

The Brave New World Of Autonomous Vehicle Litigation

By **Jonathan Feczko and Zachary Adams** (June 4, 2018, 3:03 PM EDT)

Autonomous vehicles promise to change the way we commute, work and even plan cities. Perhaps equally dramatic will be the way they change how we prepare and try litigation following a motor vehicle accident. Exploring how autonomous vehicle litigation could look, from presuit investigations to trial themes, will help practitioners better prepare for the inevitable wave to come.

Presuit Investigation and Discovery

Even before a complaint is filed, autonomous vehicles can impact the way we practice by providing unprecedented information about the moments leading up to an accident. Autonomous vehicles operate by receiving inputs from cameras, radar and often lidar sensors, processing these inputs through the vehicle's neural network and outputting decisions such as braking or turning.

Until now, the vast majority of motor vehicle accidents had only witness accounts and reconstruction experts to determine who should be named as a defendant in a complaint. Witness accounts, however, can be naturally unreliable due to the passage of time, the traumatic experience of witnessing (let alone being in) a car accident and the limitations of having only one vantage point.

Similarly, while accident reconstruction experts base their opinions on calculations derived from measurable data, they ultimately depend on secondary indicators (skid marks, final resting positions, collision debris, presumed impact areas, etc.), all of which take a great deal of time and money to gather. But with autonomous vehicles, attorneys have the potential to watch a crash for themselves from multiple angles and using several technologies before deciding from whom they will seek recovery.

When crashes occur between autonomous vehicles and those operated by a person, defendants and insurance companies will benefit by having better information on which to resolve claims than they have ever had before. And while in some cases this information may make the liability case against them easier and cheaper for plaintiffs to establish, defendants can benefit in other ways.

For example, defendants gain the efficiency of replacing a long and costly legal battle over fault with the certainty of knowing key facts at an early stage. Stepping past liability sooner will reduce the overall



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burden on parties and courts alike by narrowing the issues for discovery and trial and bringing the parties together for settlement more quickly.

Moreover, when crashes occur between two autonomous vehicles, manufacturers can use this information to determine the cause of an accident. If a manufacturer reviews data from its vehicle and finds no fault with its operation or decisions, it would have every incentive to share that information with the passengers to avoid being wrongly dragged into a suit.

Conversely, if a manufacturer does find an issue with its programming, it can use that to make a faster decision about when it is worth litigating a case involving one of its vehicles. It can also use the data to modify the training of its vehicles to prevent further similar accidents. At a time when companies already face an uphill battle to sway public opinion on the safety of autonomous vehicles, lengthy and public legal battles will not aid their cause.

Wise plaintiffs would use this information to streamline their complaints and avoid “shotgun” pleadings. Those that do will come to court armed with evidence approximating a Lone Pine order by making a showing of specific causation from day one. By having evidence of the issue that led to the accident, they can instantly win credibility with the court.

And in cases where the plaintiff has not thoughtfully named the parties, prepared defense counsel can use this evidence to identify the true cause of an accident and press for an early dismissal. By presenting this information to the court at an early stage, such defendants would also have less incentive to offer even a nuisance value settlement, further discouraging the inclusion of meritless defendants in future pleadings.

As parties and courts become more trusting of this evidence, they will become less patient with attorneys that burden the system by not making good use of it. This will especially be true when cases do proceed to trial. Jurors will see the evidence from autonomous vehicles' cameras and sensors, unfiltered by a witness's account or an expert's opinion.

This removes the potential for counsel to steer trial strategy toward a remaining defendant, and forces plaintiffs to acknowledge the cold facts of their case before significant investment has been made. But with jurors questioning less about the accident itself, it will become increasingly important for companies facing product liability suits to communicate effectively their themes about product safety and efficacy.

The Case for Safety

A key point for manufacturers on the safety of autonomous vehicles will be the amount of on-road experience they will have compared to the average person. Waymo LLC's vehicles recently surpassed five million miles of driving on public roads.[1] In contrast, the average driver logs 13,474 miles per year.[2] It would therefore take the average driver over 371 years to catch up with Waymo's current experience. (For those wondering, the Guinness record for highest human-driven vehicle mileage is just over 3 million miles — still well short of Waymo's benchmark.[3])

And as autonomous vehicles exponentially increase the amount of miles and data from which their neural networks can draw, the day may come when people are accused of negligence for the simple act of continuing to operate motor vehicles by themselves. Besides being the most experienced drivers on the road, autonomous vehicles also have more ways in which they can gather data to make decisions

while driving. People rely on the single viewpoint created by their eyes to inform the decisions they make while driving.

A Tesla Model S operating on Autopilot (which does not even claim full autonomy, but rather Level 2 or “hands off” autonomy) has eight cameras that provide the car with a 360-degree view of its surroundings at up to 250 meters away.[4] The Model S also comes equipped with ultrasonic sensors and radar, to help the vehicle detect objects regardless of weather conditions. These sensors will reach farther as the technology improves, and autonomous vehicles will eventually communicate with each other and the very infrastructure around them. When coupled with the speed and accuracy at which autonomous vehicles will process this information, it will be impossible for human drivers to keep pace.

One final way that companies could argue for the safety of autonomous vehicles is by explaining how they are the “perpetual good driver.” Autonomous vehicles will not have to worry about the consequences of taking the wheel after a happy hour or an all-nighter at the office. They will not get road rage after being cut off or suffer a case of “lead foot” while listening to their favorite song. They will not be distracted when fumbling with the navigation system or sending an email that should wait for a safer time. Their cameras and sensors will remain focused on the road at all times, processing information and making what they determine to be the safest decision. In short, autonomous vehicles will always drive as well as we wish all those around us would drive.

The End of the Soccer Mom

Beyond safety, lawyers defending autonomous vehicles can employ case themes about their benefits and efficiency in future litigation. For example, car owners spend roughly \$8,500 per year on car-related expenses — for the most part shouldering the burden themselves.[5] Conversely, many have suggested that autonomous vehicles will operate pursuant to a subscription service rather than being purchased outright.

By way of example, Uber Technologies Inc. — one of the ride-hailing companies investing heavily in autonomous vehicles — currently charges \$0.90 per mile to transport customers.[6] But between 70 and 80 percent of the total cost of their rides goes to their drivers.[7] If Uber can replace its drivers with autonomous vehicles, it stands to grow its profit margin even while reducing the cost to its consumers. If they were able to reduce the cost to even \$0.60 per mile, it would be cheaper for the average driver to travel their annual 13,474 miles entirely by Uber rather than owning a car.

Even if customers want to purchase autonomous vehicles rather than subscribe to a service, the ability to send and summon your car could result in more families being able to transition to a one-car household. It is estimated that the average car is parked 95 percent of the time.[8]

But by being able to commute to work, then send their cars back to their families for use throughout the day, only to have the cars return when needed to pick them up, many workers could do away with a second or even third family vehicle. This could reduce not only the overall transportation costs for a family, but the number of vehicles on the road in general — lessening everything from traffic jams to road wear to greenhouse emissions.

Beyond any cost savings, autonomous vehicles may offer benefits by opening automotive transportation to new segments of the population. At one end of the spectrum, parents will no longer suffer restless evenings when they send their teenagers out with the car keys for the first time. Indeed, since no one in the vehicle will be a driver, there will arguably be no difference between sending a child on a bus and in

an autonomous vehicle — pushing the “driving” age to a much younger “riding” age. At the other end of the spectrum, children would no longer have to discuss with aging parents when they should stop driving. By turning to autonomous vehicles, all these individuals could claim an independence presently closed off to them.

While mass litigation involving autonomous vehicles is not yet here, one can already envision how discovery and trials might look when it is. And in the always-competitive fields of automobiles and law, we should never forget that “the secret of getting ahead is getting started.” That is exactly what autonomous vehicle companies and their counsel should be doing today.

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[1] <https://www.forbes.com/sites/alanohnsman/2018/03/02/waymo-is-millions-of-miles-ahead-in-robot-car-tests-does-it-need-a-billion-more/#9f9b0741ef4c>.

[2] <https://www.fhwa.dot.gov/ohim/onh00/bar8.htm>.

[3] <http://www.guinnessworldrecords.com/world-records/highest-vehicle-mileage>.

[4] <https://www.tesla.com/autopilot>.

[5] <https://newsroom.aaa.com/auto/your-driving-costs/>.

[6] <https://www.ridesharingdriver.com/how-much-does-uber-cost-uber-fare-estimator/>.

[7] <http://www.businessinsider.com/uber-drivers-are-growing-angrier-over-price-cuts-2017-3>.

[8] <http://fortune.com/2016/03/13/cars-parked-95-percent-of-time/>.