

CLM

FURTHERING THE HIGHEST STANDARDS OF CLAIMS AND LITIGATION MANAGEMENT

APRIL 2017

CLINICAL EXPERTS WEIGH IN
ON WHAT'S NEXT FOR PAIN
MANAGEMENT

DEVELOPING AN EFFECTIVE CYBER
INCIDENT RESPONSE PLAN

PAVING THE WAY FOR
AUTONOMOUS VEHICLE CLAIMS



Hi, I'm Listening

The Rapidly Increasing Use of Personal Assistants and
Smart Products Provides Opportunities in Claims and Litigation



UBER



ARE WE THERE YET?

PAVING THE WAY FOR AUTONOMOUS VEHICLE CLAIMS

BY PATICE GORE

Autonomous or self-driving vehicles (AVs), once confined to the realm of science fiction, are now a reality. Most vehicles on the road today rely on some aspect of autonomous technology. Vehicles of the future will be entirely controlled by a computer—the vehicle will navigate an entire trip with minimal or no input from the human occupant. As autonomous technology proliferates, the number of accidents involving AVs inevitably will increase, as well. Indeed, AV manufacturers reported six accidents involving AVs so far this year and nine accidents in 2015.

Claims professionals will be at the forefront of the development and evolution of autonomous technology and AVs. Insurance carriers and claims professionals must be ready to face new challenges in investigating the property damage and bodily injury claims that will inevitably arise from AVs. A cursory review of claims handling issues arising from AVs highlights the complex nature of AV cases that claims professionals will soon face.

CURRENT AV LAW

In September 2016, the U.S. Department of Transportation's National Highway Traffic Safety Administration (NHTSA) released its long-awaited policy and guidelines regarding AVs—the Federal Automated Vehicles Policy. It consists of four parts: (1) vehicle performance guidance for automated vehicles; (2) model state policy; (3) NHTSA's current regulatory tools; and (4) modern regulatory tools.

It is important to note that the Federal Automated Vehicles Policy is not

a federally enacted statute or regulation. It contains only general provisions and suggestions to consider in connection with regulating AVs. It does not provide specific mandates regarding the use or operation of AVs on public roadways. The policy is merely the start of federal AV regulation, and the NHTSA intends to continue updating and revising its policy in the future.

Eight states and Washington, D.C., have enacted laws relating to AVs. Although California was not the first state to act, its legislative framework under California Vehicle Code Section 38750 and its attendant regulations are most often discussed by those interested in AVs. Under California law, an AV is a vehicle equipped with integrated autonomous technology—technology that has the capability to drive a vehicle without the active physical control or monitoring by a human operator. California does not regulate or prohibit the use of AVs on public roadways for nontesting purposes, but the Department of Motor Vehicles has discretion to impose additional requirements for the operation of unmanned AVs on the state's public roadways for nontesting purposes.

In order to test AVs on California's roads, a manufacturer must certify that the AV has an easily accessible mechanism to disengage the autonomous technology, and the engagement status must be clearly visible in the vehicle's cabin. The AV also must have a safety alert to notify the operator of a failure and allow the operator to either take control of the vehicle (through various methods) or bring it to a complete stop.

Additionally, the AV must meet federal motor vehicle safety standards, and the manufacturer must maintain an instrument of insurance, bond, or self-insurance in the amount of \$5 million. The AV must be equipped with a mechanism to capture and store autonomous technology sensor data for at least 30 seconds before a collision. The manufacturer also must provide the purchaser of an AV with a written disclosure that information is collected by the autonomous technology installed in the vehicle.

CLAIMS ISSUES:

A CALIFORNIA REVIEW

Insurers need to prepare their claims professionals to effectively handle incidents involving AVs by addressing potential issues likely to arise. Fact investigation and determining liability are only two significant obstacles that claims professionals may encounter when dealing with AV claims in the near future.

Fact investigations will pose a significant challenge to claims professionals handling AV claims. AVs are equipped with various technologies capable of sensing external conditions to navigate the vehicle. Similar to their nonautonomous counterparts, AVs also are equipped with event data recorders that maintain data obtained from the various sensors on board.

Claims professionals will need to gain access to the stored data in order to re-create the events leading up to the collision, particularly when the facts cannot be obtained from the individuals involved. Although Section 38750 requires the manufacturer to disclose the fact that the AV collects certain data, the statute does not specify who owns the collected data, and it does not include provisions as to permitted uses of the data and liability for unauthorized access.

AV manufacturers likely will resist the disclosure of such data to third parties (including insurance claims professionals) for a number of

reasons, such as a desire to protect the manufacturer's proprietary information regarding its emerging technology or to protect themselves from liability arising from the technology's failure. Thus, manufacturers may impair a claims professional's handling of cases involving AVs.

Even after passing the initial fact-gathering obstacles, AV claims present further challenges for claims professionals and carriers with respect to apportioning liability. By taking control of the vehicle, AVs are expected to prevent accidents caused by human error, the cause of most collisions. However, as former U.S. Secretary of Transportation Anthony Foxx has noted, "Autonomous doesn't mean perfect." Technology invariably fails. Furthermore, current autonomous technology is not yet capable of fully sensing the environment surrounding the AV, at least not to the same extent as human drivers.

For example, certain technologies are not able to sense inclement weather conditions such as fog and heavy rain. Moreover, AVs cannot yet respond to other road conditions encountered regularly. Indeed, the accidents reported by AV manufacturers to the California Department of Motor Vehicles show AVs are not able to effectively handle merging with intersections, responding to reckless drivers, heavy pedestrian or cyclist traffic, or parked cars. They also cannot understand hand signals from other drivers and traffic control officers.

Until AVs can reliably perform under all driving circumstances, the human AV operator is expected to be ready to disengage the autonomous technology and take control. Liability may turn on whether or not the human operator should have or should not have disengaged the autonomous technology. A disengagement of the autonomous technology can be required under various circumstances. The autonomous technology may fail or may not sense the vehicle's surroundings as expected. While California law requires the AV

to notify the operator of a failure, this is not sufficient to prevent a collision. The AV cannot alert the operator of a failure or need to cede control if the AV cannot sense the sub-optimal driving conditions prompting the need for operator intervention.

Even assuming the AV performs as intended and notifies the operator of the need to cede control, the operator may be unprepared to take control when needed. Total vehicle automation may cause operators to become distracted or lulled into a state of false security as operators become increasingly reliant on their AVs to perform major vehicle functions. The AV operator also may lack complete understanding of the AV's limited performance capabilities under certain weather conditions, or the operator may simply disengage the autonomous technology unnecessarily because they are nervous or uncertain about the AV's performance through oncoming road conditions. All of these scenarios are possible and could result in a collision.

Ascertaining the circumstances leading up to the collision will determine whether liability lies with the operator, the manufacturer, or another party. Again, the data stored by the AV may be crucial in determining what happened prior to the collision and may provide clues as to the performance of the autonomous technology (such as past failures). The data alone will not provide a full picture of liability for the accident.

AV claims will involve a reasoned and detailed analysis of the facts, competing interests, and current state of the law as well as an understanding of the limits of autonomous technology itself. Claims professionals should be prepared to understand the complexities of AV claims and the issues that they will bring in the near future. ■

Patrice Gore is an attorney with Haight Brown & Bonesteel LLP. She can be reached at pgore@hbblaw.com.