



The Liability Hot Potato - Who's to Blame in the Age of Autonomous Vehicles

Insights

11.01.18

A recent study conducted by the National Highway Transportation Safety Association (NHTSA) attributes 94 percent of serious automobile crashes to human error. Based on this key fact, the NHTSA is hopeful that autonomous vehicles will considerably reduce the number of accidents and associated damages. The bad news is that determining who is at fault when AV accidents occur may prove to be a difficult task. Traditionally, accident liability has focused on the actions of the driver. With the advent of AVs, however, liability and risk will likely shift to manufacturers, dealerships, software programmers, relevant third-party suppliers, and the company in charge of training AV operators.

Interestingly, employers who own or lease AVs for employee travel or business purposes may face potential employer liability if an accident occurs while an employee is using a company owned or leased AV. For instance, employers may face potential liability if the AV involved in the accident was being used by the employee with the employer's express or implied consent, or it is determined that the AV was not appropriately serviced or maintained, or that the software selected for the AV was not sufficiently reliable or upgraded in line with the manufacturer's instructions.

Additionally, employers may potentially be held liable in employee-owned AV accidents if the employee was operating the AV in the course and scope of his employment, or the employee's travel was incidental to the employee's job duties. Given the potential of real-time data and GPS coordinates, AVs can potentially collect while being operated, determining whether the employee was engaging in the course and scope of their employment or traveling as part of their job's "incidental duties" may be easier to determine.

The level of autonomy of the AV is likely to further play a key role in determining an employer's vicarious liability. For example, if the AV is partially autonomous—that is, it requires intervention from the operator—there is a higher likelihood that the employer may be held liable for the employee's negligence if the employee's negligence causing the accident occurred while in the course and scope of their employment.

Moreover, while the "coming and going rule" precludes employer liability when an accident occurs during the employee's commute, accidents involving employees using AVs provided as a benefit of employment, may fall under the "special risk" exception of this rule. In the past, courts have shifted

liability to employers in situations where the peculiar circumstances evidenced that the employee was being exposed to special risks while commuting and the employer had knowledge of these risks. For example, a court applied the “special risks” exemption where the employer had reservations about an employee’s ability to safely drive after suffering a work-related injury and nonetheless allowed the employee to drive home.

With AV benefits, manufacturers and employees may potentially shift liability to an employer for an AV accident by arguing that the employer exposed the employee to “special risks” associated with new technology. The applicability of the “special risk” exemption, may be further supported if the employee can show that the AV was provided without any AV operation training. Therefore, it will be critical for employers to develop targeted training aimed at employees’ safe operation of AVs, whether those AVs are provided as a benefit or are being used in course and scope of employment.

Although nearly 30 states have enacted legislation relating to AVs, determining who will be on the hook for accidents involving AVs is yet to be determined. What is clear is that claims involving AV accidents may be pursued against a number of parties, and determining who bears what portion of the blame will become increasingly murky. Protracted and expensive litigation are likely to arise, at least in the early stages of AV usage. The cost of such litigation is likely to increase as result of insurance-related issues that will emerge with the advent of AVs.

According to Andrew Enders, Vice President and General Counsel at Enders Insurance Associates, some insurance carriers are not covering autonomous features in vehicles. Enders noted that the policies that cover autonomous features only cover damages resulting when a driver is in control of the partially autonomous vehicle and not when the AV is in autopilot. Based on the foregoing, obtaining insurance coverage for truly automated vehicles may be difficult and premiums much higher.

What Does This Mean To Employers?

Employers who wish to avoid liability arising from employee operated AVs should consider the following suggestions:

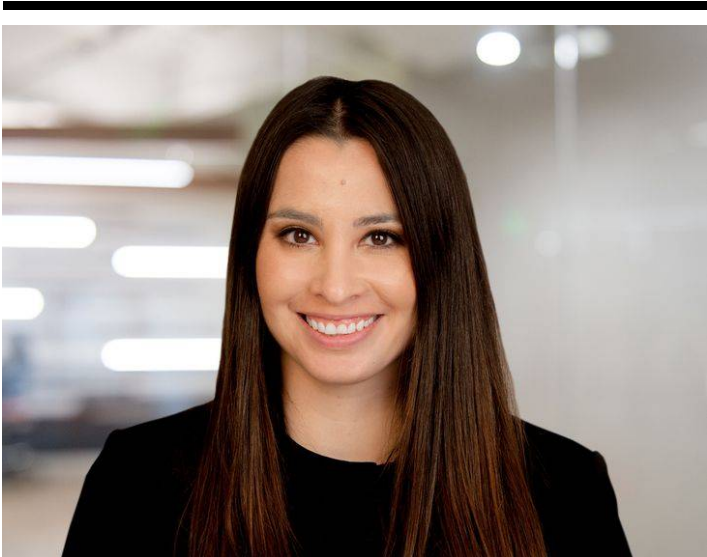
- Deliver clear communication and training to your employees about how to precisely and safely operate, use, and maintain AVs;
- Manage employee’s expectations regarding the AVs’ capabilities;
- Maintain policies regarding the maintenance, upgrading, and service of AVs;
- Maintain policies regarding any employee interference or changes to the software or parts of the AV without prior approval from the employer and/or manufacturer;
- Check data collected from AVs operated by employees to ensure the AV is being used properly and not used for personal travel;
- Maintain policies regarding distractions such as cell phone and other electronic device usage while operating AVs.

write operating AVs,

- Obtain adequate insurance coverage where available;
- Maintain procedures for employees to report any mishandling of AVs or failure to appropriately maintain or service AVs and anti-retaliation policies relating to such claims or reports;
- Reconsider policies regarding providing AVs to employees as a benefit of employment; and
- Apply all training and policies relating to AVs in a nondiscriminatory manner and with special attention to potential reasonable accommodations that may be available for employees with disabilities.

If you have any questions about “respondent superior” employer liability and how to comply with the law on discrimination and reasonable accommodations, please contact Anet Drapalski or any member of our [Autonomous Vehicles Practice Group](#).

Related People



Anet Drapalski
Partner
213.330.4476
[Email](#)