



# PUMP COURT CHAMBERS

## Contents

The Responsibilities of  
Management  
*by Charles Parry Page 2*

Intelligent technology and the  
future for road vehicles  
*by Mark Ruffell Page 4*

Driving Instructor Wins Appeal  
*By Mark Ruffell Page 11*

Team Recent Cases  
*Page 13*



# Health & Safety and Transport Law Newsletter

Issue 1

Welcome to our newsletter for November 2016.

In this edition, we have an article on the exciting progress of autonomous vehicles, a topic that appears to be high on HM Government's agenda and is not without its detractors (citing the risk of vulnerability to cyber-attack as just one of the key concerns).

In addition, we have an article on how management is increasingly being held responsible for the safety failures of their workforce - something that is likely to attract significant media attention in the coming weeks in light of the tragic consequences of the Croydon tram disaster of 9 November.

We also have a short digest of some of the recent cases that our team have been involved in.

We hope that you enjoy reading the newsletter and would value your feedback.

Tim Akers  
(Editor)



# PUMP COURT CHAMBERS

## The Responsibilities of Management A New World

by Charles Parry

Tom was late on his rounds, his deliveries had been delayed by traffic, his satnav had sent him along a track too small for his lorry and taking a left handed turn he missed the cyclist on his nearside, failed to assess the danger presented by the railings alongside the pavement edge as his lorry turned and the cyclist was crushed.

Entering a new era of fresh political leadership has sharpened the focus on executives in all industries to behave considerately and responsibly. Pressure from government to attach liability for erroneous and reckless financial decisions to senior management through the Senior Managers Regime of 2015 is but one example.

*“In an imperfect world accidents are always likely to occur”*

Since 1974 the Health and Safety at Work Act, by section 37, has made those in management potentially liable for safety breaches where there has been connivance or neglect; many other pieces of regulatory law have also widened management responsibility. Today the political initiative leans towards prosecution, not only of those immediately responsible, but also those in management who are indirectly responsible.

In an imperfect world accidents are always likely to occur; most are preventable but when they do it is usual that there will also be a breach of some regulation, standard or compliance advice.

*“risk can be mitigated, the law places a duty on employers”*

How do the managers meet these obligations? The simple answer is an audit trail which demonstrates that they have addressed and responded to the duties and responsibilities the law has placed upon them. Clearly staff cannot be supervised every minute, and human frailty will mean that someone somewhere will make a mistake with possibly fatal consequences, but the risk can be mitigated, and the law places a duty on employers to ensure that such risks are mitigated.



# PUMP COURT CHAMBERS

A straight forward way to begin addressing these duties may be achieved by appropriate training. Such training needs to be supported by records of suitable updating and staff exposure. Since 1999, the Management of Health and Safety at Work Regulations (regulation 13) require employers to ensure that employees are provided with adequate safety training.

Whilst training may be perceived to be an unwelcome burden on a business already fighting budgets, the possible consequences of breach of the law can be worse, including imprisonment for those found to be personally liable and heavy fines. Penalties may go up to two years' imprisonment and unlimited fines.

*“The changing environment for management poses potential threats not always widely appreciated.”*

The principles covering the levels of fines have also changed in recent years. Increasingly echoing perceived public disquiet at poor management, judges are guided to set the level of fines in the context of the turnover, not the profit, of the business.

This changing environment for management poses potential threats not always widely appreciated. But the downside of a catastrophic failure, prosecution and penalty to a business could be terminal.

Returning to Tom, the management would be likely to be investigated to discover to what extent the employment environment had contributed to the accident. What training had he received, was the training appropriate and up to date, was Tom's equipment adequate, what targets had his employers placed upon him, the list goes on. Only by an appropriate regime of training and audit trails to demonstrate that management had taken reasonably practicable steps to assess and avoid such an incident can the management of a business begin to defend an inquiry into their culpability.



# PUMP COURT CHAMBERS

## Intelligent technology and the future for road vehicles

by Mark Ruffell

The advances in intelligent technology have propelled us all into a new world where driverless cars, taxis, buses and lorries could be using our roads within the next decade. Technology that was once only the creation of science fiction writers, such as the taxi in the film Total Recall, or appeared to be limited to certain types of train, such as the Docklands Light Railway, now appears to be only a few years away from being commonplace on our roads.

*“90% of road traffic accidents believed to be human error”*

Those who advocate the use of such technology claim that there will be a significant improvement in road safety as 90% of road traffic accidents are believed to be caused by human error. Computers, it is claimed, could be programmed not to make mistakes and have an instantaneous response time which is quicker than any human driver. They assert that there will be better use of road space by lorry platooning. In relation to passenger vehicles, they claim that driverless cars will prolong the mobility of the elderly, whose vision or alertness may have deteriorated beyond that required to keep a driving licence. Of course, in city centres, a driverless pod and a Google or Uber app appear to be a perfect marriage.

Clearly, the number one concern has to be safety. We have had over a century of developing technology and testing how the mechanical side of road vehicles work, looking at engine reliability, braking, bodywork strength, visibility to other motorists and crash technology. A driver can test the vehicle either by daily observation or by routine maintenance from a vehicle inspector to ascertain roadworthiness. Then there is driver safety and proficiency. The driver themselves can be tested once for car driving proficiency and then can be tested again for licences for other vehicles. Much is dependent on good health. Over the last two decades technology has assisted drivers with braking, fuel consumption, navigation and parking. Now it is proposed to introduce a third component into road safety, driving under the direction of intelligent technology.



# PUMP COURT CHAMBERS

There is no history of intelligent technology being tested to see whether it is reliable in all circumstances. As we shall see, some intelligent technology will depend on constant human oversight, such as in platooning, but some won't. How will the technology be tested to cover all circumstances and give total protection?

*“Auto-pilot didn't react to obstruction”*



The fatal Tesla accident in May 2016, has sent shockwaves through those pioneering software for autonomous vehicles. A tractor-trailer travelling from the oncoming carriageway turned across the path of the Tesla. The Tesla auto-pilot did not cause the car to brake, and the car hit the trailer in the middle, went under it, and continued travelling for some distance, killing the driver. The evidence showed that for a human being, the car was sufficiently far away from the tractor-trailer, that

there would have been sufficient reaction time and stopping time from seeing the tractor-trailer to coming to a standstill so that an accident could have been avoided. Assuming that there was nothing that prevented the driver from overriding the control of the car, the auto-pilot did not react to the obstruction ahead and nor did the driver. As a consequence, this fatal accident demonstrated that the technology was still inadequate and required constant oversight. It also demonstrated how a driver who had placed a reliance on the technology then failed to respond to an imminent safety concern.

*“technology still inadequate”*

Technology that requires constant oversight perhaps has limited benefits. Bombarding a driver with constant information about risks ahead would probably be an irritation and be switched off. Technology that only intervenes when required, such as parking assistance or in an emergency such as emergency braking is helpful and becoming more commonplace. It is envisaged that intelligent technology will commence with allowing a driver to allow the vehicle to take full control in certain circumstances such as motorway driving. As the technology improves, vehicles will be able to carry out the full range of driving functions.



# PUMP COURT CHAMBERS

In this transition phase, where automated technology can only be used for part of a journey and would require manual intervention should an incident arise, the dangers for the driver are significant.

In these limited circumstances, there is the obvious risk that the driver will trust the technology rather than concentrate on the journey. The driver will not be making a decision on a second by second basis as he will have given this decision making responsibility over to the car. The driver will relax and no doubt look for distractions on their smart telephone. If an incident occurs, the driver will take some seconds, whilst still travelling, to gain an awareness of where the car is, what has happened and what the appropriate reaction should be, and at the same time the incident could be constantly changing. Such a delay could be the critical difference between preventing or causing an accident.

*“Establish UK as global centre for excellence in autonomous vehicles”*

In this country, the Government has pushed for autonomous driving to be developed. In his budget in March 2016, the former Chancellor George Osborne announced his desire to ‘*establish the UK as a global centre for excellence in connected and autonomous vehicles.*’ The Government set out its desire for wireless connectivity between vehicles that would enable the platooning of lorries on certain motorways, such as from Dover to London and on the northern parts of the M6. In addition, the Government made it clear that it wanted driverless cars to be tested on our roads in 2017. As a commitment to this, the Government pledged to provide 40 miles of road available for testing in a 3 year trial by a consortium that includes Jaguar Land Rover and mobile telephone communication companies. Sensors will be placed on roads to see how effective the technologies are in reducing congestion and improving road safety.

*“Platooning lorries may cause more dangers than hoped”*

The platooning of lorries is where up to 10 lorries travel at perhaps 10 metres apart, guided by the driver of the first lorry who uses intelligent technology to control the following lorries. Those behind have drivers who can see what the first driver can see via a monitor. Whether there is the need for platooning or whether it could work in the United Kingdom has yet to be demonstrated. There are clear concerns that drivers would become distracted and reliant on the technology and unable to swiftly respond to an incident should one arise.



# PUMP COURT CHAMBERS

There are also the concerns that with so many junctions and peak hour congestion on all our motorways, platooning lorries may could cause more dangers than the hoped for advantages. There are also concerns that because lorry platooning could lead to larger volumes being transported on roads in a way that best suits distributors and manufacturers, this would lead to less rail freight and an increased number of lorries on the roads.

*“Safety is of paramount importance”*

Currently there is a driverless pod initiative trialling in Milton Keynes. The project is the first UK trial of automated vehicle technology in public pedestrianized spaces. Findings from the project will also be fed into the UK Autodrive programme which is set to deploy 40 pods along with road-based cars as part of trials in Milton Keynes and Coventry. Most major car manufacturers are developing autonomous vehicles in what will be a second wave of technology building upon the findings of these trials.



The Department of Transport set out the background to the driverless Pod initiative in February 2015 in its publication 'The Pathway to Driverless Cars: A detailed review of regulations for automated vehicle technologies.' The Department considered whether current regulations on vehicle use needed amending to allow for autonomous vehicles to be used on our roads. It stated that *'Existing regulations governing how vehicles are used and maintained will need to be revised to allow*

*the use of automation technology without a test driver and to ensure that the technology is maintained correctly. This may involve changes, for example, to the MOT test to check roadworthiness. It may also be appropriate to revise The Highway Code to include a section on automated vehicle technologies. Promoting safety – Safety is of paramount importance. The Government will consider whether a higher standard of “driving” should be demanded of vehicles operating in an automated mode than would be expected of a conventional driver. Government will also consider how the existing regulatory framework may be developed to ensure automated vehicle technologies are protected from possible cyber threats.'*



# PUMP COURT CHAMBERS

*For the first time since the invention of motor vehicles, the ‘driver’ will be able to choose whether they want to be in control, or to hand the task of driving over to the vehicle itself. This represents a major opportunity – allowing drivers to safely use the journey time however they wish, from reading a book, to surfing the web, watching a film or just chatting face to face with other passengers.’*

*‘In current legislation a person who holds a full category B (car) driving licence without restrictions is authorised to drive any car. Existing legislation makes no reference to highly or fully automated vehicles. From a driver licencing perspective we have not identified any legal barriers that would prevent the testing of highly automated vehicles on public roads providing the test driver holds an appropriate category of licence. We do not consider that there is a need to introduce regulatory changes in relation to driver licencing or testing to allow for the testing of highly automated vehicles on public roads.’*

*‘In order to promote safety during public road testing of an automated vehicle, our expectation is that a test driver will supervise the vehicle at all times and be ready and able to take control if necessary. The test driver must hold the appropriate category of licence for the vehicle under test. This is true even if testing a vehicle’s ability to operate entirely autonomously.’*

In July 2015, the Department for Transport published ‘The Pathway to Driverless Cars – A Code of Practice for testing.’ The Code of Practice is *‘non-statutory but has been developed to promote responsible testing. It should be used by testing organisations in conjunction with detailed knowledge of the legal, regulatory and technological landscape. Failure to follow the Code may be relevant to liability in any legal proceedings. Similarly, compliance with the Code does not guarantee immunity in such circumstances.’*

**“A fully automated vehicle is ‘a vehicle in which a driver is not necessary”**

The Code distinguishes between advanced driver assistance schemes where a driver remains totally in control and highly or fully automated vehicles. It defines a highly automated vehicles as *‘a vehicle in which a driver is required to be present and can take manual control at any time. However in certain situations, the vehicle can offer an automated mode which allows the driver to ‘disengage’ from the driving task and undertake other tasks.’* A fully automated vehicle is *‘a vehicle in which a driver is not necessary. The vehicle is designed to be capable of safely completing journeys without the need for a driver in all traffic, road and weather conditions that can be managed by a competent human driver.’*

# PUMP COURT CHAMBERS

Crucially, the Code gives guidance on vehicle testing to ensure safety. Vehicle testing will be done by a suitably licensed and trained test driver or operator who will be ready and able to override automated operation if necessary. Organisations wishing to test automated vehicles on public roads or in other public places will need to ensure that the vehicles have successfully completed in-house testing on closed roads or test tracks. *‘Organisations should determine, as part of their risk management procedures, when sufficient in-house testing has been completed to have confidence that public road testing can proceed without creating additional risk to road users. Testing organisations should maintain an audit trail of such evidence. Vehicle sensor and control systems should be sufficiently developed to be capable of appropriately responding to all types of road user which may typically be encountered during the test in question. This includes more vulnerable road users for example disabled people, those with visual or hearing impairments, pedestrians, cyclists, motorcyclists, children and horse-riders.’*

However, autonomous vehicles will need to demonstrate that they are safer than the best human reactions before the public will have confidence in them. Such confidence will only come through rigorous testing. How this testing is to be monitored is unspecified. Whether all manufacturers will reveal the results of testing to demonstrate public confidence is also unknown. Clearly, they may not wish to reveal technological developments that competitors may wish to copy.



*“The real danger is that auto-pilot technology is likely to be marketed as safe”*

What happens when the autonomous part fails? We are all familiar with modern cars which can develop electrical faults that prevent certain functions. With cars that are part autonomous, the real difficulty is whether the software companies can inform drivers of where there are deficiencies in the technology and that oversight is obligatory. The real danger is that auto-pilot technology is likely to be marketed as safe, with the driver expected to have oversight should the technology fail. Such a position is unsatisfactory for a driver.



# PUMP COURT CHAMBERS

It will be of interest to see how intelligent technology will overcome some of the more amusing situations that we face on our roads such as when we take it in turns to allow traffic to come in a single track road with passing spaces and wave to thank the driver who let us pass. One can imagine how the normal car driver could just push in front of an autonomous vehicle and if followed by another normal car driver, they too could push in with the autonomous car repeatedly assessing the risk as too high to continue forwards. The military have developed autonomous weapon systems which can deal with multiple choice threats. When first designed, these weapons did not respond to two incoming missiles at once as they could not decide which one to target. This new technology will have to be impervious to cyberattack which could cause all vehicles to malfunction or be remotely controlled from another country like a land based drone.

*“One can imagine how the normal car driver could just push in front of an autonomous vehicle”*

The advances in intelligent technology make autonomous vehicles almost inevitable. However, the desire and excitement by all of us for new inventions should not influence the timing of their use until sufficient safety checks have been carried out to demonstrate that they are significantly safer than current road vehicles.



# PUMP COURT CHAMBERS

## Driving Instructor wins appeal

A Driving Instructor (DI) won his appeal against his name being removed by the Registrar from the register of approved driving instructors following his failing three consecutive standards check tests. DI, represented by Mark Ruffell, had appealed the Registrar's decision to the First Tier Tribunal.

### *“DI passed five standards check tests prior to 2015”*

DI had been an approved driving instructor for 22 years and passed five standards check tests prior to 2015. However, he failed three such tests in 2015 and made complaint that the first two were conducted unfairly by the same examiner. One part of his complaint was that the examiner had marked DI down for giving a lesson on a topic that the pupil clearly knew. DI had argued that the pupil had specifically asked for the topic as a refresher in the days preceding his driving test and that the pupil did not remember the topic clearly at the start of the lesson. A subsequent email from the pupil confirmed DI's account.

Another ground of complaint was inconsistency of marking by the same examiner over the two tests, where he had covered the same topic with two different pupils yet he was marked down in the first test for the choice of route and marked well for the same route in the second test. Following the second standards check test, DI had written in detail to the Registrar explaining his concern over the fairness and accuracy of the examiner's marking in both tests. He had received two letters from DVSA, the second being a rehash of the first and neither showing that his concerns had been properly addressed.

### *“Concern over fairness & accuracy of examiner's marking”*

On appeal DVSA had contended that because this was a complaint against the way that examinations were conducted then the appeal should have been, by virtue of s.133 of the Road Traffic Act 1988, to the Magistrates' Court, and s.133 precluded appeals against the conduct of an examination to the First Tier Tribunal, so the appeal should be dismissed. DVSA relied on the judgement of HH Judge Brodrick in Merrick and Others D/2014/179. DI was now out of time for appealing to the Magistrates' Court.



# PUMP COURT CHAMBERS

DI had argued that a distinction had to be drawn between the conduct of examinations which could be appealed to the Magistrates' Court and the decisions of the regulator which could be appealed to the First Tier Tribunal. It was submitted that the Magistrates were concerned with the appropriate standards of driving and the outcome of an appeal would be for notice to be taken by the Registrar of the adverse finding in relation to a test result. Conversely, an appeal to the Tribunal was against a decision of the Registrar. DI had written to the Registrar as it was the Registrar who makes a decision as to the significance of the test results.

## *“An appeal to the Tribunal was against decision of Registrar”*

He submitted that the Registrar failed to consider his submissions properly and/or give due weight to them. He submitted that in considering the Registrar's decision, the Tribunal had inevitably to review the standards check tests and the Registrar's view of them.

In coming to his decision, Judge Peter Lane endorsed the wording in Merrick and Others. He noted that DVSA had decided to stop advising in its complaints procedure of the right to appeal to the Magistrates' Court following the Wakefield Magistrates' Court case, which had adversely affected DI's decision making to write directly to the Registrar. DVSA had since amended their advice as a result of this case. However, due to the facts of this case, and the evidence that had been adduced by DI on appeal, the Judge found that the case should be remitted to the Registrar for reconsideration of his decision [D/2016/4]. DVSA have subsequently offered DI a further standards check test.



# PUMP COURT CHAMBERS

## Recent Cases Involving The Team

The driver of a company Ford Transit van was receiving and sending text messages when he crashed into a cyclist on the A31 causing death by dangerous driving. The driver had been caught using his mobile telephone on 8 previous occasions. He received a sentence of 9 years' imprisonment and disqualification from driving for 14 ½ years (Charles Gabb). Click [here](#) for press release.

A company on a construction site were fined after a security guard died from carbon monoxide poisoning while working. The company pleaded guilty to breaching the Act and received an £8,000 fine with £6,220 costs (Peter Asteris). [Leigh Journal](#) press release. [HSE](#) press release

An international freight haulage company who appeared at a Public Inquiry before a Traffic Commissioner. The company's Operator Licence was at risk following a number of regulatory breaches. We advised the company on how to resolve their problems and on how to prepare for the hearing. Following our submissions, the TC allowed the company to retain its licence and to continue with its successful business (James Newton-Price).

Prosecuting on behalf of the Health and Safety Executive at Southwark Crown Court. Montway Ltd had pleaded guilty to s.2 HSWA 1974 (failing to conduct its undertaking in such a way as to ensure the health, safety and welfare of its employees) but amongst other things denied that its breach was causative of a Romanian employee at its demolition site falling 5 metres from a roof, fracturing his spine. The Newton hearing was successful and causation was proved. It was found that scaffolding should have been used, failing which there should have been a properly assessed and implemented system using harnesses. Montway Ltd's system of communication to its workers was found to have been *"casual to the degree of irresponsibility"*, *"part of the bigger picture of a lax and casual approach to health and safety at work and towards the welfare of its employees"*. Montway Ltd was fined £144,000 and ordered to pay costs of £44,000 (Richard Tutt). Click [here](#) for press release.

Causing death by careless driving tried at Winchester Crown Court (Robert Pawson). [BBC](#) press release. [Surrey Mirror](#) press release.

A speeding motorist crashed into 3 cyclists and was charged with causing serious injury by dangerous driving (life changing injuries). He was acquitted and convicted of driving without due care and attention receiving a Fine and a disqualification from driving (Mark Ruffell). Click [here](#) for press release.



# PUMP COURT CHAMBERS



## Contact us

### London

3 Pump Court

Temple

London

EC4Y 7AJ

T: 020 7353 0711

F: 0845 259 3241

DX: 362 London

### Winchester

31 Southgate Street

Winchester

SO23 9EB

T: 01962 868161

F: 00845 359 3240

DX: 2514 Winchester

### Swindon

5 Temple Chambers

Temple Street

Swindon

SN1 1SQ

T: 01793 539899

F: 0845 259 3242

DX: 38639 Swindon 2

## About us

With over 70 years' experience in providing specialist legal support to clients throughout the UK, and with 90 barristers specialising in different areas of law, we have an unrivalled strength in our breadth of services and depth of expertise. We can advise on almost every conceivable legal issue that may arise for most haulage businesses, from Transport and Health and Safety Law to Employment disputes, Property and Commercial law to Criminal proceedings.

Our Chambers clients range from sole traders to SMEs to large-scale multinationals and 'blue chip' technology firm.

We recognise that our client's needs are individual and so we endeavour to provide a service that is tailored to your unique requirements.