Act is subject, by s3, to

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the familiar principles of contributory negligence (in the Law Reform (Contributory Negligence) Act 1945) and in addition under s5 the insurer/owner has a right to bring contribution proceedings against any other person liable to the injured party. There may be an argument that a collision caused entirely by the injured person has not been caused by an automated vehicle. Some guidance may be derived from the Supreme Court decision in *R v Hughes* [2013], on the different context of a criminal conviction under s3ZB of the Road Traffic Act which was held to require something 'open to proper criticism' 'beyond the mere presence of the vehicle on the road, and which contributed in some more than minimal way' to the collision. However for practical purposes involving suing for compensation, any cyclist in collision with an automated vehicle will be in no worse, and quite possibly a much better, position than one left suing a human driver. Properly functioning automated vehicles should recognise and avoid colliding with bicycles. We may be getting somewhat closer to the deemed liability provisions commonly to be found on Continental Europe.

The technology is probably not there yet, but there are grounds for optimism that autonomous vehicles will in time become significantly safer than human-driven motor vehicles. Potentially every autonomous vehicle will be capable via software updates of 'learning' from incidents involving other autonomous vehicles in a far more efficient manner than humans learn from the mistakes of other humans. Blind spots, especially on larger vehicles, should be totally eliminated as should speeding, road-rage, drowsiness, distracted driving and poor reaction times, all of which disproportionately impact upon cyclists. In time it can be hoped that those of us who specialise in assisting cyclists to obtain compensation following road traffic collisions may become redundant.

One type of case though upon which this growing technology is unlikely to have any impact is that of the cyclist/pedestrian collision. Such cases are extremely rare compared to the far more common incidences of harm being done to pedestrians by motorists. In the past 12 months or

so I have detected a marked 'Alliston' effect whereby cyclists in appropriate kit travelling on good-quality lightweight bicycles at a reasonable speed are subject to an unreasonable degree of criticism. Charlie Alliston was, in a highly publicised criminal case, convicted of causing the death of a pedestrian, Kim Briggs, by wanton

or furious driving etc (*R v Alliston* [2017]). Alliston was unquestionably at fault through not having the required front brake but both the prosecution speech and the judge's sentencing remarks indicate that he was criticised also for riding a bicycle 'built for speed' at 18mph, slowing to 10-15mph before colliding with the unfortunate pedestrian.

This effect impacts the personal injury field. I have recent experience of a surprisingly high finding of contributory negligence against a relatively fast-moving cyclist who failed to avoid pedestrians stepping out in front of him. I have equally had to fend off numerous allegations of excessive speed made against cyclists travelling of the order of 20mph. It is without question a higher standard than that placed on motorists who would in most circumstances be regarded as driving ultra-cautiously if travelling at similar speeds even in an urban environment.

Another allegation that frequently arises when acting for cyclists is that the injured person was not dressed appropriately in accordance with the Highway Code. A further advantage of driverless technology is that it should not be possible to assert blame for a collision on a victim not wearing day-glow or fluorescent clothing. Further if the overall risk of collision on the roads improves for cyclists (it has been improving for many years for motorists but not for cyclists and pedestrians), the case for contributory negligence for failing to wear a cycle

helmet should become even weaker. Although the allegation is frequently raised by insurers it seldom survives a firm rebuttal. Given the inherent limitations of cycle helmets the defendant's burden of proving causation is exceptionally difficult to discharge. However even leaving that aside the question of fault required

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by the 1945 Act should always be challenged. There are conflicting first instance, and no appellate, decisions on this. In *A (A child) v Shurrock* [2001] fault was not found for not wearing a helmet. In contrast in *Smith v Finch* [2009] the judge made a finding of fault (though not causative fault). Most recently in *Sinclair v Joyner* [2015] the judge referred to *Smith* and made the observation that 'in the present case the claimant was an adult enjoying a bicycle ride in the countryside on a sunny day', observations that only make sense when rejecting contributory negligence on the basis of fault as well as causation. The case of *Reynolds v Strutt & Parker LLP* [2011] where the claimant himself caused a crash when racing and sued his employer for not compelling him to wear a helmet remains wholly exceptional.

Clearly with advancing technology we can expect some challenges and changes in acting for cyclists in the relatively near future. ■

A (A child) v Shurrock
[2001] CL October Digest 386

R v Allison
[2017] unreported, Central Criminal Court, HHJ Joseph QC, 18 September

R v Hughes
[2013] UKSC 56

Reynolds v Strutt & Parker LLP
[2011] EWHC 2263 (Ch)

Sinclair v Joyner
[2015] EWHC 1800 (QB)

Smith v Finch
[2009] EWHC 53 (QB)