Uber-careful: Implications of Modern "Gig Economy" Litigation for the Employer's Common Law Duty of Care

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"Gig economy" litigation and the reach of employment rights

Over the past five or so years, the expression and phenomenon of the "gig economy," that is, a labour market characterised by short-term contracts or freelance work rather than permanent contracts of employment, have rapidly moved from novelty to prevalence. This movement has brought with it challenges for courts and businesses alike.

Individuals who undertake work in the "gig economy" have been characterised and treated by the organisations providing the work as "independent contractors". As a result, they have been considered to fall outside legislation conferring employment rights and protections.

Since 2016, the courts of England and Wales have seen a great deal of litigation over this issue. The transportation company, Uber,[1] was the first respondent to such claims brought in the Employment Tribunals and which are now furthest through the court structure of all the gig economy cases.[2] The case of *Aslam & Farrar v Uber BV*[3] was recently before the Court of Appeal, which upheld the decision of the Employment Tribunal and Employment Appeal Tribunal ("EAT") that the drivers are not independent contractors but rather "workers". Subject to a further and final appeal to the Supreme Court, the outcome of the case will affect at least 50,000 Uber drivers in this jurisdiction and may well have an analogous effect upon Uber drivers in other cities.

Both the Employment Tribunal and the EAT have determined that the claimant Uber drivers, Yaseen Aslam and James Farrar, whose legal action is treated as representative of the claims of multiple other (named) drivers, are "workers" within the meaning of that term as set out in the Employment Rights Act 1996 ("the 1996 Act") s.230(3)(b). That is, they are individuals who have entered into or work under any other contract, other than a contract of employment, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

The legislative scheme differentiates between "workers" and "employees" since the latter, for the purpose of rights conferred by the 1996 Act, are individuals who have entered into or work under a contract of employment, whether oral or in writing. "Contract of employment" is defined as a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing. "Contract of service" is not defined, leaving the determination of the question of whether any particular arrangement amounts to such a contract or a contract of employment, for the courts, applying the traditional tests such

[1] Uber was found to be a provider of transportation services by the Court of Justice of the European Union in *Asociación Profesional Élite Taxi v Uber Systems Spain SL* (C-434/15) EU:C:2017:981; [2018] Q.B. 854 at [37]–[40].

[2] The case of *Dewhurst v Citysprint* [2017] 1 WLUK 16 did not proceed to the Employment Appeal Tribunal. The claim brought by 50 Deliveroo riders in the Employment Tribunals was settled on 29 June 2018 (see *https://www.leighday.co.uk/News/News-2018/June-2018/Deliveroo-pays-out-in-employment-rights-claim#* [accessed 22 January 2019].

[3] *Aslam & Farrar v Uber BV* [2018] EWCA Civ 2748 ; [2018] 12 WLUK 365.

as whether there is mutuality of obligation, a requirement of personal service, control and whether the terms are consistent with the agreement being a contract of employment. Some of these concepts have traditionally been referred to as the dominant purpose test, the control test and the integration test. Courts are obliged to consider all the circumstances: *Autoclenz Ltd v Belcher*,[4] and there is no single key with which to unlock the words of the statute in every case: *Bates van Winkelhof v Clyde & Co LLP* at [38]–[39] per Baroness Hale PSC.[5] Where personal service is lacking (because the contract provides for a genuine right on the part of the individual to send a substitute to perform the work[6]) or there is no mutuality of obligation, there will be no contract of employment.

Employees are entitled to the full gamut of employment rights and protections. In contrast, independent contractors have no employment rights as they are considered sufficiently capable of protecting their own interests without the need for Parliament's assistance. "Worker" status falls in between these two extremes, entitling workers to some, but not all, protections. The 1996 Act is drafted such that every employee is a worker, though not every worker will be an employee.

It has been held that the relationship between Uber drivers and Uber London Ltd (the holder of the required Private Hire Vehicle Operator's Licence in respect of the London area) is not one of principal and agent where the principals (Uber drivers) enter into a separate contract with each passenger as and when they agree to take a trip, as Uber (the purported agent) has contended. Instead, Uber drivers are integrated into the Uber business of providing transportation services, marketed as such, such arrangements being inconsistent with the drivers acting as separate businesses on their own account as independent contractors.[7] As a result, it has been held that Uber drivers undertake to perform personally their driving work or service (it is not in dispute that login details for their driver accounts cannot be shared) "for" Uber which cannot be a client or customer of any profession or business undertaking carried on by the drivers and that the drivers do not, by driving, carry out any such profession or business on their own account.

This finding was confirmed by the Tribunals' application of the control test, which, in other contexts, is also the basis for a finding of vicarious liability on the part of employers. The Employment Tribunal found, and the EAT and Court of Appeal upheld (with a slightly different emphasis), that Uber exercises control over its drivers by carrying out interviews and an induction process, by preventing drivers from having access to passenger details or providing their details to passengers, by resolving passenger complaints without recourse to the drivers, by having previously provided a guaranteed earnings scheme for new drivers, by indemnifying drivers against fraud, by meeting cleaning costs, by requiring that drivers accept most of the trip requests allocated to them and by operating a ratings system and taking an associated performance management approach to this.[8]

Whilst it is a trite proposition that each case will turn on its own facts, *Uber* appears to mark the start of a jurisprudential trend of finding that individuals who undertake work in the "gig economy" are "workers" rather than independent contractors. This has been the case in respect of cycle couriers specialising in the delivery of medical supplies,[9] cycle couriers more generally[10] and minicab drivers.[11]

In the world of employment rights these findings are significant for claimants. "Worker" status entitles them to such benefits as the right to be paid minimum wage, the right to holiday pay and protection from being subjected to a detriment (including dismissal) for blowing the whistle. Some ink has been spilled in relation to the possible cost consequences for employers of it being found that people they treated as

[4] *Autoclenz Ltd v Belcher* [2011] UKSC 41; [2011] I.C.R. 1157.
[5] *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32; [2014] 1 W.L.R. 2047.
[6] The right of substitution must be genuine and reasonably unfettered. See *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29 at [34] per Lord Wilson.
[7] *Aslam & Farrar v Uber* [2017] 11 WLUK 238; [2018] I.C.R. 453 EAT at [109]. See also the judgment of the majority of the Court of Appeal at [2018] EWCA Civ 2748 at [95].
[8] *Aslam & Farrar v Uber* [2017] 11 WLUK 238; [2018] ICR 453 EAT at [113] and [2018] EWCA Civ at [96].
[9] *Dewhurst v Citysprint UK Ltd* ET/220512/2016, 5 January 2017 Employment Judge Wade.
[10] *Gascoigne v Addison Lee Ltd* ET/2200436/2016, 2 August 2017 Employment Judge Wade.
[11] *Lange v Addison Lee Ltd* ET/2208029/2016 Employment Judge Pearl, upheld on appeal to the EAT UKEAT/0037/18/BA.

independent contractors are in fact the beneficiaries of such rights, and in relation to whether such costs are likely to be passed on to the consumer.

The question which has received comparatively less consideration is that concerning the impact on organisations' other liabilities which do not immediately (unless unmet) sound in pay-outs to workers. In particular, what do the early outcomes of the "gig economy" litigation mean for the employer's common law duty of care to these newly formally-anointed "workers"?

Employers' liability: Existence of the duty of care

Health and safety legislation neatly side-steps the complications which have attended the determination of who is entitled to which employment rights. The Health and Safety at Work Act 1974 for example, commences by stating that the provisions of Pt I shall have effect with a view to "securing the health, safety and welfare of *persons at work*" (emphasis added). Section 3 of the 1974 Act goes on to impose a duty upon both employers and self-employed persons to conduct their undertakings in such a way as to ensure, so far as is reasonably practicable, that persons not in their employment but who may be affected thereby are not exposed to risks to their health and safety. This clearly imposes a duty upon employers to protect the health and safety of those who are self-employed but nonetheless affected by the employer's business.

The position at common law is slightly less clear.

The liability of an employer to its employees in negligence is, of course, merely a species of the general law of negligence.[12] Hence, applying first principles, an employer only owes a common law duty of care to an employee where the generally applicable tests for recognising such a duty have been satisfied, namely: (i) foreseeability; (ii) proximity; and (iii) that it is fair, just and reasonable for a duty to be imposed: *Caparo Industries Plc v Dickman*.[13] More recently, it has been confirmed that this threefold test comprises little more than labels to attach to features of situations which the law recognises as giving rise to a duty of care.[14] That is, there is no single test which can be applied in all cases in order to determine whether a duty of care exists and instead, the law adopts an approach based, in the manner characteristic of the common law, on precedent, and on the development of the law incrementally and by analogy with established authorities.[15]

This latterly-reinforced view of the Supreme Court suggests the possibility, indeed, the likelihood of an expansion of employers' liability at common law in the context of personal injury, commensurate with the expansion of rights and protections for "gig economy" workers in the context of employment law. That is, if there was ever any serious doubt, it now appears inevitable that courts will recognise the that employers owe a duty of care to those who are not, strictly speaking, "employees" as such but who would fall within the definition of "worker" in the employment context.

This is not simply the result of the influence of analogous developments in employment law. On the contrary, the seeds of such inevitability were likely sown in existing personal injury jurisprudence.

It has been said that the common law duty of care owed by the employer is peculiar to the employer-employee relationship and that, in general, it is not owed to those who are not employees. However, on ordinary principles there has nevertheless always existed the normal duty to show reasonable care for that over which the defendant (provider of work) has control. In *Inglefield v Macey*,[16] the High Court held that although the plaintiff was an independent contractor, in circumstances where the defendant provider of work had supplied the necessary equipment, as a matter of principle, the defendant owed a

[12] *White v Chief Constable of South Yorkshire Police* [1999] 2 A.C. 455 at 505 per Lord Hoffmann.
[13] *Caparo Industries Plc v Dickman* [1990] 2 A.C. 605 at 617–618 per Lord Bridge.
[14] *Michael v Chief Constable of South Wales Police* [2015] UKSC 2 at [106] per Lord Toulson.
[15] *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4 at [21] per Lord Reed.
[16] *Inglefield v Macey* [1967] 1 WLUK 239; (1967) 2 K.I.R. 146.

duty to take care regarding the equipment with which the plaintiff had been supplied. The High Court further accepted that the defendant owed a duty at least to warn the plaintiff if he was setting him to work at some place which was dangerous, of conditions of which the plaintiff might be unaware and of which the defendant was aware.[17]

Similarly, while, at the level of general principle, it has been held that he or she who engages an independent contractor ("the Lump") does not owe the duty to the contractor: *Jones v Minton Construction*,[18] there have been other cases where courts have overcome this by recognising an independent contractor as an employee specifically in order to impose a duty of care: *Lane v Shire Roofing Co (Oxford) Ltd*.[19] In the latter case, the Court of Appeal expressly observed that when it comes to the question of safety at work, there is a real public interest in recognising the employer/employee relationship when it exists, because of the responsibilities that the common law and statute place on the employer.[20]

In other situations, following discussion in the case-law, Parliament, through legislation, has specifically extended the duty of care to particular classes of individual. An example of this is the case of Crown servants to whom the duty is owed by the Crown pursuant to the Crown Proceedings Act 1947 s.2(1)(b).

Previous incremental developments in employers' liability are also apparent in the fact of a duty being owed to an employee by a parent company, on ordinary principles of negligence. Relevant circumstances which have been said to justify the existence of a duty of care are: (1) that the business of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge of some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employee's protection.[21] These have been characterised as being simply an illustration of the way in which the *Caparo* "principles" may be satisfied between a parent company and the employee of a subsidiary.

Indeed, it has long been recognised that it is the fact of the employer's control and the employee's reliance on the employer which justify courts imposing a duty to take care to protect the employee from harm.[22] If control and resultant reliance form the basis of the existence and substance of the duty of care, it must follow that where an individual has been determined to be a worker on the basis of the "control test" the employer owes him or her some form of common law duty of care. As in the case of the duty owed to employees, the extent of the duty and the standard of care must vary depending upon the extent of control, or in other words, the facts of each case.

Extent and substance of duty of care owed to "gig economy" workers

The duty of care to "employees" has traditionally been said to comprise three "heads": the provision of safe staff; safe equipment; and a safe system of work.[23] However, these heads do not amount to separate duties, instead forming one duty within the law of negligence. Hence an employer would not escape liability simply because it may be difficult to assign its conduct to one of the three heads.[24]

Some of these traditional heads may be of less relevance to employers and workers involved in the "gig economy" in which individuals frequently carry out their work independently, without reference to any "staff", provide their own equipment in the form of a motor vehicle or bicycle which they have purchased themselves and do not have a particular place of work, instead carrying out their work on public roads

[17] *Inglefield v Macey* [1967] 1 WLUK 239; (1967) 2 K.I.R. 146 at 155.
[18] *Jones v Minton Construction* [1973] 1 WLUK 257; (1973) 15 K.I.R. 309.
[19] *Lane v Shire Roofing Co (Oxford) Ltd* [1995] 2 WLUK 281; [1995] I.R.L.R. 493.
[20] *Lane v Shire Roofing Co (Oxford) Ltd* [1995] 2 WLUK 281; [1995] I.R.L.R. 493 at 421 per Henry LJ.
[21] *Chandler v Cape plc* [2012] EWCA Civ 525; [2012] 1 W.L.R. 3111 at [80].
[22] *Clerk & Lindsell on Torts*, 22nd edn, [13-04].
[23] *Wilsons and Clyde Coal Co Ltd v English* [1938] A.C. 57 at 78 and 86 per Lord Wright and Lord Maugham respectively.
[24] *Clerk & Lindsell on Torts*, 22nd edn, [13-13].

and associated paths. However, it bears repeating that each case will turn on its own facts. Uber London Limited publishes a list of makes and models of vehicles which it will permit drivers to use to carry out its transportation services. It prohibits the use of vehicles manufactured before 2006.[25] If an employer's such list only permitted the use of vehicles which it knew or ought reasonably to have known to be unsafe, the use of one of which resulted in injury to a driver, it is difficult to see how the employer would not be found to be in breach of its duty of care to said driver.

This would represent a development beyond the scope of the most relevant legislation, namely the Employer's Liability (Defective Equipment) Act 1969, s.1(1) of which renders employers liable for injury suffered by an employee in the course of his or her employment in consequence of a defect in equipment *provided by his or her employer* for the purposes of the employer's business. However, it would be in keeping with the principle of incremental development of the common law of employers' liability.

More obviously applicable to the "gig economy" is the duty to provide a safe system of work. This obligation requires the employer to give such general safety instructions as a reasonably careful employer who has considered the problem presented by the work would give to his or her workers: *General Cleaning Contractors Ltd v Christmas* at 189 per Lord Oaksey.[26] However, depending upon the circumstances of any given case, it may also involve arranging the physical layout of the job, determining the sequence in which the work is to be carried out, the provision in proper cases of warnings and notices, and the issue of special instructions.[27] It has been held that while the duty to provide a safe system of work is not absolute, a high standard is exacted.[28] In contrast, it has also been held that where the operation is simple and the decision how it shall be done has to be taken frequently, it is natural and reasonable that it should be left to the worker on the spot.[29] However, if the system or mode of operation is prolonged, for example (even if not complicated), it is a matter for the employer to take responsibility and decide what system shall be adopted.[30]

Whether the obligation to prescribe a system of work is breached is therefore a question of fact. How it is answered depends upon the nature of the operation and whether it is one which requires proper organisation and supervision in the interests of safety.[31] Where there is such an obligation, its substance is to take reasonable steps to provide a system which will be reasonably safe, having regard to the dangers necessarily inherent in the operation.[32] A safe system of work will often require that the employer has undertaken an adequate risk assessment.[33]

The employer does not discharge its duty to provide a safe system of work simply by providing such a system. It must also take reasonable steps to see that the system is properly implemented.[34] This requires instruction of the employee in the system and supervising him or her in implementing it.[35] In sum, the employer must take reasonable care to see that the system is followed and it will always be a question of degree and of fact whether this has been done in a given case.[36]

It should be noted that the mere foreseeability of a risk to an individual worker does not give rise to breach of the duty of care if the particular risk is one which could be met by employees taking obvious precautions. This was made clear in the case of *Jaguar Cars Ltd v Coates*[37] where it was held that steps

[25] *Aslam v Uber BV* ET/2202550/2015 at [44].
[26] *General Cleaning Contractors Ltd v Christmas* [1953] A.C. 180; [1953] 2 W.L.R. 6.
[27] *Speed v Thomas Swift & Co Ltd* [1943] K.B. 557 at 563 per Lord Greene.
[28] *Winter v Cardiff RDC* [1950] 1 All E.R. 819 at 822 per Lord Porter.
[29] *Winter v Cardiff RDC* [1950] 1 All E.R. 819 at 823.
[30] *Winter v Cardiff RDC* [1950] 1 All E.R. 819 per Lord Oaksey.
[31] *Clerk & Lindsell on Torts*, 22nd edn, [13-21].
[32] *General Cleaning Contractors Ltd v Christmas* [1953] A.C. 180 at 195 per Lord Tucker.
[33] *Vaile v Havering LBC* [2011] EWCA Civ 246 at [30]; [2011] 3 WLUK 406.
[34] *Barcock v Brighton Corp* [1949] 1 K.B. 339 at 343; [1949] 1 All E.R. 251.
[35] *Clerk & Lindsell on Torts*, 22nd edn, [13-23].
[36] *Clerk & Lindsell on Torts*, 22nd edn, [13-23].
[37] *Jaguar Cars Ltd v Coates* [2004] EWCA Civ 337; [2004] 3 WLUK 132.

without a handrail did not pose a risk to those who used them with reasonable care.[38] In contrast, where the employer ought to realise that a work practice poses serious risk to employees, it bears the onus of showing that it was impractical to control or eliminate the risk. It does not discharge this onus simply by asserting that the cost of doing so would have been too high or that workers would not have adhered to any training. An employer may rely on such matters but will only discharge the onus upon it where they are supported by sufficient relevant evidence.[39]

Such theoretical principles call to be tested by a practical example based in the "gig economy". In June 2017, an Australian Uber driver accelerated while his passenger was still in the process of stepping out of the driver's vehicle. This sent the passenger into the path of a bus by which he was hit and killed at the scene. The Uber driver was charged with negligent driving shortly thereafter. At the time of the accident, he had been working for Uber for 21 hours without a substantial break.[40]

On 27 October 2017, Uber's New South Wales operation introduced a system whereby drivers would be logged off from the Uber platform (thereby rendering them unable to accept any further driving jobs) automatically for a six-hour break after they had been logged on for 12 hours. Prior to 27 October 2017, Uber had developed guidelines advising drivers against continuing to work if they felt tired. There is no evidence that drivers were actively trained in these guidelines.

In hypothetical litigation over such a situation based in employer's liability in the courts of England and Wales, Uber might argue that the risks associated with driving while fatigued are so well-known and driving itself such a common task as to fall within Lord Oaksey's description of an operation that is "simple and the decision how it shall be done has to be taken frequently …" such that there was no obligation upon it to prevent drivers from undertaking any further driving after a certain number of hours' work. In addition, it may contend that the number of hours worked by a driver is a matter over which it expressly does not exercise control (which partly explains why Uber drivers had never contended that they were "employees" within the meaning of that expression as set out in the 1996 Act and pursuant to the common law tests cited above). That is, drivers are under no obligation ever to switch on the Uber app in order to be allocated driving jobs.

Such arguments would, however, ignore the principle that employers must allow for the fact that employees may be inadvertent or become heedless of risks, particularly where they are encountered on a regular basis.[41] In addition, they would also ignore the reality that drivers sign up to the Uber platform in the co-extensive interests of Uber in having drivers to provide the transportation services it offers to passengers and of drivers themselves in earning a living. Once drivers log on to the Uber app, as was found in *Aslam & Farrar v Uber BV*, they are obliged to accept most of the jobs allocated to them.[42]

The arguments would also ignore the reality that most Uber drivers rely upon driving work as their only, or principal, source of income. These realities underscore the words of Lord Oaksey in *General Cleaning Contractors Ltd v Christmas* which, although uttered in 1953, are no less relevant today in the context of a "gig economy" facilitated by technology which was unheard of to Lord Oaksey:

> "Workmen are not in the position of employers. Their duties are not performed in the calm atmosphere of a board room with the advice of experts. They have to make their decisions on narrow window sills and other places of danger and in circumstances in which the dangers are obscured by repetition."[43]

[38] The Court of Appeal also found that the trial judge had erred in equating his finding of foreseeability of risk with a finding that there was a duty to provide a handrail. The Court of Appeal held that one does not follow from the other, *Jaguar Cars Ltd v Coates* [2004] EWCA Civ 337 at [11].

[39] See *Clerk & Lindsell on Torts*, 22nd edn, [13-30].

[40] "Uber driver charged with negligent driving after passenger's death '21 hours into his shift'" *ABC news*, 5 December 2017 at *http://www.abc.net.au/news/2017-12-05/uber-driver-charged-with-negligent-driving-over-passenger-death/9226462* [accessed 22 January 2019].

[41] *Clifford v Charles H Challen & Son Ltd* [1951] 1 K.B. 495 at 498 per Lord Denning.

[42] *Aslam & Farrar v Uber BV* [2016] 10 WLUK 681; [2017] I.R.L.R. 4 at [51].

[43] *General Cleaning Contractors Ltd v Christmas* [1953] A.C. 180 at 190; [1953] 2 W.L.R. 6.

Conclusion

The foregoing demonstrates that the seeds of the extension of the concept of an employment relationship were planted within the common law of negligence concerning personal injury as early as the first half of the 20th century. Where courts have perceived an apparently unjust allocation of the consequences of inherently risky work to the person carrying it out, they have found an employment relationship which permits the re-allocation of that risk to the, typically better-resourced (and insured), provider of the work. Courts have generally done this however, on a piecemeal basis, as and when a particular injustice is perceived to arise on the specific facts of a given case. The recent "gig economy" litigation in the field of employment rights, appears to have, relatively suddenly, extended the duty of care to a substantial class of workers. The latter's classification as "workers" within employment legislation is the result of the exercise by the employer of significant control over the manner in which their work is carried out, the very same control which courts have historically accepted as the basis for the imposition of a duty of care for the welfare of workers.