TORT LAW AND THE GIG ECONOMY: A SOCIO-LEGAL STUDY OF THE PERSPECTIVES OF SERVICE PROVIDERS

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ABSTRACT

Over the last decade, information technologies have allowed individuals to connect with each other in a way that may not have been possible before. A consequence of this was the rise of a new phenomenon, that has ostensibly disrupted pre-existing notions of employment, often characterised under the umbrella concept of the so-called gig economy. Inevitably, like any enterprise, the gig economy places risk into society. Tort has capacity to distribute liability risks in the context of service provision through its core doctrines, such as vicarious liability, non-delegable duties and direct duties owed to third parties, and employer's duties owed to employees. However, many of these doctrines rely on the notion of employment to distribute risk. The classification of most service providers in the gig economy as independent contractors could disrupt this long-standing concept, meaning that the liability risks may be borne entirely by the service providers or, in some cases, the victim.

This thesis seeks to empirically examine the challenges that the gig economy poses to tort. It will examine the assumptions made by legal doctrine to determine employment and will empirically analyse the social reality of the gig economy. It is argued in this thesis that if the assumptions made by legal doctrine do not match the perspectives of the actors it seeks to represent, tort law is diminished in its capacity to distribute risk. This thesis will identify any discrepancies and challenges and will present suggested legal responses.

I Jessica Booth Gracie, declare that this thesis is a presentation of original work, and I am the sole author. This work has not previously been presented for an award at this, or any other, University. All sources are acknowledged as references.

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PART I

Introduction

The overarching purpose of this thesis is to understand the legal challenges posed to tort law by the rise of the gig economy. The gig economy is a phenomenon that has revolutionised labour relations over the last decade, and the classification of many of the service providers who work within it as independent contractors poses appreciable challenges for the law. Landmark judgments in employment law, such as *Uber BV v Aslam*,[1] in recent years has demonstrated the ability of legal doctrine to regulate these novel working arrangements, but quite how tort might respond to these challenges is another question.

This thesis seeks to answer two overarching research questions:

1. What are the key characteristics of the gig economy?
2. What legal challenges does the gig economy pose for tort law, and how should tort law respond?

In order to answer these questions, tort law will be analysed through the prism of risk. It is argued in this thesis that tort is a distributor of liability risks and does so through its key doctrines, such as vicarious liability, non-delegable duties and direct duties owed to third parties, and employer's duties owed to employees. This thesis will demonstrate that employment is also a key issue for tort, and this notion lies at the heart of many of its doctrines, therefore it is important that tort can provide a suitable response where inherent risks of service provision materialise.

It is argued that the suitability of this response relies on whether the assumptions which underpin legal doctrine and the tests it draws upon to determine employment match the

[1] [2021] UKSC 5, [2021] 4 All ER 209.

social reality. To determine the extent to which this is the case, this thesis has adopted various empirical methods to gain an understanding of the social reality of work in the gig economy. The thesis has drawn upon the perspectives of service providers in the gig economy who bear the liability risks of their service provision. As experts of their own service provision and self-employment, service providers are in the best position to present their social reality.

The thesis itself is split into three key parts. Part I will present the theoretical foundations which underpin the thesis and is comprised of four chapters. Chapter 1 is a literature review of the gig economy, Chapter 2 analyses the concept of risk in tort, Chapter 3 examines the doctrines in tort used to distribute risk, and Chapter 4 analyses the key tests used by legal doctrine to determine employment as well as the assumptions which underpin those tests. Part II of the thesis is made up of four chapters; Chapter 5 discusses the empirical methods adopted, and Chapters 6-9 will present the data garnered from these methods. Part III of the thesis is made up of one final concluding Chapter, which will analyse the legal challenges identified in Part II and will propose suggested legal responses to these challenges.

Chapter 1 - Literature Review on the Gig Economy

1.1. Introduction

In recent years, information technologies have allowed individuals to connect with each other in a way that may not have been possible before.[1] Individuals are able to sell, share, exchange, and provide access to a myriad of goods and services.[2] A consequence of this is the concomitant rise of a new phenomenon that has ostensibly disrupted pre-existing notions of employment, often characterised under the umbrella concept of the so-called 'gig economy'.[3] The gig economy is sometimes thought of in relation to popular platforms, such as Uber and Deliveroo which have revolutionised the private hire and food couriering markets. However, this chapter will demonstrate that the gig economy is a much wider phenomenon than these platforms suggest, both in terms of the numbers of those who participate in it and the types of services available.

This chapter is split into four main sections. Section 1.2. will examine some of the shifts in the labour market which have arguably facilitated the rise of the gig economy. Section 1.3. will consider the different conceptions of the gig economy, drawing upon the wide-reaching literature to demonstrate that it is difficult to find an agreed definition of what the gig economy encompasses. Section 1.4. will discuss the key characteristics of the gig economy, identified by this author and others, which forms the working definition used in this thesis. It will also discuss the extent to which these characteristics are novel principles, or whether they represent a resurgence of labour market principles which can be traced through history. Section 1.5. will consider the legal literature, of which there is a large body of for employment status. This literature helps us to understand some of the challenges that the gig economy may pose to legal doctrine.

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[1] Janne Dokko, Megan Mumford and Diane Whitmore Schanzenbach, 'Workers and the Online Gig Economy. The Hamilton Project' (2015) 4 <https://www.hamiltonproject.org/assets/files/workers_and_the_online_gig_economy.pdf>.

[2] Jenny Kennedy and others, 'Mapping the Melbourne Sharing Economy' (2017) 11 <https://apo.org.au/sites/default/files/resource-files/2017-02/apo-nid74060.pdf>.

[3] Florian A Schmidt, 'Digital Labour Markets in the Platform Economy' (2017) 18–19 <http://library.fes.de/pdf-files/wiso/13164.pdf>.

1.2. The Transition to Non-Standard Labour

The rise of the gig economy marks a shift in the evolution of labour relations. However, it did not come about overnight. It will be argued that the rise of the gig economy came about as part of a much broader trend in labour relations which represented the changing nature of service provision. Many of us have become accustomed to thinking about employment in a traditional sense. To some, 'traditional employment' may look like a permanent, full-time employment contract where, in many countries, employees will work between thirty-five to forty hours per week.[4] Legally, traditional employment has also been characterised as an employee who is dependent on an employer to provide indefinite, permanent work, and is protected from unfair termination.[5] What comes with traditional employment, at least in the UK, are benefits and rights, such as the right to be paid a minimum wage.[6]

The shift towards traditional or standard employment models happened predominantly after the Second World War. This epoch is thought to have pushed trade unionism to the forefront of labour relations. At this time, '[t]rade unionism was said not only to protect workers' terms and conditions of employment but act as a 'sword of justice' in providing citizens with the opportunity for industrial voice'.[7] The right to collective organisation is now an enshrined right for those who are employed.[8]

Traditional employment is no longer a guarantee for many living in the UK. Even those who are employed sometimes find themselves working on fixed period contracts meaning that there is no guarantee of future work beyond the termination date. These types of contracts are not novel, however, the 'increasing incidence and the high political interest' surrounding them is.[9] This kind of transition marks one of the shifts in the evolution of labour relations which, arguably, made possible the rise of the gig economy; a phenomenon which has

[4] Harald Bielenski, 'New Patterns of Employment in Europe' in Jane E Ferrie (ed), *Labour Market Changes and Job Insecurity: A Challenge for Social Welfare and Health Promotion* (World Health Organization, Regional Office for Europe 1999) 12.
[5] Employees are protected from Unfair Dismissal, see Employment Rights Act 1996, s 94-98; the right to annual leave is enshrined in The Working Time Regulations, s 13.
[6] See National Minimum Wage Act 1998.
[7] Niall Cullinane, 'The Field of Employment Relations' in Adrian Wilkinson (ed), *The Routledge Companion to Employment Relations* (Routledge 2018) 24.
[8] Trade Union and Labour Relations (Consolidation) Act 1992.
[9] Bielenski (n 4) 13.

disrupted conceptions of employment as we know it. To better understand this transition, some of the shifts in labour relations over the last century will be discussed in this section, including the rise of the 'dependent contractor', as well as the impacts of digitisation and casualisation. It is argued that these instances represent some of the shifts in the labour market that made the rise of the gig economy inevitable.

1.2.1. The Dependent Contractor

As discussed above, most of us are familiar with the, often thought to be, idealistic traditional employment which provides security to employees and was prevalent in the twentieth century. Alongside this continuance, there was also an emerging trend of self-employment.

The introduction of the Beveridge Report in 1942, and the establishment of the Welfare State marked a shift in the labour market.[10] These social structures laid the foundations for a contractual model of employment, which was grounded in 'collective bargaining combined with the rise of modern social legislation' and recognised the 'rights and obligations and the sharing of economic risk'.[11] This came at a time where there was increasing support for unionisation, as well as the Labour Party.[12] The move to contractual models which shielded the rights of workers inevitably lead to the implementation of employment protection legislation in the 1960s and 1970s, which ensured income security and protection from termination.[13]

The trend of employee protections did not continue post-1970s, though, and the UK saw a significant rise in self-employment. By 1979, just over thirty years later, the rate of self-employment begun to increase at an unprecedented rate, and this rise lasted for over ten years.[14] Employers, during this period, may have sought to benefit from classifying sections

[10] Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (OUP 2012) pt 1 and 2.
[11] Deakin and Wilkinson (n 10) 342.
[12] William Cornish and others, *Law and Society in England and Wales 1750-1950* (2nd edn, Hart 2019) 331.
[13] For example, Redundancy Payments Act 1965; Industrial Relations Act 1971; Employment Protection Act 1975.
[14] Peter Robinson, 'Exploring the Relationship between Flexible Employment and Labour Market Regulation' in Alan Felstead and Nick Jewson (eds), *Global Trends in Flexible Labour: Critical Perspectives on Work and Organisations* (Macmillan Business 1999) 13–14.

of its workforce as independent contractors, since it permitted employers to make savings on national insurance. The increase in self-employment was stilted somewhat by the year 1990.[15]

Questions about whether self-employed individuals were actually independent contractors came about in the 1960s, and the term the 'dependent contractor' was developed.[16] The dependent contractor refers to an individual who does not neatly fit within the two main employment categories of employee or independent contractor. This may be because in some aspects of their work they look like an independent contractor, for example if they retain autonomy over when or where they work. However, this cannot be said for all features of their work; they may have a principal which they rely on for their work, and the principal may exercise control over their service provision. These individuals would be classified as being self-employed independent contractors, so would not be protected by the shield of employment law, despite being economically reliant on a principal. By the 1960s, the courts had moved well beyond the classical distinction between employees and independent contractors relying on the notion of subordination and were concerned with finding an adequate way to describe the dichotomy.[17] However, the presence of the 'dependent contractor' was an obstruction in this quest for clarity.

The dependent contractor was first thought to be conceived by Arthurs in 1965, when examining the changes to the labour landscape in Canada and other jurisdictions.[18] Arthurs justified the development of this term due to the blurring of the boundaries between the two employment categories discussed above. He was one of the first advocates for the development of a new category that sits in-between the employee and independent contractor, to better reflect the changes to labour relations at that time. This article has

[15] Mark Taylor, 'Self-Employment in Britain: When, Who and Why?' (2004) 11 Swedish Economic Policy Review 139, 141.
[16] Harry W Arthurs, 'The Dependent Contractor: A Study of the Legal Protections of Countervailing Power' (1965) 16 University of Toronto Law Journal 89, 89.
[17] Paul Davies and Mark Freedland, *Labour Law Texts Cases and Materials* (2nd edn, Weidenfeld and Nicolson 1984) 83.
[18] Arthurs (n 16).

been hailed as being instrumental in the adoption of the third category of 'dependent contractor' in Canada in the 1970s.[19]

By the year 1990, McKendrick also noted the dramatic shift from post-war Britain of full-time employment to precarious labour relations, with increased incidence of self-employment, part-time, casual, and flexible work.[20] McKendrick considered the rise of self-employment in this time, and noted that part of this trend may have been fuelled by attempts to avoid the national insurance obligations associated with employment.[21] This time period marked a period of 'deregulation' from government level, where we saw a reduction in the enforcement of health and safety laws, the abolishment of the Wages Council,[22] and the ignorance to false self-employment.[23] As Davies notes, 'since the government's own policy was to reduce labour costs, it was hardly going to stop employers who had found a way of doing this for themselves.'[24]

By the latter end of the 1990s, self-employment was on the rise again.[25] This time, the number of self-employed individuals without employees began to increase against the number of self-employed individuals with employees.[26] This trend has intensified in recent years up until 2020, with self-employment increasing at an unprecedented rate.[27] For example, in 2016, self-employment reached its highest share of employment at 15%.[28] During the same time period, the incidence of part-time self-employment was on the rise.[29] It is unfortunate that the statistics do not indicate the extent of gig economy representation.

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[19] Miriam A Cherry and Antonio Aloisi, 'Dependent Contractors in the Gig Economy: A Comparative Approach' (2017) 66 American University Law Review 635, 686.
[20] Ewan McKendrick, 'Vicarious Liability and Independent Contractors - A Re-Examination' (1990) 53 The Modern Law Review 770, 776.
[21] McKendrick (n 20) 776.
[22] Trade Union Reform and Employment Rights Act 1993, s 35.
[23] ACL Davies, *Perspectives on Labour Law* (CUP 2004) 13–14.
[24] Davies (n 23) 14.
[25] Blessing Chiripanhura and Nikolas Wolf, 'Long-Term Trends in UK Employment: 1861 to 2018' (Office for National Statistics, 2019).
[26] Richard Arum and Walter Müller, The Reemergence of Self-Employment Dynamics and Social Inequality (Princeton University Press 2009) 42.
[27] Chiripanhura and Wolf (n 25).
[28] Chiripanhura and Wolf (n 25).
[29] Wain Yuen and others, 'Trends in Self-Employment in the UK' (Office for National Statistics, 2018).

It is possible that self-employed individuals without employees fit with Arthur's category of dependent contractor, or McKendrick's sham self-employment. Interestingly, the rise of the gig economy has brought about the same suggestions, with scholars across multiple jurisdictions promoting the adoption of a novel employment category of 'dependent contractor' to reflect the changes within the labour market.[30] Further discussion on this issue will be found in section 1.5. on legal perspectives of the gig economy.

1.2.2. Digitisation and Casualisation

Over the last two decades, digitisation and casualisation have been identified as global trends in the labour market. The gig economy is thought to be a 'more novel and consequential application' of these trends but is by no means the first example.[31]

The rise of information technologies has radically transformed workplaces. In the 1980s, the development of computerisation was evident anthropologically, and work began to transcend into home and leisure time.[32] A feature of this digitised phenomenon was telework: a new form of work which was carried out from the home with no requirement to be present in 'central offices or production facilities, [or for] personal contact with co-workers.[33] It removed the need for 'geographical limits' on work, which ostensibly increased the flexibility and autonomy enjoyed by teleworkers, but it invariably created a distance between the worker and employer.[34] The prevalence of digital technologies increased

[30] Seth C Oranburg, 'Unbundling Employment: Flexible Benefits for the Gig Economy' (2018) 11 Drexel Law Review; For example, Naomi B Sunshine, 'Employees as Price-Takers' (2018) 22 Lewis & Clark Law Review 105; Elizabeth J. Kennedy, 'Employed by an Algorithm: Labor Rights in the On-Demand Economy' (2017) 40 Seattle University Law Review 987; Caleb J Holloway, 'Keep Freedom in Freelance: It's Time for Gig Firms and Gig Workers to Update Their Relationship Status' (2016) 16 Wake Forest Journal of Business and Intellectual Property Law 298.

[31] Jim Stanford, 'The past, present and future of gig work' in Jeroen Meijerink, Giedo Jansen, and Victoria Daskalova (eds) *Platform economy puzzles: a multidisciplinary perspective on gig work* (Edward Elgar, 2021) 52.

[32] Christina Garsten and Helena Wulff, 'Introduction: From People of the Book to People of the Screen' in Christina Garsten and Helena Wulff (eds), *New Technologies at Work: People, Screens and Social Virtuality* (1st edn, Routledge 2003) 2.

[33] Vittorio Di Martino and Linda Wirth, 'Telework: A New Way of Working and Living' (1990) 129 International Labour Review 529.

[34] Di Martino and Wirth (n 33).

exponentially in the years following. By the year 2000, almost all businesses had begun using the internet,[35] and there was a growing trend towards home broadband.[36]

Digitisation is thought to have shifted the workplace environment in many ways. It has redefined the role of management by facilitating the introduction of automated processes and decision making which reduced the need for human involvement to a greater or lesser degree. This is thought to be on a continuum; in some industries, we see the gradual automation of aspects of work that would previously have been carried out by a person, and in other industries we see an increased use of algorithmic management seen in factories and offices, as well as in the gig economy.[37] It has also been said that workers' attitudes have changed; they are now less likely to remain with one employer, suggesting that the significance of principles such as loyalty have been eroded.[38] Instead, there has been a drive towards a focus on 'employability', with workers being more concerned with how they are perceived to outside organisations.[39] Outside of employment settings, the rapid development of technology has revolutionised life as we know it, with the development of smartphones and apps. This technology allows individuals to track all aspects of life, including exercise, sleep, eating habits, and location.[40]

Simultaneously, a move to casualised work was observed in global labour markets. As discussed above, McKendrick in his 1990 article described observable shifts in the labour market, including an increased incidence in self-employment, part-time, casual, and flexible labour. Standing suggests that at this time there was a move away from workers being proletariats, where it was easier to collectively organise, towards precarious employment relationships.[41] These relationships arguably perpetuate insecure labour, as individuals are not guaranteed the same level of labour protections as in traditional employment, whether that be income security, employment rights, or both.

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[35] Ursula Huws, 'Logged Labour: A New Paradigm of Work Organisation?' (2016) 10 Work Organisation Labour & Globalisation 7, 11.
[36] 'Large Rise in Number of Home Broadband Users' Marketing Week (2005) 15.
[37] Phoebe V. Moore, *The Quantified Self in Precarity: Work, Technology and What Counts* (Routledge 2018) 3.
[38] Miriam A Cherry, 'Beyond Misclassification: The Digital Transformation of Work' (2016) 37 Comparative Labor Law & Policy Journal 577, 596.
[39] Cherry (n 38) 596.
[40] Moore (n 37) 2.
[41] Guy Standing, *The Precariat: The New Dangerous Class* (Bloomsbury 2011) 10.

Casualisation continued and its incidence increased. One of the resulting effects of this increase was the rise of zero-hour contracts, where workers are not guaranteed a fixed number of working hours.[42] This ostensibly increased the flexibility enjoyed by workers, as they are not obliged to accept work offered. However, zero-hour contracts have been characterised by some, particularly in the popular media, as being a form of exploitation, and some employers have become notorious for adopting such practices.[43] There are also well-documented negative consequences that have resulted from this type of work. As workers cannot be guaranteed a steady income, their schedules can fluctuate; this can become unsustainable for workers, particularly those with families.[44] It is unsurprising, therefore, that the legal challenges of zero-hour contracts were 'litigated for over a decade'.[45]

The rise of precarious work mandated legislative response from the European Union (EU), including the passing of the Working Time Directive which, with minimal implementation from the UK,[46] led to the creation of a third employment category: the worker;[47] this is discussed in more detail in section 1.5. In addition to the creation of the worker status, the EU responded to other changing labour standards with 'light regulation',[48] passing Directives for part-time work,[49] fixed term work,[50] and agency work.[51] Legislation of this kind was

[42] D Pyper and D Harrari, 'Zero-Hours Contracts' [2013] House of Commons Library.
[43] Ernestine Gheyoh Ndzi and Janet Barlow, 'Zero-Hour Contracts Take a Huge Mental and Physical Toll - Poor Eating Habits, Lack of Sleep and Relationship Problems' The Conversation (9 July 2019).
[44] Matthew Taylor and others, 'Good Work: The Taylor Review of Modern Working Practices' (Department for Business, Energy & Industrial Strategy 2017) 34.
[45] Jeremias Prassl, Sylvaine Laulom and Yolanda Maneiro Vàzquez, 'The Role of National Courts in Protecting Platform Workers: A Comparative Analysis' in Josè Maria Miranda Boto and Elisabeth Brameshuber (eds), *Collective Bargaining and the Gig Economy: A Traditional Tool for New Business Models* (Hart 2022) 79.
[46] Paul Davies and Mark Freedland, *Towards a Flexible Labour Market: Labour Legislation and Regulation Since the 1990s* (OUP 2007) 70.
[47] Employment Rights Act 1996, s 230; Council Directive (EC) 93/104 concerning certain aspects of the organisation of working time [1993] OJ L307/18 (Working Time Directive).
[48] Davies and Freedland (n 46) 67.
[49] Council Directive (EC) 97/81 concerning the framework agreement concluded by UNICE, CEEP and the ETUC [1997] OJL14/20 (Part Time Work Directive).
[50] Council Directive (EC) 1990/70 concerning the framework agreement concluded by ETUC, UNICE and CEEP [1999] OJL175 (Fixed Term Work Directive).
[51] Council Directive (EC) 2008/104 on temporary agency work [2008] OJL327 (Temporary Agency Work Directive.

implemented to level the playing field, ensuring that the flexibility associated with casualisation does not automatically engender insecurity.[52]

The brief discussion in this section has sought to demonstrate a few of the shifts in the labour market in recent years. It is argued that these shifts paved the way for the rise of the gig economy, which now poses significant challenges to legal doctrine. This section has examined the increasing incidence of the dependent contractor, as well as the impact of digitisation and casualisation of work. It is thought that many of the characteristics of the gig economy retain elements of these trends, which will be demonstrated in the sections which follow.

1.3. Conceptions of the Gig Economy

As discussed above, the gig economy is made up of electronic platforms that facilitate the provision of core services between service providers and customers. A number of enterprises, known as ‘platforms’, across a range of sectors, instruct independent contractors to perform services for the public.[53] This type of work has rapidly expanded. In 2017 there was an estimated 1.1. million people working in this way in the UK alone,[54] and it was estimated that by 2019 this figure had risen to 4.4 million.[55] The classification of the workforce as independent contractors is an important component of the gig economy business model, as workers provide their own capital equipment,[56] and, to a greater or lesser degree, have autonomy over where and when they carry out their work.[57]

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[52] Chris Forde and others, ‘The Social Protection of Workers in the Platform Economy’ (European Parliament 2017).
[53] Dokko, Mumford and Schanzenbach (n 1) 4.
[54] David Morgan, ‘Employment Status: Flexibility or Security - What’s the Best Gig?’ (2017) 5 Employment Law Bulletin 1.
[55] The Trade Union Congress, ‘Seven ways platform workers are fighting back’ (2021) <https://www.tuc.org.uk/sites/default/files/2021-11/Platform%20essays%20with%20polling%20data.pdf> (accessed 04 April 2022).
[56] Joellen Riley, ‘Brand New “Sharing” or Plain Old “Sweating”? A Proposal for Regulating the New “Gig Economy”’ in Ron Levy and others (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (2017) 62–63.
[57] ‘Seven Ways Platform Workers Are Fighting Back’ (The Trade Union Congress, 2021).

Typically, work in the gig economy is made possible by the use of a smartphone 'app' or other electronic platform, which reduces tension in the market by facilitating commercial transactions.[58] Prior to the rise of the gig economy, the term gig 'was most commonly used to describe the short-term work of a musician providing a live performance'.[59] Gig economy platforms have adopted this term, and match workers with jobs, or 'gigs', that they are to carry out for customers of the app.[60] Through this technology, platforms can monitor the worker throughout the performance of the task and will remunerate the worker on a piece rate basis.[61]

A key feature of work in the gig economy is the flexibility that it allows which is beneficial for young people and those with families.[62] It can often act as a supplementary income,[63] and can provide a positive work-life balance, aided by the autonomy workers have in deciding when they would like to work.[64] A repercussion of this flexibility, however, is a lower wage rate for most as workers are classified as independent contractors, and so enterprises are under no obligation to pay them a minimum wage.[65] Because of this, Prassl suggests we should not 'overestimate' the benefits of this flexibility.[66]

1.3.1. Terminology

Work in the gig economy has been characterised in several different ways including, but not limited to, the 'on-demand economy', the 'sharing economy' and 'crowdwork'. Yet, there is no widely accepted definition that accounts for issues such as the types of services carried out, the types of people that perform the services, and the nature of the operations. As

58 Valerio De Stefano, 'The Rise of the Just-in-Time Workforce: On-Demand Work, Crowdwork and Labor Protection in the Gig Economy' (2016) 37 Comparative Labor Law & Policy Journal 471, 475.
59 Alexandrea J Ravenelle, 'Just a Gig?: Sharing Economy Work and the Implications for Career Trajectory' in Deepa Das Acevedo (ed), *Beyond the Algorithm: Qualitative Insights for Gig Work Regulation* (CUP 2020) 103.
60 House of Commons Work and Pensions Committee, 'Self-Employment and the Gig Economy' (2017) <publications.parliament.uk/pa/cm201617/cmselect/cmworpen/847/847.pdf>.
61 Jim Stanford, 'The Resurgence of Gig Work: Historical and Theoretical Perspectives' (2017) 28 Economic & Labour Relations Review 382, 352.
62 Dokko, Mumford and Schanzenbach (n 1) 4.
63 Chartered Institute of Personnel and Development (CIPD), 'To Gig or Not to Gig? Stories from the Modern Economy' (2017) <https://www.cipd.co.uk/knowledge/work/trends/gig-economy-report#gref>.
64 US Congress House Small Business Committee, 'Millennials and the Gig Economy' (2018).
65 Chartered Institute of Personnel and Development (CIPD) (n 63).
66 Jeremias Prassl, *Humans as a Service* (OUP 2018) 53.

such, it is difficult to uniformly attribute these singular terms to platforms operating in this capacity.

An examination of the literature demonstrates that there is some conflict about a definition that adequately represents the phenomenon. As stated above, some scholars refer to the phenomenon as being part of a 'sharing economy', but this term has different meanings. For example, there is a conflict about whether the sharing economy refers to platforms that facilitate the exchange of capital, such as eBay, or platforms that facilitate the temporary access of accommodation, such as AirBnb, or platforms that facilitate individuals to fundraise for their goals, such as GoFundMe.[67] This thesis will restrict the focus of examination to platforms that facilitate the provision of services, and will refer to this phenomenon only as the 'gig economy'.

1.3.2. Categories of Gig Work

The gig economy is a vast phenomenon and has been the subject of scholarship in a variety of different disciplines. Services provided in the gig economy vary drastically, in terms of the locality of the service provider and their relative level of skillset. The amorphous nature of the gig economy makes it difficult to conceptualise and, ultimately, define. This is evident, as there is little agreement in the literature regarding a definition that sufficiently captures the phenomenon.

Work in the gig economy can be distinguished into two main categories: online gig work and local gig work. The online gig economy means that services can be performed remotely anywhere in the world, whereas the local gig economy refers to services performed in a specific area.[68] It can be inferred from the literature that there are a small number of sub-categories within the online gig economy: microwork, online freelancing, and online piecework. Microwork refers to the 'decomposing of jobs into tiny 'microtasks' that can be digitally distributed'.[69] These tasks can be carried out within several seconds or minutes and

[67] Kennedy and others (n 2) 11.
[68] Brian Fabo, Jovana Karanovic and Katerina Dukova, 'In Search of an Adequate European Policy Response to the Platform Economy' (2017) 23 Transfer 163, 166–168.
[69] Vili Lehdonvirta, 'Flexibility in the Gig Economy: Managing Time on Three Online Piecework Platforms' (2018) 33 New Technology, Work and Employment 13, 15.

only require basic levels of numeracy and literacy skills. According to Berg, there are six categories of microwork.

> (1) information finding, such as looking for information on the web; (2) verification and validation, such as identifying whether a tweeter is a real person; (3) interpretation and analysis, consisting of tasks that categorize or classify products; (4) content creation, such as summarizing a document or transcribing an audio recording; (5) completing surveys, many of which are academic; and (6) content access, usually accessing another website in order to consume content.' Given the short length of these tasks, the payment for completion is typically very low.[70]

A platform that is commonly classified as being a facilitator of microwork is Amazon Mechanical Turk, which is one of the oldest online labour platforms. This work has been categorised as 'non-manual low-skill online' work.[71] Typical task categories include 'Image/Video Processing' (such as selecting appropriate pictures), 'Data Verification and Clean-Up' (such as verification of contact details), 'Information Gathering' (such as completing surveys), and 'Data Processing' (such as transcribing audio or video content). Customers of this service, known as requesters, post a task (known as a HIT) that they need to be completed. They set the rate of pay and the time required for completion. This HIT then becomes available to a pool of workers, which is allocated on a first-come-first-served basis.[72] Once a task has been completed, the requester will accept or reject the HIT, and it must be completed within thirty days of submission. Requesters also have the opportunity to rate the worker on their performance of the HIT.

Another popular platform that is considered to be low-skilled microwork is clickworker.com. This platform provides access to short-term low-skilled work where service providers can complete tasks such as surveys and data categorisation. Customers of this service have two

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[70] Janine Berg, 'Income Security in the On-Demand Economy: Findings and Policy Lessons from a Survey of Crowdworkers' (2016) 545.
[71] Ursula Huws, Neil Spencer and Simon Joyce, 'Crowd Work in Europe: Preliminary Results from a Survey in the UK, Sweden, Germany, Austria and the Netherlands' (2016) 1.
[72] Xuefei Nancy Deng and K. D. Joshi, 'Why Individuals Participate in Micro-Task Crowdsourcing Work Environment: Revealing Crowdworkers' Perceptions' (2016) 17 Jorunal of the Association for Information Systems 648, 713.

options: a managed service or a self-service. With the former, the platform will manage a given project on the customers' behalf. Doing so, clickworker.com will break a project down into micro-tasks which will be allocated to a pool of workers who possess the relevant qualifications, following which quality assurance processes will be carried out to ensure that the task has been completed appropriately. The quality assurances that clickworker.com offer to the customer include assessments, ratings, spot testing, and peer review. The completed task will then be sent to the customer for approval. If a customer opts for the self-service option, they will define the task, the fee, the target crowd, and will select the worker(s) where necessary.

Conversely, online freelancing refers to the provision of more highly skilled, professional services.[73] Online freelancing 'typically requires a higher level of expertise than microwork, with workers typically possessing technical or professional skills.[74] Online freelancing tasks tend to be larger projects that are 'performed over [much] longer durations of time.'[75] Further, they often refer to workers with a very specific skill set which they will use for the majority of their work, unlike microworkers who are often offered a variety of different types of tasks.[76]

According to Kalleberg and Dunn, workers who carry out online freelancing have a higher level of autonomy over how they carry out their work, as they are able to negotiate wage rates, and accept and reject work at their own discretion without fear of penalty.[77] However, this assumption may not necessarily be accurate. The levels of autonomy that workers have and levels of control that the platforms have over their workforce vary across platforms in both microwork and in online freelancing. Kuek et al makes a distinction between open service platforms and managed service platforms. They state that:

[73] Siou Chew Kuek and others, 'The Global Opportunity in Online Outsourcing' (2015) 1.
[74] Kuek and others (n 73) 1.
[75] Arne L Kalleberg and Michael Dunn, 'Good Jobs, Bad Jobs in the Gig Economy' (2016) 20 Perspectives on Work 10, 12–14.
[76] Kalleberg and Dunn (n 75) 12–14.
[77] Kalleberg and Dunn (n 75) 12–14.

> The two primary archetypes among [online outsourcing] firms are 'open service platforms' and 'managed service platforms'. In the former, intermediary firms offer an online marketplace where workers and employers can connect and negotiate directly. Employers pay a service fee to post jobs on the marketplace and workers can be selected based on the price they will charge or on their reputation. On the other hand, under managed service platforms, the relationship with both employers and workers are managed directly. Managed services platforms take care of finding and hiring individual workers, exercise a degree of ownership over the work, and perform quality control for clients. The boundary between open and managed services platforms is blurred but, currently, the major players in [online outsourcing] are open services platforms.[78]

Open service platforms are thought to 'function essentially as digital bulletin boards to advertise labour services… [and] provide a platform for independent producers to advertise their services to prospective buyers.'[79]

The final category identified by scholars is online piecework. Lehdonvirta, for example, claimed that this kind of work can be distinguished from both microwork and online freelancing.[80] Accordingly, online piecework 'can be defined as work performed remotely over the internet for piece-rate pay… Typical online piecework tasks are standardised clerical and data entry tasks that are easily metered.'[81] Lehdonvirta distinguishes online piecework from microwork, where workers are not necessarily compensated at a piece-rate or may not get paid at all.[82] They may also have been recruited through non-remote outsourcing, may be internal employees or are volunteers.[83] He also distinguishes online piecework from online freelancing which, he argues, is more likely to be paid at an hourly rate and work is offered to individuals based on their ability to carry out a certain skill.[84]

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[78] Kuek and others (n 73) 1–2.
[79] Stanford (n 31).
[80] Lehdonvirta (n 69) 15.
[81] Lehdonvirta (n 69) 15.
[82] Lehdonvirta (n 69) 15.
[83] Lehdonvirta (n 69) 15.
[84] Lehdonvirta (n 69) 15.

As discussed above, work in the local gig economy requires a service provider to be present in a certain area where there is a demand for a service.[85] The services found in the local gig economy will often be found outside of this phenomenon in standard, traditional employment.[86] However, the services have been 'revolutionised' by the use of IT technologies to manage the work. Scholars have paid significant attention to certain platforms, such as Uber, Deliveroo, and TaskRabbit, that facilitate the provision of transport, food delivery and 'odd jobs' at a customer's request.[87] Comparatively, scholars have made little attempt to typify the services that can be accessed in the 'local' gig economy. However, it is apparent from an analysis of the sector that the type of work found does extend far beyond low-skilled transportation or delivery services; it also refers to platforms that facilitate the provision of dog-sitting, medical, tour guide, tutoring and supply teaching services.

This section has sought to demonstrate that the gig economy is vast in terms of the enterprises that exist within it, as well as the literature examining it. This makes the phenomenon difficult to typify and define. The next section will examine some of the key characteristics of the gig economy, which will form the basis for a definition that will be adopted for this thesis.

1.4. Developing a Definition

The gig economy has been subject to scrutiny from different branches of scholarship. Within these examinations, it has been considered whether these challenges are new, with some suggesting that elements of the gig economy represent a retreat back to old-fashioned labour market principles. It has been said that '[t]oday's digital technologies seem to be taking us back to familiar sharing behaviours, self-employment, and forms of community-based exchange that existed in the past.'[88] Others have gone further and said that proposals

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[85] Huws, Spencer and Joyce (n 71) 1.
[86] For example, Uber facilitate the provision of transportation services which can be accessed without technology in the gig economy.
[87] Jeremias Prassl and Martin Risak, 'The Legal Protection of Crowdworkers: Four Avenues for Workers' Rights in the Virtual Realm', Policy Implications of Virtual Work (Macmillan 2017); Jeremias Adams-Prassl, 'Work in the Gig Economy: TaskRabbit, Uber &Co as Employers?' (2016).
[88] Arun Sundararajan, *The Sharing Economy: The End of Employment and the Rise of Crowd-Based Capitalism* (MIT Press 2016) 5.

which suggest the gig economy represents something new is 'historically false'.[89] This section will present some of the key characteristics of the gig economy and will analyse whether these characteristics are merely a resurgence of principles that have been adopted under the guise of new technologies. The factors considered will form the working definition of the gig economy for this thesis.

1.4.1. Electronic Platform

As discussed in 1.3., the labour market in recent years has been revolutionised by new digital technologies. This has resulted in a variety of changes to how individuals work, including the rise of 'teleworking' which reduced the need for a collective space. The gig economy has continued with this trend by facilitating work solely through a smartphone app or website, which has eradicated the need for a 'centralised workplace'.[90]

Platforms utilising these types of technologies have begun to revolutionise employment.[91] It creates distance between the platform and the service providers, as most of the communication, if not all, will be through technology.[92] Some platforms have gone further and have adjusted the language in their reference to work. For example, it is no longer employment or a job, but a singular 'gig', 'task' or 'ride'.[93] According to Andy Wightman former MSP, 'the language associated with the gig economy has been meticulously selected to undermine workers' rights'.[94] Some platforms have gone further and tried to use this technology to their advantage by claiming that they provide a technology service to the workforce, rather than the core service that the service providers deliver to the public.[95] As discussed above, the use of new technologies has led to well-documented consequences, including the requirement that workers be available on-demand, the lack of a traditional management role, and an avoidance of employment law obligations; these themes will be discussed in the subsections which follow.

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[89] Stanford (n 31) 57.
[90] Andrew Stewart and Jim Stanford, 'Regulating Work in the Gig Economy: What Are the Options?' (2017) 28 The Economic and Labour Relations Review 420, 420.
[91] Prassl (n 66) 53.
[92] *Aslam v Uber BV* (*Aslam*) [2017] UKEAT/0056/17/DA; | [2017] IRLR 97 at [15].
[93] Prassl (n 66) 42.
[94] The Scottish Parliament, 'Official Report: Meeting of the Parliament Wednesday 31 May 2017, Session 5' (2017) <https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=10981>.
[95] Riley (n 56) 62–63.

1.4.2. Working On-Demand

As discussed above, a key characteristic of the gig economy is the requirement for service providers to work on-demand. This means that individuals perform services as and when there is demand. Typically, this will be when a customer requests a service via the electronic platform.[96] This aspect of service provision can be seen throughout the gig economy, therefore it is no surprise that some refer to the phenomenon as the 'on-demand economy'.[97] This aspect of the phenomenon, however, does mean that those who work within it are not guaranteed certain working hours or income.[98] Whilst there is some flexibility based on the fact that there are limited obligations regarding acceptance of work, the lack of guarantees may add to feelings of insecurity.

This kind of on-demand work is not necessarily a new characteristic of work.

> Contingent or on-demand arrangements also have a long pedigree. It has been a common practice for many industries to staff labour on an on-demand basis, fluctuating with the flow of business. In earlier epochs the contingent workforce would gather each day at the workplace (for example, a mine, a wharf or a farm), hoping for an opportunity to work. In modern times, on-demand staffing could be facilitated through hiring halls, labour hire agencies or other distanced technologies. Now it is facilitated through a digital app: faster and more efficient, but not structurally different.[99]

Working on-demand was a characteristic of labour relations said to be present during the industrialisation of Britain, where work was offered when demand justified it.[100] At that time, '[t]he rationale for employers was availability of a cheap labour force which could be maintained for no cost, and which could be called upon when required for as little or as

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[96] Riley (n 56) 62–63.
[97] Stefano (n 58) 478.
[98] Stanford (n 61) 382; Robert MacDonald and Andreas Giaztzoglu, 'Youth, Enterprise and Precarity: Or, What Is, and What Is Wrong with, the "Gig Economy"?' (2019) 55 Journal of Sociology 724; Uttam Bajwa and others, 'Towards an Understanding of Workers' Experiences in the Global Gig Economy' (2018).
[99] Stanford (n 89) 57–58.
[100] John Langton, 'Proletarianization in the Industrial Revolution: Regionalism and Kinship in the Labour Markets of the British Coal Industry from the Seventeenth to the Nineteenth Centuries' (2000) 25 Transactions of the Institute of British Geographers 31, 35.

much as required'.[101] This meant that at times of particularly high demand, more workers were required, and often workers were asked to recruit their next of kin and neighbours, but during periods of low demand, workers were seen queuing up at factory gates.[102] This concept has also been traced back to dock workers.[103] Similar complaints have been made about the gig economy, where those working in the courier industries are seen queueing outside restaurants waiting to be offered work. Employers in industrial Britain had, what was coined as a 'reserve army of labour'.[104] Those in the reserve army were part of the underemployed, regularly seeking work.[105] The term 'reserve army of labour' has also been used to describe recent shifts in the labour market, in particular the notable casualisation of labour which was discussed in section 1.2. of this chapter.[106] Valerio De Stefano referred to this term when discussing the rise of zero-hour contracts.

> Developed economies are experiencing the rise of various work arrangements such as zero-hour and on-call contracts that afford the possibility to 'hire and fire' or, more precisely, to mobilize and demobilize a significant portion of the workforce on an on-demand and 'pay-as-you-go' basis.[107]

These points are also relevant to the gig economy, which suggests that this forms part of a broader trend in the labour market towards casualisation.[108] The flexible and casual nature of the gig economy, which is driven by the demand of its customer bases, means that in periods of high demand service providers are essential to the functioning of the platforms. However, when that demand has reduced, the service providers are of no further use to the

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[101] Deborah Simonton, *A History of European Women's Work: 1700 to the Present* (Routledge 1998) 220.
[102] Joshua Healy, Daniel Nicholson and Andreas Pekarek, 'Should We Take the Gig Economy Seriously?' (2017) 27 Labour and Industry 232, 104.
[103] Jeroen Meikerink, Giedo Jansen and Victoria Daskalova, 'Platform Economy Puzzles: The Need for a Multidisciplinary Perspective on Gig Work' in Jeroen Meijerink, Giedo Jansen and Victoria Daskalova (eds), *Platform economy puzzles: a multidisciplinary perspective on gig work* (Edward Elgar 2021) 3–4.
[104] Friedrich Engels, *The Condition of the Working Class in England* (David McLellan Tr ed, OUP 2009).
[105] Ellis Wasson, *A History of Modern Britain: 1714 to the Present* (2nd edn, Wiley Blackwell 2016).
[106] Larry Elliott, 'Zero-Hours Contract Workers - the Reserve Army of Labour?' *The Guardian* (4 August 2013); Education and Employment References Committee: Commonwealth of Australia, 'Exploitation of Cleaners Working in Retail Chains' (2018); MacDonald and Giaztzoglu (n 98).
[107] Stefano (n 58) 481–482.
[108] Stefano (n 58) 481–482.

platforms. This is akin to the description of zero-hour contracts, where individuals are mobilised and demobilised, or hired and fired.

Platforms in the gig economy use strategies to ensure they can meet the demand of their customer bases. For example, at periods of high demand, their prices will surge, meaning that customers are charged a premium to their standard rate of service.[109] This means that service providers will receive a higher fee for work conducted in times of higher demand.[110] According to service providers in the gig economy, platforms who adopt these systems actually notify the workforce during times of high demand.[111]

As discussed above, the on-demand nature of work in the gig economy mirrors aspects of labour relations seen in industrial Britain. Interestingly, platforms in the gig economy suggest that they have introduced a new kind of flexibility, but actually we can trace some of these so-called novel features throughout history. It has also been suggested in this section that there are features of the gig economy, for example, the ability to mobilise and demobilise the workforce, that have been continued from the zero-hour contracts which was an earlier example of casual work. This suggests that the gig economy has continued a trend towards casual work, but this trend represents a retreat to labour market principles that existed centuries ago. This adds some weight to the suggestion that the gig economy is a retreat to old-fashioned principles under the guise of new technologies.

1.4.3. Delegation of Management Functions

As discussed in section 1.2., the rise of digital technologies has revolutionised the workplace, in terms of the locality of the workforce as well as evolving the role of management. The gig economy has taken this even further by almost eradicating the role of management. Instead, the vast majority of performance management is conducted by an algorithm or the customer of the service. This is illustrated below.

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[109] Adrea Broughton and others, 'The Experiences of Individuals in the Gig Economy' (2018).
[110] Broughton and others (n 109).
[111] Broughton and others (n 109).

To the Algorithm. To a greater or lesser degree, a significant portion of the activities conducted on the platform will be facilitated by algorithmic code. To illustrate this, we will consider the example of Uber. Once a driver is allocated a job, the rate, and route are set by the online platform and once the journey has been completed, the consumer is offered the opportunity to rate their experience with the driver.[112] The technology is used to geographically track the driver during the performance of services and monitor the driver's speed and braking. The electronic system does not only gather this data but uses it to facilitate a performance review.[113] Once a customer has rated their driver from 0-5, the system will generate their average rating.[114] Uber, contractually require their drivers to maintain an average rating of above 4.4.[115] If a driver's average falls below this, they may be placed on a performance management review or, may even be terminated from the platform.[116] This process is not carried out by a manager or supervisor, instead drivers are informed of their progress via the app.[117]

Uber is also thought to use this data to determine the allocation of tasks.[118] Workers are assigned tasks based on their geographical location, the data collected on their driving capabilities, and their average rating.[119] It is thought that workers with a higher rating are more likely to be offered higher paid work.[120] The electronic platform is known to act in a disciplinary capacity for workers. If drivers decline three consecutive trips, they will be forcibly signed off the app for a period of ten minutes.[121] This practice is also enforced for drivers who cancel a trip they have already accepted.[122] This highlights the managerial functions that have been delegated to the governing algorithms, which have the ability to control the way in which the independent drivers operate.

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[112] Stefano (n 58) 478.
[113] Riley (n 56) 62–63.
[114] *Aslam* (n 92) at [37].
[115] *Aslam* (n 92) at [37].
[116] *Aslam* (n 92) at [55].
[117] *Aslam* (n 92) at [53].
[118] Stefano (n 58) 475.
[119] V De Stefano, 'The Rise of the Just-in-Time Workforce: On Demand Work, Crowdwork, and Labor Protection in the Gig Economy' (2016) 37 Comp. Lab. L. & Pol'y J. 475, 478
[120] Stefano (n 58) 475.
[121] *Aslam* (n 92) at [52].
[122] *Aslam* (n 92) at [53].

Other recognisable platforms have also been known to act in a similar capacity, including Deliveroo. Deliveroo utilise new technologies in a similar way to Uber but instruct independent cyclists or motorcyclists to deliver food and drinks to customers from a selection of restaurants.[123] Riders indicate their availability by signing into the app.[124] Following this, the algorithm is able to offer a rider work if a customer has placed an order in, or near, their location.[125] Through GPS tracking, the algorithm will offer work to the rider who is closest to the restaurant ordered from, following which the rider has three minutes to accept.[126] According to findings from the Central Arbitration Committee, Deliveroo riders will not be terminated from the platform if they do not accept a certain percentage of jobs.[127] However, they may be terminated with one week's notice if the time taken to complete a job is 'deemed too slow'.[128] It was also reported that hundreds of workers were removed from the system after being accused of fraudulent behaviour at work, specifically that these workers had been falsely notifying the system that orders had been completed.[129]

The algorithmic management processes have been referred to as a retreat to 'Taylorism'.[130] Taylorism, or 'Scientific Management', was a management idea that was adopted in industrial sectors in the late nineteenth century until after the Second World War.[131] The method involved breaking down larger tasks to smaller segments which were to be analysed.[132] Each aspect was timed and evaluated to establish the optimum efficiency in the performance of tasks.[133] Taylor advocated that there were four principles of scientific management: firstly, using scientific methods to analyse tasks and establish the most efficient ways to complete them, to provide work to each worker based on their efficiency and capabilities, to monitor the performance of all workers in each task, and to make a clear distinction between managers and workers.

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[123] *Independent Workers' Union of Great Britain (IWGB) v RooFoods Ltd (t/a Deliveroo)* (*IWGB*) [2018] EWHC 1939; [2018] IRLR 84 at [7].
[124] *IWGB* (n 123) at [71].
[125] *IWGB* (n 123) at [71].
[126] *IWGB* (n 123) at [71].
[127] *IWGB* (n 123) at [77].
[128] *IWGB* (n 123) at [77].
[129] K Markortoff, 'Deliveroo Criticised for Sacking 100 Couriers Days before Christmas' *The Guardian* (2018).
[130] The Economist, 'Digital Taylorism' (The Economist, 2015).
[131] Hugh G Aitken, *Scientific Management in Action* (Princeton University Press 1985) 187.
[132] Aitken (n 131) 22.
[133] Aitken (n 131) 22.

Taylor also introduced the differential piece rate system as a more efficient way for employers to pay for labour.[134] Employers were to pay a higher piece wage rate to faster workers, and slower workers were, in essence, penalised for their rate of work and paid a lower piece wage rate.[135] The adoption of piece rates by employers in the nineteenth and twentieth centuries was thought to be a more efficient way of structuring and organising labour.

> For example, piece work compensation is a long-standing practice in many industries, given its utility (in certain situation) for boosting productivity and ensuring that employers only pay for output they actually receive.[136]

It could be argued that features of Taylorism are present in the gig economy. This is due to the fact that platforms focus upon the efficiency of the performance of tasks. Uber and Deliveroo, for example, monitor and evaluate the performance of tasks which, in turn, has an effect on a worker's ability to carry out work in the future. This adds strength to the argument that the gig economy is not a new challenge but is merely taking labour relations back to the nineteenth and twentieth century.

To the Customer. Customers are also delegated a management function over work carried out in the gig economy. With most platforms, customers are afforded the opportunity to rate their experience with a service provider after a task has been completed.[137] This removes the burden from platforms to carry out systematic performance reviews on their workers and places that burden on the consumer.[138] The rating of workers is a subjective mechanism used by platforms, and there is no guidance as to what the customer must base their rating upon. It is thought that customers' belief systems may also influence the ratings,[139] and customers may not regard gig economy workers as a separate entity and, instead, may view

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[134] Aitken (n 131) 46.
[135] Aitken (n 131) 46.
[136] Stanford (n 89) 57.
[137] Stefano (n 58) 478.
[138] Riley (n 56) 62–63.
[139] Stefano (n 58) 475.

workers as an extension of their platform.[140] A customer, with this view in mind, may rate the worker based upon their view of the overall service, which may negatively affect the worker's ability to continue work with the platform.[141]

Consumer rating mechanisms can affect the ability of service providers to perform their services in two ways. For those who carry out their work online, often the customer will select the worker they wish to perform their required services.[142] On the electronic platform, they have access to reviews and ratings of workers from previous clients.[143] This is often present with platforms who facilitate the provision of services that require a higher level of skill. Some of the reviews can be accessed online. Customers having access to the online reviews may influence their decisions about which service provider they wish to select. For example, they may be less likely to select a service provider who is poorly reviewed.

For those who carry out their work locally, often platforms will select the most appropriate worker to carry out the task.[144] As previously established, the average rating of a worker on some platforms influences the ability of that worker to continue working for the platform or the types of work that can be offered to them.[145] The ability to rate the performance of both employees and independent contractors outside of the gig economy is not uncommon.[146] However, certain platforms within the gig economy utilise this function as a tool to facilitate algorithmic management.

1.4.4. Avoidance of Obligations Associated with Employment

As discussed above, the majority of service providers in the gig economy are classified as independent contractors.[147] This, in turn, impedes service providers from accessing key

[140] Aaron Shapiro, 'Between Autonomy and Control: Strategies of Arbitrage in the "on-Demand" Economy' (2017) 20 New Media & Society 2954.
[141] Riley (n 56) 62–63.
[142] Stefano (n 58) 475.
[143] R Telles Jr, 'Digital Matching Firms: A New Definition in the "Sharing Economy" Space' [2016] US Department of Commerce, Economics and Statistics Administrative Office.
[144] *Aslam* (n 92); *IWGB* (n 126).
[145] *Aslam* (n 92) at [55].
[146] Examples include Check a Trade, eBay, and Google Reviews.
[147] J. Dokko, M. Mumord, D. Whitmore Shanzenbach 'Workers and the Online Gig Economy' (2015) The Hamilton Project 4

rights associated with employment, such as the right to the minimum wage,[148] holiday and sick pay,[149] and pension rights,[150] to name but a few. Platforms suggest that service providers enjoy significant levels of flexibility and autonomy in how and when they carry out their work, which is not typically found in standard employment, and this contributes to their classification as independent contractors.[151] Furthermore, service providers are typically required to provide their own capital equipment,[152] and are expected to take out comprehensive public liability insurance policies.[153]

Work in the gig economy is thought to be atypical and goes against the grain of standard or traditional employment. As Stanford notes,

> [W]ork for just one employer, year-round, usually on a full-time basis, on the employer's premises and utilising capital equipment supplied by the employer. The term of employment was indefinite: workers were rarely guaranteed 'jobs for life', but the mutual expectation was that employment would continue unless some intervening force (such as a downturn in the employer's business or egregious misperformance by the worker) caused the relationship to be terminated.[154]

As can be seen from the discussions in section 1.3., work in the gig economy does not necessarily conform to the norms set in post-war Britain. We also know from examining some of the labour market trends over the last two centuries that characteristics of the gig economy are not necessarily new. We can also see this pattern of recurrence with another example from the 1960s and 1970s, where the UK saw a rise of self-employed persons without employees, discussed in more detail above. These types of workers, in particular

[148] National Minimum Wage Act (n 16) s1
[149] The Working Time Regulations 1998, s 13
[150] Equality Act 2010, s 83 (2) (a)
[151] U. Bajwa, L. Knorr, E. Di Ruggiero, D. Gastalldo, A. Zendel 'Towards an understanding of workers' experiences in the global gig economy' (2018) Global Migration and Health Initiative 12
[152] Riley (n 56) 62–63.
[153] This is relevant for those who work with an automobile and are subject to mandatory insurance rules. See, Road Traffic Act 1983, s 143.
[154] Stanford (n 61) 389.

those who provide services for one large organisation, have been subject to scrutiny by scholars.[155]

It has been argued that this kind of quasi self-employment blurs the boundaries between self-employment and employment; something that is said to have been replicated in the gig economy.[156] Typical self-employment allows one to have numerous clients, bear the entrepreneurial risk, whilst having the ability to control the way that they work and who they work for.[157] In the gig economy, workers bear the entrepreneurial risk, yet are in 'hierarchal subordination' with the enterprise, who control the way they work and who they work for; providing them with limited information about the client and leaving them unable to negotiate their own fee.[158] The House of Commons Work and Pensions Committee in the Thirteenth Report of Session 2016-17 found a number of factors which limited the control that workers in the gig economy had over their own work; these included limited freedom to choose working patterns, a continuation of work for the same company, limitations in both setting rates of pay, and the inability to substitute oneself for another worker.[159]

Some platforms claim that if employment protections, such as paid leave, were provided, the flexibility that is valued by service providers would be abandoned.[160] However, this rhetoric has been referred to as 'myth' since flexible employment practices do not automatically place the relationship outside of the scope of employment.[161] In furtherance of this assertion, the Work and Pensions Committee concluded that the government need a stronger response to this form of work as the flexibility that is offered within the gig economy does not have to render those working in this way as self-employed;[162] this sentiment was echoed in the Taylor Review on modern working practices which

[155] McKendrick (n 20); Arthurs (n 16).
[156] Oranburg (n 30); Sunshine (n 30); Elizabeth J. Kennedy (n 30); Holloway (n 30).
[157] Kalleberg and Dunn (n 75).
[158] U. Meuhlberger, *The Blurring Boundaries Between Employment and Self-Employment* in 'Dependent Self-Employment (2007, Palgrave Macmillan)
[159] House of Commons Work and Pensions Committee (n 60).
[160] House of Commons Work and Pensions Committee (n 60).
[161] Prassl (n 66) 42.
[162] House of Commons Work and Pensions Committee (n 60).

recommended the UK recategorize its employment statuses to reflect the growing trend of dependent contractors.[163]

To summarise, features of the gig economy can be traced through time, yet this form of work still poses significant policy challenges. The casual nature of work, facilitated by the use of new technologies, allow platforms to distance themselves from their workforce. Platforms, through these technologies, are able to outsource activities to their workforce but, in turn, outsource the risk of insecurity, as well as liability.[164] Furthermore, the lack of status for workers in the gig economy also contributes to a reduction in the collective bargaining power of workers.[165] The isolating nature of gig work is thought to have caused a lack of organisational identification,[166] which prohibits service providers from collectively bargaining to improve working practices.[167] This idea has been examined in relation to Amazon Mechanical Turk and it was found that

> [t]he collective representation of crowdworkers experiences the same problems previously detected concerning telework and collect labour relations. Isolation leads to the non-existence of collective voices, even though some practices, such as the 'Turker' community may be considered as milestones in the field of representation. In any case, the field of crowdwork and online activities is as yet an uncharted territory for labour law, the hidden face of the moon.[168]

For these reasons, service providers are impeded when attempting to negotiate as a collective on issues such as wage rates, and workers have been unable to create an effective digital labour movement.[169] It is therefore, no surprise, that the gig economy has been

[163] Taylor and others (n 44).
[164] Douglas Brodie, *Enterprise Liability and the Common Law* (CUP 2010) 92–94.
[165] Healy, Nicholson and Pekarek (n 102) 234.
[166] Gerald Friedman, 'Workers without Employers: Shadow Corporations and the Rise of the Gig Economy' (2014) 2 Review of Keynesian Economics 34; Patricia Leighton, 'Atypical Employment: The Law and Practice in the United Kingdom' (1986) 8 Comparative Labor Law Journal 34.
[167] 'Seven Ways Platform Workers Are Fighting Back' (n 57).
[168] José María Miranda Boto, 'Collective Bargaining and the Gig Economy: Reality and Possibilities' in José María Miranda Boto (ed), *Collective Bargaining and the Gig Economy: A Traditional Tool for New Business Models* (Hart 2022) 4.
[169] Mark Graham, Isis Hjorth and Vili Lehdonvirta, 'Digital Labour and Development: Impacts of Global Digital Labour Developments and the Gig Economy on Worker Livelihoods' (2017) 23 Transfer 135, 135.

subject to legal challenges, as well as the attention of employment lawyers. The next section will discuss this in greater detail.

1.5. Legal Perspectives on the Gig Economy

As discussed above, the gig economy is a vast phenomenon, and it has been analysed from a variety of different perspectives. A significant portion of the literature has examined the challenges that the gig economy poses to legal doctrine. Much of this literature has been focused on the challenges to employment law in multiple jurisdictions, and in particular in relation to employment status, since service providers are almost always classified as being independent contractors. Challenges to other areas of law exist, although they have been given significantly less treatment. This section will analyse some of the existing literature and case law in relation to employment law, as well as drawing upon some of the more limited literature in other spheres of legal doctrine.

1.5.1. Employment Law

As stated above, the majority of the legal literature examining the gig economy has focused on the issue of employment status, due to the classification of service providers as independent contractors. In the UK there are three separate employment categories: employees, workers, and independent contractors.[170] An employee is defined in legislation as 'an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment',[171] and a worker is an individual who works under 'a contract of employment, or any other contract… whereby the individual undertakes to perform personally any work or services for another party to the contract whose status is not by virtue… that of a client or customer of any profession or business undertaking carried on by the individual'.[172] These definitions are vague and require purposive interpretation by the courts; legal doctrine, therefore employs tests such as control and integration to determine an individual's status.[173]

[170] Employment Rights Act, s 230.
[171] Employment Rights Act, s 230(1).
[172] Employment Rights Act, 230(3).
[173] A discussion on these tests will be found in Chapter 4.

Platforms rely on rhetoric that service providers value the flexibility and autonomy associated with self-employment. This assertion has been supported by some empirical evidence.[174] However, some of this data has been criticised as 'the desires and needs of gig workers on the subject of employee status are more complex than can be adequately represented in survey research'.[175] Despite some being satisfied with their employment status, other service providers in the gig economy have attempted to reassert their employment status in Employment Tribunals in England and Wales, as well as other jurisdictions across the world.[176] One of the earlier cases was *Pimlico Plumbers and Another v Smith*, where the claimant primarily alleged that he was a worker for the purposes of Section 230(3) of the Employment Rights Act.[177] The Supreme Court recognised the difficulty in determining the employment status of service providers in the gig economy, as some aspects of their service provision suggest they are independent contractors, and others are more akin to employment.

> On the other hand, there were features of the contract which strongly militated against recognition of Pimlico as a client or customer of Mr Smith. Its tight control over him was reflected in its requirements that he should wear the branded Pimlico uniform; drive its branded van, to which Pimlico applied a tracker; carry its identity card; and closely follow the administrative instructions of its control room. The severe terms as to when and how much it was obliged to pay him, on which it relied, betrayed a grip on his economy inconsistent with his being a truly independent contractor. The contract made references to 'wage', 'gross misconduct' and 'dismissal'. Were these terms ill-considered lapses which shed light on its true nature? And then there was a suite of covenants restrictive of his working activities following termination.[178]

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[174] Veena D Dubal, 'An Uber Ambivalence: Employee Status, Worker Perspectives, and Regulation in the Gig Economy' in Deepa Das Acevedo (ed), *Beyond the Algorithm: Qualitative Insights for Gig Work Regulation* (CUP 2020) 36.
[175] Dubal (n 174) 54.
[176] For example, *E Tū Inc & Anor V Rasier Operations Bv & Ors* [2022] NZEmpC 192 (New Zealand); *Adolph v Uber Technologies Inc* [2022] WL 1073583 (California Supreme Court).
[177] (*Pimlico*) [2018] UKSC 29, [2018] 4 All E.R. 641
[178] *Pimlico* (n 177) at [48].

Ultimately, the Supreme Court held that the claimant was capable of being a worker for these purposes, despite having a limited right to substitute himself for another competent contractor, ostensibly going against the personal service requirement for worker status. However, the Supreme Court held that the language used in the contract did suggest that the claimant was required to personally perform his duties.[179] This indicates that only a genuine right to substitute oneself for another will impede a claimant from establishing their employment status as either a worker or an employee.

The requirement for personal service was not interpreted as loosely in other gig economy actions, though. For example, several service providers who worked with Deliveroo claimed that they were workers for the purposes of collective bargaining. Like with most gig economy platforms, the workers signed on to the 'app' to indicate that they were available and ready to work. However, Deliveroo workers were free to either accept or decline any work that was offered to them. Furthermore, they were also granted a contractual right to substitute another individual to carry out the work on behalf of them. At first instance, the Central Arbitration Committee held that the riders were not workers for these purposes. The applicants then brought a judicial review on the decision made by the Central Arbitration Committee in the High Court which held that that the riders had a genuine right to substitution, which negated the obligation to personally carry out any work,[180] and again to the Court of Appeal;[181] there is now an appeal outstanding on this matter to the Supreme Court.

The High Court and the Court of Appeal held that the workers therefore fell outside of the scope of the definition of a worker for collective bargaining purposes. The important issue was whether or not the contract under which the riders normally worked contained an obligation to personally perform work, to which the courts agreed with the Central Arbitration Committee that in this case it did not. The personal performance requirement is an important one, as it represents the 'broad normative issue of whether an individual is a

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[179] *Pimlico* (n 177) at [33].

[180] *R. (on the application of Independent Workers Union of Great Britain) v Central Arbitration Committee* [2018] EWHC 3342, [2019] IRLR 249.

[181] *Independent Workers Union of Great Britain v Central Arbitration Committee* [2021] EWCA Civ 952, [2022] 2 All E.R. 1105.

genuinely independent entrepreneur operating his or her own business, and hence not vulnerable to the exploitation which employment legislation is intended to protect.'[182]

Arguably the most famous and awaited case in the string of gig economy litigation was *Uber v Aslam* (*Uber*). The case begun in the Employment Tribunal in 2016, when James Farrar, Yaseem Aslam, and several other claimants contended they were workers, rather than independent contractors. The Employment Tribunal in the first instance agreed with this assertion and Uber unsuccessfully appealed up to the Supreme Court.[183]

Lord Leggatt in the sole judgment, approved the precedent in *Autoclenz v Belcher* that the courts can look beyond the contract governing the service provision if it does not adequately reflect the nature of the relationship in practice.[184] Looking contextually at the relationship between Uber and the drivers, Lord Leggatt held that the Employment Tribunal was correct in reclassifying the drivers as workers for five key reasons:

1. The drivers could not set their own fares
2. The written agreement between Uber and the drivers was unilaterally imposed
3. The control exercised over the drivers was more than minimal, for example by penalising drivers who did not accept a specific number of trips
4. The performance management mechanisms used to control the manner in which drivers deliver the service, for example through a rating system
5. Communication between passengers and drivers being managed by Uber, meaning there was no possibility of future working relationships.

The gig economy litigation, and in particular *Uber*, has further fuelled the analysis of legal scholars examining the phenomenon. The judgment in *Uber* has been said to focused on the 'exploitation-vulnerability' of the claimants, perpetuated by the Uber model.[185] This necessitated a 'purposive analysis' of the employment relationship, rather than a detailed

[182] Alan Bogg and Michael Ford, 'The Death of Contract in Determining Employment Status' (2021) 137 Law Quarterly Review 392.
[183] [2021] UKSC 5, [2021] 4 All ER 209.
[184] [2011] UKSC 41, [2011] 4 All ER 745.
[185] Bogg and Ford (n 182) 394.

examination of the contractual terms as they were not representative of the reality of the employment relations.[186] Ultimately, if Uber wanted to uphold that the drivers were independent contractors, they needed to 'accept the legal and practical reality of engaging self-employed contractors and [accept] a reduction in control.'[187]

A number of scholars are reliant upon the idea that workers in the gig economy cannot be categorised as either workers, employees or independent contractors, so believe that a new category of employment should be introduced to accommodate them: the 'dependent contractor' or the 'independent worker'.[188] This has been most commonly argued in the American literature where there is no intermediary category; this is also the case in other jurisdictions such as Ireland.[189] As some aspects of work in the gig economy suggest that an employment relationship is present, and other aspects of work are akin to the workforce being independent contractors, there is an argument that this relationship should give rise to some employment rights and benefits, but not others.

This model is already somewhat present in the United Kingdom with the introduction of the third employment category of the worker. It has also been possible for some working in the gig economy to reclassify themselves as workers, although this has not been possible for all. This suggests that worker status may not be the panacea to the problems caused by the gig economy. In fact, a government sanctioned review in the UK concluded that the legislative framework in the UK for employment status needed revision.[190] It was suggested that worker status should be reframed to a dependent contractor status to better to reflect modern challenges to labour relations such as the gig economy. To date, these suggestions have not been implemented.

Not all scholars are proponents for legislative change that will revolutionise the employment categories as we know them. For example, Cherry and Aloisi argue that a different solution

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[186] Bogg and Ford (n 182) 396.
[187] Stewart Healey, 'Case Comment: Uber BV v Aslam' (2021) 163 Employment Law Bulletin 2.
[188] Oranburg (n 30); Sunshine (n 30); Elizabeth J. Kennedy (n 30); Holloway (n 30).
[189] TCDAlumni, 'Trinity Law School Spring Series: The Gig Economy' (2021).
[190] Taylor and others (n 44) 34.

may be to introduce a 'default presumption' that gig workers are in relationships of employment.

> Instead of the current system in which the firm chooses how to classify workers and then later justifies its position in litigation, we should consider working with a different presumption. Assume that above a minimum threshold of hours worked, the default classification would be an employment relationship… There would then be opt-outs for those who are truly independent businesses and genuinely self-employed. However, such opt-out could not be a condition of work on a platform.[191]

However, a blanket response would rely on a sufficient empirical understanding of the gig economy as well as agreement on exactly what it represents, and this currently does not exist. It is argued that legal responses to the gig economy should be empirically sound.

1.5.2. Other Spheres of Law

As demonstrated above, the majority of the legal literature investigating the gig economy relates to employment law, and more specifically the employment status of those who work within it. The gig economy has also been analysed from different legal perspectives, albeit to a lesser degree, as well as in other disciplines.

Another prominent angle the gig economy has been studied from is with respect to algorithmic decision making in employment law.[192] This body of literature is growing and is also being examined outside of the gig economy, as more traditional employers begin to adopt these technologies. There are growing concerns that '[d]ecisions are increasingly made based on algorithms, posing a new problem for society, which is the development of a society based on a new type of black box – the 'black box society' – given that most of them are opaque and lack transparency.'[193] Employment lawyers have become concerned that

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[191] Cherry and Aloisi (n 19) 635.

[192] For example, Julia Tomasetti, 'Algorithmic Management, Employment and the Self in Gig Work' in Deepa Das Acevedo (ed), *Beyond the Algorithm: Qualitative Insights for Gig Work Regulation* (CUP 2020).

[193] Teresa Moreira Coelho, 'Algorithms, Discrimination and Collective Bargaining' in José Maria Miranda Boto and Elisabeth Brameshuber (eds), *Collective Bargaining and the Gig Economy: A Traditional Tool for New Business Models* (Hart 2022) 157.

algorithmic management and decision making does not have the intended effect of reducing discrimination, but actually 'reflect biases that exist in the real world and that also exist in programmers and clients… [decisions made] are often the reflection of their prejudices.'[194]

From a private law perspective, the gig economy has been given comparatively less treatment. It has been considered in an article from a contract perspective,[195] and there is some limited material from a tort perspective.[196] Here, it has been argued that '[w]hen faced with new technology-driven platforms and dubious defensive tactics by companies such as Uber it may be necessary to modernise the law to deal with the injustices that form in consequence of their activities.'[197] As discussed in the introduction, this thesis seeks to examine the gig economy from a tort perspective where there is comparatively less literature. Despite this, it will be argued in the chapters which follow that the challenges posed to tort are not insignificant and are worthy of further investigation.

1.6. Conclusion

This chapter has discussed the rise of the gig economy. It is a significant phenomenon with a growing body of literature across a range of spheres. There is little agreement in the literature about what the gig economy represents, which makes it difficult to define. This chapter has sought to track the rise of the gig economy by analysing broader trends towards digitisation and casualisation and has demonstrated that both of these trends form part of the characteristics of the phenomenon.

This chapter considered four main sections. Section 1.2 examined some of the shifts in the labour market which arguably facilitated the rise of the gig economy. Section 1.3. considered different conceptions of the gig economy, which demonstrated the extent of the phenomenon and the literature studying it has made it difficult to establish an agreed definition. Section 1.4. discussed the key characteristics of the gig economy, identified by

[194] Moreira Coelho (n 193) 157.
[195] Marc T Moore, 'The Gig Economy: A Hypothetical Contract Analysis' (2019) 39 Legal Studies 579.
[196] Julian Fulbrook, 'Reverberations from Uber v Aslam in Personal Injury Claims' (2021) 2 Journal of Personal Injury Law 59; Nigel Mackay, 'Vicarious Liability: There's an App for That' (2016) 2 Journal of Personal Injury Law 90.
[197] Fulbrook (n 196) 67.

this author and others, which is the working definition adopted by this thesis. To recap, the definition adopted refers to the following:

1. work being facilitated by an electronic platform
2. work being carried out on-demand
3. management functions being delegated to algorithmic code and/or customers
4. an avoidance of obligations associated with employment

This section also discussed the extent to which these characteristics are novel principles, or whether they represent a resurgence of labour market principles which can be traced through history. Section 1.5. considered the legal literature, of which there is an abundance in relation to employment status and is growing in other spheres of law.

As discussed in this chapter, this thesis will examine the gig economy in relation to the law of tort. The tort literature analysing the gig economy is minimal, and the problems that may arise in tort are significant. To this end, the following three chapters which analyse tort's ability to distribute risk, as well as the doctrines and tests it has in its armoury.

Chapter 2 - Legal Theories of Risk

2.1. Introduction

The previous chapter traced the rise of the gig economy and analysed the legal and non-legal literature considering the phenomenon. This thesis seeks to examine the liability risks in tort that research participants who conduct their service provision in the gig economy perceive to be inherent to their work, as well as their response to those risks. This thesis analyses risk through the lens of tort law which has the capacity to be a legal distributor of risk, and so its definition will encompass these purposes. Tort law has capabilities to distribute risk in the world of service provision through doctrines such as employer's duties to employees, vicarious liability, non-delegable duties, and direct duties owed to third parties; the doctrines will be analysed in Chapter 3, which immediately follows, and the key tests used by these doctrines will be analysed in Chapter 4.

This chapter will introduce theories which examine risk. To this end, the chapter will be split into four main sections. Section 2.2. will broadly discuss the evolution of risk theory and recognise some of the foundational steps made in the scholarship to develop social and legal theories of risk. Section 2.3. will introduce a definition of risk that will be adopted for this thesis which, as discussed above, will be limited to a focus on tort. With this in mind, sections 2.4 and 2.5. will introduce theories of risk in relation to tort, including deterrence- and insurance-based theories respectively.

2.2. Conceptions of Risk

Risk is a wide-reaching concept that transcends disciplines. Literature concerning risk is amorphous and has built strong theoretical foundations. Social theories of risk have taken significant strides to achieve this. Ulrich Beck, for example, conceptualised the 'risk society',[1] suggesting that society is divided more in terms of risk than of class or wealth.[2] Conversely,

[1] See generally, Ulrich Beck, *Risk Society: A New Modernity* (SAGE 1992); Ulrich Beck, Wolfgang Bonss and Christoph Lau, 'The Theory of Reflexive Modernisation: Problematic Hypothesis and Research Programme' (2003) 20 Theory, Culture & Society 1, 29.
[2] Anthony Giddens, 'Risk and Responsibility' (1999) 62 The Modern Law Review 1, 62.

Foucault conceived the notion of governmentality in which risk emerges from a society which governs and controls its populations.[3] These theories have been remarkably influential to the development of sociological understandings of risk. Theories of risk have also transcended into legal theory. Jenny Steele in her book on risk and legal theory suggested that risk holds 'theoretical weight'.[4] Because of this, she sought to categorise risk according to different legal theories. This included where risk is conceptualised as conferring responsibility and where risk is conceptualised as a statistical probability.[5]

Responsibility-based theories of risk, accordingly, rely upon the idea that those who create or enhance risk should be responsible if it materialises. Steele referred to scholars such as Tony Honoré, who contended that individuals, as agents with capacity, should be responsible for risks placed into society that cause harm to others.[6] Honoré argued that adopting an outcome-based approach to distributing responsibility was the fairest method, as most risks taken will confer positive outcomes and only sometimes will there be negative consequences.[7] Steele also referred to the works of Arthur Ripstein[8] who contended that we should distribute responsibility based on misfortune brought about through the decision-making of individuals.[9] He argued that there are such things as reasonable and unreasonable risks. The reasonableness of the risk taking would be best determined by an analysis of the conduct of the risk-taker which fits closely with the negligence approach taken in tort law.[10] It mattered not the outcome of the risk-taking, only the conduct of the risk-taker.[11] On this basis, if the conduct of the risk-taker was reasonable, the consequences would lie with the victim. If, on the other hand, the conduct of the risk-taker was unreasonable, the consequences and responsibility would 'belong to those who create[d] them'.[12]

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[3] See generally, Michael Foucault, *The History of Sexuality* (Allen and Lane 1979); Michael Foucault, 'The Subject and Power' (1982) 8 Critical Inquiry 777.
[4] Jenny Steele, *Risks and Legal Theory* (Hart 2004) 1.
[5] Steele (n 4) 85–153.
[6] Tony Honoré, *Responsibility and Fault* (Hart 1999) 14–15.
[7] See generally, Tony Honoré (n 6).
[8] Steele (n 4) 89.
[9] Arthur Ripstein, *Equality, Responsibility and the Law* (CUP 1999) 65.
[10] Ripstein (n 9) 54–56.
[11] This may relate to the wider literature where there is a debate surrounding whether exposure to a risk without harm is a tort. See generally, Yehuda Adar and Ronen Perry, 'Negligence Without Harm' (2022) 111 Georgetown Law Journal 187; Claire Finkelstein, 'Is Risk a Harm?' (2003) 151 University of Pennsylvannia Law Review 963; Jules L Coleman, *Risks and Wrongs* (OUP 2002) 198.
[12] Ripstein (n 9) 56.

Responsibility-based approaches to risk have been articulated elsewhere, where it has been argued that '[a]ll of us in modern society have a direct and vital interest in the proper allocation of responsibility for risky activity.'[13] The importance of responsibility rests on the fact that risk is an exposure to the possibility of loss that has been induced by a social actor for their benefit.[14] There is a suggestion that risk is shifted from the individual or organisation seeking to benefit onto another who does not share the same potential benefits.[15] This links to the enterprise liability literature, where it is suggested that 'the costs of accidents that are characteristic of an enterprise should be absorbed by the enterprise and distributed across all those who benefit from its activities'; this theory will be discussed in more detail in Chapter 4.[16]

Steele also considered risks that could be conceived as calculable probabilities. She suggested that this understanding of risk broadly does not 'differentiate between risks on the basis of who or what caused them… [but] in terms of a calculable exposure to hazard across a group.'[17] Therefore, there is an absence of consideration of the risk creator or enhancer, as well as the importance of human agency and decision making. Risk, according to Clarke, in this sense, is defined as the prospect of loss of a kind that is insured, with loss being thought of as being confined to deprivation and financial loss.[18] The concern here is not simply whether loss will occur, 'but also in cases when loss is expected to occur, with when it will occur… or how much it will occur'.[19] Other factors which might need to be considered are how likely the risk is to materialise, and well as the extent of the damage if it occurs. On this basis, risk is assessed in terms of collectiveness and predictability of material consequences.[20] This is evident in the world of insurance where our risk level is categorised based on key factors, such as age, gender, ethnicity, and location.[21] Therefore, risk must be calculable; anything that is not calculable is a mere uncertainty.[22]

[13] William Leiss and Christina Chociolko, *Risk and Responsibility* (McGill Queen's University Press 1994) 5.
[14] Leiss and Chociolko (n 13) 6.
[15] Leiss and Chociolko (n 13) 53.
[16] Gregory Keating, *Reasonableness and Risk: Right and Responsiblity in the Law of Tort* (OUP 2022) 278.
[17] Steele (n 4) 55.
[18] Malcolm Clarke, *Policies and Perceptions of Insurance Law in the Twenty-First Century* (OUP 2005) 2–3.
[19] Clarke (n 18) 2–3.
[20] Steele (n 4) 33.
[21] Steele (n 4) 33.
[22] See generally, Frank Knight, *Risk, Uncertainty and Profit* (Houghton Mifflin Company 1921).

These theories of risk have been influential to the development of legal doctrine in responding to risks and are thought to underpin some of the evolution of legal doctrine.[23] Responsibility-based approaches, especially in tort, are not concerned with whether one is 'blameworthy' per se,[24] but with examining the obligations one owes to others and whether, through the carrying out of risk, we have harmed another;[25] this can be seen in the case law, particularly with respect to the law of negligence.[26] We can see the influence of probability-based approaches on the law of tort most clearly when we examine the role of insurance in shaping both tort rules and outcomes; for a discussion on this, see section 2.5.

This thesis will adopt a definition of risk. As discussed above, the primary aim of this chapter is to analyse risk through the lens of tort and consider the assumptions which underpin the theoretical application of risk to tort. This is important in the context of the thesis which seeks to examine the liability risks that research participants perceive to be inherent to their service provision in the gig economy, and their response to those risks. Tort is a key distributor of risk, especially in the world of service provision. It does so through certain doctrines, such as vicarious liability, non-delegable duties and direct duties owed to third parties, and employer's duties owed to employees, which determine who should bear the liability risks when an employee, contractor, customer, or third party is injured. The definition of risk for the purposes of this thesis will be conceived narrowly with a focus on tort in its capacity to distribute risk. The section which immediately follows will detail the definition of risk which has been adopted.

2.2.1. Risk in this Thesis

There are many definitions of risk. Some of these understandings of risk have been discussed briefly already in this Chapter. As discussed above, responsibility-based approaches to risk have clearly influenced the development of legal doctrine, as liability can

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[23] Responsibility-based theories have influenced the development of the law of negligence, see generally, Jane Stapleton, Jane Stapleton, 'Tort Insurance and Ideology' (1995) 58 Modern Law Review 820. Probability-based theories, which fit closely with insurance-based theories, have influenced tort significantly. See Lord Denning's judgment in *Nettleship v Weston* (*Nettleship*) [1971] EWCA Civ 6, [1971] 2 QB 691. For a further discussion on insurance-based theories and its influence on the law see section 4.

[24] Keating (n 16) 2.

[25] Jane Stapleton, 'Tort Insurance and Ideology' (1995) 58 Modern Law Review 820, 824.

[26] *Nettleship* (n 23); *Dutton v Bognor Regis UDC* [1972] 1 QB 373; *Launchbury v Morgans* [1971] 2 QB 245.

be conferred if the defendant creates or enhances a risk, and this causes harm to another.[27] This is evident from the use of enterprise liability as a justification for the imposition of vicarious liability. Probability-based definitions are also thought to have influenced tort, particularly because of the prevalence of liability insurance in both mandatory and non-mandatory contexts.[28]

As both responsibility- and probability-based understandings of risk have influenced the development of tort, any definition would need to encompass both of those things. It is also imperative that the definition is limited to liability in tort to reflect the overarching purpose of the thesis. Inevitably a definition of a liability risk will be different to a broader definition of risk, which may refer to subjection to the possibility of loss. This thesis is concerned with the former, and this is narrowed to liability in tort.

According to Merkin and Steele in their text on obligations and insurance, risk in tort can be allocated to a party based on a number of factors: (1) if the party has an insuring obligation, (2) if the party has a duty to indemnify another, or (3) if the party bears the burden of liability.[29] All of these factors may be relevant to the inherent liability risks of gig economy workers while carrying out their service provision. They may be subject to mandatory insurance rules[30] or voluntarily opt to take out insurance policies in an attempt to shield themselves from the costs associated with liability; they may be obligated contractually to indemnify the platform if it is held liable for their actions; or they themselves may be held liable in tort for their own actions. It is for these reasons that this definition has been adopted for the purposes of the thesis.

There are notable implications associated with adopting this definition which are worth briefly discussing. It means that financial risks associated with employment will be excluded from the thesis, such as losses incurred from an inability to work due to illness. In the world

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[27] This is particularly relevant in the context of vicarious liability, where employers who create and run risk through the activities of its employees can be fairly and justly held liable for the torts they commit. See chapters 3 and 4 for a discussion on this.
[28] See section 4 for a discussion on this.
[29] Rob Merkin and Jenny Steele, *Insurance and the Law of Obligations* (OUP 2013) 5.
[30] For example, in an automobile context, drivers are subject to mandatory insurance rules. See, Road Traffic Act 1983, s 143.

of service provision, an employee may be shielded from such losses through statutory provisions concerning sick pay, whereas an independent contractor would be expected to bear the burden of this risk independently. The definition instead encompasses liability risks in tort. This refers to the risk that a research participant will bear the burden of liability for their own actions, the risk that the platform will bear the burden of liability for the research participants' actions, and the risk that the research participant will be a claimant in a tort action after incurring injury due to the actions of the platform.

As discussed above, the definition is solely applicable to risk in tort, where notions of risk are prominent. If an employee is injured during the course of their service provision, liability risks may be distributed to the employer through the employer's duties of care owed to its employees.[31] If an employee injured a third party during the course of their employment, the employer may bear the liability risk through the doctrine of vicarious liability, or if they owe a direct or non-delegable duty to the third party. The chapters which immediately follow will examine the development of these doctrines and the assumptions which underpin them.

This section and the previous have considered some of the core understandings of risk, and a definition of risk has been adopted for the purposes of this thesis. The following sections will analyse the theoretical underpinnings of risk management, by examining the extent to which tort alters the behaviour of actors when managing risk, and the role of insurance.

2.3. Tort and Deterrence

There is a branch of legal scholarship that examines the extent to which the risk of liability in tort has a deterrent effect on the behaviour of actors. Some proponents of this theory are positive law and economics theorists who suggest that tort law is capable of deterring the behaviour of actors. This theory has been tested in various empirical contexts in different jurisdictions and has received a mixed reception in the tort scholarship. The following subsections will examine some of these contexts.

[31] Duties of care may be derived from legislation, for example through the Health and Safety at Work Act 1974, or at common law, see *Wilsons v Clyde Coal* [1938] AC 57.

2.3.1. The Automobile Context

Tort's deterrence capacity has been assessed in an automobile context. Landes and Posner argue that there is significant empirical evidence in the automobile context that tort law deters potentially liability incurring behaviour, despite the fact that 'liability insurance is widespread… and personal safety might be expected to be of greater concern than the potential financial consequences of an accident'.[32] The empirical evidence referred to by Landes and Posner sought to measure the deterrent effect of tort in jurisdictions that adopted no-fault rules, seen in certain provinces and states in Canada and the United States of America (US) respectively.[33] These studies examined changes in the behaviour of actors including 'care and activity levels among violators and the effects of such behavioral changes on injury rates among victims'.[34]

Empirically, the effect of no-fault rules has been tested. Some of the most significant findings came from Elizabeth Landes who examined sixteen US states that adopted no-fault rules for automobile accidents between 1971 and 1976.[35] Landes examined the fatality rates that resulted from automobile accidents before and after no-fault rules had been implemented and found that fatal accidents had increased after no-fault rules were introduced. Prima facie, the results of the study suggest that the absence of liability in automobile contexts had a reduction the level of care that drivers took.

This study took significant steps in empirically demonstrating that tort is capable of influencing the behaviour of actors, however, it has been subject to criticism. This is on the basis that Landes used fatal injuries as a variable for the effect of the no-fault rules, despite the fact that fatal accidents would not be subject to no-fault rules and instead the ordinary rules of tort would apply. It is because of this that 'it is difficult to understand why no-fault jurisdictions would experience any increase in such accidents'.[36] It could, however, be explained by a general reduction in the care given by drivers to other road users which

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[32] Elizabeth M Landes, 'Insurance, Liability and Accidents: A Theoretical and Empirical Investigsation into the Effect of No-Fault Accidents' (1982) 25 Journal of Law & Economics 49, 10.
[33] No-fault jurisdictions also include Israel, New Zealand, Quebec, Sweden, and provinces in Australia.
[34] Don Dewees and Michael Trebilock, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (OUP 1996) 10–11.
[35] Landes (n 32).
[36] Dewees and Trebilock (n 34) 23.

resulted, in some cases, in fatality. This may be suggestive, given that other studies conducting similar analyses in no-fault jurisdictions were able to confirm Landes' results.[37] However, the cause of this reduction of care is still unclear. It has been suggested that driving is a complex exercise and accidents are more likely to result from momentary lapses in concentration and happen too quickly to be a conscious process, eroding the possibility that tort can deter such incidents from occurring.[38] It has been argued elsewhere that there are more powerful deterrents than tort, such as the fear of serious personal injury.[39]

Despite such criticisms, it has still been concluded that 'without added financial deterrence incentives, no-fault schemes are likely to lead to increased accident rates, injuries, and fatalities'.[40] This may shine some light on the potential deterrent effect that accident litigation can have in certain contexts, including for product liability and medical malpractice which will be considered in subsequent subsections.

2.3.2. The Product Liability Context

Scholars have also sought to test tort's deterrent effect in a product liability context. This possibility came about after a significant increase of litigation in this context in the 1970s and 1980s in the US due to a the adoption of strict liability regimes, resulting in a greater likelihood of the imposition of liability.[41] In this time, there was also a growing reliance on the idea that producers should be classed as 'product risk insurers' as well as an expansion in doctrines of product design defects and hazard warnings.[42] Goldberg also noted that judicial error in cases concerning product liability also resulted in economic inefficiency.[43] These factors were thought to discourage innovation with pharmaceutical companies opting

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[37] J David Cummins, Richard D Phillips and Mary A Weiss, 'The Incentive Effects of No-Fault Automobile Insurance' (2001) 44 Journal of Law & Economics 427; Alma Cohen and Rajeev Dehejia, 'The Effect of Automobile Insurance and Accident Liability Laws on Traffic Fatalities' (2004) 47 Journal of Law & Economics 357.

[38] Christopher J Bruce, 'The Deterrent Effects of Automobile Insurance and Tort Law: A Survey of the Empirical Literature' (1984) 6 Law and Policy 73.

[39] Dewees and Trebilock (n 34) 16; Cane and Goudkamp (n 34) 413'It seems unlikely that tort law provides people with significant incentives to take care for their own safety. '.

[40] Dewees and Trebilock (n 34) 26.

[41] W Kip Viscussi and Michael J Moore, 'Product Liability, Research and Development and Innovation' (1993) 10 The Journal of Political Economy 161, 162.

[42] Viscussi and Moore (n 41) 162.

[43] See, Richard Goldberg, *Causation and Risk in the Law of Torts: Scientific Evidence and Medicinal Product Liability* (Hart 1999).

against development, particularly those organisations which developed vaccines.[44] When looked at from a more positive angle, it was also thought that the adoption of strict liability regimes provided 'incentives for introducing safer products and eliminating unsafe products', as well as encouraging producers to 'increase their levels of precaution (or "care") in designing, manufacturing, labelling, and promoting their products'.[45]

Viscusi and Moore attempted to test whether the effect of stricter product liability rules resulted in discouragement of research and development intensity by examining data from large US firms developing products in the 1980s.[46] Interestingly, they found that there was an initial increase in the cost of research and development, but that initial cost was often maximised due to the lower liability burden. It was assumed that this lower liability burden could be attributed to the increase in research and development, potentially arising due to the threat of the product liability regimes. Viewed in this light, perhaps the threat of product liability promoted innovation in this time. It could be that the development instead facilitated the development of safer products which were less likely to result in the imposition of a liability burden, but this study could not come to any absolute conclusions on this point.

Galasso and Luo conducted a study which investigated the demand for new technologies (and therefore the incentives for companies to develop such technologies), in light of medical malpractice litigation.[47] This study came to similar conclusions as Viscusi and Moore, that the presence of liability regimes encourages product development. Again, this is likely to refer to the development of products which are less likely to confer a liability burden, to ensure the economic efficiency of product development in light of liability regimes.

In a product development context, there is some evidence to suggest that the influence of liability regimes is a positive one.[48] In certain contexts, it had not deterred the development

[44] Viscussi and Moore (n 41) 162.
[45] Viscussi and Moore (n 41) 163.
[46] See, Viscussi and Moore (n 41).
[47] Alberto Galasso and Hong Luo, 'When Does Product Liability Risk Chill Innovation? Evidence From Medical Implants' (Harvard Business School, 2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3207503>.
[48] Some of this evidence is discussed in Gary T Schwartz, 'Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter' (1994) 42 UCLA Law Review 377, 408.

of products, but had the opposite effect. Although we do not know for sure, it is likely that these regimes encouraged the development of safer products which were less likely to confer a liability burden on the producer.[49] This would be economically efficient for the producer, especially where the cost of care is less than the cost of liability, but it rests on the assumption that the organisation is aware of liability rules. The idea that tort can create a positive incentive on the behaviour of actors has also been examined in a medical malpractice context and will be examined in the next subsection.

2.3.3. The Medical Malpractice Context

Studies have also considered whether medical malpractice liability risks deter the provision of substandard medical care or incentivises 'parties to take precautions that lower the risk of harm'.[50] The deterrent or incentive produced is thought to stem from the threat or liability itself as well as potential increases to liability insurance premiums.[51] There is a debate about whether the threat of liability has an adverse effect on transparency in the sector, in terms of reporting and discussion of instances where care has been underprovided.[52] Schwartz found that hospitals had evolved in recent years to increase transparency, despite historically making efforts to avoid doing so.[53] Over 95% of hospitals in the study integrated information from previous lawsuits to improve in patient safety measures, and the consensus of research participants was that 'malpractice lawsuits generate unique and valuable information relevant to patient safety'.[54] Based on this evidence, the presence of liability risk in a medical context had a positive outcome.

Zabinski and Black examined a large dataset of State level patient safety incidents (PSIs) in the US following the implementation of damage caps, which limited the level of damages

[49] This was argued in the context of the chemical industry in Nicholas A Ashford and Robert F Stone, 'Liability Innovation, and Safety in the Chemical Industry' in Peter W Huber and Robert E Litan (eds), *The Liability Maze: The Impact of Liability Law on Safety Innovation* (Brookings Institution Press 1991) 399.
[50] Zenon Zabinski and Bernard S Black, 'The Deterrent Effect of Tort Law: Evidence from Medical Malpractice Reform' (2022) 84 Journal of Health Economics 1, 1.
[51] Roger A Reynolds, John A Rizzo and Martin L Gonzalez, 'The Cost of Medical Professional Liability' (1987) 257 Journal of the Americal Medical Association 2776.
[52] Joanna C Schwartz, 'A Dose of Reality for Medical Malpractice Reform' (2013) 88 New York University Law Review 1224, 1228.
[53] Schwartz, 'A Dose of Reality for Medical Malpractice Reform' (n 52) 1924.
[54] Schwartz, 'A Dose of Reality for Medical Malpractice Reform' (n 52) 1924.

that could be awarded.[55] The variable of PSIs referred incidents which have, or could have, resulted in harm of patients.[56] Consistent with other data,[57] the study found that there was a 'gradual rise in rates for most PSIs after reform, consistent with gradual relaxation of care or failure to reinforce care standards over time.' Therefore, Zabinski and Black came to the conclusion that 'policymakers should be cautious about relaxing tort liability without providing a substitute source of incentives.'[58]

It has, however, been suggested that the threat of liability for medical malpractice has caused an over-deterrent effect, with medical practitioners adopting defensive medical practices.[59] Defensive medicine refers to 'physicians [who] perform additional procedures and order extraneous tests in order to reduce their potential malpractice exposure… The threat of malpractice liability may also induce physicians to avoid performing high-risk procedures or accept high-risk patients, leading to a reduction in aggregate expenditures.'[60] While an appropriate level of caution may be necessary in certain settings, if the threat of tort is so high that it encourages what would otherwise be unnecessary behaviour the defensive medicine may be deemed as 'inappropriate.'[61]

A criticism of this type of care is that it is wasteful and economically inefficient – this led to calls that the liability rules for malpractice were in need of reform as it promoted too strong a deterrent effect.[62] However, the practice of defensive medicine may in fact be positive if it produces better health outcomes for patients. The studies which examined the potential over-deterrent effect that tort produces were subject to some scrutiny, which fuelled scepticism about whether the theory was correct. It has been said that most studies examining this have 'failed to demonstrate any real impacts on medical-practice arising from

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[55] Zabinski and Black (n 50) 2.
[56] Zabinski and Black (n 50) 1.
[57] For example, Michael Frakes and Anupam B Jena, 'Does Medical Malpractice Law Improve Health Care Quality?' (2016) 143 Journal of Public Economics 142.
[58] Zabinski and Black (n 50) 15.
[59] For example, David Klingman and others, 'Measuring Defensive Medicine Using Clinical Scenario Surveys' (1996) 21 Journal of Health Politics Policy & Law 185.
[60] Frakes and Jena (n 57) 457–8.
[61] Schwartz, 'Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter' (n 48) 402.
[62] Lisa Dubay, Robert Kaestner and Timothy Waidmann, 'The Impact of Malpractive Fears on Caesarean Section Rates' (1999) 18 1 Journal of Health Economics 491, 515.

higher malpractice premiums'.[63] The problem also seems to be exacerbated from a US perspective, which has a higher comparative GDP spend on diagnostics than the UK which is thought to be fuelled by both higher relative physician wages and higher malpractice rates.[64]

The so-called over-deterrence effect seen in medical malpractice contexts has been tested in the field of obstetrics. A range of studies were carried out in the 1990s which examined the rate of caesarean sections carried out to determine whether the risk of medical malpractice influenced physician decision-making. These results of these studies were mixed. One study found that physicians were less likely to perform a caesarean section,[65] another found there was no change,[66] and two studies found an increase in caesarean sections which they attributed to the threat of liability.[67] Dubay et al found that the increase in caesarean sections was limited to specific groups of women, including women in the two lowest socioeconomic groups where there was an increased risk of a malpractice claim.[68] However, they also found that there was no associated increase with Apgar scores, which referred to the health of the baby soon after birth.[69] There findings suggest that 'liability pressures may produce a level of precaution higher than is socially optimal', as it ultimately does not improve health outcomes.[70] This aligns with the idea of over-deterrence.

On the whole, whether there is a deterrent-effect in a medical malpractice context is unclear. However, the evidence suggests that the promise of tort is having some effect on behaviour. The next section will discuss the limitations of these studies in terms of its applicability in a UK context, as well as presenting some of the literature from a UK perspective.

[63] Michelle M Mello and Troyen A Brennan, 'Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform' (2002) 80 Texas Law Review 1595, 1606.
[64] Michael P Keane, Barry McCormick and Gosia Poplawska, 'Health Care Spending in the US vs UK: The Roles of Medical Educational Costs, Malpractice Risk and Defensive Medicine' (2020) 124 European Economic Review 103401.
[65] AD Tussing and MA Wojtowycz, 'No TitleThe Cesarean Decision in New York State, 1896. Economic and Non-Economic Aspects' (1992) 30 Medical Care 529.
[66] FA Sloan and others, 'Tort Liability and Obstetricians' Care Levels' (1997) 17 International Review of Law and Economics 245.
[67] Klingman and others (n 59); Dubay, Kaestner and Waidmann (n 62).
[68] Dubay, Kaestner and Waidmann (n 62) 509.
[69] Dubay, Kaestner and Waidmann (n 62) 515.
[70] Dubay, Kaestner and Waidmann (n 62) 515.

2.3.4. The UK Context

As discussed above, law and economics scholarship has tested whether tort law deters unacceptable conduct in a variety of different contexts. Some of this research suggests that tort may have some deterrent effect, and in certain contexts, such as medical malpractice, there might be an over-deterrent effect where this is defined as ordering unnecessary scans and blood tests, or performing procedures which may not otherwise be required. The vast majority of this evidence comes from a US perspective. While the legal language in the US is similar to Anglo-Welsh law, with similar concepts in negligence, the culture of the jurisdiction makes this data less valuable from an English law perspective. Doctrines such as contributory negligence differ considerably[71] and the context of the legal landscape in the US is entirely different. For example, there is a broader culture of bringing claims, especially class actions,[72] a more prominent culture of higher exemplary and punitive damages,[73] and an adoption of jury trials.[74] The difference in legal culture makes these findings less easily transferrable to an UK context.

There is little research which considers tort's deterrent effect from an English perspective, with notable exceptions.[75] Halliday et al is one of these exceptions. They examined the threat of liability on public authorities in the management of road maintenance.[76] This came about due to anxieties that public authorities were 'becoming excessively risk averse in their management of public services'.[77] It was found that for some local authorities, there was some evidence of excessive risk aversion. However, it was unclear whether such aversion to risk stemmed from 'bottom-up pressures', including complaints systems, or 'similar top-

[71] John G Fleming, *The American Tort Process* (Clarendon press 1988) 46–48.
[72] Fleming (n 71) 235–236.
[73] Fleming (n 71) 214–224.
[74] Fleming (n 71) 101.
[75] It has been said that there is 'a dearth of empirical evidence' Simon Halliday, Jonathan Ilan and Colin Scott, 'The Public Management of Liability Risks' (2011) 31 Oxford Journal of Legal Studies 527, 528; Simon Halliday, Jonathan Ilan and Colin Scott, 'Street Level Tort: The Bureaucratic Justice of Liability Decision-Making' (2012) 75 Modern Law Review 347; Jonathan Morgan, 'Strict Liability for Police Nonfeasance? The Kinghan Report on the Riot (Damages) Act 1886' (2014) 77 The Modern Law Review 434; John Hartshorne, Nicholas Smith and Rosemarie Everton, '"Caparo under Fire": A Study into the Effects upon the Fire Service of Liability in Negligence' (2000) 63 Modern Law Review2 502.
[76] Halliday, Ilan and Scott, 'The Public Management of Liability Risks' (n 75).
[77] Halliday, Ilan and Scott, 'The Public Management of Liability Risks' (n 75) 528.

down pressures such as performance audit or regulation.'[78] Equally, it was acknowledged that the aversion to risk could emerge from potential liability consequences, including financial loss and reputational harm, and certain public authorities would be more susceptible to these risks than others. However, on the whole, it was concluded that public administration, at least in the context of road maintenance, 'militates' against tort law's capacity to influence behaviour.[79]

As discussed above, the vast majority of empirical evidence relating to tort's deterrent effect comes from outside of England and Wales, which makes it difficult to analyse. The limited evidence in England and Wales also comes at an organisational level, where it may be that there is a greater likelihood of an awareness of tort. Empirically testing the effect of tort generally among individuals, studies have found that either that tort had no or weak deterrent effects, but only when damages reached a significant level.[80] This data may also be less reliable as it was again carried out from a US perspective. Further, the study carried out by Cardi et al which surveyed first-year law students may also be less easily transferrable to this context.

It can be summarised that law and economics theories of tort rely on two main assumptions: (1) that people are generally aware of tort, and (2) that promise of tort is capable of deterring or incentivising particular behaviours so that individuals can avoid liability. This is thought to be 'customary' in the behavioural economics scholarship,[81] and has formed part of judicial reasoning in tort cases.[82] As will be discussed in Part II, the thesis will examine the liability risks identified by research participants as being inherent to their service provision and will examine their purported response to such risks. It is suggested that their response to those risks will indicate the extent to which research participants are

[78] Halliday, Ilan and Scott, 'The Public Management of Liability Risks' (n 75) 548.
[79] Halliday, Ilan and Scott, 'The Public Management of Liability Risks' (n 75) 549.
[80] W Jonathan Cardi, Randall D Penfield and Albert H Yoon, 'Does Tort Law Deter Individuals? A Behavioural Science Study' (2012) 9 Journal of Empirical Legal Studies 567; Theodore Eisenberg and Christoph Engel, 'Assuring Civil Damages Adequately Deter: A Public Good Experiment' (2014) 11 Journal of Empirical Legal Studies 301.
[81] Eyal Zamir and Doron Teichman, *Oxford Handbook of Behavioral Economics and the Law* (OUP 2014) 357; See also, Gary S Becker, *The Economic Approach to Human Behavior* (University of Chicago Press 1976).
[82]For example, *Van Colle v Chief Constable of the Hertfordshire Police* [2008] UKHL 50, [2009] 1 AC, 244-245; *Hill v Chief Constable of West Yorkshire* [1989] AC 53.

aware of, as well as deterred by, the threat of liability in tort. Based on this evidence, the thesis seeks to make suggestions about whether theories such as deterrence, promoted by law and economics scholars, should underpin any legal response to the challenges posed by the gig economy. The purpose of this exercise may be questioned. However, it is argued that while there is a wealth of evidence in a US setting, and it is imperative that these findings are tested in a UK context. There has been no study in the UK, to the author's best knowledge, that has examined tort's deterrent capacity in the context of the gig economy, and the 'efficacy of tort law must be analyzed relative to a specific accident context'.[83]

2.4. Tort and Insurance

As discussed above, there is a debate in legal scholarship about whether tort is capable of deterring potentially liability-incurring conduct. There are also debates about the role that insurance has in tort, which may in fact have an influence on tort's ability to deter or incentivise certain behaviours. It could be argued that insurance has revolutionised tort, specifically with respect to its ability to distribute risk, and there is a central debate about both whether insurance does influence tort and whether it should. This section will consider both strands of the debate. This exercise is being carried out, as insurance is a very real issue for service providers in the gig economy. As independent contractors, the burden to take out liability insurance will most likely lie with them.

As discussed above, insurance has become a key aspect of tort. In light of this evolution, a branch of legal scholarship has developed which seeks to define tort with insurance in mind. As discussed above Steele suggested that actuarial and insurance approaches do not 'differentiate between risks on the basis of who or what caused them… [but] in terms of a calculable exposure to hazard across a group'.[84] Therefore, there is an absence of consideration of human agency and decision making as a creator of risk. In Clarke's work on insurance, he suggested that insurance is based on the prospect of loss of a kind that is insured.[85] As discussed above, loss is a broad concept that includes deprivation and financial

[83] Dewees and Trebilock (n 34) 5.
[84] Steele (n 4) 33.
[85] Clarke (n 18) 2–3.

loss. From an insurer perceptive, it is not simply whether the loss will occur, 'but also, in cases in which loss is expected to occur, with when it will occur… or how much it will occur'.[86]

What comes with an insurance-based approach is an acceptance that either it influences the operations of tort, or, if it has not already, that it should. Both whether insurance does or should affect tort are controversial statements and has caused a debate within legal scholarship. Lord Steyn in his article concerning the purpose of tort law stated that, while the courts' primary aim relates to corrective justice, there are other considerations, such as distributive justice.[87] With this in mind, 'our courts have not shut their eyes to such considerations: the insurance position of the parties has sometimes been treated as relevant.'[88] This is evident in the case law.[89] For example, in *Lamb v Camden London Borough Council* (*Lamb*), Lord Denning, one of the greatest judicial proponents of insurance, held that a householder was responsible for risk management of squatters in their property, as they should have had insurance.[90]

The effect of insurance is also apparent in a vicarious liability context, where notions of distributive justice are accounted for, although cannot be a sole justification for the imposition of liability.[91] However, this may be helpful for service providers in the gig economy who bear the burden of risk, but are unable to to spread risk because they have not insured against the risk or because the risk is not insurable.

Insurance is also thought to influence tort in more practical ways as most claims in tort are brought against parties with liability insurance; this is argued to be necessary to some extent as tort law would be very penal without the presence of insurance.[92] If we consider insurance to be the mode in which risk is transferred relationally between contractual parties, as Merkin and Steele do, we can understand the role it plays in shaping the tort

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[86] Clarke (n 18) 2–3.
[87] Lord Steyn, 'Perspectives of Corrective and Distributive Justice in Tort Law' (2002) 23 Irish Jurist 1.
[88] Steyn (n 87).
[89] For example, *Nettleship* (n 23).
[90] [1981] 1 QB 625.
[91] For example, *E v English Province of Our Lady of Charity* [2012] EWCA Civ 938, [2013] QB 722 at [52].
[92] Richard Lewis, 'Insurance and the Tort System' (2005) 25 Legal Studies 86.

system.[93] Kenneth Abraham believes the role of insurance in tort, at least in the US, promotes a cyclical phenomenon, where tort has increased the ubiquity of liability insurance, and the presence of liability insurance permits the expansion of tort.[94] Baker, again from a US perspective, looked specifically at different ways that insurance has shaped tort.[95] He stated that at times claimants will bring claims solely because of the defendant's access to insurance, which in turn limits the claim according to the insurance policy.[96] Baker argued that claims are often brought on this basis and has the effect of essentially capping damages, as claims rarely seek damages beyond those permitted in the policies;[97] this is evident when we look at the issue of 'blood money'.[98] This notion was also considered from a UK perspective which found something slightly different. It was argued that greater awards of damages will be made because of the 'widespread presence of insurance'.[99] Insurers, unless poorly managed, are in a position to manage the, sometimes, great sums awarded to victims.[100] A similar argument has also been made, again from a UK perspective, with cases that involve the insurance of properties.[101]

Arguments have also been made about the changing focus of tort law when dealing with negligence cases in the UK. Lord Denning was, as stated above, a strong advocate of insurance-based approaches to tort. Clarke contended that the UK courts at this time became concerned with the 'magnetic effect of money', and focused on who could best distribute the risk rather than who owed the duty of care.[102] This approach has been criticised elsewhere as it lacked justification or rationale.[103]
It has also been contended that the presence of insurance can affect the way that tort rules apply. Only very few cases proceed through the court system, which means that cases can

[93] Merkin and Steele (n 29) 19.
[94] See generally, Kenneth Abraham, *The Liability Century: Insurance and Tort Law from the Progressive Era To 9/11* (Harvard University Press 2008).
[95] See generally, Tom Baker, 'Liability Insurance as Tort Regulation: Six Ways That Liability Insurance Shapes Tort Law in Action' (2005) 12 Connetcicut Insurance Law Journal.
[96] Baker (n 95) 6–7.
[97] Baker (n 95) 6–7.
[98] Tom Baker, 'Blood Money, New Money, and the Moral Economy of Tort Law in Action' (2001) 35 Law & Society Review 275, See generally,.
[99] Cane and Goudkamp (n 39) 238.
[100] Cane and Goudkamp (n 39) 238.
[101] Cane and Goudkamp (n 39) 283.
[102] Clarke (n 18) 306.
[103] Allan Beever, *Rediscovering the Law of Negligence* (Hart 2007) 22.

often be determined by insurers who benefit from inequity in legal disputes.[104] Scholars also argue that insurance influences the law itself – transforming tort from complex rules to a 'rule of thumb' approach.[105] For example, tort has a complex set of rules for cases of rear-end automobile accidents, which requires an examination of the degree of care taken and the reasonableness of the defendant's conduct.[106] Whereas, in practice, often the defendant driver will automatically be liable.[107]

The actual influence of insurance in tort is controversial and has sparked a debate within the scholarship. Stapleton, for example, disagrees fundamentally with the role of insurance in tort and undermines its influence on the law of negligence.[108] It is her assertion that insurance has not expanded the law in any real or significant way, despite the belief of the scholars above, as tort and insurance respectively pursue two different aims; tort is concerned with restoration, and insurance is concerned with the socialisation of risk.[109] Stapleton also contended that insurance is inherently limited in its loss-spreading abilities, as it spreads losses within 'homogenous' risk pools and, because of this, is self-financed.[110] This means that it fails to promote necessary incentives which tort ultimately seeks to achieve in its deterrence capacity. In response to Stapleton, Merkin stated that Stapleton's work did not reflect the way that risk is pooled in insurance.[111] It is thought instead that risk is pooled much more heterogeneously, using tools such as reinsurance where the financial resources available to insurers are expanded to permit the acceptance of risks that may threaten the business.[112]

Stapleton also contended that insurance should not influence the tort system in any meaningful way as on the whole it would mark a retreat from any deterrence aims tort seeks to serve.[113] There is some agreement on this point, as it has been argued elsewhere that

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[104] Lewis (n 92) 87–88.
[105] Baker (n 95); Lewis (n 92) 89–90.
[106] Lewis (n 92) 89–90.
[107] Lewis (n 92) 89–90.
[108] See generally, Stapleton (n 25).
[109] Stapleton (n 25) 826.
[110] Stapleton (n 25) 821.
[111] Rob Merkin, 'Tort, Insurance and Ideology: Further Thoughts' (2012) 75 Modern Law Review 301.
[112] Merkin and Steele (n 29) 138–161.
[113] Stapleton (n 25) 820, 829–932.

insurance may in some ways dilute the deterrent effect of tort.[114] While this may be true, the use of deductibles does not shield tortfeasors from personal responsibility altogether.[115]

The loss-spreading capacity of insurers prompted theories of how tort should work in light of the presence of liability insurance. Priest, for example, in the development of enterprise liability theory, presented two principles.[116] The first, was the controlling of risk which was based on economic theories. The second, and more controversial, was based on risk distribution and insurance. The idea was that responsibility should fall on those best able to manage risk, for example those who have insured against the risk. This is at a stark contrast from theories considered earlier in this chapter which argued that the creators of risk should bear the burden of responsibility. In fact, Steele described this as 'the greatest retreat from individual responsibility'.[117] An approach such as this would necessarily require tort to radically transition into promoting distributive justice aims. Atiyah took a similar approach by arguing that the tort system currently fails in any distributive goals.[118] Atiyah suggested two different approaches at different times. The first suggestion was that risk should be socialised among individuals in society.[119] And the second was that there should be an adoption of a first-party insurance system which places the responsibility on all individuals to insure against risk which would make distribution much easier.[120]

Stapleton, in particular, strongly disagreed with this position and believed this would only enrich risk creators and would place an unfair burden on those who suffer from the materialised risk.[121] Morgan also highlighted that it can also distract from tort's other aims of corrective justice and personal responsibility.[122] However, there is widespread disagreement with these positions. It has been stated that insurance can promote personal

[114] Cane and Goudkamp (n 39) 412.
[115] Cane and Goudkamp (n 39) 416.
[116] George L Priest, 'The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law', (1985) 14 Legal Studies 461.
[117] Steele (n 4) 66.
[118] See generally, Patrick S Atiyah, 'Personal Injuries in the Twenty First Century: Thinking the Unthinkable' in Peter Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (OUP 1996).
[119] See generally, Atiyah (n 118).
[120] See generally, Patrick S Atiyah, *The Damages Lottery* (Bloomsbury 1997).
[121] Stapleton (n 25) 821.
[122] See generally, Jonathan Morgan, 'Tort, Insurance and Incoherence' (2004) 67 Modern Law Review 384.

responsibility to manage one's own affairs as it is grounded in notions of fraud and moral hazard.[123] It has also been contended that insurance promotes the more fundamental role of tort in corrective justice, as it better ensures that victims are compensated for the harm they suffer.[124] It is difficult to disagree with these assertions, as insurance can transform an individual from a straw person to a defendant.

2.5. Conclusion

This chapter has presented a definition of risk that the thesis will adopt. This definition comes from Merkin and Steele's work on insurance and obligations. They concluded that risk in tort can be allocated to a party based on a number of factors: (1) if the party has an insuring obligation, (2) if the party has a duty to indemnify another, or (3) if the party bears the burden of liability.[125] All of these factors might be relevant to the liability risks inherent to the service provision of research participants. This may be because they are subject to mandatory insurance rules or voluntarily opt to take out insurance policies in an attempt to shield themselves from the costs associated with liability, because they are obligated contractually to indemnify the platform if it is held liable for their actions, or if they are subject to a liability burden for their own actions. Inevitably, this means that financial risks associated with factors such as loss of earnings due to illness will not be included in the definition.

The chapter has also discussed the theoretical underpinnings of risk distribution in tort, as well as the assumptions that are made. For example, it has presented and discussed law and economics theories of tort which suggest that individuals are (1) aware of tort, and (2) respond to the threat of tort by altering their behaviour to avoid liability. It has also presented theories of insurance which argue that tort's function of risk distribution should be influenced by insurance. This thesis will test the some of the assumptions made by law and economics and insurance theorists by examining the extent to which research participants respond to liability risks thought to be inherent to their service provision, and

[123] Merkin and Steele (n 29) 30.
[124] Gary T Schwartz, 'The Ethics and Economics of Tort Liability Insurance' (1990) 75 Cornell Law Review 313.
[125] Merkin and Steele (n 29) 5.

the extent to which research participants feel it is necessary to insure themselves against such risks.

As discussed above, tort has capacities to distribute risk in service provision which it can exercise through specific doctrines. The next chapter will examine this in more detail, considering contexts where there is an injured employee or independent contractor, which may trigger the doctrine of employer's duties, and where there is an injured third party, which may trigger the doctrines of vicarious liability, direct and non-delegable duties.

Chapter 3 - Distribution of Risk in Tort

3.1. Introduction

This chapter will examine tort in its capacity to distribute risk in the world of service provision. The previous chapter examined different conceptions of risk, presented a definition which has been adopted for the purposes of the thesis, and examined some of the theoretical underpinnings of risk in tort. This chapter will examine the distribution of risk in tort through its core doctrines concerning service provision. These doctrines cover situations where third parties have been injured by a service provider (e.g., the doctrines of vicarious liability, direct, and non-delegable duties) and where the service provider has been injured (e.g., employer's duties of care), and ultimately may be disrupted by the rise of the gig economy. The chapter will consider the development of these doctrines and will analyse the law in its current capacity. Chapter 4, which immediately follows, will examine the assumptions made by legal doctrine when distributing risk using these mechanisms and will examine the effect that the gig economy may have on these assumptions.

The remainder of this chapter is broken down into four key sections. Section 3.2. examines how risk is distributed in employment relationships more generally. Section 3.3. discusses how risk is distributed in the context of vicarious liability and how the law has developed, at times controversially, in this sphere. Section 3.4. will examine the development of direct duties, and the fourth will discuss non-delegable duties, and section 3.5. will discuss the employer's duties of care.

3.2. Risk and Employment

The previous chapter has examined conceptions of risk, specifically with respect to tort law. This thesis is concerned with risk in tort law in the context of service provision. As previously discussed, tort has specific capacities to distribute risk in this context.[1] It can do so through

[1] Tort has been referred to as a risk regulator. See, Jenny Steele, *Tort Law: Text, Cases, and Materials* (3rd edn, OUP 2014) 1.

the various doctrines in its armoury, including vicarious liability, non-delegable duties and direct duties owed to third parties, and employer's duties to its employees.

When distributing risk in service provision, the concept of employment is significant, as, generally speaking, risk is distributed according to employment status.[2] Employees, for example, are less likely to bear the burden of risk than independent contractors. The notion of employment has been grappled with by the courts and the scholarship for a long time. It has also been necessarily adapted over time to reflect the evolving nature of labour relations, as what was once true in the nineteenth century can no longer be said to be true now; these developments will be discussed in sections 3.3., 3.4., and 3.5.

For a time, the concept of employment for a multitude of purposes was aligned, despite pursuing different policy purposes.[3] It was the same for vicarious liability, health and safety, employment status, national insurance, and tax purposes, as well as others.[4] Initially, the test of employment was developed for vicarious liability purposes, but now it is 'vital more generally since, for example, only employees qualify for benefits, employment protection rights, protection of wages on their employer's insolvency, the benefit of their employer's common law duty of care, and protection under the health and safety legislation.'[5] The tests for determining employment are also no longer the same;[6] these tests will be discussed in more detail in Chapter 4. This is important for the purposes of this chapter, which will examine the ways in which the tests of employment for tort's doctrines differ.

[2] There is a trite law distinction between employees and independent contractors for the purposes of vicarious liability. This was confirmed in *Barclays Bank plc v Various Claimants* (*Barclays*) [2020] UKSC 13, [2020] AC 973 at [7]. Duties of care which are often owed by an employer to its employees can be derived from legislation, for example through the Health and Safety at Work Act (HSWA) 1974, or at common law, see *Wilsons v Clyde Coal* [1937] UKHL 2.
[3] Simon Honeyball, *Honeyball & Bowers' Textbook on Employment Law* (14th edn, OUP 2016) 26.
[4] *E v English Province of our Lady of Charity and another* (*JGE*) [2012] EWCA Civ 938; [2013] QB 722 at [25]-[26].
[5] Honeyball (n 3) 25–26.
[6] It was confirmed in *JGE* (n 4) at [58]-[59] that vicarious liability would depart from the approach taken in other spheres of law. Instead vicarious liability would require that the defendant and tortfeasor were in a relationship that was sufficiently 'akin to employment'.

3.3. Vicarious Liability

The doctrine of vicarious liability refers to the imposition of secondary strict liability onto one party for the torts of another.[7] Liability is usually imposed onto the employer for the torts of an employee, provided the tort is not committed outside of the ordinary course of employment.[8] The doctrine is controversial as it runs contrary to the generally agreed principles of tort, that an individual is responsible for their own actions and should remedy the harm they cause to others, therefore there needs to be sufficient justification for its imposition.[9] Vicarious liability offers another option to claimants, by increasing 'the number of possible defendants to the claimant's action and thus increases the possibility of finding a solvent or insured defendant.'[10]

There are different understandings of which theoretical conceptions underpin the doctrine. For example, it is possible that vicarious liability promotes a deterrence or incentive effect on employers.[11] As seen in Chapter 3, there is some evidence which suggests that companies are aware of the threat of tort which can influence behaviour. However, to the author's knowledge, the empirical effect of vicarious liability has not been tested. Other scholars believe the doctrine is grounded in principles of corrective justice, as it has expanded to respond to situations where victims have been very deserving of compensation and there was no other avenue of recourse, for example with victims of historic sexual abuse.[12] We could refer to vicarious liability as being a product of 'rough justice', predicated on its piecemeal responses.[13] The chapter which immediately follows will discuss these theoretical underpinnings in greater detail, including the doctrines of control, integration, enterprise liability, and theories of deterrence, deeper pockets, loss spreading, distributive and corrective justice.

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[7] Patrick S Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths 1967) 1.
[8] Although liability can be imposed onto a principal for the liability of agents, among other categories. See, Thomas Baty, *Vicarious Liability: A Short History of the Liability of Employers, Partners, Associations and Trade-Union Members, with a Chapter on the Laws of Scotland and Foreign States* (The Clarendon Press 1916) 7–14.
[9] Atiyah (n 7) 12; Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (CUP 2010) 1.
[10] Phillip Morgan, 'Recasting Vicarious Liability' (2012) 71 Cambridge Law Journal 615, 617; Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (n 9) 1.
[11] See, Jenny Steele, *Tort Law: Text, Cases, and Materials* (5th edn, OUP 2022) 609; John G Fleming, *The Law of Torts* (9th edn, LBC Information Services 1998).
[12] This will be discussed in greater detail in this chapter and the next. It also raises issues of whether the tort belongs to the master or the servant.
[13] See the judgment of Lord Pearce in *ICI Ltd v Shatwell* [1965] 656, 685.

Once it has been established that an actionable tort has been committed, two stages of enquiry must be satisfied for the imposition of vicarious liability.[14] The first stage of enquiry refers to the relationship between the tortfeasor and the defendant – this must be sufficiently close to trigger the doctrine and is usually one of employment. The second stage of enquiry requires there to be a sufficiently close connection between the relationship established in stage one and the tort committed. If both stages are satisfied, then it will be fair, just, and reasonable to impose liability on the defendant. Both stages have been subject to recent and controversial expansion. The following subsections will track these developments in detail.

As stated above, the liability imposed onto an employer is strict and secondary in nature, as it is the employee's tort that triggers the doctrine, not the employer's. It is generally accepted that the courts historically constructed the liability on the basis that it was the 'master's tort', rather than the employees.[15] This was due to doctrines such as the maxim, '*facit per alium per se*'[16] which attribute the tort to the employer.[17] However, modern judgments of vicarious liability suggest that this approach is no longer the most appropriate.[18]

3.3.1. Stage One

As discussed above, stage one of the enquiry refers to the relationship between the tortfeasor and the defendant. This is typically a relationship of employment, although liability can be imposed on a principal for the activities carried out by its agent. For the purposes of this thesis, however, the focus will be on the relationship of employment and the role of the independent contractor. Traditionally, the law on vicarious liability has been focused on a dichotomy between employees and independent contractors.[19]

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[14] Atiyah (n 7) 1.
[15] Warren Swain, 'A Historical Examination of Vicarious Liability: A "Veritable Upas Tree"' (2019) 78 Cambridge Law Journal 640, 642; Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (n 9) 13; Robert Stevens, *Torts and Rights* (OUP 2007) 266.
[16] She who acts through another does the act herself.
[17] Robert Stevens, 'A Servant of Two Masters' (2006) 122 Law Quarterly Review 207.
[18] *Staveley Iron and Chemical Co v Jones* [1956] AC 627; *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656.
[19] Phillip Morgan, 'Vicarious Liability on the Move' (2013) 129 Law Quarterly Review 139.

The notion of employment for vicarious liability was historically premised on the master and servant relationship.[20] This was reflective of a time where the employer, or 'master', had greater oversight over the work of the employee.[21] They often possessed a greater skill level than the employee, which further facilitated the control that they were able to exercise.[22] It was on these assumptions that the test of control prevailed as the primary method of determining an individual's employment status for many years.[23] As discussed above, at this time there was an accepted understanding of employment for multiple purposes. This meant that an individual was an employee for the purposes of employment law, tax, and vicarious liability. The tests to determine whether an individual was an employee were also the same.

This is not the case anymore. Following *E v English Province of our Lady of Charity and another* (*JGE*), vicarious liability developed its own separate understanding of employment, due to the pursuance of different policy purposes.[24] In addition, the Court of Appeal held that a person need only find themselves in a relationship that is 'akin to employment', expanding the doctrine to account for instances where a person was not an employee for other purposes.[25] This not only accounted for the changing nature of employment relations, but also permitted the doctrine to respond to situations where it may be seen to be unconscionable for the law to respond, for example in instances of deplorable sexual abuse where the claimants have no other mode of recourse.

In *Catholic Child Welfare Society v Various Claimants* (*CCWS*), the first Supreme Court decision post *JGE*, Lord Phillips upheld the transition to akin to employment, and stated that vicarious liability was 'on the move'.[26] Lord Phillips also stated policy incidents that make it fair, just, and reasonable to impose the doctrine on an employer for the torts of another.

[20] Anthony Gray, *Vicarious Liability: Critique and Reform* (Hart 2018) 9.
[21] Christopher Walton and others (eds), *Charlesworth & Percy on Negligence* (15th edn, Sweet & Maxwell 2022) para [7-19].
[22] Christian Witting, *Street on Torts* (16th edn, OUP 2021) para 608.
[23] See chapter 4 for a further discussion on this point.
[24] *JGE* (n 4).
[25] *JGE* (n 4) at [58]-[59].
[26] [2013] UKSC 56, [2013] 2 AC 1, 20 at [19].

> (i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability; (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer; (iii) the employee's activity is likely to be part of the business activity of the employer; (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort being committed by the employee; (v) the employer will, to a greater or lesser degree, have been under the control of the employer.[27]

The policy reasoning stated by Lord Phillips relies on notions of deeper pockets, integration, enterprise liability, and control. These theories have formed part of the reasoning for vicarious liability in the Anglo-Welsh case law, in the case law of other jurisdictions, and the scholarship long before *CCWS*. A further discussion on these incidents will be carried out in Chapter 4.

The idea of bringing together multiple justifications is not a new concept. Atiyah in 1967 suggested that justifications may be 'sought in many considerations.'[28] This may be where a single justification 'taken by itself may be a sufficient reason for the principle, but the combined effect of all of them may be overwhelming.'[29] Control, for example, is no longer thought to be capable of determining employment on its own. However, taken together with other factors, high levels of control may still be suggestive of employment.[30] The idea of a multi-factorial approach is a sensible one, as no single justification has proven to provide adequate reasoning for the imposition of liability. However, the idea has been subject to criticism. Stevens suggested that applying justifications that alone could not justify the imposition of the doctrine as though they are 'ingredients' is insufficient, and instead there should be one prevailing theory.[31] To date, it does not seem that this ambition has been achieved.

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[27] *CCWS* (n 26) 15 at [35].
[28] Atiyah (n 7) 15.
[29] Atiyah (n 7) 15.
[30] This can be seen by examining the judgment in *Armes v Nottinghamshire County Council* [2017] UKSC 60, [2018] AC 355.
[31] Stevens (n 15) 259.

This is clear when we turn to the decision in *Cox v Ministry of Justice*[32] in the Supreme Court just four years after *CCWS*. The case concerned a prisoner working in a prison kitchen who injured a third party during the course of their work. The Supreme Court held that the tortfeasor was sufficiently akin to an employee to justify the imposition of vicarious liability on the defendant, despite in all likelihood them not being an employee for the purposes of employment law. This case continued the expansion of vicarious liability, with Lord Reed responding to Lord Phillip's comments in *CCWS* by stating that the expansions had 'not come to a stop'.[33]

Lord Reed cited the policy factors started by Lord Phillips in *CCWS* with approval, ostensibly confirming that vicarious liability is a multifactorial policy-driven doctrine.[34] In applying the policy factors, Lord Reed also placed different weights on them, holding that notions of control and deeper pockets were of less relevance than the remaining three.[35] By this stage, control being a less significant factor in determining a person's employment status was already well-established by the courts; this will be discussed in further detail in Chapter 4.[36] However, there is not the same agreement on this point in the scholarship. Morgan, for example, argued that control can still be relevant in a modern employment context as even if the employer does not have the ability to control an employee's work, more importantly they retain the power to do so if they wish.[37] The same most likely could not be said for a principal over the work of an independent contractor.[38] The same sentiment is echoed in the work of Watts.[39]

By placing weight on the policy factors of control and deeper pockets, Lord Reed may have unnecessarily complicated the doctrine because these factors are still of importance. Not only that but the very purpose of the multifactorial approach was that alone these factors could not justify the imposition of vicarious liability but together they could, so placing

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[32] *Cox* [2016] UKSC 10, [2016] A.C. 660.
[33] *Cox* (n 32) 666 at [1].
[34] *Cox* (n 32) 679 at [20].
[35] *Cox* (n 32) 679 at [21]-[22].
[36] Cases concerning the liability of hospitals on surgeons support this point well. For example, *Gold v Essex County Council* (*Gold*) [1942] 2 K.B. 293 *Cassidy v Ministry of Health* (*Cassidy*) [1951] 2 KB 343.
[37] Morgan, 'Recasting Vicarious Liability' (n 10) 675.
[38] Morgan, 'Recasting Vicarious Liability' (n 10) 675.
[39] Peter Watts, 'The Travails of Vicarious Liability' (2019) 135 Law Quarterly Review 7, 9–10.

weight on individual factors seems superfluous. Further, Silink and Ryan suggested caution in applying the factors as a 'rigid test', as there is a 'risk of losing sight of important qualifications recognised by the courts', especially in *Cox.*[40]

As discussed above, it was established in *Cox* that the factor of deeper pockets could also not solely justify the imposition of vicarious liability.[41] This point is not disputed in this thesis. However, it is clear that the effect of the doctrine's mere existence provides claimants with an additional defendant who in many cases will be solvent or will have insured against the risk, thus providing a mode of recourse that may otherwise be unavailable. It has been said that vicarious liability is only of 'practical relevance in situations where (1) the principal tortfeasor cannot be found or is not worth suing, and (2) the person sought to be made vicariously liable is able to compensate the victim of the tort.'[42]

It cannot be denied that one of the very fundamental principles of tort law is that a claimant should be duly compensated for the harms they suffer, and this often means putting them back into the position they would have otherwise been in had the tort not been committed.[43] Vicarious liability allows claimants to achieve this when the tortfeasor is impecunious although it does so by placing the burden of liability on an, often, innocent party. A large portion of the cases we have seen at appellate level that have triggered the expansion of vicarious liability have unfortunately been cases involving sexual abuse.[44] In such instances, vicarious liability has often been viewed as the most appropriate doctrine to respond. Whilst not expressly stated as reasoning by the courts, it is possible that the doctrine has been expanded to ensure that these claimants were sufficiently compensated for the very serious harms they suffered and to ensure that the basic principle of remedying a wrong is achieved.

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[40] Allison Silink and Desmond Ryan, 'Vicarious Liability for Independent Contractors' (2018) 77 Cambridge Law Journal 458, 460.
[41] Stevens (n 15) 258 'However, this fails to explain why this particular employer, rather than another body with an equally deep or deeper pocket, should compensate the claimant. If taken seriously, this rationale collapses into an argument that in order to ensure compensation, liability for losses should be imposed upon the deepest pocket of all: the state.'
[42] *Armes* (n 30) at [63].
[43] Steele (n 1) 1.
[44] For example, *JGE* (n 4); *CCWS* (n 26); *Armes* (n 30); *Barclays Bank* (n 2); *Lister* [2001] UKHL 22, [2002] 1 AC 215.

This point was exacerbated in *Armes v Nottinghamshire County Council* (*Armes*).[45] This case concerned sexual abuse perpetrated by foster carers to foster children. The claimants brought an action against the local authority who selected, trained, and had oversight over the foster carers. Lord Reed gave the court's majority judgment and applied the policy factors to the instant case.[46] Despite stating that control was of less importance than other policy factors only one year prior in *Cox*, Lord Reed closely applied the test of control to the facts.[47] The foster carers were subject to checks by the local authority before being permitted to foster children, were subject to regulations, and were subject to regular home. Furthermore, it 'was explained that a number of aspects of the lives of children in foster care were decided by the local authority, reflecting the fact that it was the local authority, not the foster parents, which possessed parental powers in relation to the children.'[48] It was also emphasised that the extent to the control that was present in *Armes* would not be required for vicarious liability generally as this level of control would not often be found in other contexts.[49] Similar arguments were made in the literature even before the handing down of *CCWS*.[50]

The issue of control is this case was of central importance. Evidently, it was a determining factor in imposing the doctrine on the local authority. This is surprising given just one year earlier in *Cox*, Lord Reed discounted the importance of control holding that it was one of the least significant policy factors. The law post-*Armes* was quite confused as it was unclear how significant control was to the enquiry, but it was clear the expansion was continuing.[51]

The most recent Supreme Court judgment on vicarious liability came in *Barclays Bank plc v Various Claimants* (*Barclays*).[52] The case concerned prospective employees of the Bank who underwent medical examinations carried out by a doctor in his home. The doctor sexually

[45] *Armes* (n 30).
[46] *Armes* (n 30) at [77].
[47] *Armes* (n 30) at [62].
[48] *Armes* (n 30) at [62].
[49] *Armes* (n 30) at [64].
[50] Phillip Morgan, 'Ripe for Reconsideration: Foster Carers, Context, and Vicarious Liability' (2012) 20 Torts Law Journal 110.
[51] Andrew Bell, '"Double, Double Toil and Trouble": Recent Movements in Vicarious Liability' (2018) 4 Journal of Personal Injury Law 235, 239.
[52] *Barclays* (n 2).

assaulted the prospective employees during the medical examinations. The doctor was not an employee of the Bank and conducted medical examinations for other organisations. His only connection to the Bank was the fact that the examinations were arranged through the Bank, and he was required to complete a report on Barclays Bank headed paper. The court of first instance and the Court of Appeal held the Bank vicariously liable for the actions of the doctor, but the Supreme Court did not agree with the assessment carried out.

Lady Hale, giving the Court's sole judgment, held that the lower courts had misinterpreted the test for vicarious liability.[53] Even though the doctrine had expanded at the hands of the Supreme Court in recent years, vicarious liability was still not capable of responding to the torts of true independent contractors.[54] Lady Hale stated that the key test to turn to was as set out by Lord Reed in *Cox*,[55] that vicarious liability can respond where the tortfeasor does 'carry on activities assigned to him by the defendant as an integral part its operation and for its benefit' and where the defendant has created the risk that the tort will be committed. It is incapable of responding to activities which are 'entirely attributable to the conduct of a recognisably independent business of his own or of a third party'.[56] This was said to be the case for the doctor in *Barclays*.

The relevance of the policy factors was more limited than had been appreciated by the lower courts. According to Lady Hale, the policy factors were only to be turned to where the answer to the questions stated above were unclear.[57] In the case of *Barclays*, it was evident that the doctor was a true independent contractor carrying out activities for his own benefit, therefore there was no need to consult the policy factors in this case. Lady Hale seemed to suggest that the lower courts in *Barclays* had overstated the importance of the policy factors and were too quick to apply them. This was surprising given the close application of the factors in previous Supreme Court judgments only a few years prior. Lady Hale explained this

[53] *Barlcays* (n 2) 983-4 at [16].
[54] *Barclays* (n 2) 987 at [27].
[55] *Cox* (n 32) 671 at [24].
[56] *Barclays* (n 2) 984-6 at [21]-[24].
[57] *Barclays* (n 2) 987 at [27].

away with a close analysis of these cases by stating that the answer to Lord Reed's questions were unclear, so it was necessary to turn to the factors in those cases.[58]

It is believed that this was a clear attempt to rein in the expansions and bring an end to the doctrine being 'on the move'. In some ways, it was a positive step that the Supreme Court have brought some coherence to the doctrine by putting forward a test that can be applied in future cases. However, it was unfortunate that it did not respond in the circumstances, as the claimants clearly deserved compensation for the serious harm they suffered; the difficulty in this case lied with who ought to provide that remedy, though. In *Barclays* this was the claimants only mode of recourse as the doctor had died and his estate had already been distributed, although Purshouse argued that there may have been an option for the claimants to pursue a claim against the bank for breach of non-delegable duties.[59]

It is unclear whether *Barclays* will bring an end to the expansions, though. As the courts are still able to turn to the policy incidents where the primary test cannot be answered with certainty, this may permit novel work arrangements, such as the gig economy, to be covered by the doctrine.[60] This, according to Lady Hale, is possible because the doctrine of vicarious liability is not aligned with employment law when considering the notion of employment; this guarantees vicarious liability greater flexibility when determining whether an individual is in a relationship that is sufficiently akin to employment.[61] However, cases that have reached appellate level post-*Barclays* seem to have respected Lady Hale's signals to rein in the expansion and have sought to first apply the key test before turning to the policy factors.[62] In *JXJ v Province of Great Britain of the Institute of Brothers of the Christian Schools*, for example, the High Court dismissed the claim that a religious organisation could

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[58] *Barclays* (n 2) 983-987 at [17]-[26].
[59] Craig Purshouse, 'Halting the Vicarious Liability Juggernaut: Barclays Bank Plc v Various Claimants' (2020) 28 Medical Law Review 794, 800.
[60] *Barclays* (n 2) 988 at [29].
[61] *Barclays* (n 2) 988 at [29].
[62] *Hughes v Rattan* (*Hughes*) [2022] EWCA Civ 107, [2022] 1 W.L.R. 1680; *JXJ v Province of Great Britain of the Institute of Brothers of the Christian Schools* (*JXJ*) [2020] EWHC 1914 (QB); [2020] 7 WLUK 293. Other post-*Barlcays* cases of relevance include *TVZ v Manchester City Football Club Ltd* [2022] EWHC 7; *SKX v Manchester City Council [2021] EWHC 782*; *MXX v A Secondary School* [2022] EWHC 2207; *Kennedy v Bonnici* [2021] CSOH 106.

be vicariously liable for the sexual abuse carried out by a school teacher.[63] As Giliker notes, while the facts of the case are similar to that of *CCWS*, there is a 'crucial difference': the tortfeasor had no religious affiliation, and the religious organisation had control over the operations of the school, but not the work of the teachers.[64]

Further, in *Hughes v Rattan* (*Hughes*), where it was determined whether the owner of a dentists' practice could be vicariously liable for the negligent acts of other dentists working in the practice, the Court of Appeal sought to provide some guidance on the importance of the tortfeasor carrying out 'recognisably independent business' on her own account.[65] Bean LJ held that this was not the key test for vicarious liability. While 'recognisable' in the ordinary sense might mean someone with 'no knowledge of the contractual arrangements', in reality this was not what the Supreme Court meant in the post-*Cox* cases.[66] If this was the test, Bean LJ stated he would have had no choice but to impose vicarious liability for the negligent acts as to third parties it would have appeared that these individuals were part of the business, rather than in business on their own account. However, he was permitted to turn to whether it would be reasonable to suggest that the dentists were in a relationship analogous to employment with the dentist practice, which on the facts he could not come to a positive conclusion.[67] This connotes that the courts post-*Barclays* are decelerating the previous rapid expansions outlined above.

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[63] *JXJ* (n 62).
[64] Paula Giliker, 'Can the Supreme Court Halt the Ongoing Expansion of Vicarious Liability: Barclays and Morrison in the UK Supreme Court?' (2021) 37 Professional Negligence 55, 61.
[65] *Hughes* (n 62).
[66] *Hughes* (n 62) 1705 at [88].
[67] *Hughes* (n 62). Bean LJ 1705 at [89] highlighted nine factors which suggested the dentists were not in a relationship that was analogous to employment: '(1) The Associate Dentists were free to work at the Practice for as many or as few hours as they wished; (2) They were also free to work for other practice owners and businesses, and some in fact did so; (3) The defendant had no right to control, and did not control, the clinical judgments they made or the way in which they carried out treatment; (4) They chose which laboratories to use and shared the cost of disbursements to laboratories; (5) They were responsible for their own tax and national insurance payments, and were treated as independent contractors by HMRC; (6) Although the defendant took most of the financial risk by virtue of running the premises and paying ancillary staff, they shared the risk of bad debts; (7) They were required to carry personal professional indemnity insurance and to indemnify the defendant against any claims made against him in respect of their treatment of patients; (8) They had to pay for their own professional clothing and professional development, and for any equipment they wished to use which was not provided by the Practice; (9) There was no disciplinary or grievance procedure.'

This trend continues when we examine *Blackpool Football Club Ltd v DSN*, where the Court of Appeal held that the football club was not vicariously liable for the sexual abuse perpetrated by a volunteer.[68] Griffiths LJ based this decision on the fact that the volunteer carried out his work 'with a degree of independence and lack of control by the club'.[69] This is a startling difference to Bean LJ's approach in *Hughes* which considered in detail whether the dentists were in business on their own account or in a relationship analogous to employment.

Further disparity appears when we examine *Trustees of the Barry Congregation of Jehovah's Witnesses v BXB*, now on appeal to the Supreme Court.[70] The case concerned whether vicarious liability could be imposed on a religious group for the actions of one of its elders. Davies LJ focused upon the question as to whether the elder's activities formed an integral part of the business of the group.[71] Similarly, the approach taken here is rather different from that in *Hughes*, and it appears that the post-*Barclays* landscape is not as cogent as was perhaps intended.

Stage two of the enquiry has also been subject to significant expansion, which has been subject to controversy in the scholarship. The subsection which immediately follows will discuss this in further detail.

3.3.2. Stage Two

As discussed above, stage two of the enquiry for vicarious liability refers to the connection between the relationship of the tortfeasor and the defendant identified in stage one and the tort committed. Historically, there has been a requirement for the tort committed to be sufficiently close to the employment, and this position was to be distinguished from employees being on a frolic of their own.[72] In 1907, the 'influential'[73] John Salmond

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[68] (*Blackpool*) [2021] EWCA Civ 1352.
[69] *Blackpool* (n 68) at [137].
[70] (*BXB*) [2021] EWCA Civ 356, [2021] 4 WLR 42.
[71] *BXB* (n 70) at [78].
[72] David Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 1999) 182.
[73] Gray (n 20) 31.

developed a framework to be adopted at stage two.[74] He stated that the tort committed should be either (a) an act that has been authorised by the employer or (b) an unauthorised act that is so close to the employment that it can be conceived as being 'a mode' of the employment.[75] This formulation was adopted by the courts and applied to circumstances where the employee negligently performed their activities,[76] and some instances of intentional torts,[77] but not for sexual abuse. It was thought that sexual abuse was too 'far removed from an unauthorised mode' to justify the imposition of liability.'[78]

Salmond's formulation provided a clear but narrow framework for the courts to work from. However, the serious problem of child sexual abuse, as discussed in section 3.3.1., was challenging to account for. It would likely never be an authorised act, and there are limited circumstances where it would be so close to the employment that it would be a mode. Just as it did for stage one of the enquiry, the law needed to be adapted to provide an adequate response. *Lister v Hesley Hall* (*Lister*) is one of the first examples of an English expansion at stage two.[79]

Lister concerned a warden who was employed at a boarding school for boys and was responsible for day-to-day management of the school. He organised their daily activities and oversaw their care both inside and outside of school hours. During this time, the warden sexually abused several of the schoolboys, abusing his position of authority. The House of Lords held that the school was vicariously liable for the actions of the warden. Stage one was not in question as the warden was an employee of the school. However, stage two was. Lord Steyn summarised that

> The question is whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable. On the facts of the case the answer is yes. After all, the sexual abuse was inextricably

[74] Sir John W Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (Stevens & Haynes 1907) 83.
[75] Salmond (n 74) 83.
[76] For example, *Rose v Plenty* [1976] 1 WLR 141.
[77] For example, *Lloyd v Grace, Smith & Co* [1912] AC 716.
[78] *Trotman v North Yorkshire County Council* [1999] LGR 584 at [23].
[79] *Lister* (n 44).

> interwoven with the carrying out by the warden of his duties in Axeholme House. Matters of degree arise. But the present cases clearly fall on the side of vicarious liability.[80]

The judgment in *Lister* tested the elasticity of the Salmond formulation.[81] Lord Steyn held that it was not necessary to consider limb (b) of the Salmond test, as vicarious liability was possible 'on the basis that the employer undertook to care for the boys through the services of the warden and that there is a very close connection between the torts of the warden and his employment.'[82] This brought about a new test for stage two of vicarious liability that was one of close connection and meant that vicarious liability could be imposed in cases concerning child sexual abuse. Lord Clyde expanded on this test by stating that 'there must be some greater connection between the tortious act of the employee and the circumstances of his employment than the mere opportunity to commit the act which has been provided by the access to the premises which the employment has afforded'.[83] However, it has been noted that no precise criteria was given,[84] and that this vagueness makes it 'very hard to tell when exactly an employee will be held to have committed a tort in the course of his employment.'[85]

The House of Lords also sought guidance from the courts outside of England and Wales, in particular the judgments in *Bazley v Curry* (*Bazley*)[86] and *Jacobi v Griffiths* (*Jacobi*)[87] heard in the Supreme Court of Canada (SCC). In *Bazley*, the SCC held that a children's non-profit organisation that provided residential care to children was vicariously liable for the sexual abuse carried out by an employee. The question was whether the acts were close enough to the employment to justify the imposition of liability. In this case, McLachlin J, as she then was, developed the policy rationale of enterprise liability and held that the 'employment must not only provide the locale or the bare opportunity for the employee to commit his or

[80] *Lister* (n 44) 230 at [28].
[81] *Mohamud v WM Morrison Supermarket plc* [2016] UKSC 11, [2026] AC 677, 691 at [39].
[82] *Lister* (n 44) 227 at [20].
[83] *Lister* (n 44) 235 at [45].
[84] Lord Hope, 'Tailoring the Law on Vicarious Liability' (2013) 129 Law Quarterly Review 514.
[85] Nicholas J McBride and Roderick Bagshaw, *Tort Law* (5th edn, Pearson Education Limited 2015) 900.
[86] *Bazley* (1999) 174 DLR (4th) 45, [1999] 2 SCR 534 (SCC).
[87] *Jacobi* (1999) 174 DLR (4th) 71, [1999] 2 SCR 570 (SCC).

her wrong, it must materially enhance the risk, in the sense of significantly contributing to it, before it is fair to hold the employer vicariously liable.'[88] In *Bazley,* leaving the employee alone with the children for extended periods of time, allowed the employee to create a situation of power over the children which materially enhanced the risk.

In *Jacobi*, the SCC held that a children's club could not be held vicariously liable for the sexual abuse perpetrated by an employee, as the events took place outside of working hours in the employee's home. Aligning with the judgment in *Bazley*, the SCC stated that the employment must not only provide the opportunity for the tort to be committed, and there should instead be a consideration of policy rationales, such as the material enhancement of risk seen in *Bazley*.[89] The House of Lords in *Lister* drew upon the judgments in *Bazley and Jacobi* which is telling.[90] It may suggest that the close connection to the tort arises from the fact that the employer created or materially enhanced the risk of the tort being committed. This is certainly a development to the Salmond formulation. In fact, Cane stated that 'the close connection test [was] a genuine advance on the unauthorised conduct/unauthorised mode distinction.'[91]

The close connection test developed in *Lister* was closely applied in the case of *Dubai Aluminium Co Ltd v Salaam and Others* (*Dubai Aluminium*).[92] Lord Nicholls restated the test that, 'where the actions of the tortfeasor are not authorised: is the conduct of the tortfeasor so closely connected with the acts that are authorised that it may 'fairly and properly' be regarded as being within the course of employment?'[93] Lord Nicholls also relied on similar policy factors to those articulated in *Bazley* and *Jacobi* which related to the creation or enhancement and risk. He held that the 'underlying legal policy is based on the recognition that carrying on a business enterprise necessarily involves risks to others… When those risks ripen into loss, it is just that the business be responsible for compensating the person who is

[88] *Bazley* (n 86) 558-559 at [40].
[89] *Jacobi* (n 87) 586 at [21].
[90] Lord Millett noted that the judgments provided 'many helpful insights into this branch of the law and from which I have derived much assistance' in *Lister* (n 44) 245 at [70].
[91] Peter Cane, 'Vicarious Liability for Sexual Abuse' (2000) 116 Law Quarterly Review 21, 24.
[92] *Dubai Aluminium* [2002] UKHL 48, [2003] 2 AC 366.
[93] *Dubai Aluminium* (n 92) 377 at [23].

wronged.'[94] This policy reasoning was used as justification to impose liability for actions which are not authorised by employers, and claimed that it is 'fair to allocate risk of losses thus arising to the businesses rather than leave those wronged with the sole remedy, of doubtful value, against the individual employee who committed the wrong.'[95]

The next decision to be heard in the Supreme Court was *Mohamud v Wm Morrison Supermarket plc* (*Mohamud*).[96] *Mohamud* concerned whether a supermarket could be vicariously liable for its employee, Mr Khan, who worked in its petrol kiosk and committed a racially motivated battery. The claimant in this case came into the kiosk seeking to print documents from a USB stick. Mr Khan shouted at the claimant, using racially abusive language, and demanded that the claimant leave. The claimant subsequently left the kiosk and returned to his vehicle. Mr Khan followed the claimant and violently attacked him, demanding that he never return to the premises. Lord Toulson delivered the lead judgment in this case and held that the supermarket was vicariously liable for Mr Khan's actions. This was possible by considering the functions of Mr Khan's activities 'broadly',[97] which permitted a finding that such activities were sufficiently connected to his torts. Lord Toulson suggested that Mr Khan's actions formed an 'unbroken sequence of events'.[98]

The decision in *Mohamud* sparked a lot of controversy in the scholarship. Lord Toulson justified the conclusion that the actions of Mr Khan formed an 'unbroken sequence of events' on the basis that he did not metaphorically remove his uniform in that time and that by demanding the claimant leave his employer's premises he was purporting to act in furtherance of his employer's business.[99] Ryan correctly noted that Lord Toulson did not overtly state that this was a departure or expansion of the close connection test developed in *Lister*, but on the 'factual matrix of Mohamud, it is very hard to see how there is anything more than an opportunity provided by the employer, such that the Lister qualifications on

[94] *Dubai Aluminium* (n 92) 377 at [21].
[95] *Dubai Aluminium* (n 92) 377 at [22].
[96] *Mohamud* (n 81).
[97] *Mohamud* (n 81) 693 at [44].
[98] *Mohamud* (n 81) 693 [47].
[99] *Mohamud* (n 81) 694 at [47].

this point seem to have been effectively (albeit tacitly) jettisoned.'[100] This is a fair assessment, as *Mohamud* seemed to have significantly widened stage two of vicarious liability, and the language used mirrored causal and temporal language.

Bell also rightly questioned the logic of Lord Toulson when stating that Mr Khan was purporting to act in the interests of his employer's business.[101] He stated it introduced an 'awkwardness', as the aims of Mr Khan seemed to be purely personal.[102] The effect of the judgment is relatively confusing, and the burden of interpretation was left to the lower courts.[103] It was said to have created a 'forensic lottery',[104] and the likely effect of the judgment was that it eroded the notion that an employer would not be liable for the actions of an employee on a frolic of their own. The High Court of Australia (HCA) were particularly critical of the judgment in *Mohamud* and rejected its approach in *Prince Alfred College Inc v ADC* (*Prince Alfred College*), due to the ostensible change in the law requiring the link between the tort and the employment to be one of a causal and temporal connection .[105] The HCA instead required that there be something significant about the position of the employee, for example that their employer placed them in a position of power or authority so that it provided 'the occasion' for the tort to be committed.'[106]

The judgment in *Mohamud* created confusion not only to scholars but also to the lower courts in England and Wales. This can be seen in the most recent Supreme Court case of *Wm Morrison Supermarkets plc v Various Claimants* (*Morrisons*).[107] In *Morrisons*, the Supreme Court held that an employer was not vicariously liable for a person employed in its organisation as an auditor who disclosed the personal information of its employees online. The employee had been assigned to collate and distribute this data to an external auditing

[100] Des Ryan, '"Close Connection" and "Akin to Employment": Perspectives on 50 Years of Radical Developments in Vicarious Liability' [2016] Irish Jurist 239, 248–249.
[101] Andrew J Bell, 'Vicarious Liability: Quasi Employment and Close Connection' (2016) 32 Professional Negligence 153, 156.
[102] Bell (n 101) 156.
[103] Phillip Morgan, 'Certainty in Vicarious Liability: A Quest for a Chimaera?' (2016) 75 Cambridge Law Journal 202, 205.
[104] Julian Fullbrook, 'Mohamud v WM Morrison Supermarkets Plc: Personal Injury - Torts - Employment Assault' (2016) 2 Journal of Personal Injury Law 69, 72.
[105] *Prince Alfred College* (2016) 258 CLR 134 (HCA).
[106] *Prince Alfred* College (n 105) 159 [80].
[107] *Morrisons* [2020] UKSC 12, [2020] AC 989.

company before making the disclosures. The Court heard that he made such disclosures to harm his employer after being subject to human resources consequences. The Court of Appeal held that the intentions of the employee were not a barrier to the imposition of vicarious liability, as Lord Toulson had stated that the motive of Mr Khan in *Mohamud* was not relevant to the assessment.[108] The courts also adopted similar language to Lord Toulson and held that the actions of the employee formed a seamless sequence of events and thus were closely connected to his employment.[109]

Lord Reed gave the Court's unanimous judgment in *Morrisons* and stated that the Court of Appeal and the court at first instance had 'misunderstood' the principles of stage two which were stated in *Mohamud*.[110] Motive, while not relevant in *Mohamud* as it could not be identified, was relevant in *Morrisons*.[111] It could not be said that the employee in *Morrisons* was purporting to act in furtherance of his employer's business as it actively sought to harm it.[112] However, Mr Khan's motive in *Mohamud* was likely one of racism which could not reasonably be said to be furthering his employer's aims.

According to Lord Reed, however, *Mohamud* was to be read in its context, rather than by individual quotes. However, as Lee rightly notes, the context that *Mohamud* was handed down in was when vicarious liability was significantly expanding, so it is difficult to conclude that the Supreme Court were not seeking to make a further expansion. Lee argued that a more 'viable reading' of the judgment in *Morrisons* was that 'having promoted an expansive approach that encouraged the breaking down of traditional limitations, the Justices have belatedly recognised that some parameters are necessary.'[113] It is difficult to disagree with this assertion. *Mohamud* still remains good law, but it is likely that if it were to be heard for the first time again, there would be no vicarious liability.

[108] *Morrisons* (n 107) 1017 at [29]-[30], discussing Mohamud (n 67) 694 at [48].
[109] *Wm Morrison Supermarkets plc v Various Claimants* [2019] QB 772.
[110] *Morrisons* (n 107) 1018 at [31].
[111] *Morrisons* (n 107) 1015 [22].
[112] *Morrisons* (n 107) 1015 [22].
[113] James Lee, 'The Supreme Court, Vicarious Liability and the Grand Old Duke of York' (2020) 136 Law Quarterly Review 558.

Lord Reed also attempted to rationalise the case of *Bellman v Northampton Recruitment Ltd* (*Bellman*).[114] In *Bellman*, the Court of Appeal held that an employer was vicariously liable for an assault carried out by its managing director on a subordinate employee at an unplanned drinking session after an organised Christmas party. As the assault happened directly in relation to discussions relating to work, the Court of Appeal followed *Mohamud* by stating that the employee had not taken off his 'metaphorical managing director's hat.'[115] How this relates to the close connection test developed in *Lister* and upheld in *Dubai Aluminium* is unclear. However, it has been argued that beyond 'examples of metaphorical uniform, there was little cogency or direction in the approaches' following *Mohamud*.[116]

In *Morrisons*, Lord Reed obiter also made reference to cases of sexual abuse. He stated that '[e]ven on its most elastic interpretation, the sexual abuse of children could not be described as a mode, albeit an improper mode, of caring for them.'[117] Instead, other factors, such as the conferral of authority from an employer to an employee may be a more appropriate test;[118] this mirrors the approach suggested by Beuermann where conferral of authority is at the heart of her theory.[119] This seems appropriate given that several cases of vicarious liability have concerned sexual abuse, and the claimants of these cases are duly owed compensation for the harms they have suffered.[120] As McLachlin J noted in *Bazley*, where children are placed in the care of non-profit organisations they are placed into 'society's care', so it is right that they are compensated.[121] However, Silink and Ryan are critical of this new approach, as it may be a more difficult test to satisfy.[122] The apparent new test for vicarious liability in cases of sexual abuse has been applied in cases post-*Morrisons*. In *BXB v Watch Tower and Bible Tract Society of Pennsylvania and another* (*BXB*), the Court of Appeal

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[114] *Bellman* [2018] EWCA Civ 2214 [2019] ICR 459.
[115] *Bellman* (n 114) 469 at [25].
[116] Jessica Gracie, 'Vicarious Liability : No Longer "on the Move" — Barclays Bank Plc v Various Claimants; Wm Morrison Supermarkets Plc v Various Claimants' (2020) 26 Torts Law Journal 269, 278; A similar argument was made in Lee (n 113).
[117] *Morrisons* (n 107) at [21].
[118] *Morrisons* (n 107) at [21].
[119] See generally, Christine Beuermann, *Reconceptualising Strict Liability for the Tort of Another* (Hart 2019).
[120] Richard Buxton, 'Vicarious Liability in the Twenty-First Century' (2020) 97 Cambridge Law Journal 217, 218.
[121] *Bazley* (n 86) 564 at [48].
[122] Allison Silink and Desmond Ryan, 'Twenty Years on from Lister v Hesley Hall Ltd – Is There Now a "Tailored Close Connection Test" for Vicarious Liability in Cases of Sexual Abuse, or Not?' (2022) 38 Professional Negligence 5.

held that the test also applies to instances of adult sexual abuse.[123] However, this case is currently on appeal to the Supreme Court, so this position may be subject to change.

3.4. Duties Owed to Third Parties

This section will consider alternative claims to vicarious liability, including non-delegable duties and direct duties, which claimants may turn to if an employee committed a tort outside of the ordinary course of their employment or if a claimant was injured by an independent contractor. Each of these doctrines will be considered in turn.

3.4.1. Non-Delegable Duties

The doctrine of non-delegable duties of care can also be imposed on employers for the activities of its employees. It refers to the imposition of liability onto one party for their breach of duty to a claimant. The duty they owe is one that cannot be delegated to a third party. If another performed the duty on behalf of the duty holder, and did so negligently, the duty holder would be liable for the breach.[124] In these instances, often the duty holder will be an employer or a principal and the individual performing the duty on the duty holder's behalf will be an employee or independent contractor.[125]

The doctrine is similar to vicarious liability as it refers to the imposition of strict liability onto one party, although the basis of the liability is conceptualised on a different basis. Rather than examining the relationship between the defendant and the tortfeasor, as well as the connection between that relationship and the tort committed, as seen in vicarious liability, non-delegable duties is concerned with the primary duty that is owed to the claimant by the duty holder. It is irrelevant whether the duty holder did not personally carry out the duty, their liability is imposed because the duty was incapable of being delegated to another. In *Woodland v Essex County Council* (*Woodland*), it was confirmed that the doctrines were distinct – a person can be vicariously liable for another where 'he commits no tort himself

[123] *BXB* (n 70).
[124] Michael A Jones, Anthony M Dugdale and Mark Simpson (eds), *Clerk & Lindsell Ion Torts* (22nd edn, Sweet & Maxwell 2017) para [6-70].
[125] *Rylands v Fletcher* (1868) LR 3 HL 330 is a classic example of a non-delegable duty case involving independent contractors.

and may not even hold the relevant duty', the defendant's liability arises instead 'as a matter of public policy.'[126] If there is no relationship that is akin to employment, the only other routes to liability are if the defendant was also a primary tortfeasor or had breached a non-delegable duty;[127] this is particularly relevant in circumstances where the tortfeasor is not worth suing.

Non-delegable duties are distinguished from vicarious liability on another basis – for non-delegable duties, the relationship between the duty holder and the tortfeasor is neither here nor there, therefore the doctrine is capable of responding to relationships between principals and independent contractors.[128] Whilst the doctrines are to be treated as separate,[129] it has been said in light of this distinction that non-delegable duties 'plugs the gaps' in vicarious liability,[130] and are 'often resorted to and adopted as a response to perceived inadequacies in vicarious liability.'[131] If vicarious liability was to expand to cover independent contractors, there may be no need for non-delegable duties.

The doctrine of non-delegable duties has not been subject to the same rapid expansions as vicarious liability. However, it has still seen some development in recent years. In 2014, the Supreme Court handed down judgment in *Woodland* on the issue of non-delegable duties. The Supreme Court identified two distinct routes to applying the doctrine. The first class refers to a 'large, varied and anomalous class of cases' which involve carrying on activities which are inherently hazardous.[132] This arises where an employer instructs an independent contractor to carry out activities which in inherently hazardous, or where there is a risk that such activities may become hazardous.[133] Lord Sumption stated that earlier cases were unnecessarily concerned with a distinction between hazardous and extra-hazardous

[126] *Woodland* [2013] UKSC 66, [2014] AC 537, 572 at [3].
[127] *Bull v Devon Area HA* [1993] 4 Med LR 117.
[128] For example, *Robinson v Beaconsfield RDC* [1911] 2 Ch 188 where the defendant was liable for instructing independent contractors who deposited sewage on the land of the claimant.
[129] Tony Weir, *A Casebook on Tort* (10th edn, Sweet & Maxwell 2004) 292, 'these two routes round the triangle really must be kept separate'.
[130] See generally, Glanville Williams, 'Liability for Independent Contractors' (2004) 14 The Cambridge Law Journal 180.
[131] Morgan, 'Recasting Vicarious Liability' (n 10) 650.
[132] *Woodland* (n 126) 753 at [6].
[133] *Woodland* (n 126) 573 at [6].

activities to determine whether it was appropriate to find that a defendant owed a non-delegable duty to the claimant, when there was another class of cases that could achieve the same objective on different grounds.[134]

Woodland concerned a claimant who was injured due to the negligence of an independent contractor who was acting on behalf of the school to carry out swimming lessons for the school pupils. Correctly, Lord Sumption concluded that the activities carried out by the swimming instructor did not fall under the category of inherently hazardous as it could be 'perfectly satisfactorily analysed by reference to ordinary standards of care.'[135] Instead, Lord Sumption held that the activities fell under an entirely different category which is based on an antecedent relationship between the defendant, in this case the local education authority responsible for the school, and the claimant, in this case the injured pupil. This is different to the approach taken in vicarious liability where the relationship of concern is between the defendant and the tortfeasor.

The claimant in the antecedent relationship may be a child, or a patient in the care of the defendant, or 'especially vulnerable or dependent on the protection of the defendant against the risk or injury'.[136] The necessary relationship must be one in which the claimant in is the custody of the defendant, and the defendant has a positive duty to protect the claimant where the defendant assumes a duty of care to the claimant which is so extensive that it cannot be delegated to a third party.[137] The claimant must have no control over the manner in which the defendant carries out this duty, including whether the performance of the duty is carried out by the defendant personally or is delegated to a third party.[138] The defendant must delegate the performance of the duty they owe to the claimant to a third party, and that third party must be negligent in the performance of the duty.[139]

[134] *Woodland* (n 126) 573 at [6].
[135] *Woodland* (n 126) 573 at [6].
[136] *Woodland* (n 126) 583 at [23].
[137] *Woodland* (n 126) 583 at [23].
[138] *Woodland* (n 126) 583 at [23].
[139] *Woodland* (n 126) 583 at [23].

There is an additional hurdle for claimants to meet with this class of non-delegable duties which requires the imposition of liability to be fair, just, and reasonable in recognition of the often-scarce resources available to public authorities.[140] The fair, just, and reasonable test is an assessment of policy factors, and are analogous to those which are assessed when establishing a novel duty of care in negligence.[141] In the case of *Woodland*, the Court considered that schools are conferred authority to take care of children and are entrusted to do so by parents. This would not justify the finding of a non-delegable duty in all cases involving schools, though. For example, a school's duty of care would not extend to extra-curricular activities.[142]

The Supreme Court provided the lower courts with a great level of guidance in *Woodland*, and this posed a risk that this guidance would be followed in an 'overly literal' manner.[143] This was evident in Lady Hale's judgment who sought to place limits on the expansion to avoid the unprincipled imposition of duties.[144] Ryan noted that the application of the guidance by the lower courts, in particular in the case of *Razumas v Ministry of Justice* (*Razumas*),[145] closely followed the sentiment of the judgment in *Woodland*.[146]

Giliker, however, considers that the courts had some difficulties at first instance applying *Woodland*, in particular in the case of *NA v Nottinghamshire Council* (*NA*), the lower court decision of *Armes.*[147] In this case, the Sumption principles had been met, but it was not considered fair, just, and reasonable to impose a non-delegable duty on a local authority for the sexual abuse carried out by foster carers.[148] It may be that the additional hurdle created too great an obstacle for claimants. However, a more positive reading of this might be that,

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[140] *Woodland* (n 126) 583 at [23].
[141] *Caparo Industries Plc v Dickman* [1990] UKHL 2 [1990] 2 A.C. 605; *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4, [2018] A.C. 736.
[142] *Woodland* (n 126) 585 at [25].
[143] Desmond Ryan, 'Vicarious Liability and the Non-Delegable Duty of Care: Application of the Supreme Court's Guidance at First Instance' (2018) 34 Professional Negligence 209, 212.
[144] *Woodland* (n 126) 586 at [28].
[145] *Razumas* [2018] EWHC 215 (QB); [2018] P.I.Q.R. P10.
[146] Ryan (n 143) 212.
[147] Paula Giliker, 'Vicarious Liability, Non-Delegable Duties and Teachers: Can You Outsource Liability for Lessons?' (2015) 31 Journal of Professional Negligence 259.
[148] *NA* [2014] EWHC 4005; [2015] P.T.S.R. 653.

as the claimants were able to rely on the doctrine of vicarious liability, it was not necessary for the doctrine of non-delegable duties to arise.[149]

The judgment expanded the doctrine of non-delegable duties, where other doctrines such as vicarious liability were incapable of responding. The expansion was done so in a way in which 'ordinary people'[150] can understand and ultimately can expect.[151] However, by presenting an almost exhaustive set of circumstances it may prevent the development of the doctrine in accounting for novel situations.

The actual custody requirement established in *Woodland* has been criticised. George presented a hypothetical example of a bus driver charged with the transportation of school pupils during school hours, and he performed his duties negligently.[152] According to Lady Hale, this type of example would turn on whether the school children had been placed in the actual care of the driver without the presence of a teacher or other member of staff. George questioned how relevant this would be to the assessment of the duty of care. However, he did agree with the courts that the school should only be responsible for the actions of the bus driver during school hours.[153]

Lady Hale presented three similar examples which could act as guidance to the lower courts when determining the most appropriate doctrine to turn to.[154] She stated that children who attend private school would be able to make a claim in contract, as there would be valid consideration.[155] Children who attend state schools would likely be injured due to the actions of an employee, therefore the doctrine of vicarious liability would arise.[156] And children who attend small faith schools would be more likely to rely on the doctrine of non-delegable duties due to the greater prevalence of independent contractors.[157] Despite

[149] This position was confirmed by the Supreme Court in *Armes* (n 30).
[150] *Woodland* (n 126) 586 [29].
[151] Jonathan Morgan, 'Liability for Independent Contractors in Contract and Tort: Duties to Ensure That Care Is Taken' (2015) 74 Cambridge Law Journal 109, 111.
[152] Rob George, 'Non-Delegable Duties of Care in Tort' (2014) 130 Law Quarterly Review 534, 536.
[153] George (n 152) 536.
[154] *Woodland* (n 126) 587 at [30]-[31].
[155] *Woodland* (n 126) 587 at [32].
[156] *Woodland* (n 126) 587 at [32].
[157] *Woodland* (n 126) 587 at [32].

criticism from Morgan that non-delegable duties should 'ideally be discarded',[158] the examples provided by Lady Hale do demonstrate the need for non-delegable duties, arguably to 'plug the gaps' in vicarious liability.[159] It also goes some way to suggest that legal doctrine is promoting principles of corrective justice to ensure that the law is capable of responding to situations where a vulnerable claimant has no other means of seeking compensation.

3.4.2. Direct Duties

The doctrine of direct duties establishes another route for claimants to take if they are injured through the activities of another. This doctrine was established under the Occupiers Liability Act, which inexorably created a duty that occupiers owed to take due care in the selection of contractors,[160] but has since been expanded.[161] As McKendrick noted, 'some plaintiffs in recent negligence actions have sought to expand the primary liability of employers by attempting to impose upon them a new affirmative duty of action'.[162] The duty was extended beyond the mere selection of contractors to the supervision of contractors, to ensure that they were carrying their work out in a safe manner.[163] This doctrine was also expanded beyond a statutory duty to a common law one,[164] which provided an alternative action in the tort of negligence.[165] This permits the doctrine to act as an alternative or concurrent claim to vicarious liability,[166] as it can apply where an independent contractor's actions have injured a third party or where an employee was acting outside of the course of her employment.[167]

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[158] Morgan, 'Liability for Independent Contractors in Contract and Tort: Duties to Ensure That Care Is Taken' (n 151) 137.
[159] John Murphy, 'Juridical Foundations of Common Law Non-Delegable Duties' in Jason Neyers (ed), *Emerging Issues in Tort Law* (Hart 2007) 371.
[160] Occupiers Liability Act 1957, s 2(4)(b).
[161] *Wilsher v Essex Area Health Authority* [1987] 2 WLR 425, 'a health authority which so conducts its hospital that fails to provide doctors of sufficient skill and experience to give treatment offered at the hospital may be directly liable in negligence to the patient.'
[162] Ewan McKendrick, 'Vicarious Liability and Independent Contractors - A Re-Examination' (1990) 53 The Modern Law Review 770, 776.
[163] *Gwilliam v West Hertfordshire Hospital NHS Trust* [2002] EWCA Civ 1041, [2003] QB 433; *D & F Estates Ltd v Church Commissioners for England* [1989] AC 177.
[164] *Bottomley v Todmorden Cricket Club* [2003] EWCA Civ 1575, [2004] P.I.Q.R. P18
[165] Steele (n 11) 603.
[166] *Mattis v Pollock* [2003] EWCA Civ 887, [2003] 1 WLR 2158 is an example of vicarious liability and direct duty claims being brought concurrently at appellate level.
[167] Steele (n 11) 603.

A similar route is available for employees who are injured through the activities of fellow employees, or independent contractors who are instructed by their employer.[168] This falls under the employer's duties doctrine, which will be discussed in more detail in the following section. However, the doctrine, derived from the Occupiers Liability Act 1957 and common law, discussed in this section also applies to third parties, who are often visitors of the premises.[169] McKendrick was critical of the developments to the doctrine, as it is 'indistinguishable' from non-delegable duties, and it did not act as a panacea to the limitations of other doctrines that sit in this sphere.[170]

3.5. Employer's Duties Owed to Employees

The doctrine of employer's duties of care doctrine is different from vicarious liability and non-delegable duties discussed above, as it responds only to injuries suffered by employees rather than third parties. It is a form of primary liability conferred upon an employer which stems from the wide duties of care that they owe to their employees, including those in relation to health and safety practices.

The origin of the employer's liability is in the nineteenth century,[171] where it arose in response to the doctrine of common employment which prevented an employer from being vicariously liable for the torts of an employee who injured an individual from the same organisation.[172] The common employment defence to vicarious liability developed due to anxieties surrounding extensive claims being brought against employers in certain industries.[173] The effect of the common employment doctrine meant that injured employee would be unlikely to successfully seek a remedy, and employer's duties of care developed in response to these effects.

[168] *Hudson v Ridge Manufacturing Co* [1957] 2 QB 348.
[169] Jones, Dugdale and Simpson (n 124) [11-59].
[170] McKendrick (n 162) 776.
[171] Mark Lunney, Donal Nolan and Ken Oliphant, *Tort Law: Text and Materials* (6th edn, OUP 2017) 555.
[172] *Priestley v Fowler* (1837) 3 M & W 1.
[173] Lunney, Nolan and Oliphant (n 171) 555.

The duties were said to be non-delegable in nature, meaning if another performed parts of the duty negligently the primary liability would belong to the employer.[174] The duties were said to be contingent upon the employment relationship.[175] This became clear in *Lochgelly Iron and Coal Co v M'Mullan* (*Lochgelly*), where it was stated that the employer 'cannot relieve himself of this obligation by saying that he has appointed reasonably competent persons and that the breach is due to negligence on their part.'[176] The doctrine of common employment, which placed a 'severe restriction' on claims being brought against employers,[177] was abolished in 1948[178] after facing criticisms a few years prior from Lord Wright in *Wilsons and Clyde Coal Co v English* (*Wilsons*) that it was 'illogical'[179] and gave 'little regard to reality or modern ideas of economics or industrial conditions'.[180] Despite this abolishment, the employer's duties of care remained a fundamental aspect of the law at statutory and common law level.[181] Developments at both levels will be considered in the subsections which immediately follow.

3.5.1. Statutory Duties

Social legislation was developing in the nineteenth century, as was the doctrine of employer's duties.[182] This era marked the beginning of employment safety endeavours on statutory footing. Legislation relating to work in factories and mines was enacted, largely in response to the extensive presence of women and children in these industries.[183] The statutory response to these issues were thought to be 'patchwork', as it attempted to remedy different issues 'without regard to any general pattern of development'.[184]

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[174] Lunney, Nolan and Oliphant (n 171) 556.
[175] *Smith v Baker & Sons* [1891] AC 325.
[176] *Lochgelly* [1934] AC 1, at 13. This position was confirmed in *Campbell v Peter Gordon Joiners Ltd* [2016] AC 1513, where the Supreme Court held that liability which arises under the Employers' Liability (Compulsory Insurance) Act 1969 is placed on the employer, not individual directors of the organisation.
[177] TT Arvind and Jenny Steele, *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart 2012) 33.
[178] Law Reform (Personal Injuries) Act 1948, s1.
[179] *Wilsons* (n 2) 79.
[180] *Wilsons* (n 2) 80.
[181] Lunney, Nolan and Oliphant (n 171) 555.
[182] Daniel Bennett, 'The Development of Employer's Liability Law' in Daniel Bennett (ed), *Munkman on Employer's Liability* (17th edn, LexisNexis 2019) [1.13].
[183] For example, the Factories Act 1855; The Factories Act 18556; Coal Mines Act 1855; Coal Mines Regulation Act 1872.
[184] Bennett (n 182) [1.12].

Turning to the twentieth century, more comprehensive legislation was enacted which sought place obligations on employers to protect its employees.[185] By 1969, two revolutionary acts were passed. The Employers' Liability (Defective Equipment) Act 1969 created a burden of liability for employers in negligence if equipment caused injury to its employees, unless the fault lied with the manufacturer. The Employers' Liability (Compulsory Insurance) Act made it a requirement for employers to have liability insurance. Only a few years later, the Health and Safety at Work Act (HSWA) 1974 was enacted which became an 'all-embracing statutory regime'.[186] The patchwork of other legislation implemented in the previous century was repealed by this piece of legislation.[187]

Part one of the HSWA laid out the general health and safety duties that employers owe to persons at work. Section 47 of the HSWA permitted civil claims to be brought for breaches of statutory duties unless the provisions of the relevant regulation expressly stated otherwise. Prior to section 47 of the HSWA, the courts seemed eager to establish claimants' rights to bring civil action against those who breached their statutory duties.[188] This position changed more recently in the Enterprise and Regulatory Reform Act 2013. Section 69 of this Act reversed the assumption that civil claims would be permissible under regulations unless expressly stated otherwise. Now if regulations do not expressly provide the right to civil actions, it will be assumed that the claimant has no right to do this.[189] This has narrowed the routes for injured employees to seek compensation, meaning more individuals will have to pursue a route through the common law.

Liability conferred from the statutory duties can require negligent conduct to establish the liability, unless the liability is strict. Strict liability has the advantage of offering 'an incentive to employers to ensure that safety rules [are] complied with.'[190] It also means that employees can more easily seek a remedy for their injuries without the need to overcome barriers such as foreseeability and reasonableness. The statutory duty can also be one that

[185] For example, Mines and Quarries Act 1954; Explosives Act 1923; The Fire Precautions Act 1971.
[186] Witting (n 22) 492.
[187] Witting (n 22) 192.
[188] For example, *National Coal Board v England* [1954] AC 403; *Groves v Wimborne* [1898] 2 QB 402.
[189] Steele (n 11) 929.
[190] Witting (n 22) 492.

expressly requires the need for reasonable practicability.[191] This permits the courts to interpret a negligence-based element to the duty.[192]

3.5.2. Common Law Duties

While new legislation was being implemented in the nineteenth and twentieth century, the common law was also developing. The landmark case of *Groves v Wimborne* established that claimants could pursue a civil action for damages for breaches of statutory duties.[193] The courts in that case permitted an employee, who was injured due to unfenced machinery, claim for damages and dismissed the applicability of the defence of common employment for breach of statutory duty cases.[194] By 1958, common law duties were expanded, perhaps to further corrective justice aims.[195] The decision in *Wilsons* established three heads to the duty of care employers owe to their employees which were said to be non-delegable in nature.[196] Lord Maugham summarised these duties as follows:

> [T]here was a duty on the employer to take reasonable care, and to use reasonable skill, first, to provide and maintain proper machinery, plant, appliances and works; secondly, to select properly skilled persons to manage and superintend the business, and, thirdly, to provide a proper system of working'.

These duties were said to arise only for servants, meaning employees, of the organisation.[197] The meaning of this will be discussed in more detail in the subsection which immediately follows. The duties listed above are not to be construed as separate duties but falling under the umbrella of the duty for an employer to take reasonable care for the safety of its

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[191] Witting (n 22) 495.
[192] For example, in *Baker v Quantum Clothing Group* [2011] UKSC 17, [2011] 1 WLR 1003, the Supreme Court held that the term 'reasonably practicable' needed to be assessed in terms of the standard of care that could be expected at that time and whether the harm was reasonably foreseeable. This mirrors a negligence-based approach taken once a duty of care has been established.
[193] *Cavanagh v Ulster Weaving Co Ltd* (*Cavanagh*) [1898] 2 QB 402.
[194] *Cavanagh* (n 193).
[195] See generally, Claire McIvor, *Third Party Liability in Tort* (Hart 2006).
[196] *Wilsons* (n 2) 64.
[197] Gordon Exall, 'The Employer's Duty of Care' in Daniel Bennett (ed), *Munkman on Employer's Liability* (17th edn, LexisNexis 2019) [4.51].

employees. Lord Keith in *Cavanagh v Ulster Weaving Co Ltd* made this clear by stating that 'all other rules or formulas must be taken subject to this principle.'[198]

The duty of care at common law must be established in accordance with ordinary negligence principles, as it falls under that umbrella.[199] This explains why an employer who does not take reasonable care to safeguard its employees will be liable for a breach of duty in negligence.[200] The common law duties therefore differ to some of those which are conferred at statutory level where liability can be strict.[201] The standard of care that is set is one of reasonableness, but importantly it can fluctuate with time. For example, if a court were considering a historic case, the standard of care would be assessed according to the time that the breach of duty occurred rather than the time that the case was being heard.[202] The idea that the common law duties of care are established by negligence principles also means that they are subject to the same rules of causation and foreseeability,[203] and must be established on the balance of probabilities.[204] It is possible for claimants to bring concurrent claims for breach of the statutory duty and for breach of the common law duty – the claimant could be successful in one, neither, or both claims, but the award of damages would be limited to one claim and they could not be compensated twice for the same loss.[205]

3.5.3. The Importance of Employment

The employer's duties of care are generally thought to apply only to employees and not to independent contractors.[206] The dichotomy also applies to vicarious liability. However, for breach of duty cases there are limited examples of liability being imposed due to a person

198 *Cavanagh* (n 193) 165.
199 Exall (n 197) [4.54].
200 However, there are situations where an employer will not be liable. This may be when the risk was 'unavoidable'. See, Exall (n 197) [4.65].
201 Exall (n 197) [4.63].
202 Exall (n 197) [4.68].
203 For example, in *Horton v Taplin Contracts Ltd* [2003] ICR 179 where an employer could not be held liable for an employee falling from a scaffold due to being pushed by an employee of the same organisation.
204 For example, *Bonninton Castings Ltd v Wardlaw* [1956] AC 613, at 620: a claimant 'must in all cases prove by the ordinary standard of proof in civil actions: he must show on the balance of probabilities the breach of duty caused or materially contributed to his injury.
205 Astra Emir, *Selwyn's Law of Employment* (21st edn, OUP 2020) 328.
206 *Wilsons* (n 2) 64.

who is not an employee being injured.[207] Like vicarious liability, as labour relations have evolved in recent years, the law has needed to do so too. This has been facilitated at an international level, with the implementation of EU regulations which ensure that those working in casual or flexible employment situations will be offered the same health and safety protections are those who are employment permanently, although this does not extend to independent contractors.[208] At a statutory level, it is clearer who the duties apply to. For example, the general duties of care established in the HSWA apply to both employees and 'other persons' at work.[209]

The common law position, however, is more complicated. As discussed above, for a time the understanding of employment was the same for a multitude of purposes. This meant that the tests used to determine whether a person was an employee was the same for vicarious liability and for establishing a direct duty of care owed by an employer to an employee. We now know that this is no longer the case. Despite this, the common law approach to establishing employer's duties of care seems to have adopted have become more flexible and there is a willingness to look at relationships that may not mirror traditional employment but that are analogous to employment.[210] There has also been a move to considering policy rationale, such as whether it is fair, just, and reasonable to impose liability, which closely mirrors the approach taken in vicarious liability.[211]

It has been suggested that those who are indistinguishable from workers in terms of the risks they face at work should have the same, or at least similar, legal protections to employees.[212] Prima facie, this seems like a sensible and fair approach. However, a similar argument could be made in a vicarious liability context, that if an independent contractor at work is largely indistinguishable from an employee to a third party the employer should be vicariously liable for both of their torts. However, as discussed above, the trite law position

[207] For example, in *Baker v TE Hopkins & Son Ltd* [1958] 3 All ER 147 it was held that a duty of care was owed to a person outside of its employment.
[208] For example, Temporary Workers Directive 91/383/EC.
[209] HSWA (n 2) s3. The requirements imposed are subject to the reasonable practicability test.
[210] Exall (n 197) [4.6].
[211] For example, *Rice v Secretary of State for Trade and Industry* [2007] EWCA Civ 289, [2007] ICR 1469
[212] Exall (n 197) [4.5]; See generally, Douglas Brodie, *Enterprise Liability and the Common Law* (CUP 2010) ch 11.

that vicarious liability cannot respond to the torts of an independent contractor has been confirmed recently by the Supreme Court in *Barclays*. If the common law duties of care continue to evolve at a similar pace to vicarious liability, it is unlikely that we will see such developments soon.

For an extended period, establishing an employment relationship was reliant on whether the employer was able to exercise control over its employee. This was true for employment status, vicarious liability, and employer's duties of care purposes. Although more will be said on this in the next chapter, the control test has been subject to criticism by the courts.[213] As discussed above, for vicarious liability at least, control is no longer a determinative test. The same position has been adopted in the employer's duties of care context also. In *Lane v Shire Roofing Co (Oxford)* (*Lane*), the Court of Appeal outlined the test to be followed where control could not be decisive, for example if the case related to a skilled employee:

> In such cases the question is broadened to whose business was it: was the workman carrying on his own business, or was he carrying on that of his employers?... The answer to this question may cover much of the same ground as the control test (such as whether he provides his own equipment and hires his own helpers) but may involve looking to see where the financial risk lies, and whether and how far he has an opportunity of profiting from sound management in the performance of his task[214]

This test is similar to the integration test put forward by Lord Reed in *Cox*, outlined above. It seeks to examine whether the individual is in business on their own account or whether they are working for another's business. Where the former is true, the individual is likely to be an independent contractor. Where the latter is true, the individual is likely to be an employee.

The case law on employment for the purposes of employer's duties of care is thin which makes it difficult for our purposes to examine exactly what tests are adopted. However, it is not unreasonable to suggest that the common law positions for employer's duties of care

[213] For example, *Gold* and *Cassidy* (n 36).
[214] *Lane* [1995] EWCA Civ 47, [1995] PIQR 417, 422.

and vicarious liability are very similar. It would be unreasonable, however, to suggest they were the same. As we know, where the answer to the integration question posed by Lord Reed in *Cox* is unclear, the courts are permitted to turn to the five policy incidents, which include notions of enterprise liability and deeper pockets. These arguments do not seem to be present within the principles of employer's duties of care.

It is suggested that in cases which sit between the boundaries of employment and self-employment, the position for vicarious liability is clearer than that of employer's duties of care. This could be problematic in a gig economy context where service providers are almost always classified as independent contractors, but, in reality, their employment situation is muddier. Such individuals may be vulnerable, to the extent that they may be unable to compensate claimants whom they injure during the course of their service provision, or they may not be in a position to sustain their livelihood if they themselves are injured during the course of their service provision. This could pose serious problems for tort.

This thesis seeks to examine these problems in greater depth and will do so by examining the way tort assesses employment. In making these assessments, legal doctrine makes assumptions with respect to the nature of the employment relationship as well as to the effect of the decision to impose or to not impose liability in certain situations. For legal doctrine to function well, its assumptions should match reality. This thesis seeks to test whether such assumptions match the reality of those working in the gig economy. To this end, the next chapter will analyse these assumptions.

3.6. Conclusion

This chapter has examined tort in its capacity to distribute risk in the world of service provision, through its core doctrines concerning service provision, including the doctrines of vicarious liability, non-delegable and direct duties, and employer's duties. The chapter has considered the development of these doctrines and has analysed the law as it stands today. The chapter which immediately follows will examine the assumptions made by legal doctrine when distributing risk, and will also consider the potential consequences that the gig economy poses to this exercise.

Chapter 4 - Assumptions in Tort

4.1. Introduction

The previous chapter analysed doctrines in tort which distribute risk in the context of service provision. These doctrines rely on a variety of tests to determine the circumstances in which it is appropriate to impose liability onto an employer. This chapter seeks to examine these tests in detail and the assumptions that underpin them, as well as analyse the potential challenges that the gig economy poses to these assumptions. To this end, the chapter is split into three main sections. Section 4.2. will analyse the key tests of employment and the assumptions they make about employment, including tests of control, integration, and enterprise liability. Section 4.3. will consider a theoretical approach which has not been taken, and section 4.4. will consider the theoretical aims of liability, including deterrence- and incentive-based purposes, corrective justice aims, and distributive justice. Section 4.5. will analyse the extent to which the gig economy may challenge tort in its determination of employment, with respect to the tests and the policy purposes which underpin liability.

4.2. The Tests for Employment

As discussed in the previous chapter, in the world of service provision, legal doctrine has capacity to distribute risk in tort through key doctrines. The previous chapter discussed three of these doctrines: vicarious liability, non-delegable duties, direct duties, and employer's duties. These doctrines are mechanisms which distribute risk when third parties have been injured by service providers, and when service providers themselves have been injured.

The doctrines of vicarious liability and employer's duties of care respond primarily to employment relationships, or relationships which are closely analogous to employment.[1] To determine whether a person is in a relationship that is analogous to employment, tests which rely on notions such as control, integration, enterprise liability, and deeper pockets

[1] See *Barclays Bank plc v Various Claimants* (*Barclays*) [2020] UKSC 13, [2020] AC 973; *Lane v Shire Roofing Company Co (Oxford)* [1995] EWCA Civ 47, [1995] P.I.Q.R 417.

are deployed.[2] Naturally, there is a reliance on assumptions about the nature of service provision, such as the extent to which control and integration is present in employment relationships, and the nature of enterprises. It is suggested in this thesis that if the assumptions relied upon do not match the reality of service provision, legal doctrine is diminished. This thesis will test some of the assumptions made in the context of the gig economy. Before doing so, this chapter will examine some of these assumptions, each of which will be taken in turn.

4.2.1. Control

As discussed in the previous chapter, the test of control was a core aspect of the assessment of employment relationships. It was prevalent at a time where work was predominantly carried out in agricultural and industrial contexts, where employees were likely to be supervised by employers who had a similar or greater skillset then they did.[3] Maxims such as *qui facit per aluim per se*[4] and *Respondeat Superior*[5] were relied upon to justify the imposition of liability.[6]

Hilbury J stated the importance of control in *Collins v Hertfordshire CC* (*Collins*).[7] Accordingly, '[t]he distinction between the contract for services and the contract of service can be summarized in this way: In the one case the Master can order or require what is to be done, while in the other case he can not only require what is to be done but how it shall be done.'[8] Subsequent cases emphasised the importance of control being related to the 'manner' in which work is done, not merely control per se.[9] This is to be distinguished from supervision which does not guarantee the right to control how work is carried out.[10] At this time, the nature of control in employment was being considered. Lord Thankerton in *Short v J & W*

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[2] See Lord Phillips' restatement of the five policy factors in *Catholic Child Welfare Society v Various Claimants* (*CCWS*) [2012] UKSC 56, [2013] 2 AC 1, 15 at [35].

[3] Christian Witting, *Street on Torts* (16th edn, OUP 2021) 608.
[4] She who acts through another does the act herself.
[5] Let the Master answer.
[6] David Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 1999) 182.
[7] *Collins* [1947] KB 598.
[8] *Collins* (n 7) 615.
[9] *Yewens v Noakes* (1880) 6 QBD 530; *Mersey Docks and Harbour Board v Coggins* [1947] AC 1,17.
[10] For example, *Biffa Waste Services v Maschinenfabrik Ernst GmbH* [2009] 3 WLR 324 at [58].

Henderson (*Short*) concluded that there were four indicia to be analysed: '(a) the master's power of selection of his servant; (b) the payment of wages or other remuneration; (c) the master's right to control the method of work; and (d) the master's right of supervision.'[11]

Several notional factors were relied upon to determine whether an individual was an employee, however, none were conclusive alone which meant the courts relied upon the cumulative effect of all of the factors.[12] The factors included whether the employer could control details of the work, which party provided the tools and equipment, and the method of payment.[13] These factors were also part of the enquiry when an employee was lent to a second employer – in such instances it was to be determined which employer in the circumstances was best able to exercise control over the employee.[14]

However, concerns about the control test had begun to emerge. One criticism was that control as a justification fails to explain why parents are not vicariously liable for the acts of their children.[15] It was also suggested that the control test could not explain why superior employees were not liable for subordinate employees, as they may often be in a better position than the employer to exercise control.[16] This conflict was exemplified in an earlier case in *Hillyer v The Governors of St Bartholomew's Hospital* (*Hillyer*), where a claimant sought damages from governors of a hospital for the negligence of hospital staff during an operation.[17] The Court of Appeal held that no duty of care could be owed by the governors of the hospital to the claimant vis-à-vis the negligence of the hospital staff, and that the governors owed only a duty of care to appoint competent staff; this is an example of a direct duty owed to third parties discussed in the previous chapter. This was because the hospital governors were not in a position to exercise direct control over the hospital staff.

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[11] *Short* (1946) 62 TLR 427, at 429.
[12] Witting (n 3) 608–609.
[13] See generally, *Quarman v Burnett* (1840) 6 M. & W. 499; *Denham v Midland Employers Mutual Assurance Ltd* [1955] 2 QB 437, at 446.
[14] *Mersey Docks* (n 9) 17.
[15] Robert Stevens, *Torts and Rights* (OUP 2007) 258 It was established in Donaldson v McNiven [1952] 2 All ER 691, at 692 that parents are not vicariously liable for their children. This is not true of all jurisdictions, for example the French Civil Code. See, Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (CUP 2010) 54.
[16] Patrick S Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths 1967) 16.
[17] *Hillyer* [1909] 2 K.B. 820.

Subordinate hospital staff would be subject to the supervision and control of superior staff, rather than the governors. Understandably, control was thought to have been taken to its 'logical conclusion' in this case.[18]

An assumption which underpinned the once prevalent control test was that an employer would be in a position to control her employees by way of her relative higher skill level.[19] As discussed above, this assumption was based on the agricultural and industrial contexts that many were working in, but could no longer be said to be reflective of work in the mid-twentieth century.[20] This was reflected in the later cases of *Gold v Essex County Council* (*Gold*)[21] and *Cassidy v Ministry of Health* (*Cassidy*)[22] where it was held that the ability for superior employees to exercise control over those subordinate to them was not relevant. So long as the hospital authority employed, paid, and had the right to dismiss the employees, they could be liable for their negligence.

It was around this time, the test of control started to erode, and this allowed a more 'realistic' test to develop.[23] MacKenna J in his famous judgment in *Ready Mixed Concrete v Minister of Pensions and National Insurance* (*Ready Mixed Concrete*) held that while control was still the dominant test for employment, a composite test which drew upon multiple factors was necessary, including mutual obligation between the employer and the employee that work will be personally provided in exchange of remuneration, a degree of control, as well as there being no factors which suggest this is not a relationship of employment.[24] At a similar time, tests of integration were also being developed; this will be discussed in section 4.2.2.

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[18] Simon Honeyball, *Honeyball & Bowers' Textbook on Employment Law* (14th edn, OUP 2016) 27.
[19] Witting (n 3) 608.
[20] Witting (n 3) 608.
[21] *Gold* [1942] 2 K.B. 293.
[22] *Cassidy* [1951] 2 KB 343, at 352.
[23] Honeyball (n 18) 28.
[24] *Ready Mixed Concrete* [1968] 2 Q.B. 497 at 515, it was held that the tests were as follows: '(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.'

The multifactorial approach taken in *Ready Mixed Concrete* to draw upon multiple factors is still relevant to date, and it is not the only example of a multifactorial approach. The doctrine of vicarious liability also draws upon a variety of factors, including control, to determine whether liability can be imposed on an employer.[25] As discussed in chapter 3, vicarious liability, after breaking away from the approaches taken by other spheres of law,[26] began to impose secondary strict liability on defendants who were not employers but were in relationships with defendants that were sufficiently akin to employment.[27]

Traditionally, determining if an individual was an employee would depend on whether they worked under a contract for services or a contract of service, the latter being a contract of employment. Arising from a contract of service were rights and powers held by an employer to supervise and carry out intermittent performance management, to have oversight over the employee's work and their conduct, including relating to their attire, working hours, and place of work.[28]

As discussed in Chapter 3, in the last decade we have seen a flurry of cases where the courts have imposed vicarious liability on defendants despite them not being in a contract of service with the tortfeasor.[29] In these circumstances there was no control vis-à-vis a contract of service, which Morgan referred to as 'legal control'.[30] The courts instead begun to look at the reality of the relationships and the 'factual control' that was present.[31] In *E v English Province of Our Lady of Charity* (*JGE*), the Court of Appeal heard a case concerning abuse perpetrated by Father Baldwin whilst working in a children's home operated by an order of nuns.[32] Despite this, the claim was pursued against the diocese on the basis that Father Baldwin was still working in the service of the diocese, which acted as sufficient reasoning to hold them vicariously liable for his torts. However, there was no contract of service between

[25] *CCWS* (n 2) 15 at [35].
[26] *E v English Province of Our Lady of Charity* (*JGE*) [2012] EWCA Civ 938, [2013] QB 722.
[27] For example, *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660; *Armes v Nottinghamshire County Council* [2017] UKSC 60; [2018] AC 355.
[28] IDS Employment Law Brief Team (ed), 'Continuity of Employment', *IDS Employment Law Handbook* (Thomson Reuters 2022) para [2-35].
[29] For example, *JGE* (n 26); *CCWS* (n 2); *Armes* (n 27).
[30] Phillip Morgan, 'Recasting Vicarious Liability' (2012) 71 Cambridge Law Journal 615, 642.
[31] Morgan (n 30) 634.
[32] *JGE* (n 26).

Father Baldwin and the diocese, and therefore, the Court instead sought to understand the reality of the relationship between Father Baldwin and the bishop.

All processes were regulated through Canon law, including the oversight and visitation of the bishop to the parish.[33] It also stipulated the priest's obligation 'to show reverence and obedience' to the bishop.[34] Should the priest fail to do this, there may be very real consequences for him. It was noted though, there was no day-to-day supervision over the activities of Father Baldwin, who held a great deal of discretion over his work.[35] This was crucial to the Court's finding that factual control was present in the relationship and overcoming the obstacle that Roman Catholic Canon law was not recognised by the Anglo-Welsh courts, as well as the absence of a contract of employment.

The Supreme Court one year later heard the case of *Catholic Child Welfare Society v Various Claimants* (*CCWS*), which involved a large class action. The claimants attended a school whose headmaster, along with many of its staff, were recruited through the Institute of Christian Brothers (the Institute).[36] The claimants were physically and sexually abused by staff members whilst they attended the school. Like in *JGE*, the brothers were not employed by the Institute, but were in fact employed by the school. Despite this, the Court still sought to uncover the nature of the relationship between the brothers and the Institute to determine whether it was fair and just to impose liability on the Institute, as well as the school. Despite the fact Lord Phillips confirmed in this case that the significance of control had been eroded, the nature of the control exercised in the relationship between the brothers and the Institute was still considered in some detail.

Each brother took a lifetime vow of 'chastity, poverty and obedience' and were bound by codes of conduct.[37] They were obliged to be obedient to their superiors and vowed to 'go wherever [he] may be sent and to do whatever [he] may be assigned'.[38] The rules each

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[33] *JGE* (n 26) at [29].
[34] *JGE* (n 26) at [29].
[35] *JGE* (n 26) at [29].
[36] *CCWS* (n 2).
[37] *CCWS* (n 2) at [8].
[38] *CCWS* (n 2) at [8].

brother was bound by even extended to their conduct in the teaching of children.[39] Although the brothers were employed directly by a school and the Institute had little control over whether a school would employ a brother, they could 'control whether a brother worked in a school that was prepared to engage him'.[40] The Court was confident that even if a brother was employed outside of the Institute, the control, made possible through their sacred vows, remained very real.

The application of factual control can also be seen in cases concerning dual vicarious liability but not concerning abuse. This refers to liability being imposed on two defendants for the actions of a tortfeasor.[41] The tortfeasor may be employed by employer A and lent to employer B, and the tortfeasor may be in a relationship of employment with employer A, but not employer B. There will often be no 'transfer of contract' from one defendant to the other during the course of the transfer, so legal control can only exist in the relationship with the lender and not the borrower.[42] In such cases, even if only one employer retains legal control, if both employers can exercise sufficient factual control over the tortfeasor, they may both be vicariously liable for her torts.[43]

As discussed above, control while once prevalent in assessing an individual's employment, is no longer the sole test. This development was due to increasing concerns about the ability that employers have so that they can exercise control in modern employment relationships, especially where employees are more skilled than their employers. This can be seen in modern case law where there is an assumption that high levels of control may not be present in employment relationships. This is not accepted by all, though. Morgan, for example, suggests that employers, while not necessarily being personally able to exercise control, will retain the right to employ somebody superior to the employee to oversee their work, and that this may be reflective of control in modern employment relations.[44]

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[39] *CCWS* (n 2) at [9].
[40] *CCWS* (n 2) at [17].
[41] Instances where dual vicarious liability has been considered include *Mersey Docks* (n 9); *CCWS* (n 2); *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* (*Viasystems*) [2005] EWCA Civ 1151, [2006] QB 510.
[42] Phillip Morgan, 'Recasting Vicarious Liability' (2012) 71(3) C.L.J 615, 630.
[43] *Viasystems* (n 41) 527 at [47].
[44] Morgan (n 30) 675.

Despite control not being fundamental to establishing employment, it has still been adopted in several recent Supreme Court cases, as discussed above.[45] It still clearly holds some significance, particularly in religious contexts where high degrees of control may be present. Where this is the case, it is evident that the degree of control is relevant to the assessment and may point towards a relationship that is sufficiently close to employment. However, the starting position seems to be that, in modern employment settings, it is rare that high degrees of control will be present, so control is no longer a dominant test.

4.2.2. Integration

As discussed above, in the mid-twentieth century, the control test was beginning to erode. To remedy some of the problems associated with the control test, there was an attempt to supplement this with another test which was one of integration.[46] Understanding of the meaning of integration can differ, as it can relate to several different things. This was recognised by Kidner who proposed a helpful framework.[47] He suggested that there were three tests of integration.[48] The organisation test – which considered whether the activities of the individual were sufficiently central to the organisation. The integration test – which analysed whether the individual was operating a business on their own account or were providing services on behalf of another organisation. The entrepreneur test – which analysed whether the individual was an entrepreneur on their own account, including whether they managed risks and had an opportunity to profit from those risks.

The tests are said to examine two things.[49] Firstly, is the individual operating a separate entity from the organisation? This may be contingent on whose behalf the individual is working, established through the integration test, and whether the individual displays the relevant entrepreneurial behaviour, established through the entrepreneur test. Secondly, how central are the activities of the individual to the objectives of the organisation? This is to be established through the organisation test.

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[45] It was also closely applied in *Armes* (n 27). For a discussion on this, see chapter 3.
[46] IDS Employment Law Brief Team (n 28) [2-35].
[47] Richard Kidner, 'Vicarious Liability: For Whom Should the "Employer" Be Liable?' (1995) 15 Legal Studies 47, 63–64.
[48] Kidner (n 47) 63–64.
[49] Kidner (n 47) 60–61.

One of the first applications of integration in case law was in *Stevenson, Jordan & Harrison Ltd v MacDonald and Evans* (*Stevenson*).[50] In *Stevenson*, Lord Denning presented the organisation test, and stated

> One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and the work is done as an integral part of the business, whereas under a contract for services, his work, although done for the business, is not integrated into it but is only an accessory to it.[51]

Lord Denning expanded upon this by stating an employee will be 'part and parcel' of the organisation.[52] This represents a clear shift from the control test. Instead of looking contractually at the extent of the employer's control, the courts began to look contextually at the nature of the relationship in practice. Lord Denning found support in *Bank voor Handel en Scheepvart NV v Slatford*, where it was assessed whether the individual was 'part and parcel' of the organisation.[53] The test was subject to criticism, however. For example, Atiyah claimed the test was more of a 'restatement of the problem rather than a test for a solution' as it was unclear what being an integral part of an organisation might look like.[54] It has also been said that it amounts to 'little more than saying that you can recognise an elephant when you see it.'[55]

At a similar time, the courts also began to refer to the second question discussed by Kidner – whether the individual was operating a separate business to the organisation, which are answered by the tests of integration and entrepreneurship. One of the first applications of these tests was by Lord Wright in the Privy Council decision of *Montreal v Montreal Locomotive Works Ltd* (*Montreal*).[56] Lord Wright recognised that working conditions were becoming 'more complex' which required 'more complicated tests'.[57] With this in mind, he

[50] *Stevenson* [1952] 1 TLR 101.
[51] *Stevenson* (n 50) at [111].
[52] *Stevenson* (n 50) at [111].
[53] Mason J in *Stevens v Brodbibb Sawnilling Pty Co Ltd* | [1987] 1 WLUK 566, 160 C.L.R. 16
[54] Atiyah (n 16) 37–38.
[55] Gordon Exall, 'The Employer's Duty of Care' in Daniel Bennett (ed), *Munkman on Employer's Liability* (17th edn, LexisNexis 2019) para [4.21].
[56] *Montreal* [1947] 1 DLR 161.
[57] *Montreal* (n 56) 169.

presented four factors which were relevant to the assessment: (1) control is present in the relationship; (2) the individual owns their own tools; (3) the individual has a chance of making a profit; (4) whether the individual bears the risk of loss.[58]

Cooke J applied the same sentiment to the case of *Market Investigations v Minister of Social Security* (*Market Investigations*).[59] He stated that the 'fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing as a person in business on his own account?"'[60] Cooke J claimed that it was not possible to draw up an exhaustive list of factors that were relevant to determining this, but that factors of relevance to the enquiry might relate to the provision of equipment, the hiring of helpers, whether the individual takes financial risk, and whether they have the opportunity to profit from such risks.[61] It was held in subsequent cases that the purpose of the test was 'to paint a picture from the accumulation of detail'.[62] It was confirmed again that the list was non-exhaustive, and that different factors would be important to different cases.[63] For example, in some cases the intention of the parties at the time of contracting may be relevant, as well as whether they perform work for one or more organisations.[64]

For a while, it seemed that the integration and entrepreneur tests were preferred over the organisation test first stated by Denning LJ. *Montreal*, for example, was cited with approval by MacKenna J in *Ready Mixed Concrete*. It is thought that the factors established in *Montreal* and subsequent cases that relate to the integration and entrepreneur enquiries actually form part of the final requirement of the test established in *Ready Mixed Concrete* – that the 'other provisions of the contract are consistent with its being a contract of

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[58] *Montreal* (n 56) 169.
[59] *Market Investigations* [1969] 2 QB 173.
[60] *Market Investigations* (n 59) 184.
[61] *Market Investigations* (n 59) 185.
[62] *Young & Woods Ltd v West* [1980] IRLR 201; *Hall v Lorrimer* (*Hall*) [1992] ICR 739, 744; *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374, 383 per Lord Griffiths: 'There is no suggestion in the evidence that he priced the job, which is normally a feature of the business approach of a sub-contractor; he was paid either a piece-work rate or a daily rate according to the nature of the work he was doing. It is true that he was not supervised in his work, but this is not surprising, he was a skilled man and he had been told that the beams upon which he was to work and the depth to which they were to be cut and his work was measured to see that he achieved that result'.
[63] *Hall* (n 62) per Mummery J.
[64] *Hall* (n 62) per Mummery J.

service.'[65] However, even with the support that these tests garnered, it was stated that the mere fact that an individual is not conducting a business on their own account does not automatically mean they are an employee, which suggested it was not a determinative or sole test for employment.[66]

While the organisation test did not gain as much support as the remaining two in the twentieth century, there were thought to be 'modern echoes' of the test in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd (Viasystems).*[67] The case was one of dual vicarious liability where an employee had been temporarily lent to another. In this case, Rix LJ held that both employers used the employee 'for the purposes of their business.'[68] Unlike May LJ, who delivered the other judgment in this case, Rix LJ was 'sceptical that the doctrine of dual vicarious liability is to be wholly equated with the question of control… I would hazard, however, the view that what one is looking for is a situation where the employee in question, at any rate for relevant purposes, is so much part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence.'[69] This closely matches Lord Denning's judgment in *Stevenson* over fifty years after it was handed down.

Applications of these tests in recent years give us an idea of how relevant they are in a modern context. As discussed in Chapter 3, Lord Phillips in *CCWS* stated various policy incidents that make it fair, just, and reasonable to impose the vicarious liability on an employer for the torts of another, including

> (i) the employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability; (ii) the tort will have been committed as a result of activity being taken by the employee on behalf of the employer; (iii) the employee's activity is likely to be part of the business activity of

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[65] *Ready Mixed Concrete* (n 24) 515.
[66] It was stated that a person is not necessarily an employee by virtue of the fact that they are not operating a business on their own account in *Wickens v Champion Employment* [1984] ICR 365, 371. The same sentiment was seen in *Ironmonger v Movefield Ltd* [1988] IRLR 461 at [19]-[206].
[67] Exall (n 55) [4.21].
[68] *Viasystems* (n 41) 536 at [77].
[69] *Viasystems* (n 41) 537 at [79].

> the employer; (iv) the employer, by employing the activity to carry on the activity will have created the risk of the tort being committed by the employee; (v) the employer will, to a greater or lesser degree, have been under the control of the employer.[70]

Factor (ii) points to the integration and entrepreneur tests, which seek to establish whether the individual is carrying out a business on their own account. If the individual is carrying out work on behalf of an organisation, they are unlikely to be pursuing their own business interests. Factor (iii), on the other hand, points to the organisation test, which considers whether the activity is an integral part of the organisation. If the individual is pursuing activities that form a central role in the organisation, they are more likely to be employed by that organisation. As discussed in Chapter 3, however, these policy factors are not the starting point for vicarious liability. Initially, the courts should question whether the individual carries 'on activities assigned to him by the defendant as an integral part its operation and for its benefit', or whether the activities are 'entirely attributable to the conduct of a recognisably independent business of his own or of a third party'.[71] This again seems to have amalgamated the three tests into one, which suggests that each of them is relevant to the assessment of employment.

From an employer's duty of care perspective, the courts seem to prefer the integration and entrepreneur tests. For example, in *Lane v Shire Roofing Co (Oxford)*, the Court of Appeal held that the relevant question was whether 'the workman was carrying on his own business, or… carrying on that of his employers'.[72] This involved an assessment of factors, such as whether the individual provides their own equipment, or can subcontract helpers, 'but may involve looking to see where the financial risk lies, and whether and how far he has an opportunity of profiting from sound management in the performance of his task'.[73]

It can be derived from recent judgments on modern vicarious liability and employer's duties of care that the organisation test, which considers how central the activities of the individual

[70] *CCWS* (n 2) 15 at [35].
[71] *Barclays* (n 1) 984-6 at [21]-[24].
[72] *Lane* (n 1).
[73] *Lane* (n 1) 417, 422.

are to the objectives of the organisation, is less central to the assessment. A factor which may be relevant to determining whether the individual is performing a core aspect of the organisation's activities would be if they are required to wear a uniform. This was particularly relevant in *Hawley v Luminar Leisure* (*Luminar*).[74] This case concerned a nightclub, Luminar, who contracted with ASE to provide doormen. ASE put forward a doorman who worked at Luminar for two years, before punching the claimant and fracturing his skull. The question to be answered by the Court of Appeal was whether either or both Luminar and ASE were vicariously liable for the doorman's tort. The Court dismissed dual vicarious liability and held that Luminar were vicariously liable, although Lord Phillips noted in *CCWS* that it was arguable that the 'facts of each case could have supported a finding of dual vicarious liability.'[75] A key factor in this decision was that the doorman was required to wear a Luminar branded uniform, as well as the fact that Luminar were able to exercise detailed control over the work of the doorman.

> Further, it appears to us that there can be no doubt that any customer, passer by or police officer seeing the doormen decked out in Luminar uniforms would have assumed they were Luminar staff. In effect this is what they were held out to be. The doormen were not recognisable physically as the employees of ASE. For over two years any regular visitor would have seen Warren dressed in Luminar's uniform working at the club answering to Luminar management on the detail of his job. It was his sole or certainly primary place of employment for that entire period.[76]

However, more recently the Court of Appeal did not apply the same logic. The case of *Hughes v Rattan* (*Hughes*) considered the professional negligence of three dentists who worked at the defendant's dental practice which provided NHS dental care to patients.[77] Following *Barclays*, the Court held that the dentists were not in relationships analogous to employment and were independent contractors, so the defendant could not be liable for their negligence. Bean LJ held, following *Cox*, that the courts should look as to whether the

[74] *Luminar* [2006] EWCA Civ 18, [2006] PIQR 17.
[75] *CCWS* (n 2) 18 at [46].
[76] *Luminar* (n 74) 232 at 80.
[77] *Hughes* [2022] EWCA Civ 107, [2022] 1 WLR 1680.

tortfeasor was conducting a recognisable business independent of the defendant's, and defined recognisable as being 'someone with no knowledge of the contractual arrangements between the tortfeasor and the defendant.'[78] Bean LJ stated that if *Cox* was the 'last word on the subject from the Supreme Court, I would have upheld the judge's finding of vicarious liability'.[79] However, it was necessary to consider the judgment in *Barclays.*

Bean LJ interpreted *Barclays* as holding that the courts should first consider whether the tortfeasor was akin to an employee, 'with the focus being on the contractual arrangements between tortfeasor and defendant.'[80] This leaves the relevance of the perception of the outside world in question. Not only that, but the conclusion that the dentists were operating separate businesses could be questioned. As Beuermann notes, if the dentists 'were independent contractors, the business they were undertaking could not have been a business for treating patients (for the patients belonged to the defendant's practice)'.[81]

Conversely, in Australia, the relevance of the outside world has been significant to the expansion of liability. The High Court of Australia (HCA) considered the case of *Hollis v Vabu* (*Hollis*), and held that Vabu, a courier platform trading under the name of Crisis Couriers, was vicariously liable for a courier who had injured a pedestrian whilst at work despite being formally classified as self-employed.[82] A few factors were determinative in finding there was sufficient justification for the imposition of vicarious liability in this instance, including the stringent requirements regarding the appearance of couriers, including bearing the logo of the organisation. In this case, the tortfeasor was unidentifiable, beyond his attire which ostensibly led to the conclusion of him being a Crisis Courier representative. To the outside world, regardless of the internal operations, the courier was an 'emanation' of the business providing an integral service to its organisational structure.[83]

[78] *Hughes* (n 74) 1704 at [86].
[79] *Hughes* (n 74) 1704 at [86].
[80] *Hughes* (n 74) 1705 at [88].
[81] Christine Beuermann, 'Strict Liability for the Torts of Associate Dentists' (2022) 38 Professional Negligence 166, 172.
[82] *Hollis* [2001] HCA 44; [2001] 207 CLR 21.
[83] *Hollis* (n 82) at [65].

The HCA held that (a) the courier was performing their services for Vabu on behalf of its clients; (b) the courier was doing this for Vabu's economic benefit; and (c) the courier did so as a representative of Vabu. Wearing company-branded livery was the 'only means by which [the claimant] could identify the courier'.[84] Brodie rationalised *Hollis* on estoppel grounds; he suggested that by presenting the couriers as 'emanations' of the business, Vabu was essentially estopped from suggesting they did not form an integral part of its operations.[85] *Hollis* was also reasoned on agency grounds by McHugh J concurring.[86] This will be drawn upon in greater detail in Chapter 10 of this thesis.

It is reasonable to derive that the factor of representation is evidently relevant to the organisation test. The assumption which underpins this is that if a service provider is required to wear an organisation-branded uniform, they are likely to form an integral part of the business, although the extent to which this remains relevant in England and Wales is unclear. Another assumption of the organisation test is that organisations are not likely to subcontract core aspects of their business to independent contractors, and this will largely be performed by employees. This has been criticised by Brodie who suggests that many organisations have little choice but to subcontract to independent contractors,[87] which may also be true of gig economy work.

The integration and entrepreneurship tests consider whether the individual is operating a business on their own account. These tests are particularly relevant to modern cases of vicarious liability and employer's duties of care which require that the tortfeasor is not operating a 'recognisably independent business'. Factors which are relevant to this assessment relate to risk management, such as the extent to which an individual is controlled, whether the individual owns their own tools, whether they have an opportunity to make a profit, and whether they bear the risks of the service provision.[88] These factors

[84] *Hollis* (n 82) at [102].
[85] Douglas Brodie, 'Enterprise Liability: Justifying Vicarious Liability' (2007) 27 Oxford Journal of Legal Studies 493, 504.
[86] *Hollis* (n 82) at [85]-[93].
[87] Douglas Brodie, *Enterprise Liability and the Common Law* (CUP 2010) 75.
[88] *Montreal* (n 56).

are intrinsically linked to aspects of enterprise liability which will be discussed in more detail in the subsection which immediately follows.

Assumptions which underpin these tests are that independent contractors are generally less economically reliant on a principal than employees, they have autonomy over how they perform their services, they have autonomy over who performs their services, and that they bear financial and liability risks.[89] However, in the context of modern employment relationships, many individuals who are independent contractors cannot be said to be entrepreneurs operating businesses independent of the principal they conduct their service provision with, particularly for those who conduct most, if not all, of their service provision with one organisation whom they are economically reliant on. This may be representative of those working in the gig economy, and this thesis will attempt test this.

4.2.3. Enterprise Liability

The notion of enterprise liability has fuelled some of the developments in vicarious liability in England and Wales.[90] The theory 'in its simplest form… [contends that] enterprises ought to be responsible for losses' they create.[91] The principle is that an employer 'ought to be liable for all those torts which can fairly be regarded as reasonably incidental risks to the type of business he carries on'.[92] An earlier example of enterprise liability in the UK is thought to be the Workmen's Compensation Act 1897. This Act required employers to pay compensation for its employees who were injured in accidents at work unless the injury was caused by the employees. It also formed part of the reasoning for the imposition of liability onto organisations for entering dangerous products onto the market.[93]

[89] We can draw similarities from the literature on dependent contractors. For a discussion on this, see Chapter 1.
[90] See generally, Gregory C Keating, 'The Theory of Enterprise Liability and Common Law Strict Liability' (2001) 54 Vanderbilt Law Review 1285.
[91] George L Priest, 'The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law', (1985) 14 Legal Studies 461, 463.
[92] Atiyah (n 16) 24. This quote was cited with approval by Lord Millet in Lister v Hesley Hall [2001] UKHL 22, [2002] 1 AC 215, 245.
[93] See generally, George L Priest (n 91).

More recently, notions of enterprise liability have been adopted to justify the imposition of vicarious liability, particularly by the courts in Canada.[94] It has been said that vicarious liability 'has the broader function of transferring to the enterprise itself the risks created by the activity performed by its agents.'[95] In the ground-breaking case of *Bazley v Curry* (*Bazley*), the Supreme Court of Canada (SCC) relied heavily on notions of enterprise liability.[96] McLachlin J stated that where

> the employer puts in the community an enterprise which comes with it certain risks. When those risks materialise and cause injury to a member of the public despite the employer's reasonable efforts, it is fair that the person or organisation that creates the enterprise and hence the risk should bear the loss.[97]

In this case, the organisation had not only created, but enhanced the risk of sexual abuse, and so it was fair to hold them vicariously liable.

Originally, enterprise liability theory had been couched to hold profit-making organisations liable. Stapleton's work is a good example of this: 'if in seeking to secure financial profit, an enterprise causes certain types of loss, it should be legally obliged to pay compensation to the victim'.[98] Atiyah much earlier also referred to enterprise as being the party who is 'benefitting from the work',[99] and while benefit may be construed as being financial,[100] the theory can extend to non-profit organisations,[101] such as the organisation seen in *Bazley*.[102] *Bazley* has acted as persuasive precedent for the development of vicarious liability in England and Wales.[103] In *CCWS*, *Bazley* was referred to with some approval by Lord Phillips. As discussed in Chapter 3, Lord Phillips stated the policy incidents that were appropriate for

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[94] *Bazley v Curry* (*Bazley*) (1999) 174 DLR (4th) 45, [1999] 2 SCR 534 (SCC); *Jacobi v Griffiths* (*Bazley*) (1999) 174 DLR (4th) 71, [1999] 2 SCR 570 (SCC).
[95] *London Drugs Ltd. v. Kuehne & Nagel International Ltd* [1992] 3 SCR (SCC) 299, 399 per La Forest J.
[96] *Bazley* (n 94).
[97] *Bazley* (n 94) 544 at [31].
[98] Jane Stapleton, *Product Liability* (Butterworths 1994) 187.
[99] Atiyah (n 16) 333.
[100] JW Neyers, 'A Theory of Vicarious Liability' (2020) 287 Alberta Law Review 287.
[101] Brodie (n 85) 11. Criticism of enterprise liability theory for organisations which do not operate for profit 'only has merit if profit is viewed in a purely financial sense.'
[102] *Bazley* (n 94).
[103] For example, *Lister* (n 89).

vicarious liability. Incidents (iii) and (iv), for example, are relevant to enterprise liability: '(iii) the employee's activity is likely to be part of the business activity of the employer, (iv) the employer, by employing the employee to carry on the activity will have created the risk of the tort being committed'.[104] Lord Phillips also stated that an 'employer [is] treated at law as picking up the burden of an organisational or business relationship which he had undertaken for his own benefit'.[105] It is evident that there is an importance for an organisation to create a risk, and benefit from that risk, in order for it to be fair that they are liable for the risk materialising. Brodie is critical of these developments as it refers to the risks of the activities of the employee, rather than the inherent risks that are generated by the enterprise or organisation.[106]

Lord Nicholls in *Dubai Aluminium Co Ltd v Salaam and Others* (*Dubai Aluminium*) also applied reasoning of enterprise liability when applying the close connection test at stage two of the enquiry for vicarious liability.[107] It was stated that

> The underlying legal policy is based on the recognition that carrying on a business enterprise necessarily involves risks to others. It involves the risk that others will be harmed by wrongful acts committed by the agents through whom the business is carried on. When those risks ripen into loss, it is just that the business should be responsible for compensating the person who has been wronged.[108]

Enterprise liability is closely aligned to the deeper pockets theory that an employer will be able to bear the loss than the employee. Priest in his seminal article on enterprise liability proposed two principles.[109] The first was based on controlling risk. The second, and more controversial, was based on risk distribution and insurance. He contended that responsibility should fall on those best able to manage risk, for example if they had insured against the risk. Steele described this as 'the greatest retreat from personal responsibility.'[110] This

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[104] *CCWS* (n 2) 15 at [35].
[105] *CCWS* (n 2) at [43].
[106] Brodie (n 87) 75.
[107] *Dubai Aluminium* [2002] UKHL 48, [2003] 2 AC 366.
[108] *Dubai Aluminium* (n 107) 377 at [21].
[109] George L Priest (n 91).
[110] Jenny Steele, *Risks and Legal Theory* (Hart 2004) 66.

argument can be applied more narrowly from a vicarious liability lens since an enterprise can better absorb the risk if it does materialise.[111] This may be because the employer has taken out liability insurance which will provide cover for negligent acts, as well as the ability to pass the cost onto customers.[112]

The theory has been criticised as it fails to justify why liability can only be imposed on an employer for the torts of an employee and not an independent contractor.[113] It is thought that it merely justifies strict liability and not vicarious liability.[114] The assumption is likely that an enterprise will run its primary risks through its employees, not independent contractors. However, as Brodie acknowledged, in modern employment relations, there is a growing reliance on the work of independent contractors, particularly in the construction industry where the service of employees alone may not be sufficient to carry out the enterprise's activities.[115] In situations where a true independent contractor internalises the inherent risks of the enterprise, the employer may escape liability. This task is also more complex for the courts with the 'permanent opaqueness of the demarcation line between a contractor of employment and one for services.'[116]

Atiyah questioned whether vicarious liability should be extended to the actions of independent contractors, where the employer runs its business activities through the independent contractor and benefits.[117] This would incentivise 'employers to seek out and contract with financially responsible contractors who can meet any damages awarded against them (or indemnify the employer against liabilities imposed on him) and this is in the public interest.'[118] McHugh, also critical of the independent contractor and employee

[111] Simon Deakin, 'Enterprise-risk: The Juridical Nature of the Firm Revisited' (2003) 32 Industrial Law Journal 97, 112.
[112] Jeremiah Smith, 'Sequel to Workmen's Compensation Acts' (1914) 27 Harvard Law Review 235, 252.
[113] James Plunkett, 'Taking Stock of Vicarious Liability' (2016) 132 Law Quarterly Review 556, 559–60.
[114] Plunkett (n 113) 559–60.
[115] Brodie (n 87) 75.
[116] Brodie (n 87) 75.
[117] See generally, Atiyah (n 16).
[118] Atiyah (n 16) 333.

dichotomy, argued that the independent contractor and employer should be jointly liable which would encourage the development of indemnification agreements.[119]

The underlying assumption is that enterprises and organisations through their operations run inherent risks in society. For non-profit organisations that provide residential care for children, unfortunately an inherent risk is one of child sexual abuse. Where such inherent risks materialise, '[e]quity dictates' that it should be the party who benefits from those risks who bears the burden'.[120] This notion is furthered in the context of modern enterprises that are assumed to operate 'as a mechanism for absorbing, controlling and spreading social and economic risks', meaning they are best able to bear the burden of liability.[121] This might be particularly relevant where the independent contractor is impecunious.

4.3. Paths Not Taken

While the existing tests of employment for the purposes of tort have been discussed above, there have been other approaches postulated. One such approach is the notion of agency. Agency is a type of relationship formed between a principal and an agent. Usually, an agent will be appointed by a principal 'to bring about, modify, or terminate legal relations between the principal and more of more third parties.'[122] As a result of this, the principal can be personally liable in contract where the agent contracts with a third party on their behalf.[123]

The recognition of a relationship of agency is usually characterised by a conferral of express or implied authority from the principal onto an agent.[124] The agent's authority may be 'actual', which means it is identifiable through the means of a consensual agreement. In this case, the agent will be vested with the authority to act on behalf of the principal in transactions. Authority can also be ostensible, or apparent, which means the 'authority of

[119] See generally, James B McHugh, 'Risk Administration in the Marketplace: A Reappraisal of the Independent Contractor Rule' (1973) 40 The University of Chicago Law Review 661.
[120] Brodie (n 87) 9.
[121] Deakin (n 111) 112.
[122] Ewan McKendrick, *Goode and McKendrick on Commercial Law* (6th edn, Penguin 2020) 207.
[123] *Freeman & Lockyer v Buckhurst Park Properties (Mongal) Ltd* (*Freeman*) [1964] QB 480
[124] Peter G Watts and FMB Reynolds, *Bowstead & Reynolds on Agency* (22nd edn, Sweet & Maxwell 2020) para [2-001].

the agent as it appears to others'.[125] In this case, the agent will be imbued with the authority to act on behalf of the principal. Where an agent has imbued authority, the principal can be estopped from denying that a relationship of agency exists.

Agency law in England and Wales is primarily used in contract disputes. However, notions of agency have also been peppered throughout the common law history of vicarious liability in England and Wales and, according to Gray, have been used to 'explain the liability of the master' in some cases.[126] In the nineteenth century, for example, the language adopted was that of 'master' and 'agent'.[127] This was at a time, as previously stated, where the predominant theory and test which underpinned vicarious liability was that of the control that a master had over her servant. At a similar time, there was some development in relation to the notion of a conferral of authority from a master to a servant or agent, a concept that is expressly interwoven into the law of agency.

The use of this concept be seen clearly in in *Laugher v Pointer* where Abbott CJ stated 'whatever is done by his authority is to be considered as done by him.'[128] This not only draws upon the concept of respondeat superior, but also suggests more broadly that the conferral of authority from a master or principal to a servant or agent was relevant to the analysis. Further evidence of the idea of a conferral of authority being used to rationalise vicarious liability can be seen in the excellent work of Beuermann who tracked its prevalence throughout the history of the common law.[129] A clearer statement of agency was seen in *Pattern v Rea*, where Williams J claimed that 'the real question is whether the servant while doing the negligent act complained of was acting as the agent of the defendant'.[130]

An interpretation of ostensible authority was also applied in *McDermid v Nash Dredging Co* at first instance in England and Wales, as identified by McKendrick.[131] Here, it was argued

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[125] *Freeman & Lockyer v Buckhurst Park Properties (Mongal) Ltd* (*Freeman*) [1964] QB 480
[126] Anthony Gray, *Vicarious Liability: Critique and Reform* (Hart 2018) 24.
[127] For example, *Barwick v English joint Stock Bank* (1867) LR 2 Ex 259 at 265.
[128] *Laugher v Pointer* (1826) 108 ER 204, 215.
[129] See generally, Christine Beuermann, *Reconceptualising Strict Liability for the Tort of Another* (Hart 2019).
[130] *Pattern v Rea* (1857) 2 CBNS 606.
[131] Ewan McKendrick, 'Vicarious Liability and Independent Contractors - A Re-Examination' (1990) 53 The Modern Law Review 770, 781.

that where the precise nature and terms of the relationship were unknown to the claimant, they may be entitled to assume the tortfeasor was an employee. McKendrick found 'much to commend' in the judgment.[132]

These notions were continued into more modern judgments of vicarious liability involving motor vehicle accidents. For example, Lord Wilberforce in *Morgans v Launchbury* stated that 'to fix vicarious liability upon the owner of a car… it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty.'[133] Lord Wilberforce also noted that he accepted the concept of agency in this context 'entirely' where the owner of the vehicle 'has authorised the act, or requested it, or because the actor is carrying out a task or duty delegated, or because he is in control of the actor's conduct.'[134] The ulterior rationale for this trend may be coloured by the issue of compulsory insurance for motor vehicles, but the express acceptance of an agency-based approach in this context cannot be ignored.

Looking to other jurisdictions, the concept of agency and the doctrine of vicarious liability are not siloed. This is clear when we look at the United States of America (US) where vicarious liability falls under the umbrella of agency law.[135] Looking also to Canada, which is more akin to England and Wales with a common law jurisdiction, notions of agency have also appeared in the doctrine. For example, in *Hollis*, discussed above, McHugh J, concurring, attempted to rationalise the imposition of vicarious liability on agency grounds.[136] In the case of *Hollis*, McHugh J suggested that Vabu had conferred authority to its couriers to carry out its core business activities and, in doing so, had made the couriers its direct representatives.[137]

However, modern day vicarious liability judgments in England and Wales have opted against an agency-based approach to the imposition of secondary liability onto one party for the

[132] McKendrick (n 131) 781.
[133] *Morgans v Launchbury* [1973] AC 127, 135.
[134] *Morgans* (n 133) 135.
[135] Restatement (Second) of Agency (1958); Restatement (Third) of Agency (2006).
[136] *Hollis* (n 82).
[137] *Hollis* (n 82) at [102].

torts of another. Instead, the doctrine is supported by a plethora of different policy underpinnings which seek to justify the imposition of liability in this context, despite the concept of agency being beneficial in rationalising the representative capacity of actors when working with a principal or an organisation.[138]

As discussed above, this issue was reconciled in *Hughes v Rattan*,[139] where Bean LJ outlined the meaning of the term 'recognisably independent business' taken from Lord Reed's test in *Cox*. Bean LJ stated that while 'recognisable' in the ordinary sense might mean someone with 'no knowledge of the contractual arrangements', in reality this was not what the Supreme Court meant in the post-Cox cases.[140] If this was the test, this would be akin to the 'ostensible' authority imbued on agents, as it refers to the perspective of the outside world. According to Bean LJ, if this was the correct meaning he would have had no choice but to impose vicarious liability for the negligent acts committed.

However, this was not the correct meaning of Lord Reed's terminology. In this context, a 'recognisably independent business' means that an individual is working in business on their own account and not in a relationship with a principal that is analogous to employment. Bean LJ's interpretation of this terminology is significant when we consider the notion of agency. This is a clear indication that the English courts are not currently willing to depart from existing maxims and theoretical underpinnings.

4.4. The Purpose of Tortious Liability in Employment Settings

The previous section has analysed the different theories used in tort to determine employment, and the assumptions which underpin those theories. This section seeks to examine the effect that tortious liability in an employment setting has or is thought to have on the behaviour of defendants and tortfeasors. This has been broken down into three main sub-sections. The first considers the deterrent or incentive effect that liability may have, and the second considers the notion of corrective justice. The third and final subsection

[138] See *CCWS* (n 2).
[139] *Hughes* (n 77).
[140] *Hughes* (n 77) at 1704 [88].

considers the aims of distributive justice. Each of these subsections will be considered in turn.

4.4.1. Deterrence and Incentive

Deterrence- or incentive-based theories underpin the imposition of strict liability for the tort of another, as well as negligence-based liability for employers.[141] In the context of strict liability, Steele states

> The argument from deterrence is that the employer has the *opportunity* to increase standards of safety, for example, through better procedures for selecting employees and for their supervision. Therefore, it is best if there is an *incentive* for him or her to do so, through liability for the employee's tort.[142]

This suggests that the policy is to deter employers from allowing safety standards to erode through the promise of tortious liability, as well as to positively incentivise employers to increase safety standards as they will incur the benefit of avoiding liability. This will certainly be applicable to employers whose liability is incurred from their negligent conduct, as if an employer has taken reasonable steps to increase safety standards it is less likely to be held liable for the breach of duty owed to its employee. This may be more difficult to reconcile in a strict liability regime where the employer is liable regardless of its negligence. However, the decreased safety risk generally may result in fewer torts being committed generally, so the promise of tort may still have some effect. As Steele correctly noted, the aim of deterrence is not about fixing standards, but in general it is to encourage the organisation to improve the standards.[143]

In the context of strict liability for the tort of another, through doctrines such as vicarious liability and non-delegable duties, similar logic has been applied. Fleming argued that deterrence is fundamental to the imposition of strict liability for the tort of another.[144] The

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[141] Lord Hope, 'Tailoring the Law on Vicarious Liability' (2013) 129 Law Quarterly Review 514, 526; Marco Cappelletti, *Justifying Strict Liability: A Comparative Analysis in Legal Reasoning* (OUP 2022) 119.
[142] Jenny Steele, *Tort Law: Text, Cases, and Materials* (5th edn, OUP 2022) 609.
[143] Steele (n 123) 609.
[144] See generally, John G Fleming, *The Law of Torts* (9th edn, LBC Information Services 1998).

SCC in *Bazley* agreed and weaved notions of deterrence throughout the judgment, holding that an employer is 'often in a position to reduce accidents and intentional wrongs by efficient organization and supervision.'[145] This may occur by taking greater care in the initial selection of employees, as Atiyah stated,[146] or by serving employers an incentive to 'discipline servants guilty of wrongdoing'.[147] Taking such steps are thought to 'reduce the risk of future harm'.[148]

It is also worth considering the potential effect that imposing liability on an employer might have on the future behaviour of its employees. Are they then more likely to engage with risky behaviour at work, or commit intentional torts, as they are less likely to bear the burden of liability? This depends on many factors. Perhaps they do not have the same awareness of tort as their employer does, or that liability in tort does not influence their judgment in the same way it might for their employer.[149] Not only that, but there may still be consequences for the employee as their employer could seek an indemnity[150] or they could be dismissed.

Stevens is critical of deterrence-based theories. He claims that

> If we think that the goal of vicarious liability is deterring careless conduct, it makes sense to require the employee to indemnify the employer, so that the person primarily responsible for the carelessly inflicted loss has the loss put upon him.[151]

A further criticism of deterrence in a strict liability context might that the aims are more appropriate for negligence-based primary liability. For example, by requiring an employer to have sufficiently high safety standards for its employees, or to take reasonable care in the selection of employees, seen in an employer's non-delegable duties of care.[152] The SCC

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[145] Bazley (n 94) 554 at 32
[146] Atiyah (n 16) 333.
[147] Fleming (p. 410).
[148] Bazley (n 94) 554-555 at 32
[149] For a discussion on the tort's influence on the behaviour of actors, see chapter 2.
[150] This could be sought through the Civil Liability (Contribution) Act 1978.
[151] Stevens (n 15) 259.
[152] For a discussion on this, see chapter 3.

rejected this approach, as employers can more easily avoid negligence-based primary liability, particularly in cases involving historic sexual abuse, as there may be an absence of evidence. Wilkinson J articulated this in *G.J. v. Griffiths* (*G.J.*) by explaining that

> If the scourge of sexual predation is to be stamped out, or at least controlled, there must be powerful motivation acting upon those who control institutions engaged in the care, protection and nurturing of children. That motivation will not in my view be sufficiently supplied by the likelihood of liability in negligence. In many cases evidence will be lacking or have long since disappeared. The proof of appropriate standards is a difficult and uneven matter.[153]

As discussed in the previous chapter, it is clear that sexual abuse cases have had a significant impact on the development of strict liability. In England and Wales, the courts in recent years have not overtly or closely applied deterrence aims to strict liability, although it would be incorrect to say they have been absent. For example, when considering the test of control in *Viasystems*, the Court of Appeal suggested that the 'employer is encouraged to control that risk' if they are vicariously liable for it materialising.[154] It is evident that, to some degree, deterrence- and incentive-based theories have helped to justify the imposition of liability onto employers for its own torts or the torts of its employees. The following subsection will examine the extent to which notions of corrective justice have also underpinned this development.

4.4.2. Social Justice and Corrective Justice

The previous chapter examined the development of doctrines such as vicarious liability and discussed the extent to which these doctrines promote theories of corrective justice in deplorable instances of child sexual abuse. This subsection will draw upon similar arguments considering the importance of corrective justice in the development of legal doctrine.[155] Vicarious liability has been said to be a 'doctrine designed for the sake of the claimant'.[156]

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[153] *G.J.* [1995] B.C.J. No. 2370 (QL) at [69]. This was cited with approval in *Bazley* (n 94) 555 at 32.
[154] *Viasystems* (n 41) 529 at [59].
[155] Ernest J Weinrib, 'Corrective Justice in a Nutshell' (2002) 52 University of Toronto Law Journal 349.
[156] *CCWS* (n 2) 17 at [43].

Just as the doctrine of non-delegable duties of care does, vicarious liability has the effect of remedying the loss suffered by a claimant, particularly if the tortfeasor is impecunious or unidentifiable making them essentially judgment proof. Fleming, for example, stated that notions of deterrence and corrective justice underpinned tort,[157] which was upheld by the SCC in *Bazley*.[158]

As discussed in the previous chapter, strict liability for the tort of another has evolved rapidly in light of the inherent risk of child sexual abuse in residential settings. These harms are sadly a widespread problem, and the victims of this abuse are duly owed a remedy. It has been noted elsewhere that there are other limitations to compensation schemes available to victims of abuse, such as UK Criminal Injuries Compensation Scheme.[159] It is difficult to argue against the idea that these harms have influenced the development of legal doctrine. Giliker has also argued that the courts have focused on ensuring that social justice has been achieved:

> The answer, it is submitted, lies in the Court's belief that social justice requires that the courts should ensure that innocent victims are able to obtain compensation from solvent defendants, notably in the context of sexual abuse claims. In all three decisions, the Court was therefore unwilling to leave an innocent victim at the mercy of a claim against an uninsured tortfeasor likely to be of limited means.[160]

Giliker also took note of Lord Dyson MR's comments in *Mohamud v Wm Morrison Supermarkets plc* (*Mohamud*) that the Court were looking to develop a 'fairer and more workable test' at stage two.[161] Lord Dyson MR went further by stating that the Salmond test could no longer satisfactorily represent the instances where an employee's tort are sufficiently close to their employment.[162] Instead, principles of 'social justice' should be

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[157] Fleming (n 125).
[158] McLachlin J stated that these policy considerations 'usefully embrace the main policy considerations that have been advanced' in *Bazley* (n 94) 552 at [30].
[159] Paula Giliker, 'Analysing Institutional Liability for Child Sexual Abuse in England and Wales: Vicarious Liability, Non-Delegable Duties and Statutory Intervention' (2018) 77 Cambridge Law Journal2 506, 509.
[160] Paula Giliker, 'Vicarious Liability in the UK Supreme Court' (2016) 7 Supreme Court Yearbook 152, 153.
[161] *Mohamud* [2016] UKSC 11, [2026] AC 677, 695 at [56].
[162] *Mohamud* (n 161) 695-696 at [56].

applied which better accounts for circumstances where the employer created the risk and ran it through the activities of its employee.[163] The same logic can be seen in *Wm Morrison Supermarkets plc v Various Claimants* (*Morrisons*), where Lord Reed agreed that principles of 'social justice' should help determine the circumstances in which an employer can be held liable for the actions of its employee, although this should not be determined according to individual judge's views of social justice.[164] Notions of social justice for stage two have been characterised as arising from the fact that enterprises or organisations create risks and run them through the activities of employees, which aligns with the theory of enterprise liability discussed in section 4.3.3.

As stated above, it is difficult to argue that legal doctrine, particularly with respect to vicarious liability, has not developed according to social or corrective justice. However, the debate centres on whether it has done so in a reasoned and principled way or whether it lacks legal cogency. In Chapter 3, this author was critical of recent Supreme Court judgments which sought to rein in the expansion of strict liability without being able to satisfactorily explain the developments; this argument is particularly relevant to stage two of the enquiry and the judgments handed down in *Mohamud*.[165]

In *ICI Ltd v Shatwell* (*ICI*), half a century before the recent expansions to the doctrine, Lord Peace acknowledged that vicarious liability was a product of 'social convenience and rough justice' and had failed to grow from 'any very clear, logical or legal principle'.[166] The same could be said now. The courts seem to have taken a patchwork approach that is not grounded in legal principle and has responded to social injustice on 'an ad hoc basis to accommodate circumstances in which it would be unconscionable for the law not to provide a remedy.'[167] This can also be seen with the development of non-delegable duties of care which are thought to 'plug the gaps' of vicarious liability by responding to situations where an independent contractor employed by a principal commits a tort.[168]

[163] *Mohamud* (n 161) 693 at [45].
[164] *Morrisons* [2020] UKSC 12, [2020] AC 989 at [26].
[165] Jessica Gracie, 'Vicarious Liability : No Longer "on the Move" — Barclays Bank Plc v Various Claimants; Wm Morrison Supermarkets Plc v Various Claimants' (2020) 26 Torts Law Journal 269, 278.
[166] *ICI* [1965] 656, 685.
[167] Gracie (n 165) 275.
[168] *ICI* (n 166) 685.

4.4.3. Distributive Justice

The previous chapter examined the development of doctrines such as vicarious liability and discussed the extent to which these doctrines promote theories of distributive justice.[169] Distributive justice 'requires a focus on the just distribution of burdens and losses among members of a society.'[170] Doctrines which impose strict liability onto one party for the tort of another are a form of distributive justice by nature as they ensure that a claimant is compensated for their losses, usually by placing the burden of liability onto a party that is able to compensate the claimant. Vicarious liability provides claimants with an additional defendant who in many cases will be solvent or will have insured against the risk.[171] It has 'practical relevance in situations where (1) the principal tortfeasor cannot be found or is not worth suing, and (2) the person sought to be made vicariously liable is able to compensate the victim of the tort.'[172] To quote Fleming, the 'master is a more promising source of recompense than his servant who is apt to be a man of straw'.[173]

Atiyah claimed that tort failed in achieving those goals and noted that the cost of liability in tort was spread thinly.[174] However, an employer is likely to be insured against the loss or able to distribute loss within the enterprise by decreasing the dividends taken by shareholders.[175] In a vicarious liability context, distributive justice aims are evident. As discussed above, Lord Phillips in *CCWS* stated that the deeper pockets justification was one of the five policy factors that make it fair, just, and reasonable to impose secondary liability onto one party for the torts of another.[176]

Stevens suggested this justification is flawed as it 'fails to explain why this particular employer, rather than another body with an equally deep or deeper pocket, should

[169] *McFarlane and Another v Tayside Health Board* (*McFarlane*) [2000] 2 AC 59, 83.
[170] *McFarlane* (n 169) 82.
[171] Morgan (n 30) 617.
[172] *Armes* (n 27) at [63]
[173] Fleming (n 125) 410.
[174] Patrick S Atiyah, 'Personal Injuries in the Twenty First Century: Thinking the Unthinkable' in Peter Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (OUP 1996).
[175] McHugh (n 119) 672.
[176] *CCWS* (n 2) 15 at [35]

compensate the claimant.'[177] He claimed that rationalising vicarious liability on this basis fails to justify vicarious liability and questioned why it should not be imposed on the 'deepest pocket of all: the state.'[178] A response to this may be that as this justification is coupled with other policy factors which suggest a closeness in the relationship between the tortfeasor and the defendant and the tort committed which would make imposing liability on other parties inappropriate.[179] It is not disputed that deeper pockets arguments should not alone justify the imposition of liability, but it is undeniable that the effect of these doctrines provides claimants with an additional and, importantly, solvent defendant.

Williams was highly critical of the distributive-based policy reasoning being applied to this kind of strict liability.[180] He claimed that '[i]t may be questioned whether the social evil of the occasional insolvent tortfeasor is of sufficient gravity to justify the somewhat complicated rules and the imposition of vicarious liability',[181] although this claim may now be an understatement. He also contended that the deeper pockets argument 'hardly applies to contractors, who are often far wealthier than their employers'.[182]

Lady Hale in *Woodland v Essex County Council* (*Woodland*), responded to these arguments holding that they are not relevant in a modern context.[183] Often large organisations will subcontract core aspects of its business to independent contractors who one could scarcely say would be wealthier than the organisation it conducts its services with. Not only that, but the doctrines of vicarious liability and non-delegable duties do not permit both the primary tortfeasor and the defendant from being held liable, nor does it prevent the defendant from seeking an indemnity from the tortfeasor. Further, the courts have been faced with social injustice in recent years which involve vulnerable claimants, including children who have suffered harm, be that negligent harm as seen in *Woodland*, or intentional harm. This has permitted a greater reliance on policy, and a greater need to compensate victims effectively.

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[177] Stevens (n 15) 258.
[178] Stevens (n 15) 258.
[179] Atiyah (n 16) 15.
[180] Glanville Williams, 'Liability for Independent Contractors' (2004) 14 The Cambridge Law Journal 180.
[181] Williams (n 180) 198.
[182] Williams (n 180) 195.
[183] *Woodland* [2013] UKSC 66, [2014] AC 537, 590 at [42].

Beever claims that distributive justice is conceptually distinct from corrective justice.[184] Notions of distributive justice are interwoven and entangled in theories of corrective justice and deterrence.[185] The SCC in *Bazley* referred to distribution as being a 'hybrid' of corrective justice and deterrence.[186] Distributive justice, as used in doctrines of vicarious liability and non-delegable duties in care, is a mechanism which allows the claimant to seek a remedy from a solvent defendant, but also has the effect of correcting the injustice. It is also interwoven with deterrence- and incentive-based aims of liability, as the party best able to remedy the wrong will often be the employer, who may then be deterred from allowing such risks to occur again. It may also have the effect of encouraging the employer to insure against potential risks.[187]

This section has considered the purposes of tortious liability. It has analysed deterrence- and incentive-based purposes, as well as notions of corrective and distributive justice in turn, all of which are argued to contribute to the imposition of liability in tort. The previous section analysed the tests which determine whether there is a sufficiently close relationship between the defendant and the tortfeasor to justify the imposition of liability, including tests of control, integration, and enterprise liability. The next section will analyse the potential disruption that the gig economy may pose to these theories and the assumptions which underpin them.

4.5. Gig Economy Disruption to Tort

This section seeks to examine the potential impact that the rise of the gig economy may have on tort in its capacity to distribute risk. It will do so by analysing the potential problems that tort may face in light of the gig economy. This prefaces Parts II and III of the thesis, which will discuss the findings of an empirical examination of the gig economy in more detail.

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184 Allan Beever, 'Corrective Justice and Personal Responsibility in Tort Law' (2008) 28 Oxford Journal of Legal Studies 475, 477–488.
185 See generally, Claire McIvor, *Third Party Liability in Tort* (Hart 2006) ch 1.
186 *Bazley* (n 94) 552 at 29
187 Alan O Sykes, 'The Economics of Vicarious Liability' (1982) 93 Yale Law Journal 1231.

As discussed in Chapter 1, the majority of the legal literature analysing the gig economy has been written in relation to employment law. The vast majority of cases concerning the gig economy have related to employment law issues, such as employment status and collective bargaining.[188] Comparatively little has been written on the gig economy and tort.[189]

As stated above, some of the challenges that the gig economy has posed to employment law relates to employment status. Courts in England and Wales, and in other jurisdictions, have had some difficulty determining whether service providers in the gig economy are employees or independent contractors. As discussed above, the notion of employment is also central to doctrines in tort, such as employer's duties and vicarious liability. There is a requirement that there is a relationship sufficiently akin to employment. On this basis, tort may face similar problems in determining whether gig economy service providers are in relationships analogous to employment if they fall victims to a tort or they themselves commit a tort; there is evidence that these risks are beginning to materialise in the UK and the US.[190] Section 4.2.1. of this chapter examined the different tests which are applied to determine whether there is a relationship of employment, including the tests of control, integration, and enterprise liability, as well as the assumptions which underpin those tests. This thesis seeks to test these assumptions in the context of the gig economy. Ultimately, it is argued that if the assumptions do not match the perspectives of actors, legal doctrine is diminished in its aims.

The development of the control test was analysed in section 4.2.1. of this thesis. As discussed above, this has been subject to change in recent years, particularly for the purposes of vicarious liability, to account for the changing nature of work and situations where there is no formal contract of employment. Instead of looking contractually at the relationship, the courts began to look at the reality of the relationship. Gig economy

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[188] For example, *Pimlico Plumbers and Another v Smith* (*Pimlico Plumbers*) [2018] UKSC 29, [2018] 4 All E.R. 641; *Uber BV v Aslam* (*Uber*) [2021] UKSC 5, [2021] 4 All E.R. 209; *Independent Workers' Union of Great Britain (IWGB) v RooFoods Ltd (t/a Deliveroo)* [2017] 11 WLUK 313; [2018] I.R.L.R. 84.
[189] For notable exceptions, see chapter 1.
[190] Matt Millington, 'Uber Agrees "landmark" Payout after Two Women Report Sexual Assault by Leeds Taxi Driver' *Leeds Live* (2019); Sara Ashley O'Brien and others, 'CNN Investigation: 103 Uber Drivers Accused of Sexual Assault or Abuse' *CNN* (2018) <https://money.cnn.com/2018/04/30/technology/uber-driver-sexual-assault/index.html#:~:text=Of the 103 Uber drivers,drivers were found not guilty.>.

scholarship details control which is algorithmic in nature. Much of this research has been conducted in relation to Uber, which conducts systematic performance management over its supervisors using algorithmic rating systems.[191] This was considered to be a core factor in the landmark judgment handed down by Lord Leggat in the Supreme Court in *Uber v Aslam* (*Uber*), which held that Uber drivers were workers for the purposes of employment law. He based this judgment on five key factors.

1. The drivers could not set their own fares
2. The written agreement between Uber and the drivers was unilaterally imposed
3. The control exercised over the drivers was more than minimal, for example by penalising drivers who did not accept a specific number of trips
4. The performance management mechanisms used to control the manner in which drivers deliver the service, for example through a rating system
5. Communication between passengers and drivers being managed by Uber, meaning there was no possibility of future working relationships.[192]

The precedent set by the Supreme Court in *Uber* means that algorithmic control is capable of constituting control, at least in the sphere of employment law. It may be assumed that a similar approach could be adopted in tort.

As discussed above, an assumption made by the courts in relation to control is that it is less likely to feature in modern employment relationships due to the growing prevalence of employees who possess a greater skillset than their employers. It is on this basis that the courts have said that control is no longer a primary test for determining whether someone is employed, although its absence may be suggestive that the individual is an independent contractor. However, if control is extensive in a gig economy setting, maybe more so than other factors, it is unclear how relevant this will be to the assessment.

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[191] Julia Tomasetti, 'Algorithmic Management, Employment and the Self in Gig Work' in Deepa Das Acevedo (ed) Beyond the Algorithm: Qualitative Insights for Gig Work Regulation (CUP, 2020); Teresa Coelho Moreira, 'Algorithms, Discrimination and Collective Bargaining' in José María Miranda Boto and Elisabeth Brameshuber (eds), Collective Bargaining and the Gig Economy: A Traditional Tool for New Business Models (Hart, 2022) 157
[192] *Uber* (n 188) at [94]-[100].

The tests for integration were discussed in section 4.2.2. of this chapter. It was concluded that there are three tests associated with integration, some of which are closely linked with theories of enterprise liability. The first examines whether the activities of the individual are integral to the organisation. The second examines the extent to which the individual is operating a business on their own account. The third considers the extent to which the individual is an entrepreneur. The first test relies on the idea that the activities of the individual form 'part and parcel' of the business. The assumption here will be that organisations are less likely to outsource core aspects of its business to independent contractors. As gig economy service providers are generally independent contractors, would they be capable of being integrated into the business activities of the platforms? And to what extent can they be integrated into the business of the platforms when they are physically distant from the platforms due to their work being carried out primarily on smartphone apps or websites?

It has also recently been restated in *Hughes* that the service provider's appearance to the outside world is no longer relevant to the assessment of employment in tort. Gig economy service providers are often the face of the platforms and will often wear platform-branded uniforms or use platform-branded equipment.[193] In these instances, third parties may duly come to the conclusion that these individuals are working for the platform and performing an integral service to their business. If this was presented in argument to the courts in a case concerning tortious liability it is unclear whether this would be applicable to the assessment.

The remaining two tests consider whether the individual is an entrepreneur conducting business activities on their own account. Where the answer to these questions is in the affirmative, it is likely that the individual is an independent contractor. As discussed above, it is assumed that independent contractors are less economically reliant on a principal, they have autonomy over how they perform their services, and that they bear the burden of financial and liability risks. In the gig economy, however, there has been some concern over the suggestion that they are each operating individual businesses separate to the platforms

[193] For example, *Pimlico Plumbers* (n 188) at [48].

they work with.[194] Despite being classified as independent contractors, they may not be operating their service provision in a manner which is consistent with legal doctrine's understanding.

Section 4.2.3. of this chapter analysed the notion of enterprise liability which contends that enterprises which run inherent risks through the activities of employees should be liable if those risks materialise and cause injury to a third party. It is therefore important to analyse the risks that service providers perceive to be inherent to their service provision. Not only that, but it is important to determine which enterprise those risks are inherent to. Is this the enterprise of the service provider, or the platform, or both? And is it the service provider or the platform that is the creator of this risk? To do this, it is important to determine the boundaries between enterprises, which has been an overwhelmingly difficult challenge for the courts.

Finally, it is important to determine what effect liability might have. If a third party was injured through the activities of the service provision, how effective would bringing a claim against the tortfeasor be? This may rest on whether the service provider has insured against the risk, which may not be possible if an intentional tort was committed. If, however, liability is imposed on the platform, would this have an effect on the behaviour of service providers? This would rest on the extent to which service providers were aware of tort, and whether the threat of tort influences their behaviour. As discussed in chapter 2, much of the literature considering tort's deterrent effect was carried out in relation to organisations which are more likely to be aware of tort.[195] The limited evidence carried out with individuals suggested that tort had little deterrent effect.[196]

The assumptions that have been discussed in sections 4.2 and 4.3. of this chapter have been analysed in relation to the gig economy. This section has sought to analyse these

[194] M. A. Cherry, A. Aloisi, 'Dependent Contractors in the Gig Economy: A Comparative Approach' (2017) 66 Am. U. L. Rev. 635.

[195] For a discussion on this, see chapter 2.

[196] W Jonathan Cardi, Randall D Penfield and Albert H Yoon, 'Does Tort Law Deter Individuals? A Behavioural Science Study' (2012) 9 Journal of Empirical Legal Studies 567; Theodore Eisenberg and Christoph Engel, 'Assuring Civil Damages Adequately Deter: A Public Good Experiment' (2014) 11 Journal of Empirical Legal Studies 301.

assumptions in the context of the gig economy to preface some of the challenges that the gig economy may pose. As stated above, if the assumptions made by legal doctrine do not match the perspectives of actors it is ultimately diminished in its aims. This thesis seeks to test the assumptions in the context of the gig economy so that the courts are better informed when they are faced with these challenges.

4.6. Conclusion

The previous chapter analysed doctrines in tort which distribute risk in the context of service provision. These doctrines rely on a variety of tests to determine the circumstances in which it is appropriate to impose liability onto an employer. This chapter has examined these tests in detail and the assumptions that underpin them and has analysed the potential challenges that the gig economy poses to those assumptions.

Section 4.2. analysed the key tests and the assumptions they carry that are adopted to determine whether liability can be imposed on an employer, including tests of control, integration, and enterprise liability. Section 4.3. considered the theoretical aims of liability, including deterrence- and incentive-based purposes, corrective justice aims, and distributive justice. Section 4.4. analysed the extent to which the gig economy may challenge tort in its determination of employment, with respect to the tests and the policy purposes which underpin liability.

Part II of the thesis immediately follows this chapter. This will detail the empirical investigation that has been conducted by this author which has sought to test the assumptions made by legal doctrine in relation to employment in the context of the gig economy. It is argued in this thesis that if the assumptions made by legal doctrine do not match the perspectives of actors it is diminished its aims. Part II will present the findings from the empirical analysis, and Part III of the thesis, which is the final Part, will present conclusions from this empirical investigation.

PART II

Chapter 5 - Methodology

5.1. The Research Matter

The aim of this thesis is to understand the legal challenges that the gig economy poses to tort law. As discussed in chapter two, there are a variety of different ways that the gig economy may disrupt tort, particularly with respect to its capacity to distribute risk. As the gig economy refers to service provision, doctrines such as vicarious liability, non-delegable duties and direct duties owed to third parties, and employer's duties owed to employees may be challenged. Thus, it is important to fully appreciate these challenges, as well as sufficiently examine the tools available to understand whether legal doctrine is capable of adequately responding to those challenges. If it is not capable, it is also important to provide the roadmap for doctrine to respond. With this in mind, the overarching research questions are as follows:

1. What are the key characteristics of the gig economy?
2. What legal challenges does the gig economy pose for tort law, and how should tort law respond?

To address these questions, this thesis has adopted empirical methods to adequately understand the challenges that the gig economy poses. To do so, it has sought to gain and understand the perspectives of service providers who work in the gig economy on issues such as their relationships with the platforms as well as the risks they face and how they respond to those risks. It is argued that understanding these perspectives will permit a better-informed response to the challenges.

5.1.1. Qualitative Methods

This project has used qualitative methods. It has employed a case study approach, semi-structured interviews, and focus groups. As will be seen in the remaining chapters of this thesis, the data collected using these methods has informed analysis relating to the challenges that the gig economy poses to tort as well as suggestions for how tort might respond to those challenges.

Socio-legal scholarship is limited in tort. There are few qualitative studies generally,[1] and no qualitative studies investigating how tort law should respond to the gig economy. Despite this, it is argued that it was imperative to adopt a socio-legal approach to study the phenomenon and the challenges it poses for the law. While there is no 'agreed definition of socio-legal studies',[2] and any definition is difficult to pin down,[3] the socio-legal approach allows researchers to examine the '*actual* operation of law and its effects on people'.[4] It has been argued elsewhere that the socio-legal approach is inherently valuable as it provides an opportunity for researchers to consider the relationship between the law and relevant situations; by doing this, we can see 'the part the law plays in the creation, maintenance and/or change of the situation.'[5]

This argument can be applied in the context of this thesis. As has been outlined in the previous chapter, legal doctrine makes many assumptions about service provision, but without testing those assumptions in the relevant contexts their validity and relevance remain unknown and legal doctrine may not evolve in a manner which reflects the relative experience of the actors it represents. Necessarily for socio-legal research, there are natural 'target areas' which this thesis aligns with; these include, 'reform of the law, reform of lawyers and reform of law faculties; [and] the topics chosen for research reflect these priorities.'[6] This thesis aims to analyse the assumptions made by legal doctrines in the context of a new phenomenon and determine the capabilities of legal doctrine in

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[1] Notable exceptions include, Simon Halliday, Jonathan Ilan and Colin Scott, 'The Public Management of Liability Risks' (2011) 31 Oxford Journal of Legal Studies 527; Simon Halliday, Jonathan Ilan and Colin Scott, 'Street Level Tort: The Bureaucratic Justice of Liability Decision-Making' (2012) 75 Modern Law Review 347.
[2] DR Harris, 'The Development of Socio-Legal Studies in the United Kingdom' (1983) 3 Legal Studies 315, 315.
[3] Simon Halliday, 'Public Law' in Caroline Hunter (ed), *Integrating Socio-Legal Studies into the Law Curriculum* (Palgrave Macmillan 2012) 141.
[4] CM Campbell and Paul Wiles, 'The Study of Law in Society in Britain' (1976) 10 Law & Society Review 547, 549.
[5] David N Schiff, 'Socio-Legal Theory: Social Structure and Law' (1976) 39 Modern Law Review 287, 287.
[6] Campbell and Wiles (n 4) 571.

responding to challenges posed. This necessarily will involve determining the law's scope for reform, and this thesis will suggest possible legal responses.

To do so, this thesis has adopted a range of empirical, qualitative methods to investigate these issues which have permitted the collection of a broad dataset. Aspects of the dataset have provided essential information about how factions of the gig economy (as well as actors within it) operate. Through other aspects of the dataset, we have discovered the experiences of service providers in relation to their relationships with the platform and customers, as well as their understanding of risk and risk management. The data has also been used to inform the extent to which the assumptions made by legal doctrine to distribute risk amongst actors matched the perspectives of those actors.

It is argued that there is value to be found in analysing the perspectives of actors for this study. In order to appreciate the extent to which legal doctrine is functional in its capacity to distribute risk, the assumptions that it makes must be examined in relation to the real-world perspectives and experiences of the actors it seeks to regulate. This thesis argues that if the assumptions made do not match the perspectives of actors in the real-world context, its ability to distribute risk amongst these actors is diminished, and as experts of their own self-employment, these actors are in the best position to provide us with this perspective.[7]

As discussed above, this thesis has employed empirical qualitative methods to examine the gig economy from a tort law perspective. It has been argued elsewhere that qualitative methods allow for the collection of in-depth, rich, and sometimes holistic data.[8] This kind of data can also 'have strong potential for revealing complexity' which is helpful when studying social phenomena such as the gig economy.[9] Qualitative study is compared to quantitative, which can often rely on innate objective rigour as they typically will collate data from large

[7] Karen Gregory, '"My Life Is More Valuable Than This": Understanding Risk among On-Demand Food Couriers in Edinburgh' (2021) 35 Work, Employment and Society 316, 317.
[8] Matthew Miles, Michael Huberman and Jonny Saldana, *Qualitative Data Analysis: A Methods Sourcebook* (3rd edn, SAGE 2014) 30.
[9] Miles, Huberman and Saldana (n 8) 30.

samples that can be more easily be generalised to population groups.[10] Conversely, qualitative researchers usually work with much smaller sample sizes, and this permits study 'far beyond snapshots of "what?" or "how many?" to just how and why things happen'.[11] The in-depth and context specific study of experience allows qualitative researchers to explore the meaning often missed in quantitative study.

Empirical study has been used to great effect in legal studies.[12] It has been used to inform both the public and policymakers,[13] to examine legal problems that legal doctrine is faced with at a particular point in time,[14] and has helped to examine the law in its relevant contexts.[15] To do this, some legal researchers have employed qualitative methods to study a context, and many scholars advocate for such approach. According to Baldwin and Davis, the 'strength of this approach lies in its capacity to reflect the complexity of legal processes, and the complexity of the relationship between process and outcome.'[16]

This thesis adopts similar justifications for employing qualitative methods to study the gig economy. It seeks to examine tort law in the context of the phenomenon, as well as the challenges that tort law currently faces in light of these novel working practices. To do so, this study seeks to engage with the experiences of participants which provides the vital context surrounding the challenges that this social phenomenon poses to tort. While we cannot say that the findings of this study are representative of the gig economy as a whole, or even representative of the cases it examines, the study can present findings which are indicative of the challenges that tort may face and will inform any suggestions relating to tort's response to these challenges. In doing so, this research seeks to lay the foundations for future work in this area.

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[10] David De Vaus, *Surveys in Social Research* (6th edn, Routledge 2014) 382; Robert Adcock and David Collier, 'Measurement Validity: A Shared Standard for Qualitative and Quantitative Research' (2001) 95 The American Political Science Review 529.

[11] Miles, Huberman and Saldana (n 8) 30.

[12] Philip Selznick, 'Law in Context Revisited' (2003) 30 Journal of Law & Society 177, 180; Ross Cranston, 'Law and Society: A Different Approach to Legal Education' (1978) 5 Monash University Law Review 54; P Ishwara Bhat, *Ideas and Methods of Legal Research* (OUP 2020) 359.

[13] Theodore Eisenberg, 'Why Do Empirical Legal Scholarship' (2004) 41 San Diego Law Review 1741, 1746.

[14] Selznick (n 12) 180.

[15] Harris (n 2) 315.

[16] John Baldwin and Gwynn Davis, 'Empirical Research in Law' in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies* (OUP 2005) 891.

5.2. Case Study Approach

As discussed in Chapter 1 of this thesis, the gig economy is a vast phenomenon and the same can be said for the literature studying it. There is little agreement in the scholarship in terms of a definition, or even the types of platforms it encompasses. A case study approach is typically employed when trying to understand a complex phenomenon in its real-life context and this seemed fitting for the objectives of this project.[17] However, it also meant that developing a strategy for case selection was challenging. The following subsection will detail the approach taken to do this.

5.2.1. Developing a Typology

To develop a typology, a mapping exercise of the gig economy was conducted. This involved an analysis of the gig economy literature, and a thorough internet search to identify possible gig economy platforms. The working list of platforms was refined according to the definition of the gig economy developed in Chapter 1. The findings of the mapping exercise showed there was significant diversity in the gig economy with respect to the types of services contracted for, as well as the method of payment, and other factors. The extent of the diversity found meant it was difficult to categorise the phenomenon according to these characteristics. Instead, it appeared more fitting to map the platforms in accordance with the aims of the thesis, i.e., to examine how tort law should distribute liability risks in the gig economy.

As discussed in Chapters 2-4, there are a number of doctrinal categories used to determine how liability should be distributed in tort; they are as follows:

1. The service provider is an employee (or akin to) of the enterprise.
2. The service provider is an employee (or akin to) of the customer.
3. The service provider is an employee (or akin to) of the enterprise and the customer.
4. The service provider is an independent contractor.

[17] Lisa Webley, 'Stumbling Blocks in Empirical Legal Research: Case Study Research' [2016] Law and Methods 1, 1.

The reason why these four categories were chosen is that, theoretically, every gig economy platform should fit within one of the categories listed above. To determine which category a service provider fits into, legal doctrine draws upon the key tests of control and integration as set out in Chapter 4. Applying this to the doctrinal categories above, four overarching questions were deduced:

1. To what extent can the enterprise exercise control over the service provider?
2. To what extent can the customer exercise control over the service provider?
3. To what extent is the service provider apparently integrated into the business of the enterprise?
4. To what extent is the service provider apparently integrated into the business of the customer?

As part of the mapping exercise, we attempted to match platforms in the gig economy to the doctrinal categories using the overarching questions of control and integration as variables. The results of this mapping exercise are depicted in Figures 1-4. As depicted in Figures 1-4, the delivery platforms of Stuart, Deliveroo, and UberEATS represented a good match for the 'employed by enterprise' category, as the platforms appear able to exercise control over the service providers, and the service providers appear to be integrated into the businesses of the platforms. Teacherise and TeachersRegister, which provide supply teaching to schools, and Bubble, which provides childcare services, appear to be a good match for 'employed by customer', as the customer appears able to exercise control over the service providers, and the service providers appear to be integrated into the business of the customer.

There is a moderate match for the third category of 'employed by both the enterprise and the customer' with the Fiverr platform which provides remote freelance services such as website design. This platform scores relatively highly on all four variables. The E-Therapy platform, which provides online therapy, and the Rover platform, which provides dog-care services, are good matches for the independent contractor category, as neither the platforms nor the customers appear able to exercise control over the service providers, and the service providers do not appear to be integrated into the businesses of the platforms or the customers. These four platforms discussed above can be characterised as archetypes for the four doctrinal categories.

However, as seen in Figures 1-4, there are platforms which are not a good fit and appear to blend the doctrinal categories. MyTutor, for example, which provides online tuition to students, scores moderately in all four variables which does not fit with the assumptions made by legal doctrine to categorise service providers for the purpose of employment. Platforms, such as MyTutor, which do not neatly fit into the doctrinal categories will be referred to herein as hybrids.

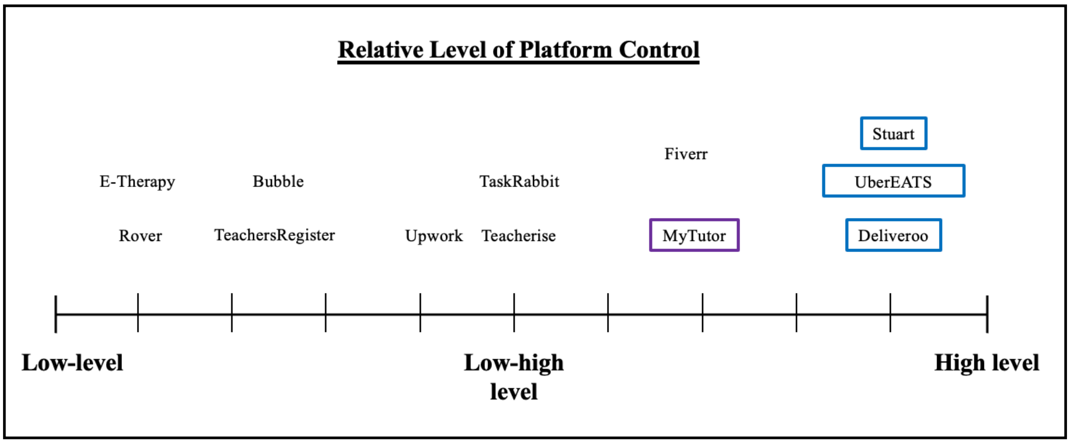

Figure 1: depicting relative level of platform control.

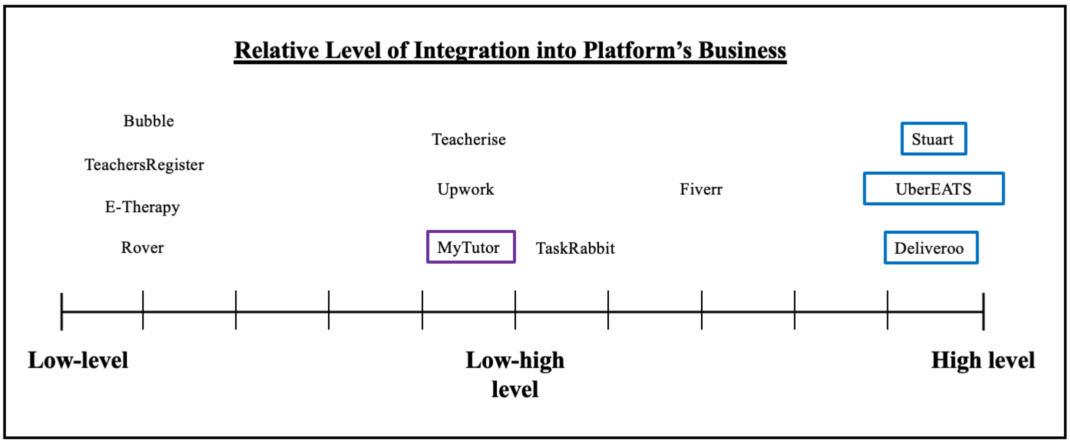

Figure 2: depicting relative level of integration into platform's business.

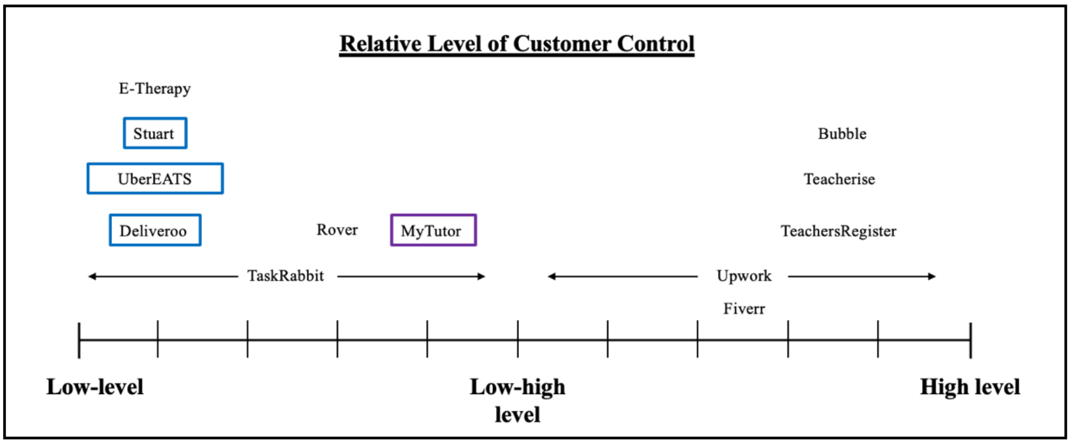

Figure 3: depicting relative level of customer control.

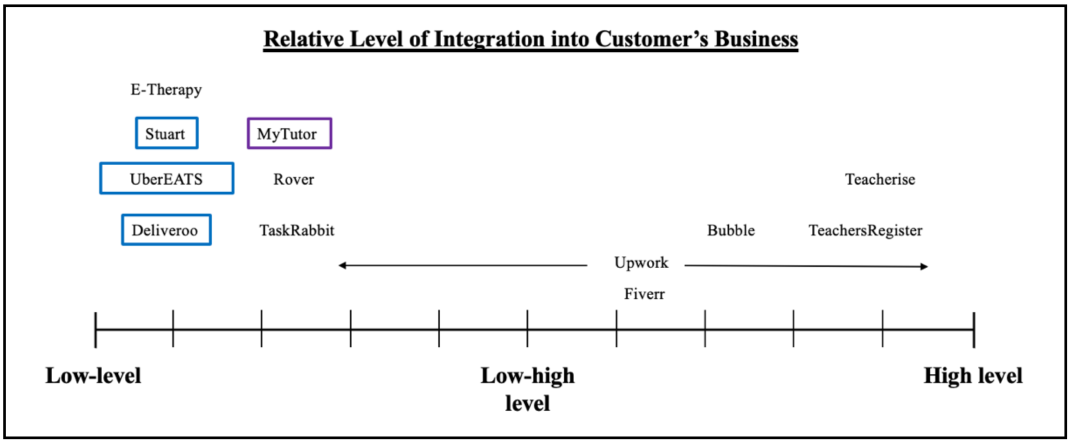

Figure 4: depicting relative level of integration into customer's business.

When selecting cases, it became important to select a range of platforms, some being archetypes of the doctrinal categories and some being hybrids. This was to ensure that a diversity of challenges to legal doctrine could be explored. To ensure a range of platforms were considered, while maintaining a manageable project, four case studies were chosen; three of which represented a strong match for the doctrinal categories, and one which was a hybrid. The three doctrinal categories selected were: 'employed by enterprise', 'employed by customer', and 'independent contractor', as they appeared the most prevalent in the gig economy. The excluded category of 'employed by both the enterprise and the customer' refers to a rare doctrine of dual vicarious liability which has been argued only on few occasions at appellate level in England and Wales which formed the justification for its exclusion.

As can be seen from Figures 1-4, ultimately, it was only possible to analyse two case studies. Case study one was represented by the courier platforms of Deliveroo, UberEATS, and Stuart, which, as discussed above, were a strong match for the 'employed by enterprise' category. Case study two was represented by the MyTutor platform which was a hybrid category. Sub-section 5.6.1 will discuss why it was not possible to consider the remaining categories, despite best efforts.

It should be acknowledged that the platforms depicted in Figures 1-4 and discussed in this chapter do not make up the whole of the gig economy. The extent to the phenomenon stretches far beyond the possible scope of a doctoral project. It is also probable that levels of control and integration will vary further, which future research conducted by this author will seek to investigate. This research, however, seeks to contribute to tort scholarship by presenting some of the problems that factions of the gig economy present to legal doctrine in the sphere of tort. To this end, it has analysed two case studies which present potentially diverse challenges and may therefore require diverse legal responses. These cases were also selected as they had easily recognisable recruitment avenues by comparison to other potential cases, which is useful in any doctoral project. Ultimately, any generalisations made from this research will be limited due to the scope of the study, but with future research it may be possible to generalise more broadly.

5.2.2. Case Studies as a Method

The case study approach is a popular and flexible method in the social sciences. The approach was defined by Yin as being an empirical inquiry that seeks to investigate something in its real-life context when the boundaries between the phenomenon and the context are not clearly evident and where there are multiple sources of evidence to draw upon.[18] It has been distinguished from other methods in terms of its ability to aid the researcher to ground and embed the case studies in their context.[19]

[18] Robert K Yin, *Case Study Research: Design and Methods* (3rd edn, SAGE 2003) 23.
[19] Alan Bryman, *Social Research Methods* (2nd edn, OUP 2004) 49.

According to Yin, there are three types of case studies: (1) descriptive, (2) exploratory, and (3) explanatory. Descriptive case studies are thought to be focused upon collecting information about a significant characteristic of social phenomena. To this end, the cases should seek to 'give maximal information about the specific features of social phenomena'.[20] An exploratory approach is used as a tool to test, explore, and explain the phenomenon, rather than to shine light on a phenomenon with the aim of describing it.[21] It is usually adopted if little research into that phenomenon has been carried out. An explanatory case study, conversely, seeks to explain causal relationships within social phenomena and relies upon an iterative process to build and develop upon existing theoretical ideas.[22] A research project's positionality across these categories is best determined by an analysis of the research questions being asked. This project seeks to uncover the key characteristics of the gig economy, as well as explore the legal challenges it presents to tort. Therefore, a descriptive and exploratory case study was employed.

Some researchers opt to pursue single cases, rather than multiple cases. A single case design is usually adopted to 'examine one unit of a social phenomenon', which can provide researchers with a rich understanding of one aspect of a phenomenon.[23] However, this can make it difficult to generalise results as there is little to compare findings with. Other researchers prefer multiple cases to analyse similar findings across cases for objective replication or alternatively to demonstrate contrasting cases for comparison.[24] It can help to remedy some of the generalisation concerns with single cases, as multiple cases can used to test or compare findings. However, it does not permit the level of detail that can be achieved with single cases often due to the limited resources available to researchers. This project is employing a multiple case study approach to explore some of the diverse challenges associated with the gig economy.

[20] Inge Bleijenbergh, 'Case Selection' in Albert J Mills, Gabrielle Durepos and Elden Wiebe (eds), *Encyclopedia of Case Study Research* (SAGE 2010) 61–63.
[21] Bleijenbergh (n 20) 61–63.
[22] Bleijenbergh (n 20) 61–63.
[23] Bleijenbergh (n 20) 613–617.
[24] Yin (n 18) 61–63.

Gerring also provides guidance on case selection strategies. He identifies a number of sub-categories of Yin's case study types discussed above. These sub-categories include typical, deviant, and diverse.[25] A typical case is to be represented by something that can be explained by 'an existing model'; a deviant case refers to the selection of a case that 'demonstrates a surprising value'; and a diverse case attempts to maximise variance amongst the cases and should be representative of any variance in the given population.[26] The archetypal case of employed by platform, represented by the courier platforms, is a 'typical' case, and the hybrid case, represented by MyTutor, is a 'deviant' case as it is not a strong match for any of the four doctrinal categories.

Case studies are rarely used in legal research, with some exceptions,[27] but it is nonetheless a 'powerful method'.[28] As discussed above, the adoption of the case study method permits an examination of a phenomenon in its context, but this can also be explored from a legal perspective. When employed with other qualitative methods, the case study can be used to 'investigate how actors consider, interpret and understand phenomena (e.g., law, procedure and policy) and therefore allow the researcher to study perspectives and processes and how they influence behaviour'.[29] This is the way in which this thesis seeks to employ case studies, as it seeks to examine research participants' perspectives of their relationships with the platforms, of their working practices, and the role of tort law.

5.3. Interviews

Interviews are a commonly adopted method in the social sciences, as well as in socio-legal research. In fact, it has been said that '[s]ociology has become the science of the interview',[30] as well '*the* central resource'.[31] The method permits researchers to access

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[25] John Gerring, *Case Study Research: Principles and Practices* (2nd edn, CUP 2017) 56.
[26] Jason Seawright and John Gerring, 'Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options' (2008) 61 Political Research Quarterly 294.
[27] Phillip Morgan, 'Ripe for Reconsideration: Foster Carers, Context, and Vicarious Liability' (2012) 20 Torts Law Journal 110.
[28] Webley (n 17) 20.
[29] Webley (n 17) 2–3.
[30] Mark Benney and Everett C Hughes, 'Of Sociology and the Interview: Editorial Preface' (1956) 62 American Journal of Sociology 137.
[31] Svend Brinkmann, 'Unstructured and Semistructured Interviewing' in Patricia Leavy (ed), *The Oxford Handbook of Qualitative Research* (2nd edn, OUP 2020) 424.

‘biologically grounded experiences and meaning of social actors’ that cannot be achieved with other methods.[32] ‘Interviewing also allows one to discover worlds that may be forever closed to direct observation, allowing people to report their perspectives and define their behaviour’.[33] Bryman also highlights that the interview method helps to ensure researchers maintain a specific focus without being overly intrusive on participants’ lives.[34] Different scholars adopt different structures of interviewing, although semi-structured is the most common.[35] This project, as discussed above, also adopts that approach as it facilitates researchers to gain a more in-depth insight into the perspectives of research participants and allows ‘much more leeway for following up on whatever angles are deemed important by the interviewee’.[36]

The interview method, while widespread in other areas of legal research, is not commonly used in tort, where qualitative research is limited generally. It is particularly useful to carry out interviews with research participants when conducting research into policy and law reform,[37] as well as for researchers ‘who aim to describe the legal world as it is, not as it is meant to be, with many studies emphasizing the disparity between textbook depictions of legal and judicial processes and their everyday reality.’[38] This speaks directly to the focus of this thesis which seeks to analyse the extent to which the assumptions that underpin the legal framework match the reality of the perspectives of social actors.

The interview method has also been a commonly employed method for researchers studying the gig economy. There is a body of research examining the economic realities of gig economy work, drawing mostly upon service providers’ perspectives to do so.[39] This

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[32] Paul Atkinson and David Silverman, ‘Kundera’s Immortality: The Interview Society and the Invention of the Self’ (1997) 3 Qualitative Inquiry 304.
[33] See interview with Doreen McBarnett in Simon Halliday and Patrick Schmidt, *Conducting Law and Society Research* (CUP 2009) 152.
[34] Bryman (n 19) 339.
[35] Brinkmann (n 31) 437.
[36] Brinkmann (n 31) 437.
[37] Ian Dobinson and Francis Johns, ‘Qualitative Legal Research’ in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 20.
[38] Baldwin and Davis (n 16) 886.
[39] Gianpiero Petriglieri, Susan J Ashford and Amy Wrzesniewski, ‘Agony and Ecstasy in the Gig Economy: Cultivating Holding Environments for Precarious and Personalized Work Identities’ (2019) 64 Administrative Science Quarterly 124; Vili Lehdonvirta, ‘Flexibility in the Gig Economy: Managing Time on Three Online

project has taken a similar approach to those studies. As discussed above, it is believed that service providers are experts of their own self-employment and are best placed to discuss their own experiences of the service provision. By understanding the perspectives of these key actors and using those perspectives to understand the challenges that the gig economy poses to legal doctrine in the sphere of tort, it is believed that we can appropriately respond to those challenges.

5.4. Focus Groups

Focus groups are also an important method in the social sciences. The focus group method is not a replacement for interviews, 'but rather group interviewing will provide data on group interaction, on realities defined in a group context, and on interpretations of events that reflect group input.'[40] It has many advantages, even when comparing the method to interviews. Despite not being able to 'easily tap into individual biographies or the minutia of decision making during intimate moment'… 'its main advantages [are] to be gained from the interaction between participants,'[41] Kitzinger argues that focus groups are not necessarily designed to establish group consensus, but often can be used to establish heterogeneity within the group.[42] She also states that identifying diversity within a group can facilitate conversation with participants to explore why they think a certain way, 'often identifying aspects of their personal experience which had altered their opinions or specific occasions which had made them re-think their point of view.'[43] As a group, the participants can therefore theorise about the causes of the diversity which is unlikely to occur in an individual interview setting.[44]

Piecework Platforms' (2018) 33 New Technology, Work and Employment 13; Alex J Wood and others, 'Good Gig, Bad Gig: Autonomy and Algorithmic Control in the Global Gig Economy' (2019) 33 Work, Employment and Society 56.

[40] James H Frey and Adrea Fontana, 'The Group Interview in Social Research' in David L Morgan (ed), *Successful Focus Groups: Advancing the State of the Art* (SAGE 1993) 20–21.

[41] Jenny Kitzinger, 'The Methodology of Focus Groups: The Importance of Interaction between Research Participants' (1994) 16 Sociology of Health & Illness 103, 116.

[42] Kitzinger (n 41) 113–114.

[43] Kitzinger (n 41) 113–114.

[44] Kitzinger (n 41) 113–114.

To benefit from the potential exploration of diversity that the focus group method permits, this study first conducted individual interviews with participants to get a full and rich understanding of the types of perspectives that service providers had about their work, their relationships with platforms and customers, and the risks they perceive and manage. This meant that questions for focus groups could be designed with an understanding of the diversities in perspectives already in mind.

The focus group method was also employed to look beyond the mere description of experience, but to understand 'how participants discuss, argue, and justify their opinions and attitudes' with one another.[45] From a legal perspective, it allows individuals to work cooperatively to provide the researcher with insights into their experiences of the law that may not be gained from individual interviews,[46] as well as examining the collective social effect of the law on their working lives, in a 'truly participatory interviewer-interviewee interaction'.[47]

5.5. Research Design

This section will discuss the research design in principle, including decisions regarding interview subjects and sampling. The section which immediately follows will discuss how the planned research was implemented in practice.

5.5.1. Service Providers as Participants

During the research design process, the selection of participants is critical to the ensure that research questions are properly addressed. A decision was made to recruit service providers who worked with, or had recently worked with, the platforms from the two case studies discussed above. This chapter and previous chapters have discussed the triangular relationships found in the gig economy, made up by the platforms, the service providers, and the customers. The decision was made to exclude two of the three pillars of the triangular relationship from the sampling based on the research questions posed by this project. As a

[45] Brinkmann (n 31) 441.
[46] Bhat (n 12) 375.
[47] Brinkmann (n 31) 936.

foundational research question asked relates to the challenges posed to tort in terms of its distribution of risk, the best way to understand these challenges is based on the perspectives of those who bear the risk. As independent contractors, these service providers are more likely to bear liability risks and risks of harm to self, and so their perspectives of these risks and their response to the risks is central to this project.

5.5.2. Selection of Participants

The selection of participants in this project was purposive. A purposive approach involves the strategic selection of participants to ensure that the sample is best placed to answer the research questions asked.[48] Emmel states that this kind of approach helps to provide the researcher with the most insight into aspects of the research that are most important to the project.[49]

A purposive approach was taken to try and capture some of the diversity in the gig economy. Some of the empirical studies into the gig economy found that service providers who use their gig economy work to supplement another primary income have different perspectives and experiences to those who work in the gig economy full time. Other factors were considered by this researcher that may also influence perspectives. These included the level of skill and education of the service provider, as well as their location, age, gender, and ethnicity. To try and maximise variance in the sample, a participant screening questionnaire was designed through Qualtrics.

If taking a solely purposive approach did not prove fruitful in terms of sample size, it was decided that a snowballing strategy would be adopted to supplement the purposive approach. A snowballing strategy involves asking prospective participants to distribute information about the study to individuals who also meet the criteria.[50] This kind of approach can be beneficial as it can yield a greater sample size in a resource and time

[48] Nick Emmel, *Sampling and Choosing Cases in Qualitative Research: A Realist Approach* (SAGE 2013) 3.
[49] Emmel (n 48) 3.
[50] Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2020) 934.

efficient way. However, it can further limit the generalisability of the research, particularly if it leads to bias in the sample.

To recruit participants, it was intended that a targeted Facebook campaign using Facebook's pixel process would be created to distribute information about the study to prospective participants. Once an individual clicked on the advertisement, they would be taken to the preliminary screening questionnaire generated through Qualtrics. The pixel process meant that once one individual engaged with the advertisement, the advertisement would then be distributed and shared with those who engaged with the individual on Facebook. This assumed that these individuals will also be part of the same target population. A research grant of £600 was awarded by York Law School's Research Committee. It was decided at this point that £100 of this grant would fund the advertising campaign. To supplement the campaign, it was also determined that the study would also be advertised on online fora, such as Reddit and Facebook groups. Participation in the study was also incentivised by placing participants in a lottery to win one of twenty Love2Shop vouchers at the value of £25, which was drawn and distributed once the fieldwork was completed.

5.5.3. Sample Size

The initial target was to conduct sixty semi-structured interviews in total across the four cases of (1) employed by platform, represented by Deliveroo, (2) employed by customer, represented by Bubble, (3) independent contractor, represented by Rover, and (4) hybrid case, represented by MyTutor, with fifteen interviews per case. It was then intended for a further forty participants to be sampled for focus groups, with two focus groups per case each made up of five participants. This would bring the total number of participants to one hundred.

The intended plan was to put out advertisements for all the cases to determine if any would yield participants. If there was a case which proved particularly fruitful, this would be explored first. Where possible, it was hoped that each case could be researched at one time. The COVID-19 pandemic was in full swing and nationwide restrictions were in place by the time of the ethics application. To ensure that fieldwork could go ahead, all interviews and focus groups were to be virtual. The messy nature of fieldwork meant that the plan did not go as smoothly as anticipated. Although best efforts were made to stick to the plan, this was not always possible, as discussed in more detail in the following section.

5.6. Research in Practice

As mentioned above, fieldwork in practice was less streamlined than the original plan had intended. Ethical approval was granted for the study in September 2020 by the Economics, Law, Management, Politics and Sociology Ethics Committee. The fieldwork began almost immediately after this.

5.6.1. Recruitment and Sampling

The recruitment strategy outlined in the previous section was less fruitful than initially intended. The Facebook advertisements using Facebook's pixel process generated very little in terms of participants who fit the sample. Some individuals who followed the advertisement to the survey generated by Qualtrics worked in the gig economy for platforms which were not part of the case studies, and others worked outside of the gig economy. This was perceived to be a possible outcome at the research design stage, and so the study was also advertised on online fora such as on Reddit and Facebook groups.

For case study one: employed by platform which was represented by Deliveroo, the study was advertised on an abundance of forums, such as a Reddit forum for Deliveroo riders, as well as on an abundance of local and national Facebook groups for app-based couriers. This generated much more response than the targeted Facebook advertisements. A number of the respondents to the survey for this case worked for platforms other than Deliveroo. This initially excluded these individuals from the sample. However, after conducting three interviews with Deliveroo couriers, it became apparent that it was very common for service providers in this sector to work across multiple courier platforms at one time. Based on this, as well as to aid with yielding a larger sample size, the case was expanded to include all app-based courier work. In the end, based on the data available, the case was represented by Deliveroo, UberEATS and Stuart.

At the same time, the study was also advertised on Facebook groups and Reddit forums for parents, as well as for babysitters to recruit participants for case study two: employed by customer, represented by Bubble. This generated only three responses to the survey and resulted in one interview taking place which was not enough for data analysis purposes. Unfortunately, this interviewee did not have contacts with other service providers who worked with Bubble, so snowballing was not possible. Other platforms, such as TeachersRegister, AirSupply, and Teacherise were also advertised, due to having similar characteristics to Bubble. Advertisements were posted on Reddit forums and Facebook groups for teachers. However, there was very limited response, and no interviews were arranged. In a final attempt to reach participants, an application to amend the ethics form for the study was put in to the ELMPS Committee, requesting permission to use the platform as a gatekeeper to access participants. Approval for this change was received in March 2021. Despite contacting Bubble on multiple occasions, they did not respond. Ultimately, a decision was made to drop this case. This was very disappointing, but in the end, it was necessary due to the limited time and resources available.

Similar problems were found in the third case of independent contractor, represented by Rover. The same approach was taken, advertising the study with targeted Facebook advertisements as well as on Reddit threads and Facebook groups. There was limited response to the survey, with only one respondent meeting the criteria for the study. Despite contacting this prospective participant, there was no response. Other respondents to the survey worked with the platform worked and resided outside of the United Kingdom, which meant they were not eligible participants. There were no identifiable avenues at the time and unfortunately a decision was made to drop this case. This was disappointing but felt inevitable due to limited options available in terms of recruitment, as well as strains on resources and time.

Thankfully, there was more luck with the final case study: the hybrid case represented by MyTutor. Similarly, to the other cases, there was very little traction from the targeted Facebook advertisements. However, there was much more traction through manually advertising the study on a MyTutor Facebook group. This method actually recruited all participants from this sample.

A total of forty-two service providers participated in the study; all participants were provided with Participant Information Sheets (Appendix C and D), and signed consent forms (Appendix E and F). Thirty-nine individual interviews (twenty in the courier case and nineteen in the tutor case) and three focus groups (one in the courier case and two in the tutor case) were carried out. Unfortunately, we were only able to recruit two further service providers to participate in the courier focus group and one further service provider to participate in the tutor focus groups. This meant that focus groups were mostly made up of existing participants who partook in an individual interview.

For both cases, there was a gender bias. Approximately 91% of participants in the courier case were male, and 85% of participants in the tutor case were female. While there is no data on the make-up of service providers who work with MyTutor, data does suggest that the majority of service providers who work for courier platforms are male.[51] All participants interviewed were under the age of sixty, and when broken down according to the platform, all participants who worked with MyTutor were under the age of thirty. Most participants stated their work with the platforms was their main source of income. All participants lived and worked in the United Kingdom, although analysis of the legal implications will be limited to England and Wales.

As discussed above, the intended research plan was to speak with approximately one hundred service providers across four case studies. However, despite pursuing a range of recruitment methods, two of the four case studies had to be dropped. Within the two cases that were studied, there was some difficulty was found in turning responses to the survey into participation in the study. Despite receiving close to three hundred responses to the survey, only forty-two participated in the study. Some responded to requests for participation indicating that they were not interested in participation, but most did not respond. Some who did respond to requests indicated that the incentive was minimal and not sufficient for their time. This was definitely an understood limitation before conducting fieldwork. This may be reflective of the sample as a whole, as the vast majority of research

[51] Brhmie Balaram, Josie Warden and Fabian Wallace-Stephens, 'Good Gigs: A Fairer Future for the UK's Gig Economy' (RSA 2017).

participants requested a summary of the findings indicating their interest in the research. The interest of those who participated in the study may have seen this as a stronger motivation to participate than the limited incentive on offer.

Another disappointment from the fieldwork was the organisation of focus groups. This proved more challenging than had been anticipated. There was a much lower response rate for focus groups than individual interviews, with one individual requesting to take part in an individual interview as opposed to a focus group. There were also more non-attendances of participants to focus groups than interviews. It was hoped that a second focus group could be carried out in the courier case, but some participants were unresponsive and those who did had conflicting availabilities which meant that it became impossible to organise. For future studies where both interviews and focus groups are employed, the focus groups will be arranged earlier in the fieldwork process allowing more time for organisation and the recruitment of new participants, rather than leaving them until after the interviews had taken place.

It was disappointing not to gain access to all four case studies and to have a more limited number of research participants than originally hoped for due to the difficulty in arranging focus groups. However, it is recognised among empirical scholars that data collection is a messy process and rarely goes to plan. As stated by Kritzer, if empirical scholars were to look back at early research plans, 'they would have often discovered that… [they] started from very different points than the authors themselves now recall'.[52] This is indicative of working empirically, where it is possible and indeed likely to run into a range of different dilemmas. This project was no exception, as can be seen above. Nonetheless, it is submitted that the analysis of two distinct case studies is still a success. As will be seen in the remaining chapters of this thesis, this analysis has revealed some diversity and is an important first step in understanding the challenges posed to tort law by the gig economy.

[52] Herbert M Kritzer, 'Conclusion: "Research Is a Messy Business" - An Archeology of the Craft of Sociolegal Research' in Simon Halliday and Patrick Schmidt (eds), *Conducting Law and Society Research: Reflections on Methods and Practices* (CUP 2009) 264.

5.6.2. Interviews in Practice

As stated above, the COVID-19 pandemic was already in full swing by the time of the ethics application, which meant that the research plan was a virtual one. The duration of the interviews varied from just under forty minutes to one hour and thirty-five minutes. Most of the interviews were conducted using Zoom, with two taking place over the phone. Typically, in-person interviews can make it easier for a researcher to build a rapport with the participants, meaning that the interview can often begin before the recording starts. This was more difficult to replicate in a virtual setting. Building a rapport with a participant is actually vital for the collection of data. By ensuring the participant is comfortable, it is easier to collect 'rich and detailed responses'.[53]

The first interview conducted was quite challenging. The nature of the questions and the interaction with the participant felt quite scripted and awkward. As the interview went on, the communication became more conversational as both the researcher and participant relaxed into the interview. This is clear from some exchanges of humour. This kind of conversational style was something the researcher tried to integrate into interviews from the beginning of interviews going forward, as meeting someone for the first time on a computer screen can be quite daunting.

It was also apparent from the first interview that new information was overlooked at times. This was due to a fear that we might lose track of the planned structure. This became really apparent when transcribing the interview. Whilst the interview still provided some valuable data, it is difficult not to think about the data that might have been missed. When new information comes to light in the interview that is not accounted for by the topic guide (seen in Appendix A and B), it is crucial to the semi-structured interview method to ensure that this is followed up on. McBarnett points out that 'getting new information that you didn't know is more important than making sure all the planned questions are answered'.[54] This interview was transcribed before other interviews were carried out, so this point was

[53] Miles, Huberman and Saldana (n 8) 30.
[54] See interview with Doreen McBarnett in Halliday and Schmidt (n 33) 158.

identified at the time. Thankfully, this meant that the same mistakes were not repeated in further interviews and the researcher became more flexible as the interviews went by.

Other Zoom-based interviews were much smoother than the first interview and it became easier to build a rapport with participants. As stated above, two interviews were conducted over the phone due to participants not having access to a computer. This was more challenging than the virtual interview where you can learn more about a person from their facial expressions and body language. It was also more difficult for the researcher to show interest in what the participant was saying, due to worries of interrupting them. Often on Zoom, the researcher would smile, or give a nod of the head, to show that the participant was being listened to and their views were being respected. The data gained from the telephone interviews was nonetheless valuable, but the rapport built was more limited.

The nature of the world we were living in at the time meant that people had a lot more time on their hands. This meant that interviews were arranged very quickly, often for the same or the next day. This could also have been facilitated by the on-demand nature of the work these individuals engage with, meaning they are used to being called upon with very little notice. Once fieldwork had started, the interviews happened very quickly. Multiple interviews were taking place each week, and sometimes each day. Due to fears that participants would lose interest if interviews were pushed to later dates, there was little time to reflect and analyse the data in-between interviews. There were two brief breaks during the fieldwork process to aid with this, but on reflection perhaps more time could have been dedicated to analysis so that future questions better reflected the data.

5.6.3. Focus Groups in Practice

As stated above, the focus groups were more challenging than anticipated at the research design stage. Due to organisational difficulties, wariness, and hesitation from participants about taking part in focus groups, and a higher level of non-attendance/cancellation, only three new participants were sampled across the two cases. Despite this limitation, the data that arose from the focus groups was as fruitful as anticipated.

The first focus group had a difficult start, with only two of the four participants logging on to the Zoom call. One participant, who was new to the sample, stated he would not be turning his camera on. This meant that only the researcher and the other participant who had already taken part in an individual interview could see each other. The new participant to the sample was comparatively less forthcoming than the other, which left a feeling of awkwardness obvious amongst the researcher and the participants. However, after about fifteen minutes the two other participants joined the call almost at the same time, one who had taken part in an individual interview and the other who was new to the sample. After this point, the experience of the focus group improved. Participants suddenly appeared to feel validated by the experiences of others in the group, and much of what was shared resonated with other participants, particularly in relation to their frustrations with the platform. This meant that the researcher could act as a moderator, speaking comparatively less than in the individual interviews. In doing so, the researcher would merely clarify understanding of the viewpoints of the participants and ask follow-up questions where necessary. Much of the data collected in this focus group was a testament to the rapport the participants built with each other.

The next focus group was conducted with tutors. This focus group was made up of four participants, each had taken part in an individual interview. This was somewhat disappointing, as there was a last-minute cancellation from a new participant and a no-show from another. However, having already spoken to all of these participants on an individual basis, the rapport was already built. The participants came from different backgrounds and relied on their gig economy work to a varying degree. This was identified quickly and the diversity in their experience was explored in detail, which Kitzinger states is a huge benefit of conducting focus groups.

The final focus group was also challenging as initially only two of the five participants logged on to the Zoom call, one was an existing participant, and another was new to the sample. Both participants were forthcoming and built a good rapport, although the diversity found in the previous focus group was less apparent here. About ten minutes into the focus group, a third participant who had also taken part in an individual interview joined. This helped take some of the pressure of the existing members to take up the floor space. Some of the diversity also explored in the previous focus group was discussed here also.

5.7. Data Analysis

During and following the data collection, interviews and focus groups were transcribed and analysed thematically. Braun and Clarke define thematic analysis as 'a method for identifying, analysing and reporting patterns (themes) within data'.[55] The process for analysing the data was in alignment with Braun and Clarke's 'phases', which are: (1) become familiar with the data, (2) generate initial codes which are 'feature of the data' categorised by the researcher, (3) search for themes, (4) review the themes, (5) define the themes, and (6) produce the piece of writing.[56] Codes have been defined in the literature as a 'word or short phrase that symbolically assigns a summative, salient, essence-capturing, attribute for a portion of language-based or visual data'.[57]

The initial analysis phase was completed by transcribing, reading, and making notes about the data. Following this, paper copies of the transcripts were annotated by hand and initial codes were generated. This mitigated against the potential risk of losing the necessary context which can occur when splitting up the data and assigning it to codes.[58] The codes were generated both inductively, allowing themes to arise from the dataset, and deductively, with some codes being deduced from previous theoretical research. The initial codes were generated mostly inductively, and a combination of an inductive and deductive approach was used to generate, review, and define themes. A wholly inductive approach was not possible as it was difficult to be ignorant of knowledge of legal doctrine and theory, especially when much of the project design was influenced by this knowledge. The phases of searching for themes, reviewing them, and defining them took some time. It was an iterative process which was largely because of the number of codes generated inductively. There were codes which overlapped and needed to be grouped as sub-codes under a primary

[55] Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 Qualitative Research in Psychology 77, 79.
[56] Braun and Clarke (n 55) 86–93.
[57] Miles, Huberman and Saldana (n 8) 78.
[58] Bryman (n 19) 578.

code. There were also codes which went beyond the scope of the project and so were excluded from the analysis. Much of this related to employment law and future work will hopefully consider the data.

To facilitate data analysis, many researchers use software, such as NVivo. This software allows the upload of transcripts and generation of codes. From this, researchers can look at segments of transcripts which have been categorised by the same code or theme. Alongside the fieldwork, a number of interviews were transcribed and analysed using NVivo. Working through the data at a computer screen meant that it was difficult to feel immersed in the data. Because of this, some of the initial coding post fieldwork was done using a pen and paper. This was a much more immersive experience, but there was some anxiety about working with non-digitised data, due to the transportation of transcripts and limited options available to back-up the work. Other methods were trialled until we settled on uploading the transcripts to an application called Notability which can be used on an iPad. The transcript could be highlighted, and annotations could be made in the margins of the pages using an Apple Pencil, which meant the immersive experience of pen and paper was not lost and copies could be backed up digitally. Once codes and themes were defined, a record of the codes and themes were uploaded to an excel database manually.

5.8. Limitations of the Study

Earlier sections of this chapter have considered some of the limitations associated with qualitative research, such as difficulties in claiming generalisation. As discussed above, this study does not seek to claim representation or generalisation of the sample, and this is inevitably one of the study's limitations.

A second limitation identified with this study is a lack of triangulation. While interviews and focus groups as methods have their distinct benefits and limitations, they are similar in principle. Other observational methods would have helped to mitigate this limitation as it provides another opportunity to look inwardly at a social phenomenon. However, due to the COVID-19 pandemic, this was not possible. It may be that future work would seek to adopt such methods. Another option for triangulation would have been to adopt the documentary analysis method, by analysing data available on online fora which was used to facilitate recruitment of participants. However, when the data available on the fora was examined, a number of issues were identified. Firstly, forums are often international, which means the jurisdiction of the commenters is difficult to determine. Secondly, much of the content on online fora did not provide quality data for the types of questions this project seeks to understand. In fact, this data was available elsewhere on private Facebook groups, however, this would have raised more serious ethical issues.

Despite triangulation being an issue, there was some saturation reached in the interviews. After approximately fifteen interviews in both case studies, this was achieved. There was also some confirmation of this during the focus groups, with similar experiences and perspectives being discussed.

5.9. Structure of the Thesis

Earlier chapters in Part I of this thesis have outlined the key characteristics of the gig economy, and based on this, the potential legal challenges this social phenomenon may pose for tort. These challenges relate specifically to tort's capacity to distribute risk amongst actors. Given that this thesis is concerned with service provision, doctrines such as vicarious liability, non-delegable duties and direct duties owed to third parties, and employer's duties owed to employees may be disrupted by this new way of working.

Part II of this thesis will present the data analysis from the fieldwork. The data relates to the challenges that might be posed to tort in relation to its capacity to distribute risk. Chapter 6 will outline the liability risks which arise out of the participants' service provision. Chapter 7 will discuss how the liability risks influence the behaviour of participants in their service provision. Chapter 8 will outline whether and to what extent participants perceive their service provision is controlled by the platforms. Chapter 9 will discuss whether and to what extent participants perceive themselves to be integrated into the business of the platforms. Part III of the thesis will draw upon the findings presented in part two to answer how tort law should respond to these legal challenges.

Chapter 6 - Data Analysis: Liability Risks

6.1. Introduction

The previous chapter outlined the methodology of this thesis. This chapter is the first of four data analysis chapters. It discusses the liability risks that participants across the two case studies perceived to be connected to their service provision in the gig economy. It therefore seeks to address this question:

- What liability risks arise as a result of the research participants' gig economy work?

As one of the overarching research questions of this thesis addresses the legal challenges that the gig economy might pose to tort law, the liability risks outlined in the question above relate only to those which might arise in tort. It excludes financial risks, such as inability to work due to sickness which might arise in the context of employment and social security law.

The aim of this chapter is to discuss the risks that research participants identified as being inherent to their service provision in the gig economy. This helps to identify the kinds of risks that tort may be faced with and provides context for the types of legal responses that might be required, which will be discussed in Part III of this thesis, although this will inevitably be limited by the awareness of the research participants. The chapter which immediately follows will turn again to these risks to discuss how the research participants responded to them and how (if at all) they changed their behaviour accordingly. This will contribute to the literature on whether tort law is capable of deterring potentially liability incurring conduct, which was discussed in detail in Chapter 2 of this thesis. The answer to this question will influence the theoretical underpinnings of the legal response discussed in Part III of the thesis.

This chapter is split into three main sections. Section 6.2. will give brief outline of the platforms subject to analysis. Section 6.3. will consider risks of harm which participants perceived as potentially occurring to themselves, including the risk of being in a road traffic accident, the risk of physical harm being caused intentionally by a third party, or the risk of reputational harm. Each of these individual risks could potentially be legally actionable in tort. Section 6.4. considers risks of harm which participants perceived they could potentially cause to third parties, including both negligent and intentional harm. The kinds of risks considered could also be potentially legally actionable harms in tort.

6.2. Overview of the Case Studies

There are three platforms subject to analysis which facilitate the provision of couriering services: Stuart, Deliveroo, and UberEATS. The courier platforms contract with service providers who deliver a range of goods, including restaurant orders, groceries, and retail items, to customers of the service. Whilst they seem largely similar in their purposes, their operations, including the flexibility at work, differ.

Free login work takes place on all three platforms, this means that service providers can work when they choose, and they owe no obligation to sign on at certain times. They are paid a piece rate for the work, rather than an hourly rate, so, essentially, are paid according to their productivity and the demand for their services at the time. Work on-slot is quite different and operates only on the Stuart platform. There is no obligation for service providers to work on-slot, but they can choose this as an alternative to free login work. Working on-slot means service providers are obliged to turn up to their allocated shifts and must follow platform dictated rules during this time, including accepting a certain percentage of orders. To compensate service providers for meeting their obligations, the platform ensures a minimum guarantee of approximately £8 an hour to service providers which means those who earn under this amount will be topped up to the minimum rate. Those who earn more than the minimum rate will be allowed to keep what they earn.

MyTutor is an online tutoring programme which facilitates the matching of tutors with students, typically represented by their school, or their legal guardian. To tutor with the platform, tutors must study, or have studied recently, at specific universities which the platform lists and must successfully complete an application and interview with the platform. The platform boasts of its exclusivity, with only one in eight tutors being accepted.

The platform operates two programmes: the private and the schools' programme. The former operates as one may expect an online tuition platform to. Tutors create their own profile and are listed on the website for customers to offer them work. Typically, the guardians of students will contact tutors directly to set up a meeting, following which they will decide whether the student will work with the tutor. After having a lesson with a private tutor, customers are afforded the opportunity to give the tutor a rating out of five and leave feedback, all of which appear on the tutor's profile. Tutors on the private programme can set their own rate according to the platform's prescribed bands, which range from band one to band eight. The first band corresponds to tutors earning £10 per hour, and the eighth band means tutors will earn approximately £30 per hour.

The schools' programme works very differently. Here, students, often from disadvantaged backgrounds, that have been identified as needing extra support by their school, will have private tuition on the platform which is funded partially through a Pupil Premium paid by the government. Rather than setting up a profile and being contacted based on suitability, tutors will sign themselves up to certain slots made visible to them by the platform. They are also paid at a rate determined by the platform, which stands at £12 for A-Level students and £10 for GCSE students.

6.3. Risk of Harm to Self

This section will discuss the risks of harm to self that participants identified as being inherent to their service provision in the gig economy. It will consider three types of risk to self, including the risk of being a victim in a road traffic accident, the risk of intentional physical harm committed by a third party, and the risk of reputational harm.

6.3.1. Risk of a Road-Traffic Accident

Service providers working with Deliveroo, UberEATS, and Stuart inevitably spend an increased amount of time on the road. Therefore, it was no surprise that research participants in the courier case who work with one or more of these platforms identified that a risk inherent to their service provision was being in a road traffic accident. Research participants identified this risk as posing a risk of harm to themselves as well as to third parties, although the risk in relation to third parties will be considered later in this chapter.

The vast majority of research participants in the courier case were aware of the risk of being in a road traffic accident in principle, and some had discussed either experiencing being in a road traffic accident or coming close to being in one. One research participant described on one occasion sitting in his parked vehicle when a passing car hit his wingmirror. Thankfully in this instance no damage was caused to the research participant or to his vehicle. Another participant described being in a collision with a dog while working using his motorcycle. While the dog was unharmed, the research participant suffered injuries which prevented him from working for a period of time.

Not all research participants had experienced the risk of being in a road traffic accident materialising for them personally. However, many drew upon their experiences on the road to demonstrate that they understood how pressing the risk was. One participant who worked with Deliveroo and UberEATS using his bicycle did so aptly.

> I've have had a few, I don't want to say near misses, but moments where I've been like, Oh, that was a bit close' or I've had stern words with someone. Yeah, it does happen, definitely. Not like every day, but from time to time. It does give you a bit of a wake-up call.[1]

Another participant who, for a time, used his bicycle for his service provision with Deliveroo almost found himself in a collision with an automobile and suffered harm as a result.

> Another negative is not so much as a driver, but as a cyclist, is safety. When you're cycling on the road, I did it for probably about a year to two years as a cyclist around the city. I was not knocked down, but I had a sort of close... I came off the bike and

[1] Interview Participant 3 (Couriers) 09 October 2020 13.

damaged the bike a bit and just wrecked my leg for ages. A taxi, I wasn't actually hit, but a taxi just suddenly swung round in front of me, just U-turned unexpectedly[2]

By working in this industry, research participants understood that they bear the risk of being in a road traffic accident which confers additional liability risks. Service providers who work using automobiles will have a legal responsibility to insure against these risks, but this is not the case for those who use bicycles for their service provision;[3] the role of insurance in service provision will be considered in further detail in the chapter which immediately follows. But with or without the protection of insurance, as self-employed individuals, service providers bear the liability risks for being in a road traffic accident and some are all too aware of this reality.

6.3.2. Risk of Intentional Physical Harm Caused by a Third Party

A second risk that research participants in the courier case identified to be inherent to their service provision was the risk of injury intentionally caused by a third party. Discussion about this risk again arose in the vast majority of interviews with research participants in the courier case and, for many, this was a particularly pressing concern. Some research participants were aware of this risk as they had anecdotally heard about instances of other couriers being physically attacked usually in attempt to steal their possessions. Most participants discussed how the presence of this risk influenced their behaviour. This issue will be discussed in Chapter 7 which immediately follows.

Two participants in the courier case discussed experiencing concerning incidents of this nature personally. One described being chased by a group of masked individuals,[4] and another discussed having their car circled by a group of people.[5] Working as a courier for these platforms, especially when wearing a uniform, was described by one participant as making oneself a 'fluorescent target'.[6]

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[2] Interview Participant 11 (Couriers) 09 December 2020 5.
[3] Road Traffic Act 1983, s 143.
[4] Interview Participant 11 (Couriers) 09 December 2020 6-7.
[5] Interview Participant 19 (Couriers) 17 December 2020 18.
[6] Interview Participant 11 (Couriers) 09 December 2020 5-6.

This risk was also to thought to be enhanced by UberEATS' mechanisms for allocating work. Research participants who worked with UberEATS described that when receiving an offer for work through the app, they would be informed only of the restaurant they were to collect the order from. Only at the point they had collected the order from the restaurant would they be informed of the location they were delivering to. As a result, most research participants preferred Deliveroo's model which provided all of the information at the point of the offer of work. Not only does this have potential consequences with respect to doctrines of control and integration for tort which will be discussed in Chapters 8 and 9 respectively, but it also could exacerbate the existing risk that service providers may be intentionally injured by third parties.

Research participants themselves argued that without being provided the necessary information of where they were to travel to, they were unable to make an informed decision about whether this was an area they wished to travel into. A participant working in central London on a bicycle discussed this fear below.

> [Y]ou don't know where you're delivering to with UberEATS until after you've collected the food… I don't like that very much because especially at night-time, I might not want to go to some areas as a 52-year-old lady on a bike. I might not want to do that.[7]

Research participants also described how the routing systems would at times increase their risk. One participant described being routed through parks at night-time without lighting. She suggested that by doing this, she was 'just asking for somebody to, you know, shove me off my bike, steal my bike and mug me. I could easily in a dark place, I could easily put a wheel into the canal, you know, so there's that aspect. There's the other person aspect of people out there being a danger to me.'[8] Other participants confirmed this experience. One discussed being routed through an army base,[9] a different participant described being

[7] Interview Participant 12 (Couriers) 10 December 2020 13.
[8] Interview Participant 12 (Couriers) 10 December 2020 4-5.
[9] Interview Participant 7 (Couriers) 07 December 2020 25.

routed towards a flooded canal, and another had been routed through pedestrian only areas.[10]

This kind of risk has also been discussed in the media in relation to Stuart's platform.[11] Its GPS system was allegedly routing service providers through building sites and road closures and was also said to be suggesting that they break road traffic rules by directing them to turn right where there was a sign forbidding this. Some service providers have allegedly had their contracts with Stuart terminated because of deviating from the GPS routes provided by the platform, despite being unable to take such routes.

6.3.3. Reputational Harm

As discussed above, the risks of a road traffic accident and physical harm intentionally being caused by a third party was raised by research participants in the courier case. Research participants in the tutor case, however, identified a risk of reputational harm. As discussed in section 6.2. of this chapter, MyTutor operate two programmes: the private programme and the schools' programme. On the private programme there is a review system which allows customers to rate tutors they work with from one to five and write a review to accompany this. The ratings and reviews feature on the tutors' individual profiles on the website.

Research participants in the tutor class recognised there was a risk of reputational harm if a negative review was posted on their profile, despite most having positive experiences with the review system. Two participants described receiving accidental one-star reviews which were accompanied with a positive statement. One participant was able to get this review removed by the platform,[12] whilst another was informed by the platform that if a review was removed it would affect 'the integrity of the review system'.[13]

Participants also considered the possibility that negative reviews might be untrue. Such reviews, according to one participant would 'definitely [be] damaging to our reputation. I

[10] Interview Participant 5 (Couriers) 12 October 2020.

[11] Eve Livingston, 'Food delivery drivers fired after 'cut-price' GPS app sent them on 'impossible' routes' *The Guardian* (2 July 2022)

[12] Interview Participant 2 (MyTutor) 23 December 2020 27.

[13] Focus Group 1 (MyTutor) 13 May 2020 19.

don't know if that would be to go so far as to say that it's defamatory in some way, I think they would have to leave a pretty negative review, honestly, for it to tread into those grounds. But I mean, I think, definitely, there should be some sort of ramifications for parents or students that do leave reviews like that.'[14]

For some participants, the ramifications of negative reviews were considered in relation to their work with the platform. One participant analysed how this would affect them personally.

> I'm lucky. I have over one hundred 5-star reviews and one 4-star review because the website wasn't working. So, it would take a long time for me to get pulled down that low. But I think when you're first starting out, it would be quite easy, to like, if someone's just not even happy with the way you teach, and they rate lowly because of that.[15]

Other participants also considered how this may affect their reputation beyond on the platform.

> [T]he last thing I would want is for me in 20 years' time, successful in my practice as a barrister, for someone to be looking through my name for information to find my MyTutor profile and then to see that someone had at one point said that I'm extremely unprofessional and rude, and then for me to lose work because of that'.[16]

Some research participants also discussed how the presence of this risk influenced their behaviour. This will be discussed in the chapter which immediately follows.

[14] Interview Participant 9 (MyTutor) 23 December 2020 25.
[15] Interview Participant 2 (MyTutor) 23 December 2020 27.
[16] Interview Participant 9 (MyTutor) 23 December 2020 26.

6.4. Risk of Harm to Third Parties

This section will consider the risks of harm that research participants believed they could cause to third parties. Causing harm to third parties can be actionable in tort, meaning additional liability risks are also conferred. Tort law distinguishes between negligent and intentional torts, and so this section will be broken down with subheadings to reflect this distinction.

6.4.1. Negligent Harm

As discussed in subsection 6.3.1., most participants in the courier case understood that there was a risk of being in a road traffic accident. Some had even experienced this personally. Subsection 6.3.1. considered the risk that research participants might be a victim in a road traffic accident, but this subsection will consider the same risk but where the service provider is at fault. Some research participants described instances of potentially negligently increasing the risk of an accident themselves. Three participants in the courier case discussed occasionally experiencing a lapse in concentration which increased their risk on the road. This was attributed to a variety of reasons, including to check their phone for directions. Most participants in this case acknowledged that if an accident resulted from their own negligent conduct, they should be liable for this.

However, two participants felt that the platforms in some ways contributed to this increased risk for third parties. They discussed that they usually would expect a voice-over feature on the app that would read directions aloud to them. This feature, on occasion, would stop working. This meant that participants felt they needed to look at their app more often and this was described by one as feeling 'more risky' especially when in an unfamiliar area.[17] In his view, '[i]t could've caused accidents for people'.[18]

A potential challenge that may be presented to tort law is the way that some couriers allegedly use their apps. One issue that was discussed by more than half of the research participants in the courier case was multi-apping. This occurs when couriers work across

[17] Interview Participant 7 (Couriers) 17 October 2020 24.
[18] Interview Participant 7 (Couriers) 17 October 2020 24.

multiple different apps. According to participants, there are two forms of multi-apping, one which is acceptable and the other which is not. The acceptable form of multi-apping refers to having multiple apps on at one given time but ensuring that other apps are turned off once they begin working on a job. The unacceptable form of multi-apping, which most participants took issue with, was where couriers would accept multiple jobs from different platforms at the same time. This could mean that service providers are delivering multiple orders for multiple platforms at one given time. If, for example, the tort of negligence was to be committed during this time, and the victim sought to take action against an entity to make them vicariously liable for the actions of the service provider, which platform would action be taken against? Furthermore, which platform would be held liable? Would it be one, both, or neither?[19]

Research participants in the tutor case also discussed the risk of negligently causing harm to third parties. Participants in this case understood the role they played in facilitating the education of young people and how, as professionals, they owed an obligation of reasonable care to their customers. Some discussed that there was a risk of covering content from the incorrect exam board of the student, or covering content at the incorrect level (e.g., foundation or higher level at GCSE). For some tutors, this kind of mistake was 'easy' to make, and some admitted to occasionally making such mistakes themselves. One tutor also discussed that there was a further risk that lessons from tutors 'might not be' up to the expected standard of a professional.[20]

Whether this kind of potentially negligent conduct could confer liability onto the tutor (e.g., if their teaching causally resulted in a poor grade for the student) was a more difficult question for the participants to answer. For some participants, they hoped that this would not be the case.

> I don't think you can blame the tutor because it's not your only source of information. It's also your responsibility to learn things, and also you get taught in school. Maybe

[19] There is a possibility for dual vicarious liability, see *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151; [2006] QB 510.
[20] Focus Group 1 (MyTutor) 13 May 2021 18.

it's different if you teach someone purely based on tuition, which some people do, but I don't do that. So, I don't think I have the main responsibility of children.[21]

This participant raises an important issue of causation. Perhaps many tutors are providing supplementary support to the student, meaning their tuition is less likely to affect the student's grade factually and legally. The students may receive support through their school for this subject and the students themselves also have responsibility over their own revision and own autonomy during the assessment. However, as this participant acknowledged, in instances where the tutor is the primary or only support for the student in that subject the responsibility owed to that student is greater. Other tutors suggested that in some instances the tutor ought to know better, and in those cases, fault should lie with the tutor.

6.4.2. Intentional Harm

Research participants in the courier case typically associated intentional harm with criminal offences. Some discussed the risk that individuals with criminal records may be working with the platforms. Usually, service providers must successfully undergo a Disclosure and Barring (DBS) check to be onboarded onto the platform. However, some research participants discussed illicit methods that individuals allegedly use to get around this. For example, research participants alleged that service providers who had passed the DBS check and whose name was registered on the account treat access to that account as a commodity by renting it out to individuals who would otherwise not be able to access the platform for work. Some research participants suggested that account renting was used primarily for individuals who could not pass a DBS check due to them having a criminal record. One stated that it may increase the likelihood of criminal offences, or for our purposes, intentional torts, taking place on the platform.

[W]hen you're delivering McDonald's and you've got a criminal record, fair enough, what does it overly matter? But if someone is delivering to a house where it's got

[21] Interview Participant 19 (MyTutor) 01 April 2021 17

> vulnerable people and they've got a criminal record for burglary, or theft, or assault, that could be that could be the worrying side of things[22]

Interestingly, one participant discussed that for his first three months of working with Deliveroo he worked without a DBS check due to a backlog during the COVID-19 pandemic.[23] Considering the concerns put forward by the participant quoted above, this could have increased the risk of intentional harm to third parties.

Participants in the tutor case also discussed the possibility of criminal behaviour taking place on the platform.

> I think that it is a lot easier to get away with [inappropriate behaviour online]. People maybe forget the kind of environment that they're in and can could say something a bit weird. And students complete the lessons in their own room, or privately, with no one else listening around because otherwise it's too much pressure and it's distracting. So, there is obviously the opportunity for it. But I think you kind of get that in person as well anyway. That could happen at [tutoring centres], that could happen with private tutoring. No one wants it to happen, obviously, and it definitely shouldn't happen. But I think that if you're going to have a tutoring experience, then you would always be worried about it to some degree as a parent. Hopefully, MyTutor screens everything enough so that it doesn't happen…`[24]

Participants in this case also discussed that it was only necessary to have a DBS check when working with the schools' programme and that it was not necessary when working only with private clients. This means that there may be some risk that those with criminal records could be working with young people. However, one participant believed that this kind of risk might be mitigated by the platform's safeguarding policies, including a prohibition of contact with customers outside of the platform and the automatic censoring of certain types of

[22] Interview Participant 5 (Couriers) 12 October 2020 14.
[23] Interview Participant 3 (Couriers) 09 October 2020 4.
[24] Interview Participant 6 (MyTutor) 20 December 2020 19.

messages.[25] It is hoped that risks of such criminal behaviour outlined by the participant above would not materialise, but unfortunately it is instances such as this which have seen the law of vicarious liability develop.[26] If such risks were to materialise, this would raise interesting questions about primary and secondary responsibility in tort law.

6.5. Conclusion

This chapter has presented the liability risks which research participants perceive may arise as a result of their gig economy work. All of the risks considered are potentially legally actionable harms in tort law. The risks considered include risks of harm which participants perceived as potentially occurring to themselves, such as the risk of being in a road traffic accident, the risk of physical harm being caused intentionally by a third party, or the risk of reputational harm. This chapter has also considered risks of harm which participants perceived they could potentially cause to third parties, including both negligent and intentional harm.

This chapter has helped to identify the types of risks that tort might be presented with and will provide the necessary context for the legal responses that might be required. This will be discussed in Part III of the thesis. The following chapter will analyse the risks presented here and will discuss how the research participants responded to those risks and how (if at all) they changed their behaviour accordingly. This will seek to address the question as to whether tort law is capable of deterring potentially liability incurring conduct. This is important as it will influence the theoretical underpinnings of the legal responses that will be presented in part three of the thesis.

[25] Interview Participant 11 (MyTutor) 29 December 2020 19.
[26] For example, *E v English Province of Our Lady of Charity* [2012] EWCA Civ 938; [2013] QB 722 [52]; *Armes v Nottinghamshire County Council* [2017] UKSC 60; [2018] AC 355; *Barclays Bank plc v Various Claimants* [2020] UKSC 13; [2020] AC 973.

Chapter 7 - Data Analysis: Response to Liability Risks

7.1. Introduction

The previous chapter of this thesis discussed the liability risks that research participants across the two case studies perceived to be inherent to their service provision in the gig economy. This chapter intends to analyse the research participants response to those liability risks. Therefore, the question this chapter seeks to address is:

- How, if at all, do liability risks influence the behaviour of the research participants in their gig economy work?

It is important to understand how research participants respond to liability risks. As outlined in Chapter 2, some believe that the threat of tortious liability has a deterrent effect on actors,[1] and this has been tested empirically in real life settings, including in an automobile,[2] product liability,[3] and medical malpractice context.[4] This necessarily relies on actors being aware of the presence of tort and amending their behaviour in response to this. Some proponents of this theory would suggest that deterrence should be a foundational theoretical underpinning of tort law. By examining how research participants respond to liability risks in this study, we can test to some degree whether tort can deter potentially liability incurring conduct, as well as the role that insurance plays in their service provision. This will inevitably be limited by the research participants perspectives, and there is a limit

[1] See generally, William M Landes and Richard A Posner, *The Economic Structure of Tort Law* (Harvard University Press 1987).

[2] Elizabeth M Landes, 'Insurance, Liability and Accidents: A Theoretical and Empirical Investigsation into the Effect of No-Fault Accidents' (1982) 25 Journal of Law & Economics 49; J David Cummins, Richard D Phillips and Mary A Weiss, 'The Incentive Effects of No-Fault Automobile Insurance' (2001) 44 Journal of Law & Economics 427; Alma Cohen and Rajeev Dehejia, 'The Effect of Automobile Insurance and Accident Liability Laws on Traffic Fatalities' (2004) 47 Journal of Law & Economics 357; Yu-Ping Liao and Michelle J White, 'No-Fault for Motor Vehicles: An Economic Analysis' (2002) 4 Americal Law and Economics Review 258.

[3] Steve Garber, *Product Liability and the Economics of Pharmaceuticals and Medical Devices* (RAND Institute for Civil Justice 1993); W Kip Viscussi and Michael J Moore, 'Product Liability, Research and Development and Innovation' (1993) 10 The Journal of Political Economy 161; Richard Goldberg, *Causation and Risk in the Law of Torts: Scientific Evidence and Medicinal Product Liability* (Hart 1999).

[4] Zenon Zabinski and Bernard S Black, 'The Deterrent Effect of Tort Law: Evidence from Medical Malpractice Reform' (2022) 84 Journal of Health Economics 1; Michelle M Mello and Troyen A Brennan, 'Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform' (2002) 80 Texas Law Review 1595; Joanna C Schwartz, 'A Dose of Reality for Medical Malpractice Reform' (2013) 88 New York University Law Review 1224.

to how much this can be generalised both within the wider gig economy and within the case studies themselves. However, the answer to these questions will influence the theoretical foundations of the suggested response to the legal challenges posed to tort in the final part of this thesis.

This chapter will be split into three main parts. Section 7.2, which immediately follows, discusses the role of insurance in the research participants' service provision. It examines whether they have taken out insurance policies, and how necessary they believe such policies to be in light of liability risks. Section 7.3. will discuss steps that research participants described taking to mitigate liability risks, although as will be illustrated, it is unclear whether this was due to the threat of tort or for other reasons, such as their own personal safety. Section 7.4. will discuss steps that research participants described taking to enhance liability risks. This was due to two key factors: financial and algorithmic influences.

7.2. Insurance

As discussed in the previous chapter, liability risks included risks of harm that research participants perceived could occur to themselves (such as being a victim in a road traffic accident, being intentionally physically injured by a third party, and suffering reputational harm), as well as risks of harm that research participants believed they could cause to third parties (including negligent (e.g., causing a road traffic accident) and intentional harm). In response to some of these risks, some research participants took out insurance policies to protect themselves.

Some research participants in the courier case discussed using an automobile for their service provision (e.g., a car or a motorcycle). This meant that they were subject to mandatory insurance rules.[5] Participants in the courier case who used an automobile for their service provision represented over half of the sample (12/22). They discussed having a higher level of compulsory insurance which they were required to evidence to the platforms as part of their onboarding. This type of insurance is called 'Hire and Reward' and permits

[5] Road Traffic Act 1998, s 143

use of an automobile for food couriering purposes. It is an additional form of insurance, on top of their 'Social, Domestic, Pleasure' policies.

Perspectives of the necessity of insurance also varied across the case study. It was important to gain the research participants' perspectives of insurance to understand their responses to the liability risks discussed in the previous chapter. Some felt that they were being taken advantage of financially and that there was limited justification for this kind of insurance. Others understood why such policies were necessary for their work as the risk of accidents taking place were foreseeable. Service providers suggested that this was because they are 'always on the road'[6] and that their risk was increased due to 'excessive use of a vehicle'.[7] It is clear from the mixed responses from research participants that not all research participants perceive liability risks in the same way. Whilst the response to the liability risks for those who use an automobile for their service provision was the same, due to the liability insurance requirements, the perspectives regarding the necessity of this response was not.

The remaining participants who used bicycles for their service provision were not subject to the same requirements for liability insurance. However, some were aware of insurance policies provided by the platform on their behalf; understanding of what this policy covered was limited and varied, though. There were also mixed perspectives about the necessity of the insurance cover provided by the platform. One participant when asked if he was reassured by the presence of insurance said:

> [A] little bit, because obviously given being on the road it can be quite dangerous and if I was to be injured to a certain extent it could be potentially life changing. You know what I mean? And if I know that I'm not going to be without money to an extent then, it does help you a little bit, and even if I was to accidentally damage, say if I hit a car, it's good to know that I'm not gonna foot the bill for it because of an accident. It's good to know, and it gives just give me a bit of confidence to go out and do it.[8]

[6] Research Participant 6 (Couriers) 13 October 2020 14.
[7] Interview Participant 5 (Couriers) 12 October 2020 27.
[8] Interview Participant 4 (Couriers) 11 October 2020 18/

Some had not considered how the insurance policies protected them, and others were not aware that such insurance existed. One participant who used his bicycle for work was asked if he was insured for his work with UberEATS and Stuart; his response to this question is below.

> No. My God, you've got me thinking now. (Pause) I wonder if my household insurance would cover it if I was delivering? I've no idea. I should have thought of it, shouldn't I? I really don't know. I think Stuart have got some sort of insurance for partners, in inversed commas, I think so, but I don't know about it. Perhaps I should…[9]

As stated above, the kind of insurance in place for research participants who used a bicycle for their service provision was the same, but the perspectives in relation to that insurance varied.

For participants in the tutor case, the platform had not taken out any policies on their behalf. This meant that any liability insurance would have to be taken out by the research participants themselves. Interestingly, though, no research participants had taken out an insurance policy for their work. When asked, the vast majority of tutors, including the one quoted below, had never considered taking out an insurance policy.

> I hadn't even thought of it as a thing that I should have on my radar, to be honest. And that's especially strange, because I'm also a qualified ballet teacher, for which I obviously have insurance because there's very material risks of someone slipping in your class or injuring themselves. I have [public] liability insurance for that … but it never even occurred to me that there might be parallel things that I should have for the tutoring work.[10]

Most participants in the tutor case did not feel that insurance was necessary for their service provision. One participant stated, 'I'm not really sure why I would need it… I've not so far

[9] Interview Participant 2 (Couriers) 07 October 2020 22-23.
[10] Interview Participant 1 (MyTutor) 03 January 2021 33.

seen any reason that I would need to take out insurance.' The majority of research participants in the tutor case had not considered insurance at the point of individual interviews, but some admitted that they may later reconsider this approach after discussing some of the liability risks outlined in the previous chapter. However, as discussed in Chapter 5 on methodology, some of these research participants also took part in focus groups following their interview. When asked about insurance again in the focus groups, each participant said they had investigated the possibility of taking out an insurance policy for their work but had decided against pursuing it due to weighing up the cost of a policy against the associated risks it would seek to protect them from. This suggests that most of the research participants in the tutor case did not believe the liability risks discussed in the previous chapter, such as reputational harm and negligence, were so inherent to their service provision as to warrant the level of prudence involved with taking out an insurance policy.

7.3. Mitigation of Liability Risks

Despite not all research participants across the courier and the tutor cases believing that insurance was necessary to help shield them from liability risks, several participants took additional steps to mitigate those risks themselves. As discussed in the previous chapter, an inherent risk which was particularly pressing for research participants was the risk of being intentionally physically injured by a third party. One participant who worked for Deliveroo discussed mitigating this risk.

> [I]ncreasingly, you know, riders get mugged for their food, basically. It is a risk, and the further that the economy deteriorates, the more that risk increases… I'm not going to go [to those areas] in the dark anymore because things have deteriorated with regards to the amount of thefts and burglaries and break-ins, and generally crime has increased over the last 11 months… I've become a little bit more wary, and certain addresses are no-go areas.

This was not uncommon with research participants in the courier case, and several participants discussed adopting similar measures to mitigate this risk. This was because they felt that the risk of harm to themselves was heightened by travelling into certain areas. As discussed in the previous chapter, it was not possible for research participants to take such steps when working with UberEATS, as the destination for the delivery was not revealed to the service providers until after they had collected the order from the restaurant. It could be said that the inability for service providers to mitigate a risk that many deem to be pressing could ostensibly increase this risk.

Research participants in the courier case also discussed the risk of being in a road traffic accident. Inevitably, this raises further liability risks, either for a third party or for the service provider. Awareness of road traffic accidents was heightened in the courier case. This was unsurprising, as one participant said, as couriers, they are 'always on the road'.[11] In response to this risk, research participants described a change in their behaviour. Some research participants took steps to increase or enhance this risk, and others took steps to mitigate the risk.

Some participants described taking their time with deliveries to ensure these risks did not materialise. One participant said, '[b]ad weather, bad traffic, if someone's ordering food… I ain't gonna be rushing because it's dangerous.'[12] Some research participants also reflected this view in their comments about taking risks. However, it is unclear whether this increased vigilance on the road was due to the threat of tort. One participant stated he mitigated the risk due to their 'own safety',[13] and another claimed that he had managed to avoid 'serious' injury by taking care on the road.[14] No participant discussed taking steps to mitigate their risk due to the threat of liability.

The previous chapter also drew upon the risk of reputational harm that research participants in the tutor case identified as being inherent to their service provision. This was due to the review system that the platform operated. This was a significant risk that several tutors discussed in the individual interviews. While most had a largely positive experience with the

[11] Interview Participant 6 (Couriers) 13 October 2020 14.
[12] Interview Participant 4 (Couriers) 11 October 2020 24.
[13] Interview Participant 6 (Couriers) 13 October 2020 27.
[14] Interview Participant 17 (Couriers) 08 December 2020 4.

review system, research participants still anticipated the risk, due to fears about reviews affecting their reputation on the platform and in future career pathways.

One participant described their anxieties about reputational harm and the steps they took in response to this.

> I turned down a student a couple of months ago because I had – they're supposed to be 15-minute free video meetings – this is only for the private tuition – but you can meet the student and the parent and explain what you do. And I've done these many times, usually they last like 5 minutes. I just say who I am, where I go to university, and stuff like that. But this one went on for like 25 minutes; they just kept asking questions, being really pushy – this was the mum, not the kid – and I initially had said yes to it, because it was two hours a week for the foreseeable, and I could probably do with that, but then I thought this is going to be more than it's worth. So, I was like, 'sorry, I can't help you.[15]

The participant above discussed this in relation to their fears about the review system. Other research participants also described being aware of 'pushy parents'.[16] However, it was unclear whether their fears were because of the potential reputational harm or something else entirely. As will be seen from the next section, though, not all research participants in the tutor case responded to the risk of reputational harm in the same way. In fact, some actually described enhancing this risk.

7.4. Enhanced Liability Risks

Section 7.3. has outlined examples of research participants describing taking steps to mitigate the liability risks discussed in the previous chapter. This section will illustrate that not all research participants respond to liability risks in the same way. It will draw upon two factors that influenced the decision making of the research participants: a financial influence

[15] Interview Participant 13 (MyTutor) 02 February 2021 9.
[16] Interview Participant 10 (MyTutor) 28 December 2020 4.

and an algorithmic influence. The presence of these factors ostensibly influenced research participants to enhance the liability risks inherent to their service provision.

7.4.1. Financial Influences

As has been discussed earlier in this chapter, as self-employed individuals, service providers must bear the burden of the managing the liability risks associated with their service provision. Being an independent contractor in the gig economy also means that there is no guarantee of work. One participant described going to work as a 'gamble', hoping that they will earn enough to make a sufficient living.[17]

Over half of research participants in the courier case believed there was not an equilibrium when it came to the amount of work available and the number of service providers willing to take that work on. One participant stated:

> I think they can flood the market with a lot of drivers - there's very little negative of them flooding the market with a lot of drivers, especially newer drivers who don't understand what it's like to earn something before. And then you just get a gradual erosion of earnings over time, and you just rely on the growing industry (which it is growing) and you rely on their promotions when they put it out, as well. So, in essence, is not entirely secure. You don't feel secure, and I don't think they intend to make it as secure for you.[18]

This participant describes a flooding of the market with service providers without a substantial change in the level of work available. Another participant claimed that the platforms seek to exploit the fact that there are 'very poor people that really, really need money in this country, and they will do this kind of work for less than minimum wage. And there is no end to the number of people that will do this work for minimum wage.'[19]

[17] Interview Participant 1 (Couriers) 07 October 2020 10.
[18] Interview Participant 15 (Couriers) 15 December 2020 3-4.
[19] Interview Participant 12 (Couriers) 10 December 2020 9.

In these instances, some service providers, to regain some control over their financial position, described increasing the risk of harm to themselves and third parties. Some participants suggested that in the absence of a set hourly rate, their predominant concern was 'all about time'.[20] This meant that there was sometimes a conflict between 'getting there safely and also delivering it in a time that you'll be happy with and making the amount of money that you'll be happy with'.[21] The appreciation of this conflict resulted in several participants in turn increasing their risk on the road to achieve financial stability, including by cycling down one-way roads in the wrong direction,[22] speeding in a motor vehicle,[23] or driving and cycling through red lights.[24]

Another participant described that his risk taking was further influenced by the idea that he was replaceable by other service providers.

> There is a several months long waiting list in my area for Deliveroo. There are probably thousands of people just waiting to take my place. If I stop at a red light, there will be 50 people who will sign up next week, who will go through the red light. Deliveroo doesn't care.[25]

This was said in the context of a focus group with other service providers who concurred with this statement. This, in some ways, sought to normalise the risk taking.

A different participant described his work with Deliveroo collapsing during the pandemic, at which time his platform work was his primary form of income. This meant that when work picked up again later the same year, he placed pressure on himself to ensure he 'made up for it.'[26] This meant he was working for up to thirteen hours at a time, leaving himself with as

[20] Interview Participant 17 (Couriers) 08 December 2020 11.
[21] Interview Participant 17 (Couriers) 08 December 2020 11.
[22] Interview Participant 17 (Couriers) 08 December 2020 19-20.
[23] Interview Participant 6 (Couriers) 21 December 2020.
[24] Focus Group 1 (Couriers) 19 April 2021 12.
[25] Focus Group 1 (Couriers) 19 April 2021 14.
[26] Interview Participant 15 (Couriers) 15 December 2020 11-12.

little as six hour's rest time before restarting work again. The participant admitted that these choices were 'dangerous, but if you need the money, you need the money'.[27]

Similar issues arose for tutors, albeit less frequently and prominently. In the tutor class, some research participants discussed taking on additional risks, such as working with clients who were more demanding and, to them, represented a greater risk for reputational harm to the service providers through negative reviews, or a greater liability risk if the tutoring was not to be at the expected standard of the client. This risk, for some, was represented by clients with unrealistic expectations, such as wanting the tutor to guarantee a large jump in performance in a short-turnaround time. Some tutors acknowledged that during times when they had greater financial worry, they would be more likely to take on these clients who they believed posed a greater risk to themselves.

The responses to risk outlined in this section are very different to those outlined in section three, where some research participants sought to mitigate liability risks. This suggests two things. Firstly, not all research participants respond in the same way to liability risks. Secondly, some research participants believe that the financial factors, arguably perpetuated by the platform, posed a greater threat to them than the threat of liability.

7.4.2. Algorithmic Influences

The second factor to be discussed in this subsection is the influence that algorithmic mechanisms have on the decision-making of service providers in relation to risk taking. Some research participants who worked for Deliveroo described that the platform records the time in which it takes couriers to deliver an order to the customer. For those who deliver in the expected time frame, they will receive a green screen with a 'thumbs up' or a 'smiley face', which states something to the effect of 'great ride'. For those who do not deliver in the expected time frame, they will receive a red screen and, whilst they will not receive a thumbs down, or a sad face, they will receive 'an absence of a thumbs up'. One participant articulately described this mechanism in practice.

[27] Interview Participant 15 (Couriers) 15 December 2020 11-12.

When I'm riding for Deliveroo, I am very aware, very, very aware that getting somewhere and getting that 'well done. Good job, thumbs up', you know, 'nice ride' [to acknowledge I have delivered in time] … [I]t doesn't take into account things like roadworks and temporary traffic lights. So, I know if you see and I am, again, an old lady, I prefer to follow the rules. You know, I am a cyclist that stops at lights. I'm a cyclist that prefers not to go as fast as I can through pedestrianised area, but when I'm working for Deliveroo, there's a huge incentive to do that. If I'm at a long light, and there is nobody coming, I will blaze through it if I'm working for Deliveroo. And I know I'm not supposed to do that. I know it's wrong and bad. But man, there is something inside of me that says don't get marked down with Deliveroo, you might still need this job. And if it takes you too long to get there, you don't get that thumbs up, that's it.[28]

As can be seen from the research participant quoted above, the fear of what is behind the algorithmic mechanism influences her to take steps to enhance her risk of being in a road traffic accident. It seems that research participants believe they must follow the ostensible rules of the platform, even if they lack the certainty that such rules exist. They do so even if this means breaking road traffic rules or increasing the risk of harm to themselves or those around them. This feeling was also exemplified by a participant who was also aware of the ticking clock while working on other platforms. He admitted that when he approaches roadworks, he cycles on the pavements.[29]

Again, the responses to risk in this section are different to those discussed in section 7.3. where participants took steps to mitigate liability risks inherent to their service provision. This also suggests that: (1) not all research participants respond in the same way to liability risks, and (2) that some research participants perceive the algorithmic factors, arguably perpetuated by the platform, to pose a greater threat than the threat of liability.

The financial and algorithmic sources of risk posed in this section evidently had an influence on how service providers across the two cases perceived risk and, ultimately, how they

[28] Interview Participant 12 (Couriers) 10 December 2020 22.
[29] Interview Participant 2 (Couriers) 07 October 2020 24.

responded to risk. In a sense, they were forced to evaluate risk of legally actionable harm against potentially losing, for some, their main source of income.

7.5. Conclusion

This chapter has discussed research participants response to the liability risks presented in the previous chapter. It has considered the role of insurance in the research participants' service provision. It examined whether they had taken out insurance policies and how necessary they perceived such policies to be. It has also examined steps taken by research participants to mitigate liability risks, although it was unclear whether this was due to the threat of tort. It also discussed steps taken by research participants to enhance liability risks. These steps were allegedly taken due to financial and algorithmic factors, arguably perpetuated by the platforms, which influenced research participants to amend their behaviour.

This chapter has concluded that research participants respond to liability risks in different ways, and it is unclear whether their responses are influenced by the threat of tortious liability. Where research participants took steps to enhance the risk of liability, it is also argued that they believe that algorithmic and financial factors posed a greater threat to them than potential liability. This is important to understand, as this contributes to the ongoing debate about whether tort law is capable of acting as a deterrent to potentially liability incurring conduct. This question will be analysed in detail in Part III of this thesis to determine whether deterrence-based theories are suitable to underpin the proposed legal responses to the challenges that are posed by the gig economy.

The final two chapters of Part II of the thesis which immediately follow will analyse the doctrines of control and integration. As outlined in Chapters 3 and 4, legal doctrine has adopted tests to determine who risk should be distributed to; these tests include control and integration. Therefore, the next two chapters will consider the extent to which research participants believe their service provision is controlled by the platform, and the extent to which research participants believe they are integrated into the business of the platform.

Chapter 8 - Data Analysis: Control

8.1. Introduction

The previous two chapters have analysed the liability risks that research participants believed were inherent to their service provision, as well as their responses to those risks. This chapter will consider the notion of control, which is one of the central tests used by legal doctrine to distribute risks in tort, as set out in Chapter 4. It will draw upon the research participants' perspectives about the level of control that is exercised over their service provision. Therefore, this chapter seeks to address one question:

- In what ways do gig economy platforms exercise control over the research participants in their work?

To address this question, the chapter is split into two main parts. Section 8.2. draws upon data relating to factual control, which means the data closely matches the test for control used by legal doctrine. Section 8.3. draws upon data that has been induced from the dataset, which relates to the perspectives of research participants about their relationships with the platforms that does not fit with the existing doctrinal tests. This suggests that there is a gap between legal doctrine and the social reality in the gig economy, and this data will facilitate analysis of the legal challenges posed by the gig economy and, ultimately, the legal responses proposed. This analysis will feature in Part III of this thesis.

8.2. Factual Control

Chapter 4 of this thesis examined the key tests of employment for tort, including the doctrine of control. Here, it was discussed that doctrines in tort have developed outside of the traditional employment category and have found relationships of employment which perhaps would not have been found in other spheres of law. To assist with this transition, the courts begun to examine control that was not exercised vis-à-vis the contract of service (as this contract did not exist where the individual was not an employee for other purposes) but was instead observed factually. In the context of the case studies, all research participants were classified as independent contractors so did not have a contract of service. This meant there was no legal control arising. Therefore, this chapter will examine control that can be observed factually, and it will draw upon a number of different themes which fall into this category. These themes include, financial and wage obligations, obligations to follow rules, implied obligations to accept work, the use of statistics, and the use of reviews. Each of these themes will be discussed in turn.

8.2.1. Financial Obligations and Wage Obligations

Research participants in the tutor case described how the payment structure worked on the MyTutor platform. They explained that customers would pay MyTutor for service provision, MyTutor would take a deduction from that fee, and then would pay the remainder to the tutors. Interestingly, the fees taken by the platform for work carried out on both the schools' and private programmes were determined by the platform and were non-negotiable.

The majority of research participants in the tutor case had negative perspectives regarding the fees payable to the platform, and one participant described the fee as an 'outrageous amount'[1] which could represent up to half the amount paid by the customer. Further, because the amount payable was deducted before payment was made to service providers, research participants described being unable to negotiate or amend the payment according to the value of the service. For example, if tutors were facing technical difficulties during tuition sessions which made it difficult, or impossible, for the sessions to go ahead – which many tutors discussed having experienced – tutors could not reduce the fee or refuse to make payment to the platform to leverage the improvement of the service. Because of this, some felt there was a hierarchical structure in play, where tutors were in a position of subordination, as they had little power to improve their own working conditions.

Research participants in the courier case also described being subject to obligations regarding their wage. They explained that they were not able to set their own rate, as this was calculated, determined, and paid by the platform. Several participants did not complain about this issue, but some stated that whilst it is the platform's 'business model… it feels like

[1] Interview Participant 14 (MyTutor) 09 February 2021 16.

you're treated as a sole trader, but essentially, that's just a way of getting around some of the rights [with employment]'.[2] Others believed that the platform's authority over wages posed a serious financial risk, as they could reduce rates at any time they choose. In a focus group with couriers, there was agreement amongst participants that Deliveroo had done this previously.[3] The reduction of commission paid to service providers has also been discussed in the literature by Dubal, who suggested that this unfairly reduced the amount that service providers could earn per job.[4]

Several research participants discussed attempting to renegotiate their wage for specific jobs. At times, when delivering an order to a customer, the delivery address would change meaning that research participants would redirect their route to ensure the order arrived with the customer. In such instances, research participants described travelling additional miles, therefore incurring additional costs. Naturally, they felt they should be paid a greater fee to reflect these costs and would contact the platform requesting to be adequately compensated for their work. Several research participants described feeling frustrated as the platforms would respond with automated messages, often declining their requests for additional compensation. One participant said, 'I've had a barney with them a few times on the Help Chat, but the Help Chat's not very good. They're just like robots on there. They just send you automated responses'.[5] Another stated, 'if I was to do 10, and say I've driven longer, I'd probably only have 3 of them adjusted… and that's for their benefit.'[6] This finding has been discussed in other empirical work in the gig economy, where it was stated that service providers 'are not empowered to negotiate the terms of their work by communicating to a representative of higher management.'[7]

Conversely, research participants in the tutor case explained that the method to determine the rate of pay depends on the programme the service provider works on. Those who

[2] Interview Participant 15 (Couriers) 15 December 2021 3.
[3] Focus Group 1 (Couriers) 19 April 2021 4-5.
[4] Veena D Dubal, 'An Uber Ambivalence: Employee Status, Worker Perspectives, and Regulation in the Gig Economy' in Deepa Das Acevedo (ed), *Beyond the Algorithm: Qualitative Insights for Gig Work Regulation* (CUP 2020) 34.
[5] Interview Participant 7 (Couriers) 17 October 2020 6.
[6] Interview Participant 5 (Couriers) 12 October 2020 6.
[7] Alex Rosenblat, Luke Stark, 'Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers' (2016) 10 International Journal of Communication 3771.

worked on the private programme could set their own rate within bands prescribed by the platform. The bands ranged from one to eight, and each band came a descriptor defined by MyTutor which stipulated what a customer might expect of a tutor at that level. According to research participants, the descriptor for each band sets out an expected number of completed lessons, an expected number of positive reviews, and an expectation regarding the tutor's level of education, as tutors on higher bands may have more than one degree in their chosen subject area. According to participants, at the end of each school term, MyTutor would send out what was thought to be automated emails to tutors who they felt could be pricing themselves on a higher band according to the criteria mentioned above.

The nudge sent by the platform regarding the position they felt the service providers were in with respect to their price band acted merely as guidance and tutors were under no obligation to comply with this guidance. Accordingly, tutors could choose to remain on a lower price band despite meeting the apparent criteria for higher price bands and, equally, tutors could price themselves at a higher band which they do not meet the apparent criteria for. Despite these nudges acting only as guidance, only one participant discussed changing their prices without receiving a nudge.

There were not thought to be any consequences exercised by MyTutor for changing price bands outside of MyTutor's guidance, although two participants did note that in order to change price bands, they were required to apply to MyTutor in relation to this change which required their approval, but they did not believe MyTutor would ever decline such application. Despite this, participants could still conceive of consequences resulting from pricing themselves higher than the MyTutor guidance permits, including receiving little or no offers of work from customers. Conceivably, if, as the dataset suggests, most research participants abided by the guidance of the platform on the matter of price bands, customers would be able to catalogue the price bands based on tutors' experience and level of education and, inevitably, those who represent anomalies within those categories, in particular those who may be deemed to be overpricing themselves, may receive fewer offers of work.

Tutors on the schools' programme, however, are never permitted to set their own rate, as this is a set price. Several research participants who carried out at least some of their work on the schools' programme described feeling less autonomous than when they (or others) worked on the private programme. Some described the rate on the schools' programme as being a fixed rate, meaning they had no control over their prices. One participant described how this affected the extent to which she felt self-employed when working on the schools' programme.

> '[T]he schools' program is probably what makes me feel the least like [self-employed], because that is pre-scheduled slots that I just have to do, and I get paid a flat rate for it, and there's no subjectivity or flexibility there.'[8]

Another stated that would be 'really hard' to make work on the schools' programme genuine self-employment.[9] Several participants felt, to a greater extent, self-employed on the private programme where they had greater autonomy over their rates.

8.2.2. Obligations to Follow Rules

Research participants in the courier case described being subject to rules while working with Stuart. As discussed in Chapter 6, service providers on the Stuart platform can choose between working 'on-slot' or 'free login'. Whilst working on-slot for Stuart, to guarantee a minimum hourly rate of approximately £8 per hour, couriers described following rules prescribed by the platform. One participant described signing up 'bindingly' to on-slot shifts and perceived consequences resulting from his lack of attendance, although he did not identify what those consequences might be.[10] He compared his position with that of the former President of the United States, Donald Trump, who at the time was hospitalised with COVID-19.[11] He stated that if he found himself in a similar position, but also had an upcoming shift with Stuart, he would be 'more worried about that' than his illness.[12]

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[8] Interview Participant 9 (MyTutor) 23 December 2020 22.
[9] Focus Group 2 (MyTutor) 15 May 2021 6.
[10] Interview Participant 2 (Couriers) 07 October 2020 14.
[11] David Smith, 'Trump Begins First Full Day at Hospital after Covid Diagnosis' *The Guardian* (2020) <https://www.theguardian.com/us-news/2020/oct/02/trump-hospital-covid-coronavirus-diagnosis>.
[12] Interview Participant 2 (Couriers) 07 October 2020 14.

A second participant aptly described how the rules operated in practice once signing up to a shift.

> [W]hen I book a slot, I follow a whole bunch of rules. I have to stay in my zone, I have to book in on time and in the zone, I have to accept everything they offer me, no matter what it is – even if it's like a real long haul one that takes me to the other side of the river, I accept it. If I don't get another trip when I've dropped off in that area, I need to beeline back to my zone and maybe I'll get a trip on the way, but I still need to beeline back to my zone because I might not… [L]ast week, I booked a slot, I was on that slot, I did everything, but twenty minutes before the end of the slot, I had a glove on my hand – the rule is you can only decline one order for your entire slot, no more – so I declined it. It was offering me something on the other side of the borough and I'm like, 'oh, not another long pickup, so I'm going to use my one decline.' So, I clicked decline and with my one gloved hand I turned off the app as well. So, then I went to turn the app on right away because I've already been offline – you can only be offline for no more than 6% of your entire time – so I'd been offline for 6%, but my phone was below 15% in battery and the app wouldn't let me go back online until I was above 15% battery. So, I'm like 'I've lost my minimum guarantee'.[13]

This participant explained that '[W]hen I'm working on-slot for Stuart, I feel like an employee'.[14] This perception may be legally accurate, as the Court of Appeal held that Stuart riders were workers for the purposes of employment law while working on-slot.[15]

8.2.3. Implied Obligations to Accept Work

The majority of research participants in the courier case were able to recognise there was no official obligation to accept work but described not feeling able to decline work for an array of reasons. For one participant, this was due to having his contract with Deliveroo terminated some years prior to the interview due to the rate of his rejections.

[13] Interview Participant 12 (Couriers) 10 December 2020 20.
[14] Interview Participant 12 (Couriers) 10 December 2020.
[15] *Stuart Delivery Ltd v Augustine* [2021] EWCA Civ 1514, [2022] IRLR 56.

> Near the end of my work for them, [two separate delivery zones were] just amalgamated [and became] one single area. So, it used to be really easy for me to just sit in my house and wait for an order in my area. But whenever the zones were joined, I could get offered something, you know, three or four miles into the city centre when it was busy… I think, mostly on principle, that I didn't like that the zones had been joined, which seemed to be more hassle for a cyclist, I just rejected every order that wasn't in my area… I got away with it for ages, but, eventually, they just sent me an email saying, 'you've rejected 97% of orders offered to you, we're cutting your contract.[16]

This participant felt, despite his experience, there was not a specific obligation to accept work, but an expectation of 'reasonableness' in determining whether to accept or decline work.[17] He thought, generally speaking, if you accept and reject 'properly, there's absolutely no comeback'.[18] However, the fact that such expectation may exist, along with evidence that platforms may take disciplinary action against those who they deem as being unreasonable with respect to the acceptance and rejection of work suggests, at least, an implied obligation owed by service providers to the platform.

Two research participants who carried out their work with UberEATS described there being a mechanism on the platform which would sign the courier off the app for a particular length of time if a courier had declined three orders in a row. This length of time is disputed by participants, with one claiming they could be signed off the platform for up to fifteen minutes,[19] and another claiming they could sign back on immediately.[20] Naturally, the former felt this acted as a penalty for declining work and may influence his decision to decline work in the future, whereas the latter felt that, as he could log straight back in, the mechanism had no negative effect on his work.

[16] Interview Participant 11 (Couriers) 09 December 2020 11.
[17] Interview Participant 11 (Couriers) 09 December 2020 11-12.
[18] Interview Participant 11 (Couriers) 09 December 2020 11-12.
[19] Interview Participant 18 (Couriers) 16 December 2020 6.
[20] Interview Participant 20 (Couriers) 06 April 2020 8.

The final reason which contributed to the feeling of an implied obligation to accept work was a distinction in the transparency of information between each of the platforms. As discussed in Chapter 6 on inherent risks, Deliveroo was much more transparent in the information provided to service providers when offering work as opposed to UberEATS, as they provided the restaurant address, the delivery address, and the fee they would be paid at the time of the job offer. With UberEATS, service providers would initially be told only the restaurant address and would not be informed of the delivery location until they had collected the order from the restaurant, nor would they be told of their fee until they had delivered the food to the delivery location. One participant claimed that this prevented couriers from 'cherry picking' work with UberEATS but accepted that as an independent contractor he should be permitted to do this.[21]

As a result, participants felt more autonomous at work, with respect to fee negotiation and in managing their personal safety in determining the areas they wished to travel when working with Deliveroo, in comparison to their work with UberEATS. They also stated they were more likely to accept work offered by UberEATS, as they were unaware as to whether they would be rejecting lucrative work. Of course, control of information does not necessarily confer an obligation to accept work, but the information asymmetry, in effect, meant service providers lacked the necessary information to make autonomous decisions at work and, as a result, they accepted the majority of work offered to them.

Research participants in the tutor case also had similar perspectives. Some described feeling uncomfortable declining work offered to them by the platform. One participant, who carried out her work on the private platform, provided an account of an experience she had with the platform in which she felt pressured to accept work offered to her.

> MyTutor hopped in and sent to me from the parent's account a lesson request, like a free video meeting request, which is booked in the same way as a lesson, but it's free and only lasts ten to fifteen minutes, and they sent that basically straightaway. Immediately upon sending it, they tried to call me three times to kind of get me to

[21] Interview Participant 5 (Couriers) 12 October 2020 20-21.

accept the lesson request which they had just sent, which would have been fine; I would have answered the phone had I not already been teaching on their platform… I think the only way I would have been comfortable saying no to that work was… if I genuinely couldn't help, not from a time point of view, but from a specialism point of view.[22]

Here, whilst there may be no specific contractual obligation to accept the work and, arguably, this participant would have been within her rights to decline the offer of work, the conduct of the platform in this instance placed pressure on her to accept the work. The feeling of pressure to accept work as a result of the platform was reiterated by two other participants, but it was not a feeling held by all. Some participants felt genuinely autonomous in their ability to accept and decline work as it was offered to them. Clearly, this is a challenging issue as it demonstrates not all service providers perceive the same obligations. It is evident that the social reality is complex, which presents a challenge to the tort law in its response.

8.2.4. The Use of Statistics

Research participants in the courier case described their service provision being managed by the platforms by statistics, especially those who worked with Stuart. Research participants described being ranked through a client performance score (CPS) which managed their performance at work. According to Stuart's own website, the CPS 'reflects [a service provider's] contribution to the Stuart community'.[23] The scores are updated every three weeks and reflect a number of factors. For those service providers who work on slot, the score takes into account time spent outside of the service provider's allocated zone, acceptance rate of orders, time spent online, the number of times a service provider failed to turn up to their agreed slot, the number of times the service provider was on time to their agreed slot, and the number of times the service provider declined work offered. For those service providers who work in a free login zone, the score takes into account the

[22] Interview Participant 1 (MyTutor) 03 January 2021 11.
[23] Stuart, 'Client Performance Score (CPS)' <https://help-partner.stuart.com/en/articles/5268662-client-performance-score-cps> accessed 2 August 2021.

number of deliveries completed per hour and the quality of the service which assesses both ratings and complaints from clients.

Research participants were able to articulate clear anticipated consequences for the score either being at an acceptable or unacceptable level. One participant discussed feeling incentivised to ensure her client performance score was in the top 10%, as this meant she would be able to book slots one day prior to them becoming available to the other couriers.[24] Other participants discussed potential consequences of their client performance score being unacceptably low, such as receiving fewer offers of work in the future or termination of their contract.

Research participants in the tutor case also described similar experiences, especially those who worked on the schools' programme. Participants described being allocated a slot allowance, which referred to the number of slots they were permitted to organise with customers. This was not guidance but was hard coded into the system meaning it was impossible for tutors to sign themselves up for additional work than permitted by the platform. At the end of each month, tutors described receiving an update by way of email from the platform which outlined the number of lessons they had attended, the number of lessons they were on time to, and the number of lesson reports they had completed following a lesson. For their slot allowance to be increased, participants were expected to demonstrate reliability and commitment to the programme, evidenced according to the three variables listed above.

Based on the platform's assessment, if participants were deemed to have demonstrated reliability and dedication to the programme, their slot allowance would be increased, meaning they could take on additional work. However, if participants had fallen below the expectations of the platform, their slot capacity could be reduced, or they could have their slots removed entirely. The management of the schools' programme in this manner naturally affected several participants' perspectives of their employment.

[24] Interview Participant 12 (Couriers) 10 December 2020 16.

> As a schools' tutor, I felt I was… more employed because my actions had consequences, which is fine, it's not an unreasonable thing for them to expect from their tutors, but we're not their tutors… If we're your tutors, that's fine – and I still believe I would hold those things. I would always turn up on time, and fill in my lesson reports, and deliver good lessons, but I feel like they can't necessarily expect that because we're not employed by them.[25]

8.2.5. The Use of Reviews

Research participants also described being subject to performance management with the use of review systems. For example, participants in the courier case, particularly those who worked with UberEATS, explained that customers essentially had delegated review functions to document their experience with service providers. Following the completed delivery of an order, customers could give the service provider a 'thumbs up' or a 'thumbs down' in a number of categories, including professionalism, speed, and efficiency.

All participants who worked with UberEATS were of the understanding that if their rating fell below a certain threshold, they would, at least, be subject to disciplinary procedures or, at worst, see their contract with the platform terminated. One participant described this as 'a threshold… that Uber classes as acceptable',[26] which referred to specific behaviour outputs such as the professionalism or efficiency of the courier. The actual threshold was much more contested, but it was generally conceived by participants to be within the region of 70-90%.

The ratings system operated by UberEATS was a source of anxiety for most participants as, if their rate fell too low, they felt at risk of having their contract terminated which, for some, would mean their main source of income would be cut off completely. One participant, who at the time would have found himself in this exact position if his contract was terminated, described feeling incentivised to cancel an order driven by fear of receiving a negative review from the customer.

[25] Focus Group 1 (MyTutor) 13 May 2021 13.
[26] Interview Participant 4 (Couriers) 11 October 2020 27.

> I got to McDonalds… So, I went into the restaurant [and] I was waiting for the food, and the woman rang me up saying did I see the delivery driver's note. Now, the delivery driver's note is for you to put your address, or any details about where you live to help me, sort of. But anyway, you don't see that until you're on your way delivering… She said, 'Can you make sure my drink's extra cold, and can you make sure my McFlurry has extra sauce on it?' So, it was 11 o'clock at night… I said to her politely, I said, 'I'm just the driver. I'm not going to tell McDonalds how to do their job' sort of thing … But she kept repeating herself, you know, I thought, this woman's going to be funny and give me negative feedback… I couldn't make her happy because I wasn't in the restaurant making her drink extra cold.[27]

Because of this incident, the research participant explained that he then cancelled the order due to the fear of receiving a negative review. This is demonstrative of the effect that algorithmic management practices have on the behaviour of research participants.

As discussed in Chapter 6, research participants in the tutor case also discussed being subject to review mechanisms. Research participants explained that customers were offered the opportunity to rate the tutor between one and five and could leave an accompanying review. The ratings and reviews would feature on the tutor's online profile, which also included a biography, a list of qualifications, a list of subjects offered for tuition, and an indication of general availability. Research participants generally did not believe that the reviews were monitored by the platform, but that they were important for customers.

Several research participants stressed the importance of maintaining a five-star rating. One said, 'if you get a single four-star review on MyTutor your rating is ruined, because everybody gives five stars'.[28] The fear of receiving a lower rating stemmed from the idea that they would not receive offers of work from customers in the future. Like the process on UberEATS, this function is delegated to the customers. However, there does not seem to be direct repercussions for receiving an abundance of positive or negative feedback from the

[27] Interview Participant 7 (Couriers) 17 October 2020 11-12.
[28] Interview Participant 13 (MyTutor) 02 February 2021 8.

platform. It could be suggested, though, that in practice the result is the same, as the research participants across both case studies believe that they will no longer be able to work if they receive low ratings. The only difference here is that with UberEATS, this is dictated by the platform, and with MyTutor, this is dictated by the customer.

8.3. Perceived Control

As discussed above, legal doctrine adopts the tests of factual and legal control to facilitate the determination as to whether a given individual is an employee of an organisation. Examples of factual control were discussed in the previous section. This section seeks to present data that does not arise by way of a contract or service and cannot be said to be definitively occurring factually. This data relates to the perspectives of research participants that control is being exercised by the platform, without them knowing this for certain. This is made possible by the algorithmic mechanisms used in the gig economy, which push service providers into the background.[29] As platforms seek to maintain the secrecy of their algorithms, service providers are unaware of the manner in which they are used. This is thought to 'confound' service providers sense of self-employment,[30] and has resulted in significant behavioural changes which will be discussed below.

8.3.1. The Possibility of Being Observed

Several research participants in the courier case believed that their service provision was being monitored by the platforms and this could potentially affect the amount and/or types of work offered to them. The majority of couriers hypothesised the basis upon which they are offered work. Some assumed it was based on the demand at the time, combined with the distance of the courier with respect to the restaurant, or it was allocated based on a waiting list. Other participants postulated that they may be offered work based on how they fared in the platforms' ranking systems, with respect to factors such as efficiency, or their acceptance and rejection of work ratio. Most participants explained that, as independent contractors, they reserved the right to choose which work they carried out and which they

[29] Jamie Woodcock, *The Fight Against Platform Capitalism* (University of Westminster Press 2021) 39.
[30] Karen Gregory, '"My Life Is More Valuable Than This": Understanding Risk among On-Demand Food Couriers in Edinburgh' (2021) 35 Work, Employment and Society 316, 316.

would not. Even so, many questioned whether the platforms abided by these terms in practice. One participant described this well.

> I think Uber operates an unofficial… I call it the 'sin bin'. If I rejected order after order, because… we've got three McDonald's in this town, and one of them is in this place, and at certain times of the day it gets horrific for traffic. If I'm in the town centre at 5 o'clock, I'm not going anywhere near that place. But McDonalds at five o'clock is busy… So, I will reject – rejection after rejection – certainly for that place at certain times of the day. And it could be that all of a sudden, my app will go quiet for fifteen or twenty minutes. And I do sit there and wonder, 'am I in the 'sin bin'? Are we being penalised for rejections? They'll never tell you they are.[31]

A different participant even questioned whether Deliveroo's algorithm was programmed in such a way it was capable of 'playing God' or testing their loyalty to the platform.[32] He postulated whether accepting all or most of the work offered, would result in offerings of lower paid work, and being more selective would mean more lucrative jobs would be offered. For this participant, this perpetuated a feeling of being in an 'abusive relationship' where the platform had the control and power to decide to offer, or not to offer work, made possible by an asymmetry of information.[33] This was described by another as leaving him at the 'mercy' or the 'whim' of the platform.[34] As a result of this, some participants questioned their employment status, and felt more akin to being employed than being an independent contractor, as they did not have control over the work they were offered. Without complete transparency from the platform on how they make such decisions, it is impossible for service providers to alter their behaviour to ensure they are in a position to improve their economic position. Research participants articulately explained that because of this they feel are though they are in a position of subordination to the platform, which is incompatible with their independent contractor status.

[31] Interview Participant 5 (Couriers) 12 October 2020 22-24.
[32] Interview Participant 13 (Couriers) 10 December 202 23.
[33] Interview Participant 13 (Couriers) 10 December 2020 23.
[34] Interview Participant 1 (Couriers) 07 October 2020 22.

Research participants in the tutor case also described feeling as though their work was observed and monitored. As discussed above, participants described recordings being used to 'spot check' tuition sessions on the schools' programme to manage their quality. On the private programme, research participants also described being aware that their sessions are recorded. Most discussed that they were told this was for safeguarding purposes, as well as to allow customers to use sessions as a resource in the future.

However, research participants who conducted their work on the schools' programme described that the platform used the recordings for quality control, and management staff employed by the platform would sometimes watch the tuition sessions live.[35] The observations were said to be carried out at random.[36] One participant described having experienced a review conducted by the platform but was the only participant who discussed experiencing this.

> So, all the lessons are recorded, they've told us this. And they might, not assess, but a little bit, and watch your recordings for quality control. I have had that done before – it wasn't in a mean way. It was, 'all these things are great. Here are some tips of how you could improve in the future. I don't know what would happen if I did a terrible job.[37]

This participant described what was a relatively positive experience with the performance management process, but as she notes this may have not been the case if her performance was not as expected. It could be said that the express form of performance management, which oversees and guides the performance of tutors, goes beyond the expected rights held by an online intermediary.

Generally, participants felt conscious of the fact the recordings were taking place, and some felt it was used as a mechanism to check that tutors were conducting adequate tuition, or even to ensure they were not attempting to tutor customers off the website. One participant

[35] Interview Participant 13 (MyTutor) 28 December 2020 14.
[36] Interview Participant 13 (MyTutor) 02 February 2021 11.
[37] Interview Participant 11 (MyTutor) 29 December 2020 8.

explained that she sometimes has to be careful with her communication when asked by customers to work with them off-site which is against the platform's rules.

> [I]t's hard to communicate, particularly you're worried that MyTutor is watching. It's very hard to communicate that you don't feel comfortable leaving the site, even though you really empathise with their concerns.[38]

Another research participant claimed that often she experiences technical difficulties as a result of platform failures. At one time, she was discussing the role of the platform with a customer and she felt she should respond in a diplomatic way, as she was concerned the platform may be listening to her conversations and this may reflect negatively on her. Several research participants also discussed an anecdote that they had heard about through the platform's managed Facebook group.

> [S]he put, 'I've just received a very angry phone call from MyTutor saying that (so, there's these school sessions that are group sessions where there's just you and three students, rather than one to one and I think it makes it slightly cheaper for the school if they do it in group) in a group session on the 24th of February, I only remained in the lesson for 19 minutes, and asking why this was. They were lecturing me on how difficult students are finding lockdown, and how by leaving the lesson, I'm not helping them. I had to explain that maybe I refreshed it if a student couldn't hear me or something, but I promised that I was in the lesson the whole time. And they said, 'Oh, right, I need to check with the tech team then.' I've been on the site for nearly three years now and I've completed nearly 900 lessons, I'm really upset about this. And I'm a bit shocked that I would receive such an angry phone call.'[39]

The participant quoted above who retold this anecdote questioned how the platform knew the service provider had left the virtual room. These anecdotes seem to feed into perspectives that the research participants are being observed at all times.

[38] Interview Participant 14 (MyTutor) 09 February 2021 19.
[39] Interview Participant 17 (MyTutor) 04 March 2021 7.

The ostensible observations of research participants across both cases closely resembles Bentham's Panopticon.[40] Bentham suggested that the Panopticon was a prison which had, at its centre, one warden who could observe each inmate at any time without the inmates' knowledge or consent. Naturally, it would be impossible for the warden to watch each inmate at all times, but it was very possible that the warden could be watching a specific prisoner at any given time. Given this possibility, coupled with the fact the prisoners would not know when they would be watched, their response was to act as though they were always being observed.

We can make links of Bentham's Panopticon to the gig economy. For research participants across both case studies, they did not know if or when they were being observed, be that by a human or an algorithm, and so assumed that they were always being observed. The effect of this resulted in changes in their behaviour; the couriers were more likely to accept orders, and the tutors were more likely to speak highly of the platform. Bentham's Panopticon has also been compared to call centres, notably by Woodcock, who described the call centre floor operating as the Panopticon.[41] Woodcock stated that supervisors were situated at the end of each row of workers and were able to monitor their performance. Whether the managers actually monitored their work was unclear, but their presence was significant. The same physical presence of managers cannot be replicated in the gig economy, but with the power of technology service providers can still perceive that someone is looking over their shoulders.

8.3.2. Perceived Algorithmic Management

Research participants also perceived that their service provision was controlled through algorithmic mechanisms. Algorithmic management is well-documented in the literature on the gig economy, but the effect that this has on behaviour is not.[42] As discussed in Chapter 7,

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[40] Jeremy Bentham, *The Panopticon Writings* (Verso 1995).

[41] Jamie Woodcock, *Working the Phones: Control and Resistance in Call Centres* (Pluto Press 2017).

[42] James Duggan and others, 'Algorithmic Management and App-Work in the Gig Economy: A Research Agenda for Employment Relations and HRM' (2020) 30 Human Reseource Management Journal 114; Julia Tomasetti, 'Algorithmic Management, Employment and the Self in Gig Work' in Deepa Das Acevedo (ed), *Beyond the Algorithm: Qualitative Insights for Gig Work Regulation* (CUP 2020); Alex Rosenblat and Luke Stark, 'Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers' (2016) 16 International Journal of Communication 3758.

participants in the courier case described that the Deliveroo platform records the time in which it takes couriers to deliver the order to the customer. For those who deliver in the expected time frame, they will receive a green screen with a 'thumbs up' or a 'smiley face', which states something to the effect of 'great ride'. For those who do not deliver in the expected time frame, they will receive a red screen and, whilst they will not receive a thumbs down, or a sad face, they will receive 'an absence of a thumbs up'. One participant described this mechanism in practice.

> When I finish the delivery, it'll go, 'great ride', and if it's red when I've finished, I'll get nothing… it's an absence of a 'great ride'. It's all algorithm. It just means you've gone slower than they thought you should. Since that came in place, I have absolutely been taking more risks on the road, and I know there have been times when I have done things which are not safe for me.[43]

The majority of research participants described feeling, to a greater or lesser degree, aware of the timings. This was largely because they felt unsure as to whether there was a metric which recorded the number of instances they delivered an order outside of the expected time, and whether this would reflect negatively upon them and affect their ability to carry out work with the platform. Research participants could not say for sure whether there were direct consequences for being shown 'red screens' for late deliveries. However, the majority of research participants believed that it was used for performance management. This may be true, as it has been suggested that the algorithms are used to 'set expectations' for service providers.[44] However, without access to the algorithms we cannot know for sure whether they are being used for these purposes. What we can say is that there is an observable change in behaviour to some research participants, who described taking additional risks on the road such as running red lights and cycling in pedestrian-only areas to meet the ostensible standards of the algorithm.

[43] Focus Group 1 (Couriers) 13 April 2021 19.
[44] Duggan and others (n 42) 120.

Research participants in the tutor case also described feeling controlled by algorithmic mechanisms on the platform. Some described feeling pressured to make certain decisions because of the way they were framed. One participant described feeling this pressure in relation to her work on the schools' programme as a result of automated processes which would flag up to her if she decided to decline work offered or cancel work she had already accepted. The participant claimed she would receive automated messages, such as, 'Are you sure you want to do this?' which she believed sought to discourage her from her decision making.[45] This participant described feeling as though she might be 'shirking [her] responsibility to [her] employer' if she was to make the decision that went against the expectations of the platform.[46] Again, we do not know whether the platform is doing this knowingly, but we can see the effect this has on perspectives of control.

8.4. Conclusion

This chapter has considered the notion of control, which is one of the central tests used by legal doctrine to determine employment. It has drawn upon research participants' perspectives in relation to two types of control: factual control, which is a current doctrinal test, and perceived control. The examples of factual control are likely unproblematic and should be accounted for by the current tests, but this may not be the case for perceived control. We cannot say for certain whether this type of control actually takes place, or whether the platforms have any knowledge of this. However, we can say that this has an effect on both the perspectives of the research participants and their behaviour which, in some instances, poses a threat of harm to themselves and to third parties. Ultimately, it is argued in this thesis that this is a significant legal problem that requires a suitable legal response. Part III of this thesis will pose potential solutions to this problem.

[45] Interview Participant 14 (MyTutor) 09 February 2021 21.
[46] Interview Participant 14 (MyTutor) 09 February 2021 21.

Chapter 9 - Data Analysis: Integration

9.1. Introduction

The previous chapter analysed data in relation to the notion of control. This chapter seeks to analyse data in relation to the notion of integration, which is also a core test used by legal doctrine to determine employment, as discussed in Chapter 4. This chapter seeks to address one question:

- In what ways are the research participants integrated into their gig economy platforms?

To address this question, this chapter is split into two main parts. The first part draws upon data that closely matches the current legal tests used to analyse integration. The second part draws upon data that has been induced from the dataset. This data relates to the perspectives of research participants about their relationships with the platforms that does not closely match these doctrinal tests. This suggests that there is a gap between legal doctrine and the social reality in the gig economy. This is important as it will facilitate analysis of the legal challenges posed by the gig economy and, ultimately, the legal responses proposed. This analysis will feature in Part III of this thesis, which immediately follows this chapter.

9.2. Legal Integration

As discussed above, this chapter distinguishes between legal and perceived integration. This is to demonstrate that there is a gap between the tests that legal doctrine draws upon to determine the extent to which a service provider is integrated into the business of the principal and the perspectives presented by research participants. This will illustrate some of the challenges presented to legal doctrine by the gig economy.

Chapter 4 discussed some of the tests adopted by legal doctrine to determine the level of integration present in the relationship between the principal and the service provider. Three tests were discussed, including the entrepreneurship test, the integration test, and the organisation test. The entrepreneurship test asks whether the individual displays the relevant entrepreneurial behaviour, the integration test asks whether the individual is working on their own behalf or on behalf of the principal, and the organisation test asks how central the activities of the individual are to the objectives of the organisation. This section will outline how the perspectives of the research participants fit with these tests. The following section will outline perspectives that do not fit with these tests, demonstrating the gap between the perspectives of service providers and the social reality.

9.2.1. Entrepreneurship

As discussed above, and set out in Chapter 4, the entrepreneurship test seeks to ask the extent to which the individual displays the relevant entrepreneurial behaviour. This includes questions such as whether the individual manage the risks associated with the service provision, and whether they have an opportunity to make a profit from their activities.

Research participants across both case studies discussed bearing the financial risks associated with their service provision. One research participant in the courier case described his service provision as 'a gamble', as sometimes there would not be sufficient work available.[1] This kind of gamble can actually attract certain individuals to work in these types of industries, as it relies on self-motivation.[2] Another participant claimed that 'being self-employed working for these companies [is] rewarding in some ways, if you think about it, because the more you're working the more you're getting paid'.[3]

Research participants in the tutor case discussed managing similar risks. As discussed in previous chapters, research participants who worked on the private programme believed they had more control over the work they can take on. Because of this, some described feeling a sense of entrepreneurship in pitching to prospective clients and ensuring they work in a professional manner with clients to maintain relationship. As one participant puts it, 'if you're doing bad as a tutor, I guess you just wouldn't get more students. So, in that sense,

[1] Interview Participant 1 (Couriers) 07 October 2020 10.
[2] Interview Participant 19 (Couriers) 17 December 2020 14.
[3] Interview Participant 18 (Couriers) 16 December 2020 13.

it's self-employed. You just try and impress people, get good reviews, get more people.'[4] A study examining the service provision of solo self-employed tutors presented similar findings. By 'selling their appeal to parents', just as this participant described above, tutors were seen to be displaying entrepreneurial behaviour.[5] Whilst this is not profit driven, it is an example of financial risk mitigation; something which is an expectation for most entrepreneurs.

However, findings of this study demonstrate that not all research providers in the tutor case discussed examples that were demonstrable of entrepreneurial behaviour. This was particularly true for research participants who worked solely on the schools' programme. As discussed in Chapter 8 on control, research participants on this programme were allocated a slot allowance which was increased or decreased based on performance. In many ways, the ability to increase undertakings and earnings was lacking on the schools' programme. As one participant puts it, 'if something comes up [on the schools' programme], you can't take it because you've already got six slots going. Whereas that's not the case on the private bit, there's no cap on how many students you can take on.'[6] This seemed to influence the extent to which research participants felt in charge of their own destiny and in their ability to make a profit.

Research participants in both cases also discussed managing and mitigating financial risks. A research participant in the courier case discussed strategically identifying the busiest periods and 'more often than not… [chose] to go out at [those busy periods].[7] Another participant who worked in a university city where demand would significantly decrease in the summer months discussed considering 'finding something else to cover your gaps. If you're doing Deliveroo as a self-employed nobody stops you from taking a part-time job, even on a normal contract. More of the self-employed people are actually doing summertime jobs.'[8]

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[4] Interview Participant 17 (MyTutor) 04 March 2021 15.
[5] Sarah L Holloway and Helena Pimlott-Wilson, 'Solo Self-Employment, Entrepreneurial Subjectivity and the Security-Precarity Continuum: Evidence from Private Tutors in the Supplementary Education Industry' (2021) 53 Environment and Planning 1547, 1557.
[6] Interview Participant 11 (MyTutor) 29 December 2020 10.
[7] Interview Participant 1 (Couriers) 07 October 2020 10.
[8] Interview Participant 16 (Couriers) 15 December 2020 9.

Similar examples of mitigation were identified by research participants in the tutor case. Whilst there was always an element of uncertainty regarding the availability of work with MyTutor, the cancellation of GCSE and A-Level examinations had a detrimental impact to the tuition industry. One participant described feeling 'lucky' as she was able to take on a project with another tutoring platform during the first few months of the pandemic which helped to mitigate the lost business at that time.[9]

To further mitigate the risk of loss or financial insecurity, some research participants felt they should seek work in other industries, while some discussed working for direct competitors of the platforms. This may in some contexts be indicative of self-employment as the obligation to one employer seems to be absent.[10] Working for competitors was an indicator of entrepreneurship in a study examining the entrepreneurial experience of food delivery couriers in the gig economy. It was suggested that such individuals displayed entrepreneurial behaviour in their 'attempts to increase their income by maximising 'piece' allocation' including by working with multiple platforms.[11]

One participant in the courier case described being 'encouraged' by the platforms to sign up for platforms in direct competition.[12] The idea of working with competitors was not unusual in the courier case, as thirteen participants worked with direct competitors of their primary platform. This was less prevalent with the tutors, as work with competitors was less readily available, with all participants suggesting that their work with MyTutor was their primary, if not only, platform work. Working with direct competitors may in some cases be a barrier to employment and may also be demonstrative of entrepreneurship. It is argued in this chapter though, that that may be the case if we look only at the doctrinal understanding of integration. However, as the section 9.3. of this chapter will demonstrate, this may not be the only way to look at integration and examining this from a different lens may suggest that this kind of entrepreneurship in the gig economy is artificial.

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[9] Interview Participant 1 (MyTutor) 03 January 2020 6-7.
[10] *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 Q.B. 497 [516].
[11] Tom Barratt, Caleb Goods and Alex Veen, '"I'm My Own Boss…": Active Intermediation and "Entrepreneurial" Worker Agency in the Australian Gig-Economy' (2020) 52 Environment and Planning A 1643, 1651.
[12] Interview Participant 3 (Couriers) 09 October 2020 1.

A second example of a financial risk that arose in the dataset was the issue of refunding clients. This was not applicable for research participants in the courier case as the platforms retained discretionary powers on that matter, but this was an important issue for some in the tutor case. However, there was not equivalence in the dataset on this issue. One participant claimed,

> It's up to us. [It's] at our discretion to… refund them.[13] Others concurred with this assessment and had their own policy on the matter. I usually ask for students to give me 24-48 hours' notice if they want to cancel a lesson or reschedule. 12 hours – it depends on what I'm doing with my time. If they don't turn up to the lesson, I tend not to refund unless they're in a situation which is out of their control. The first time it happens I'm quite lenient because it does happen, life does get in the way and as long as the parent or student communicates their situation to me, they don't have to be in detail, obviously, but explained that they are apologetic about missing it, or rescheduling, or cancelling at the last minute then, usually, it's fine. So, it's about communication.[14]

Whilst other participants could acknowledge that the overall decision-making power belonged to the tutors with respect to refunds, they also claimed that this power was contained within certain parameters dictated by the platform. One participant who was discussing the 24-hour policy he operates, claimed

> The 24-hour cancellation policy is a MyTutor policy. So, it's their policy. So, there's a refund button for the parent on the website that disappears at 24 hours, so I couldn't have any other policy. If I said 48 hours, then there's nothing I could do, they could be refunded at 24 hours. So, I couldn't really do anything different to what I do. I'd like a 48-hour cancellation policy…[15]

[13] Interview Participant 5 (MyTutor) 20 December 2020 6.
[14] Interview Participant 7 (MyTutor) 09 February 2021 13-14.
[15] Interview Participant 12 (MyTutor) 30 December 2020 12-13.

This suggests that the platform limited the research participants in their discretionary powers with respect to refunds, but that they may operate at their own discretion within that limit.

Other participants had a more cynical view of the refunds process and claimed that there can sometimes be an expectation from the platform to refund, particularly if a parent has contacted the platform to complain.[16] In fact, two of the research participants believed that the platform could, by using the technology, refund clients on their behalf. Whilst the discrepancy on this issue does not provide much clarity on the actual policy in place, it does tell us that in areas where one might expect a self-employed individual to have autonomy and a sense of entrepreneurship, such feelings were not reflected by all.

Experiences of entrepreneurship differed both across and within the two cases and, interestingly, as did perspectives of self-employment. For reasons such as working as and when they choose and maintaining the ability to be in control of one's destiny, most couriers (16/22) felt somewhat self-employed. Several participants also claimed they enjoyed not having the 'pressure of a boss or manager' which made them feel in charge of their own destiny.[17] Two participants, who had previously owned their own business, explained they felt more in charge of their own work than they had done previously and enjoyed the absence of pressure of being relied upon by employees. Again, there was not uniformity in the dataset on this issue, as some felt as though the algorithm was their boss.[18]

Conversely, fewer tutors (9/20) felt somewhat self-employed. The tutors drew upon similar reasoning to justify their satisfaction with their employment status, such as the flexibility they enjoy over their working times, along with the management of client relationships. As a larger portion of tutors felt their work was more akin to employment, this chapter will draw upon their reasoning for believing this.

[16] Interview Participant 11 (MyTutor) 29 December 2020 7.
[17] Interview Participant 16 (Couriers) 15 December 2020 3.
[18] Interview Participant 15 (Couriers) 15 December 2020 10.

9.2.2. Integration

The next test to be considered is the integration test. As discussed above, this test seeks to examine whether the individual is operating a business independent of the organisation, or whether they are working on behalf of the organisation. Where this is the case, the individual is likely to be an independent contractor, in business on their own account. They are also likely to be displaying some of the entrepreneurial characteristics set out in the above subsection. Research participants in the courier and tutor case discussed feeling to some extent as though they worked on behalf of the platforms due to feeling part of a hierarchical structure, often leaving them feeling subordinate to the platforms.

At platform level, messages to service providers and to the outside world read: be an entrepreneur; work when you wish; earn competitive rates. This type of messaging creates a distance between the platform and the service provider which may disguise the integral role that these individuals play in the business operations of the platforms and the intertwined nature of their relationship. Such messaging can also extend to characterising service providers as 'partners', a term adopted by UberEATS. This conflicts with the messaging of MyTutor and Deliveroo who coin their service providers as 'our tutors' and 'our riders' respectively. The adoption of the term 'partner' is an interesting one, though, as it suggests there is a sense of equality in terms of bargaining power, access to information and other important aspects of the working relationship. However, as the previous chapter on control has hopefully demonstrated, for the couriers, these notions are not axiomatic. This participant describes this dynamic perfectly.

> Uber like to say we're partners. We would like to say, 'Okay, well, if we're partners, we need to see some sort of transparency into how your system works.' They might have some documentation online, but that doesn't translate to any sort of practicality on the roads.[19]

This participant referred to the cloaked nature of the courier platforms' algorithmic operations, which was covered in in the previous chapter. A secondary consequence of this

[19] Interview Participant 15 (Couriers) 15 December 2020 5.

might be to place the service provider in a position of subordination with respect to the platform. This notion was also replicated in the tutor case, where participants also described feeling subordinate to the platform, as they did not have access to the information they needed to improve their own economic position.

> I feel if we're going to be self-employed, you can't have that hierarchical kind of thing that you might have with a structured business where you've got different access to different tiers information based on your status as an employee. You're beginning, you're a new employee, maybe you have limited access for information. I think when we're all self-employed, we all need to be put on the same platform and I don't really feel like that is the case. I feel like we are a couple of rungs down and, equally, I feel like there's a bit of a discrepancy between older tutors who know more about navigating the site, not necessarily to their benefit, but they know more, and newer tutors who are - and I see this in the forum - very consistently asking questions that I don't think they should have to ask, I think should be given to them as information by MyTutor.[20]

Four research participants in the tutor case for a time were not permitted to access the private programme and their access was limited to the schools' programme only. These tutors were under the impression that they would in effect be promoted to the private programme with (a) more experience, (b) a proven track record, and (c) sufficient demand on the private side. This also suggested there was a more complex hierarchy within the platform itself. The notional idea of a hierarchy within an organisation in itself suggested that the individuals participating at the different levels are actually integrated into the organisation.

Not only did participants describe feeling as though they were part of a hierarchical structure, but they also felt that in their service provision they were representatives of the platforms. Participants in the courier case felt this way for a variety of reasons. For one

[20] Focus Group 1 (MyTutor) 13 May 2021 11.

participant, it was because he was encouraged to wear company branded uniform.[21] For another, the language used by Deliveroo to describe his work made him feel part of the team.[22] Regardless of the reasoning, there was some consensus within this case that it was on the platform's behalf that they were carrying out their work.

By comparison, research participants in the tutor case discussed how they presented their relationship with the platform to customers, which suggests that they felt they were representatives of the platform. One participant discussed in detail his frustrations with technical difficulties when working with the platform. He described how these feelings were often replicated by the customers who would frequently express this in conversation with him. In these instances, he was 'tempted' to express his own feelings on this matter and reveal the significant cut that is taken by the platform but chose not to take such action.

> [I] think that it's a bad look on me professionally, because I recognise myself as kind of being a representative of the website, even though I don't work for them, and that's really frustrating when the site goes down… But I'm always having to tread that line of saying, 'Yes, I agree with you. This is rubbish. The website should be better than this.' And also recognising that I kind of represent the website and if I bad mouth it too much, they'll say, 'we'll just go somewhere else for our tuition' and they can't take me with them.[23]

This was also reflected by another participant who claimed that tutors were obliged to 'familiarise [themselves] with the platform and uphold MyTutor's name'.[24] This notion of feeling like a representative of another's business leads to suggestions that these individuals are working on someone else's behalf, rather than their own.

[21] Interview Participant 2 (Couriers) 07 October 2020 17-18.
[22] Interview Participant 1 (Couriers) 07 October 2020 16.
[23] Interview Participant 12 (MyTutor) 30 December 2020 19.
[24] Interview Participant 19 (MyTutor) 01 April 2021 14.

9.2.3. Organisation

The organisation test is the final test that will be considered in this section. As discussed above, this test is concerned with whether the individual's activities are integral to the objectives of the organisation. Interestingly, the overwhelming majority of participants did not explicitly deal with the centrality of their activities to the objectives of the platform. However, in the section which follows, inferences will be drawn from the conduct of the platform which suggest that the service providers are integral to the functioning of the platforms.

One participant in the courier case, however, did recognise the role played by the service providers for the food delivery platforms. She claimed, '[i]f there wasn't any delivery cyclists and riders out here, they would not have a business app, like zero, they would have zero business.'[25] The participant correctly understands that the core function of the food courier platforms business is performed by the service providers themselves. This can also be reflected in the tutor case where, without the tutors, the platform would not be operational. It could be said that they are performing an integral role in the operations of the organisations.

9.3. Perceived Integration

As discussed above, this section differs from the previous section on legal integration. The previous section seeks to present research participants' perspectives of the doctrinal tests which seek to determine the extent to which integration is present in relationships. This section will present research participants' perspectives of integration which do not fit with the doctrinal understanding. This is to demonstrate the gap between legal doctrine and social reality. By doing this, we can begin to understand the challenges that the gig economy poses to legal doctrine. The final part of this thesis will analyse this in detail and will propose legal responses to the challenges.

[25] Interview Participant 12 (Couriers) 10 December 2020 7.

To facilitate this, the section is split into four subsections: competition, organisational schemes, organisational branding, and perspectives of integration. These themes will be analysed in turn.

9.3.1. Competition

The notion of competition relates not only to how service providers perceive themselves, but how they perceive those working around them. Whilst not considered as part of the entrepreneurship test, nor the integration test, it is submitted that perspectives of competition may shine light on whether we are looking at one or more enterprises. Accordingly, working with one enterprise as an independent contractor, one may anticipate feelings of competition with other service providers seeking to do the same. These notions were explored in depth in the dataset.

Some research participants in the courier case described feeling as though they are in direct competition with those around them. They explained that there is a limit to the amount of work available, so if one service provider is receiving work, this could be detrimental to others around them who are not. One participant described a level of animosity within the rider community. He claimed that 'the other Uber guys aren't always going to be friendly with you because they're obviously wanting that job as well, and they're like who are you taking my job sort of thing.'[26] Other participants identified with the feelings of frustration that the participant above was perhaps on the receiving end of.

> I mean I get frustrated now about the people coming in from out of area to work and if I was doing this full-time, I could see that growing into a real frustration and probably anger. I've heard of these gangs in London, where they almost like monopolise an area and then people are getting attacked for working in their areas and things like that.[27]

Another participant even contemplated whether some service providers were actively trying to harm their competition by damaging their equipment.[28] This sense of being in

[26] Interview Participant 7 (Couriers) 17 October 2020 19-20.
[27] Interview Participant 1 (Couriers) 07 October 2020 4.
[28] Interview Participant 13 (Couriers) 10 December 2020 15.

competition with others was not replicated with the tutors. However, within the courier case, the causes of such feelings were explored.

The majority of the couriers claimed that there was a lacking equilibrium when it comes to the amount of work available and the number of service providers willing to take that work on.

> I think they can flood the market with a lot of drivers – there's very little negative of them flooding the market with a lot of drivers, especially newer drivers who don't understand what it's like to earn something before. And then you just get a gradual erosion of earnings over time, and you just rely on the growing industry (which it is growing) and you rely on their promotions when they put it out, as well. So, in essence, is not entirely secure. You don't feel secure, and I don't think they intend to make it as secure for you.[29]

This participant describes a flooding of the market with service providers without a substantial change in the level of work available. Naturally, this affects those who are already seeking to provide those services and may begin to explain some of the negative attitudes towards couriers who are newer to the industry. Another participant claimed that the platforms seek to exploit the fact that there are 'very poor people that really, really need money in this country, and they will do this kind of work for less than minimum wage. And there is no end to the number of people that will do this work for minimum wage.'[30] This is also reflected in the literature, where it has been stated that platforms are guilty of reducing the commission available to service providers while increasing the number of service providers on the platforms which reduces their relative income.[31]

Interestingly, the act of increasing the supply of service providers seemed to affect the levels of reliance that service providers feel to the platforms. This also induced research

[29] Interview Participant 15 (Couriers) 15 December 2020 3-4.
[30] Interview Participant 12 (Couriers) 10 December 2020 9.
[31] Veena D Dubal, 'An Uber Ambivalence: Employee Status, Worker Perspectives, and Regulation in the Gig Economy' in Deepa Das Acevedo (ed), *Beyond the Algorithm: Qualitative Insights for Gig Work Regulation* (CUP 2020) 34.

participants to experience feelings of insecurity, or, as others put it, the feeling of being 'disposable',[32] which is also reflected in the literature.[33] Actually, when the demand for their services was limited, research participants saw an erosion in their autonomy and ability to have their destiny in their own hands. Instead, as one participant put it, they are more at 'the whim and mercy' of the platforms.'[34]

One could argue that this sense of competition is a falsity perpetuated by the platform. As the platforms seek to improve their efficiency and productivity, it in turn upsets the equilibrium enjoyed by the service providers that give them some sense of autonomy over their work, and a feeling that their services are in demand. In doing so, despite ostensibly increasing feelings of competition amongst the service providers, it ensures the service providers are more reliant on the platform, rather than themselves.

Whilst such feelings of competition were not present in the dataset for tutors, the same cannot be said for the changes to the balance of supply and demand. This issue was particularly prevalent for those who work on the schools' programme.

> [The] opportunities are not coming in at the moment. I think they have actually employed, well employed (laughs), taken on some tutors that are only allowed to do the schools programme, and they're not doing the private ones. And then the long-term private tutors are not getting the opportunities for school, but we're kind of like, 'well, doesn't matter that much at the moment because we're getting more money per hour with our experience in the private sector.' So, that's kind of what I'm doing. I'm only taking on the odd cover slot as a bonus.[35]

The lack of availability of work on the schools' programme is particularly difficult for those who solely work on that programme. Some of these tutors claimed that the slots available

[32] Interview Participant 12 (Couriers) 10 December 2020 7.
[33] Teresa Moreira Coelho, 'Algorithms, Discrimination and Collective Bargaining' in José Maria Miranda Boto and Elisabeth Brameshuber (eds), *Collective Bargaining and the Gig Economy: A Traditional Tool for New Business Models* (Hart 2022) 156.
[34] Interview Participant 1 (Couriers) 07 October 2020 22.
[35] Interview Participant 11 (MyTutor) 29 December 2020 9.

for allocation were released in the middle of the night, typically around 02:00. As this programme is significantly saturated with tutors, the slots go almost immediately.[36] This has resulted in one participant adapting her sleeping pattern to accommodate this.[37] This amplifies the almost desperate reliance that some service providers have on the work being offered to them. Another research participant felt frustrated with the lack of work on the schools' programme and discussed this in a focus group with a participant who conducted all of her work on the schools' programme.

> I'll just make a comment on that, so I've been doing the schools and private for three years, and I've probably not taught schools for about a solid year. So, I had all of my schools cancelled at the start of the pandemic and they said they were going to bring them back and replace them, but they haven't. And they've also hired (in quotation marks), because self employed, but taken on all of these other new tutors to just do schools. So, I have nothing against you, obviously, but it means that there are people that have been there, however long, have not seen a single slot in the past year, so I've only ever taken cover. I've kind of like made my peace with it, because I do get a lot more interest in the private side with the experience that I've had at the moment, but it is a bit annoying, because you've got the people that have joined with schools, no indication of when they're coming to private, we've got private side that have been there for years and now not getting schools. So, that wasn't communicated well either to us, we've kind of just put the pieces together ourselves, I think.[38]

Again, whilst the tutors are ostensibly in competition with each other to receive such work on the schools' programme, they are in reality relying more intensely on the platform to offer them the work because it has oversaturated the market in this way. This suggests that this kind of competition is not an example of entrepreneurship and is artificial.

[36] Interview Participant 17 (MyTutor) 04 March 2021 5.
[37] Interview Participant 18 (MyTutor) 11 March 2021 4.
[38] Focus Group 2 (MyTutor) 15 May 2021.

9.3.2. Organisational Schemes

As discussed in the previous section on the organisation test, there was a general absence of data regarding the integral function that research participants believed their activities played in the platforms' businesses. This section draws upon organisational schemes which some platforms adopt. From this, inferences will be made about the integral role that service providers play in the organisation.

Platforms that provide couriering services notably adopt dynamic pricing systems which can offer service providers an enhanced rate. Such systems are often coined as providing 'boosts' or 'incentives' and can prompt service providers to work at times of peak demand. One participant who worked only at peak times to supplement his primary income claimed that he would never carry out this work on a full-time basis as it is only possible to make a sufficient living by working at times of high demand.[39] This is supported by a mathematical study which demonstrated that these types of incentives can make the peak hours the only financially viable time for service providers to work.[40] This is an interesting finding which draws into question the so-called autonomy over when the service providers can work, which was a determinative factor in the majority of couriers feeling somewhat akin to a self-employed person.

It has also been suggested that the adoption of dynamic pricing systems can be effective and efficient.[41] On Uber's taxi platform this type of pricing system increases the number of service providers available to work by incentivising them with increased financial reward and a greater supply of work.[42] This sub-section will argue that the adoption of schemes such as the dynamic pricing systems suggests that platforms are reliant on the service providers to perform an integral service for the organisation. By incentivising service providers to work at times of high demand, the platforms demonstrate their reliance on the service providers to perform a core aspect of their business. The platforms rely on a certain number of service

[39] Interview Participant 3 (Couriers) 09 October 2020 4.
[40] Gerard P Cachon, Kaitlin M Daniels and Ruben Lobel, 'The Role of Surge Pricing on a Service Platform with Self-Scheduling Capacity' (2017) 19 Manufacturing & Service Operations Management 368.
[41] M Keith Chen and Michael Sheldon, 'Dynamic Pricing in a Labor Market : Surge Pricing and Flexible Work on the Uber' (2016) 1 <http://www.anderson.ucla.edu/faculty_pages/keith.chen/papers/SurgeAndFlexibleWork_WorkingPaper.pdf>
[42] Chen and Sheldon (n 41).

providers to work at these peak times to meet demand. If they are unable to do so, there could be serious financial consequences. It may be that the platforms adopt these schemes to manage this risk.

These incentives also extend beyond boosts and promotions. UberEATS operate a scheme which further incentivises couriers to work at specific hours. This demonstrates the platform's reliance on couriers to perform services that are central to the objectives of the platform. A participant describes the scheme below.

> Uber started something called Uber Eats Pro. So, this is a scheme they recently - it's been a week, I think - started it. Every delivery you do, you're gonna get a point. So, like, at lunchtime between 12:00-2:00, every delivery you do, you're gonna get two points per delivery. Between 5:00-9:00, every delivery you do, you're gonna get six points per delivery. And the rest of the day, you're gonna get one point per delivery. And then there is a rank: gold, diamond and platinum. So, if you can make 1200 points in a month, then you're gonna be a diamond Uber Eats courier. And then there is a list of incentives you can get if you're a diamond courier. If you're a gold courier, there's a list of incentives you can get.[43]

The UberEATS Pro scheme provides incentives such as discounts on insurance and petrol, which are highly relevant for the industry these couriers are working in.[44]

Most participants who discussed this scheme did so with positive connotations, claiming it was yet another incentive to work with the platform. However, one participant described it as 'pathetic' and 'unrealistic' as he would never achieve the points to reap the rewards.[45] He also described the scheme as 'carrot and stick'.[46] These schemes are quite common in organisations, as they are generally thought to incentivise and increase the productivity of

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[43] Interview Participant 6 (Couriers) 13 October 2020 15.
[44] Interview Participant 1 (Couriers) 07 October 2020 29.
[45] Interview Participant 2 (Couriers) 07 October 2020 19-20.
[46] Interview Participant 2 (Couriers) 07 October 2020 19-20.

workers.[47] By describing these types of schemes as 'carrot and stick', this participant may have identified the motivations which underpin this scheme: to incentivise and encourage the vital service provision for the organisation. Perhaps this is demonstrable of the platforms' reliance on the service providers as a collective. Without them, it may not be possible to operate and meet the demands of its customer base.

Whilst these types of incentives are not available with MyTutor, the platform recognise the key role that the tutors play in its organisational structure in other ways. One example that was referred to in the dataset was a novel tutor representative scheme that the platform was seeking to trial. A participant describes the scheme below.

> So, they recently, just a couple of days ago, sent out an email asking for people to apply to this tutor representative role, where they wanted feedback. There was an application for it. The email just says, 'become a tutor rep', because we've been getting a lot of feedback lately. 'We're looking for six tutors who are active on the site and invested in the improvement of MyTutor and its community.' And a lot of people are quite annoyed about this because it says, 'the scheme will run for six months, and will involve a one hour long zoom call every month to collate feedback.' So, obviously, outside of that one hour, you will still need to collect all that feedback, and speak to people, and find out what people wanted you to say in that meeting.[48]

The scheme was developed during the latter stages of the data collection process, meaning that discussions on this issue were limited to one interview and one focus group. The scheme itself was discussed in quite a negative light, largely because the roles were available on an unpaid basis. The platform claimed this was to ensure that financial compensation would not be the 'primary incentive' behind any application.[49]

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[47] See generally, Michael Gibbs, 'Incentive Compensation in a Corporate Hierarchy' (1995) 19 Journal of Accounting and Economics 247.
[48] Interview Participant 17 (MyTutor) 04 March 2021 16-18.
[49] Focus Group 1 (MyTutor) 13 May 2021 4-5.

One participant identified an apparent conflict between seeking feedback from tutors with the almost vehement manner in which the platform reasserts its classification of tutors as self-employed individuals.

> If we were employees, then they would be welcome to get feedback from us. If you work for a company, I'm sure they get feedback from you all the time and, if you had feedback to give, you'd email them and give them the feedback, as you're all kind of part of one company, or whatever. Whereas they reiterate so many times that we are self-employed, so we're not part of the company.[50]

This participant astutely identified a potential incompatibility with their employment status and the apparent integration of the tutors into the platform. Perhaps in seeking the feedback of the tutors, the platform was recognising the integral function that the tutors play in the organisational structure of the business. Being tutors who use the platform's software, they arguably have more experience than any other stakeholder in understanding the efficiency of the platform's operations. By recognising this aspect of their work, they could also be impliedly recognising their status as a core cog in the platform's machine.

9.3.3. Organisational Branding

This sub-section concentrates on the use of company branded equipment and uniform to facilitate the service provision of the couriers and how this may influence their appearance to the rest of the world. This idea is not featured in the tort tests which consider the relationships between organisations and individual service providers.[51] This section will consider the obligations to wear company branded livery and the apparent benefits from doing so, including advertising and identification. Such concepts play into the notion that to the outside world these service providers are representatives of the platforms and are performing an essential function of the platforms' businesses.

[50] Interview Participant 17 (MyTutor) 04 March 2021 16-18.

[51] This was confirmed in *Hughes v Rattan* [2001] [2022] EWCA Civ 107, [2022] 1 WLR 1680.

The platforms in the courier case operate different policies with respect to wearing company branded uniforms. Participants who work for all three courier platforms analysed in this case described how Stuart operate a policy which requires service providers to wear platform branded or unbranded uniform, meaning any uniform which brands a competitor company is forbidden. Whereas Deliveroo and UberEATS do not seem to operate policies on uniform, beyond requiring service providers to ensure their uniform is fit for purpose. According to one participant, the policy requires service providers to own a bag with a foil lining inside to ensure that any goods are kept at their desired temperature.[52]

Participants who work with Deliveroo discussed being provided with Deliveroo branded equipment at no cost during the onboarding process.[53] This encouraged several participants to use this equipment rather than purchasing branded equipment associated with other platforms. One participant, who conducted all his work with Deliveroo, used platform-branded equipment to carry out his work. He claimed that 'if you look at the bigger picture, the more I can advertise Deliveroo, the more likely it is that perhaps people are going to order Deliveroo, but that's a big picture sort of thing. I think it's not something that's going to affect me day to day.'[54]

This participant identifies the benefit of advertising the platform to the outside world by assuming a role of representing the platform, or being an ambassador for the brand.[55] In doing so, they 'constitute the interface between a brand's internal and external environment'[56] and 'communicate the values of the corporate brand in the way they behave and interact.'[57] This can be further facilitated using company branded livery, where logos represent associations with the brand.[58]

Another participant discussed the additional benefit of identification.

[52] Interview Participant 4 (Couriers) 11 October 2020 6.
[53] Interview Participant 4 (Couriers) 11 October 2020 6.
[54] Interview Participant 8 (Couriers) 07 December 2021 12.
[55] Gary Davies and Rosa Chun, 'Employee as Symbol: Stereotypical Age Effects on Corporate Brand Associations' (2012) 46 European Journal of Marketing 663, 664.
[56] Fiona Harris and Leslie de Chernatony, 'Corporate Branding and Corporate Brand Performance' (2001) 35 European Journal of Marketing 441, 441.
[57] Davies and Chun (n 55) 664.
[58] Davies and Chun (n 90) 665.

> I did years in retail before I got into logistics and… as a customer you wouldn't want some random person turning up, especially with a motorcycle helmet on and no identification about who they could possibly be which is often the case. So, I was probably one of the few that actually wore [the correct] uniform [for] whoever I was working for.[59]

This was also important for another participant who conducts her work using her car. Many couriers are identifiable using their branded backpacks, particularly those who use bicycles. This is not possible for couriers who use their cars and, as a result, this participant adapted her vehicle by attaching stickers to the bodywork to ensure that she was identifiable as a representative of the company to customers she was delivering to.[60] She noted that this had the additional benefit of avoiding parking tickets as traffic wardens will understand that there is an appropriate reason for her use of a loading bay.

Another participant who initially began his work with UberEATS and purchased all its associated equipment and uniform. He later adapted his equipment and uniform to acknowledge his more recent work with Deliveroo. Whilst he still uses his UberEATS equipment, he has 'made some little stickers with the Deliveroo motif on… [to ensure], the customer doesn't get too confused.'[61]

9.3.4. Perspectives of Integration

The perceptive experience of stakeholders is also largely unaccounted for in the doctrinal conceptions of integration. This section will draw upon data to demonstrate the perspectives of research participants about how the outside world views their roles in the organisations of the platforms. It will make inferences from the behaviour of customers, such as their use of the review processes and their selection of service providers. The subsection will also draw upon possible explanations of this behaviour which have been identified by research participants.

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[59] Interview Participant 1 (Couriers) 07 October 2020 5.
[60] Interview Participant 16 (Couriers) 15 December 2020 16.
[61] Interview Participant 20 (Couriers) 06 April 2021 11.

As discussed in Chapter 1, a key feature of the gig economy is the delegation of management functions to the consumer. This is very often done through delegating review functions to the consumers to express their views of the service provision and may later be used by the platform as a tool for performance management. Interestingly, an important topic of discussion for many research participants was the review process. Often, participants found that it was not their service provision that was being reviewed, but the overall service. This issue was particularly prevalent for participants who conducted some or all of their work with UberEATS. In fact, the vast majority of couriers who work with UberEATS discussed being reviewed negatively for things outside of their control. This suggested that the reviews were a reflection of the overall organisation, rather than a reflection of their individual service provision. An example of this is provided by this participant below.

> [You can receive reviews for a] perfect handoff, speedy delivery, efficiency, whether it's left on the doorstep, and you stood back… They just give you a thumbs up and a thumbs down [based on] whether everything's gone okay. What is annoying, though, some customers, if items are missing, they'll rate us down for it… because they can't rate the restaurant. 'How was your delivery from me? Up or down'… If ever I know there's something missing, I will always tell the customer. It could be that McDonald's say to me they've run out of barbecue dip, or they've run out of whatever, and I'll say, 'really sorry, message from the restaurant, it's missing this. When you're ready, go on the app, issue with the delivery, missing item, you'll get the refund. Really sorry about that'. Great, you still get a thumbs up. If the restaurant doesn't tell you there's an item missing, and I just go and deliver it… I've had three down ratings because of missed items.[62]

This experience was widely reflected in the dataset, with another participant claiming he had never been negatively reviewed for his own role in the service provision and his role was always being conflated with the restaurants. This indicates that perhaps the roles of the independent stakeholders are not easily distinguishable. Because of this, it may be easy for customers to assume that they are one of the same, all encompassed under the umbrella of

[62] Interview Participant 5 (Couriers) 12 October 2020 16-17.

the platform. We can assume this based on the way they are reviewing their overall experience with the platform, rather than their experience with individual stakeholders in the process.

This notion is furthered when we look at Deliveroo. Rather than operating a formal review process where customers are afforded the opportunity to rate individual service providers, Deliveroo instead email customers requesting they review the overall service. This is explained aptly by the participant below.

> [Customers using Deliveroo are] not able to rank the rider. Once you receive your food, you'll receive an email asking you how satisfied were you with the service. So, saying service is not a clear distinction between food service and the person itself, so it is just the overall pack. Like in Uber you can rank the driver. It will they will say how satisfied are you with the driver? Was the rider using any thermal bag? Was there any issues with your items or with the food?[63]

Here, customers are encouraged to view the service provision of the couriers are part of their overall experience with Deliveroo. As the feedback given by customers is not made available to the couriers, this issue was not explored in any detail. However, it is clear how this may feed into perspectives that the couriers are an integral cog in the platform's machine.

The issue of conflating the roles of the platform and the service providers is not exclusive to the courier industry. Whilst significantly less prevalent, research participants in the tutor case also discussed this issue. Whilst no participant admitted to having a negative review on their profile for reasons inside or outside of their control, it was an issue they were familiar with indirectly through the MyTutor managed Facebook group.

[63] Interview Participant 16 (Couriers) 15 December 2020 17-18.

> Nobody's left [me] a bad review yet, but I have seen on the forum, again, that people have been given bad reviews when the site goes down, or when there's a problem with the site, which isn't the tutor's fault.[64]

Research participants discussed that others had been reviewed for issues outside the scope of their role and, in some cases, where the platform was at fault. In these situations, the customers were viewing tutors and the platforms as being one and the same and mistakenly assuming that the tutors are involved in the operations of the platform, despite them being separate legal entities.

Interestingly, four participants in the tutor case explained that customers do not only review the service provision of the tutors but will also review the platform on independent websites. After having a negative experience with a tutor, participants described that customers would turn to websites such as Trustpilot to post negative reviews about the platform. Whilst in this instance, the review would have the negative effect on the platform rather than the service provider, the issue remains the same: the two stakeholders are being conflated as being one of the same.

For research participants in the courier case, the conflation of separate legal entities manifested in ways beyond the rating systems. For example, one participant had been asked if he could provide a refund in cash to a customer who no longer wanted their order. The participant described being faced with an insistent customer who was confused as to why he was unable to provide her with a refund despite the fact that he 'works for Uber'.[65] This participant described feeling some frustration towards customers as not all can identify the distinction between the couriers and the platforms and understand that they are only the 'middlemen'.[66] Another participant described a telephone exchange with one customer who had requested that he ensures that her drink is 'extra cold', along with other requests that he was unable to fulfil.[67] These examples demonstrate how the couriers are viewed as being

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[64] Interview Participant 16 (MyTutor) 10 February 2021 17.
[65] Interview Participant 4 (Couriers) 11 October 2020 20-21.
[66] Interview Participant 4 (Couriers) 11 October 2020 20-21.
[67] Interview Participant 7 (Couriers) 17 October 2020 11-12.

part of the organisation and are an integral part of its structure. This may be because the couriers are the 'face' of the business to the customers.

Participants in the tutor case discussed more generally how they believe customers perceive them with respect to their roles within the organisation. Whilst there was some consensus in the acknowledgement that customers view the tutors as being a core part of the organisation, and there can be difficulty in distinguishing the tutors from the platform, the extent to which this is true can vary and be dependent on a variety of factors. This participant describes this notion well.

> I think different parents view it differently, depending on how engaged they are with the platform and the staff there. Some parents have gone to the extreme of, like, clearly googling my name, and my university and my course to try and find my contact details, because I've had emails from them to, like, to my Oxford email address, saying, you know, 'hi, we're the parents of the kids you teach.' And so they clearly see us as individual, self-employed, who they know through My Tutor, but are still individual. Other parents definitely don't see it like that. And I can't, kind of, you know, quantify or even really explain why. But I guess it's centred on the idea that you just pop up on a screen. And you can do that whenever because it's almost like you're an AI bot who just arrives to teach that kid, rather than an actual human who has, you know, other things going on in their life in their day. And definitely the parents who see us as faces that pop up on a screen, basically as a My Tutor face, not as a self-employed person.[68]

Interestingly, participants in this case identified different reasons to support their belief for why customers perceive tutors as being part of the organisation. The three key reasons which were drawn upon were, firstly, the way in which service providers are selected by customers, secondly, the platform's advertising literature, and, finally, the management of the relationship between the service provider and the customer. Whilst such reasons were identified by participants in the tutor case only, some of this reasoning can be applied in the courier context.

[68] Interview Participant 1 (MyTutor) 03 January 2021 32-33.

The first reason which will be discussed is the process for selecting a service provider. With MyTutor, the method for doing this depends on the programme. On the private programme, customers can use a search function to identify suitable tutors for their needs. In this sense, they may view tutors as individuals who can cater to their specific requirements. They are permitted to select several tutors to interview to identify which, if any, would be suitable; they are not dealing with a platform, but several independent entities. One participant aptly described this as 'shopping for a tutor'.[69]

When we compare this to the situation of those working on the schools' programme, the picture is quite different. Customers on the schools' programme, unlike those on the private side, have no control over which tutor is assigned to the student. This differs to the 'shopping for a tutor' experience on the private programme. Instead, the platform assigns a tutor a selection of slots which tutors may choose from. This picture is more comparable to the couriers where the customers have no control over which service provider will deliver their order. As this is selected by the platform, the customers may feel as though they are contracting with the platform, rather than the independent couriers involved in performing the service.

However, this is a simplified take on the private programme. While customers are searching for suitable service providers, they may be influenced by platform endorsements along the way. One participant discussed having a 'trusted by schools' badge on his profile, which was a result of his work on the schools' programme, along with a 'premium tutor' badge which was indicative of his engagement with postgraduate study.[70]

> Basically, if you search for tutors, my profile just has a thing on it that says premium tutor. [It recognises the] meaningful difference between me teaching someone and a first-year philosophy student and [helps to] differentiate me from someone else who has less experience. So, that's good on your profile. And it helps in terms of getting

[69] Interview Participant 6 (MyTutor) 21 December 2020 6-7.
[70] Interview Participant 12 (MyTutor) 30 December 2020.

> clients because they can see that you're a premium tutor, so you are worth paying more for… I've never thought of it's an endorsement, although I guess it is.71

In placing this badge on the participants profile, the platform could be seen to affirming his role in the organisation and separating his work from others on the platform. In doing this, it may also suggest that there is a hierarchy of tutors. This may be indicative of a greater connection between the platform and the tutors. The second reason which was drawn upon by participants was the advertising literature used by the platform to encourage prospective customers to engage with the platform. Just a quick glance at the MyTutor website demonstrates what this participant was referring to.

> Our tutors are from top UK unis, and because they're just a few years older, they can explain things in a way that teens find relatable. We interview all of our tutors, and only the friendliest and most knowledgeable make it on to our platform. We're very picky about it - just 1 in 8 applicants make the cut.[72]

The reference to 'our tutors', suggests that service providers are part of the organisation. The idea that they are handpicked and brought on to a competitive programme has similar connotations. To the outside world, the platform and the tutors are almost indistinguishable, and it does not give the impression that these stakeholders are separate legal entities. This is also comparable to the courier platforms. Again, we see references to 'our riders [who] are at the heart of all that we do'.[73] Interestingly, here Deliveroo are actually acknowledging the core role that the couriers play in the service provision.

The final reason, which participants drew upon most frequently was the management of the relationship with the customer. When contracting with an independent contractor, a customer may assume that this individual will be involved in the management of the relationship. This can be seen with tutors on the private programme who had a reasonable

[71] Interview Participant 12 (MyTutor) 30 December 2020 14-15.
[72] MyTutor, 'MyTutor: Online tutoring | Affordable high quality online tutors' (2022) <https://www.mytutor.co.uk> (accessed 21 March 2022).
[73] Deliveroo, 'About Us – Deliveroo' (2022) < https://deliveroo.co.uk/about-us> (accessed 21 March 2022)

expectation that they would be involved in the management of their relationship with the customers. This can be seen with their enjoyment of managing their own time and, to some degree, if and when they wish to refund clients, in comparison to the schools' programme which is more 'fixed'.[74]

On both programmes, however, the customer and tutor know limited information about the other respectively and are permitted to know each other's first names only. They are unable to exchange contact information and may only communicate with one another on the platform.[75] This limits the extent to which the service providers can manage the relationships with their customers. This also means that 'MyTutor itself, as an entity, is a much bigger part of the tutoring experience [than other tutoring platforms might be].'[76]

The platform was also described as being involved in dispute resolution processes between tutors and customers. Several participants described how the platform encouraged customers to use it as a third-party mediator in these types of situations, rather than contacting the tutor directly about any issues.[77] This may influence the views of customers with respect to the connection that the platform and the service provider have, and the specific function that the service provider has in the platform's organisation.

As service providers are classified as independent contractors, one may assume that the customer is the client of the tutor. However, as one tutor puts it, by involving themselves in what should be in the remit of the tutor, the platform could be seeking to make the customer a client of them.

> I think it's often it's just the way they present it to parents which can be quite frustrating. When they kind of claim ownership of people who are technically their clients, and then they kind of treat the parents as a customer to the website and, actually, the parents aren't the customer of the website at all, they're my customers.

[74] Interview Participant 4 (MyTutor) 19 December 2020 4.
[75] Interview Participant 10 (MyTutor) 28 December 2020 5.
[76] Interview Participant 7 (MyTutor) 21 December 2020 19.
[77] Interview Participant 9 (MyTutor) 23 December 2020 14; Interview Participant 12 (MyTutor) 30 December 2020 18.

> And yet, they'll encourage parents to do dispute resolution through them, or encourage parents to talk to them, and just the way they present themselves. That can be quite frustrating… It's a strange one. I don't really like the website, but I like the work I get through it.[78]

This participant makes a number of pressing points. Firstly, that the platform claims ownership of the tutors. Secondly, that the platform seeks to make the customers clients of the website, rather than clients of the tutor, through its management of that relationship. Actually, if such messages are translating to the customers, it is possible that they view the tutors are being part of the organisation, and an integral aspect of its operations.

9.4. Conclusion

This chapter has sought to address the ways in which research participants believe they are integrated into their gig economy platforms. To achieve this, the chapter was split into two main sections. The first section discussed legal integration which referred to data relating to the tests of entrepreneurship, integration, and organisation. The second part discussed data that related to the perspectives of research participants about their relationships with the platforms that does not fit with the doctrinal tests. This suggests that there is a gap between legal doctrine and the social reality in the gig economy. These poses problems for legal doctrine, as there is a mismatch in the assumptions which underpin the legal tests and the social reality it seeks to represent, and this problem ultimately requires an adequate response. Part III, which immediately follows this chapter, will analyse these challenges and present suggested responses to those challenges.

[78] Interview Participant 12 (MyTutor) 30 December 2020 18.

PART III

Chapter 10 - Testing Theoretical Assumptions and Responding to Legal Challenges

10.1. Introduction

This chapter seeks to analyse the challenges posed by the gig economy to tort law and present possible legal responses that legal doctrine might seek to adopt. To this end, the chapter is split into two main sections. Section 10.2. will analyse the data presented in Part II of this thesis and test this against the some of the key theoretical underpinnings of the imposition of liability in tort, including both deterrence- and insurance-based approaches. Section 10.3. will draw upon the existing tests that are adopted by legal doctrine when determining employment, including control, integration, and enterprise liability, and test the extent to which these tests are capable of accounting for the challenges that the gig economy poses. Where legal doctrine is incapable of responding, this chapter will present possible responses, drawing from other areas of law.

10.2. Theoretical Underpinnings

Chapter 2 of this thesis discussed some of the theoretical underpinnings which, to a greater or lesser degree, influence the operations of tort, including theories of deterrence and insurance. There are debates in the literature about both whether these theories do influence tort and whether they should; these debates have been discussed in detail in Chapter 2 of this thesis. Chapters 6 and 7 presented data relating to liability risks and the response to those liability risks. This section will test the theoretical assumptions made relating to deterrence- and insurance-based approaches against the dataset and will make suggestions relating to a potential legal response.

10.2.1. Deterrence

As discussed above, there is a debate in the tort literature about whether deterrence influences the law of tort; this debate was discussed in detail in Chapter 2 of this thesis. Scholars who subscribe to law and economics theory believe that tort is capable of influencing the behaviour of actors, as it deters potentially liability-incurring behaviour. This theory rests on two key assumptions: firstly, that actors have an awareness of tort and its rules, and, secondly, that actors are influenced by the operations of tort and will alter their behaviour accordingly.[1] Law and economics theorists have tested these assumptions in a variety of contexts, including for automobile accidents,[2] product liability,[3] and medical malpractice,[4] which has shown that tort has some influence on the behaviour of actors. This section will also test these assumptions with the data collected and will assess the extent to which tort appears to be influencing the behaviour of research participants in both the courier and tutor case.

Chapter 6 of this thesis presented the liability risks perceived to be inherent to research participants' service provision. As outlined in Chapter 2, the notion of liability risks for the purpose of this thesis has been narrowed to tort and include the risk that a service provider

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[1] See generally, William M Landes and Richard A Posner, *The Economic Structure of Tort Law* (Harvard University Press 1987).

[2] Elizabeth M Landes, 'Insurance, Liability and Accidents: A Theoretical and Empirical Investigsation into the Effect of No-Fault Accidents' (1982) 25 Journal of Law & Economics 49; J David Cummins, Richard D Phillips and Mary A Weiss, 'The Incentive Effects of No-Fault Automobile Insurance' (2001) 44 Journal of Law & Economics 427; Alma Cohen and Rajeev Dehejia, 'The Effect of Automobile Insurance and Accident Liability Laws on Traffic Fatalities' (2004) 47 Journal of Law & Economics 357.

[3] W Kip Viscussi and Michael J Moore, 'Product Liability, Research and Development and Innovation' (1993) 10 The Journal of Political Economy 161; Richard Goldberg, *Causation and Risk in the Law of Torts: Scientific Evidence and Medicinal Product Liability* (Hart 1999); Alberto Galasso and Hong Luo, 'When Does Product Liability Risk Chill Innovation? Evidence From Medical Implants' (Harvard Business School, 2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3207503>.

[4] Zenon Zabinski and Bernard S Black, 'The Deterrent Effect of Tort Law: Evidence from Medical Malpractice Reform' (2022) 84 Journal of Health Economics 1; Roger A Reynolds, John A Rizzo and Martin L Gonzalez, 'The Cost of Medical Professional Liability' (1987) 257 Journal of the Americal Medical Association 2776; Joanna C Schwartz, 'A Dose of Reality for Medical Malpractice Reform' (2013) 88 New York University Law Review 1224; Michael Frakes and Anupam B Jena, 'Does Medical Malpractice Law Improve Health Care Quality?' (2016) 143 Journal of Public Economics 142; David Klingman and others, 'Measuring Defensive Medicine Using Clinical Scenario Surveys' (1996) 21 Journal of Health Politics Policy & Law 185; Lisa Dubay, Robert Kaestner and Timothy Waidmann, 'The Impact of Malpractive Fears on Caesarean Section Rates' (1999) 18 1Journal of Health Economics 491; Michelle M Mello and Troyen A Brennan, 'Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform' (2002) 80 Texas Law Review 1595; AD Tussing and MA Wojtowycz, 'The Cesarean Decision in New York State, 1896. Economic and Non-Economic Aspects' (1992) 30 Medical Care 529; FA Sloan and others, 'Tort Liability and Obstetricians' Care Levels' 17 1997 245.

might be a victim of tort, with a third party or the platform being the tortfeasor, or that a service provider is the tortfeasor. Therefore, the risks encompassed include both harms to self and to third parties. These include:

Risks of harm to service providers:

- Intentional physical harm caused by a third party (courier case)
- Risk of a road-traffic accident (courier case)
- Risk of reputational harm (tutor case)

Risk of harm to third parties:

- Risk of a road-traffic accident (courier case)
- Risk of physical or sexual abuse (courier case)
- Risk of negligent tuition (tutor case)
- Risk of physical or sexual abuse (tutor case)

Chapter 7 of this thesis presented the purported responses of research participants to the liability risks listed above. Across the courier and tutor cases, research participants described mixed responses to liability risks, including both ostensibly taking steps to mitigate and to enhance risk. Most research participants in the courier case were aware of the risk of becoming a victim of tort due to being intentionally injured or having their belongings appropriated by a third party. As discussed in Chapter 6, some research participants described concerning experiences which added to this anxiety, including having their vehicle circled and being chased while at work. Some research participants believed that this risk was intensified while working in certain areas and, where possible,[5] felt the need to mitigate the potential risk of harm to self by avoiding travelling into areas they perceived posed a greater threat to their safety.

As discussed above, the reasoning that research participants gave for mitigating risk was to shield themselves from physical harm. No participants used the threat of tort in their

[5] This was not possible with working with UberEATS, as research participants described not being informed of the location of the delivery until after they had picked up the order from the restaurant.

reasoning or considered that they might commit a tort by injuring a third party while over-zealously protecting themselves or their belongings. While it is accepted amongst law and economics scholars that the threat of harm to self is an important consideration for actors,[6] the fact that no research participants in this case considered the possibility of liability in tort may be suggestive that tort is not having a significant influence.

Some research participants in the courier case also described taking steps to mitigate the risk of a road traffic accident. For example, some described increasing their vigilance on the road and avoided rushing while making deliveries, especially in periods of bad weather. As discussed above, and in more detail in Chapter 2, the extent to which tort influences the behaviour of actors has been considered in an automobile context. In this context, there was compelling evidence which indicated that the absence of strict liability rules increased fatal road-traffic accidents. These studies suggested that road users were aware of tort rules and were influenced by them, which added to the credibility of the assumptions which underpin the deterrence-based approach discussed above.

Interestingly, research participants described wanting to avoid physical injury to self, and no participants discussed the threat of tort if they were to be at fault in an automobile accident. We cannot conclude from the data that research participants were not influenced at all by tort, but there is no compelling evidence to suggest that they were. We also cannot come to any convincing conclusions regarding the extent to which research participants were aware of tort or its rules. However, we can cautiously conclude that the strongest influence on the behaviour of research participants was the risk of physical harm to self.

This does not necessarily contradict the law and economics theory on deterrence as the threat of tort need not be the strongest influence on behaviour.[7] In automobile contexts, the risk of harm to self may be a more immediate influence on behaviour than the threat of tort.[8] This is largely reflected in the data, but the absence of reasoning relating to tort may

[6] Landes and Posner (n 1) 10 'liability insurance is widespread… and personal safety might be expected to be of greater concern than the potential financial consequences of an accident'.
[7] Landes and Posner (n 1) 10.
[8] Don Dewees and Michael Trebilock, *Exploring the Domain of Accident Law: Taking the Facts Seriously* (OUP 1996) 16.

be suggestive that it is not having a significant influence in this context. This may be explained by the notion of the person of straw who is ‘unlikely to carry insurance’ and ‘likely to be guilty of torts’.[9] The person of straw is an individual without substantial assets and without insurance, meaning they are not worth suing. The presence of vicarious liability means that claimants have an additional route to a remedy; this is particularly important where the tortfeasor is a person of straw who could be described as being judgment proof.[10]

The nature of the work carried out in the courier case may mean that some service providers do not have pressure from tort due to being persons of straw. We cannot discount this as an explanation for why some research participants did not use tort in their reasoning for mitigating risk. However, not all research participants in the courier case could be described as persons of straw. Some used gig economy work as a supplementary income to their other well-paid work, and some owned their own home which suggests that they have ‘skin in the game’. An alternative explanation might be that the threat of tort is not influencing behaviour as law and economists might assume due to the more immediate threats of harm to self. However, to come to a compelling conclusion on this point we would need to test this in a context where the actors are not endangered. We can, however, make suggestions for how deterrence-based theories might be adopted in tort’s response to the legal challenges posed by the gig economy. This will be discussed in greater detail below.

As stated in the list of risks above, research participants in the tutor case perceived the risk of possible reputational harm which may result from negative reviews left by clients on their profile. Some research participants perceived that this work might negatively affect their work both on and off the platform. This risk was also perceived by some to be heightened when working with parents whom they believed to be ‘pushy’. Research participants described ‘pushy’ parents as having unreasonably high expectations which would be unlikely to be met. In response to this, some participants described choosing to decline work opportunities from these parents, although not all did this.

[9] Tony Weir, ‘Subrogation and Indemnity’ (2012) 71 Cambridge Law Journal 1.
[10] Rob Merkin and Jenny Steele, *Insurance and the Law of Obligations* (OUP 2013) 318.

The reasoning that research participants adopted for taking such steps was the possible harm that this may cause to their reputation, as future prospective clients may choose not to work with them, and it may also affect their work with future employers. One research participant who was a law graduate considered that this may constitute defamation if the review left was untrue. Interestingly, no participants considered that a 'pushy' parent might be litigious and might bring a claim in tort for negligent teaching if this had a negative impact on the student's grade. This did not appear to form part of the reasoning for the ostensible mitigation of risk.

This may also be explained by the notion of the straw person, as all research participants were students or recent graduates so were unlikely to have substantial assets. Without 'skin in the game', this might mean that tort is not capable of having a meaningful influence on research participants' behaviour. Alternatively, the research participants may not have had an awareness of tort and its rules which affected the extent to which tort could influence their behaviour. Again, we cannot come to any conclusions on these points, but this section will make suggestions for how deterrence can be appropriately incorporated into a legal response.

As stated above, research participants across both cases not only took steps to mitigate possible liability risks but also took steps to ostensibly enhance such risks. Research participants in the courier case described that the platforms were guilty of 'flooding the market' with additional service providers which reduced the amount of work available. In response to this, some research participants described reducing the care they took on the roads to ensure that deliveries were completed sooner, and they were available to accept future work more promptly. To ensure this, research participants described cycling or driving through red lights or speeding. One participant claimed that he worked up to twelve hours per day with little sleep in-between to make up for instances where work was not offered.

Research participants in the tutor case also described ostensibly taking steps to enhance their risk of liability by working with parents they perceived to be 'pushy'. As discussed above, no participants in the tutor case had considered that these parents may be more litigious which may increase the threat of tort. Participants described working with these parents when they felt a greater financial strain, which was exacerbated at times by the fact that the platform had been flooded with other tutors meaning there was less work available.

This data suggests that the threat of tort might not be deterring research participants from increasing their risk of liability. Research participants' reasoning for enhancing liability risks was that they were mitigating more immediate financial risks. This data does not necessarily conflict with deterrence theory. Law and economics theory of deterrence rests on an assumption that humans are rational actors who undertake cost-benefit analyses when making decisions.[11] Applying the theory to this context, it is possible that the immediate financial reward for taking such risks were valued more highly than the possibility that liability risks might materialise in the future. This may also be exacerbated if the research participant is a person of straw.

Research participants, particularly in the courier case, also described being aware of the 'black box' i.e., the algorithms used by the platforms. On the Deliveroo platform, research participants described being presented with a green screen or a thumbs up when they delivered an order on time and a red screen or an absence of a thumbs up when they did not. Several research participants perceived this to be an algorithmic metric which was recording their timekeeping and could result in the termination of their contract, although they could not say whether this was happening for certain. This was exacerbated by the feeling that there was a queue of people who would be willing to deliver orders on time at all costs.

In response to this, some research participants described taking additional risks on the road such as running red lights and cycling on the pavements. In these instances, the threat of tort did not seem to deter the potentially liability-incurring behaviour. This may be because the research participants were not aware of the threat of tort which compounded tort's ability to influence their behaviour. Alternatively, it may be because the research participants placed a higher value on ensuring they had future work and income over the possibility of a liability risk materialising.

[11] See generally, Landes and Posner (n 1).

As discussed above, it does not appear that the threat of tort significantly influenced the behaviour of research participants across both the courier and tutor cases. This may be for a variety of reasons. As stated above, this thesis cannot conclude which, if any, of these points adequately explains the diminished threat of tort in these contexts. However, it can make suggestions about how we should use this data to inform a legal response. The data suggests that the threat of tort is not adequately deterring potentially liability-incurring behaviour in these contexts as law and economists might suggest it should. In light of this finding, this thesis suggests that the courts should not be overly cautious when imposing liability on platforms for the torts of its service providers. The seemingly diminished threat of tort for service providers may alleviate concerns that the imposition of liability at platform level would incentivise service providers to increase their risks at work if they are not personally liable for their own wrongs.

Furthermore, the deterrence-based theories may be of greater use at organisational level. As discussed in more detail in Chapter 2 of this thesis, the majority of studies examining tort's deterrent effect have been conducted at organisational level, for example when considering medical malpractice and product liability. In many of these studies, it has been found that tort rules have influenced the decision-making of organisations when managing risk. This may be because an organisation is more likely to adopt a cost-benefit analysis to its decision-making and may be more familiar with legal rules. This study cannot come to any conclusions about whether this is true of gig economy platforms, although future work may examine this, but it is possible to make inferences from other studies at organisational level.

This thesis argues that there is a role for a deterrence-based theoretical underpinning to a legal response to the challenges posed by the gig economy. It is submitted that, where appropriate, liability should be imposed at organisational level as the platforms are more likely to be aware of and influenced by tort rules. Moreover, this may decrease the pressure placed on service providers by the nature of the 'black box' and the design of the algorithm to negligently perform their work. An underlying aim of the imposition of liability would be for the platform to take steps to manage or remove the risks that service providers experience and prevent future harms.

10.2.2. Insurance

Chapter 2 of this thesis discussed the role of insurance in tort law, including a discussion about the debate in the literature about (1) whether insurance does play a role in shaping tort law, and (2) whether insurance should play a role in shaping tort law. Scholars who see insurance as being at the heart of tort define risk with insurance in mind. As Steele notes, risk is not defined by who or what causes them to materialise, but 'in terms of a calculable exposure to hazard across a group'.[12]

The framework for risk that was identified and adopted in Chapter 2 of this thesis is also of relevance here. The framework, as set out by Merkin and Steele in their text on insurance and the law of obligations, states that risk in tort can be allocated to a party based on a number of factors: (1) if the party has an insuring obligation, (2) if the party has a duty to indemnify another, or (3) if the party bears the burden of liability.[13] All three of these factors are relevant to service provision generally, and the gig economy is no exception to this. For example, service providers may be subject to mandatory insurance rules or voluntarily opt to take out insurance policies in an attempt to shield themselves from the costs associated with liability; they may be obligated contractually to indemnify the platform if it is held liable for their actions; or they themselves may be held liable in tort for their own actions.

Insurance formed a key part of the individual interviews and focus groups carried out; this data was presented in Chapter 7 of this thesis. Research participants in both cases discussed the role of insurance in their service provision. A small majority of research participants who conducted their service provision using an automobile in the courier case were subject to mandatory insurance rules. Research participants described this liability insurance as 'Hire and Reward' insurance which permitted them to conduct food couriering using an automobile. The remaining research participants who did not use their automobile for their service provision also discussed having insurance for their work. Rather than being subject to mandatory insurance rules, the platform provided the insurance.

[12] Jenny Steele, *Risks and Legal Theory* (Hart 2004) 33.
[13] Rob Merkin and Jenny Steele, *Insurance and the Law of Obligations* (OUP 2013) 5.

Looking broadly at the data collected, it becomes clear that there was a real disparity in terms of participants' understanding of insurance, extending to their own obligations and insurance policies. Some research participants were aware of their obligation to hold a 'Hire and Reward Policy' and had read their policies, while others did not know if they had an insuring obligation.

The purpose of insurance and its role in the legal system also promoted disparity in terms of understanding. Some research participants perceived insurance to be necessary, owing to the increased risk they posed being on the road more often. Others felt reassured by the presence of insurance and in particular by a workplace policy arranged by the platform which provided financial assistance to service providers when they were unable to work for health reasons. Others had more cynical perspectives on insurance, and believed it was an unnecessary cost.

Research participants in the tutor case also discussed the role of insurance in their service provision, however, there was not the same presence of insurance. No research participants in the tutor case took out liability insurance for their work. Research participants who took part in focus groups following their individual interviews stated that although they had since considered insurance, they did not feel the benefits were worth the cost it would be to insure. This suggests that the research participants undertook a cost-benefit analysis and concluded that the management of risk was outweighed by the cost and the probability of the risk materialising. More broadly, this may also suggest that the inherent risks associated with tuition, by comparison to couriering, are less prevalent.

The differences in perspective and understanding of insurance across both case studies was widespread. One common factor was that no research participant discussed the role of insurance in the legal system, nor did any participant suggest that it altered their behaviour. This is an interesting finding as it is largely accepted by scholars that insurance shapes tort rules and determines the cases which come before a courtroom.[14]

[14] See generally, Tom Baker, 'Liability Insurance as Tort Regulation: Six Ways That Liability Insurance Shapes Tort Law in Action' (2005) 12 Connectcicut Insurance Law Journal; Richard Lewis, 'Insurance and the Tort System' (2005) 25 Legal Studies 86, 238.

Returning to the framework of risk adopted for this thesis, which is detailed above, the findings of this thesis suggest that all three factors are relevant to the gig economy context. The first aspect of the framework is that a party has an insuring obligation. This was relevant for a small majority of research participants in the courier case study who used motor vehicles to carry out their work. This meant that they had an obligation to insure and, as discussed above, many but not all participants recognised this obligation.

In reality, the presence of insurance is likely to have a real effect if service providers in this context were to commit a tort. If, for example, service providers are persons of straw, the presence of liability insurance may mean that a claimant is more likely to litigate. This may be particularly relevant for service providers in the courier case who all have liability insurance. However, in the tutor case where liability insurance is not widespread, cases may be less likely to appear before a courtroom, especially if the service providers' absence of assets makes them judgment proof.[15]

Furthermore, not all liability risks will be insured against; this may be true if the cover of the insurance policy does not extend to intentional torts. This suggests that while insurance may play a role in certain instances, for example if a negligent tort was committed by a service provider of a courier platform where liability insurance is present, it cannot account for all instances of possible harm. It seems more appropriate to couple insurance- and deterrence-based approaches to any response to adequately respond to the challenges posed by the gig economy.

The second and third aspects of the framework were that a party may have a duty to indemnify another and that a party may bear the burden of liability. In reality, both of these factors are realistic prospects for service providers operating in these contexts and could come about due to the imposition of liability on the platform for the actions of the service provider, or the imposition of liability on the service provider for their own actions. Despite this, these factors were not considered by research participants. This may be for a number

[15] For a general discussion on judgment proof individuals, see Lynn M LoPucki, 'Virtual Judgment Proofing: A Rejoinder' (1997) 107 Yale Law Journal 1413.

of reasons, but this thesis cannot conclude which, if any, of these are true. For example, research participants may not have been aware of the potential legal consequences of their actions, or research participants may not have been influenced by the potential legal consequences of their actions. This adds weight to the deterrence arguments made above and provides support to the proposition that it may be more appropriate to impose liability at platform level where the promise and threat of tort, coupled with the presence of insurance, is likely to have a concrete influence on behaviour.

In summary, the role of insurance is complex and difficult to comprehend, which was exemplified perfectly by the research participants. Insurance can play an important role in the tort system, particularly if a negligent tort is committed and liability insurance is present. However, liability insurance cannot account for all instances of possible harm. Therefore, it may be more appropriate to take a multi-factorial approach to the imposition of liability that also accounts for the factor of deterrence. Coupling theoretical approaches is, in this author's view, the most suitable way to adequately reflect the social reality of the gig economy characterised by the two selected case studies in this thesis. The next section which immediately follows will provide a more detailed examination of what this might look like in practice.

10.3. An Appropriate Response

Section 10.2. of this chapter analysed the data relating to two of the theoretical underpinnings of the imposition of liability in tort; it considered both deterrence- and insurance-based approaches. It also drew inferences from the data and made suggestions about the relevance of those theoretical approaches in any legal response to the gig economy in tort. This section will draw upon the existing tests that are adopted by legal doctrine when determining employment and test the extent to which these tests are capable of accounting for the challenges that the gig economy poses. It will also test the assumptions made by legal doctrine when employing these tests, as it has been argued earlier in this thesis that where the assumptions made do not match the experience of actors, legal doctrine should be updated to better reflect the social reality. This section will identify any discrepancies and will make suggestions for how tort might look to respond to this. To do so, it will draw upon the key tests of control, integration, and enterprise liability; each of these tests will be discussed in turn.

10.3.1. Control

This section will examine the extent to which legal doctrine through the notion of control can adequately respond to the gig economy using the tools already in its armoury. As detailed in Chapter 4 of this thesis, the doctrine of control has been subject to change over the last century in response to evolving labour relations. Control was traditionally underpinned by an assumption that an employer was able to control what an employee did and how she did it.[16] This was reflective of a time where employment was largely agricultural and industrial, and employers had a higher skillset than employees.[17] This meant employers were able to control how employees performed their activities.

By the mid-twentieth century, legal doctrine was forced to adapt as this level of micro control was no longer relevant to many industries. Instead, courts began to examine whether employers had the right or ability to control the work of employees.[18] This was no longer thought to alone justify the finding of an employment relationship, so control was eventually supplemented by other tests; this was at a time where the notion of employment was the same for employment law and tort law.[19] However, due to the pursuance of different policy purposes, we have since seen a split between employment law and tort and the notion of employment is no longer the same.[20]

For the purposes of tort, control is still no longer alone able to justify the existence of an employment relationship and instead forms part of a multi-factorial test which includes factors such as integration and enterprise liability that will be discussed in more detail in

[16] *Collins v Hertfordshire CC* [1947] KB 598.
[17] Christian Witting, *Street on Torts* (16th edn, OUP 2021) 608.
[18] This became apparent in cases involving surgeons in a hospital. For example, *Gold v Essex County Council* [1942] 2 K.B. 293; *Cassidy v Ministry of Health* [1951] 2 KB 343, at 352.
[19] *Ready Mixed Concrete* [1968] 2 Q.B. 497 at 515, it was held that the tests were as follows: '(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.'
[20] This was confirmed in *E v English Province of Our Lady of Charity* (*JGE*) [2012] EWCA Civ 938, [2013] QB 722.

subsections 10.3.2. and 10.3.3. respectively.[21] To keep pace with the rapidly evolving labour relations, as well as the increasing number of claims concerning historic sexual abuse, the notion of control has also been adapted in recent years and the courts begun to distinguish between legal and factual control.[22]

As discussed in detail in Chapter 4, legal control refers to control that is exercised vis-à-vis the contract of service. More recently, the courts at appellate level began to determine cases concerning the possible vicarious liability of organisations which were not, for the purposes of employment law, the employers of the tortfeasors.[23] In these instances, as there was no contract of service, there could be no legal control and so the courts began examining the factual nature of the relationship which has since been coined 'factual control'.[24]

Applied in the context of the gig economy, there appears to be no or limited control arising from the contract, as they are not contracts of service rather contracts for services. However, it is possible to examine the factual matrix to determine whether control is exercised in reality. Chapter 8 of this thesis presented data which represented examples of possible factual control. This included themes such as: (1) wage obligations, (2) the obligation to follow rules, (3) implied obligations to accept work, (4) the use of statistics, (5) reviews, and (6) recordings. This section will analyse each of these themes in turn.

As stated above, one of the several examples of factual control was obligations relating to wage. In Chapter 8, it was set out that those working for a platform, or multiple platforms, in the courier case were unable to set their own rates. This was a standardised fee per order that was unilaterally set by the platform, and research participants described having no autonomy to negotiate this. Conversely, in the tutor case, research participants described that the autonomy they held over their own rate of pay would vary depending on the

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[21] See Lord Phillips' restatement of the five policy factors in *Catholic Child Welfare Society v Various Claimants* (*CCWS*) [2013] UKSC 56, [2013] 2 AC 1, 15 at [35].
[22] Phillip Morgan, 'Recasting Vicarious Liability' (2012) 71 Cambridge Law Journal 615, 634.
[23] For example *CCWS* (n 20); *Cox v Ministry of Justice* [2016] UKSC 10; [2016] A.C. 660; *Armes v Nottinghamshire County Council* [2017] UKSC 60; [2018] AC 355.
[24] Morgan (n 24) 634.

programme they were working on. On the private programme, research participants were permitted to select their own rate within prescribed bands, and on the school's programme research participants were paid a unilaterally determined hourly rate.

As discussed in Chapter 4, the method of payment has historically been linked to the assessment of control.[25] It has become reasonable to assume that independent contractors might retain autonomy in negotiating their wage; this might be an overall fee that is invoiced to a principal in place of an hourly rate, although this is not always the case. As discussed above, research participants who worked with the courier platforms or with the tutor platform on the school's programme described having an absence of autonomy over their rate of pay. This made some feel like their status was closer to employment than to self-employment. Where the power of remuneration lies solely with the platforms and this is essentially imposed on service providers, this may be used as evidence of factual control and aid in concluding that the individuals are in relationships that are akin to employment.

Chapter 8 also presented data relating to obligations to follow rules and implied obligations to accept work. Research participants in the courier case described a distinction between work on-slot and free-login work. Work on-slot was available with Stuart and entailed service providers signing up in advance to work a certain shift. In exchange for following certain rules, such as ensuring that they remained in a specific zone and accepting a certain number of orders, service providers were entitled to a standard hourly rate. Conversely, with free-login work, research participants described retaining flexibility and autonomy over where they worked and what orders they accepted and were paid per delivery.

It is relatively simple to identify the factual control present when service providers work on-slot. Subjecting service providers to rules in exchange for an hourly rate appears to be masking employment, and it is no surprise that these factors contributed to the finding of the Court of Appeal that service providers were workers for the purposes of employment

[25] *Short v J & W Henderson* (1946) 62 TLR 427, at 429. According to Lord Thankerton, there were four indicia to be analysed: '(a) the master's power of selection of his servant; (b) the payment of wages or other remuneration; (c) the master's right to control the method of work; and (d) the master's right of supervision.'

law while working on-slot for Stuart.[26] Free-login work might be more difficult to characterise as factual control, although this thesis argues that we can imply obligations that service providers owe, inferred from the conduct of the platforms.

Chapter 8 identified a number of examples which suggest that the platforms imply that service providers owe obligations to follow certain rules while at work. One research participant previously had their account terminated with Deliveroo due to rejecting 97% of orders, despite the party-line of the platform being that service providers are free to accept and reject orders as they choose. The same research participant suggested that platforms may apply the principle of 'reasonableness' when considering if a service provider has accepted a sufficient number of orders.

While working with UberEATS, two research participants described that they would be automatically signed off the platform if they were to reject three orders in a row. There was some discrepancy over how long they were signed off the platform for, with one research participant suggesting that this was for fifteen minutes and another stating he was able to automatically log back on. This factor was considered in the landmark judgment of *Uber BV v Aslam*, where the Supreme Court held that a group of Uber drivers were workers for the purposes of employment law. Lord Legatt drew upon findings from the Employment Tribunal, including that if a driver were to reject three orders in a row, they would be signed off the platform automatically for a period of ten minutes. This was deemed to be a 'warning' from the platform and was indicative of control.[27]

Chapter 8 also discussed that research participants perceived that they had less autonomy while working with UberEATS. This stemmed from the fact that they had no knowledge of where they were delivering to or how much they would be paid for an order when they chose to accept it. It was because of this that most research participants preferred working with Deliveroo where they were provided with all of the necessary information initially to determine whether they wished to accept the order. The absence of transparency that

[26] *Stuart Delivery Ltd v Augustine* [2021] EWCA Civ 1514, [2022] ICR 511.
[27] *Uber BV v Aslam* (*Uber*) [2021] UKSC 5, [2021] 4 All E.R. 209 at [18].

research participants experienced while working with UberEATS is indicative of the limited autonomy that they enjoy at work. In response to this, research participants described accepting the vast majority of work offered to them by UberEATS as they risked declining lucrative work. More broadly, this suggests that the platform retain factual control over the work of the service providers to ensure that they accept a sufficient number of orders. The landscape is slightly different when examining the perspectives of research participants in the tutor case. The vast majority of research participants indicated that they retained autonomy over the work they chose to accept and reject on both programmes. However, this need not be a barrier to the finding of employment as a trend of flexible work allows workers to retain autonomy over when they carry out their work.

Finally, Chapter 8 presented data relating to the use of statistics, recordings, and reviews. This thesis argues that this mirrors the use of metrics by platforms to manage the performance of its service providers. For example, research participants who worked with Stuart described being subject to a client performance score (CPS), which is described on Stuart's website as a score that score 'reflects [a service provider's] contribution to the Stuart community'.[28] The scores are updated every three weeks and reflect a number of factors, including time spent outside the service provider's allocated zone, the acceptance rate of orders, time spent online, and the number of times a service provider has failed to turn up to an agreed slot. It also accounts for the number of deliveries completed per hour and the quality of the service provided which assesses both ratings and complaints from clients. Research participants identified that maintaining a CPS in the top 10% of service providers ensured they could select slots earlier. They were less able to articulate the consequences of having a low CPS but suggested they may receive fewer offers of work or even have their contracts terminated.

Research participants working in the tutor case also described being subject to statistical mechanisms. Those working on the schools' programme described being allocated a slot allowance, which was subject to increase or decrease dependent on certain metrics, such as

[28] Stuart, 'Client Performance Score (CPS' <https://help-partner.stuart.com/en/articles/5268662-client-performance-score-cps> (accessed 02 August 2021)

the number of lessons they had attended, the number of lessons they were on time to, and the number of lesson reports they had completed following a lesson. This is similar to the metrics used on the Stuart platform, as it affects the ability of service providers to work with the platforms. The use of a metric to measure the performance of service providers is indicative of performance management and factual control. This may be relevant in an assessment of the relationship between service providers and the platforms if it came before a court.

Research participants from both case studies also described being subject to review processes. On the UberEATS platform, research participants explained that customers essentially had delegated review functions to the customers who were afforded an opportunity to document their experience with service providers. Following the completed delivery of an order, customers could give the service provider a 'thumbs up' or a 'thumbs down' in a number of categories, including professionalism, and speed and efficiency. All participants who worked with UberEATS were of the understanding that if their rating fell below a certain threshold, they would, at least, be subject to disciplinary procedures or, at worst, see their contract with the platform terminated. This matches the findings of the Supreme Court in *Uber*, who determined that failure 'to maintain a specific average rating will result in warnings and ultimately termination of the driver's relationship with Uber.'[29] This is certainly suggestive of performance management and indicates that there is factual control retained by the platform, and this is exacerbated by the reliance and economic dependence that many research participants had on work being offered by the platforms.

Research participants in the tutor case who worked on the private programme also discussed being subject to reviews. They explained that customers were offered the opportunity to rate the tutor between one and five and could leave an accompanying review. The ratings and reviews would feature on the tutor's online profile, although most did not believe that the reviews were monitored by the platform. However, the vast majority of research participants stressed the importance of maintaining a five-star rating as they would be less likely to receive offers of work from customers in the future. According to

[29] *Uber* (n 29) at [99].

research participants, the vast majority of service providers on the platform have an array of five-star reviews, and it was unlikely that they would receive work if they did not maintain the same high scores. While there are not direct consequences from the platform for failing to maintain a high rating, as can be seen with UberEATS, there are social consequences. This thesis argues that the platforms are operating an indirect performance management scheme. Even if they do not directly monitor the ratings of its service providers, it is reasonable to assume that lower rated tutors will not receive offers of work, which helps to maintain the reputation of the platform.

Further evidence may come from the recordings carried out on MyTutor. Participants explained that the platform recorded each tuition session. According to participants, the platform used this mechanism as a tool to evaluate and conduct 'quality control' of the tuition sessions carried out by tutors.[30] It is thought the platform would 'spot check' tuition sessions at random.[31] Only one participant discussed having their lesson spot-checked but stated that she was given 'tips' on how she could improve her lessons in the future. This is a clear example of factual control and could form part of the factual matrix which could build a clear picture of the control retained by the platform.

It appears that the examples of factual control identified in Chapter 8 of this thesis can be accounted for by the doctrine of control in tort. However, this thesis has identified a novel form of control that has been coined as 'perceived control' and is distinct from both legal and factual control. Perceived control in the gig economy refers to a perception that the algorithms used by the platforms are controlling the work of service providers. Due to the 'black box' nature of the algorithms, it is unclear whether this control is actually taking place. However, the strength of the perception of service providers has an influence on their behaviour.

A key theme identified across both case studies was the perception of research participants that they were being observed. In the courier case, research participants perceived that the

[30] Interview Participant 13 (MyTutor) 02 February 2021 14.
[31] Interview Participant 13 (MyTutor) 02 February 2021 11.

platforms were observing their metrics, including their acceptance rates, as well as the time it took them to deliver an order. Some perceived they would be punished for rejecting orders, and that the algorithm was 'playing God' in determining what work was available for them. While research participants in the tutor case perceived that the platform was monitoring and observing their lessons. The cloaked nature of the algorithms meant that research participants could not say definitively that this was taking place, but the perception that it might be ultimately had an effect on their behaviour. Research participants in the courier case would be more likely to accept orders offered, and those in the tutor case would speak highly of the platform in case they were being watched.

This was compounded by certain algorithmic mechanisms used by the platforms. For example, research participants who worked with Deliveroo described that the platform recorded the time in which it took the couriers to deliver orders to the customer. When they delivered an order within the expected time frame, they would receive a green screen, a thumbs up, or a smiley face, with an accompanying message that stated something to the effect of 'great ride'. When they did not deliver within the expected time frame, they would receive a red screen, or an 'absence of a thumbs up'. Because of this, the majority of research participants described being aware of the timings, but some were unsure whether this was used as a metric to manage their performance. Research participants could not say for sure whether there were direct consequences for delivering outside of the expected time frame. However, the majority of research participants believed that it was used as a metric for performance management, and some adapted their behaviour because of this. This involved taking additional risks on the road, by running red lights, or cycling in pedestrian only areas.

The extent of the potential control that might be taking place runs contrary to the assumption that high levels of control are no longer present in modern employment settings. This suggests that there is some credibility in the suggestion that the nature of the 'black box' in the gig economy represents a retreat to old-fashioned labour market principles where employees were subject to micro-control and scrutiny.[32] It is argued in this thesis that perceived control is a novel form of control that poses a new challenge to the courts when determining employment for the purposes of tort law. Control vis-à-vis belief is not something novel in itself; this can be seen in cases heard at appellate level concerning vicarious liability in religious contexts. In *JGE*, Father Baldwin, the tortfeasor, because of his beliefs, promised to 'show reverence and obedience'.[33] We see a similar situation in *CCWS*, where the brothers took a lifetime vow of 'chastity, poverty and obedience'.[34] It was their spiritual belief which made the factual control possible. While research participants in this study did not alter their behaviour due to religious beliefs, they did so because of a belief that control was taking place in the background. This is not the novel aspect of control that this thesis is claiming.

It is submitted that the platforms analysed in this thesis, and the algorithms they employ, are designed in such a way that they influence the behaviour of the service providers; this may be done purposely or unknowingly, and this thesis cannot make any claims with respect to this. The secretive nature of the algorithms used means that service providers have little understanding if or what metrics are being used to assess their performance and whether this will have any effect on their future work with the platform. Research participants infer from the behaviour of the platforms, such as the thumbs up when making a delivery on time, or messages which state 'Are you sure you want to do this?', that the algorithm is operating in a way that is observing their behaviour and encouraging them to behave in a particular way. It is the ostensible encouragement of behaviour, made possible by technology, which is the novel aspect of control.

As discussed in section 10.2.1., the effect of the nudges from platforms in this manner encouraged research participants to engage in risk-taking behaviour. This may result in serious social and legal consequences if a research participant or third party were to be injured through these activities, and it is argued in this thesis that it is important that legal

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[32] Jim Stanford, 'The Past, Present and Future of Gig Work' in Jeroen Meikerink (ed), *Platform economy puzzles: a multidisciplinary perspective on gig work2* (Edward Elgar 21AD) 57.
[33] *JGE* (n 22) at [29].
[34] *CCWS* (n 23) at [8].

doctrine ensures it has an adequate legal response. This section will propose a possible approach that could be adopted to respond to this legal challenge.

As discussed above, legal doctrine makes a distinction between factual and legal control when determining if an individual is an employee for the purposes of vicarious liability. Factual control usually refers to the observable control exercised by an employer onto its employee, and is capable of forming part of the factual matrix. This kind of reasoning has been deployed in instances where the tortfeasor was not an employee for other purposes, including for employment law, but there was sufficient control present to justify the imposition of vicarious liability.

In *JGE*, which concerned the abuse perpetrated by Father Baldwin who, at the time, was working in a children's home ran by an order of nuns, the Court of Appeal considered whether there was sufficient control to justify the imposition of vicarious liability on the diocese of whom he was still working in the service of.[35] In this instance, there was no contract of service between Father Baldwin, or the diocese and their relationship was regulated solely through the Canon Law. Father Baldwin was expected to show 'reverence' and 'obedience' to the bishop, who held some limited oversight over his work.[36] One year later, the Supreme Court heard the similar case of *CCWS* concerning the sexual abuse perpetrated by staff members, known herein as 'the brothers' of a school.[37] The Brothers were arranged to work with the school by the Institute for Christian Brothers, although were not employed by the Institute. Despite working at the school, Lord Phillips considered that the brothers were still largely accountable to the Institute, which was made possible by sacred vows they had previously taken.[38]

There is an important parallel to be drawn from *JGE* and *CCWS*. The control that the diocese and the Institute were able to exercise over Father Baldwin and the brothers respectively was made possible by their religious beliefs. This belief resulted in their subordination to an

[35] *JGE* (n 22).
[36] *JGE* (n 22) at [29].
[37] *CCWS* (n 23).
[38] *CCWS* (n 23) at [8]-[9].

organisation. Applying this in the context of the gig economy may seem surprising at first, but there are significant similarities that are worth exposition. Research participants, as discussed above, perceived that the algorithms were observing their behaviour which may or may not be having an effect on their ability to perform services, which is notably similar to an omniscient God. The All-Seeing eye of the algorithm, in theory, watches their every move, sends them signals to behave in a certain way, and the research participants alter their behaviour in response. Just like Father Baldwin in *JGE* and the brothers in *CCWS*, they succumbed to the will of another due to their beliefs. While research participants did not alter their behaviour due to religious beliefs that we are aware of, they did so because they believed there would be negative consequences if they did not.

There is no way of knowing whether the signals sent by the algorithms are deliberate, or if there are any consequences for not following their ostensible instructions, without gaining access to the algorithms. But we do know that this is having an effect on the behaviour of research participants which poses a risk of harm to themselves and to third parties. This thesis argues that regardless of the intention behind the message, these instances of perceived control should form part of the factual matrix of control. The courts should continue to adopt the reasoning that control made possible by belief is a type of factual control, capable of forming part of the reasoning for the imposition of liability onto an organisation.

10.3.2. Integration

Chapter 4 of this thesis discussed in detail the development of the test of integration. This test was developed to supplement the increasingly outdated test of control, which began to erode in the mid-nineteenth century. In Chapter 4, integration was separated into three key tests: the entrepreneurship, the integration, and the organisation tests.[39] The entrepreneurship test examines the extent to which the service provider is an entrepreneur. This rests on factors such as whether the service provider manages the risk of their operations and has an opportunity to profit from their activities. The integration test

[39] These tests were separated according to, Richard Kidner, 'Vicarious Liability: For Whom Should the "Employer" Be Liable?' (1995) 15 Legal Studies 47.

examines whether the service provider is working in business on their own account or working on behalf of another's organisation. The entrepreneurship and integration tests ask similar questions and assumes there is a sharp distinction between employees and independent contractors. According to these tests, independent contractors are financially independent and will not primarily rely on one principal for their work. Finally, the organisation test examines the extent to which the service provider's activities are integrated into the organisational structure of the business activities. The underlying assumption is that only employees will carry out activities which are integral to the business of the organisation.[40]

Chapter 9 examined data relating to the legal tests of integration, and this was split according to the three tests. Chapter 9 first presented data relevant to the entrepreneurship test. Research participants considered going to work as a 'gamble'; as there were few assurances from the platforms that they would be offered work, they had to rely on self-motivation to ensure they achieved financial security. To manage the financial risks associated with their work, research participants in the courier case explained that they would work during 'peak' hours to maintain a sustainable level of work. Research participants in the tutor case also managed similar risks by keeping availability for after-school hours. Those who worked on the private programme also described pitching and selling themselves to prospective clients to achieve financial security.

This data suggests that research participants have an opportunity to profit from their activities, but personally manage the risk that they may make a loss from their activities. This is a good match for the entrepreneurship test and might suggest that the individuals are working on their own account rather than on the platform's behalf. However, as this section will go on to argue, the entrepreneurship that research participants appeared to enjoy might be artificial. To account for this, legal doctrine may need to update the integration test to be more reflective of work in the gig economy.

[40] For criticisms of this assumption, see Douglas Brodie, *Enterprise Liability and the Common Law* (CUP 2010) 75.

The second test considered in Chapter 8 was the integration test. As discussed in Chapter 8, there were mixed perspectives from research participants across both case studies about whether they were working in business on their own account or on behalf of the platforms. Some perceived they were independent contractors due to the flexibility and autonomy they retained over where and when they performed their work. Others believed they were working in a hierarchical structure which was articulated to them in the language employed by the platforms in their advertising literature, including referring to service providers as 'our riders' and 'our tutors'. The cloaked nature of the algorithms also left some perceiving that they were in an inequitable position and were working in subordination to the platform.

The final legal test considered was the organisation test. This was not explicitly dealt with by the vast majority of research participants, but it was raised in one interview with a research participant in the courier case. This participant claimed that without the service providers, the courier platforms would cease to have a business. This thesis agrees with the assertion made by the above participant. Service providers across both case studies perform the integral activities of the businesses. This raises a discrepancy with the assumption that employees will carry out integral activities of the business, rather than independent contractors, as all service providers across the two case studies are classified as being self-employed.

The data presented in chapter 9 was mixed. In some instances, research participants displayed behaviour characteristic of entrepreneurship which may have some influence on the finding that they were acting in business on their own account. Conversely, not all research participants perceived themselves to be independent contractors owing to the imbalance of power between themselves and the platforms. Terms were essentially unilaterally imposed onto research participants which they had little control over, and they were required to perform functions that were central to the business activities of the platforms. The conflicting evidence might make it difficult for the courts to adequately assess the roles of service providers in the context of the organisations they work with. This thesis argues that the courts should look more broadly at the behaviour of the platform and the effect this has on the perspectives of its service providers, its customers, and the general public at large. Chapter 9 identified themes that are tangential to integration that could be drawn upon to aid in this endeavour; these themes have been connected under the umbrella term of perceived integration.

The first of these themes is the notion of competition. Some research participants, particularly in the courier case, perceived themselves as working in competition with other service providers on the platform. This was exacerbated due to the hostility that some research participants experienced from other service providers. Some identified that this feeling of competition stemmed from the fact that the platforms had oversaturated the market with service providers which did not match the demand for the service. This meant that there would often be service providers waiting for jobs and not making a sustainable income. On the face of it, feeling in competition with other service providers might be an indication of entrepreneurship as it demonstrates managing the risk of loss and having the opportunity to make a profit. However, this thesis argues that this marks a trend towards further precarity and leaves the service providers more reliant on receiving work from the platform.

The second theme considered was the organisational schemes adopted by platforms to incentivise service providers at work. This included the adoption of a dynamic pricing system on the courier platforms which paid the service providers additional fees for working at the busier times, as well as a scheme for tutors which allowed them the opportunity to be representatives and work closely with the platform to improve experience. This thesis argues that while this is unlikely to be accounted for by legal doctrine, the adoption of organisational schemes should evidence the centrality of the role that service providers play in the organisations. Adopting schemes to encourage and incentivise the performance of a service is demonstrative of the reliance that platforms have on service providers carrying out the activities integral to its business.

The third theme considered was organisational branding. This was largely manifested through the adoption of uniforms, which was particularly prevalent in the courier case. While there was no official obligation to wear the uniform of any of the platforms, many of the research participants did and some were particularly concerned with their appearance to the outside world. Wearing a uniform could be seen as a representation to the outside world that the service provider is a representative of an organisation. Although this is no longer a factor that is considered by legal doctrine when assessing the integration test, it is argued that this is relevant to the overall picture.

The final theme considered was the perspectives of service providers and the outside world about their role within the organisations. For example, research participants across both case studies described that when they received reviews from customers this would often be for something that was outside of their control. In the courier case, research participants received negative reviews for missing food items which was the responsibility of the restaurants, and research participants in the tutor case would receive negative reviews for failings of the technology which was the platform's responsibility. In these instances, the customers of the service seem to be blending the roles of the service providers with other stakeholders in the organisation. This suggests that the service providers are viewed as being part of the organisation, rather than being recognised as carrying out their own business activities. These kinds of perspectives are typically not considered, but this thesis argues that the perspectives of the service providers, the customers, and the outside world are relevant to the assessment of the role that service providers play within organisations. This section will suggest how legal doctrine might go about accounting for this.

There also appears to be a discrepancy between the assumptions made by legal doctrine relating to integration and the experience of research participants in their own service provision. As discussed above, and in more detail in Chapter 4, the notion of integration is made up of several underlying assumptions: (1) independent contractors manage their own financial risk and will not be primarily reliant on work from one organisation, and (2) that only employees will carry out essential activities for an organisation. In the gig economy case studies examined in this thesis, service providers are classified as independent contractors. Despite this, most research participants relied upon work being offered from one primary platform, and all research participants carried out essential activities to the platforms' businesses. This suggests that the current approach taken by legal doctrine is not sufficient to reflect working practices in the gig economy in reality.

This section will make a suggested approach which might better reflect the experiences of those working in the gig economy. It is important at this stage to circumscribe this proposal, as the empirical work which informed this finding was necessarily small in scale. In light of this, this thesis is not proposing a complete change to the law of vicarious liability, but is merely proposing an alternative approach which can henceforth be tested in other gig economy contexts and more widely outside of the gig economy. If this approach holds true in other contexts, this may add weight to the suggestions postulated in this thesis.

The approach suggested in this thesis is grounded in the concept of agency. As discussed in Chapter 4, agency itself is a notion that is 'notoriously slippery and difficult to define'.[41] An agency relationship is created between a principal and an agent.[42] Typically, the principal will appoint an agent 'to bring about, modify, or terminate legal relations between the principal and one or more third parties.'[43] A principal is usually only personally liable in contract, even where the agent contracts with a third party on the principal's behalf.[44]

A relationship of agency is characterised by a conferral of authority by a principal onto an agent; the conferral of authority may be express or implied.[45] The authority of an agent might be 'actual', which means it is 'created by a consensual agreement'. This is where the agent is 'vested' with the authority to act on behalf of the principal in transactions. Authority can also be ostensible, also known as apparent, which means 'the authority of the agent as it appears to others'.[46] This means the agent has been imbued with the authority to contract with others. Where an agent is imbued with ostensible authority, the principal is estopped from denying that a relationship of agency exists, therefore the relationship of ostensible authority and agency is bound by estoppel.

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[41] Roderick Munday, *Agency: Law and Principles* (3rd edn, OUP 2016) 2.
[42] Peter G Watts and FMB Reynolds, *Bowstead & Reynolds on Agency* (22nd edn, Sweet & Maxwell 2020) para [2-001].
[43] Ewan McKendrick, *Goode and McKendrick on Commercial Law* (6th edn, Penguin 2020) 207.
[44] *Freeman & Lockyer v Buckhurst Park Properties (Mongal) Ltd* (*Freeman*) [1964] QB 480
[45] Watts and Reynolds (n 45) [2-001].
[46] *Freeman* (n 47).

Promissory estoppel is an equitable doctrine that is a shield not a sword, meaning it can only be used as a defence to a legal action.[47] The defence rests upon the claimant 'having made a representation of fact to the defendant, that he is entitled to the benefit he has received, and on the defendant having changed his position to his detriment in reliance on this representation.'[48] The representation has such an effect that it is unconscionable for the law to allow the representor to go back on their initial representation. The requirements for agency by estoppel are very similar; 'you cannot call in aid an estoppel unless you have three ingredients: (i) a representation, (ii) a reliance on the representation, and (iii) an alteration of your position resulting from such reliance.'[49]

The representation must relate to the agent's authority to act on behalf of the principal in legal relations.[50] It can be made by the principal herself or another agent, but it must appear that the agent has the relevant authority.[51] The representation can be made in writing or orally, but they are unusually made by conduct.[52] A third party must be aware of the representation and rely on that.[53] If they are put on notice, for example if the transaction clearly runs contrary to the business interests of the principal[54] or the agent is clearly acting outside of the scope of that type of agent, then there can be no reliance.[55] The purpose of the reliance requirement is 'to establish a link between the representation and the act of the third party.'[56] Finally, the third party must alter their position because of their reliance on the representation, however, the changed position need not be to their detriment as seen in promissory estoppel.[57] The absence of the detriment requirement arguably makes it difficult to distinguish between the altered position and the reliance requirement and has fuelled criticisms that agency by estoppel is a weakened form of promissory estoppel.[58]

[47] *Low v Bouverie* [1891] 3 Ch. 82 at 101.
[48] Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff & Jones The Law of Unjust Enrichment* (10th edn, Sweet & Maxwell 2022) para [30-01].
[49] *Rama Corporation Ltd v Proved Tin and General Investments Ltd* [1952[2 QB 147, 150.
[50] *Freeman* (n 47) at 503.
[51] *Attorney General of Ceylon v Silva* [1953] AC 461 (PC).
[52] *Freeman* (n 47) 503-4.
[53] *Freeman* (n 47) 503-4.
[54] *Criterion Properties plc v Stratford UK Properties LLC* [2004] UKHL, 28, 1 WLR 1846 at [31].
[55] *Midland Bank Ltd v Reckitt* [1933] AC 1.
[56] Lee Roach, *Card & James' Business Law* (4th edn, OUP 2016) 193.
[57] *Pickard v Sears* (1837) 6 A&E 469.
[58] Munday (n 43) 71.

Agency law is primarily used in contract disputes, but, as discussed in Chapter 4, notions of agency have been peppered throughout the history of the Anglo-Welsh common law of vicarious liability. Following more recent judgments on vicarious liability, this is no longer the case. Despite this, this approach may well be applicable to the case study contexts considered in this thesis.

It is argued that platforms confer ostensible authority to service providers to act as representatives of the platforms and carry out their essential business activities. Platforms make representations to service providers and to the public at large that service providers are agents of the platforms by equipping them with platform-branded equipment and labelling them as 'our couriers' or 'our tutors'. This is having an apparent effect on the service providers' and the general publics' perception of the role of the service providers within the organisation. If such framework were to apply in this context, it is argued that the platforms would likely be estopped from denying that the service providers are its agents.

A similar argument was made in the concurring judgment of McHugh J in the Australian case of *Hollis v Vabu* (*Hollis)*.[59] *Hollis* concerned a third party who was injured by an independent contractor working as a cycle courier for Vabu, trading as 'Crisis Couriers'. The case reached the High Court of Australia (HCA), where the majority held that the courier was an employee of Vabu for the purposes of vicarious liability which justified the imposition of liability onto the organisation for the torts of the courier. McHugh J agreed with the majority that liability should be imposed onto Vabu for the torts of the courier but came to this conclusion using different reasoning.

McHugh J suggested that the courier was not an employee, as the majority did, but an agent of Vabu. He contended that for vicarious liability to remain relevant with the developments to employment relations, it must adapt to reflect the changing world. However, he suggested that the courts should adopt caution to ensure that any developments are done 'consistently with the principles that have shaped the development of vicarious liability and

[59] *Hollis* [2001] HCA 44; [2001] 207 CLR 21.

the rationales of those principles… [and they] should also be done in a way that has the least impact on the settled expectations of employers and those with whom they contract.'[60] This approach is cleared from the scrutiny that the majority judgment came under for its 'disjointed… emphasis on policy yet at the same time insisting on retaining the standard of doctrinal rules'.[61]

The agency argument was justified by McHugh J because Vabu had conferred authority to its couriers to carry out its core business activities, and Vabu had made the couriers its direct representatives. The couriers wore Crisis Couriers branded uniform which not only promoted the business of Vabu but was the only reasonable means for the claimant to identify the tortfeasor. Furthermore, in its advertising literature, Vabu labelled the couriers as the 'Crisis Bike Couriers'. All of these factors 'manifested itself to customers and the public' and acted as a representation that the couriers were its agents.[62]

A similar argument was made in *McDermid v Nash Dredging Co* at first instance by Staughton J, as identified by McKendrick.[63] Here, it was argued that where the precise nature and terms of the relationship were unknown to the claimant, they may be entitled to assume the tortfeasor was an employee. This is certainly different from the current approach to vicarious liability in England and Wales, which does not consider the perspectives of third parties as relevant to the assessment as to whether an individual is carrying out a 'recognisably independent business'.[64] English law is therefore more concerned with looking inside the relationship, rather than what it might look like from the outside. This thesis, however, considers both factors to be relevant to the assessment.

The judgment in *McDermid* had 'much to commend in it', according to McKendrick,[65] although the approach seems less contoured than that taken by McHugh J. McHugh's

[60] *Hollis* (n 62) at [85].
[61] K Lee Adams, 'Recent Cases: The High Court on Vicarious Liability' (2003) 16 Australian Law Journal of Labour Law 214, 219.
[62] *Hollis* (n 62) at [102].
[63] Ewan McKendrick, 'Vicarious Liability and Independent Contractors - A Re-Examination' (1990) 53 The Modern Law Review 770, 781.
[64] *Hughes v Rattan* [2001] [2022] EWCA Civ 107, [2022] 1 WLR 1680 at [88].
[65] McKendrick (n 66) 781.

judgment, however, has received criticism as, while it offered 'consistency of treatment', the suggestion to fragment categories was thought to weaken the position of atypical workers.[66] From an English law perspective, this does not seem to be correct. The unbounded nature of the expansions to the employment category of vicarious liability, which often seemed to lack principles or cogency, has left the current law in an uncertain state, and with the Supreme Court now seeming adamant on rolling back the expansions, atypical workers may be in an even more precarious position. The most sensible approach, in this author's view, would be to adopt additional categories to adequately catch those who cannot neatly fall within either side of the employee and independent contractor chasm.

We can draw similarities from *Hollis* to the courier and tutor gig economy case studies. While *Hollis* has limited persuasive value due to it being a concurring judgment from another jurisdiction, this thesis argues that there lies a compelling argument that provides an adequate solution to the challenges posed by gig economy work. McHugh J also recognised other theoretical underpinnings to support his judgment, such as that the imposition of liability at organisational level would incentivise the organisation to prevent future risk;[67] this thesis also supports this argument. Furthermore, it was also underpinned by notions of enterprise liability which this thesis also argues in support of.[68] This will be discussed in more detail in the next section.

10.3.3. Enterprise Liability

Enterprise liability is the final test that legal doctrine employs to determine employment for the purposes of tort. It has fuelled developments to vicarious liability in England and Wales and, put simply, contends that enterprises should be liable for the losses caused by the risks they place into society.[69] The theory is based on fairness, that those who benefit from the running of risks should bear the burden of those risks if they materialise.[70] Organisations typically run risks that are inherent to their business through individuals, be that employees

[66] Simon Deakin, '"Enterprise Risk": The Juridicial Nature of the Firm Revisited' (2003) 32 Industrial Law Journal 97, 109.
[67] *Hollis* (n 62) at [91]-[93].
[68] *Hollis* (n 62) at [90].
[69] George L Priest, 'The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law', (1985) 14 Legal Studies 461, 463.
[70] Jane Stapleton, *Product Liability* (Butterworths 1994) 187.

or independent contractors.[71] Enterprise liability is interwoven with deeper pockets theory that contends that an organisation is often in a better position to manage and distribute loss than an employee.[72] As argued in Chapter 4 of this thesis, the two theories go hand-in-hand.

The gig economy is no different to other organisations, as platforms run inherent risks through the activities of its service providers who are classified as independent contractors. In the context of the courier and tutor case studies, the inherent risks are as follows:

Risks of harm to service providers:

- Intentional physical harm caused by a third party (courier case)
- Risk of a road-traffic accident (courier case)
- Risk of reputational harm (tutor case)

Risk of harm to third parties:

- Risk of a road-traffic accident (courier case)
- Risk of physical or sexual abuse (courier case)
- Risk of negligent tuition (tutor case)
- Risk of physical or sexual abuse (tutor case)

This thesis argues that the above risks are inherent to the service provision carried out in the courier and tutor case studies. The courier platforms, for example, seek to transport goods to customers. This is a core aspect of the platforms' business activities, which is delegated to service providers. The nature of the work means that service providers and third parties are exposed to the risk of road-traffic accidents, food contamination, and physical or sexual abuse. These risks are argued to be inherent to the service provision, which the platforms benefit from. In some instances, as discussed above, the platforms could be seen to be encouraging service providers to increase these risks through the operations of its algorithms.

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[71] See generally, Brodie (n 42).
[72] See generally, Peter Cane and James Goudkamp, *Atiyah's Accidents, Compensation and the Law* (9th edn, CUP 2018).

Where organisations have been seen to enhance risk in the case law, enterprise liability has stepped in to hold the organisations accountable when the risk materialises; this has been particularly relevant in cases concerning sexual abuse.[73] The tutor platform seeks to provide high-quality, affordable tuition to students. By doing so, the platform delegates a core aspect of its business activities to service providers who are classified as independent contractors. By classifying its service providers in this way, the platform shifts the inherent risks of reputational harm, negligent tuition, and physical and sexual abuse to its service providers and to customers.

Adopting the language of enterprise liability theorists, the platforms across the courier and tutor case studies create and enhance risks which they run through their core business activities that are delegated to service providers. The classification of service providers as independent contractors seeks to abrogate the responsibility associated with risk creation and materialisation and shift the burden of risks to those less able to manage it. However, enterprise liability contends that the risk creators and enhancers ought to bear the risk, and this thesis does not disagree with this assertion.

As has been argued throughout this chapter, the platforms confer ostensible authority to its service providers which renders them agents carrying out its core business activities. Drawing again upon *Hollis*, a key aspect of the judgment rested on the fair principle that the couriers were carrying out activities which sought to further the economic interests of Vabu. 'It was Vabu who introduced into the community a business activity that carried with it the risk of injury to users of public thoroughfares… [and] the courier was "on the business" of Vabu.'[74] This justified McHugh's contention that it was fair to impose liability on the organisation for the actions of its agent. This thesis argues that this argument extends to the case study contexts considered in this thesis, which warrants further investigation into other employment contexts both within and outside of the gig economy.

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[73] This is most illuminating in *Bazley v Curry* (*Bazley*) (1999) 174 DLR (4th) at [31].

[74] *Hollis* (n 62) at [90].

10.4. Conclusion

The findings of this thesis have demonstrated that there are similarities between the two case studies, including the presence of an algorithm, which acts as a 'black box' and has the ability to influence the behaviour of service providers. This finding may have wider implications beyond the case studies analysed, as algorithmic management is now widely used outside of the gig economy. This thesis has also found identifiable differences, for example in the level of autonomy that service providers perceive they have over their work, for example in relation to fee negotiation.

This chapter has identified some discrepancies between the assumptions made by legal doctrine when distributing risk in the context of service provision and the perspectives of research participants who conduct their work in the gig economy. This is an important problem that requires a suitable response. To this end, this chapter has argued that legal doctrine should continue to accept that factual control, made possible by belief, is a recognisable form of control capable of forming part of the legal analysis.

It has also been argued that to rectify the discrepancies between the assumptions made by legal doctrine and the social reality as presented in the case study contexts, legal doctrine could borrow maxims from the law of agency. This is because service providers who work in the courier and tutor contexts appear to be acting as agents with the authority to carry out the core business activities of the platforms. The nature of the work carried out in the two case studies means that risks inherent to the business activities of the platforms are delegated to service providers, classified as independent contractors, which have the potential to materialise and cause injury to both service providers and third parties.

To support the agency argument, enterprise liability notions may also be drawn upon justify the imposition of liability at platform level, as it is the platforms which are the ultimate creators and enhancers of risk. The platforms benefit financially from the risks and should ultimately bear the responsibility if those risks materialise.

To facilitate this, the courts can also draw upon deterrence-based arguments to impose liability at organisational level. By doing so, the courts may incentivise platforms to reduce the risks carried out by service providers, as well as reduce the pressure placed on service providers to take and increase risk at work. This is supported by the literature on organisational deterrence, which suggests that this would be the case.

In some instances, insurance might mean that service providers in the gig economy are no longer persons of straw, and this may influence the cases that appear before a courtroom. The presence of insurance might mean that service providers are adequately compensated for the injuries and losses they suffer at work and may also mean that claims are brought against them for the torts they commit. However, insurance will not cover all instances in tort and the inclusion of the platform as an additional defendant may be more useful.

Necessarily, these proposals need to be contained due to the small-scale empirical work that forms the basis of this suggestion. Therefore, this thesis is merely suggesting that the findings of the empirical work indicate that a different approach to the imposition of vicarious liability might be appropriate. However, this should be tested in a range of contexts both within and outside of the gig economy.

Conclusion: Implications, Limitations and Looking Ahead

This thesis had one overarching aim: to understand the legal challenges posed by the gig economy to the law of torts. It has been argued in this thesis that tort is a key distributor of risk in the context of service provision, and it is able to do this through its key doctrines: vicarious liability, non-delegable duties, direct duties owed to third parties, and employer's duties to its employees. Several of these doctrines are underpinned by the notion of employment. The rise of the gig economy poses a challenge to these doctrines, through its classification of service providers who work within it as independent contractors which ostensibly obscures the notion of employment.

Throughout the thesis it has been argued that the adequacy of tort law's response to the challenges presented by the gig economy rests on whether the assumptions which underpin its doctrines sufficiently match the social reality of the gig economy. To garner this understanding, this thesis has employed various empirical qualitative methods including case studies, interviews and focus groups. Part II of this thesis presented data collected through these methods, which produced some interesting findings.

Chapters 6 and 7 of this thesis discussed the liability risks that service providers perceived to be inherent to their service provision, as well as the service providers' apparent response to those risks. This data was compared to the literature on deterrence in Chapter 10, where it was concluded that tort law does not appear to be influencing the behaviour of actors in the gig economy. Chapter 8 presented data which considered the extent to which service providers perceived their service provision was subject to control by the platforms. This data was analysed with the case law and literature on control, where it was found that there was discrepancy between the assumptions which underpin the doctrine of control and the perspectives of research participants. Further, it was discussed that legal doctrine in its current form is only capable of responding to some instances of control. Finally, Chapter 9 presented data which analysed the extent to which service providers perceived their service provision was integrated into the business of the platforms. Again, it was concluded that there was a misalliance in the assumptions made by legal doctrine and the social reality, and it appeared that legal doctrine could respond only to certain forms of integration.

To the author's best knowledge, this is the first study to empirically analyse the gig economy from a tort law perspective in England and Wales, and it has hopefully demonstrated that this empirical work is both possible and revealing. As stated above, it has found a disparity between legal doctrine and the social reality of the gig economy. This poses significant challenges to tort law, and it has been argued in this thesis that this needs to be remedied so that tort can adequately respond to these challenges. Chapter 10 proposed possible reforms to tort law, including the extension of the doctrine of factual control, the borrowing of the concept of agency from contract law, and the continued use of enterprise liability.

The thesis has inevitable limitations which have been discussed in Chapter 5. The findings of the study can only be analysed with respect to the cases that have been studied, and the limited number of participants means that the findings cannot be generalised beyond or even within the case studies. Future work will necessarily need to examine other case studies to appreciate a greater diversity in perspectives and experiences with a wider number of participants and triangulate the findings using other methods such as participant observation.

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APPENDIX A – TOPIC GUIDE (COURIERS)

Topic Guide – Interviews

1. Introduction
   1.1. Thank you for meeting with me today and offering to participate in the study.
   1.2. Before we begin, I will go through some information provided to you on the Participant Information Sheet.
   1.3. The interview will last approximately one hour.
   1.4. The interview is semi-structured, so I will have a list of topics to discuss with you.
   1.5. The interview will be audio recorded.
   1.6. I may need to take some notes during the interview if I feel we need to come back to anything, but don't worry I am listening to what you're saying!
   1.7. Feel free to ask any questions at any stage during the interview.
   1.8. Remember you can withdraw your consent at any point during the interview or up to two months after the interview.
   1.9. Are you happy to proceed?
   1.10. Do you have any questions before we begin?

2. Background
   2.1. How did you come about working for the platform?
   2.2. Is that the same for other platforms you work for?
   - How long have you been working there?

2.3. Positives and negatives of the work.

2.4. Expectations of working with the platform.

2.5. How does the work compare with your expectations?

2.6. How does the work compare with other work you have carried out in the past?

3. Work Characteristics

3.1. Operational questions

- What was the process for working for the platform?
  - Checks/applications/interviews?
  - How does that compare with other platforms you work for?
- How often is work offered? Regularity – does it meet expectations?
  - If not, why is this not the case?
- How often is offered work accepted?
  - Why is this the case?
  - Do you have to sign on regularly?
- Once work is accepted, how is your progress monitored?
  - Feelings towards this.
- Payment: frequency, amount, type (wage per hour/per task; is this negotiable?).
- Uniform – do you have to wear the uniform? Can you wear uniform for other platforms?
- Can you be signed into both apps at once?

3.2. Communication with platform

- How does the platform communicate with you regarding your performance of a job?
  - Rating systems.
  - Disciplinary procedures.

- How often do you hear from the platform? Do they contact you when you are not working?

3.3. Communication with end-user

- How do you communicate with the end-user? On the platform? Monitored? Free to communicate off the platform?
- How does the customer indicate whether they are happy or unhappy with your work?
  - Consequences of that?
  - Feelings?
  - Disciplinary procedures.

3.4. How do these issues relate to feelings of job security? Does this balance with the flexibility of work?

4. <u>Employment Status</u>

4.1. I'm not sure I totally understand, do you work for the platform, or work for yourself?

- How do you feel about that? What aspects of your work makes you feel like you work for yourself? What aspects of you work makes you feel like you don't work for yourself?
- How does that compare with your previous employment?

4.2. Potential topics include (if appropriate and not discussed earlier):

- Uniform (identification)
- Use of algorithm/app;
- Tracking feature on app;
- Rating system;
- Payment: frequency, amount, type (wage per hour/per task; is this negotiable?);
- Disciplinary procedures – awareness of the processes/experiences?

- Organisation of tax and national insurance.

4.3. Organisation of holidays/time off.

5. <u>Perceptions of Risk</u>

5.1. Have you ever experienced times where you have been unable to sign on to the platforms?

5.2. Have you ever experienced times where you could not accept work whilst working for the platforms?

- If response is yes, expand upon this experience.
- If response is no, has this possibility been considered?
- What is the procedure if this is the case?
- What *should* happen in this circumstance? (Notions of risk bearing).

5.3. Insurance?

- Have you ever been in a situation at work where an accident happened resulting in harm to yourself or to others?
- Have you considered this possibility?
- Insurance?
- Do they believe they should be responsible for organising their own insurance?
- Do they think insurance is necessary? Why?

APPENDIX B – TOPIC GUIDE (MYTUTOR)

Topic Guide – Interviews

2. Introduction
   5.4. Thank you for meeting with me today and offering to participate in the study.
   5.5. Before we begin, I will go through some information provided to you on the Participant Information Sheet.
   5.6. The interview will last approximately one hour.
   5.7. The interview is semi-structured, so I will have a list of topics to discuss with you.
   5.8. The interview will be audio recorded.
   5.9. I may need to take some notes during the interview if I feel we need to come back to anything, but don't worry I am listening to what you're saying!
   5.10. Feel free to ask any questions at any stage during the interview.
   5.11. Remember you can withdraw your consent at any point during the interview or up to two months after the interview.
   5.12. Are you happy to proceed? Do you have any questions before we begin?
   5.13. How did you come to hear about the study?

6. Background
   6.1. How did you come about working for the platform?
   6.2. Do you work for any other platforms?
      - If not, why?

- Indicated that this is your main source of income. What work did you do before you started up with the online platforms?

6.3. How much is your income made up for working for the platform?

6.4. How often do you work for the platform?

6.5. Positives and negatives of the work.

6.6. How does the work compare with your expectations?

7. <u>Work Characteristics</u>

7.1. What was the process of working for the platform? Checks/applications/interviews?

7.2. What (if any) training was provided? Was this sufficient?

7.3. How is work offered to you?

- Ranking on the website

7.4. Do you always accept work? Do you feel comfortable rejecting work?

7.5. Can you tell me a bit about how payment works?

- Is this sufficient?
- Feelings towards control, or lack thereof, over your fee?

7.6. Are you able to work for multiple tutoring platforms?

7.7. If you are unable to work, are you able to substitute yourself?

7.8. Communication with platform

- How does the platform communicate with you regarding your performance of a job?
  - Rating systems.
  - Disciplinary procedures.
- How often do you hear from the platform? Do they contact you when you are not working?

7.9. Communication with end-user

- How do you communicate with the end-user?

- How does the customer indicate whether they are happy or unhappy with your work?
    - o Consequences of that?

7.10. How do these issues relate to feelings of job security? Does this balance with the flexibility of work?

- Are you a member of a union?

8. Employment Status

8.1. I'm not sure I totally understand, do you work for the platform, or work for yourself?

- How do you feel about that? What aspects of your work makes you feel like you work for yourself? What aspects of you work makes you feel like you don't work for yourself?
- Would you still want to work for the platforms if you were offered employment rights?
- What would those rights look like?

9. Perceptions of Risk

9.1. Have you ever experienced times where you have been unable to sign on to the platforms? E.g., through having to self-isolate because of Covid.

9.2. Have you ever experienced times where you could not accept work whilst signed on to the platforms?

- What *should* happen in this circumstance? (Notions of risk bearing).

9.3. Do you feel as though there are any health and safety risks with the work you do?

- Do you feel as though your risk is enhanced by the work that you do?

9.4. Do you have insurance for the work you do? (public liability insurance or professional indemnity insurance)

- Is it encouraged by the platform?
- Do you believe you should be responsible for organising your own insurance?
- What is your insurance in place for? Is it necessary?
- Have you considered taking out additional policies for protection of yourself/belongings?

APPENDIX C – PARTICIPANT INFORMATION SHEET (ONLINE INTERVIEWS)

The York Law School

Participant Information Sheet – Online Interviews

Contact Information

Researcher

Miss Jessica Gracie, York Law School, University of York – jessica.gracie@york.ac.uk

Chair of the Economics, Law, Management, Politics and Sociology Ethics Committee

Professor Tony Royle, University of York – tony.royle@york.ac.uk

Background

I would like to invite you to take part in a research project investigating work in the gig economy. The gig economy is understood as work that is facilitated by the use of a smartphone app or other electronic platform. We would like to gain an understanding of work carried out in this manner to try and identify any challenges it may pose for the law. The research is being conducted by Miss Jessica Gracie (PhD student, University of York) and is supervised by Mr Phillip Morgan (University of York) and Professor Simon Halliday (University of York). Before agreeing to take part, please read this information sheet carefully and let us know if anything is unclear, or you would like further information.

What is the purpose of the study?

The study is designed to gain an understanding of work in the gig economy. To do so, we are looking to capture your perceptions and experiences on a range of issues associated with your work, such as your motivations for seeking work in this sector and your understanding of your relationships with the platform and customer(s).

This research project seeks to answer the following questions:

1. What are the key characteristics of the gig economy?
2. How diverse is the gig economy?
3. What legal challenges does the gig economy pose to employment law, and how should employment law respond?

4. What legal challenges does the gig economy pose for tort law, and how should tort law respond?

Why have I been invited to take part?

An important part of this study is to understand your perspective on a range of issues related to your work. Understanding these issues will provide a unique insight into how this type of work may affect the law and may indicate how the law should respond.

As part of this research project, we are seeking to speak with individuals who perform services on a specific platform. If you have seen this advert – either online or distributed through a network you are part of – it means we are particularly interested in recruiting people who perform services on the platform that you use.

Do I have to take part?

No, participation is strictly on a voluntary basis. If you do decide to take part, you will be given a copy of this information sheet for your records and will be asked to complete a participant consent form. If you change your mind at any point during the study, you will be able to withdraw your participation without having to provide a reason.

What is going to happen?

If you consent to participate, you will be asked to complete a screening form. This form asks for your name, email address, contact number, and a few questions about yourself (i.e. your age bracket, gender, broad geographical location, your education background, and some details about your work). This is so we can ensure that our sample covers a range of people.

Once you have filled out that form, the researcher will contact you to organise a slot for an online interview lasting approximately 1 hour. This will take place using a mutually convenient piece of software (such as Zoom). The researcher will ask a series of questions about your experiences of work on the platform you perform services for.

The interview will be audio recorded. Once the recording has been transcribed, all copies will be destroyed, and any identifying details will be removed from the transcription.

At the end of the study – as a thanks for your time – you will be entered into a lottery of (at most) 100 participants, with a chance to win 1 of 20 Love2Shop vouchers each at the value of £25. This means that, at a minimum, 1 in every 5 participants will win a voucher.

On what basis will you process my data?

Under the General Data Protection Regulation (GDPR), the University has to identify a legal basis for processing personal data and, where appropriate, an additional condition for processing special category data.

In line with our charter which states that we advance learning and knowledge by teaching and research, the University processes personal data for research purposes under Article 6 (1) (e) of the GDPR:

Processing is necessary for the performance of a task carried out in the public interest

Special category data is processed under Article 9 (2) (j):

Processing is necessary for archiving purposes in the public interest, or scientific and historical research purposes or statistical purposes

Research will only be undertaken where ethical approval has been obtained, where there is a clear public interest and where appropriate safeguards have been put in place to protect data. In line with ethical expectations and in order to comply with common law duty of confidentiality, we will seek your consent to participate where appropriate. This consent will not, however, be our legal basis for processing your data under the GDPR.

How will you use my data?

Data will be processed for the purposes outlined in this notice.

Will you share my data with 3rd parties?

No personal data will be shared with 3rd parties. Data will be accessible to the researcher and project supervisors only. Anonymised data may be reused by the research team or other third parties for secondary research purposes.

Will you transfer my data internationally?

No.

How will you keep my data secure?

The audio file will be held securely on a University of York managed system. This will be transcribed and then deleted – leaving just the anonymised transcript. Your personal details will be listed only in a master list of participants which will be stored as an encrypted file accessible only by the researcher.

Will I be identified in any research outputs?

You will not be identified in any research outputs – all the data will be kept anonymous.

How long will you keep my data?

Data will be retained in line with legal requirements or where there is a business need. Retention timeframes will be determined in line with the University's Records Retention Schedule. Any personal data will be destroyed on completion of the research. Data generated by the researcher may be archived for a period of 10 years. However, archived data will remain encrypted.

What rights do I have in relation to my data?

Under the GDPR, you have a general right of access to your data, a right to rectification, erasure, restriction, objection or portability. You also have a right to withdrawal. Please note, not all rights apply where data is processed purely for research purposes. For further information see, https://www.york.ac.uk/records-management/generaldataprotectionregulation/individualsrights/.

Questions or concerns

If you have any questions about this participant information sheet or concerns about how your data is being processed, please contact Jessica Gracie (jessica.gracie@york.ac.uk) in the first instance. If you are still dissatisfied, please contact the University's Acting Data Protection Officer at dataprotection@york.ac.uk.

Right to complain

If you are unhappy with the way in which the University has handled your personal data, you have a right to complain to the Information Commissioner's Office. For information on reporting a concern to the Information Commissioner's Office, see www.ico.org.uk/concerns.

APPENDIX D – PARTICIPANT INFORMATION SHEET (ONLINE FOCUS GROUPS)

THE UNIVERSITY of York

The York Law School

Participant Information Sheet – Online Focus Groups

Contact Information

Researcher

Miss Jessica Gracie, York Law School, University of York – jessica.gracie@york.ac.uk

Chair of the Economics, Law, Management, Politics and Sociology Ethics Committee

Professor Tony Royle, University of York – tony.royle@york.ac.uk

Background

I would like to invite you to take part in a research project investigating work in the gig economy. The gig economy is understood as work that is facilitated by the use of a smartphone app or other electronic platform. We would like to gain an understanding of work carried out in this manner to try and identify any challenges it may pose for the law. The research is being conducted by Miss Jessica Gracie (PhD student, University of York) and is supervised by Mr Phillip Morgan (University of York) and Professor Simon Halliday (University of York). Before agreeing to take part, please read this information sheet carefully and let us know if anything is unclear, or you would like further information.

What is the purpose of the study?

The study is designed to gain an understanding of work in the gig economy. To do so, we are looking to capture your experiences on a range of issues associated with your work, such as your motivations of working in this manner and your understanding of your relationships with the platform and customer(s).

This research project seeks to answer the following questions:

1. What are the key characteristics of the gig economy?
2. How diverse is the gig economy?
3. What legal challenges does the gig economy pose to employment law, and how should employment law respond?

4. What legal challenges does the gig economy pose for tort law, and how should tort law respond?

Why have I been invited to take part?

An important part of this study is to understand your perspective on a range of issues related to your work. Understanding these issues will provide a unique insight into how this type of work may affect the law and may indicate how the law should respond.

As part of this research project, we are seeking to speak with individuals who perform services on a specific platform. If you have seen this advert – either online or distributed through a network you are part of – it means we are particularly interested in recruiting people who perform services on the platform that you use.

Do I have to take part?

No, participation is strictly on a voluntary basis. If you do decide to take part, you will be given a copy of this information sheet for your records and will be asked to complete a participant consent form. If you change your mind at any point during the study, you will be able to withdraw your participation without having to provide a reason.

What is going to happen?

If you consent to participate, you will be asked to complete a screening form. This form asks for your name, email address, contact number, and a few questions about yourself (i.e. your age bracket, gender, broad geographical location, your education background, and some details about your work). This is so we can ensure that our sample covers a range of people.

Once you have filled out that form, the researcher will contact you to organise a slot for a focus group made up of around 5 individuals that perform services on the same platform that you use. This will take place using mutually convenient piece of software (such as Zoom) and will last approximately 1 hour. As will be explained at the start of the interview, this will be recorded and then transcribed, though you will be kept completely anonymous. The researcher will ask a series of questions about your experiences of work on the platform you perform services for, which you will be asked to discuss with the other members of the group.

We suggest that, in order to maintain your anonymity, you change your display name on the software. Prior to the focus group, you will be contacted by the researcher and will be provided with instructions on how to change your display name on the selected technology used for the focus group. This remains entirely your decision and you do not have to provide any reasoning for your choice, but you will be asked to communicate your preferred pseudonym to the researcher in advance of the focus group so that your anonymity can be maintained. If you do not choose to change your display name, you will not be anonymous to other focus group participants, although you will not be identified in any future research outputs.

As you will be amongst other participants if you take part in the focus groups, we ask that any information discussed in the focus group remains entirely confidential. We also suggest that you do not disclose any sensitive information during the course of the focus group.

The focus group will be audio recorded. Once the recording has been transcribed, all copies will be destroyed, and any identifying details will be removed from the transcription.

At the end of the study – as a thanks for your time – you will be entered into a lottery of (at most) 100 participants, with a chance to win 1 of 20 Love2Shop vouchers each at the value of £25. This means that, at a minimum, 1 in every 5 participants will win a voucher.

On what basis will you process my data?

Under the General Data Protection Regulation (GDPR), the University has to identify a legal basis for processing personal data and, where appropriate, an additional condition for processing special category data.

In line with our charter which states that we advance learning and knowledge by teaching and research, the University processes personal data for research purposes under Article 6 (1) (e) of the GDPR:

Processing is necessary for the performance of a task carried out in the public interest

Special category data is processed under Article 9 (2) (j):

Processing is necessary for archiving purposes in the public interest, or scientific and historical research purposes or statistical purposes

Research will only be undertaken where ethical approval has been obtained, where there is a clear public interest and where appropriate safeguards have been put in place to protect data. In line with ethical expectations and in order to comply with common law duty of confidentiality, we will seek your consent to participate where appropriate. This consent will not, however, be our legal basis for processing your data under the GDPR.

How will you use my data?

Data will be processed for the purposes outlined in this notice.

Will you share my data with 3rd parties?

No personal data will be shared with 3rd parties. Data will be accessible to the researcher and project supervisors only. Anonymised data may be reused by the research team or other third parties for secondary research purposes.

Will you transfer my data internationally?

No.

How will you keep my data secure?

The audio file will be held securely on a University of York managed system. This will be transcribed and then deleted – leaving just the anonymised transcript. Your personal details will be listed only in a master list of participants which will be stored as an encrypted file accessible only by the researcher.

Will I be identified in any research outputs?

You will not be identified in any research outputs – all the data will be kept anonymous.

How long will you keep my data?

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What rights do I have in relation to my data?

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Questions or concerns

If you have any questions about this participant information sheet or concerns about how your data is being processed, please contact Jessica Gracie (jessica.gracie@york.ac.uk) in the first instance. If you are still dissatisfied, please contact the University's Acting Data Protection Officer at dataprotection@york.ac.uk.

Right to complain

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APPENDIX E – CONSENT FORM (ONLINE INTERVIEWS)

<u>Consent Form – Online Interviews</u>

Having read the Participant Information Sheet, please complete this consent form if you would like to participate in the study. This form is for you to state whether or not you agree to take part in the project. Please read and answer every question. If there is anything you do not understand, or if you want more information, please contact Jessica Gracie (jessica.gracie@york.ac.uk).

Participation is entirely voluntary and, if over the course of the research you decide you no longer wish to participate, you are free to withdraw. If you do wish to withdraw at any time, please contact Jessica Gracie. Please note, if you do withdraw from this study, you will not be entered into the lottery for the vouchers.

If you wish to participate, please tick the boxes where appropriate below and click "I consent".

Name	
Email Address	
Contact Number	

By clicking "I agree", I confirm that I have read and understood the information in both the Participant Information Sheet and this Consent Form. I freely consent to participate in the study and for anonymised data to be used in future analysis and research.

☐ I consent to participating in the research study outlined above.

☐ I consent to my interview being recorded and then transcribed; this data will be stored anonymously and securely.

☐ I understand that my participation is voluntary and that I am free to withdraw at any time during the research task, without giving any reason. If you wish to withdraw, please email Jessica Gracie (jessica.gracie@york.ac.uk).

☐ I consent to my personal data (name and contact information) being stored during the data collection phase of the project.

☐ I wish to receive a summary of the findings of this research.

I consent [automatically dated and tied to the email address of the participant]
I do not consent, I do not wish to participate

The ethics of this research has been reviewed by the ELMPS inter-departmental ethics committee at the University of York. If you have any concerns about the research, you can contact Tony Royle the Chair of the ELMPS committee elmps-ethics-group@york.ac.uk.

APPENDIX F – CONSENT FORM (ONLINE FOCUS GROUPS)

Consent Form – Online Focus Groups

Having read the Participant Information Sheet, please complete this consent form if you would like to participate in the study. This form is for you to state whether or not you agree to take part in the project. Please read and answer every question. If there is anything you do not understand, or if you want more information, please contact Jessica Gracie (jessica.gracie@york.ac.uk).

Participation is entirely voluntary and, if over the course of the research you decide you no longer wish to participate, you are free to withdraw. If you do wish to withdraw at any time, please contact Jessica Gracie. Please note, if you do withdraw from this study, you will not be entered into the lottery for the vouchers.

If you wish to participate, please tick the boxes where appropriate below and click "I consent".

Name	
Email Address	
Contact Number	

By clicking "I agree", I confirm that I have read and understood the information in both the Participant Information Sheet and this Consent Form. I freely consent to participate in the study and for anonymised data to be used in future analysis and research.

☐ I consent to participating in the research study outlined above.

☐ I consent to the focus group being recorded and then transcribed; this data will be stored anonymously and securely.

☐ I understand that my participation is voluntary and that I am free to withdraw at any time during the research task, without giving any reason. If you wish to withdraw, please email Jessica Gracie (jessica.gracie@york.ac.uk).

☐ I consent to my personal data (name and contact information) being stored during the data collection phase of the project.

☐ I wish to receive a summary of the findings of this research.

I consent [automatically dated and tied to the email address of the participant]
I do not consent, I do not wish to participate

The ethics of this research has been reviewed by the ELMPS inter-departmental ethics committee at the University of York. If you have any concerns about the research, you can contact Tony Royle the Chair of the ELMPS committee elmps-ethics-group@york.ac.uk.