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Paper in Response to Questions 17 (1) and (2) in the  
Law Commission's Preliminary Consultation Paper on  
the Law of Automated Vehicles (CP 240)

2 February 2019

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To: Jessica Uguccioni

Lead Lawyer, Automated Vehicles Review, The Law Commission

2 February 2019

Dear Jessica,

**Civil Liability under the AEVA 2018**  
**Consultation Questions 17(1) and (2):**  
**Causation, Contribution and Contributory Negligence**

Please thank all of your team at the Law Commission for producing such a superb preliminary consultation paper and for the fascinating discussion at the roundtable meeting in January.

I have written the attached paper as an initial exploration of the issues of causation, contribution and contributory negligence in the AEVA 2018. These go to just two questions in the paper (**Questions 17 (1) and (2)**). Nevertheless, it is quite a journey, involving several diversions from the usual routes of RTA civil claims.

My initial conclusions are that one route (contribution between tortfeasors) has been dug up and rebuilt by the AVEA, that another (contributory negligence) has been replaced by a winding path – in parts obscured by the foliage of its wording – and that the third part of the route (causation) has opened up, into a larger and much more intricate landscape than previously existed in this area (RTA law).

As the AEVA has changed the landscape of these topics so much, I thought it might be useful to provide a separate paper, discussing the area in more detail. My answers to **Questions 17(1) and (2)** appear at the end of the paper.

This is certainly only the beginning of a broader discussion as to civil liability in AV cases, so I have no hesitation in answering the **First Question on Chapter 6** – “Is there a need for a further review?” – in the positive.

I provide just one other answer in response to the Consultation, which relates to the adequacy of the label “user in charge” to convey its meaning (**Question 2**). I do so

tentatively, knowing that you and the team have given much careful thought to this point already.

On reflection, my view is that the phrase “**person in charge**” might be preferable, for two reasons:

(1) “person” seems, in general terms, the more familiar word than “user” (the latter has connotations of expertise in computing and technical matters which might prove restrictive in its appeal, so unhelpful from the perspective of communicating the effect of the law of AVs broadly). In short, it is the plainer word; and

(2) “person in charge” is the phrase used in Section 3(2) AEVA (“Contributory Negligence etc”), so has the weight of the primary statute behind it. As described in the paper, it is also consistent with the language of the 1945 Act.

As discussed at the round table meeting, I would avoid the word “driver”, which in my view would fail to make the crucial distinction which you rightly draw between the role of the *person* in charge of an Advanced Driving System and the role of a *driver* of a non-Advanced System.

Because my experience is mainly in liability cases for compensation in tort, I have concentrated my attention on those questions. I had considered addressing other areas in the Consultation, but on reflection I think it far better that the Law Commission is advised by experts on questions particularly within their own expertise. It is clear that you draw upon the highest level of experience in the many fields contributing to the law of automated vehicles, so I stand back from those other areas.

I apologise in advance for the digressions in the Paper, and especially if you think I have occasionally taken the wrong route entirely. Thank you for your invitation to contribute and, as ever, for your superior navigation of the whole area.

With best wishes,

Alex

## **INTRODUCTION**

### *The Scheme of the Automated and Electric Vehicles Act (AEVA) 2018*

1. The 2018 Act creates its own scheme in law, for the compensation of victims of accidents caused by AV's, by a claim directly against the vehicle's insurer or owner. The AEVA scheme also provides for the protection of such compensation by compulsory insurance and for the protection of the compensator by ensuring that it meets only its just share of compensation (by a contributory negligence reduction to - and in one circumstance complete extinction of<sup>i</sup> - the compensation, where appropriate, as well as by a separate remedy of contribution).
2. Similar protections already appear elsewhere in the law<sup>ii</sup>, but the AEVA applies its own particular scheme. That particularity is illustrated, for example, by:
  - (1) The AEVA's creation of its own remedy of contribution between tortfeasors. In contrast to its application (with modification) of the Civil Liability (Contributory Negligence) Act 1945, the AEVA does *not* apply the Civil Liability (Contribution) Act 1978; it explicitly excludes the right to seek contribution under the 1978 Act (AEVA Section 6(5): "Application of enactments"). So the insurer or owner's contribution remedy under the AEVA is not, for example, fettered by the requirement in the 1978 Act that both insurer/owner and the contribution Defendant be "liable in respect of the same damage"<sup>iii</sup>. Nor does the Section 5 AEVA remedy make any reference to joint or several liability. I infer that the avoidance of the 1978 Act was motivated by a desire for simplicity: both to avoid the complexities and pitfalls to contribution which the 1978 Act has occasionally caused, and to accentuate the security of the successful AEVA Claimant's compensation, by clearly dividing that cause of action from any contribution action pursued by the insurer/owner.
  - (2) The way in which contributory negligence is treated. The AEVA refers to the Civil Liability (Contribution) Act 1945 - explicitly adopting that Act as the measure of the appropriate reduction (AEVA Section 3(1)) but modifying it by substituting " a person other than the insurer or vehicle owner" in place of the AV car (the robot driver, in my phrase) as the "other person" in Section 1(1) of

the 1945 Act (AEVA Section 6(3) – I shall consider that wording in more detail later). For the purpose of assessing a Claimant’s contributory negligence, the Act appears to consider the standard of the AV’s driving by reference to a hypothetical human driver, ie. by a legal fiction. I will expand upon that point later.

3. A further feature of the Act is the prominence of causation. The AEVA provides a statutory cause of action in tort<sup>iv</sup> against an insurer or AV owner to a person injured in an accident caused by an insured AV when driving itself on a road or other public place in Great Britain (Section 2(1)). “Caused by” includes “partly caused by” (Section 8(3)(b)). The threshold question in most cases will be causation: the Claimant must prove that the accident was caused by the AV when the AV was driving itself. The centrality of causation to the AEVA presents some practical problems of evidence and adjudication, which I consider below.

*Summary of my views on Causation, Contribution and Contributory Negligence as dealt with by the AEVA 2018*

4. Like the authors of the report, I have grappled with the causation, contribution and contributory negligence aspects of the AEVA. The Act deals with some difficult concepts and its language does not immediately reveal its meaning.
5. CP 240 describes the way in which the AEVA treats contributory negligence as “counter-factual”<sup>v</sup>. I agree with that label. However, after much reflection, I am not convinced that this is in fact a criticism, given the current state of knowledge as to the working of AV systems (a technology still under development).
6. This is an infant area of law, where policy and legal theory need to plug the several factual gaps, particularly as to how we are to understand and describe the way in which artificial intelligence “thinks”. An American Judge, Curtis E A Karnow, has described the gap between the reasonable foreseeability required by tort law and what is known (or not known) about the foresight of robot systems. He observes that, in future:

“It may be that robotic common sense will make the acts of autonomous robots more predictable, and so make it easier to engage classic tort theories.”<sup>vi</sup>

7. But we are not there yet. The AEVA sometimes tackles this problem by avoiding it: chiefly by its use of a legal fiction in relation to the assessment of contributory negligence. However, it cannot completely avoid the problem, which looms in relation to causation of an accident in the first place (causation of an accident by an AV being the threshold question for liability under Section 2(1) of the Act).
8. My view is that, in this instance, the use of legal fiction is a pragmatic response. Occasionally the law encounters a situation in which the facts are so mysterious as to prevent the Court adjudicating a dispute. In such a situation, adopting a legal fiction is a pragmatic, if untraditional, response to those gaps in our knowledge. The mesothelioma cases provide one example of such a baffling situation, where apportionment between possible tortfeasors lacked any discoverable factual basis because “medical science cannot support the suggestion that any of these possibilities [inhalation of injurious fibre at a particular time] is to be regarded as more probable than any other”<sup>vii</sup>.
9. Such a factual vacuum might feature in an AEVA case. Whether or not an accident was “caused in part by an AV when driving itself” on a road or other public place in the UK (Sections 2(1) and 8(3)(b) AEVA) might be similarly mysterious, given the sophistication of an AV’s systems. The Act reduces the chance of an unresolvable causation problem in its interpretation section, 8(3)(b), by providing that “a reference to an accident caused by an automated vehicle includes a reference to an accident that is partly caused by an automatic vehicle”. That seems similar to treating “a material increase in the risk” of injury, by the tortious cause of two concurrent causes, as a “material contribution” to injury, which was the approach taken by the House of Lords to the dermatitis case of *McGhee v National Coal Board* in 1973<sup>viii</sup>. But that approach (as the discussion in Clerk & Lindsell shows) did not resolve the causation problem entirely, leaving the Courts to adopt a further legal fiction where there was no scientific evidence capable of distinguishing between competing causes.

10. I do not suggest that the AEVA 2018 should not be amended in future, as the facts become clearer, to remedy any unfair results of AEVA compensation claims (as happened in the mesothelioma litigation, discussed below). The need for amendment seems likely to arise, even though the circumstances are difficult to predict as a matter of fact. I have elsewhere described the AEVA 2018 as a “foundation stone”<sup>ix</sup> piece of legislation, upon which many layers remain to be built. The use of legal fiction in the AEVA, in relation to contributory negligence, seems to me to be a practical solution to a gap in present factual knowledge.
11. There is room for disagreement, but my view is that pretending that there is certainty as to how these complex factual issues would be adjudicated, before the facts are known, would be the more hazardous legal approach. I have also described the AEVA as going as far as it should and no further (see the article cited in endnote viii). That approach seems better to serve the core purpose of the Act (seeking to secure payment of compensation for injury caused by an insured AV) than multiplying complex arguments as to the reasonableness of non-human decisions.
12. Those are all personal views and there is certainly scope for valid disagreement, especially by the extremely well-informed team at the Law Commission.

## **DISCUSSION**

### *Causation*

13. Some aspects of the law of tort are counter-factual. The law sometimes meets difficult facts – even paradoxes and mysteries – that it must resolve in order to achieve justice.
14. A recent example is the law of causation as it has recently applied to proof of cause of asbestos-induced mesothelioma, where no evidence exists which is capable of attributing fault to a particular actor: see the line of such cases starting with *Fairchild v Glenhaven Funeral Services Ltd*<sup>x</sup>. In such cases, legal theory, policy and, in effect, legal fictions fill the evidential gaps, until a future date when further evidence and expert opinion clarify the facts. This is far from an easy decision for

any Court to make – demonstrated by the legislative overruling of a subsequent Supreme Court judgment on mesothelioma – and one which the Courts will understandably resist wherever possible.

15. The editors of Clerk & Lindsell label the area of the law of causation raised in the mesothelioma cases “Scientific uncertainty about causal mechanisms”<sup>xi</sup>. That seems a good label for the factual problems of causation likely to be experienced by Judges in AV cases. Although the likelihood of very complex questions of fact arising in road traffic accident cases might now seem remote, the likelihood of such questions arising in cases involving artificially intelligent vehicles (equipped with many high-technology components including deep neural learning systems) is clearer. AVEA claims will be highly technical and dependent upon expert opinion to a much greater extent than current RTA cases, fought predominantly on the familiar landscape of negligence and involving contests between human drivers.
16. The risk of complex causation issues arising has been recognised in the drafting of the AVEA. It has been mitigated by the insertion of a reduced standard of causation – partial causation – in Section 8(3)(b). But that is unlikely to remove the risk of factual difficulty entirely.
17. In fact, the leading practitioner’s work on tort acknowledges that evidential complexity is already a feature of causation issues in some RTA cases:

“On one view, there is no reason why the *Fairchild* principle should be confined to *scientific* uncertainty about causation. In *Fitzgerald v Lane*, the Court of Appeal applied *McGhee* to a case involving three discrete possible causes of injury, namely three distinct impacts in a road traffic accident involving a pedestrian and two vehicles.”<sup>xii</sup>
18. The writer’s experience of cases involving CCTV and other digital evidence taken from vehicles involved in road traffic collisions (particularly those involving buses and emergency service vehicles) supports that view.
19. Clerk & Lindsell make no mention of the possibility of automated vehicles nor of the complex questions of causation to which artificially intelligent driving systems will give rise (which is unsurprising, as the first AV RTA claims have yet to happen). But the prospect of causation questions of a *Fairchild* level of complexity

arising in road traffic cases is already real and seems very likely to manifest at some time after AV's start to drive on public roads.

20. Before I leave causation, a few further thoughts:

- (1) Does the maxim *res ipsa loquitur* have any application to AVs? My prediction (though I am not certain of this) is that the AEVA encompasses the *res ipsa* points and that the maxim would add nothing to the AEVA, once it is in force.
- (2) What does Section 8(3)(a) ("a reference to an accident includes a reference to two or more causally related accidents") add to the way in which Courts now deal with RTA claims? Section 8(3)(a) does not say anything about how causation is to be determined. What it seems to do is to place a "concertina" type of accident (car 1 hits rear of car 2 which is shunted into car 3, for example) under the umbrella of the AEVA, if an AV is at least part of the cause of that accident (Sections 2(1) and 8(3)(a)). How that would work in practice might depend upon the position of the AV within the concertina of cars. The section might aim at this: enabling the Judge to consider the entire "concertina" within the meaning of the AEVA, in order to adjudicate which parties succeed in the AEVA cause of action, before then considering other possible causes of action (negligence against the drivers of the non-AVs). But how this would work in practice is untested.

### *Contributory Negligence*

21. The AEVA deals with contributory negligence, expressly in Sections 3 ("Contributory Negligence etc") and 6(3) ("Application of Enactments"). Section 4 ("Accident resulting from unauthorised software alterations or failure to update software") seems to have an effect similar to contributory negligence.
22. Beyond general description and a single written answer to a question (see below), I have not been able to find any detailed explanation in the parliamentary literature on the AEV Bill shown online<sup>xiii</sup> of the way in which the contributory negligence provisions of the AEVA work. It might be that there is an explanation that I have missed (one of the links to amendments on the site was not working and I have

not read all of the submissions made to government and parliament, nor all of the parliamentary debates). So what follows is my interpretation alone, on the language of the Act itself.

23. As I read the sections of the AEVA dealing with contributory negligence, the method appears to be as follows:

- (1) The Claimant having proven the liability of the insurer or owner under Section 2 (see Section 3(1)(a)), it is open to the insurer or owner to allege (presumably having first so pleaded in their Defence) that the accident and/or the damage resulting from it, was to any extent caused by the injured party (Section 3(1)(b));
- (2) The Law Reform (Contributory Negligence) Act 1945 (and Section 5 of the Fatal Accidents Act 1976, which also invokes the 1945 Act) has effect for the purposes of Section 3(1) AEVA, subject to “the behaviour of the automated vehicle” being deemed to be “the fault of the insurer or owner” (Section 6(3) AEVA). Here, “the behaviour of” the AV seems to mean “the AV behaviour which caused the accident”, ie. the fault element of liability under Section 2(1)(a) AEVA. So Section 6(3) appears to make the insurer or owner vicariously liable for the fault of their AV for the purpose of the Court assessing a contributory negligence reduction (vicarious liability might also be the description of the insurer or owner’s primary liability, under Section 2(1)).
- (3) The method by which the reduction for contributory negligence is assessed is also set out in Section 3(1): “... the amount of the liability is subject to whatever reduction under the Law Reform (Contributory Negligence) Act 1945 would apply to a claim in respect of the accident brought by the injured party against a person other than the insured or vehicle owner”. The need for that last phrase has, understandably, been described by the Law Commission as introducing a further step to the method (§6.36). It might, however, be explicable by the need for the comparator to be a human driver. “Person” is defined by the Interpretation Act 1978 as including “a body of persons corporate or incorporate”. An insurer would usually be such an organisation, often a company. Likewise, the owner of a vehicle might also be a company (for example, although it is a point rarely taken in my experience - because bailment

usually makes it redundant in a car damage claim - the legal owner of a car is very often a financing company). Neither a company nor an incorporate body would be a human driver, so neither could be the comparator required for the purposes of assessing a contributory negligence reduction in a road traffic accident case. That might explain the need for the final phrase in Section 3(1): “a person other than the insured or vehicle owner”, as a sign that what was intended was that the AV should be assessed by the standard of care applicable to a human driver. It might be said, fairly, that merely adding another “person”, who might again not be human, does not provide clarity, and that the word “human” should have been used. But this would have created conflict with the language of the 1945 Act, which uses “person” throughout (in the written evidence on the Bill<sup>xiv</sup>, I note a letter from John Hayes MP dated 15 November 2017 dealing with contributory negligence which asserts that “It is the policy intent of the Bill that it mirrors existing processes as closely as possible without making complex legislative changes to the legal framework ...”). So the cumbersome form of words in Section 3(1) might admit of an explanation (the need to make clear that the comparator is a human driver and not a body corporate or incorporate, as the insurer would be and the owner might be).

- (4) The AEVA explicitly describes as contributory negligence one situation in which the insurer or owner is deemed not liable to any extent under Section 2, by reason of the injured person in charge’s negligence, which is “where the accident that it [the vehicle] caused was wholly due to the person [in charge]’s negligence in allowing the vehicle to begin driving itself when it was not appropriate to do so” (Section 3(2): “Contributory Negligence etc”). That seems to be the only *contributory negligence* situation explicitly described as such by the AEVA in which contributory negligence by the injured person – specifically the person in charge – operates in effect as a 100% contributory negligence, so as to absolve the insurer or owner (and, at root, the vehicle) of all AEVA liability, from the starting point of that liability (Section 2 AEVA).

- (5) However, there is a further basis upon which an *insurer* may avoid or limit its liability under Section 2(1) of the AEVA, which is by excluding or limiting insurance cover for damage suffered by an insured person by direct result of unauthorised software alterations or failure to install safety-critical software (Section 4 AEVA: “Accident resulting from unauthorised software alterations or failure to update software”), then proving that the accident happened in that way. Because of the direct liability of the insurer under Section 2(1) of the Act, this might be viewed not merely as an exclusion or limitation of insurance coverage but (as Section 4(1) describes) an exclusion or limitation of “the insurer’s liability under section 2(1) for damage suffered by an insured person ...”, ie. of the liability itself. Section 4 is not framed as contributory or whole negligence by the injured person, and “Contributory Negligence etc” is dealt with under that title in Section 3. But the effect of Section 4 seems very similar to a case of contributory (or entire) negligence by the injured party.
24. The legal fictions at the heart of the contributory negligence scheme of the AEVA seem therefore to be:
- (1) that the Law Reform (Contributory Negligence) Act 1945 (and Section 5 of the Fatal Accidents Act 1976) “have effect as if the behaviour of the automated vehicle were the fault of the person made liable for the damage by Section 2 of this Act”, ie. the insurer or owner (Section 6(3)) and
  - (2) that the AV’s behaviour is to be assessed, in the exercise of assessing reduction of the Claimant’s compensation for contributory negligence, by the standard of a hypothetical, reasonably careful human driver.
25. Those fictions have the advantage of providing certainty as to the standard of care. The driver’s standard of care is familiar to the Courts and supported by a weight of jurisprudence.
26. Significantly, the human driver’s standard of care is established in law on the basis of its link in policy to compulsory third party motor insurance, which insurance the AEVA extends to AV’s. See Lord Denning’s description of the driver’s standard of care in *Nettleship v Weston*<sup>xv</sup>:

“He must drive in as good a manner as a driver of skill, experience and care, who is sound in wind and limb<sup>xvi</sup>, who makes no errors of judgment, has good eyesight and hearing, and is free from any infirmity ... The high standard thus imposed by judges is, I believe, largely the result of the policy of the Road Traffic Acts. Parliament requires every driver to be insured against third party risks. The reason is so that a person injured by a motor car should not be left to bear the loss on his own, but should be compensated out of the insurance fund. The fund is better able to bear it than he can. But the injured person is only able to recover if the driver is liable in law. So the judges see to it that he is liable, unless he can prove care and skill of a high standard” .

27. That standard of care is sufficiently certain, both by its clarity and by its establishment over time in the common law. That certainty is important in the AV context, as a guarantee of a uniform approach across the civil courts to the otherwise very difficult question of how computers think in comparison to humans (a comparative question which has vexed authors and scientists<sup>xvii</sup> and which would, at least on present scientific knowledge, probably also ensnare the Courts if engaged in the essentially comparative<sup>xviii</sup> debate on contributory negligence).
28. The Law Commission preliminary report (at §§6.34 to 6.39, pp.107-108) criticises the AEVA’s approach to contributory negligence in Sections 3(1) and 6(3) on the following grounds:
- (1) “The provisions require the reader to imagine two counter-factual situations: first, that the claim is brought against someone other than the insurer, and secondly that the insurer is at fault because of the behaviour of the automated vehicle. The combined effect of these provisions can be quite difficult to follow” (§6.36).
  - (2) “These provisions might suggest that the courts should treat the issue as if a human driver had been involved. We think that this could be an undesirable distraction. Take an example in which a person cycling without lights at night is hit by an automated vehicle. A human driver would have had difficulty in seeing the unlit cyclist. If the appropriate comparator claim is with a

hypothetical human driver, the cyclist would bear considerable responsibility for the accident. However, the failure to have lights might have very little effect on an automated vehicle equipped with LIDAR. The concern is that section 3(1) could be used to apply human standards of fault to quite different claims involving automated vehicles” (§6.37).

- (3) The report queries whether a 100% reduction for contributory negligence is possible under the AEVA and asks “how the courts will deal with an insurer’s submission that it is just and equitable for a claimant under section 2(1) of the AEV Act to be awarded nothing on the grounds of contributory negligence” (§6.38).

29. If I am correct in my interpretation of the AEVA, the answers might be as follows:

- (1) The two situations are counter-factual, but that is not an objection. The wording is certainly difficult to follow, but its purpose might be to make clear that the AV’s behaviour is to be assessed, in the reduction of any Claimant’s damages for contributory negligence, by the standard of a human driver. The fact that the liable Defendant (insurer or owner) will often be a corporate or incorporate body, rather than a human person, might explain the introduction of an additional “person” as comparator. The use of that term, rather than “human” (for example) harmonises the language of the AEVA with the language of the 1945 Act, perhaps with the aim of avoiding litigation over a satellite issue (see the letter from John Hayes MP, above).
- (2) Using a human driver as comparator gives greater certainty to Judges as to the standard of care to be applied to the AV in the contributory negligence assessment, than would applying the realistic but conceptually difficult concept of the blameworthiness of a machine. A clear and strong standard of care underpins our system of compulsory, third party motor insurance (see *Nettleship v Weston*<sup>xix</sup>), which system the AEVA continues. It is a legal fiction, but that is not a conclusive objection if the fiction has a strong policy basis (vicarious liability, for example, is another legal fiction). The fiction is likely to retain consistency in future adjudication of contributory negligence issues, not only across AV claims but in RTA claims generally. In the example given by

the Law Commission, and the view that a realistic robot comparator would be preferable, it is notable that a cyclist riding in the dark without lights would on that view suffer a lesser reduction for contributory negligence under the AVEA than he would in a negligence claim against a human driver at common law. That would introduce an inconsistency between AV and conventional vehicle cases, which might not be beneficial. In the example, I also do not take as self-evident the premise that an AV would *not* be assisted by lights on the bicycle. There is a danger of AV law encouraging omissions which would now, on sound and lawful grounds, be taken into account *against* a party by a civil court, as would now be the case on this example<sup>xx</sup>. It is also questionable whether Courts endorsing cyclists riding at night without lights would encourage safe cycling, at a time when cycling is known to be expanding as a means of transport<sup>xxi</sup>.

- (3) The AEVA provides expressly for one total contributory negligence situation (in Section 3(2)) and by implication for another, in relation to an insurer's ability to avoid direct liability under Section 2 for software faults for which it has excluded cover (Section 4(1)). So the extinction of damages by reference to contributory negligence is not objectionable in principle under the AEVA.

### *Contribution*

30. The Act is in this respect clear: it adopts its own scheme and, as already described, does not apply the 1978 Act.
31. That is distinct from AEVA's adoption of the scheme of the 1945 Act (albeit clarified to cement a "person" as the comparator) in relation to contributory negligence.
32. I do not know but wonder whether this abandonment of the 1978 Act might be due to past difficulties with that Act in a road transport context, and a desire to simplify the remedy under the AVEA. The "same damage" requirement of the 1978 Act has caused some difficulty in road transport law, for example in relation to whether an insurer seeking contribution to credit hire charges from a third party's dilatory repairer was suing for the "same damage" (its liability to the

Claimant in hire charges) as that suffered by the Claimant (damage to the car, if that is the correct comparison). The Court of Appeal had indicated, possibly *obiter*, that the insurer could seek contribution to its liability to pay the hire charges from the repairer<sup>xxii</sup> but a Judge of the County Court subsequently held otherwise<sup>xxiii</sup>, on his contrary construction that this was not the “same damage” as that suffered by the Claimant. But that is pure speculation on my part; it might be that there are different reasons for the abandonment of the 1978 Act in the AEVA scheme.

## CONCLUSION

*Answers to Questions 17(1) and (2)*

33. *Are sections 3(1) and 6(3) on contributory negligence sufficiently clear?* Though they do require deep exploration, my view is that those sections are sufficiently clear.
34. *Do you agree that the issue of causation can be left to the courts, or is there a need for guidance on the meaning of causation in section 2?* I agree with the view at §6.51 of CP 240. Causation would be better determined by the Courts, because it is (a) a legal issue, and a complex one when it involves (as seems likely in the AV context) scientific uncertainty as to causative mechanisms (b) fact-sensitive, so better dealt with on a case-by-case basis, on ascertainable past facts, than on a generic, predictive basis. That is not to suggest that comment on the causative issues under the AEVA should be restricted; legal academics and practitioners should take every opportunity to discuss and teach this issue.

ALEX GLASSBROOK

Temple Garden Chambers

2 February 2019

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<sup>i</sup> Section 3(2) AEVA (“Contributory Negligence etc”): the insurer or owner of an AV is not liable under section 2 to the person in charge of the vehicle where the accident that it 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.

<sup>ii</sup> Compulsory insurance in the Road Traffic Act 1988, direct right of action against insurer under the European Communities (Rights against Insurers) Regulations 2002, right of contribution under the Civil Liability (Contribution) Act 1978, reduction for contributory negligence under the Law Reform (Contributory Negligence) Act 1945.

<sup>iii</sup> Civil Liability (Contribution) Act 1978, Section 1(1) (“Entitlement to Contribution”)

<sup>iv</sup> Section 6(4) AEVA.

<sup>v</sup> Law Commission Preliminary Consultation Paper on AV law (CP 240) §6.36, p.107.

<sup>vi</sup> Curtis E A Karnow, “The application of traditional tort theory to embodied machine intelligence”, in *Robot Law* (ed. Calo, Froomkin and Kerr, 2016) p.51, at p.76.

<sup>vii</sup> *Fairchild v Glenhaven Funeral Services Limited* [2002] UKHL 22; [2003] 1 AC 32, per Lord Bingham at §7.

<sup>viii</sup> See *McGhee v National Coal Board* [1973] 1 WLR 1 (HL), discussed in Chapter 2 of Clerk & Lindsell (below) at §2-44 onwards.

<sup>ix</sup> “Moving up a gear” by Rachel Rothwell, *The Law Society Gazette*, 28 January 2019, pp.21 to 23. <http://edition.pagesuite->

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[professional.co.uk/html5/reader/production/default.aspx?pubname=&edid=49afbb01-6cba-4529-8fa9-8abfbb166d7c](http://professional.co.uk/html5/reader/production/default.aspx?pubname=&edid=49afbb01-6cba-4529-8fa9-8abfbb166d7c)

<sup>x</sup> *Fairchild v Glenhaven Funeral Services Limited* (above), discussed in Part (2)(c) of Chapter 2 of Clerk & Lindsell on Torts (endnote below) at §2-52 onwards.

<sup>xi</sup> Clerk & Lindsell on Torts (22<sup>nd</sup> edition), Chapter 2 (“Causation in Tort: General Principles”), Section 2 (“Factual Causation”), Part (c) (“Scientific uncertainty about causal mechanisms”).

<sup>xii</sup> *Ibid*, §2-74(10)

<sup>xiii</sup> At <https://services.parliament.uk/bills/2017-19/automatedandelectricvehicles/documents.html>

<sup>xiv</sup> *Ibid*.

<sup>xv</sup> *Nettleship v Weston* [1971] 2 QB 691 at 699-700 per Lord Denning MR.

<sup>xvi</sup> An equestrian metaphor: a horse sound “in wind and limb” is healthy in its breathing and muscles.

<sup>xvii</sup> Eg. “Do Androids Dream of Electric Sheep?” by the novelist Philip K Dick (1968) and “Life 3.0” by the physicist Max Tegmark (2017).

<sup>xviii</sup> See van Dongen, E.G.D. and Verdam, H.P., 2016. The Development of the Concept of Contributory Negligence in English Common Law, *Utrecht Law Review*, 12(1), pp.61-74. DOI: <http://doi.org/10.18352/ulr.326>

<sup>xix</sup> See endnote xv, above.

<sup>xx</sup> Rule 60 of the Highway Code, which requires a cyclist to have white front and red rear lights lit at night. A failure to observe a provision of the Highway Code may be relied upon by any party to any proceedings as tending to establish or negative any liability which is in question in those proceedings, under Section 38(7) of the Road Traffic Act 1988.

<sup>xxi</sup> See the Department of Transport’s Future of Mobility report, 31 January 2019:

<https://www.gov.uk/government/publications/future-of-mobility>

<sup>xxii</sup> *Clark v Ardington* [2003] QB 36 at §121

<sup>xxiii</sup> *Mason v TNT and Groupama* 13 April 2009, Oxford County Court, LTL document no. AC0121869, 6 August 2009