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# Will Automated Vehicles Crash the Courthouse?

## Or do policymakers have something else in mind?

The number of Automated Vehicles (“AVs”) on the American road system is increasing. The expansion of this budding technology is finally spilling over into the courtroom. This area of law, however, will not be developed in the courtroom alone. Policymakers could always have as much an impact shaping liability issues with AVs as lawyers, judges, and juries.

As the technology around AVs continues to develop, leaders at all levels of government have begun preparing for the future where AVs are more prevalent and, perhaps, dominant. Because elections always have consequences, I’d urge readers to stay on top of this issue and be prepared to educate policymakers on the need to stand up for safe vehicle deployment and the need those injured in and by AVs to obtain justice. While WAJ has been monitoring this issue in the Capitol, there is no substitute with arming yourself with the knowledge to be an effective advocate.

2018 has featured both the first personal injury lawsuit seeking damages for injuries caused by an AV, a high-profile pedestrian death in a different crash,<sup>1</sup> and continued attempts on the policy front to craft a legal and regulatory framework that will allow continued development and eventual widespread deployment.<sup>2</sup>

Emerging technology is often a tempting target for regulators and lawmakers looking to attach themselves to popular causes. This improves the odds that the industry may succeed in obtaining favorable treatment making it harder to bring claims against them from the known harms their products may cause. While Federal action is stalled at the time of this writing, state regulators continue to examine how best to adjust regulatory regimes, generally with an aim towards encouraging AV deployment.<sup>3</sup> Using the first known lawsuit against an AV, a California case, this article examines some of the potential policy and legal issues that may emerge as AVs makers seek to put their cars on the road.

The first known personal injury lawsuit involving an AV<sup>4</sup> was filed and settled within the first six months of 2018.<sup>5</sup> The value of the settlement is not public. As one might imagine, the vehicle’s manufacturer, a named defendant may have had

strong motivation to settle the case quickly. In many ways, it is surprising the plaintiff had to file suit at all.

The plaintiff alleged that he was injured in early December 2017 while riding his motorcycle in San Francisco.<sup>6</sup> The action was venued in federal court for the Northern District of California.<sup>7</sup> The facts from the complaint are relatively straightforward. To wit, the plaintiff was operating his motorcycle directly behind a 2016 Chevrolet Bolt that was engaged in a self-driving mode.<sup>8</sup> The Bolt allegedly changed lanes, and moved over into the left-hand lane.<sup>9</sup> As the Bolt moved to the left, the plaintiff continued forward.<sup>10</sup> As he moved forward, the Bolt allegedly “veered back into the plaintiff’s lane, striking him and knocking him to the ground.”<sup>11</sup> The plaintiff alleged that he suffered injuries requiring “lengthy treatment” as a result of this collision.<sup>12</sup>

Although the facts were somewhat straightforward, the case was not a ‘slam-dunk’ on liability. Regulations enacted by the state of California (and sometimes local) offer AV makers an opportunity to put forth their own narrative in the event of a crash. This may impact manufacturer liability. A report generated from the accident found Mr. Nilsson at fault. In California, when an automated vehicle is involved in a collision, the manufacturer is required to create a traffic incident report and file it with the Department of Motor Vehicles.<sup>13</sup> The traffic report generated for this particular collision offers differs substantially from the plaintiff’s complaint.<sup>14</sup> The report, filed a week after the collision, asserts that the plaintiff caused the crash, rather than operator of the Bolt, or the Bolt itself.<sup>15</sup> It reads, “the motorcyclist was determined to be at fault for attempting to overtake and pass another vehicle on the right under conditions that did not permit that movement in safety.”<sup>16</sup> Thus, from shortly after the accident onward, it is clear the AV manufacturer disputed its role in causing the collision.

Industry observers have long wondered, who is the appropriate defendant to sue in this situation? As it exists today, our system of risk and recovery hinges on the actions of individuals. Human neg-

ligence is a *sine qua non* of most motor vehicle collisions. Traditionally, this places human drivers and their liability insurance policies at the epicenter of personal injury litigation. Yet, AVs shift this calculus. By placing a computer program at the helm of the vehicle, human negligence may be removed from the equation. Thus, personal injury litigators must confront a tension between new technology and historical legal frameworks. The same question will confront policymakers.

Wisconsin will someday be forced to determine who the operator of an AV. The best approach to this question is not clear. We should, however, be mindful of attempts to craft a regime that leaves no entity responsible for the vehicle's operation.

In both Florida and California, regulators fashioned a legal fiction to define who "drives" a driverless car.<sup>17</sup> In California, the state where the crash discussed above took place, an "operator" of an AV is defined as the "person who is seated in the driver's seat, or, if there is no person in the driver's seat, causes the autonomous technology to engage."<sup>18</sup> With this definition, human action remains a focus of AV operation and, importantly, this places duties and obligations on the "operator" that may be relevant when determining liability under more than one legal theory. In situations where there is a legal definition that allows the suits against the "operator" the plaintiff is presented with a choice: to sue, or not to sue? And if yes, under what theory/cause of action? Going forward, we should strive to preserve a system that gives multiple avenues to seek justice.

Because we're discussing the case, we know the answer to at least one of the questions posed above. Oscar Nilsson, the plaintiff discussed above ultimately filed suit against General Motors LLC ("GM"), the maker of the autonomous Chevrolet Bolt that crashed into him.<sup>19</sup> He did not assert any products liability claims, instead alleging a single negligence claim.<sup>20</sup> According to the complaint, GM "owed [Mr. Nilsson] a duty of care in having its [AV] operate in a manner in which it obeys the traffic laws and regulations."<sup>21</sup> The breach of this duty allegedly occurred when the AV "veered into an adjacent lane of traffic without regard for a passing motorist."<sup>22</sup> Mr. Nilsson did not allege any claims against the operator of the Bolt, or against any liability insurer.

Yet the complaint does not altogether ignore the Bolt's operator, Mr. Manuel DeJesus Salazar. After identifying him, the complaint describes Mr. Salazar's control over the vehicle with some specificity.<sup>23</sup> Though his hands were off the wheel, the complaint alleged that Mr. Salazar had some

control over the vehicle. It states that "Mr. Salazar ... commanded the Self-Driving Vehicle to change lanes shortly before the collision."<sup>24</sup> It is unclear how Mr. Salazar commanded the vehicle to change lanes; however, this language offers an important practical lesson. That is, human error can still cause collisions in the AV context because humans nevertheless maintain a degree of control over the AV. Here, the complaint suggests that Mr. Salazar played a fundamental role in causing the collision. Yet, Mr. Nilsson did not file suit against Mr. Salazar. One is left to wonder, why not? We must also reflect on the fact that California's policy framework allowed different theories of liability.

One potential answer lies in the history of GM's automated vehicle division.<sup>25</sup> This division was formerly "Cruise Automation" until GM purchased it.<sup>26</sup> Importantly, the company may have intentionally taken risks when deploying its vehicles for testing. The CEO and founder of Cruise Automation, Kyle Vogt, explicitly targeted the San Francisco market for deployment of its AV system *because* it would be subject to a more significant amount of risk than in any other market.<sup>27</sup> That is to say, this AV developer intentionally loaded the dice for the risk of a collision. In a piece he wrote, Vogt explained that in San Francisco, "our vehicles encounter challenging (and often absurd) situations up to 46 times more often than other places self-driving cars are tested."<sup>28</sup> Of course, intentionally exposing individuals to known risks can expose defendants to significant liability.

Though explicitly invoked in this case, issues involving insurance will, for obvious reasons, loom large in the development of AV law and regulation. The choices made about who is, for example, a vehicle operator have traditionally been linked to things like financial responsibility laws, insurance policy limits, and other regulations.

A policy choice made by California offers additional insight as to why the plaintiff may have named only the defendant manufacturer. Under Cal. Veh. Code § 38750(b)(3), all manufacturers testing autonomous vehicles in California are required to carry \$5,000,000 in insurance. Therefore, although the law does not set per-incident minimums, the manufacturers must have putatively available coverage. Legislators have also taken steps to give teeth to the requirement by prohibiting any manufacturer opting to self-insure from operating in CA if there are "any outstanding unsatisfied final judgments against the manufacturer arising out of a motor vehicle collision."<sup>29</sup> As AV developers envision a reduction or elimination of human control over vehicles, it seems like a wise

policy choice to ensure there is a backstop of insurance coverage available in the event of injury.

Regardless of “why” GM was ultimately chosen as the only defendant, practitioners should take note of the outcome. GM quickly settled a lawsuit involving one of its AVs – the first of its kind – even though it ostensibly disputed liability. This is a major bellwether moment in AV development and in personal injury litigation though public image considerations for the industry may have driven GM’s decision-making. We will eventually be forced to tackle these issues in Wisconsin. Barring some unforeseen breakdown in the technology, it is only a matter of time until such a case must be filed here.

We must take an active role in the policy development governing AVs. Wisconsin has already begun taking steps to alter motor vehicle laws in anticipation of AV deployment. In May 2017, Governor Scott Walker, via executive order, created the Automated and Connected Vehicle Testing and Deployment (“ACVTD”) Steering Committee to help advise policy makers on how Wisconsin should respond to the advancement of the industry.<sup>30</sup> Notably, the panel was stacked with representatives connected to the AV industry and, save motorcyclists, it left pedestrians, cyclists, and potentially injured people, unrepresented. Nevertheless, the commission’s recommendations were somewhat modest in scope.

On June 29, ACVTD Steering Committee delivered its final report to the Governor after holding meetings, which were monitored and attended by WAJ, throughout 2017-18.<sup>31</sup> As the name of the committee suggests, the scope of the report encompasses both “connected and automated vehicles” (“CAVs”). “Connected vehicles” refers to those vehicles with the capability to wirelessly network with each other. The final report of the ACVTD is still noteworthy in several respects.

First, the report recognizes that Wisconsin law is already accommodating for these new technological advances.<sup>32</sup> As the report recognizes, 2017 Wisconsin Act 294 exempted certain “platooning” trucks from the minimum following distances required under Wis. Stat. § 346.14.<sup>33</sup> “Platooning” is an industry term of art that refers to a method of operation for connected vehicles. Essentially, when connected, vehicles can harmonize braking and acceleration.<sup>34</sup> Thus, when one of the vehicles brakes or accelerates, so do the other vehicles to which the first vehicle is connected. This is referred to as “platooning” is intended to lower trucks’ fuel economy by allowing them to tailgate, i.e., draft each other in groups. The takeaway here is clear:

Wisconsin legislators are welcome to amending existing law to prospectively accommodate for new vehicle technology.

Beyond documenting how the law is already changing, the report also established a set of primary recommendations to policy holders.<sup>35</sup> Among other things, the report suggested that Wisconsin:

- Identify the Department of Transportation as Wisconsin’s lead state agency to support CAV testing and deployment, respond to emerging issues and engage the public and business community on CAV topics.
- Create a working group with the ongoing responsibilities of responding to CAV technology and deployment, promoting CAV research development, providing policy advice and coordinating the state’s response.
- Work with the legislature to generate and formally authorize a CAV testing framework that defines expectations for manufacturers which test automated vehicle technologies on Wisconsin’s public roads.
- Recognize proposed regulatory and development guidelines for CAVs created by the United States Department of Transportation, the National Highway Traffic Safety Administration, and the American Association of Motor Vehicle Administrators.<sup>36</sup>
- Support legislative and administrative efforts to update and clarify state statute and administrative rules regarding CAV operation and liability.
- Promote the entire state of Wisconsin as “Open for CAV deployment.”
- Highlight and pursue existing, near-term strategic partnerships while continuing to explore new strategic social, economic, and environmental partnerships through the creation of a CAV working group.<sup>37</sup>

Technological and legal changes continue to alter the landscape of AV litigation. The report is note-

worthy for the issues it did not address. Unlike California, the committee has not recommended mandating insurance coverage, nor has it suggested Wisconsin is ready to redefine who is operating a motor vehicle. In total, the committee favors a light regulatory touch. This is favorable to manufacturers and marketers of AVs – it also leaves the current system in place to resolve disputes that may arise. That said, it is only a matter of time before these issues come up and we should be wary of any attempts to restrict liability or grant immunity for injuries caused by AVs.

Wisconsin litigators should remain attentive as courtrooms and statehouses across the country wrestle with these changes. As members of this organization, we should be prepared to be vigilant in making sure that policy makers look out for safety and do not ignore the interests of injured people when making new laws governing AVs. 

WAJ Government Affairs Director Jim Rogers contributed to this article.

#### ENDNOTES

1. On March 18, 2018, a manned, but self-driving Volvo owned by Uber technologies killed a pedestrian walking a bicycle in Tempe Arizona.
2. ELIZA FAWCETT, Driverless-car makers want Congress to free them from state safety standards, Los Angeles Times (July 11, 2018), <http://www.latimes.com/politics/la-na-pol-driverless-vehicle-legislation-20180711-story.html> (Discussing the stalled fate of H.R.3388 - SELF DRIVE Act and S.1885 - AV START Act).
3. *Id.*
4. For the purpose of this article, AVs are defined to be those operating with systems in the Level 4 and Level 5 mode. This does not include Tesla vehicles widely sold to date and which have been involved in some high-profile crashes, injuries and deaths. <https://www.caranddriver.com/features/path-to-autonomy-self-driving-car-levels-0-to-5-explained-feature>
5. Joint Stipulation for Dismissal with Prejudice, *Nilsson v. General Motors LLC*, No. 4:18-cv-00471 (N.D. Cal. June 26, 2018), ECF No. 34.
6. Complaint at 2-3, *Nilsson v. General Motors LLC*, No. 4:18-cv-00471 (N.D. Cal. Jan. 22, 2018), ECF No. 1.
7. *Id.* at p. 1. (The plaintiff, Oscar Nilsson was represented by Trinette G. Kent, an attorney with Lemberg Law, LLC, a Connecticut-based law firm).
8. *Id.* at p. 2-3.
9. *Id.* at p. 3.
10. *Id.*
11. *Id.*
12. *Id.*
13. Cal. Code Regs. tit. 13, § 227.48

14. See Report of Traffic Accident Involving an Autonomous Vehicle, available at [https://www.dmv.ca.gov/portal/wcm/connect/1877d019-d5f0-4c46-b472-78cfe289787d/GMCruise\\_120717.pdf?MOD=AJPERES](https://www.dmv.ca.gov/portal/wcm/connect/1877d019-d5f0-4c46-b472-78cfe289787d/GMCruise_120717.pdf?MOD=AJPERES) (“Crash Report”).
15. *Id.* at p. 2.
16. *Id.*
17. Cal. Veh. Code § 38750 (a)(4); Fla. Stat. Ann. § 316.85 (2);
18. Cal. Veh. Code § 38750 (a)(4);
19. Complaint at 2-3, *Nilsson v. General Motors LLC*, No. 4:18-cv-00471 (N.D. Cal. Jan. 22, 2018), ECF No. 1.
20. *Id.* at p. 3.
21. *Id.* at p. 4.
22. *Id.*
23. *Id.* at p. 3 (The complaint specifically alleged that Mr. Salazar did not have his hands on the wheel. According to the complaint, Mr. Salazar “had the Self-Driving Vehicle engaged in a self-driving mode, and [that] he kept his hands off of the Self-Driving Vehicle’s steering wheel.”).
24. *Id.*
25. See Crash Report (GM Cruise LLC is the manufacturer listed on the crash report filed with the California Department of Motor Vehicles).
26. Bill Vlasic and Mike Isaac, *General Motors to Buy Cruise Automation in Push for Self-Driving Cars*, N.Y. Times (March 11, 2016), <https://www.nytimes.com/2016/03/12/business/general-motors-to-buy-cruise-automation-in-push-for-self-driving-cars.html>.
27. Kyle Vogt, *Why testing self-driving cars in SF is challenging but necessary*, Medium.com (Oct 3, 2017), <https://medium.com/kylevogt/why-testing-self-driving-cars-in-sf-is-challenging-but-necessary-77dbe8345927>.
28. *Id.*
29. Cal. Code Regs. tit. 13, § 227.12
30. Executive Order 245, Governor Scott Walker (May 18, 2017).
31. Report of the Governor’s Steering Committee on Autonomous and Connected Vehicle Testing and Deployment (June 29, 2018), available at <https://wisconsindot.gov/Documents/about-wisdot/who-we-are/comm-couns/av-final-report-062918.pdf>. Coincidentally, this was just three days after Mr. Nilsson’s suit was dismissed subsequent a stipulation.
32. *Id.* at p. 5.
33. *Id.*
34. *Id.*
35. *Id.* at p. 2.
36. This indicates the state’s view that safety requirements should be the purview of the Federal government.
37. *Id.*