The State of insurance and autonomous vehicles in Ontario

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The Ontario government began 2019 by introducing amendments to the automated vehicles testing regulation that allows most vehicles equipped with SAE Level 3 technology[1] to be driven on public roads within the province. These vehicles will no longer be restricted to registered pilot participants (although vehicles with aftermarket Level 3 technology remain restricted to the pilot program). Level 4 and 5 vehicles also remain restricted to the pilot program under O. Reg. 306/15 (the "Regulation").

In our January issue, we examined some general aspects of the amendments in the Regulation that allow Ontario to continue its push to be a leading Canadian jurisdiction for both the testing and deployment of autonomous vehicles. In this issue, we look at the insurance aspects of the Regulation.

What insurance requirements does the Regulation impose?

The Regulation divides all vehicles into two groups:

1. ***Exempt vehicles***: vehicles at SAE Levels 0, 1, 2, and 3, but excluding truck platoons and SAE Level 3 vehicles that have been upgraded from Level 2 to Level 3 by a third party ("**aftermarket Level 3 vehicles**"); and
2. ***Pilot program vehicles***: vehicles at SAE Levels 4 and 5, aftermarket SAE Level 3 vehicles, and truck platoons.

The Regulation establishes insurance requirements for pilot program vehicles, requiring that these be insured to a minimum of $5 million (or $8 million where the vehicle can seat eight people or more). Additionally, driverless testing program participants for SAE Levels 4 and 5 are required as part of the application form to have an executed "insurance declaration and undertaking" which confirms coverage for "bodily injury or death, and from loss or damage to property from any one accident as a result of the use or operation of the automobile regardless of whether the operator of the pilot vehicle or technology is at fault for an accident during driverless pilot testing" (the "**insurer undertaking**").

The insurance implications of the Regulation?

Taking the regulatory insurance requirement for pilot program vehicles and the insurer undertaking, the province has effectively adopted the single policy approach for a subset of pilot program vehicles, meaning that the policy insuring the vehicle will respond whether the vehicle was being operated by the driver or in autonomous mode. This approach has been recommended by the Insurance Bureau of Canada which has suggested that the single policy coverage be extended to Level 3, 4, and 5 vehicles.

The apparent endorsement of the single policy approach for Level 4 and 5 vehicles may have the effect of simplifying potentially complex civil actions arising from the use or operation of a testing Level 4 or 5 vehicle. However, the exclusion of non-exempt Level 3 testing vehicles from the insurer undertaking and single policy approach leaves an open question as to whether the traditional auto coverage under the existing Ontario insurance regime is sufficient to cover these types of vehicles.

With respect to exempt Level 3 vehicles, it would appear that, for the most part, the standard Ontario Automobile Policy (OAP 1) would provide the same coverage whether the vehicle is in autonomous mode or being operated by a human driver. There may, however, be some unique scenarios where a different interpretation is possible. Without legislative amendments to make the legislative intent clear, we may have to wait and see how the courts address any ambiguities.

[1] The levels of driving automation are the following: Level 0 (no automation); Level 1 (driver assistance); Level 2 (partial automation); Level 3 (conditional automation); Level 4 (high automation); Level 5 (full automation). This six-level taxonomy has been developed by the Society of Automotive Engineers (SAE) and has been adopted by the Ontario pilot program testing regulation from its inception (s. 1(2))

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