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How Semi-Autonomous Driving Technology Impacts the Practice of Law

As we transition into a world of driverless vehicles, civil practitioners must prepare for a change in the way we prosecute and defend lawsuits stemming from motor vehicle accidents. The fully autonomous vehicle is coming, and we will undoubtedly see a shift from driver liability in negligence to manufacturer and automotive industry actions based in products liability.

In the interim, the semi-autonomous vehicle is here. As a result, civil practitioners must factor both human error and the shortcomings or failures of semi-autonomous driving technology into the analysis of determining fault. Human error may present more of an issue now than ever before, as drivers are

lulled into a heightened state of security brought about by advancements in driving technology, resulting in greater inattention and distraction.

American drivers spend an average of more than 17,600 minutes, or 290 hours, behind the wheel of a motor vehicle each year; travel almost 10,900 miles each, annually; and make around two trips a day, each covering 30 miles over 48 minutes.¹ Despite the influx of vehicle safety features, such as collision avoidance systems, adaptive cruise control systems, electronic stability control systems, anti-lock braking systems, cameras, shatterproof glass and airbags, motor vehicle accidents remain one of the leading causes of death, and traffic-related injuries remain one of leading causes of emergency room visits. Advocates of full and semi-autonomous driving systems, which navigate with the use of a combination of sensors, cameras and GPS (global positioning system), argue that these features will make travel safer by removing the potential for human error.

In analyzing the facts surrounding a motor vehicle accident, civil practitioners investigate the speed and positioning of the vehicles before, during and after the accident, and they scrutinize the drivers' actions leading up to the accident. Those of us on opposite sides dispute the particular cause, or causes, of a motor vehicle accident in a given case, but we generally agree on one thing: in the context of a personal injury or wrongful death lawsuit stemming from a motor vehicle accident, excluding those cases involving claims of negligent roadway design, liability usually rests with the driver of a motor vehicle. With

advancements in semi-autonomous driving technology, we must broaden our search from human error to include errors and malfunctions related to coding, operating systems and software.

Semi-autonomous driving systems vary in their ability to identify and navigate depending upon the manufacturer and vehicle type; however, as long as a human remains behind the wheel, arguably none of the semi-autonomous driving systems negate the obligations of a driver to remain alert and attentive to the surrounding traffic and road conditions. Thus, the current legal framework continues to apply, but we are beginning to see cases involving the engagement of semi-automotive technology at the time of a crash and the apportionment of fault between the human driver and the automakers, manufacturers and software developers.

This apportionment of liability between the human and the machine can be seen in what is regarded as the first lawsuit filed in the United States involving autonomous vehicle technology. The suit was commenced by motorcyclist, Oscar Nilsson. The complaint, filed in United States District Court in San Francisco, alleges that General Motors (GM) "owes a duty of care in having its self-driving vehicle operate in a manner in which it obeys the traffic laws and regulations." It also states that GM breached the duty of care when "its self-driving vehicle drove in such a negligent manner that it veered into an adjacent lane of traffic without regard for a passing motorist." The accident is alleged to have occurred when, after attempting to change lanes, the vehicle suddenly veered back into its initial lane of travel, striking the motorcyclist and knocking him



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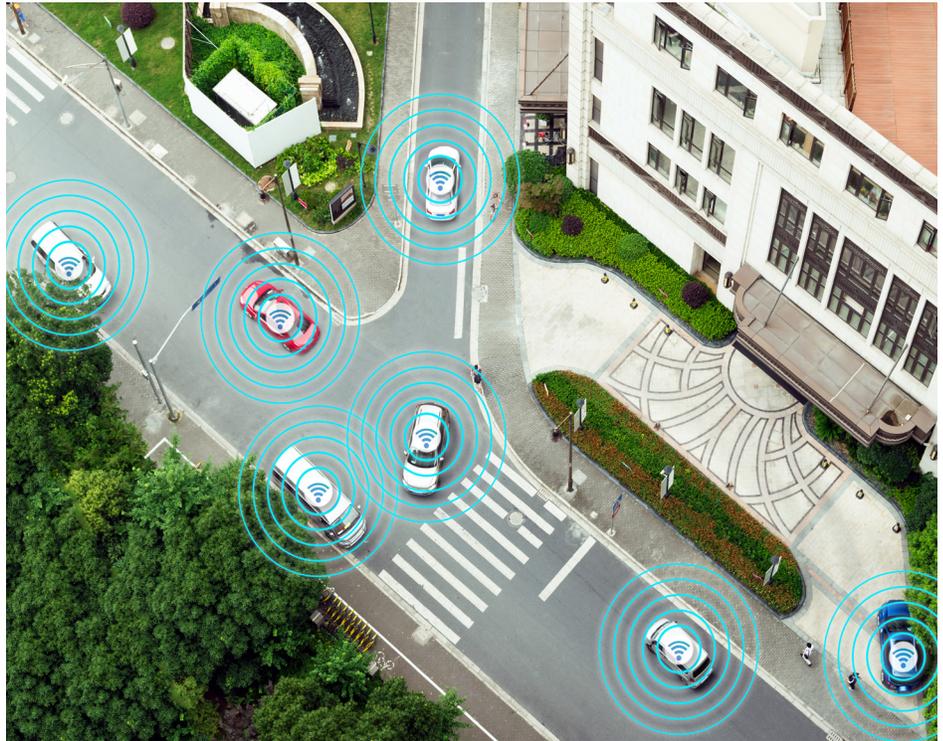
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to the ground. A very different picture is painted by the defense, who claim that the vehicle was re-centering itself in the lane when the motorcyclist, who had been illegally riding in between two lanes, sideswiped the vehicle. There was an individual seated in the front of the GM vehicle who allegedly had his hands off the wheel at the time of the accident. In addition to being a key witness to the events, the individual who was seated in the front of the GM vehicle, to the extent that he retained, or should have retained, any degree of control over the vehicle's operating system, arguably bears a portion of the fault for the happening of the accident.

In what has been regarded as the first pedestrian death associated with self-driving technology in the United States, the case of Elaine Herzberg raises similar issues of comparative liability. Ms. Herzberg was walking her bicycle outside the crosswalk on a four-lane road in the Phoenix suburb of Tempe when she was hit by a Volvo XC90 SUV. The vehicle, which also had an individual behind the wheel, was traveling in an autonomous mode at a speed of about 40 miles per hour in a 45 mile per hour zone. Footage of the crash, taken from the vantage point of the vehicle's front dashboard, shows the pedestrian approach the front driver's side of the vehicle just about a split second before the collision. In footage depicting the interior of the vehicle, the individual behind the wheel appears to be looking away from the road. Critics of autonomous software point to the vehicle's light detection and ranging system (LIDAR) radar, arguing that it failed to detect the pedestrian approaching. However, from the perspective of the driver's camera, it is not entirely clear that a reasonably prudent person would have seen and reacted to Ms. Herzberg any better than the LIDAR, as she seemingly walks out of the shadows directly into the path of the vehicle.

In the case of Joshua Brown, an individual who was killed when his Tesla Model S struck the side of a tractor-trailer in May 2016, The National Transportation



Safety Board (NTSB) investigated and determined that, in addition to faults in the operational design of Tesla's automation software, which "allowed prolonged disengagement from the driving task and enabled the driver to use it in ways inconsistent with manufacturer guidance and warnings,"² human error – both on the part of the tractor-trailer driver and Mr. Brown – were factors in the accident. The NTSB detailed what it described as Mr. Brown's "over-reliance on the automation." According to data recovered from the Tesla, Mr. Brown's hands were not on the wheel at the time of the accident, despite multiple audible prompts directing that he put his hands on the wheel. Data reportedly also showed that Mr. Brown had adjusted the vehicle's rate of speed just minutes prior to the accident and that the vehicle was operating at a speed greater than the posted speed limit.

The advancement of semi-autonomous capabilities and features designed to assist with accident avoidance begets perhaps an even greater responsibility on a driver to remain vigilant and attentive to the roadway. As we begin to see cases where human involvement and semi-autonomous software each play a role in the operation of a vehicle, it is incumbent upon legal practitioners prosecuting or

defending cases involving fault for the happening of a motor vehicle accident to dig even deeper into the mechanics of the accident. At minimum, the scope of our discovery efforts should be widened as many vehicles now contain data recording devices and are equipped with a driver's camera which must be demanded during discovery. At depositions and during pre-trial discovery, we should be questioning drivers about the capabilities of their vehicles and the extent to which they were utilizing semi-autonomous driving systems at the time of the accident. Attention should be paid to any potential visual or audio safety prompts within the vehicle in the moments leading up to an accident. Impleader of automakers, manufacturers and software developers should be considered in cases where semi-autonomous technology is engaged at the time of an accident. In this new, exciting legal landscape, civil practitioners must stay ahead of the curve. **P**

- 1 The "American Driving Survey," conducted by AAA's Foundation for Traffic Safety using data reported by nearly 6,000 drivers about their daily driving habits in 2014 and 2015.
- 2 See The Nation Transportation Safety Board's Accident Report [ntsb.gov/investigations/AccidentReports/Reports/HAR1702.pdf](https://www.ntsb.gov/investigations/AccidentReports/Reports/HAR1702.pdf)