Ensuring & Insuring the Promise of Autonomous Vehicles

BY EMMANUEL SANDERS

The autonomous vehicle sensation that has been sweeping the nation has made its way to the shores of Ohio. This past January, Governor John Kasich initiated DriveOhio, an initiative of the Ohio Department of Transportation aiming to organize and accelerate autonomous vehicle projects in Ohio. In May, Governor Kasich followed this up with Executive Order 2018-04K, authorizing autonomous vehicle testing in Ohio and laying out safety requirements capable of complying with Ohio traffic regulations. When signing the Order, Governor Kasich emphasized that developing and adopting driverless technology will eliminate the human components of car accidents and save lives:

> "Computers do not comb their hair. Computers do not text. Computers do not talk on cellphones … this technology, which is going to be the 21st century technology, is going to save lives."

Ohio governor opens state public roads for smart vehicle testing, Automotive News (May 9, 2018), https://www.autonews.com/article/20180509/MOBILITY/180509775/ohio-governor-opens-state-public-roads-for-smart-vehicle-testing.

Governor Kasich's sentiment is borne out by studies suggesting that adoption of driverless technology will lead to dramatic decreases in automobile accidents. *See generally* James M. Anderson et al., Rand Corporation, *Autonomous Vehicle Technology: A Guide for Policymakers* (2016), *http://www.rand.org/pubs/research_reports/RR443-2.html.* Further, driverless vehicles will "increase mobility for those currently unable to drive, decrease energy use and pollution, and allow commuters to create value in their travel time by engaging in work or leisure activities instead of operating their vehicles." Marie Williams, *Steering Consumers Toward Driverless Vehicles: A Fed. Rebate Program As A Catalyst for Early Technology Adoption*, 23 Mich. Telecomm. & Tech. L. Rev. 327, 328 (2017).

With all the potential benefits of autonomous vehicles, it would be prudent to consider some of the obstacles that may impede the adoption of this life saving technology. One such obstacle may be the availability of insurance coverage for claims resulting from crash optimization algorithms, an area of liability heretofore overlooked in examinations of the insurance consequences of autonomous vehicles.

To be sure, much has been written about how the shift to autonomous vehicles will alter the nature of and parties involved in litigation arising out of car accidents. For accidents arising from putative design or manufacturing defects of an autonomous vehicle or its software, plaintiffs will try to sue, not only the driver of the offending vehicle, but also the manufacturers of the autonomous vehicle and the programmers of its software. As articulated by Professor Mark Geistfeld, "scholars have reached the shared conclusion that elimination of a human driver will shift responsibility onto manufacturers as a matter of products liability law, with most tort litigation involving claims for design or warning defects." Geistfeld, *A Roadmap for Autonomous Vehicles: State Tort Liab., Auto. Ins., & Fed. Safety Regulation*, 105 Cal. L. Rev. 1611, 1619 (2017) (internal quotation marks omitted). This, as predicted by a 2015 white paper KPMG, *Automotive Insurance in the Era of Autonomous Vehicles*, will cause a corresponding shift in insurance coverage for car accidents, from automobile insurance for individual drivers, to more robust liability insurance for manufacturers and programmers.

But the aforementioned shift may also bring with it an expansion in the *kinds* of claims brought against manufacturers and programmers, and *ipso facto*, the types of claims manufacturers and programmers will seek to insure. Because autonomous vehicles will be pre-programmed with crash-optimization algorithms geared towards minimizing overall damage in the case of an inevitable accident, when an autonomous vehicle engages in this cost-benefit analysis and then minimizes damage accordingly, the resulting crash can be characterized as, in some sense, "intentional." For example, if an autonomous vehicle is directed by its crash-optimization algorithm to minimize the damage of a crash by veering into a lone motorcyclist rather than a bus full of children (a reasonable approach to crash optimization) that algorithm-driven outcome may be seen as itself a choice favoring the outcome preferred by the algorithm.

Under Ohio law "[a] person is subject to liability for battery when he acts intending to cause a harmful or offensive contact, and when a harmful contact results." *Love v. City of Port Clinton*, 37 Ohio St.3d 98, 99, 524 N.E.2d 166 (1988). Thus, combining the intentionality of a crash optimization choices by autonomous vehicles, with the definition of battery under Ohio law, it would seem that each instance of crash-optimized accident where an autonomous vehicle chooses to save one individual or group of individuals at the expense of another individual or group, is an intentional tort in Ohio. But, Ohio public policy generally prohibits obtaining insurance to cover damages caused by intentional torts. *Gearing v. Nationwide Ins. Co.*, 76 Ohio St.3d 34, 38, 665 N.E.2d 1115 (1996). Should public policy bar insurance for crashes resulting from the intentional crash optimization of autonomous vehicles?

The unavailability or coverage for damages resulting from crash optimization would be nothing less than tragic. Not only might it disincentivize research and implementation of life-saving crash optimizing technology, but it

would have the absurd result of allowing coverage for claims arising from *defects* in autonomous vehicles, but not for damages that have been minimized by crash optimization algorithms that perform exactly as designed and intended.

One path to circumventing a public policy bar on coverage for the intentional torts of autonomous vehicle is by invoking a distinction Ohio courts thread between "direct intent" and "substantial certainty" intentional torts. A "direct intent" tort, such as a battery, occurs when the actor does something which brings about the exact result desired whereas a "substantial certainty" tort, on the other hand, exists when the actor does something which such individual believes is substantially certain to cause a particular result even if the actor does not desire that result. *Harasyn v. Normandy Metals, Inc.,* 49 Ohio St.3d 173, 175, 551 N.E.2d 962, 964 (Ohio 1990). Under *Harasyn*, and its progeny only direct intent intentional torts are uninsurable. *Id.* Per this distinction one could argue, that when an autonomous vehicle engages in crash optimization that results in injury or death, the vehicle, or more accurately the vehicle's crash optimization algorithm, intends no harm to any individual, but only to minimize overall damage with the unavoidable, but undesired, consequence of injuring or killing.

This solution, however, is called into question by the doctrine of inferred intent. Under the doctrine, intent to harm can be inferred in "cases in which the insured's intentional act and the harm caused are intrinsically tied so that the act has necessarily resulted in the harm." *Allstate Ins. Co. v. Campbell*, 128 Ohio St.3d 186, 2010-Ohio-6312, 942 N.E.2d 1090, ¶ 56 (2010). Autonomous vehicles that select some victim for harm, say the motorcyclist, over another, say the school bus, can be said to be choosing to crash in a manner that will *necessarily* harm the motorcyclist, and thus claims for the resulting damages would be uninsurable.

The better approach to understanding why intentional harm resulting from crash optimization should be covered is by looking, not to the intent of the autonomous vehicle, but by examining whether allowing coverage will incentivize tortious behavior. The public policy underlying the uninsurability of intentional torts is that "[l]iability insurance does not exist to relieve wrongdoers of liability for intentional, antisocial, criminal conduct." *Gearing v. Nationwide Ins. Co.*, 76 Ohio St.3d 34, 1996-Ohio-113, 665 N.E.2d 1115 (1996). As the Supreme Court of Ohio clarified in *Harasyn*, failing to appropriately distinguish between different kinds of intentional torts:

> ...does not admit the possibility that some torts might not be particularly encouraged if insurance were available for them. The better view is to prohibit insurance only for those intentional torts where the fact of insurance coverage can be related in some substantial way to the commission of wrongful acts of that character.

Harasyn, 49 Ohio St.3d at 176 (internal quotation marks and citations omitted). In other words, insurance should only be barred for intentional torts where harmful conduct would be encouraged by allowing transfer of "the financial cost of the loss from the wrongdoer to his insurer." *Id.* (internal quotation marks omitted).

In the case of autonomous vehicles, manufacturers and programmers seeking to minimize the overall harm of a crash are not driven by some "antisocial" impulse, but by a rational and laudable desire to minimize harm. Indeed, crash optimization only comes into play where damages are certain to result and the only question is how to best minimize overall harm. Development and adoption of crash optimization technology should be encouraged, and ensuring the availability of coverage for the intentional torts resulting from crash optimization will help unlock the life-saving potential of autonomous vehicles.

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