Two Bites of a Peculiar Cherry? *Res judicata*, time bar and illiquid debts: Insurer Recoveries under the Automated and Electric Vehicles Act 2018

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1. Introduction

On the 19th of July 2018, the Automated and Electric Vehicles Act 2018 (the Act) gained Royal Assent.[1] Part 1 of the Act creates an insurance and liability regime specifically for automated vehicles[2] in Great Britain.[3] The Act was passed during a three year regulatory review of automated vehicles in the UK.[4] This review is being undertaken jointly by the Law Commission and the Scottish Law Commission.[5] It is part of the Government's 'Future of Mobility Grand Challenge', one of four such challenges contained within its Industrial Strategy, which was published in 2017.[6] The document affirms the Government's desire to "…see fully self-driving cars, without a human operator, on UK roads by 2021."[7] The Government is also keen to promote domestic innovation in this area.[8] While it is highly doubtful that the dream of 'fully self-driving cars' will even come close to being realised within the next two years, it is undeniably true that, with the benefit of significant Government funding, automated vehicle technology in the UK is developing rapidly.[9]

Automated vehicles are typically categorised according to their level of automated functionality,[10] albeit this functionality is often context-specific,[11] requiring varying degrees of human control and supervision. The Act broadly reflects this. As such, the Act applies to those motor vehicles that, in the opinion of the Secretary of State,

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[1] Part 1 of the Act, which deals with the liability of insurers, is not yet in force. By virtue of s 21, the Act will come into force on such a date as the Secretary of State appoints by regulations.

[2] The phrases 'driverless', 'self-driving', 'autonomous' and 'automated' vehicles are often used interchangeably. However, they have specific meanings relating to the vehicle's functionality.

[3] The Act does not apply to Northern Ireland.

[4] HM Government, *Industrial Strategy: Building a Britain Fit for the Future*, 2017

[5] The Law Commissions have recently published their second consultation paper, with further papers to follow in due course. Details of the Law Commissions' consultation can be found at: < https://www.lawcom.gov.uk/project/automated-vehicles/>

[6] *Op. Cit.*

[7] *Ibid.*, p.50

[8] To this end, the Department for Transport's Centre for Connected and Autonomous Vehicles (CCAV) has produced its 'Code of Practice: Automated vehicle Trialling.' The Code confirms that there is currently no bar to testing automated vehicles on UK roads, provided trialling organisations and vehicles confirm with UK Road Traffic Law.

[9] Testing of Automated Vehicles is already underway in the UK in Milton Keynes and Oxford, with passenger trials taking place in London and Edinburgh.

[10] The taxonomy most commonly applied is that developed by the Society of Automotive Engineers (SAE) in their technical document J3016 in 2014. The SAE scale runs from SAE Level 0 (no automation, requiring complete driver control) up to SAE Level 5 (full automation, requiring no input from the driver whatsoever). Further information in this regard can be found in the Law Commissions' *Automated Vehicles: A Joint Preliminary Consultation Paper*, available on the Commissions' websites.

[11] Relevant factors being the road type and rules, location and weather conditions, etc. Combined, these conditions are known as an automated vehicle's Operational Design Domain.

are capable, in certain circumstances, of safely and lawfully driving themselves.[12] A vehicle is 'driving itself' if it is operating in a mode in which it is not being controlled, and does not need to be monitored, by an individual.[13] Given the foregoing, it follows that not every vehicle with automation features will be an automated vehicle under the Act.

While automated vehicles' proponents argue that they will, in time, greatly reduce the number of motor accidents on our roads, inevitably, this immature technology will also cause accidents too. Prior to the Act's passing, there was widespread concern that, without a negligent driver to blame, the UK's existing motor insurance system might not offer sufficient remedies for accidents caused by automated vehicles.[14] Instead, claimants would have to seek compensation from the vehicle's producers under the UK's complex product liability laws.[15] Parliament was keen to ensure that when a relevant accident occurred, 'the compensation route for the individual remains within a motor insurance settlement framework,' rather than the product liability equivalent.[16] The Act seeks to achieve this in s 2(1) by making the automated vehicle insurer liable for damage caused by an automated vehicle when driving itself on a road or public place in Great Britain.[17] This "…wholly new form of liability…"[18] is not an insignificant innovation. Under the present motor compensation model, liability to compensate an injured party is imposed upon a negligent driver according to well-established delictual[19] principles. Where insured, the negligent driver enjoys the benefit of a contractual indemnity under their motor policy and typically the insurer funds third party compensation directly. In contrast, under the Act the automated vehicle user is completely removed from

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[12] Section 1(1).
[13] Section 8(1)(a).
[14] Centre for Connected and Autonomous Vehicles, 'Pathway to Driverless Cars: Proposals to support advanced driver assistance systems and automated vehicle technologies,' July 2016.
[15] Oliver Jeffcott and Rose Inglis, 'Driverless Cars: Ethical and Legal Dilemmas,' Journal of Personal Injury Law, Issue 1 2017. These concerns lingered even as the Bill was making its way through Parliament. Lord Campbell-Savours, referring to a report from the Science and Technology Committee during the second reading of the Bill in the House of Lords, noted that "…The report goes on to state that there were, 'some remaining issues, particularly around product liability'. That is the understatement of 2017. The whole approach to vehicle liability will turn into a legal nightmare in the end despite the assurances given by the Minister. It is a *lawyer's* dream…" And thereafter, regarding proposed exclusions in policy cover in respect of inadequate software maintenance or software misuse, "We will end up in trench warfare between the likes of Microsoft, Tesla, Dyson, Ford, Mitsubishi and the big insurance companies and poor old Joe Bloggs, the innocent man caught in the middle…" Hansard HL vol 789 cols 20-21 (20 February 2018).
[16] Louise Butcher and Tim Edmonds, 'Automated and Electric Vehicles Act 2018,' House of Commons Briefing Paper, 15 August 2018, Number CBP 8118.
[17] The duty to insure a vehicle for use on the road under s 145 of the Road Traffic Act 1998 includes Automated Vehicles, as defined by the Secretary of State (in accordance with s 1 of the 2018 Act). As such, under s 8(1)(b), an automated vehicle is "insured" if there is in force in relation to the use of the vehicle a policy of insurance that satisfies the conditions in section 145 of the 1988 Act.
[18] Law Commissions' *Joint Consultation Paper on Automated Vehicles*, *op.cit*. para 6.15.
[19] Under Schedule 5 of the Scotland Act 1998, save for some limited exceptions, the subject matter of the Road Traffic Act 1988 is a reserved matter and thus outwith the legislative ambit of the Scottish Parliament. Consequently, Road Traffic law in the UK can therefore broadly be said to be a state, rather than national, competence. Conversely, while the substantive and procedural law on civil damages in Scotland, and England and Wales, are analogous, they are nonetheless jurisdiction-specific. Where no specific distinction is drawn between their respective legal systems, the points made regarding the operation of the Act should be understood as applying with equal force in both jurisdictions. Consequently, references to delict should also be understood to be references to tort, and delinquents as to tortfeasors, unless otherwise specified.

the liability model. The effect of s 2(1) is to make the insurer[20] strictly liable for the harm caused by an autonomous vehicle when it is driving itself. This ensures that parties suffering 'damage'[21] will not usually require to pursue a product liability claim against the vehicle manufacturer.

Instead, should they wish to do so, this falls to the party made liable under s 2. Once they have settled the claim, s 5(1) of the Act provides them with a form of statutory relief, so that "…any other person liable to the injured party in respect of the accident is under the same liability to the insurer or vehicle owner."[22] Parliament's stated aim in s 5 was to 'give insurers a right of recovery against the person actually responsible for the incident' but only '*to the same extent that the person is liable to the victim* (emphasis added).'[23] Section 5(1) notwithstanding, Parliament found it necessary to further guard against insurers profiting under the Act by including additional safeguards within ss 5(3) and (4). Section 5(3) requires that, where the liable insurer or owner obtains a better settlement under s 5(1) than they paid to discharge their liability under s 2, the difference must be passed on to the claimant. Section 5(4) prevents a party liable under s 5(1) from being required to make payments to the victim and insurer that, when combined, 'exceeds their liability.'

Comparing the position in Scotland with that in England and Wales, this article will begin by analysing the private law obligations imposed on insurers by the Act in their doctrinal context. It will argue that the Act's two-stage hybrid liability model destabilises the traditional boundaries between delict and contract. It will then detail the operation of the framework for insurer recoveries under s 5, contending that the Act creates novel grounds of action that fly in the face of long-established legal principle that will likely cause needless and intractable disputes. Specifically, in areas relating to time bar, *res judicata* and illiquid debts. It will argue that, by operation of the law in both jurisdictions governing compensation and unjustified enrichment, many of these provisions are redundant. Consequently, the Act ought to and can readily be amended to resolve these issues.

2. Contort and Counter-Factuals – Liability in the air

At its heart, the function of the Act is one of risk transference. Difficult questions about liability and causation alluded to above have simply been passed on from claimant to insurer. Ostensibly, the Act's two-stage approach is a neat solution. Innocent parties suffering damage face a low bar to compensation. Thereafter, insurers are self-evidently better placed and resourced to pursue complex product liability claims. Nonetheless, while undoubtedly inventive, it is submitted that this scheme flows from fundamental misconceptions about reparation law.

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[20] Under s 2(2), in certain limited circumstances, where a vehicle is not insured the vehicle owner is liable for the damage. This article focusses on those cases where s 2(1) applies.
[21] Which is defined at s 2(3), and includes death or personal injury.
[22] While the nature of the liability transferred is not specified, it is anticipated that the majority of claims pursued by insurers under s 5(1) will be product liability claims. (This point is considered in more detail in the contractual analysis section. This article is therefore drafted with this in mind. See Matthew Channon, Lucy McCormick and Kyriaki Noussia, *The Law and Autonomous Vehicles*, Informa Law, Oxon, 2018; Law Commissions' *Joint Consultation Paper*, op. cit. at para 6.64, p.113.
[23] Hansard HC Automated and Electric Vehicles Bill Deb (First Sitting) col 131 (14 November 2017)

The root of the problem is the Act's conflation of obligations. Historically, a motor insurer's obligations in contract ran in tandem to the insured driver's obligations in delict or tort to their victim. These obligations were conceptually distinct, the former consensual and the latter non-consensual. As Professor DM Walker noted of Scots law, "…the fundamental distinction between delict and contract is that in the former the obligation, not to do harm unjustifiably, and the secondary obligation, to compensate a person injured by harm unjustifiably done, are both imposed by force of the general law."[24] In contrast, in contract the primary obligation of performance arises by voluntary agreement and "…only the secondary obligation is imposed by force of law..."[25] It is trite to note that each branch of law is therefore governed by its own specific rules. While Professor Walker noted that "…obligations *ex delicto* and *ex contractu* may coincide…"[26] there is no suggestion that they should merge.[27] Save for very limited exceptions,[28] liability should, in the words of Professor Israel Gilead, "…be characterised as tortious, contractual, or both. There should not be "…'liability in the air,' liability that has no defined origins."[29] Nonetheless, by conjoining these parallel forms of obligations into a singular liability vehicle, something akin to 'liability in the air' is just what ss 2(1) and 5(1) of the Act achieve.

In large part, this is because the matrix of obligations contained within s 2(1), and ss 5(1) and (3) is so convoluted. A, the insurer, contracts with B, an automated vehicle user, so that A assumes a contingent statutory liability, arising potentially from the fault of C, an automated vehicle manufacturer, to compensate a party suffering damage, D, and which enables B to use the vehicle. For the purposes of s 2(1), A is under no obligation to B but the parties nonetheless are joined by their insurance contract. By virtue of which, A voluntarily assumes the contingent delictual liability under s 2(1) of the Act. Nonetheless, the character of the insurer's obligation under s 2(1) is involuntary, since the Act imposes an obligation to compensate D. Its duties discharged, s 5(1) thereafter replicates and transfers to A D's right of action against C to A. Then, under s 5(3), where A betters the settlement they paid to D, the Act imposes a new but related obligation on A to further compensate D.

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[24] David M. Walker, *Delict*, W. Green, 2nd Edn, Edinburgh, 1981, p.13-14. See also, Hector L. MacQueen, 'Concrete Solutions to liability: changing perspectives in contract and delict,' Arbitration, 1998, p.285-291; Martin Hogg, 'Concurrent Liability in the Scots Law of Contract and Delict,' Juridical Review, No.1, 1998.
[25] *Ibid*, p.14.
[26] *Ibid.*
[27] See Joe Thomson, 'Delictual liability between parties to a contract,' S.L.T. 1994, 3, 29-34.
[28] While some academic lawyers are willing to concede a degree of blurring at the edges of what Professor Israel Gilead describes as 'tort and contract's equations of consent,' this tends to be limited to very specific areas like pure economic loss. See, Israel Gilead, 'Non-Consensual Liability of a Contracting Party: Contract, Negligence, Both, or In-Between?' *Theoretical Enquiries in Law*, Vol 3.511, 2002; Jay Feinman, 'Doctrinal Classification and Economic Negligence,' *San Diego Law Review*, Vol. 33, Issue 1 (Winter 1996), pp. 137-174; Grant Gilmore, *The Death of Contract*, Ohio State University Press, 1995; Michael Dorff, 'Attaching Tort Claims to Contract Actions: An Economic Analysis of Contort,' *Seton Hall Law Review*, *28 Seton Hall L. Rev. 390 (1997-1998)*; Rob Merkin and Jenny Steele, *Insurance and the Law of Obligations*, Oxford University Press, 2013; William W. McBryde, *The Law of Contract in Scotland*, 3rd edn, Thomson/W.Green, 2007, paras 1-13.
[29] Israel Gilead, *op. cit.*, p.514.

Meanwhile, B's obligations, which are necessary to the operation of s 2(1), are imposed under the general law but extend only to obtaining a motor insurance policy.[30] It is important to keep in mind that s 2(1) does not impose any liability on B.[31] Consequently, the secondary obligation to compensate D does not arise for B either.

C is first under a delictual duty not to place a product in the market that harms D and, because a right of action subsists under the Consumer Protection Act 1987,[32] where such harm occurs, C is strictly liable to compensate D. Where D is the automated vehicle owner, C will also have entered into a contractual relationship with D .[33] C would then be under a second concurrent set of consensual contractual obligations to D.[34] However, once A's liability to D under s 2(1) is discharged, C's delictual and contractual obligation to compensate D appears to fall away. C is then, by virtue of s 5(1), under a secondary obligation to pay compensation to A. This would apply, for example, where owner D is a passenger in the automated vehicle but the user-in-charge is another insured person, B. However, it may well be that B, the insured user-in-charge, is the same as D, the automated vehicle owner.

In and of themselves, complex 'relational' models of private law obligations are not especially unusual. Indeed, as Merkin and Steele observe, "…private law as a whole is concerned with the relationships between parties."[35] In doing so, they critique the traditionally narrow focus of legal scholars on bipartite relationships in private law. The loss-spreading role of insurance calls, they suggest, for a more nuanced and expansive view of private law obligations.[36] This article does not take issue with their arguments, which have much to commend them. However, their thesis is predicated on a coherent and well-regulated legal model that admits of greater flexibility than is typically understood. However, by contrast, the Act's Gordian knot of legal obligations is not just difficult to follow. It is submitted that it also interferes with the effective operation of contractual and delictual principles. By conflating the parties' obligations, it obfuscates their juristic character and, as will be discussed later, in so doing, it destabilises the remedies that flow from them.

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[30] Under ss 143 and 145 of the Road Traffic Act 1988. Under s 143, use of a vehicle on the road or public place is illegal unless there is in place a policy of insurance, the requirements of which are contained within s 145 of the Act.

[31] Albeit, B's obligations in respect of vehicle maintenance under regs 29 and 100(1) of the Road Vehicles (Construction and Use) Regulations 1986, as well as those arising at common law, subsist (See *Henderson v Henry E Jenkins & Sons* [1970] AC 282.) Complex questions about causation may arise should there be allegations that the accident was caused by a failure to maintain the vehicle. See *Bruce v Brown* [2011] CSOH 165.

[32] A right to claim in negligence also subsists, albeit the bar to successfully pursuing a claim against them is much higher.

[33] This liability matrix is relatively simplistic. In due course, as automated vehicles are incorporated into 'Mobility as a Service' (MaaS), the contractual chains between automated vehicle stakeholders are likely to become increasingly complex. See The Society of Motor Manufacturers and Traders, 'Connected and Autonomous Vehicles,' Connected Report, 2019.

[34] Subject to any prohibitions under existing UK consumer law, these obligations may be modified by competing contractual obligations owed by D to C that arise elsewhere, such as End-User License Agreements.

[35] Rob Merkin and Jenny Steele, *Insurance and the Law of Obligations*, Oxford University Press, 2013, p.19.

[36] *Ibid*, p.9.

3. Contract

At a contractual level, the Act's compensation model functions in a way that sits awkwardly with the cover available under traditional motor insurance policies. Since the secondary obligation to compensate the claimant is imposed solely and directly upon the insurer by s 2(1), any payment by the insurer to discharge its own liability cannot constitute an indemnity to the assured under the contract of insurance. Inasmuch as 'the concept of indemnity plainly underlies most insurance policies,'[37] the absence of indemnity in this context is incongruous. Similarly, since s 2(1)(c) provides that an insurer's liability extends to 'an insured person as well as any other person', compensation paid to a policyholder thereunder is more akin to a life or accident policy than an indemnity policy.[38] Likewise, absent any liability or duty to compensate, the assured has no risk under s 2(1) to transfer to the insurer through the insurance policy. As such, notwithstanding that two of the common law requirements for an insurance contract are satisfied,[39] there nevertheless seems to be no insurable interest.[40] If the liability is the insurer's alone and 'there can be no insurance where no risk is transferred,'[41] a somewhat perverse consequence of this might be that the insurer's liability under s 2(1) is incapable of being insured under the assured's motor policy.[42] At first blush, this seems to conflict with the general requirement to obtain motor insurance.[43] Section 8(1)(b) of the AEVA provides that "…a vehicle is "insured" if there is in force in relation to the use of the vehicle on a road or other public place in Great Britain a policy of insurance that satisfies the conditions in section 145 of the Road Traffic Act 1988." However, while 'use' under s 145 of the 1988 Act can be readily construed to extend to the operation of an automated vehicle,[44] the obligation to insure operates only in respect of 'any liability *which may be incurred by the user* […] caused by, or arising out of, the use of the vehicle on a road.'[45] Given the

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[37] *Colinvaux's Law of Insurance*, Robert Merkin (ed), 11th edn, Sweet & Maxwell, 2016, para 1-026, p.4.

[38] While it is currently possible to provide this cover on a first party basis to a policyholder, it is nonetheless not mandated by the compulsory motor insurance scheme. For a further discussion of the distinction between contingency and indemnity insurance, see *Gould v Curtis* [1913] 3 K.B. 84.

[39] Namely a benefit to the assured (i.e. use of a vehicle on the road or public place) and an uncertain event.

[40] *Prudential Insurance v Inland Revenue Commissioners,* [1904] 2 KB 658.

[41] *Colinvaux's Law of Insurance*, *op. cit.*, at para 1-030: "Although this point is not developed in the *Prudential Assurance* definition, it is clear that one of the determining factors is whether a risk is being transferred by the assured to the insurer. If no risk is transferred, then there can be no insurance." See also, Rob Merkin and Jenny Steele, *op. cit.*, p. 26, 38-39. Conversely, standing FN 38, it would appear that an insurable interest in a contingency based on an assured's potential liability for that contingency could be covered by a life policy where it is properly framed. See *Feasey v Sun Life Assurance Co of Canada* [2003] EWCA Civ 885, per Dyson LJ at [123].

[42] Although, see *MacGillivray on Insurance Law*, John Birds, Ben Lynch and Simon Paul (eds), 14th edn, Sweet & Maxwell, 2019, para 1-011.

[43] Under s 145 of the RTA, which gives effect to the Motor Insurance Directive (Directive 2009/103/EC).

[44] See *Vnuk* [C-162/13] and *Rodrigues de Andrade* [C-514/16], and *R & S Pilling t/a Phoenix Engineering (Respondent) v UK Insurance Ltd* [2019] UKSC 16.

[45] Section 145(3)(a). It has been suggested by Rob Merkin and Jenny Steele that EU law has "…transformed the original concept from insurance against the liability of the driver to insurance arising from the use of an insured vehicle…," so that insurance as a source of compensation has been manipulated to extend beyond the reach of personal responsibility of the driver, notably without recourse to traditional ideas of vicarious liability or agency." (*Insurance and the Law of Obligations*, Oxford University Press, Oxford, p.266). Indeed, Directive 2009/103/EC is not framed in terms of the user's personal liability but rather speaks only of civil liability. Nonetheless, it is submitted that the duty to insure an automated vehicle under Section 145(3)(a) falls to be considered in light of the approach taken by the Supreme Court in *R & S Pilling t/a Phoenix Engineering (Respondent) v UK Insurance Ltd* [2019] UKSC 16. Although the Court was primarily concerned with the scope of 'use' of a vehicle, its reasoning at paras 35-41 of the judgment apply equally in respect of a user's liability: "EU law does not require a

foregoing, there appears to be a statable argument that if the user cannot incur liability under s 2(1), there is no requirement to insure against such a liability.[46] Further, that a motor policy providing cover commensurate with a policyholder's obligations under s 145 of the 1988 Act would not respond.[47] The foregoing is, however, subject to one potential exception. Namely, situations where the accident caused was "…wholly due to the person's negligence in allowing the vehicle to begin driving itself when it was not appropriate to do so."[48] In these circumstances, the user is liable as the Act effectively requires a finding of 100% contributory negligence.[49] However, properly understood, in this scenario it is difficult to see how the vehicle 'driving itself' can be said to be the 'real, efficient cause'[50] of the accident. This being so, the causative requirements of s 2(1) do not appear to be satisfied and so it is submitted that no insurer liability therefor should arise under this provision.[51]

Questions of causation aside, while the foregoing does not provide any sensible basis for eliding its status as insurer for the purposes of s 2(1), there is nonetheless more than a hint of artificiality about this arrangement. In responding to such a claim, the motor policy is effectively operating as a form of contingency insurance; albeit, one in which the assured has no insurable interest. Should automated vehicle technology progress so as to render human control nugatory and bring the majority of accidents within the scope of s 2(1), motor insurance policies might increasingly begin to resemble other commercial risk transfer products like credit derivatives, which in turn may have different tax and regulatory regimes.[52] In the shorter term, insurers will presumably face something of a dilemma when doing their actuarial calculations. Accidents will arise from use of the vehicle but the extent to

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national court, hearing a dispute between private persons, to disapply the provisions of national law and the terms of an insurance policy, which follows national law, when it is unable to interpret national law in a manner that is compatible with a provision of a directive which is capable of producing direct effect: see judgment of the Grand Chamber of the CJEU in *Smith v Meade* (Case C-122/17) 7 August 2018." Another curious result of this analysis is that, absent liability, the insolvency of an automated vehicle user is irrelevant to an action for damages under s 2(1). Consequently, the Third Parties (Rights against Insurers) Act 2010 is not engaged.

[46] Similarly, since the absence of cover is not the same thing as a policy exclusion, this analysis should not fall foul of the prohibition on exclusions of liability under s 2(6) of the Act.

[47] This might impact on the funding of defence costs, since the motor policy would likely only cover legal fees incurred for investigating, defending or settling a claim against the insured. Similarly, where policyholder and insurer are both potentially liable, insurers instructing solicitors on a delegated authority basis will need to be alive to the potential VAT implications.

[48] Section 3(2) of the Act.

[49] A requirement not entirely without controversy. See The Law Commissions' *Joint Consultation Paper on Automated Vehicles*, *op.cit*. at para 6.38.

[50] Per Lord Mance, *Global Process Systems Inc and Another v Syarikat Takaful Malaysia Berhad*, [2011] UKSC 5, at [49]. See FN 414 of the *Joint Consultation Paper on Automated Vehicles.*

[51] Indeed, in such circumstances, the vehicle clearly *does* need to be monitored. As such, it is also submitted that the vehicle is not driving itself (as defined by s 8(1)(b) of the Act) for the purposes of s 2. Given the clear wording of s 8(1)(b), it would appear there is not the requisite control, management or operation to amount to *use* of the vehicle, per *Brown v Roberts* [1965] 1 Q.B. 1.

[52] See The Law Commission and Scottish Law Commission's 'Reforming Insurance Contract Law, Issues Paper 10, Insurable interest: updated proposals,' p.5, 27 March 2015. Despite this, it is clear that, until such time as CAV technology is sufficiently sophisticated so as to render s 145 of the 1988 Act obsolete, CAV motor policies will likely remain policies of insurance for the purposes of the FCA's Perimeter Guidance, namely one where the contract contains "…an identifiable and distinct obligation that is, in substance, an insurance obligation…" *Perimeter Guidance manual*, Chapter 6, at para 6.6.7.
<https://www.handbook.fca.org.uk/handbook/PERG.pdf>

which an insurer can factor their own liabilities into premiums they charge their policyholders is open to question.[53]

Further confusion occurs in relation to the status of the insurer under s 2(1) where there is more than one insured person in a vehicle. Under s 145, the duty to insure arises in relation to the user, rather than the vehicle itself.[54] Thus, depending on the motor policy terms, it is possible that there may be more than one insured person for the purposes of s 2(1). Accordingly, this ambiguity may cause uncertainty as to whether one insurer or another, or both, is liable under s 2(1). This could conceivably cause difficulties where there is a dispute about who the user of the vehicle was. For example, this might arise in an accident where there are two or more intoxicated insured persons in the automated vehicle. It is foreseeable that both may deny being the 'user-in-charge'[55] of the vehicle to avoid prosecution. Taken to the extreme, the Act appears to permit a scenario where, in an accident caused by an automated minibus driving itself, which contains, say, 15 appropriately insured persons, 15 different insurance policies are engaged. Absent any obvious mechanism to identify the appropriate user-in-charge, it is submitted that the insurers of insured persons in both scenarios will be jointly and severally liable. It might be thought that historical concerns around fraud and lack of insurable interest may also apply with equal force here.[56]

This ambiguity around insurer status might also operate so as to frustrate policy exclusions permitted by s 4 of the Act. Under this provision, insurers are entitled to limit or exclude liability to their policyholders in certain circumstances relating to failure to install safety critical software updates or the installation of prohibited software.[57] Nonetheless, the duty to provide cover to third parties under the Motor Insurance Directive[58] subsists and so s 4 requires to be construed accordingly. As such, where a s 4 exclusion in a motor policy operates so as to exclude an insured person's losses from cover and there was a second insured person in the CAV with them at the material time, it remains theoretically possible for them to recover damages from the second insured person's policy.[59] The opportunity and reasons to seek to defraud a motor insurer in this context are self-evident.

Perhaps alive to the juristic ambiguities discussed above, the drafters of the Act have attempted to impose some clarity at s 6(4). This subsection provides that a liability under s 2 is treated as liability in delict or tort.[60] At first sight, it might be thought this statutory classification necessarily informs the type of liability arising under s 5(1),

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[53] The premium charged as consideration for underwriting the policy being a reflection of the risk transferred by assured to the insurer.

[54] *Sahin v Harvard* [2017] 1 WLR 1853. Merkin and Steele suggest that in principle, "…cover attaches to the car, not to the driver…" (*Op.cit.* p.273). However, it remains the case that s 151(2)(b) operates so as to cover the liability of "…any person other than one who is insured by the policy." In the context of automated vehicles, this distinction is of no little importance.

[55] For more on the user-in-charge, see sections 3.27-3.60 of Law Commissions' *Automated Vehicles: a joint preliminary consultation paper*.

[56] *Colinvaux's Law of Insurance*, *op. cit.,* para 4-002.

[57] Section 4(1) provides that 'an insurance policy in respect of an automated vehicle may exclude or limit the insurer's liability under section 2(1) for damage suffered by an insured person arising from an accident occurring as a direct result of- (a) software alterations made by the insured person, or with the insured person's knowledge, that are prohibited under the policy, or (b) a failure to install safety-critical software updates that the insured person knows, or ought reasonably to know, are safety-critical.'

[58] Directive 2009/103/EC.

[59] Subject to any deductions for contributory negligence under s 3 of the Act.

[60] For the purposes of any enactment conferring jurisdiction on a court with respect to any matter.

since that subsection provides that any other person liable to the injured party *is under the same liability to the party liable under s 2*. However, reference to s 5 is conspicuously absent from s 6(4). It specifies the type of liability of an insurer or vehicle owner under s 2 only. Meanwhile, s 2(7) of the Act makes clear that imposition of liability by s 2 does not affect any other person's liability in respect of the accident. Since the word 'liability' has historically been employed by turns to refer to both the primary and secondary obligations discussed above, clearly, great care should be taken when considering its meaning in a statutory setting.[61] Standing such concerns, it presumably follows that, where any other person is liable to the party suffering damage in contract, the character of that liability subsists, unaffected by s 6(4). To construe this so that the liability becomes delictual could lead to the contracting party's rights under the contract being diminished and without their consent.[62] Likewise, such a construction would render s 2(7) redundant. However, following the logic of s 5(1), if an automated vehicle causing – or partly causing[63] - an accident while driving itself gives rise to a contractual liability, this liability appears to be capable of being transferred to an insurer.[64] If this analysis is correct, the parameters of this contractual liability will be defined by the terms of the contract. This will include any relevant terms imported into the contract from statute.[65] In circumstances where a producer has a defence to a claim under the Consumer Protection Act 1987,[66] an insurer will presumably wish to avail themselves of any alternative remedies available under contract. Otherwise, they will be unable to recover their outlays. For example, where an accident is caused by a defective post-sale software update in the automated vehicle, it may be that the supplier can resist the insurer's s 5(1) claim because the defect was not present at the time of supply.[67] Nonetheless, where the trader is liable to the claimant for a breach of an implied contractual term regarding digital content under the Consumer Rights Act 2015,[68] a literal reading of s 5(1) would result in this liability transferring to the relevant automated vehicle insurer. As a matter of statutory interpretation, while this may operate to the benefit of insurers and, in certain circumstances, the claimant,[69] a literal construction of s 5(1) that affords insurers benefits intended for consumers[70] would be bizarre. Given the standing presumption against readings of statutes that lead to absurd results, this is

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[61] For further discussion of the various meanings attributed to the word 'liability,' see Douglas Hogg, 'Saying What We Mean: Fundamental Structural Language in Contract Law,' in Larry A. DiMatteo and Martin Hogg (Eds), *Comparative Contract Law: British and American Perspectives*, (Oxford University Press, 2015) p.17.

[62] Section 2(3) effectively excludes any damage to the automated vehicle and property in the custody of the party suffering damage, as well as goods carried for hire or reward from any delictual claim. As such, the prejudice resulting from applying a construction that prevents an injured party from obtaining a remedy under a different branch of law could well be significant.

[63] Per s 8(3)(b), under which a reference to an accident caused by an automated vehicle includes a reference to an accident that is partly caused by an automated vehicle.

[64] It should be noted that this view is absent from the Law Commissions' *Preliminary Consultation Paper on Automated Vehicles*. However, it has been noted that the liability arising under s 5(1) is broader in scope that that under s 2. See Alex Glassbrook, Emma Northey and Scarlett Milligan (eds), *A Practical Guide to the Law of Driverless Cars*, (2nd ed), Law Brief Publishing, 2019, p.90.

[65] In particular, those imported under the Consumer Rights Act 2015 and Unfair Contract Terms Act.

[66] See s 4 of the 1987 Act. Claims relating to a product's fitness for purpose or durability generally fall outwith the ambit of the 1987 Act and are more properly dealt with under the Consumer Rights Act 2015. See *McGlinchey v General Motors UK Ltd* [2011] CSOH 206.

[67] S 4(1)(d) of the 1987 Act.

[68] Under s 46(2) of the Consumer Rights Act 2015, for damage to a device caused by defective digital content

[69] See footnote 55.

[70] For example, the requirement that compensation be paid within 14 days of settlement under s 46(5) of the 2015 Act.

presumably not what Parliament intended.[71] This being so, a more purposive reading of s 5(1) seems justified. By adopting 'a not strictly grammatical construction,'[72] 'under the same liability' can more sensibly be understood as meaning *is liable to the insurer or owner for the settlement amount referred to in s 5(1)(b)*.[73] Delineating the other party's liability in this way would facilitate recovery of the insurer's losses but without creating the quasi-contractual nexus discussed above. Whether this is a more strained construction or simply rewriting the statute is open to question.[74] Either way, if a literal reading of s 5(1) "…leads to such impractical results that it is necessary to do a little adjustment so as to make the section workable,"[75] there seems to be a powerful argument for amending s 5(1) so that the liability arising thereunder reflects the sum paid in s 5(1)(b).

4. Delict and Tort

Applying a delictual analysis, it is difficult to anchor the insurer's obligations under the Act to liabilities traditionally imposed by the general law. It is noteworthy that liability under s 2(1) does not arise due to any wrongful act or omission by the insurer.[76] And yet, the insurer is undoubtedly liable under the Act to provide pecuniary satisfaction to the party suffering damage.[77] Since 'the requirement of a wrong is an entirely necessary feature of damages,'[78] the sum due under s 2(1) does not appear to be a form of damages *stricto sensu*. In this specific sense, notwithstanding the foregoing, the insurer's liability here is analogous to a contractual indemnity arising under the insurance policy.[79] However, while s 2(1) necessarily requires the existence of a motor insurance

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[71] *Bennion on Statutory Interpretation*, *op.cit.,* p.359.
[72] *Williams* v *Evans* (1876) 1 Ex D 277
[73] It has been suggested that the drafters of the Act deliberately avoided greater specificity as to the character of any liability arising under s 5(1). This was seemingly done to avoid the controversy caused by the wording of s 1 of the Civil Liability (Contribution) Act 1978, under which liability is imposed 'in respect of the same damage.' This caused some difficulty in recent credit hire claims. (See Alex Glassbrook, Emma Northey and Scarlett Milligan (eds), *op.cit.*, p.89.) While this might be true, it indicates a legislative sensitivity to recent case law that, as this article suggests, is strikingly absent from the rest of the Act. In any event, it is submitted that the issue does not justify the exclusion of the 1978 or 1940 Acts under s 6(5) of the Act.
[74] Per Lady Dorrian, *Deborah Gordon against a decision of an Additional Support Needs Tribunal dated 25 August 2006* [2007] CSOH 45, at para 39.
[75] Per Lord Denning in *SJ Grange Ltd* v *Customs & Excise Commissioners* [1979] 2 AER 91.
[76] Particularly given the putative effect of s 6(4).
[77] There are clearly parallels with s 151 of the Road Traffic Act 1988, which imposes on the relevant insurer a liability to pay for unsatisfied judgments arising out of the negligent driving of an unidentified third party. Indeed, the Court of Appeal noted in *Cameron v Hussain* [2017] EWCA Civ 366, "…the policy of imposing third party liabilities on the insurer of a vehicle irrespective of its obligations to its insured has stood since the Road Traffic Act 1934…" (Gloster LJ, at para 43). In this regard, it is therefore not surprising, as Merkin and Steele note, that the Road Traffic Acts and EU law have blurred the lines between insurance and liability (*op.cit*, p. 278-80). Nonetheless, there are distinctions that can reasonably be taken between the two models. Firstly, liability under s 151 relates to an otherwise insurable liability under s 145 (per *Sahin v Harvard, op.cit.*). Secondly, theft by unidentified third parties is a relatively rare occurrence, which is factored into its assessment of the risk and associated premium. (See *Cameron* at para 44.)
[78] *McGregor on Damages*, by The Hon Mr Justice James Edelman, Dr Jason Varuhas and Simon Colton (eds), Sweet & Maxwell, 20th Edition, 2019, at para 1.1.1-004. This passage continues "…There is thus excluded from damages three common types of case giving pecuniary satisfaction by success in an action because they are not dependent on wrongdoing. These are actions for money payable by the terms of a contract, actions for restitution based on unjust enrichment, and actions under statutes where the right to recover is independent of any wrong."
[79] See the discussion in *Bartoline Ltd v Royal Sun Alliance Insurance Plc*, [2006] EWHC 3598 (QB) from [77].

policy, liability thereunder may well arise absent any contractual nexus between the insurer and party suffering damage.[80] Settlements made under s 5(1) involve a delinquent/tortfeasor and so arguably cure the deficit of harm, but, the s 2(1) claim having been satisfied, payment is then made to the insurer. This appears somewhat incongruous with principle of compensation.

However unlikely, it remains open to a party suffering damage to forego a claim against the automated vehicle's insurer and instead pursue a claim against a manufacturer directly under the Consumer Protection Act 1987.[81] Since there are two separate delictual grounds of action causing the same damage, the manufacturer and insurer might be thought to be concurrent tortfeasors, jointly and severally liable.[82] Nevertheless, the similarities with joint and several liability in either jurisdiction are procedural and stretch only so far.[83] Settlement of a direct claim would not afford the manufacturer with a common law right of relief against the insurer. Although, by satisfying their claim, the manufacturer would appear to extinguish the insurer's liability under s 2(1).[84]

By contrast, an action pursued by an insurer against a responsible party under s 5(1) cannot be said to be equivalent to be a form of statutory assignation,[85] since the insurer's right to sue is not subject to the same limitation period governing claims under s 2(1).[86] Under an assignation, an insurer would only obtain the same right as an injured party had.[87] Instead, the transfer of liability from claimant to insurer is closer to the contractual principle of subrogation, wherein the insurer stands in the shoes of its insured and pursues a recovery of its outlays. Matters are further complicated by a legislative sleight of hand, in which the Act asks us by turns to treat the insurer first as one thing, the delinquent/tortfeasor, and then its direct opposite, the claimant. Indeed, the requirement that we must assume things are not quite what they seem is a curious feature of the Act.[88] Both s 2 and s 5 generally are predicated around a series of opaque and confusing 'counter-factuals.'[89] In creating these 'contortious'

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[80] Although the Act allows for policyholders to be compensated in certain circumstances.
[81] This may give rise to two separate claims and thus increased insurance costs that are ultimately passed on to the consumer. As such, so far as the Act makes "…intermediaries in the distribution chain liable under the same conditions as a manufacturer…," it would appear to contravene Article 3 of the Directive for Defective Products (Directive 85/374/EC), per *Commission v Denmark* (C-327/05). However, since the UK is leaving the EU, the point appears to be moot.
[82] *Jameson and Another v Central Electricity Generating Board*, [1999] 2 W.L.R. 141, per Lord Hope at 472.
[83] See *Beedie v Norrie* (1966) SC 207. "It was argued that under this subsection no right existed in the defender until after he has paid damages to the pursuer. But although he has no enforceable right to recover from the third party until after he has paid the pursuer, his prospective right nonetheless exists before any decree in the pursuer's favour is pronounced. I agree with what Lord Kissen says in *Findlay v. National Coal Board*, 1965 S. L. T. 328, at p. 330: 'I think that the short answer is that Rule 110 A [now Rule 85] deals with a procedural matter only and is not dealing with substantive law. It is a procedure which enables a right of relief to be claimed at an early stage although, of course, it will not be exercisable unless and until the defenders are found liable.'" Per Lord President Clyde, at p 210.
[84] Per *Clark v Urquhart* [1930] A.C.28.
[85] Equivalent to an assignment in England & Wales.
[86] See para 2.22, p.7, Scottish Law Commission, *Report on Civil Liability – Contribution*, 14 December 1988.
[87] *Ibid*. See *Cole Hamilton v Boyd* 1968 SC (HL) 1.
[88] As the Law Commissions note at paras 6.33-36 of their joint preliminary consultation paper, this is made explicit in the Act at s 3(1), which, for the purposes of the Law Reform (Contributory Negligence) Act 1945 requires us to imagine that a claim has been brought against a person rather than the vehicle insurer or owner. Likewise, s 6(3), which effectively ask us to assume that, for the purposes of s 3(1), the 1945 Act applies as if the behaviour of the vehicle was that of the insurer or owner.
[89] *Ibid*, at 6.36.

ambiguities, the Act changes the algebra of reparation; so much so that the duties and remedies it creates are difficult to reconcile with traditional models of compensation.[90]

5. Insurer Recoveries - Remedies in the Air?

In and of themselves, these innovations might have been of no great moment, had long-established legal principles of reparation been allowed to subsist. Unfortunately, although ss 5(2) and (3) employ language that ostensibly reaffirms these legal concepts, the operation of these provisions sits at odds with them.[91] Section 5(3) provides that:

> "If the amount recovered under this section by the insurer or vehicle owner exceeds the amount which that person has agreed or been ordered to pay to the injured party (ignoring so much of either amount as represents interest), the insurer or vehicle owner is liable to the injured party for the difference."[92]

The language employed here by the Act's drafters is clear and without ambiguity. The effect of s 5(3) is to create an enforceable legal right for claimants to recover the difference between their claim settlement and any improved sum achieved by an insurer or vehicle owner. A corollary of this is that Parliament explicitly contemplated the possibility of insurers or owners achieving improved settlements. Once one begins to tease out the implications of this, a series of questions inevitably present themselves as to the necessary steps to be taken to ensure this right is given effect.

6. The Difference

To operate at all, s 5(3) requires some mechanism by which parties compensated under s 2 are informed of any subsequent improved settlements. Otherwise, s 5(3) will be redundant. Once the effect of s 5(3) is understood, claimants' solicitors will likely be anxious to maintain dialogue with insurers to protect their client's interests. Indeed, they may even feel they are under a professional obligation to do so. One difficulty resulting from this is that it could lead to ever increasing fees without any clear prospect of recovery, so as to render such an approach prohibitively expensive. Standing their previous involvement in the earlier s 2 claim, while claimant firms might

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[90] To somewhat strain the metaphor adopted by Lord Rodger in *Heaton and Others v AXA Equity and Law Life Assurance Society Plc and Another*, while there are similarities, it is nonetheless distinguishable from those kinds 'of legal eternal triangle… familiar to classical Roman lawyers.' [2002] UKHL 15, at [85].

[91] Militating against a construction whereby Parliament should be understood to have incorporated the common law rules by allusion to legal concepts. See *Bennion on Statutory Interpretation*, *op.cit.* p.653.

[92] The language employed here appears to contemplate a very short period of time between the insurer settling a claim under s 2(1) and recovering its outlays under s 5(1). It is respectfully submitted this is unrealistic, if so. Section 5(1) only operates after the insurer has discharged its liability under s 2(1).

seek instructions to pursue recoveries under s 5(1), acting on a joint- retainer basis for insurer and claimant alike, there appears to be clear conflicts of interest preventing this.

In circumstances where a s2 claimant cannot be traced, the question arises as to whether an insurer may retain the difference. The Act is silent on this point. Section 5(4) provides that nothing "…in this section allows the insurer or vehicle owner and the injured party, *between them*, [**my emphasis**] to recover from any person more than the amount of that person's liability to the injured party." However, given the draftsman's use of the phrase 'between them,' it might be that the mischief the Act seeks to avoid is some form of joint enterprise, designed to achieve inflated settlements to the profit of both claimant and insurer. The language seems to allude to a form of fraudulent deception. If so, s 5(4) simply reflects the criminal law of England and Wales, and Scotland. That being the case, it is not clear why this provision was thought to be necessary.[93] In any event, absent fraudulent joint enterprise and *mala fides* sufficient in and of itself to found a conviction, retention does not appear to give rise to any criminal liability.

It could be that the draftsmen sought simply to reflect the principle that:

> "…a plaintiff cannot recover in the aggregate from one or more defendants an amount in excess of his loss. Part satisfaction of a judgment against one person does not operate as a bar to the plaintiff thereafter bringing an action against another who is also liable, but it does operate to reduce the amount recoverable in the second action. However, once a plaintiff has fully recouped his loss, of necessity he cannot thereafter pursue any other remedy he might have and which he might have pursued earlier. Having recouped the whole of his loss, any further proceedings would lack a subject matter. The principle of full satisfaction prevents double recovery."[94]

However, the plain meaning of s 5(4) does not support this reading. This is unavoidably so, since the contribution sought is not one borne of joint and several liability. Once again, the two-tiered hybrid liability model leads to unnecessary confusion. In any event, where the sum sued for by a claimant contains an element of 'double recovery,' it is surely within a court's inherent jurisdiction to modify its award of damages so as to avoid unjustified enrichment.[95]

Likewise, if, for any reason, the claimant fails to bring an action under s 5(3) to recover the difference, nothing within the Act imposes any obligation to pay the difference to the claimant. Similarly, if an insurer exercising reasonable diligence cannot trace a claimant, there does not appear to be a bar to them retaining the increased

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[93] See *Edwards v Hugh James Ford Simey* [2018] EWCA Civ 1299: "As a number of the authorities have made clear, public policy sets some limits to the principle of *restitutio in integrum*. If it emerges that the original claim (or part of it) was based on fraud, then of course the court will not lend itself to fraud." Per Irwin LJ, at 71.

[94] *Tang Man Sit (Personal Representatives of) v. Capacious Investments Ltd* [1996] A.C. 514, per Lord Nicholls of Birkenhead at 522.

[95] Per *Comex Houlder Diving Ltd v Colne Fishing* 1987 SC (HL) 85, "…If there has been any connivance or collusion with the pursuer, that would be a matter proper for consideration in determining what contribution, if any, was just."

sum, along with any interest generated thereon.[96] A consequence of this is that insurers may be tempted to avoid disclosing the improved settlement in the hope that any obligation under s 5(3) is extinguished by operation of limitation/prescription, thereby allowing them to keep the difference. If the operation of statutory timebars facilitated such an approach, it is difficult to see what can be done to prevent this.[97] Of course, where a claimant only discovers the existence of an improved settlement late in the day and litigates, an insurer's failure to disclose may well give rise to adverse findings in relation to expenses. As such, a prudent insurer may wish to protect itself against adverse awards of expenses/costs orders by keeping a detailed record of the steps taken to trace a claimant due a settlement uplift. The type and frequency of enquiries sufficient to achieve this are questions of fact that will fall to be considered by the courts. In any event, insurers will almost certainly require to reconsider their policies around archiving claim files.

Another issue that may well arise is the claimant pre-deceasing the improved settlement. It might be expected that the money would vest in their estate. Section 1 (1) of the Law Reform (Miscellaneous Provisions) Act 1934 provides that 'on the death of any person all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate.' While flowing from the same proximate cause, it is nonetheless submitted that the liability under s 5(3) is a new and discreet cause of action to the liability arising under s 2(1). The liability under s 2(1) is discharged by an insurer settling the claim, thereby extinguishing the insurer's obligation to compensate. The subsequent liability under s 5(3) is contingent upon the insurer achieving an improved settlement.[98] If, at the time of death, an insurer's liability under s 5(3) has not yet crystallised, it is not yet a realised cause of action. It therefore does not appear to be a right, at that time, capable of being transferred to the claimant's estate. If this analysis is correct, it might encourage insurers to delay recovery under s 5(1) in the hope the obligation to pass on the difference dies with the claimant. Similarly, s 1(1) of the Fatal Accidents Act 1976 provides that the liability for causing death by a wrongful act, neglect or default survives the death of the injured party but only where they were entitled to maintain an action and recover damages. Since the subsistence of the liability in the 1976 Act is predicated upon the claimant's ability to recover damages in respect of the original cause, it follows that any contingent liability under s 5(3) is a different cause of action not capable of vesting in the estate.

The position in Scotland is equally unforgiving for claimants' executors. The Damages (Scotland) Act 2011, s2(1), provides for the transmission of 'like rights' to damages to a deceased person's executor for personal injuries suffered by and vested in the deceased immediately before their death. However, the 2011 Act specifically provides that these 'like rights' do not include any right to damages by way of compensation for patrimonial loss[99] attributable to any period after the date of death. Similarly, any right in respect of non-patrimonial losses is

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[96] It may be that FCA takes a view that s 5(3) matters falls within the scope of an insurer's regulatory duties under the FCA's Insurance: Conduct of Business Sourcebook (ICOBS), particularly those provisions in ICOBS 6 and 8 requiring insurers to treat customers and handle claims fairly. In any event, it is conceivable that this would give rise to new forms of compensation recovery firms targeting s 5(3) payments in much the same way that others focussed on PPI payments.

[97] And, absent deliberate concealment, per s 32(1)(b) of the Limitation Act 1980, it is submitted below that they do.

[98] See FN 59.

[99] Financial losses.

transmissible to the estate only if an action to enforce the right is brought by the deceased and not concluded before their death. As such, regardless of whether one conceptualises the difference as a form of *solatium* or general damages, or, rather, as special damages, any contingent right under s 5(3) would appear to die with the claimant in Scotland.[100]

7. Limitation and Prescription

The convoluted operation of s 5 is further impeded by deficiencies in the Act's approach to time bar. At s 6(5), the Act provides that a party with a claim under s 5 "…does not have a right to recover contribution from that person under the Civil Liability (Contribution) Act 1978 or under section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940." In so doing, the Act casually severs all ties with a significant body of settled case law in this area from both jurisdictions.[101] In its place, s 5(5) of the Act amends s 10A of the Limitation Act 1980 (the 1980 Act), and s 18ZC of the Prescription and Limitation (Scotland) Act 1973 (the 1973 Act) in respect of an insurer's s 5(1) recovery rights. The two year time bars are therefore, it would appear, reinstated in both the jurisdictions' respective legislation on limitation and superficially the status quo appears to subsist.

Unfortunately, it would appear that the drafters of the Act did not appreciate the distinction between limitation and prescription in Scots law. The former is a matter of procedural law, rendering certain rights unenforceable but which, per s 19A of the 1973 Act, may be overridden by the courts where it is just and equitable to do so. The latter, in contrast, is a complete defence on the substantive merits, operating so as to extinguish completely any obligation to compensate.[102] There is no statutory discretion to allow prescribed claims to proceed out of time. Currently, claims advanced under s 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 are subject to a two year *prescriptive* period, which is contained within s 8A of the 1973 Act. Section 8A makes clear that the obligation to make a contribution is extinguished upon the expiration of the two year period. However, by contrast, the new time bar in s 18ZC of the 1973 Act has been placed beside the various species of personal injury in Scotland, which are subject to a limitation period[103] and the judicial override available under s 19A. While s 19A does not apply to s 18ZC, the language employed in s 18ZC is that of limitation, providing that a claim under s 5(1) of the Act 'may not be brought in Scotland after the expiration of the two year time bar.' In effect, the obligation subsists but is no longer justiciable. Consequently, this may mean that the nature of any prescriptive period applicable to claims under s 5(3) discussed below is open to doubt. Further, it creates further confusion as to the character of s 5(3) claims in Scotland, since 1973 now effectively treats s 5(1) claims – and, by extension, those under s 5(3) – as a type of personal injury, rather than an action for relief. Section 6(5) therefore arguably puts the law on time bar around s 5(1) recoveries in Scotland at large.

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[100] *Actio personalis moritor cum persona*. See *Stewart v London, Midland and Scottish Railway* (1943) S.C. (H.L.) 19.
[101] Indeed, in Scotland, the effect of s 6(5) is to re-establish the ambiguous common law position around the need for a decree to found an action for relief that existed prior to the 1940 Act. See *NCB v Thomson 1959* SC 353.
[102] See *Macphail's Sheriff Court Practice*, *op.cit.*, para 2.114.
[103] These different forms of injury claim and their limitation period are set down in ss 17, 18, 18A or 18B of the 1973 Act.

Likewise, no equivalent time bar is provided for under the Act regarding liability arising under s 5(3). Consequently, it is far from straightforward what, if any, prescription or limitation period applies. Once again, matters turn on the hybrid nature of an insurer's obligation under s 5(3). A similar point came before the Outer House of the Court of Session in *Cullen v Advocate General for Scotland*.[104] The question for the Lord Ordinary was whether an obligation under s 71 of the Social Security Administration Act 1992 to repay benefits obtained by deception should be characterised as a remedy for unjustified enrichment. If so, it was subject to a five year prescription period under para 1(b) of Schedule 1 to the 1973 Act. It was not disputed that, for the case to engage the doctrine of unjustified enrichment, the three criteria outlined by Lord Hope in *Dollar Land (Cumbermauld) Ltd v CIN Properties Ltd*[105] must be met, namely: (1) one party must have been enriched at the expense of the other; (2) there must be no legal justification for the enrichment; and (3) it must be equitable to compel the party enriched to make redress.'[106] In applying the test, the Lord Ordinary felt it necessary to consider the nature of the remedy to understand the nature of the obligation. He concluded that, "…in contrast to redress for unjustified enrichment, which is a common law remedy grounded in equity, the power conferred by s 71, and the corresponding obligation to repay, are creations of public law." The obligation to make redress was statutory and its corresponding remedy not an equitable one. Consequently, the obligation to repay had not been extinguished by operation of prescription. When one considers the numerous issues caused by the Act's hybrid liability model, it is particularly noteworthy that the issues in *Dollar Land (Cumbernauld) Ltd* were due to a conflict between remedies available under the laws of unjustified enrichment and contract.[107] Indeed, Lord Hope was at pains to acknowledge that much of the confusion around the law of unjustified enrichment has "…arisen from its explanation in terms of quasi-contract."[108]

For Scottish claims, applying the Courts' approaches in these cases, it is submitted, with some hesitation, that the obligation under s 5(3) is one based on redress of unjustified enrichment, within the meaning of para 1(b) of Schedule 1 to the 1973 Act, and so it would prescribe after five years. It is uncontroversial that the liable insurer has been enriched at the expense of the claimant, since the payment flows from original liability for the claimant's injury (albeit, it is conceptually awkward, since the difference arises from a different cause of action and the claimant must be satisfied by way of damages before any s 5 liability can arise). Meanwhile, standing the language and apparent purpose of s 5(3), it is difficult to see how there can be a legal justification for enrichment and retention.[109] Last of all, it would appear to be entirely equitable to compel payment. Furthermore, adopting one line of reasoning advanced by the Respondent in *Cullen*, the 'language of para 1(b) is that of the private law of obligations.'[110] The three-limbed test for an obligation for redress under the law of unjustified enrichment is

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[104] [2016] CSOH 170
[105] 1998 S.C. (H.L.) 90
[106] Lord Armstrong, at [34], *Cullen*.
[107] In this case, a tenant sustained losses following their landlord's reliance on an irritancy clause (similar to forfeiture in England and Wales) in the lease, which led to a windfall for the landlord.
[108] Lord Hope, at [98] of *Dollar Land*.
[109] *Ibid*, at [94]. Nonetheless, the position might be different if retention arose as part of a counter-claim by an insurer owed money by a policyholder. "There can be no better justification for an enrichment than that it was obtained and is being retained in the exercise of a contractual right against the party who seeks to invoke the remedy." Lord Hope, *Dollar Land (Cumbernauld)*.
[110] *Cullen*, *op.cit*, at 32.

broadly consistent with the obligation arising under s 5(3) of the Act. Nonetheless, there are cogent arguments that might be advanced to the contrary, not least because the obligation arises under statute and not at common law.[111]

In England and Wales,

> "…a claim to enforce a right given by statute may under the current law fall within the definition of an "action upon a specialty" within the meaning of section 8 of the 1980 Act or it may be a claim to recover money recoverable by virtue of an enactment under section 9 of the 1980 Act."[112]

As above, insofar as s 5(3) creates an enforceable right to the difference, any liability thereunder would be subject to the shorter 6 year limitation period under s 9.[113] Since s 9 specifically contemplates recoveries by virtue of an Act of Parliament, many of the issues ventilated in *Cullen* do not arise. It would appear that, for the purposes of s 9, time begins to run from the date when the overpayment has been finally determined.[114] This is defined at s 5(2) of the Act.[115]

Yet this too gives rise to another potential ground of contention. Namely, the precise point at which an insurer's liability in respect of s 5(3) crystallises. Section 5(3) states that this occurs at the point where the difference is recovered but it does not say when recovery takes place. Is it when the insurer is put in funds by the other person liable to the injured party? Or, earlier, where a judgment or decree is obtained, or even an extra-judicial settlement? Section 5(2) provides the points at which settlement for the purposes of s 5 is achieved but, by virtue of s 5(5), this specifically relates to the point at which s 5(1) recovery rights accrue to an insurer for limitation purposes.

Given that the Act's primary objective is to create a pre-emptive framework for an as yet unrealised technology, a provisional approach to the drafting of certain provisions is entirely understandable. However, the Act's intra-jurisdictional misconceptions around time bar do not warrant such latitude. Indeed, it is not unduly harsh to suggest that the more effective operation of s 5(1) might be achieved by removing s 6(5) entirely. Meanwhile, for the reasons developed below, such time bar issues as might arise in relation to s 5(3) may be moot.

8. *Res Judicata*

Whilst far from trivial, the issues examined above are primarily mechanistic and procedural by nature. Yet a far more insuperable problem lies at the heart of s 5(3). Namely, this provision's underlying presumption that an insurer can improve upon the levels of damages paid to a claimant under s 2(1). It is worth recalling that the

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[111] *Ibid*. at para 23.
[112] Law Commission, *Report on Limitation of Actions*, (Law Com No 270 (2001)), at para 4.8.
[113] Under s 8(2), the 12 year limitation period is displaced by any shorter period of limitation for an action prescribed by any other provision of the Act.
[114] See R(SB) 5/91, CSB/888/1988, a decision of a social security commissioner; also, *Cullen*, at para 17.
[115] When it is established by judgment or decree; an arbitral award; or an enforceable agreement. See below.

"…purpose of an award of damages is compensation, or restitution *in integrum*…"[116] In other words, the "…object of an award of damages is to place the injured party as nearly as possible in the same financial position as he or she would have been in but for the accident."[117] It is therefore difficult to imagine a situation where the increased settlement suggested by s 5(3) might occur, unless a liable party decides to pay an insurer more than they are owed. This seems unlikely, given the general rule that a party seeking contribution "…can extract no more than the measure of his loss when he executes judgment."[118] Similarly, s 5(3) excludes interest and so it cannot be that. It may be that the drafters of the Act did view s 5(1) as a form of assignation, which required the constraints of s 5(3) to avoid injustice to any party suffering damage. However, under this approach, s 2(1) settlements are not compensation but rather the 'cost of purchasing a statutory assignation.' Since s 5(3) does not guarantee improved settlements, along with its distinct time bar under s 6(5), this construction of s 5(1) can readily be discounted.[119] The only remaining option is startling but difficult to discount. As suggested above, if s 5(3) creates an enforceable legal right for claimants to recover the difference, it must follow that the Act contemplates some legal process for improving the original settlement or else the provision is redundant. Furthermore, the requirement that insurers pass on the difference to the claimant indicates that the difference flows directly from the original cause of action. More significantly, it implies that, ultimately, the difference forms a constituent part of the original damages. The consequences of this analysis are twofold. Firstly, if the amount of compensation ultimately paid to the claimant can be 'topped up', it calls into question whether the claimant has been 'satisfied' by the s 2(1) payment. This thereby renders any discharge of liability uncertain.[120] Secondly, the internal logic of this is that a claim under s 2(1) can be reopened to allow the original settlement to be improved.

A claim of this kind would inevitably be answered with defences arguing that claim was subject to *res judicata* and questions around an insurer's standing to bring such a claim. The principle of *res judicata* is well understood. In England and Wales, it operates so that "…a litigant in a civil action may be estopped from denying what has previously been finally decided by a competent court."[121] In Scotland, "…a delictual claim is discharged by decree and satisfaction of the decree. The cause... is *res judicata* and cannot be raised again."[122] The doctrine is one of public policy.[123] Subject to rare and exceptional circumstances to further the administration of justice,[124] the broad

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[116] *Delict*, *op.cit.* p. 461. See also *Liesbosch Dredger v S.S. Edison* [1933] A.C. 449, per Lord Wright at 463.
[117] Lord Hope, *Jameson and Another v Central Electricity Generating Board*, [2000] 1 A.C. 455, at [471].
[118] *Clerk and Lindsell on Torts*, by Michael A. Jones, Anthony M Dugdale, Mark Simpson (eds), 22nd Ed, Sweet & Maxwell, 2017, Chapter 31, s 7. See also Lord Hope in *Jameson*, "The basic rule is that a plaintiff cannot recover more by way of damages than the amount of his loss." *Op.cit.* at 471.
[119] See the Scottish Law Commission's *Report on Civil Liability – Contribution*: "An assignee takes exactly the same right which the injured party had. His right to sue his fellow delinquents is therefore subject to prescription from the date of the original liability to the injured party not from the date of the assignation. Moreover, an assignation is not designed to produce a fair apportionment of damages among all the parties responsible. The amount which the assignee may recover from the other delinquents will depend on whether the payment he made to the injured party is regarded as a payment of compensation or simply the purchase price of the assignation. An assignation is not therefore an adequate substitute for a proper right of relief following settlement." *Op.cit*.
[120] *Cf* FN 87. Following this logic, might a claimant settle early at a lower level than they otherwise would in the hope that the insurer will achieve a better result on their behalf under s 5(1)?
[121] *Clark and Lindsell on Torts*, *op.cit.*
[122] *Delict*, by William J. Stewart, 4th Edn, Thompson & Green, 2004.
[123] *Delict*, by DM Walker, *op.cit.* p.343.
[124] For a discussion of which, see *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)*, [2013] UKSC 46.

rule is that a claimant may not re-litigate a point of law previously decided. For a plea of *res judicata* to succeed in the Scottish courts, five conditions require to be met. Namely, that "…the prior determination was made by a competent court; that decree was pronounced after contention by the parties; and that it may be settled by compromise; that the subject matter of the two actions is the same; that matters in contention are the same; and that the parties in the second action are either the same as, or are representatives of, the parties in the first action."[125] Nonetheless, exceptions do exist. Consequently, while the principle appears too well-established to permit bald applications to re-litigate any and all claims, there nonetheless appears to be a statable argument that s 5(3) affords claimants an implied right to reopen their claims in certain circumstances.[126]

If this is correct, any implied right should, at the very least, be on all fours with the existing authorities around *res judicata* in each jurisdiction.[127] In time, however, it seems reasonably foreseeable that claimants would seek to test the boundaries of the general rule. Particularly so, where the only other option may well be a professional negligence claim, which is likely to be 'treated with some circumspection.'[128] An inferior settlement caused by a negligently prepared report by an expert witness, perhaps?[129] A failure by the previous agents to make the most of a case in any extra-judicial settlement?[130] A judicial award of damages sufficiently low that, were the case still live it would be amenable to appeal? Or perhaps even an award that is simply lower than hoped for?[131] Perhaps the law has developed since the original trial so it is now more favourable to the claimant's cause?[132] However such an implied right might develop, it is submitted that any narrowing of the scope of the application of the principle of *res judicata* under s 5(3) is highly undesirable. There are clear and self-evident public policy grounds for preventing claimants from resurrecting settled claims. Similarly, since any such judicial reconsideration lies outwith the ordinary rules of appeal in the civil courts, it could conceivably create a perverse result where a lower court is invited to reconsider the determination of a higher court of appeal in the same case.[133]

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[125] *John Cole and Others v Advocate General for Scotland* [2015] CSOH 102. This passage draws on the rules of *res judicata* outlined in *Macphail on Sheriff Court Practice*, paras 2.104-2.113.

[126] This scenario appears to be distinguishable from a matter in which partial settlement is achieved and some matters are left outstanding, as per *Johnson v Gore Wood* [2002] 2 A.C. 1, since this is a qualified settlement, as opposed to a settlement where the claimant has compromised their claim to affect resolution of the matter. It is submitted that under the latter, the insurer's obligation to the claimant is discharged.

[127] See *Clark v In Focus Asset Management & Tax Solutions Limited* [2014] EWCA Civ 118: "…*res judicata* …is part of the common law and Parliament legislates against the background of the common law and is presumed to intend it to apply."

[128] Per Simon Brown LJ, *Ogilvy & Mather Ltd v Rubinstein Callingham Polden & Gale*, 20 July 1999, Unreported, CA. See also, William Flenley and Tom Leech, *Solicitors' Negligence and Liability*, 2nd edn, Tottel Publishing Ltd, 2008, para 12.6, p. 639.

[129] If so, the court will be called upon to consider a s 5(3) claim through the lens of a professional negligence claim (See *Hunter v Hanley* (1955) S.C. 200; *Bolam v Friern Hospital Management Committee [1957] 1 W.L.R. 582*). To do so might prompt claimants to seek to lead new expert witness evidence in the s 5(1) claim, so as to challenge the findings made in relation to the evidence of an expert witness by the court in the preceding s 2(1) claim. See *Edwards v Hugh James Ford Simey (A Firm)* [2018] EWCA Civ 1299. Regardless, it is far from clear that the rules of procedure in either jurisdiction would accommodate such a claim.

[130] *Hickman v Blake Lapthorn* [2005] EWHC QB 2714; *Channon v Lindley Johnstone* [2002] EWCA Civ 353.

[131] See *Blair v FJC Lilley Marine*, 1981, S.L.T. 90; *Bowers v Strathclyde Regional Council*, 1981 S.L.T. 122; and *Girvan v Inverness Farmers Dairy* (No.2), 1998 S.L.T. 21.

[132] *SAAMCo v York Montague* [1997] AC 191.

[133] The general principle being that there should be finality in litigation. "Appeals should be neither necessary nor desirable, but that principle is overridden not only by the need to recognise the human fallibility of judges, to

Insofar as s 5(3) affords claimants a right to recover increased damages secured by an insurer, the standing of the insurer in any preceding claim advanced under s 5(1) is complex. In seeking to recover its own outlays, the insurer is clearly acting in its own interests. The position in respect of the difference is less clear. Since the liability under s 5(3) is contingent on the outcome of a s 5(1) settlement, what remedy is there for a claimant who, believing there are reasonable grounds and prospects for an improved settlement under s 5(1), is faced by an insurer who seeks only to recover what they paid the claimant? Similarly, might any negligent failure by an insurer to seek an improved settlement on behalf of a claimant (where it has reasonable grounds and sufficient knowledge to do so) be, in and of itself, actionable? In both instances, while the insurer's actions appear to frustrate a potential benefit, the loss of chance of an improved recovery appears too remote to be justiciable. The position might be different where an insurer assumes a responsibility to do so.[134] Since the insurer's liability to the claimant under s 5(3) is contingent upon and only crystallises at the point of an improved settlement under s 5(1), it would appear that the claimant enjoys no rights or standing until the improved settlement is achieved. A claimant may seek to overcome this by making it a condition of settlement that the insurer notifies them of any subsequent s 5(1) proceedings but this is unlikely to further their cause a great deal. Moreover, it is submitted that in an action advanced under s 2(1), the terms of s 5(3) are not capable of founding an award of provisional damages. A Scottish court is unlikely to interpone authority to a joint minute of settlement drafted in terms that reserve the pursuer's right to seek further damages should an improved settlement materialise.[135] Similarly, an application to give effect to a consent order for provisional damages in England and Wales would presumably encounter similar difficulties.[136]

The drafting of s 5(3) is clearly problematic. As a general rule, "…Parliament must be taken to have legislated against the background of the general principles of the common law…"[137] It might be thought that the courts could 'give a rectifying construction'[138] of s 5(3) so as to ensure conformity with these general principles. However, this is not a case where the uncertainty arises only because the provision's language is 'not entirely plain,' and can be cured simply by applying a narrower construction.[139] Conversely, a statutory provision's meaning is *prima facie* taken to be that which corresponds with its grammatical meaning.[140] It is submitted that s 5(3)'s plain language and, where a more purposive reading is adopted, its redundancy, are objective indicators supporting the reading

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correct any errors they may make and to produce just results in particular cases, but also by the need to maintain and develop a uniform and coherent system of law. A system of appeals also encourages inferior judges to keep in view their duty to apply the law judicially and to refrain from making arbitrary or unreasonable decisions." *Macphail's Sheriff Court Practice*, *op.cit.* Chapter 8, paras 18-02.

[134] Given the law of contract's approach to pure economic loss, this is theoretically statable but seems highly unlikely in practice.

[135] In this regard it is worth comparing s 5(3) with the detailed provisions contained within s 12 of the Administration of Justice Act 1982. Section 6 of the Act, amending s 32 of the Senior Courts Act 1981, sets down the position in England and Wales.

[136] The rules for Consent Orders for Provisional Damages are contained within CPR Practice Direction 41A. However, under Part 41.2(b) of the CPR, to grant an award for provisional damages, the court must be satisfied that there is a chance that at some future date the claimant will suffer a deterioration in their physical or mental condition as a result of the negligent act. However, as this article suggests, this does not appear to be the primary concern of s 5(3).

[137] *Wisely v John Fulton (Plumbers) Ltd, Wadey v Surrey County Council* [2000] 2 All ER 545

[138] *Bogdanovic v Secretary of State for the Home Department*, [2014] EWHC 2872 (QB)

[139] *Nokes v Doncaster Amalgamated Collieries* [1940] A.C. 1014

[140] *Bennion on Statutory Interpretation, op.cit.* p.292

of this provision advanced above. Absent any obvious 'countervailing indicators,' it is difficult to see how a court seeking to identify Parliament's true intention for s 5(3) can diverge from its plain meaning.[141] Similarly, the presumption that Parliament did not intend to change the common law can be overturned where, whether expressly or by necessary implication, it has clearly indicated its intention to do so.[142] If not expressly, it would nonetheless appear s 5(3) contains an implied rebuttal of the common law presumptions in relation to *res judicata*.[143] In all the circumstances, even the possibility under s 5(3) of reopening a previously settled claim seems entirely undesirable. It is also unnecessary, as the existing law on *restitutio in integrum* and unjustified enrichment already provide sufficient protection to claimants from insurers profiting at their expense under the Act. As such, given the significant uncertainties caused by s 5(3) and the detrimental effect it might have on the administration of justice, it is respectfully submitted that this sub-section should also be deleted.

Of course, that the option to seek an improved settlement exists does not mean that insurers will try to make use of it. Indeed, for the reasons outlined above, this, on its face, seems unlikely. However, take a scenario where an insurer becomes aware that the s 2(1) claim was settled for significantly less than the claim's true worth (e.g. following intimation of new medical evidence indicating a much more severe injury). If there were statable grounds for an increased settlement under s 5(3), an insurer might be concerned that any failure to do so conflicted with its regulatory obligations to treat claimants fairly under the FCA's ICOBS 6 and 8.[144] Similarly, an insurer might also pursue an increased settlement for tactical reasons where a s 2(1) claim has litigated. For example, there might be statable grounds for a claimant to appeal the level of damages awarded at first instance. However, the insurer's agents may try to persuade the claimant to drop the appeal in return for the insurer seeking the additional amount under s 5(1). If the improved settlement can be achieved via an extra-judicial s 5(1) claim with minimal costs, it may well be viewed by both sides as less risky and thus a more attractive means of resolving the claim. As such, it is submitted that the likelihood of the problems discussed in this article materialising are more than merely fanciful.

9. Section 5(2) and illiquid debts – an inequitable liability?

The potential problems created by s 5(3) and the legislative innovations elsewhere that compound them are of no little consequence. Consequently, it is perhaps not overstating matters to suggest that the Bill would have benefitted from robust scrutiny by experienced civil practitioners from both jurisdictions. It is therefore regrettable that s 5(2) only serves to reinforce this view. Having excluded s 5(1) claims from the ambit of the Civil Liability (Contribution) Act 1978 and the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 via s 6(5), the drafters of the Act sought to identify when the limitation periods for claims under s 5(1) begin. It does this in s 5(2) the Act, which provides that:

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[141] *Bogdanovic*, *op.cit*. See also *Inco Europe Ltd v First Choice Distribution* [2000] 1 W.L.R. 586
[142] *R v Secretary of State for the Home Department, ex p Pieson* [1997] 3 W.L.R. 492
[143] *Clark and another v In Focus Asset Management and Tax Solutions Ltd* [2014] EWCA Civ 118
[144] While, strictly speaking, this applies to claims made by policyholders, insurers usually extend the concept of treating claimants fairly (TCF) to third party claimants.

> "(2) For the purposes of this section, the amount of the insurer's or vehicle owner's liability is settled when it is established—
>
> (a) by a judgment or decree,
>
> (b) by an award in arbitral proceedings or by an arbitration, or
>
> (c) by an enforceable agreement."

On its face, section 5(2)(c) seems to bring extra-judicial settlements within the scope of s 5(1) recoveries. Since this is likely to be the majority of claims, this provision will therefore be a not insignificant feature of the prospective motor compensation landscape. When the Bill was laid before Parliament, the nature of enforceable agreements under s 5(2) was raised. To which the response was:

> "I am told that the agreement must be legally binding and therefore enforceable in court. Whether that satisfies my right hon. Friend, I do not know, but that is all I have to say, so he is not going to get any more out of me."[145]

Notwithstanding the presumption of a rational, reasonable and informed legislature, competently drafting legislation,[146] these comments do not immediately inspire confidence in Parliament's understanding of Scottish reparation law. And so it is here that, as elsewhere in s 5, a close reading reveals problems. As before, the ambiguity around the liabilities arising under s 2(1) and s 5(1) is at the heart of it. By including at s 5(2)(c) extra-judicial settlements within the scope of s 5(1) claims, the Act appears to specifically to provide for recoveries of illiquid debts. In England and Wales, s 1(4) of the Civil Liability and Contribution Act 1978 provides that "…an action of contribution may be based upon a payment made in *bona fide* settlement or compromise of a claim without regard to whether or not the person seeking contribution himself is, or ever was, liable in respect of the damage."[147] By contrast, the position in Scotland in respect of actions for relief under the 1940 Act is that a decree is essential.[148] Consequently, "…it will not be enough for a defender to base his claim for contribution under s 3(2) on… a simple extrajudicial settlement, where the settlement sum is paid over, but no decree of any sort is pronounced by the court…"[149] This being so, by failing to limit the application of s 5(2)(c) to England and Wales, it is submitted that Parliament has legislated *per incuriam*.

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[145] Hansard HC Automated and Electric Vehicles Bill (First Sitting) (Deb) col 131 (14 November 2017).
[146] *Bennion on Statutory Interpretation*, *op.cit.* p.288.
[147] Per Lord Mackay, *Comex Houlder Diving Ltd v Colne Fishing Co Ltd*, 1987 SC (HL) 85. See also *George Wimpey and Co. v. B.O.A.C.* [1955] A.C. 169 and *Stott v. West Yorkshire Road Car Co. Ltd.* [1971] 2 Q.B. 651.
[148] *National Coal Board v Thomson*, (1959) SC 353.
[149] 'When is a liability not a liability? Third party procedure: traps for the unwary,' by Dave McNaughton, Scots Law Times, 2003

The thorny issues around recovery of illiquid debts was considered by the Scottish Courts in cases like *National Coal Board v Thomson*[150] and *Comex Houlder Diving Ltd v Colne Fishing Co Ltd*.[151] These same issues will be equally relevant to actions pursued under s 5(1). In *National Coal Board*, the court declined to extend the common law to allow a right of relief absent constitution of the debt, since to do so "…would deprive a co-delinquent of the opportunity to have his liability determined on an equitable, rather than a strict *pro rata,* basis."[152] However, as discussed above, the effect of s 6(5) is to distinguish claims for recovery advanced by insurers under s 5(1) from other types of claim for contribution made under the 1940 Act. In doing so, the Act specifically excludes s 5(1) claims from the ambit of those authorities dealing with the same issue in respect of the 1940 Act, creating further uncertainty. It is submitted that, since the Act expressly removes claims from the ambit of the 1978 Act, while the status quo is likely to subsist,[153] the failure to draft in a more jurisdictionally nuanced manner is, at best unhelpful, and, at worst likely to encourage otherwise avoidable legal challenges. It is not inconceivable that an injury claim under s 2(1) or (2) might drag on, litigate and then settle. If any subsequent claim under s 5(1) litigates, an insurer may then take several years to achieve the improved settlement. This could mean any action for breach of s 5(3) takes place many years after the original accident giving rise to a claim. This is particularly problematic when considered in the light of the issues raised by s 5(2).

Another consequence of s 5(3) is that, if a settlement under s 2(1) is amenable to being reopened so as to allow an improved settlement, might it also be reduced on the same basis?[154] When faced with a product liability claim advanced under s 5(1), a manufacturer might conceivably seek to resist the case in respect of quantum, arguing that, "…the agreed amount of damages would not be conclusive against the party from whom contribution was sought, nor indeed would the quantum of damages awarded in a contested action to which he had not been a party. In either event it would be open to him to contend, and lead evidence in support of the contention, that damages were excessive."[155]

On one view, the exclusion of s 5(1) claims from the scope of the 1940 and 1978 Acts appears to compound this issue, as it leaves quantification open-ended, without any statutory requirement for judicial scrutiny.[156] However,

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[150] 1959 SC 353

[151] 1987 SC (HL) 85. See *Report on Civil Liability – Contribution*, *op.cit.* at para 2.10.

[152] *Report on Civil Liability – Contribution*, *op.cit,* at para 2.09.

[153] Albeit, under the common law rules "…it remained unsettled whether it was always necessary for a party claiming relief to have had a decree awarded against him or whether it would be sufficient that he had settled with the injured party." *Ibid*, para 2.4.

[154] In *Jameson and Another v Central Electricity Generating Board*, it was argued that "…*Clark v. Urquhart* [1930] A.C. 28 decides no more than that payment of the full amount discharges the tort. It does not establish the converse: that less than 100 per cent recovery is not satisfaction under an agreement between the parties." The court did not directly consider this counterpoint.

[155] *Comex Houlder Diving Ltd v Colne Fishing Co Ltd*, *op.cit,* per Lord Keith at 122.

[156] Section 1(1) of the 1978 Act provides that "…Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)." By virtue of s 2(1), the amount of contribution to be recovered shall be such as is deemed by a court to be just and equitable. Similarly, s 2(2) allows a court to exempt any person from liability to make a contribution or direct that their contribution amounts to a full indemnity. Meanwhile, under the 1940 Act, s 3(2) provides that: "Where any person has paid any damages or

the converse may be an equally statable proposition. Namely, the absence of these arrangements should be understood to mean they ought not to be live concerns. In any event, there is sufficient ambiguity around the point to cause confusion amongst the unwary.

10. Conclusion

While Parliament's desire to legislate proactively to protect victims of automated vehicle damage from complex and unpredictable litigation is laudable, the hybrid liability model it has created to achieve this is misconceived. As a risk transfer mechanism, the Act cannot reasonably be considered a success since the conflation of contractual and delictual obligations in ss 2 and 5 cause more problems than they solve. Similarly, it is inconceivable that Parliament intended to introduce a liability scheme so at odds with fundamental principles of reparation law in either jurisdiction. Indeed, when one reads the Act, there is sense that the drafters of the Act have transposed an existing liability model from another statutory scheme without entirely appreciating the implications of doing so. The language employed by the Parliamentary draftsmen in these provisions evokes the language of contractual indemnity, rather than liability. It is noteworthy, therefore, that s 5(3) echoes the wording of s 1(4)(a) of the Third Parties (Rights against Insurers) Act 1930. If the 1930 Act has informed the Act, this may go some way to explaining many of the issues raised in the foregoing.

The various problems outlined above can be resolved relatively simply with some judicious redrafting to bring the Act into line with the existing law. Firstly, the Act should be amended to modify the structure of the parties' obligations, by making the automated vehicle owner (or user-in-charge) strictly liable instead of the insurer. This would clarify the juristic nature of the compensatory duties of liable parties under ss 2 and 5. It would create a personal liability on the vehicle user commensurate with the insurance requirements under s 145 of the Road Traffic Act 1988. It would also enable the requisite transference of risk from assured to insurer under the motor policy, with payment thereunder constituting an indemnity and thus re-establishing the traditional compensatory model of motor insurance. Further, it resolves the difficulty of identifying the relevant insurer and related issues around policy exclusions. Amending the Act in this way would also provide greater consistency with the liability imposed on uninsured drivers under s 2(2).

Furthermore, since the measures contained within ss 5(3) and (4) seek to replicate safeguards already provided at common law, they are redundant. Consequently, taking this into account and s 5(3)'s potential antagonism of the long-settled principle of *res judicata*, it is submitted that ss 5(3) and (4) should be deleted entirely. Similarly, since Parliament has, by implication, legislated *per incuriam* in relation to s 5(2)(c), the Act can readily be amended so

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expenses in which he has been found liable in any such action as aforesaid, he shall be entitled to recover from any other person who, if sued, might also have been held liable in respect of the loss or damage on which the action was founded, such contribution, if any, as the court may deem just." The 1940 Act makes clear the need for a different approach between live and settled matters. Thus, where a case is still live, then the courts are able to examine the issues. By contrast, s 3(1) provides that: "Where in any action of damages in respect of loss or damage arising from any wrongful acts or negligent acts or omissions two or more persons are, in pursuance of the verdict of a jury or the judgment of a court found jointly and severally liable in damages or expenses, they shall be liable inter se to contribute to such damages or expenses in such proportions as the jury or the court, as the case may be, may deem just…"

that this provision only applies in England and Wales. Finally, ss 6(5) and 5(5) of the Act should be excised, and ss 10A of the Limitation Act 1980 and 18ZC of the Prescription and Limitation (Scotland) Act 1973 should be amended to reflect the *status quo ante*.

This article's approach may appear doctrinally conservative when one considers Merkin and Steele's arguments on insurance and private law obligations. It is nonetheless hoped that it will, in some small way, serve as a reminder that the traditional borders around delict and contract, as well as their respective rules, formed for good reason. Consequently, it can be said with some confidence that, while the new technology of automated vehicles requires new laws, they do not require new legal principles to support them.