

First fatal accident with a connected car

Part II: Manufacturers' and distributors' liability

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On 1 July 2016 we had news of the first reported fatal accident owing to the failure of an object detection system fitted into a connected car that was being driven on autopilot mode. The object detection system failed, resulting in a collision against a truck. This happened in Florida, USA, and the outcome was the death of the driver-owner of the connected car and, most probably, although not specifically reported, injuries and material damage being sustained by the truck driver.

In Spain legislation has been enacted to carry out on-road tests with autonomous vehicles and, since January of this year, there is an Instrument (*Instrucción*) of the Directorate-General for Traffic concerning remote control self-parking, but it is not yet possible for vehicles to be driven on autopilot at a level of automation similar to that commented on.

As the automation and connectivity of vehicles advances, one of the legal issues of concern to manufacturers, distributors and dealers is the liability they might take on in Spain in these cases vis-à-vis the driver-owner of the connected vehicle that fails and any aggrieved third parties, as well as the rights of action for contribution they might have, if any, against the manufacturers of the connectivity systems fitted into their vehicles.

1. Governing rules on liability:

- a) *Liability of manufacturers, distributors or importers in the EU for defective products.*

The cornerstone that articulates in Spanish law the potential liability of manufacturers

and distributors in cases such as the above-mentioned is the defective product liability regime, because unlike other remedies that exist in our country to claim liability for damage, this regime does not require the claimant (the person who has sustained damage as a result of the defect) to prove 'intent' or 'negligence' on the part of the manufacturer of the defective product and, as it is a regime of strict liability, it is easier to obtain a judgment ordering the manufacturer to pay damages as compensation for the damage caused by the defective product it placed on the market.

In the case under consideration, both the heirs of the deceased and the truck driver or any third party who sustained damage, would be entitled to claim this type of strict liability, having only to prove: (1) the existence of a defect in the product (that the object detection system failed whilst driving); (2) the damage; and (3) the causal link between the two (that the failure in the object detection system whilst driving in autopilot mode caused the collision).

Under this regime, liability can be claimed on the part of the vehicle's manufacturer (defined by legislation as the manufacturer of the finished product or any of the elements fitted into the same) and/or distributor and/or importer within the European Union. It provides that they are all jointly and severally liable, that is, those aggrieved may claim against any of them (usually the most solvent)

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the full amount of liability, without prejudice to the manufacturer, distributor, etc. ordered to pay compensation bringing after an action for contribution, considering the party liable for the failure. Normally, liability will pass to the manufacturer of the connectivity system that failed and was fitted into the vehicle.

Since we are dealing with a strict liability regime, the circumstances exonerating from liability, as to which existence the manufacturer must furnish proof, are limited by law as follows: (1) the product was not put into circulation; (2) in the circumstances it is probable that the defect which caused the damage did not exist at the time when the product was put into circulation; (3) the product was not manufactured for sale or for economic purposes; (4) the defect was due to non-compliance of the product with mandatory regulations; and (5) the state of scientific and technical knowledge at the time when the product was put into circulation was not such as to enable the existence of the defect to be discovered. On the face of it, it does not seem that the foregoing exonerating circumstances apply to the case at hand.

However, given that the regime of strict liability for defective products does not cover damage to the defective product itself and has certain limits of amount (the manufacturer's overall civil liability for death or personal injuries caused by identical defective products with the same defect is limited to EUR 63,106,270.96), normally manufacturer and distributor liability claims will also be based on tort and contract law.

b) *Tort liability of manufacturers or distributors for damage.*

As for the damage sustained by the truck driver or the mortal victim's heirs not covered by the strict liability regime, these could seek to make the vehicle's manufacturer or distributor liable in tort, in which case they would have to additionally prove intent or negligence by the manufacturer or distributor in respect of the failure in the object detection system the vehicle was fitted with.

c) *Contractual liability of the dealer or repair shop.*

In certain cases, if there is breach of contractual obligations, the vehicle driver-owner (here his heirs) may also, if necessary, claim damages for breach of contract by the vehicle's seller (dealer) or repair shop, based on their respective contractual relationship – sale and purchase, in the case of the seller, and services in the case of the repair shop that performed the vehicle service. In these cases, intent or negligence on the part of the dealer or repair shop must be proven in respect of the breach of obligations assumed with the vehicle owner. In the case in question, intent or negligence by the dealer – in failing to ensure that the vehicle complied with product specifications in relation to the autopilot feature – or by the repair shop – in failing to adequately service and repair the vehicle – must be proven.

d) *Actions for contribution by the vehicle driver-owner or the insurance companies against the manufacture.*

The heirs of the owner-driver of the damaged vehicle – in the event of having had to pay compensation to others harmed by virtue of civil liability legislation concerning motor vehicle traffic – or, more often, insurance companies – in the event of having had to pay compensation on behalf of the vehicle owner-driver to others harmed by virtue of the compulsory insurance policy – could, moreover, pass on to the manufacturer, distributor, dealer or repair shop (as appropriate) such payment.

e) *Consumer and user protection legislation.*

In addition to the above, Spanish legislation protects consumers from any 'lack of product conformity'. In this regard, if the published vehicle features decisively influenced the owner's decision to purchase the vehicle and there are malfunctions or failures in respect of the features that were decisive in the decision to purchase, the vehicle owner can ask the seller for the vehicle to be repaired, replaced,

and reduced in price or for the contract to be rescinded.

In the present case, the vehicle's automatic systems or connectivity could to some extent be decisive in the purchase by the owner-driver (in fact, such systems were in use at the time of the accident), although this aspect would have to be properly proven. Thus, the heirs of the owner-driver might resort to asking that the damaged vehicle be repaired, replaced, and reduced in price or for the contract to be rescinded, in the face of which the reasonableness of the remedy sought, together with the prejudice that has been caused, would have to be examined.

2. Possible actions by automakers against the undertakings marketing the connectivity systems fitted into their vehicles:

As discussed, with the development of connectivity and automated features in vehicles, automobile manufacturers and distributors and dealers could see their exposure to liability claims widened.

In this regard, the European Automobile Manufacturers' Association (ACEA), in its 'Strategy Paper on Connectivity' of 16 April 2016, underlines this fact and calls for third-party applications that interact with the vehicle to be only developed and approved in cooperation with the vehicle manufacturer to eliminate security, data protection and product liability risks, which are the main risks the use of new technologies poses to automakers.

In any case, despite all the safeguards that are being adopted nowadays by automobile manufacturers, such failures once the automobiles are marketed may still occur, and the content of the contracts that automakers sign with their technology partners and, particularly, the clauses relating to the liability assumed in respect of each other, will be an element of great legal relevance, since it is on the basis of such content that the automakers' actions to pass on damages to the manufacturers of the technological systems fitted into the vehicles (where third parties independent of the manufacturer) must be brought.