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Self-Driving Vehicles Will Change the Insurance and Litigation Industries

By Daniel E. Cummins

Control

The future of self-driving vehicles (SDVs) is rapidly approaching. In fact, you might say that it has rounded the corner and arrived on its own.

A year-end review article in *Time* magazine titled "2017 The Year in Smart Auto," outlined the many advancements of last year in the field of SDVs:

- January: The city of Las Vegas launched a self-driving shuttle program on a section of its famous Strip in a gamble to convince visitors of the safety of self-driving vehicles.

- February: Ford Motor Co. invested $1 billion in self-driving software startup Argo AI and, a month later, Intel acquired a similar startup, Mobileye, for $15 billion.

- March: California, which has the country's largest auto market, passed landmark legislation that reversed a rule that required human backup drivers in autonomous vehicles.

- August: Ford partnered with Domino's Pizza to test a self-driving delivery service.

- September: The U.S. House of Representatives approved the first federal legal framework for oversight of SDVs, which may smooth the path to mass adoption of similar laws nationwide.

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- November: Google's Waymo, an autonomous car development subsidiary company, launched the first self-driving vehicle without a human backup driver on public roads in Arizona; and Uber agreed to buy up to 24,000 autonomous cars from Volvo, beginning in 2019. *Time* noted that this purchase could turn Uber into the largest self-driving fleet operator in the world.

Speaking of Uber, that company has been testing SDVs in a pilot program in Pittsburgh since September 2016. Accordingly, SDVs are coming into vogue across the country and are already starting to drive themselves into Pennsylvania.

However, Uber recently suffered a setback in its movement to advance self-driving vehicles when, on March 18, 2018, a self-driven Uber Volvo SUV fatally struck a pedestrian in Phoenix as she was walking her bicycle along the street. An Uber employee was behind the wheel but apparently did not intervene prior to the impact. Reports indicated that the vehicle was traveling 40 mph in a 35 mph speed limit zone and that the vehicle's perception sensors obviously failed under the circumstances.

After this accident, Uber temporarily suspended its autonomous vehicle operations in Phoenix, San Francisco, Toronto and Pittsburgh. Commentators noted that this fatality confirms that autonomous vehicles are not infallible and that there should, therefore, be no great rush to put driverless cars, buses or trucks on the highways and byways of the country. Many experts commented that a human driver could have responded more quickly and thereby potentially avoided this fatal accident.

Do People Really Want Self-Driving Vehicles?

With the rise of SDVs being highlighted in the national media on a regular basis, the question remains as to whether the public really wants totally autonomous self-driving vehicles. The answer appears to be a resounding "No."

According to a 2017 study by the Pew Research Center, 87 percent of Americans want SDVs to always have a person inside who retains the ability to take control over the vehicle in the event of an emergency. That same study also reported that 83 percent of Americans want driverless vehicles to have a dedicated lane of travel.

Another survey by Gartner Consumer Trends in Automotive was more tempered, noting that 55 percent of those individuals surveyed in the United States and Germany would not ride in a fully autonomous vehicle. That survey indicated that 70 percent of respondents would instead be willing to ride in a partially autonomous vehicle, which was defined as a vehicle that could drive autonomously but would also allow for a driver to retake control over the vehicle if necessary.

The Society of Automotive Engineers has classified SDVs across six different categories of automation, from "no automation" to "full automation." To date, it does not appear that the issue of whether humans will have the ability to override the computer system and take control over a self-driving vehicle has been finalized by the auto manufacturers.

The eventual acceptance and widespread use of such vehicles by the public at large may depend on whether the auto manufacturers listen to the overwhelming public sentiment in favor of human drivers maintaining at least some control over these vehicles and not being at the whim of the vehicles' computer systems, hurtling them literally out of control along highways and roadways.

In addition to impacting the auto industry, the advent of SDVs is sure to change the automobile insurance and accident litigation industries. The extent and impact of these changes remains to be seen.

Potential Impact on Automobile Insurance

It is a fair prediction that the rise of self-driving vehicles will drastically reduce the number of car accidents, which are almost always a result of human error or negligence. As such, some commentators feel that the rise of SDVs could have a great impact on the insurance industry. Others disagree.

"The demise of the insurance industry that's often predicted in relation to self-driving cars is based only in conjecture," James Lynch, chief actuary at the Insurance Information Institute told the *New York Daily News* in an interview. "[Understand] that the revolution is not going to take place overnight and it's not going to take place in five years; it's going to take a long time and the

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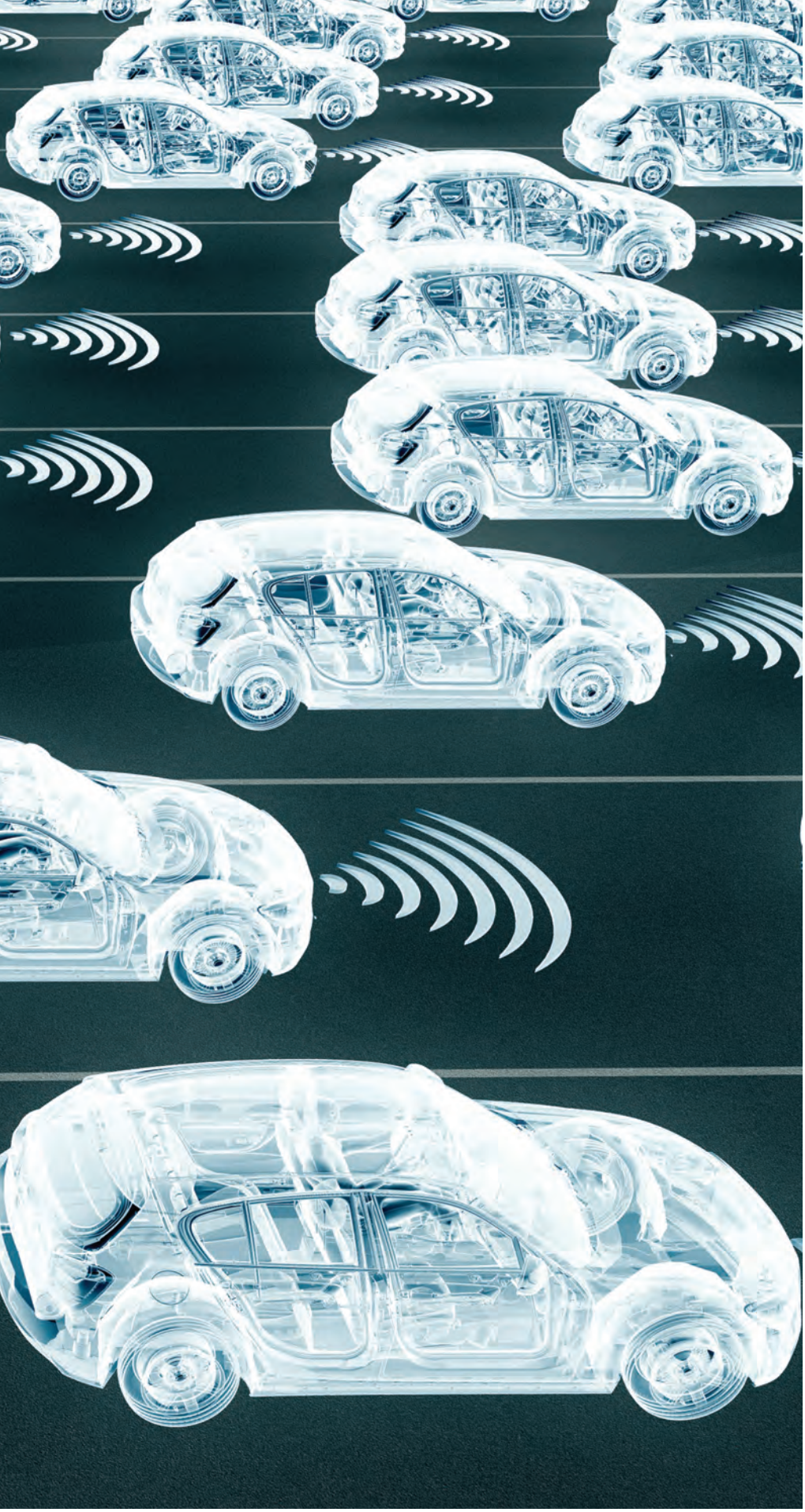

insurance will change as the technology emerges."

It is likely that premiums for insurance policies that cover SDVs will be higher than those of traditional vehicles, given the more expensive costs to repair a SDV, including the vehicle's computer components, after a crash. Simply put, the need to replace or fix a bumper equipped with radar sensors may make even a fender bender a much more costly accident in terms of property damages.

These anticipated higher expenses for property damages may lead to higher minimums and requirements for collision coverage. Such higher property damage limits may, in turn, give rise to more litigation on the property damages aspect of motor vehicle accidents.

It is also expected that litigation following accidents involving self-driving vehicles will almost certainly have a products liability component. Commentators predict that insurance companies will sell more products liability insurance to automakers to provide greater protection in the new era of self-driving vehicle litigation.

And as long as the automakers manufacture partially autonomous vehicles where the human driver retains some control over the vehicle, it can be also anticipated that personal liability automobile insurance will remain in place to protect and cover individuals sued for causing an accident involving a SDV.

Automobile Accident Litigation

In today's world, automobile accident litigation revolves around an analysis of which driver's negligence was the cause of the collision. Typically, the resolution of this issue centers around gathering information from the drivers involved, any eyewitnesses and the police report. Where the liability issues are less than clear, an accident reconstruction expert may be called in to provide an

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assessment. In less common situations, products liability may be implicated if defects with one of the vehicles involved in the accident are alleged.

Many of these same issues will still be in play in the future with SDVs, assuming such vehicles are manufactured with partially autonomous controls. In cases involving self-driving vehicles, drivers could still be found to have been negligent in failing to decide to retake control over the vehicle in response to an impending accident. Drivers may also be found to be negligent for their acts or omissions that occur after they retake control of the vehicle and are still unfortunately involved in an accident due to their negligence.

Owners of SDVs may also be found to be liable for failing to follow instructions in setting the controls of the vehicle prior to the commencement of a trip or for allowing a person not familiar with the use of these types of vehicles to utilize the car or truck. Liability issues may arise from individuals who alter the machinations or controls of the vehicle in an effort to override safety devices that come with the vehicle.

Perhaps the biggest anticipated change for lawsuits involving partially autonomous vehicles will be the greater emphasis on products liability claims. It is likely that deep-pocket product and component manufacturers and suppliers will routinely be

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joined as defendants. Wealthy defendants will be drawn into the litigation under claims of software malfunctions, design and manufacturing defects, inadequate warnings, breach of warranty or failure to comply with safety standards that may have been developed with respect to self-driving vehicles.

Given that these products liability issues will become a major part of future motor vehicle accident cases, it would be beneficial for litigators to become familiar with the line of cases following the Pennsylvania Supreme Court's decision in *Tincher v. Omega Flex*, 104 A.3d 328 (Pa. 2014), under which the court generally elected to stay with products liability law as set forth in Section 402A of the Restatement (Second) of Torts.

In *Tincher*, the plaintiffs sued a flexible natural gas piping company under a products liability theory. The plaintiffs asserted that their house was burned to the ground as a result of a lightning strike that allegedly burned a hole in the gas piping in their house. At trial, the jury found against Omega Flex on plaintiffs' strict liability count, but in favor of Omega Flex on the plaintiffs' negligence count.

Omega Flex appealed and the case climbed up the appellate ladder to the Pennsylvania Supreme Court. The plaintiffs advocated for the retention of the Restatement (Second), while Omega Flex sought adoption of the Restatement (Third) of Torts.

In its lengthy opinion, the Pennsylvania Supreme Court overruled its prior decision in the case of *Azzarello v. Black Brothers Co., Inc.*, 391 A.2d 1020 (Pa. 1978), but declined to adopt the law set forth in the Restatement (Third) of Torts relative to products liability matters.

The prior *Azzarello* decision and its progeny attempted to remove all negligence concepts from product liability cases, which proved to be problematic for defendants in design defect cases where the reasonableness of the design is typically an important consideration. The *Azzarello* decision also held that that the trial court and not the jury was in charge of evaluating the risk-utility of a defendant's product. Under the old standards set forth in *Azzarello*, trial courts were also required to charge juries that a product supplier was essentially a guarantor of its product and that the product must be provided with every element necessary to make it safe for its intended use.

In a 4-2 decision in *Tincher*, the Pennsylvania Supreme Court did away with the notion that manufacturers were essentially

guarantors of their products and formulated a new standard of review for Pennsylvania products liability cases that included both "consumer-expectation" and "risk-utility" definitions of a defect.

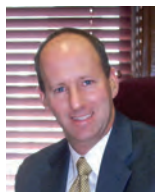
Under the consumer-expectation test, a "product is in a defective condition if the danger is unknowable and unacceptable to the average or ordinary consumer." *Tincher*, 104 A.2d at 387. This test focuses on whether the product carries a surprise element of danger.

The separate risk-utility standard is "a test balancing risks and utilities or, stated in economic terms, a cost-benefit analysis." *Id.* at 389. With the risk-utility test, a product is considered defective when the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions. The risk-utility analysis can take into account a number of factors.

Under the *Tincher* analysis, plaintiffs are permitted to proceed on one or both theories and it is expected that they will do so in future cases arising out of accidents involving self-driving vehicles.

Prepare for the Future

As litigators and claims professionals will soon come to realize, the potential insurance, legal, liability and property damages issues attendant with the rise of SDVs will change the direction of automobile accident litigation in the not too distant future. To prepare for these changes, litigators and claims professionals may benefit from putting themselves on autopilot in terms of reading everything they can about the technological advancements of self-driving vehicles as well as any products liability decisions handed down by the state and federal courts of Pennsylvania as that law continues to evolve in the post-*Tincher* era. ⚖



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