

**A PRIME OPPORTUNITY FOR TORT LAW
DEVELOPMENTS: LIABILITY ISSUES RELATED TO
AMAZON’S DELIVERY SERVICE PARTNER PROGRAM**

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I. INTRODUCTION

Since 2015, there have been more than sixty accidents involving Amazon delivery contractors resulting in serious injuries, with ten of those crashes causing deaths.¹ Among those killed in the Amazon crashes was a nine-month-old girl, Gabrielle Kennedy.² Gabrielle’s mom, Ellen Kennedy, was driving to drop off Gabrielle at daycare before heading to work, when a box truck rushing to deliver Amazon’s packages rear-ended her car.³ The driver claimed that he was running late, and, in his haste, he failed to see Ellen Kennedy’s Jeep.⁴ This crash killed baby Gabrielle, who was in the back strapped in her car seat.⁵ At the time of the accident, Ellen Kennedy was unaware that the driver was delivering packages for Amazon; she would not discover this fact until months later.⁶ The driver was charged with aggravated driving to endanger and ultimately went to jail.⁷ His position as a delivery driver paid around \$600 a week, and he could not afford a lawyer.⁸ The driver received no help from his delivery company or Amazon.⁹ With seemingly no one able to compensate them for their loss, Gabrielle’s family

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¹ Patricia Callahan, *Amazon Pushes Fast Shipping but Avoids Responsibility for the Human Cost*, N.Y. TIMES (Sept. 5, 2019), <https://www.nytimes.com/2019/09/05/us/amazon-delivery-drivers-accidents.html> [<https://perma.cc/G2FQ-7T93>].

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

did not bring a suit against the driver or his company, which had filed for bankruptcy.¹⁰

Under a traditional theory of tort liability, an employer is vicariously liable for injuries caused by an employee acting within the scope of his employment.¹¹ Amazon, however, has managed to skirt this liability by characterizing its delivery drivers as independent contractors, even in the most egregious cases.

These devastating injuries were no doubt caused by drivers delivering Amazon's packages, but those injured, and their loved ones, cannot obtain compensation from Amazon. In the instances where claims were filed, Amazon avoided liability through its system of independent delivery partners.¹² This held true even when Amazon was the entity in control of the schedule and pay of individual "independently contracted" drivers.¹³ Further, individuals injured in accidents with Amazon delivery drivers are often unaware that the person responsible is associated with Amazon due to the use of unmarked vans and trucks, as was the case with Gabrielle's mom.¹⁴ By structuring its delivery logistics system with localized delivery partners and independent contractors, Amazon has created a two-fold shield from liability. This liability avoidance strategy has legal implications that are significant, far-reaching, and may be devastating to the often-blameless people involved in these accidents.

As Amazon continues to push the limits of fast delivery, promising same-day delivery soon, the pressure on drivers has never been greater.¹⁵ While Amazon continues to pressure drivers for speedier deliveries, it is simultaneously avoiding the repercussions of that speed. While Amazon's interest in avoiding legal liability is certainly an understandable goal for a business venture, it seems increasingly likely that the law will evolve to respond to the changing nature of business relationships in the modern world. This will include addressing concerns that companies like Amazon can utilize existing legal doctrines and advances in technology to derive a benefit from the conduct of delivery drivers while avoiding responsibility for injuries caused to blameless third-parties.

This article will explore the history and development of Amazon as an enterprise and will explore both the structure of Amazon's delivery

¹⁰ *Id.*

¹¹ *Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1040 (Utah 1991).

¹² Callahan, *supra* note 1.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

logistics scheme and the resulting legal issues that arise from this system. This article will also examine the traditional theories of liability that apply in circumstances involving commercial delivery drivers. Additionally, this article will address why the current Amazon business model for deliveries presents a unique problem for the existing legal framework and will examine various alternative theories that could be employed to propose a solution to attribute liability in a manner more in line with the traditional objective of the tort law system.

II. AMAZON'S DEVELOPMENT

A. *Amazon's Development from an Online Book Retailer to One of the Largest Worldwide Business Operations*

After graduating from Princeton University with degrees in computer science and electrical engineering, Jeff Bezos began working on Wall Street.¹⁶ In 1994, Bezos quit his job as a hedge fund executive and founded Amazon after learning that web usage was growing at 2,300% per year.¹⁷ Bezos strove for a business plan that would allow him to capitalize on this growth.¹⁸ After mulling over which products to sell, he finally settled on books because of the vast number of titles available.¹⁹ With so many items, Bezos was able to quickly build an online store.²⁰

¹⁶ Taylor Locke, *From Jeff Bezos to Mark Cuban: What some of the world's richest billionaires studied in college*, CNBC (Feb. 6, 2020), <https://www.cnbc.com/2020/02/06/what-jeff-bezos-mark-cuban-warren-buffett-studied-in-college.html>; See Emmie Martin, *Jeff Bezos Hasn't Always Had the Golden Touch: Here's What the Amazon Founder was Doing in His 20s*, CNBC: MAKE IT (Aug. 2, 2017) <https://www.cnbc.com/2017/08/02/what-amazon-billionaire-jeff-bezos-was-doing-in-his-20s.html> (discussing Bezo's work on Wall Street).

¹⁷ Michael Grothaus, *A rediscovered 1997 Video Reveals why Jeff Bezos Chose Books and not CDs to be Amazon's First Product*, FAST COMPANY (Nov. 13, 2019), <https://www.fastcompany.com/90430303/a-rediscovered-1997-video-reveals-why-jeff-bezos-chose-books-and-not-cds-to-be-amazons-first-product> [https://perma.cc/L446-CBQC].

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

Amazon opened for business on July 25, 1994, and grew very quickly.²¹ Bezos' motto was "Get Big Fast."²² He argued that growing the company quickly was imperative to succeeding as an online retailer.²³ By the end of 1996, Amazon reached 180,000 customer accounts and had already earned \$15.7 million in revenues, but it was still not profitable.²⁴ Bezos said that the company was going to be unprofitable for a long time, and that was their strategy.²⁵ In May 1997, Amazon went public and raised \$54 million on the NASDAQ market, allowing it to expand its business even further.²⁶ By the end of the century, Amazon had expanded well beyond its beginning as a book retailer and sold many items, including CDs, video games, and toys.²⁷ Despite the expansion, the company did not realize its first full year profit until 2003.²⁸

In 2000, Amazon began allowing third parties to sell their products on its website.²⁹ Amazon Marketplace allows vendors to sell merchandise, and Amazon fills the orders and pays a referral fee to the sellers.³⁰ The referral fee is typically around 15%, though it varies depending on the type of item.³¹ Amazon Marketplace allows the average person to take advantage of Amazon's web traffic, and it provides Amazon with extra revenue. In the

²¹ Lydia DePillis & Ivory Sherman, *Amazon's Extraordinary Evolution*, CNN: BUSINESS (Feb. 3, 2021), [cnn.com/interactive/2018/10/business/amazon-history-timeline/index.html](https://perma.cc/ZG83-FMHH) [<https://perma.cc/ZG83-FMHH>].

²² Mark Hall, *Amazon.com*, ENCYCLOPEDIA BRITANNICA (Apr. 9, 2020), <https://www.britannica.com/topic/Amazoncom> [<https://perma.cc/9X8S-YWKW>].

²³ *Id.*

²⁴ *Id.*

²⁵ Josh Spiro, *The Great Leaders Series: Jeff Bezos, Founder of Amazon.com, Inc.* (Oct. 23, 2009), <https://www.inc.com/30years/articles/jeff-bezos.html> [<https://perma.cc/Y9ZF-Q23M>].

²⁶ Matthew Johnston, *Investing in Amazon Stock (AMZN)*, INVESTOPEDIA, <https://www.investopedia.com/articles/investing/082715/if-you-had-invested-right-after-amazons-ipo.asp#:~:text=Amazon.com%20Inc.,That's%20more%20than%20120%2C000%25%20growth> [<https://perma.cc/7RU3-32LR>] (last visited Oct. 6, 2021).

²⁷ Hall, *supra* note 22.

²⁸ Spiro, *supra* note 25.

²⁹ DePillis & Sherman, *supra* note 21.

³⁰ Hall, *supra* note 22.

³¹ *Marketplace Commission Rates Comparison: Amazon, eBay and Walmart (2021 Update)*, ZENTAIL, <https://www.zentail.com/blog/marketplace-commission-rates-comparison-jet-com-walmart-amazon-ebay> [<https://perma.cc/7USZ-QVDN>] (last visited Mar. 23, 2021).

last quarter of 2020, 55% of purchases on Amazon were attributable to third-party sales.³²

From the beginning, Bezos claimed that Amazon was a technology company, not an online retailer.³³ In 2002, he proved this when he expanded Amazon even further by launching Amazon Web Services (AWS).³⁴ AWS began by offering data on internet traffic patterns, but in 2006, it turned into a cloud computing company that rents out computer processing power and storage space.³⁵ Amazon was the first company to provide a cloud infrastructure service,³⁶ and it currently has 33% of the cloud market share.³⁷

One of Amazon's biggest successes is Amazon Prime, which began in 2005.³⁸ Prime members pay an annual fee (\$79 in 2005 and \$119 today) in return for unlimited two-day shipping.³⁹ Tens of thousands of people joined Prime on its launch day, and 80% of them were still members ten years later.⁴⁰ The growth of Prime members was steady until 2011, when Amazon added access to Prime Video to its Prime membership.⁴¹ At this point, Prime

³² Daniela Coppola, *Share of paid units sold by third-party sellers on Amazon platform as of 3rd quarter 2021*, STATISTA (Nov. 10, 2021), <https://www.statista.com/statistics/259782/third-party-seller-share-of-amazon-platform/> [<https://perma.cc/ZWC2-NJAD>].

³³ Hall, *supra* note 22.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Ron Miller, *How AWS Came to be*, TECHCRUNCH (Jul. 2, 2016, 11:00 AM), <https://techcrunch.com/2016/07/02/andy-jassys-brief-history-of-the-genesis-of-aws/#:~:text=AWS%20was%20first%20to%20market,share%2C%20at%20least%20for%20now> [<https://perma.cc/G7J7-YUJJ>].

³⁷ *Cloud Market Growth Rate Nudges up as Amazon and Microsoft Solidify Leadership*, SYNERGY RESEARCH GROUP (Oct. 29, 2020), <https://www.srgresearch.com/articles/cloud-market-growth-rate-nudges-amazon-and-microsoft-solidify-leadership> [<https://perma.cc/F7KG-8V9K>].

³⁸ Jason Del Rey, *The Making of Amazon Prime, the Internet's Most Successful and Devastating Membership Program*, VOX, (May 3, 2019, 6:00 AM), <https://www.vox.com/recode/2019/5/3/18511544/amazon-prime-oral-history-jeff-bezos-one-day-shipping> [<https://perma.cc/APG2-AEQK>].

³⁹ *Id.*

⁴⁰ Hayley Tsukayama, *What Amazon Learned from a Decade of Prime*, WASH. POST (Feb. 3, 2015, 7:01 AM), <https://www.washingtonpost.com/news/the-switch/wp/2015/02/03/what-amazons-learned-from-a-decade-of-prime/> [<https://perma.cc/MBY5-Y49A>].

⁴¹ *Id.*

membership skyrocketed.⁴² Currently, there are more than 100 million Prime members worldwide.⁴³

Another piece of technology created by Amazon was the Kindle, which Amazon began selling in 2007.⁴⁴ The Kindle was a novel e-reader that allowed people to buy books and read them right on the device.⁴⁵ Amazon also created a publishing line, Amazon Encore, which allowed people to publish their e-books, and Amazon Publishing, which developed and published its titles.⁴⁶ The e-reader shook up the online book market, and by 2011, Kindle e-books were outselling all printed books on Amazon.⁴⁷ Major publishers now considered Amazon to be a competitor rather than another online bookseller.⁴⁸

B. Exploring What Made Amazon Successful and Allowed it to Grow into the World's Largest Online Retailer

Amazon's ventures did not stop. They have proven to be successful in many different industries. The company's success can be attributed to four guiding principles: customer obsession rather than competitor focus, passion for invention, commitment to operational excellence, and long-term thinking. Since Amazon's beginning, Bezos has sustained these principles.

According to Bezos, customer focus is the most important principle,⁴⁹ which aligns with having a passion for invention. Being customer focused allows Amazon to be proactive and innovative.⁵⁰ Bezos says, "[i]f you're competitor-focused, you have to wait until there is a competitor doing something. Being customer-focused allows you to be more pioneering."⁵¹ Amazon does not shy away from entering new markets and doing things differently. It has many failed ventures, including its attempts to create an

⁴² *Id.*

⁴³ Del Rey, *The Making of Amazon Prime, the Internet's Most Successful and Devastating Membership Program*, *supra* note 38.

⁴⁴ Hall, *supra* note 22.

⁴⁵ Day One Team, *Kindle: A Year in Review*; THE AMAZON BLOG: DAYONE (Dec. 23, 2019), <https://blog.aboutamazon.co.uk/innovation/kindle-a-year-in-review>.

⁴⁶ Hall, *supra* note 22.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Marla Tabaka, *Amazon's 4 Keys to Success, According to Jeff Bezos*, INC. (Apr. 15, 2019), <https://www.inc.com/marla-tabaka/jeff-bezos-says-these-4-principles-are-key-to-amazons-success-they-can-work-for-you-too.html> [<https://perma.cc/5VGT-CBDY>].

⁵⁰ *Id.*

⁵¹ *Id.*

Amazon cellphone, a travel website, a music importer, and an online payment portal.⁵² Bezos noted that many of Amazon's failures occurred when they attempted to enter a market to compete with a current business.⁵³ Conversely, many of Amazon's greatest triumphs were services that were unheard of before Amazon unveiled them, including Amazon Prime and free, two-day shipping.⁵⁴

Operational excellence is key to implementing Amazon's current procedures and new inventions. Amazon is always seeking to utilize new technology to accomplish its goals. It collects and uses complex data, including which products customers buy or look at, where a customer lives, and whether the customer leaves reviews and feedback.⁵⁵ Using this information, combined with data from customers with similar characteristics, Amazon provides recommendations to persuade customers to buy a product.⁵⁶

Amazon also uses cutting-edge technology for its logistics. In 2012, Amazon acquired Kiva Systems, a company that makes robots that automate processes in large warehouses.⁵⁷ Soon after, Amazon brought the company inhouse, renaming it Amazon Robotics.⁵⁸ The robots are used to find and retrieve products from the warehouse and bring them to employees to be loaded onto trucks.⁵⁹ Kiva robots have increased productivity in Amazon

⁵² Rebecca Borison, *Here are 10 of Amazon's Biggest Failures*, THE STREET (Nov. 13, 2015, 10:35 AM), <https://www.thestreet.com/investing/stocks/here-are-10-of-amazon-s-biggest-failures-13364106>.

⁵³ Tabaka, *supra* note 49.

⁵⁴ Del Rey, *The Making of Amazon Prime, the Internet's Most Successful and Devastating Membership Program*, *supra* note 38.

⁵⁵ Bernard Marr, *Amazon: Using Big Data to Understand Customers*, BERNARD MARR & Co. (July 23, 2021), <https://www.bernardmarr.com/default.asp?contentID=712> [<https://perma.cc/58T8-2J23>].

⁵⁶ *Id.*

⁵⁷ Eugene Kim, *Amazon's \$775 Million Deal for Robotics Company Kiva is Starting to Look Really Smart*, BUS. INSIDER (June 15, 2016, 4:02 PM), <https://www.businessinsider.com/kiva-robots-save-money-for-amazon-2016-6> [<https://perma.cc/MX5V-NUH3>].

⁵⁸ Frank Tobe, *The Technology Gap Left by Amazon's Acquisition of Kiva Systems*, THE ROBOT REP. (Apr. 13, 2016), <https://www.therobotreport.com/the-technology-gap-left-by-amazons-acquisition-of-kiva-systems/> [<https://perma.cc/7AT8-VLHM>].

⁵⁹ Jason Del Rey, *How Robots are Transforming Amazon Warehouse Jobs—for Better and Worse*, VOX (Dec. 11, 2019, 8:00 AM), <https://www.vox.com/recode/2019>

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warehouses by 300-400%.⁶⁰ Amazon also reduces shipping costs and increases efficiency by using technology to ship products from the Amazon warehouse, where the shipping price will be the lowest, even if it is not necessarily the closest warehouse to the customer.⁶¹ In the final stage of delivery from the warehouse to the customer's home, what Amazon calls the "last mile," the drivers' routes are automated to maximize efficiency.⁶²

All of these operations take time to implement, and Amazon does not make big changes on a whim. Instead, it employs long-term strategies. Bezos estimates that Amazon has a five to seven year timeframe before a new idea is tested and implemented.⁶³ He compares this to other companies, which might have two-to-three year timeframes.⁶⁴ Fully vetting ideas before implementing them saves them from financial disasters.⁶⁵

Amazon's core principles have allowed it to become a global powerhouse, with sales continuing to rise every year.⁶⁶ The company has over one million employees,⁶⁷ services fifty-eight countries, and reaches 1.2 billion people per year.⁶⁸ Amazon enjoys almost half of the e-commerce

/12/11/20982652/robots-amazon-warehouse-jobs-automation [https://perma.cc/6H9D-UT7E].

⁶⁰ *Id.*

⁶¹ See generally Jennifer McKeivitt, *Amazon Gambled on Expansion and won Lower Shipping Costs*, SUPPLY CHAIN DIVE (May 4, 2017), <https://www.supplychaindive.com/news/amazon-logistics-cost-3PL-fulfillment-gamble/441905/> (generally discussing Amazon's low shipping costs).

⁶² See generally Ben Stevens, *Amazon Rolls out Scout Delivery Robots to 2 More Cities*, CHARGED RETAIL (July 22, 2020), <https://www.chargedretail.co.uk/2020/07/22/amazon-rolls-out-scout-delivery-robots-to-2-more-cities/> (discussing the automation system that Amazon uses for delivery).

⁶³ Tabaka, *supra* note 49.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Daniela Coppola, *Amazon: Quarterly net Revenue 2007-2021*, STATISTA (July 19, 2021), <https://www.statista.com/statistics/273963/quarterly-revenue-of-amazoncom/> [https://perma.cc/3K53-VJWY].

⁶⁷ Aimee Picchi, *Amazon says it now has more than 1 Million Employees*, CBS NEWS (Oct. 30, 2020, 2:18 PM), <https://www.cbsnews.com/news/amazon-1-million-employees/> [https://perma.cc/ZP2H-6DWZ].

⁶⁸ Dan Alaimo, *Amazon Dominates International Marketplace Reach*, RETAIL DIVE (Sept. 10, 2018), <https://www.retaildive.com/news/amazon-dominates-international-marketplace-reach/531926/> [https://perma.cc/SL6W-9J86].

market share, representing 5 percent of total retail sales across the country.⁶⁹ It is also a big player in other markets. In fact, AWS accounts for half of Amazon's profit, despite making up only 13% of its sales.⁷⁰ Amazon's cloud computing software claims over a third of the market share of the worldwide cloud infrastructure services.⁷¹

III. AMAZON'S DELIVERY SERVICE PARTNER PROGRAM

A. Amazon's Delivery Practices Throughout its Development

Despite Amazon's success in many different industries, its claim to fame is still the ability to deliver products to customers fast and efficiently. Amazon has not always delivered its own packages, though; it only started doing so recently.⁷² In the beginning, it relied exclusively on other companies, such as FedEx, UPS, and USPS to deliver all its packages.⁷³ UPS initially supported Amazon's Prime membership two-day shipping, delivering almost two-thirds of all Amazon packages in the United States in 2015.⁷⁴ That same year, Amazon delivered just 3% of its own packages.⁷⁵ FedEx also supported Amazon with its Prime deliveries; however, it was briefly suspended after a lackluster performance during the 2019 holiday season.⁷⁶

⁶⁹ Ingrid Lunden, *Amazon's Share of the US E-commerce Market is now 49%, or 5% of all Retail Spend*, TECH CRUNCH (July 13, 2018, 12:57 PM), <https://techcrunch.com/2018/07/13/amazons-share-of-the-us-e-commerce-market-is-now-49-or-5-of-all-retail-spend/?guccounter=1> [<https://perma.cc/Y8G5-SKZ4>].

⁷⁰ Felix Richter, *Cloud Business Drives Amazon's Profits*, STATISTA (Apr. 26, 2019), <https://www.statista.com/chart/9174/amazon-operating-profit> [<https://perma.cc/MT6J-6C7P>].

⁷¹ Lundeen, *supra* note 69.

⁷² Jay Greene, *Amazon's big Holiday Shopping Advantage: an in-house Shipping Network Swollen by Pandemic-Fueled Growth*, THE WASH. POST (Nov. 27, 2020), <https://www.washingtonpost.com/technology/2020/11/27/amazon-shipping-competitive-threat/> [<https://perma.cc/4HU3-GH8P>].

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ George Paul, *Amazon is suspending FedEx amid a slip in delivery performance*, BUS. INSIDER (Dec. 18, 2019, 9:25 AM), <https://www.businessinsider.com/amazon-suspends-fedex-ground-from-prime-2019-12> [<https://perma.cc/5E8H-XFMK>].

Amazon used information that it acquired from these companies to push them out and begin shipping more products on their own.⁷⁷ For example, UPS often shared information and data with Amazon executives to sell them on its business.⁷⁸ In turn, Amazon used this data to support its own shipping efforts.⁷⁹ As Amazon began to ship more of its own products, UPS began to share less information.⁸⁰

B. Amazon's Current Delivery Practices

In 2019, Amazon ramped up its own delivery efforts, delivering half of its own packages in the United States, compared to just 20% of its own packages in 2018.⁸¹ Morgan Stanley predicted Amazon will be delivering 65% of its own orders by 2022, surpassing both FedEx and UPS in the total number of packages delivered.⁸² Amazon can deliver more packages with a smaller fleet because it uses its own resources to deliver packages in urban areas, where there is a higher population density.⁸³ Just 11% of Amazon's deliveries are to rural areas, compared to roughly 25% of FedEx and UPS's deliveries.⁸⁴ Delivering its own packages is still costing Amazon more money than using other companies for delivery, but the cost is worthwhile for Amazon because it is one step closer to controlling the delivery process from start to finish.⁸⁵

⁷⁷ Greene, *supra* note 72.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Michael Sheetz, *Watch Out, UPS. Morgan Stanley Estimates Amazon is Already Delivering Half of its Packages*, CNBC (Dec. 12, 2019, 2:43 PM), <https://www.cnbc.com/2019/12/12/analyst-amazon-delivering-nearly-half-its-packages-instead-of-ups-fedex.html> [<https://perma.cc/HBB4-Z4ZH>].

⁸² Emma Cosgrove, *Amazon Logistics parcel volume will surpass UPS and FedEx by 2022, Morgan Stanley says*, SUPPLY CHAIN DIVE (Dec. 13, 2019), <https://www.supplychaindive.com/news/amazon-logistics-volume-surpass-ups-fedex-2022-morgan-stanley/569044/> [<https://perma.cc/TE4H-4KJB>].

⁸³ Rachel Premack, *The Postal Service is subsidizing Jeff Bezos' quest to turn Amazon into a delivery machine that competes with UPS and FedEx — but USPS can't break up with Bezos*, BUS. INSIDER (May 6, 2020, 2:49 PM), <https://www.businessinsider.com/amazon-usps-rural-packages-deliveries-2020-5>.

⁸⁴ Cosgrove, *supra* note 82.

⁸⁵ Nick Statt, *Amazon is delivering half its own packages as it becomes a serious rival to FedEx and UPS*, THE VERGE (Dec. 13, 2019, 3:21 PM),
(continued)

Amazon even has its own airline, Amazon Air, which operates at more than 35 airports across the United States.⁸⁶ Its main hub is at Cincinnati/Northern Kentucky International Airport, chosen for its central location.⁸⁷ Amazon Air launched in 2016 and began operations in 2017. It has over 70 planes that it uses to operate an estimated 100 flights per day.⁸⁸ Amazon leases most of its aircrafts, but in January 2021, the company took advantage of lowered prices due to the lack of air travel during the COVID-19 pandemic and purchased eleven Boeing 767-300 planes.⁸⁹ Five contractors share the operation of Amazon Air: Atlas Air, Air Transport International, Southern Air, Sun Country Airlines, and ABX.⁹⁰ A DePaul University study estimates that Amazon could have 200 aircrafts in its fleet by 2023.⁹¹ Amazon Air allows the company to have smaller warehouses and to avoid having to use a third party to ship its packages across the country.

Amazon also uses independent contractors to deliver packages in the last mile.⁹² Amazon Flex, which launched in 2015 and operates in approximately fifty cities, is an app-based program that allows drivers to deliver packages when it is convenient for them.⁹³ Drivers launch the app and choose whether

<https://www.theverge.com/2019/12/13/21020938/amazon-logistics-prime-air-fedex-ups-package-delivery-more-than-50-percent> [<https://perma.cc/37UM-QPHJ>].

⁸⁶ AMAZON AIR, <https://www.amazon.jobs/en/teams/airplanes> [<https://perma.cc/TYB3-XW38>] (last visited Apr. 2, 2021).

⁸⁷ Chris Wetterich & Erin Caproni, *Amazon to create \$1.5B air hub at CVG*, THE BUS. J.: CIN. BUS. COURIER (Feb. 1, 2017, 1:59 PM), <https://www.bizjournals.com/cincinnati/news/2017/01/31/amazon-to-create-1-4b-air-hub-at-cvg.html> [<https://perma.cc/B68V-UWL6>].

⁸⁸ Joseph P. Schwieterman & Jacob Walls, *Insights into Amazon Air 2020's Transportation Juggernaut*, DEPAUL UNIV. CADDICK INST. FOR METRO. DEV. 1, 2 (2020), <https://las.depaul.edu/centers-and-institutes/chaddick-institute-for-metropolitan-development/research-and-publications/Documents/Amazon%20Air%20Policy%20Brief%20final.pdf> [<https://perma.cc/B9PZ-M92S>].

⁸⁹ *Amazon buys its first planes to expand air network*, BBC NEWS (Jan. 6, 2021), <https://www.bbc.com/news/technology-55560414> [<https://perma.cc/76T9-D3HK>].

⁹⁰ Schwieterman & Walls, *supra* note 88, at 3.

⁹¹ *Id.* at 5.

⁹² Jake Alimahomed-Wilson, *Building Its Own Delivery Network, Amazon Puts the Squeeze on Drivers*, LAB. NOTES (Dec. 17, 2020), <https://labornotes.org/2020/12/building-its-own-delivery-network-amazon-puts-squeeze-drivers> [<https://perma.cc/Y8UZ-W6BW>].

⁹³ Annie Palmer, *Amazon Flex Drivers are Using bots to Cheat Their way to Getting more work*, CNBC (Feb. 9, 2020, 9:42 AM), <https://www.cnbc.com/2020/02/09/amazon-flex-drivers-use-bots-to-get-more-work.html> [<https://perma.cc/K7V6-JE2H>].

to accept delivery shifts.⁹⁴ If drivers accept a “block” of time to work, they drive to an Amazon fulfillment center to pick up the packages.⁹⁵ Drivers are responsible for their own expenses such as gas, tolls, insurance, and car maintenance.⁹⁶ Amazon provides insurance for Flex drivers beyond their personal insurance for any accidents that occur while they are delivering for Amazon Flex.⁹⁷

Flex drivers can earn eighteen to twenty-five dollar per hour and can also receive tips from customers.⁹⁸ Amazon advertised that 100% of tips went to drivers, but it was recently caught allocating tips toward drivers’ base pay rather than adding the tips on top of the base pay.⁹⁹ In February 2021 Amazon agreed to pay \$61.7 million to settle allegations by the Federal Trade Commission that it was misappropriating tips.¹⁰⁰

C. *An Explanation of Amazon’s Delivery Service Program*

In 2018, Amazon launched its Delivery Service Partner (DSP) program, which is available in the United States, Canada, the United Kingdom, Spain, Germany, Italy, Ireland, Brazil, and India.¹⁰¹ The DSP program allows individuals to create and manage their own team of delivery drivers.¹⁰² DSPs are individual companies that employ their own drivers, own their own assets, and control the day-to-day operations of their team.¹⁰³ Ultimately, the

⁹⁴ *Id.*

⁹⁵ Katie Schoolov, *What it’s really like to be an Amazon Flex delivery driver as Prime one-day shipping expands*, CNBC (Jun. 19, 2019 11:00 AM), <https://www.cnbc.com/2019/06/19/how-amazon-flex-delivery-drivers-get-paid-and-what-its-really-like.html> [<https://perma.cc/KMF2-F6YU>].

⁹⁶ *Id.*

⁹⁷ *Everything you need to know About Amazon Flex*, GRIDWISE (Nov. 3, 2020), <https://gridwise.io/everything-you-need-to-know-about-amazon-flex> [<https://perma.cc/77NB-NEEC>].

⁹⁸ Annie Palmer, *Amazon will pay \$61.7 million to settle claims it withheld tips from delivery workers*, CNBC (Feb. 3, 2021), <https://www.cnbc.com/2021/02/02/amazon-to-pay-61point7-million-in-ftc-driver-tipping-settlement-.html> [<https://perma.cc/Q5AD-M87C>].

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Frequently asked questions*, AMAZON, <https://logistics.amazon.com/marketing/faq> [<https://perma.cc/GN9Y-LN22>] (last visited Apr. 2, 2021).

¹⁰² *Id.*

¹⁰³ Todd Bishop, *Amazon offers its employees funding to quit and start their own package delivery customers*, GEEK WIRE (May 13, 2019, 10:37 AM),
(continued)

success or failure of a DSP depends on its management, but Amazon provides help to start up the company and allows DSPs to take advantage of Amazon's already established customer base.¹⁰⁴

DSP owners must apply and be accepted into the program.¹⁰⁵ Amazon says that even those without any experience in logistics can start their own business as a DSP.¹⁰⁶ Once accepted, they attend required trainings held by Amazon.¹⁰⁷ Amazon assists DSP owners by offering exclusive deals to get businesses up and running for around \$10,000 in total.¹⁰⁸ They also provide Amazon-branded vans and uniforms, Amazon devices, and discounts on business services, such as recruiting tools, legal support, insurance, and accounting software.¹⁰⁹ The vans available for DSPs to lease are just light enough to allow them and the drivers to escape Department of Transportation oversight.¹¹⁰ Once DSP owners establish their businesses, they are responsible for hiring, managing, and training all of their employees.¹¹¹ As of November 2020, Amazon had 1,700 DSP owners worldwide.¹¹²

Although the DSPs are companies independent of Amazon, Amazon still has significant control over them. DSP owners are limited to operating a maximum of forty vans to prevent the companies from unionizing and becoming large enough to gain leverage against Amazon.¹¹³ Amazon directs drivers' routes, controls the number of packages that are to be delivered on each route, tracks the drivers' progress in real time, and even calls drivers if

<https://www.geekwire.com/2019/amazon-offers-employees-funding-quit-start-package-delivery-companies/> [https://perma.cc/LWK3-FA4F].

¹⁰⁴ *Id.*

¹⁰⁵ *Frequently asked questions, supra* note 101.

¹⁰⁶ Elias Wolfberg, *Amazon Orders 20,000 vans for small businesses*, AMAZON: NEWS/TRANSP. (Sep. 7, 2018), <https://www.aboutamazon.com/news/transportation/amazon-orders-20-000-vans-for-small-businesses> [https://perma.cc/6JC3-PJ9D].

¹⁰⁷ *Frequently asked questions, supra* note 101.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Caroline O'Donovan & Ken Bensinger, *Amazon's Next-day Delivery has Brought Chaos and Carnage to America's Streets—but the World's Biggest Retailer has a System to Escape the Blame*, BUZZFEED NEWS (Sep 6, 2019, 5:14 PM), <https://www.buzzfeednews.com/article/carolineodonovan/amazon-next-day-delivery-deaths> [https://perma.cc/97A7-V2HN].

¹¹¹ *Frequently asked questions, supra* note 101.

¹¹² Greene, *supra* note 74.

¹¹³ Alimahomed-Wilson, *supra* note 92.

they fall behind schedule.¹¹⁴ Amazon requires that 99.9% of packages are delivered on time or else the DSPs risk having their contract with Amazon terminated.¹¹⁵ Despite all of this involvement in the deliveries, Amazon's contracts with DSPs require that the companies "defend, indemnify and hold harmless Amazon" for "all loss or damage to personal property or bodily harm including death."¹¹⁶

D. Explaining the Business Considerations that Motivate Amazon Creating the Delivery Service Partner Program

While Amazon is making efforts to bring most of its operations in-house, it is odd that it is relying more on third parties only for last-mile deliveries. In fact, Amazon actively encourages its employees to quit their jobs and start their own delivery businesses.¹¹⁷ They are offering up to \$10,000 and three months' pay to Amazon employees who quit their jobs and start their own package delivery company through Amazon's DSP program.¹¹⁸ This shift towards outsourcing last-mile deliveries is most likely attributable to Amazon not having to manage the drivers, the cost-savings of not having to pay their salaries, insurance, and other benefits, and most importantly, the liability that Amazon avoids.

Because all the DSP owners control their own employees, Amazon does not have to deal with many of the day-to-day operations, including hiring, firing, scheduling, and disciplining employees. Amazon still oversees the operations of these DSPs, but it is on a more macro level, essentially only intervening when necessary to correct their actions. As a result, Amazon does not have to hire as many employees to perform these deliveries or to oversee and manage the delivery drivers. Thus, Amazon saves money on their salaries and benefits.

Likely the most influential factor in Amazon's decision to start the DSP program is that Amazon is not liable for injury caused by drivers of vehicles operated by DSPs. Amazon's denial of liability for these accidents earned the company some negative publicity, which led to a letter from three United States senators to Jeff Bezos addressing these concerns and asking for clarity on the DSP program.

¹¹⁴ O'Donovan & Bensinger, *supra* note 110.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Bishop, *supra* note 103.

¹¹⁸ *Id.*

On August 31, 2019, BuzzFeed released an article lambasting Amazon for its delivery practices.¹¹⁹ It highlighted the story of an eighty-four year-old grandmother who was killed after being struck by a delivery driver employed by a DSP.¹²⁰ The victim's family sued Amazon, the DSP, and the driver for wrongful death, but Amazon was able to avoid liability because the DSP was not under the direction or control of Amazon.¹²¹ The DSP involved had previous safety concerns and had been cited by the Department of Labor for withholding pay from its drivers.¹²² The owner had several cocaine-related felonies and had previously declared bankruptcy.¹²³ Despite its spotty record, including the accident highlighted by the article, Amazon continued to use the DSP for its last-mile deliveries.¹²⁴ A week later, ProPublica and The New York Times released similar articles highlighting deaths caused by DSP drivers for which Amazon was able to avoid liability.¹²⁵

These articles caught the attention of three United States Senators. On September 12, 2019, Senators Richard Blumenthal, Sherrod Brown, and Elizabeth Warren wrote a joint letter to Jeff Bezos outlining their concerns with Amazon's delivery practices.¹²⁶ The Senators accused Amazon of using "evasive practices and moves to cut regulatory corners" by way of using DSPs for last mile deliveries.¹²⁷ They noted that Amazon repeatedly claimed

¹¹⁹ O'Donovan & Bensinger, *supra* note 110.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Patricia Callahan, *The Deadly Race: How Amazon Hooked America on fast Delivery While Avoiding Responsibility for Crashes*, PROPUBLICA (Sep. 5, 2019), <https://features.propublica.org/amazon-delivery-crashes/how-amazon-hooked-america-on-fast-delivery-while-avoiding-responsibility-for-crashes/> [<https://perma.cc/7S8H-C9H8>]; Patricia Callahan, *Amazon Pushes fast Shipping but Avoids Responsibility for the Human Cost*, THE NEW YORK TIMES (Sep. 5, 2019), <https://www.nytimes.com/2019/09/05/us/amazon-delivery-drivers-accidents.html> [<https://perma.cc/6QYA-YLM5>].

¹²⁶ Letter from Sen. Richard Blumenthal, Sen. Sherrod Brown, and Sen. Elizabeth Warren to Jeffrey Bezos (Sep. 12, 2019), https://www.blumenthal.senate.gov/imo/media/doc/2019_09_12%20-%20Letter%20to%20Amazon%20re%20Delivery%20Service%20Labor%20Violations_FINAL.pdf [<https://perma.cc/69FG-S2XU>].

¹²⁷ *Id.* at 1.

that it is not liable for accidents caused by DSPs; however, Amazon's "aggressive managerial style" contributes to unsafe conditions faced by drivers and directly leads to worker abuse and vehicle accidents.¹²⁸

Despite the admonishment from these Senators, Amazon is not breaking any laws by using DSPs for their deliveries. Recently, Amazon has shown more of a willingness to hold DSPs accountable for safety and labor violations. In February 2020, Amazon cut ties with many of these companies, citing concerns for safety, performance, and working conditions.¹²⁹ This led to over 2000 drivers losing their jobs and the closing of at least one delivery company.¹³⁰ But Amazon's DSP program is still in place, and it continues to control the work of these companies while escaping liability for any accidents that occur.

IV. LIABILITY ISSUES RELATED TO AMAZON'S DELIVERY SERVICE PARTNER PROGRAM

In determining liability allocation in cases involving a motor vehicle collision caused by the negligence of a commercial driver, the primary consideration is the employment relationship between the driver and the company for which he was employed. This section will explore how liability is traditionally allocated in such cases. Specifically, this section will discuss different employment relationships a commercial driver may have with a company and how that relationship affects liability. Finally, this section will look at Amazon's employment relationship with its delivery drivers and explain how this relationship presents a problem for the application of the traditional methods for allocating liability.

A. Exploring the Liability Analysis that Would Apply in the Context of Injuries Caused by Delivery Drivers that are Employed Through More Traditional Models of Liability

When a commercial driver is involved in a motor vehicle collision, it is important to determine the employment relationship between the driver and

¹²⁸ *Id.* at 1-2.

¹²⁹ Taylor Soper, *Amazon stops working with several small delivery contractors, forcing companies to lay off hundreds*, GEEK WIRE (Feb. 14, 2020, 3:11 PM), <https://www.geekwire.com/2020/amazon-stops-working-several-small-delivery-contractors-forcing-companies-lay-off-hundreds/> [<https://perma.cc/3QSF-99WT>].

¹³⁰ Lindsey Bergeron, *Amazon ends Partnerships with Logistics Providers due to Safety Issues*, FOLEY SERVICES (Feb. 2020), <https://www.foleyservices.com/news/amazon-ends-partnerships-with-logistics-providers-due-to-safety-issues/> [<https://perma.cc/7ZKB-48CC>] (last visited Apr. 2, 2021).

the company for which he was performing work at the time of the incident. This classification is important because, if the driver is found liable for the collision, liability will be allocated on this basis. Where the relationship is categorized as one of an employee and employer, the employee will typically be considered an agent of the employer, and the employer will be held vicariously liable.¹³¹ Under the theory of vicarious liability, an employer can be held liable for the negligent acts of their employee when such acts are committed within the scope of the tortfeasor's employment.¹³² In contrast, where the driver is considered an independent contractor, the employer will typically not be liable for their negligent acts.¹³³

As each employment relationship may present unique characteristics, there is no exact definition of an employee or agent.¹³⁴ Instead, courts generally consider a number of factors to determine whether each individual relationship is one of employee/employer or merely an independent contractor.¹³⁵ The most significant factor is the determination of who has the right to control the work being performed.¹³⁶ The remaining factors include:

- (1) whether or not the one employed is engaged in a distinct occupation or business;
- (2) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (3) the skill required in the particular occupation;
- (4) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (5) the length of time for which the person is employed;
- (6) the method of payment, whether by the time or by the job;
- (7) whether or not the work is a part of the regular business of the employer;
- (8) whether or not the parties believe they are creating the relation of master and servant; and

¹³¹ RESTATEMENT (SECOND) OF AGENCY § 1 (AM. L. INST. 1958); RESTATEMENT (SECOND) OF AGENCY §219 (AM. L. INST. 1958); RESTATEMENT (THIRD) OF AGENCY §7.03 (AM. L. INST. 2006).

¹³² RESTATEMENT (SECOND) OF AGENCY § 219(1) (AM. L. INST. 1958).

¹³³ *Id.* § 2 cmt. b.

¹³⁴ *Id.* § 220 cmt. (1) c.

¹³⁵ *Id.* § 220(2).

¹³⁶ *Rich v. Brookville Carriers, Inc.*, 256 F. Supp. 2d 26, 27 (D. Me. 2003) (“Control is the most significant criterion when vicarious liability is the issue.”).

(9) whether the principal is or is not in business.¹³⁷

To get a better understanding of how the courts weigh these factors, it is best to turn to case law. In *Grange*, the court had to determine whether a delivery services driver, who negligently caused a collision, was an employee or an independent contractor.¹³⁸ The court first looked to the employment contract to determine whether it gave, or the employer assumed, the right to control how the work was performed.¹³⁹ The contract specified that the driver “shall be responsible for the manner and means of securing the end result” and the employer “shall exercise no direct control over Owner/Operator, nor the method or means used by Owner/Operator in the performance of such services.”¹⁴⁰ Along with who had the right to control, the court took into account that the driver had to provide his own vehicle, maintain his own insurance, pay all of his own operating costs, and independently satisfy conditions set by the customers.¹⁴¹ Following its analysis, the court concluded that the relationship was clearly one of an independent contractor.¹⁴²

Although there was evidence that (1) the employer required the driver to wear an I.D. badge indicating he was an owner/operator for the employer and (2) the employer required the driver to allow them to inspect his vehicle, the court still declined to recognize this as an employer-employee-relationship.¹⁴³ The court explained that an employer may exercise general supervision over an independent contractor without taking the work out of the hands of the contractor, therefore creating an employer-employee relationship.¹⁴⁴ These specific requirements fell into the category of general supervision because (1) customers required I.D. badges for security reasons and (2) inspecting drivers’ vehicles simply ensured drivers could carry out deliveries.¹⁴⁵

Aside from this common law test, a commercial driver may be deemed an employee under statutory law, regardless of whether the parties recognize their relationship as an employer-employee type. Where the employer is engaged in business involving interstate commerce and a commercial motor

¹³⁷ RESTATEMENT (SECOND) OF AGENCY § 220(2)(a)-(j) (AM. L. INST. 1958).

¹³⁸ *Grange Indem. Ins. Co. v. BeavEx, Inc.*, 804 S.E.2d 173, 174 (Ga. Ct. App. 2017).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 174-75.

¹⁴¹ *Id.* at 175.

¹⁴² *Id.*

¹⁴³ *Id.* at 175-76.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 175.

vehicle in connection with that business is provided to the driver by the employer, that driver will be considered an employee.¹⁴⁶

Determining whether a driver is an employee or independent contractor does not end the court's analysis. After a court categorizes the employment relationship, it must determine if the employer can be held liable. In the context of an independent contractor relationship, the court will look into whether there was any negligence by the employer that would make them directly liable for the collision. An employment relationship involving an employee and employer, however, only requires that the employee was working within the scope of his employment for liability to be present. The following sections will explore each of these situations in part.

1. How Liability is Allocated in Cases Involving Independent Contractor Delivery Drivers

Generally, an employer who hires an independent contractor is not liable for the negligent acts of the contractor or their employees.¹⁴⁷ The justification for this limitation on liability has commonly been that, because the employer has no right to control the work being done, liability should rest solely with the independent contractor.¹⁴⁸ The general rule, however, is subject to several exceptions, that it is only applied "where no good reason is found for departing from it."¹⁴⁹

The exceptions fall into three categories: (1) where the employer retains control of the work being done, including negligence in "selecting, instructing, or supervising the contractor"; (2) where the work is especially or inherently dangerous; and (3) where the employer is under a specific nondelegable duty.¹⁵⁰

¹⁴⁶ 49 C.F.R. § 390.5T (West) ("Employee . . . includes a driver of a commercial motor vehicle . . . including an independent contractor while in the course of operating a commercial motor vehicle").

¹⁴⁷ See *Georgia-Pacific Corp. v. Charles*, 479 So.2d 140, 145 (Fla. Dist. Ct. App. 1985) (holding that an employer was not liable for a collision involving an independent contractor even where the independent contractor's failure to use side reflectors was the proximate cause of the collision); See also *Mateo v. PGA Tour*, 2010 U.S. Dist. LEXIS 16934, *16 (D. Mass.); *Wilkins v. P.M.B. Systems Engineering*, 741 F.2d 795, 800 (5th Cir. 1984); *Richter v. Am. Aggregates Corp.*, 522 Fed. App'x 253, 260 (6th Cir. 2013); *Coffey v. Chevron U.S.A., Inc.*, 2017 U.S. Dist. LEXIS 169907, *13 (D. Wyo.).

¹⁴⁸ *Kleeman v. Rheingold*, 614 N.E.2d 712,715 (N.Y. 1993).

¹⁴⁹ *Logue v. United States*, 412 U.S. 521, 528 (1973).

¹⁵⁰ *Helton v. Avrio Group Surveillance Solutions, Inc.*, 5 F. Supp. 386, 404 (W.D.N.Y. 2014); RESTATEMENT (SECOND) OF TORTS § 409 cmt. b. (AM. LAW INST. 1965).

Before exploring these exceptions, it is important to note that, even where one of these exceptions applies, an employer will not automatically be found vicariously liable for the conduct of the independent contractor.¹⁵¹ Instead, the injured party must show that the employer's direct negligence was a proximate cause of their injuries.¹⁵²

a. Where the Employer Retains Control of the Work Being Done

One theory of liability that falls under this category is "negligent selection." Under this theory, an employer of an independent contractor may be liable to a third-party for its negligence in selecting the independent contractor for the job if the plaintiff can prove that: (1) the employer knew or should have known that the contractor was unfit for the position and could create a danger of harm; (2) that the unfitness was known or should have been known at the time of hiring; and (3) that the particular unfitness was the proximate cause of the injury.¹⁵³

In considering these elements, courts look to the particularities of a given case; however, there are some general guidelines. For instance, if a casual shipper of goods lacks knowledge of an independent contractor's incompetence, they have no duty to investigate whether the contractor is certified or uses safe highway equipment.¹⁵⁴ A duty to investigate the contractor's credentials arises, however, when the shipper regularly ships cargo that presents a highway hazard and is aware that some of the carriers operating on the highway are unlicensed.¹⁵⁵ Further, when considering whether the unfitness was the proximate cause of the injury, courts look to whether the damages caused by a contractor were related to the characteristic that made them unfit for the position.¹⁵⁶

b. Where the Work is Especially or Inherently Dangerous

Work can fall into the category of "especially or inherently dangerous" when a peculiar risk exists. Under this theory, an employer may be liable if: (1) the risk is foreseeable to the employer at the time of contracting, and (2) the risk is different from the ordinary risk associated with the type of work

¹⁵¹ *McComb v. Bugarin*, 20 F.Supp.3d 676, 682 (N.D. Ill. 2014).

¹⁵² *Id.*

¹⁵³ *Id.* at 683.

¹⁵⁴ *L.B. Foster Co. v. Hurnblad*, 418 F.2d 727, 730-31 (9th Cir. 1969).

¹⁵⁵ *Id.*

¹⁵⁶ *McComb*, 20 F. Supp.3d at 683 (citing cases where the contractors used unsafe equipment, were negligently hired, and the unsafe equipment was, later, the direct cause of an accident).

being done.¹⁵⁷ In determining whether the peculiar risk doctrine applies to a given case, a court will look to whether the employer had special reason to know that a contractor's activities would create a particular risk to others if special precautions were not taken.¹⁵⁸

In the case of independently contracted delivery drivers, this exception has little applicability. When presented with the issue, courts have uniformly declined to apply this exception.¹⁵⁹

c. Where the Employer is Under a Specific Nondelegable Duty

Under the nondelegable duty doctrine, an employer that owes a duty to others may not avoid responsibility by claiming to have delegated that duty to an independent contractor.¹⁶⁰ The duty may arise from statutory law, administrative law, or common law.¹⁶¹ One instance in which this doctrine may arise in the motor carrier setting is where the motor carrier is licensed under a regulatory body, making it subject to the regulatory power of that agency.¹⁶² Even where the motor carrier hires independent contractors to carry out its work, the contractors must abide by the rules of the agency; otherwise, their regulatory authority would be impaired.¹⁶³

2. How Liability is Allocated in Cases Involving Employee Delivery Drivers

If it has been determined that the negligent actor is an employee or agent, an employer can be held vicariously liable for their negligence under the

¹⁵⁷ *Donnelly v. SEPTA*, 708 A.2d 145, 148 (Pa. Commw. Ct. 1998).

¹⁵⁸ *Wilson v. Good Humor Corp.*, 757 F.2d 1293, 1305 (D.C. Cir. 1985) (holding that an employer of an independent contractor curbside ice-cream vendor could be liable for the wrongful death of a three-year old hit by a vehicle because the employer had previously made efforts to minimize the risk to children approaching the ice-cream vendor and now took no affirmative steps to minimize the risk).

¹⁵⁹ *Hood v. Azrael*, 175 A. 666, 667 (Md. 1934) (explaining that hauling and delivering sacks of coal could not be so inherently dangerous that the employer could be liable for a collision caused by the delivery driver).

¹⁶⁰ *Vargas v. FMI, Inc.*, 182 Cal. Rptr. 3d 803, 810 (Ct. App. 2015).

¹⁶¹ *Id.*

¹⁶² *Id.* at 811.

¹⁶³ *Id.* (holding that a motor carrier licensed by the Public Utilities Commission was subject to their regulations and if the independent contractor violated these regulations, the motor carrier should also be found liable (citing *Eli v. Murphy*, 248 P.2d 756, 599-600 (Cal. 1952)).

doctrine of *respondeat superior*.¹⁶⁴ Under this doctrine, an employee or agent must be acting within the course or scope of their employment for an employer to be found liable.¹⁶⁵

When determining what falls within the scope of one's employment, courts look not to what the employee was permitted to do, but instead, to whether their act was in furtherance of the employer's business.¹⁶⁶ The doctrine of *respondeat superior* is strictly applied, however, in that even if an employee deviates from his work to pursue his own errand, as long as he remains engaged in his employment duties or returns to its path, the employer will still be liable for his negligence.¹⁶⁷ For instance, in a case involving a collision caused by a meat delivery truck driver, the court found that the employee was acting within the scope of his employment even though he had not been permitted to make the delivery.¹⁶⁸ The court reasoned that, because the employee routinely used the vehicles to make deliveries and the delivery directly benefited the employer, his actions could be considered within the scope of his employment.¹⁶⁹

In another case involving a collision caused by a delivery driver employee, the court held that the employee was acting within the scope of his employment even when he deviated six blocks from his trip for a personal errand.¹⁷⁰ In *Leuthold*, an employee was directed to take a company delivery truck used to load and transport pianos to a public dump to remove a quantity of rubbish from it.¹⁷¹ After dumping the waste, he was directed to take the delivery truck to his home, where he would perform repairs and change the construction of its body to be more suitable for

¹⁶⁴ *Pierson v. Helmerich & Payne Int'l Drilling Co.*, 209 Cal. Rptr. 222, 229 (Ct. App. 2016).

¹⁶⁵ *Id.*

¹⁶⁶ *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W. 3d 754, 757 (Tex. 2007) (holding that, although an employee had possession of his employer's truck, was available via pager twenty-four hours a day, and was permitted to use the truck for personal business, the employer could not be held liable for a collision caused by the employee's negligence while he was running personal errands).

¹⁶⁷ *Whimster v. Holmes*, 190 S.W. 62, 68 (Mo. Ct. App. 1916) (Johnson, J., dissenting); *Moon v. Matthews*, 76 A. 219, 220 (Pa. 1910) ("The fact that while acting for the master he may have disobeyed his commands, does not take the act out of the scope of his employment.").

¹⁶⁸ *Taylor v. Dupree*, 484 So. 2d 986, 989 (La. Ct. App. 1986).

¹⁶⁹ *Id.*

¹⁷⁰ *Leuthold v. Goodman*, 157 P.2d 326, 330 (Wash. 1945).

¹⁷¹ *Id.* at 327.

transporting pianos.¹⁷² Instead of taking the truck straight to his home after dumping the waste, the driver chose to take a six-block detour to pick up his daughter and grandchild to bring them to his home for dinner.¹⁷³ It was during this detour that the accident occurred.¹⁷⁴ While acknowledging that *respondeat superior* is inapplicable in situations where an employee completely deviates from his employment to complete his own errand, the court held that the driver did not deviate from his employment enough to fall outside of the scope of his employment.¹⁷⁵ The court reasoned that, even though the driver derived some personal benefit from the deviation, the deviation was relatively slight.¹⁷⁶ Further, even with this deviation, the driver was still headed in the general direction of his home, where he would be performing another duty within the scope of his employment.¹⁷⁷

While there are situations where delivery drivers may clearly be categorized as an employee or an independent contractor, there are many situations where, even after weighing all the factors, the employment relationship is unclear. This is particularly an issue when delivery service companies are hired by larger companies to perform work and the larger company maintains some level of control, falling somewhere on an unclear spectrum between an independent contractor and an employee. These types of employment relationships make it difficult to place delivery drivers into either traditional category, presenting a legal issue of how to assess liability in that context.

B. Explaining why Amazon's Delivery Service Partner Program does not fit neatly into Traditional Methods of Analyzing Liability

1. Use of Separate Companies as Independent Contractors as a Means of Limiting Liability

As discussed above, traditionally, when an employee engages in tortious conduct while in the course and scope of their employment, that results in the harm of another, the employer is held liable under the theory of *respondeat superior*, or vicarious liability.¹⁷⁸ This analysis is made more difficult by the current trend amongst United States employers to turn to

¹⁷² *Id.* at 328.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 329-30.

¹⁷⁶ *Id.* at 330-31.

¹⁷⁷ *Id.*

¹⁷⁸ RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM L. INST. 2006).

independent contractors, particularly in the case of Amazon.¹⁷⁹ The use of DSPs has complicated, perhaps by design, the court's ability to assign fault to responsible parties. Apportionment of liability is particularly difficult in the case of an automobile accident involving delivery carriers; most notably, Amazon.

2. *Limiting Liability in Employment Disputes Through the Use of Independent Contractors*

While the case law addressing this specific issue is sparse, courts have taken up the issue with some consistency in the labor and employment framework. The court in *Edmonds v. Amazon.com, Inc.*, addressed the problem created by the company's use of peculiarly situated third-party deliverers.¹⁸⁰ Here, in the context of a Fair Labor Standards Act (FLSA) claim, the court found that the plaintiff had alleged sufficient facts asserting Amazon's potential liability under the FLSA to survive Amazon's motion to dismiss.¹⁸¹ Notably, the court found the plaintiff's testimony describing his DSP's reliance on Amazon as its sole client to be particularly compelling.¹⁸² The integral role Amazon plays in the operation of the DSPs, from the creation of the DSP to the everyday operation of its services, allowed the court to treat Amazon as an employer and ultimately find it liable.¹⁸³ This attempt by Amazon to avoid liability from employment claims arising out of its delivery scheme is not an isolated incident, but rather, part of a concerted effort on its part to avoid liability in all instances.

In *Gibbs v. MLK Express Servs., LLC*,¹⁸⁴ the court analyzed the relationship between Amazon and the various DSPs they contract with, noting Amazon's exercise of control over "hiring, training, uniforms, delivery vans, pick up and drop off locations, schedules, and discipline."¹⁸⁵ The plaintiffs argued that due to the level of control Amazon has over the

¹⁷⁹ Yoed Halbersberg & Ehud Guttel, *Behavioral Economics and Tort Law*, THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 405, 425-28 (Eyal Zamir & Doron Teichman eds., 2014).

¹⁸⁰ *Edmonds v. Amazon.com, Inc.*, No. C19-1613JLR, 2020 U.S. Dist. LEXIS 66562 (W.D. Wash. Apr. 15, 2020).

¹⁸¹ *Id.* at *23.

¹⁸² *Id.* at *16.

¹⁸³ *Id.* at *11-18.

¹⁸⁴ *Gibbs v. MLK Express Servs., LLC*, No. 2:18-cv-434-FtM-38MRM, 2019 U.S. Dist. LEXIS 20189 (M.D. Fla. Feb. 7, 2019).

¹⁸⁵ *Id.* at *12.

DSPs, Amazon was in essence a joint employer.¹⁸⁶ Plaintiffs further alleged that, as a joint employer, Amazon should be held liable for the FLSA violations orchestrated against the drivers delivering its packages.¹⁸⁷ The court found these arguments and the evidence presented to be persuasive.¹⁸⁸ Accordingly, the court dismissed Amazon's motion for summary judgment.¹⁸⁹ Amazon eventually settled the plaintiffs' claims out of court.¹⁹⁰

In the 11th Circuit, to determine whether an entity is a joint employer, the court must consider the following factors:

- (1) nature and degree of control of the workers;
- (2) degree of supervision, direct or indirect, of the work;
- (3) ability to determine pay rates or method of payment;
- (4) the ability, directly or indirectly, to hire, fire, or modify employment conditions;
- (5) preparation of payroll and payment of wages;
- (6) ownership of facilities where work occurred;
- (7) performance of a specialty job integral to business; and
- (8) investment in equipment and facilities.”¹⁹¹

Amazon's involvement with the operation of the various DSPs aligns with every factor used by the court to determine whether an employer-employee relationship exists.¹⁹² Accordingly, the court found that the plaintiffs had offered sufficient evidence alleging Amazon's status as a joint employer of the drivers.¹⁹³ Accordingly, the court denied Amazon's motion to dismiss, and the case proceeded, ending eventually with a settlement by Amazon.¹⁹⁴

¹⁸⁶ *Id.* at *9-12.

¹⁸⁷ *Id.* at *6-8.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at *13.

¹⁹⁰ Order, No. 2:18-cv-434-SPC-MRM, 2019 U.S. Dist. LEXIS 20189 (2021) (discussing the fact that the parties settled the action).

¹⁹¹ *Garcia-Celestino v. Ruiz Harvesting, Inc.*, 843 F.3d 1276, 1294 (11th Cir. 2016).

¹⁹² See generally *Gibbs*, No. 2:18-cv-434-FtM-38MRM, 2019 U.S. Dist. LEXIS 20189 (comparing the facts of the case to the factors presented in *Garcia-Celestino*, 843 F.3d at 1294).

¹⁹³ *Gibbs*, No. 2:18-cv-434-FtM-38MRM, 2019 U.S. Dist. LEXIS 20189 at *11.

¹⁹⁴ *Id.* at *13 (indicating motion was denied); Order, No. 2:18-cv-434-SPC-MRM, 2019 U.S. Dist. LEXIS 20189 (2021) (discussing the fact that the parties settled the action).

Not all courts view the status of the delivery drivers in the same way. In *Morales v. Amazon.com, LLC*,¹⁹⁵ the court found that, even though the plaintiff drivers reported to Amazon facilities and wore a uniform bearing the Amazon logo, the drivers were merely independent contractors.¹⁹⁶ The court based this determination largely on the plaintiff drivers' inability to demonstrate how the level of control Amazon exercised over the packages being delivered *directly* impacted the drivers.¹⁹⁷ Here, the court did not even turn to the aforementioned factors to determine whether an employer-employee relationship existed.¹⁹⁸ Rather, the court found that the only connection between Amazon and the drivers was the packages, so it granted Amazon's motion to dismiss.¹⁹⁹

The *Morales* opinion provides an example of why the law is likely to evolve to address the problems created by the ever-changing economy. The court here had no applicable law on point with the issues and, accordingly, Amazon was relieved of liability once again.²⁰⁰ The ability of Amazon to categorize workers who, for all intents and purposes, work *for* them, as independent contractors allows them to avoid liability for nearly all incidents involving its drivers.

3. *Limiting Liability in Automobile Accidents Through the Use of Independent Contractors*

The sparse nature of cases dealing with Amazon's liability in the motor vehicle accidents of its drivers precisely reflects the issue of this article. Because would-be plaintiffs often have no idea that Amazon is the company behind the driver in the accident, Amazon is often not a party in the automobile accident suit at all. Further, in the rare circumstance where a plaintiff does include Amazon in their lawsuit, the plaintiff is almost always unable to recover. Not only does the difference in financial resources between an injured individual and the behemoth, that is Amazon, account for a disparity in legal representation, but the applicable tort law employed by the courts does not comport with the new structure of DSPs used by Amazon.

¹⁹⁵ *Morales v. Amazon.com, LLC*, No. 2:17-cv-1981-ODW-JEM, 2018 U.S. Dist. LEXIS 127158 (C.D. Cal. July 30, 2018).

¹⁹⁶ *See id.* at *23, *7.

¹⁹⁷ *Id.* at *7.

¹⁹⁸ *Id.* at *9.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at *8.

In one of the few cases directly addressing the issue of Amazon's utilization of DSPs and transportation liability, Amazon was able to avoid liability due to the DSP's status as an independent contractor. The court in *Hoffee v. AAC Transp. LLC*, was tasked with determining whether Amazon could be found negligent in an automobile accident allegedly caused by one of the drivers employed by a contracted DSP.²⁰¹ Here, the court found that, because Amazon did not directly hire the driver at fault, it could not be found liable for negligently hiring the driver or the DSP.²⁰²

The traditional analysis for determining whether an employer-employee relationship existed did not fit the unique circumstances of Amazon's relationships with independent contractors, and thus the court was unable to find it liable.²⁰³ The court further stated that Amazon was too far removed from the DSP to exert the control alleged by the plaintiff, and thus could not be found negligent under a theory of vicarious liability.²⁰⁴ The logic behind the *Hoffee* court's holding is in no way unsound, but instead shows the disconnect between the traditional employer liability determination for tortious conduct by an employee, vicarious liability, and that of the independent contractor driving for a DSP. The Amazon model confounds the traditional idea of what it means to be an independent contractor and what it means to be an employee. This confusion surrounding liability is to the benefit of one party: Amazon.

Similarly, in *Hobbs v. Rui Zhao*, the court once again determined that Amazon was not liable for negligent hiring and entrustment following a motor vehicle accident with a DSP driver.²⁰⁵ The court relied largely on Oklahoma case law addressing the reasonable care standard in the goods-shipping context to reach this conclusion.²⁰⁶ In traditional theories of tort liability, an employer is not liable for the actions or omissions of an independent contractor.²⁰⁷ Accordingly, the *Hobbs* court distinguished the liability of a direct employer from that of a company that engages

²⁰¹ *Hoffee v. AAC Transp. LLC*, No. 18-cv-01908, 2019 U.S. Dist. LEXIS 107641, at *1-2 (M.D. Pa. June 26, 2019).

²⁰² *Id.* at *8-9.

²⁰³ *Id.* at *5.

²⁰⁴ *Id.* at *7.

²⁰⁵ *Hobbs v. Rui Zhao*, No. 13-CV-0673-FHM, 2015 U.S. Dist. LEXIS 11762, at *11, *16 (N.D. Okla. Feb. 2, 2015).

²⁰⁶ *Id.* at *10.

²⁰⁷ *Id.* at *11 (quoting *Bouziden v. Alfalfa Elec. Co-op., Inc.*, 2000 OK 50, 16 P.3d 450, 455 (2000)).

independent contractors.²⁰⁸ The duty of reasonable care to ensure competent individuals are selected for such a position stops with the selection of the DSP. Amazon contracted with a company, which it deemed to be a capable logistics company, and it was now the onus of the DSP to select qualified drivers. The court reasoned that, because Amazon itself did not hire the driver at fault, they were not an employer for vicarious liability.²⁰⁹ By structuring its delivery services in this way, Amazon has been able to ensure it retains no liability for the actions of its drivers.

4. *Use of Indemnification Agreements*

An indemnity agreement is a promise made between two parties, with one party promising the other that it will be liable for any injury resulting from a specific event, often referred to as a “trigger event.”²¹⁰ Essentially, an indemnification agreement is a contractual promise which protects against liability for the actions of another party. Such agreements are commonplace in construction, manufacturing, and particularly in the case of independent contractors.²¹¹ Without indemnity agreements, a contracting party would be liable for the other party’s actions, even when the opposing party is likely to create risk due to the nature of the work involved.²¹²

Amazon routinely uses indemnification language in business agreements with third parties, including those with DSPs and with vendors selling merchandise on its website.²¹³ The case law surrounding an employer’s liability for the injurious conduct of independent contractors is notably silent on the issue created by Amazon’s many indemnity agreements with its contracted drivers. There are, however, a few select cases in which the court attempted to address Amazon’s use of indemnity agreements with contracted vendors and products liability claims.

²⁰⁸ *Id.* at *13-14.

²⁰⁹ *Id.* at *16.

²¹⁰ *Indemnity*, ROCKET LAW., <https://www.rocketlawyer.com/gb/en/quick-guides/indemnity> (last visited Feb. 10, 2022).

²¹¹ *Indemnification Clause*, CONTRACTSCOUNSEL., <https://www.contractscounsel.com/g/c/us/contract-clauses> (last visited Feb. 10, 2022) (select “Indemnification Clause” from list of contract clauses).

²¹² *Privette v. Super. Ct.*, 854 P.2d 721, 729-30 (Cal. 1993).

²¹³ Josh Eidelson & Matt Day, *Amazon Work Rules Govern Tweets, Body Odor of Contract Drivers*, BLOOMBERG (Feb. 12, 2022, 4:08 PM), <https://www.bloomberg.com/news/articles/2021-05-05/amazon-work-rules-govern-tweets-body-odor-of-contract-drivers>.

In *Oberdorf v. Amazon.com Inc.*, the 3rd Circuit Court of Appeals held Amazon liable as a “seller,” as contemplated by § 402A of the Second Restatement of Torts.²¹⁴ This rendered Amazon strictly liable for any injuries to the consumer caused by defective products purchased through its website.²¹⁵ Here, the court acknowledged the indemnity agreement that Amazon required vendors to sign before selling products on its website.²¹⁶ The court determined that this indemnification agreement could not overcome the imposition of strict liability usually applicable in manufacturing cases.²¹⁷ Ultimately, the Court vacated this opinion and set the case for rehearing *en banc*.²¹⁸ It remains to be seen whether Amazon will avoid liability in this action.

The New Jersey District Court in *Papataros v. Amazon.com, Inc.*, inspired by the *Oberdorf* opinion, imposed liability on Amazon.²¹⁹ Here, the court determined that Amazon was strictly liable for consumer injuries sustained from a defective scooter.²²⁰ Even though the vendor signed an indemnity agreement, the actual language indemnifying Amazon was so buried in the business agreement, the court determined it would be unconscionable to relieve them from liability.²²¹ Amazon was the best-situated party to have noticed and reported or resolved these issues before the product injured the consumer.²²² In these cases, the court assigned liability to Amazon for injuries sustained by individuals, even though indemnity agreements existed between Amazon and a third-party vendor.

V. THEORIES OF LIABILITY THAT MAY BE CONSIDERED IN CASES INVOLVING AMAZON’S DELIVERY SERVICE PARTNER PROGRAM

This section will discuss the theories of liability that may be considered in cases involving Amazon’s DSP program. The seven theories include: (A) joint enterprise liability; (B) joint employer; (C) negligent hiring, supervision, and retention; (D) negligent entrustment; (E) agency by estoppel; (F) piercing the corporate veil; and (G) trademark liability via negligence, strict liability, and agency principles. Each subsection will

²¹⁴ 930 F.3d 136, 153 (3d Cir. 2019).

²¹⁵ *Id.* at 147.

²¹⁶ *Id.* at 153.

²¹⁷ *Id.* at 145-46.

²¹⁸ *Oberdorf v. Amazon.com Inc.*, 936 F.3d 182 (3d Cir. 2019).

²¹⁹ No. 17-9836, 2019 U.S. Dist. LEXIS 144253, at *2 (D.N.J. Aug. 26, 2019).

²²⁰ *Id.* at *45.

²²¹ *Id.*

²²² *Id.* at *43.

provide a short introduction to the theory of liability and its elements. Then, the elements will be examined as to how they may be applied to Amazon and its DSPs. Finally, the section will conclude with an examination of punitive damages and cases in which they may be assessed including against Amazon and its DSPs.

A. *Joint Enterprise Liability*

Joint enterprise liability allows for liability to be imposed upon a party who would otherwise not be liable. More specifically, “the theory of joint enterprise is to make each party thereto the agent of the other and thereby to hold each other responsible for the negligent acts of the other.”²²³ Flowing from this theory, “joint enterprise includes a partnership, but it also includes less formal arrangements for cooperation, for a more limited period of time and a more limited purpose.”²²⁴ To determine whether joint enterprise applies, it is common to examine four elements: “(1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.”²²⁵

Examining the first element, Amazon clearly has an agreement with its delivery service partners. The more complicated issue is whether Amazon has an agreement with those who drive for the DSPs. When Amazon contracts with a DSP, it is not necessarily contracting with the individual driver like it is through its Flex program. That said, the argument can still be made that Amazon and the DSP drivers have an agreement because the drivers are required to abide by certain Amazon guidelines and policies, like Amazon delivery routes.²²⁶ The second element may also be satisfied, as both Amazon and the DSP drivers have a goal of delivering Amazon packages.²²⁷

A community of pecuniary interest in delivering the packages is also apparent because without timely delivery, the DSPs may lose their contracts,

²²³ *Straffus v. Barclay*, 219 S.W.2d 65, 68 (Tex. 1949).

²²⁴ RESTATEMENT (SECOND) OF TORTS § 491, cmt b. (AM. LAW INST. 1965) (stating great majority of decisions regarding joint enterprise involve motor vehicles).

²²⁵ *Id.* at cmt. c.

²²⁶ James Bander et al., *Inside Documents Show How Amazon Chose Speed Over Safety in Building Its Deliver Network*, PROPUBLICA (Dec. 23, 2019), <https://www.propublica.org/article/inside-documents-show-how-amazon-chose-speed-over-safety-in-building-its-delivery-network> [<https://perma.cc/N29L-9TFE>].

²²⁷ *Id.*

drivers may lose their jobs, and Amazon may face bad publicity. Despite the satisfaction of the first three elements, joint enterprise liability requires all four elements be satisfied.²²⁸ Satisfying the fourth element could prove much more difficult. DSPs have control over whether they choose to contract with Amazon, and Amazon contends that DSPs have control over who they hire or fire. The issue then turns on whether there is equality in the right of control.²²⁹ Amazon, who is often the only client for contractors, can demand certain drivers not be used, and directs and tracks drivers' routes.²³⁰ Whether that amounts to a holding that DSPs do not have equal control has yet to be decided.²³¹ Interestingly, Amazon's assertion of control in an independent contractor analysis could act as a catch-22 and prove to be detrimental in a joint enterprise liability analysis.

B. Joint Employer

Joint employer status is another liability theory that could potentially be asserted against Amazon. The determination "of 'joint employer' status is a factual one" analyzed by looking at whether the claimed joint employer "possesse[s] sufficient control over the work of the employees."²³² This means that "two or more employers exert significant control over the same employees—where . . . it can be shown that they share or co-determine those matters governing essential terms and conditions of employment."²³³ While it is uncontested that Amazon exerts control over the employees of the contractors it employs, the question remains whether that control is sufficient or significant.

In examining whether Amazon is considered a joint employer, the Ninth Circuit employs two multi-factor tests: the *Bonnette* economic reality test and the *Torres-Lopez* test.²³⁴ Applying these tests, no one factor is conclusive, but rather, a determination "depends on 'the circumstances of

²²⁸ *Durrett v. Harris Pauley*, 558 F. Supp. 2d 718, 72122 (E.D. Tex. 2007).

²²⁹ Patricia Callahan, *The Deadly Race: How Amazon Hooked America on Fast Pace Delivery While Avoiding Responsibility for Crashes*, PROPUBLICA, (Sep. 5, 2019), <https://features.propublica.org/amazon-delivery-crashes/how-amazon-hooked-america-on-fast-delivery-while-avoiding-responsibility-for-crashes/> [<https://perma.cc/2UX6-4XWY>].

²³⁰ *Id.*

²³¹ *Id.*

²³² *NLRB v. Browning-Ferris Industries, Inc.*, 691 F.2d 1117, 1121 (3d Cir. 1982) (citing *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964)).

²³³ *Id.*

²³⁴ *Edmonds v. Amazon.com, Inc.*, No. C-19-1613JLR, 2020 U.S. Dist. LEXIS 66562 (W.D. Wash. April 15, 2020).

the whole activity.”²³⁵ While the Ninth Circuit has yet to answer whether Amazon is considered a joint employer when it comes to its DSP drivers, the court declined to dismiss a claim against Amazon because “sufficient facts to create a plausible inference” existed.²³⁶ The basis for this was that, of the twelve factors from the two tests, nine weighed in favor of Amazon being a joint employer, two were neutral, and one weighed against Amazon being a joint employer.²³⁷ The United States District Court for the District of New Jersey refused to consider its twelve-factor joint employer test as the Plaintiff was a regional director of operations for a company other than Amazon, and Amazon was not responsible for outlining his responsibilities, overseeing his work, assessing his performance, determining his compensation, or ending his tenure.²³⁸ Therefore, although it has yet to be litigated, a majority of the factors relating to whether Amazon qualifies as a joint employer to its DSP drivers weigh in favor of joint employer status.

C. Negligent Hiring, Supervision, and Retention

Negligent hiring, supervision, and retention act as a third theory of liability which could be asserted against Amazon even if DSP drivers are considered independent contractors. Although an employer is not generally “liable for the torts of an independent contractor . . . there are many exceptions to the rule.”²³⁹ One such exception applies in cases where a party, like Amazon, does not “exercise reasonable care” in selecting a carrier, and

²³⁵ *Id.* (citing *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983)).

²³⁶ *Id.* at 17.

²³⁷ *Id.* (Finding supervision and control of work schedules or conditions of employment; maintenance of employment records; whether the work was a specialty job on the production line; whether the premises and equipment of the employer are used for the work; whether the employees had a business organization that could or did shift as a unit from one worksite to another; whether the work was “piece work” and not work that required initiative, judgment or foresight; whether the employee had an opportunity for profit or loss depending upon the alleged employee’s managerial skill; whether there was permanence in the working relationship; and whether the service rendered is an integral part of the alleged employer’s business all weigh in favor of joint employer status, power to hire and fire and whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without material changes are neutral factors, and determination of the rate and method of payment weigh against joint employer status).

²³⁸ *Malia v. Amazon.com, Inc.*, No. 2:17-5155 (WJM), 2017 U.S. Dist. LEXIS 212301, *6 (D.N.J. Dec 28, 2017).

²³⁹ *Hudgens v. Cook Ind., Inc.*, 1973 OK 145, ¶ 11 521 P.2d 813, 815 (1973).

injury to others may occur in the ordinary course of events if precautions are not taken.²⁴⁰ In *Hobbs*, Amazon accepted a bid from a previously approved primary carrier who then outsourced the bid to another carrier, which then contacted another carrier, and that carrier contacted Zhao.²⁴¹ Because Amazon was so far removed, the court was unable to find Amazon failed to exercise reasonable care as Amazon did not “select” Zhao as a driver.²⁴² This, however, may not always be the case.

In some instances, Amazon is much more directly involved in the selection of DSP drivers. Amazon’s Flex program serves as an example. Through its Flex program, Amazon allows drivers to sign up and deliver packages using their own vehicles via an application. It requires drivers to conduct video training, be at least twenty-one years old, and pass a background check.²⁴³ Likewise, some Amazon contracts require “every driver pass a background check and drug test, have at least six months’ experience, and pass an extended road test.”²⁴⁴ Based on these requirements, the argument that Amazon is not involved in the selection of DSP drivers becomes much more difficult. Additionally, as Amazon monitors accidents and maintains the ability to keep certain drivers from being used, arguments for negligence are also strengthened when a driver with a poor driving record or history of complaints is involved in an incident.²⁴⁵ Thus, when Amazon is directly involved in the selection of DSP drivers, an argument for negligent hiring, supervision, and retention could have merit, and even in instances where Amazon does not directly select DSP drivers, individual facts could demonstrate a sufficient connection to impute liability against

²⁴⁰ *Id.* at 816.

²⁴¹ *Hobbs v. Rui Zhao*, No. 13-CV-0673-CVE-FHM, 2015 U.S. Dist. LEXIS 11762, *2-3 (N.D. Okla. Feb. 2, 2015).

²⁴² *Id.* at *13.

²⁴³ Callahan, *supra* note 229; AMAZON, <https://amazonflexbusiness.com/job-requirements> [<https://perma.cc/7RQ4-7R7M>] (last visited June 8, 2020).

²⁴⁴ Caroline O’Donovan & Ken Bensinger, *Amazon’s Next-Day Delivery Has Brought Chaos And Carnage To America’s Streets - But The World’s Biggest Retailer Has A System To Escape The Blame*, BUZZFEED NEWS (Sep. 6, 2019, 5:14 PM), <https://www.buzzfeednews.com/article/carolineodonovan/amazon-next-day-delivery-deaths> [<https://perma.cc/M8RA-VKWB>].

²⁴⁵ *See Hoffee v. AAC Transp. LLC*, No. 1:18-cv-01908, 2019 U.S. Dist. LEXIS 107641 (M.D. Pa. June 26, 2019) (dismissing Plaintiffs claim against Amazon without prejudice because, although Amazon was three steps removed, the possibility that Amazon should have known the broker it contracted with was negligent in researching and retaining its carriers).

Amazon. However, such a demonstration is fact-dependent and has yet to be addressed by a court.

D. Negligent Entrustment

Negligent entrustment acts as a fourth possible form of liability, but it differs from negligent hiring, supervision, and retention in the fact that negligent entrustment is not premised upon an employment relationship. The Second Restatement of Torts states:

It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.²⁴⁶

Stemming from the Restatement, entrusting a third party with a vehicle can be cause for negligent entrustment liability. While few courts have addressed the issue of “whether a shipper has a duty to investigate the independent contractors of an entity it retains to deliver its product[,]” it is clear that “application of negligent entrustment to a shipper can be a fact-bound exercise.”²⁴⁷

Because negligent entrustment is a fact-bound exercise, each application must be examined on a case-by-case basis.²⁴⁸ Still though, certain facts are more likely to create liability than others. For example, in *Hobbs*, the court held that Amazon could not be held liable for negligent entrustment because Amazon was too far removed, and the cargo Amazon entrusted to the driver was not a dangerous instrumentality.²⁴⁹ Conversely, if Amazon entrusts someone with a vehicle that it owns or leases, then negligent entrustment is more likely to apply. Likewise, if Amazon contracts with a person who has a history of reckless driving, traffic citations, or a record of complaints filed against them, the chances of liability existing are greater. Contracting with companies who have low safety ratings or have been known not to take proper safety precautions in the past is another factor that could contribute

²⁴⁶ RESTATEMENT (SECOND) OF TORTS § 308 (AM. L. INST. 1965).

²⁴⁷ *Adames v. May Furniture, Inc.*, No. 1:17-CV-00652, 2019 U.S. Dist. LEXIS 206068, at *20-21 (M.D. Pa. Nov. 26, 2019) (referencing *Hoffee* and the courts allowance of Plaintiffs to amend their complaint to assert facts which would support a direct claim against Amazon).

²⁴⁸ *Id.*

²⁴⁹ *Hobbs v. Rui Zhao*, No. 13-CV-0673-CVE-FHM, 2015 U.S. Dist. LEXIS 11762, at *7-11 (N.D. Okla. Feb. 2, 2015).

to liability.²⁵⁰ Furthermore, the closeness in proximity between Amazon and another party involved in an incident can be a significant factor. For example, if Amazon were to contract with one party to ship its goods and that party then contracted with another party who then used yet another party, proving Amazon's negligence would be much more difficult than if Amazon contracted directly with the party involved in the incident. Thus, claims for negligent entrustment are heavily fact dependent and may turn on how far removed a party, like Amazon, is from the entrustment.²⁵¹

E. Agency by Estoppel

A fifth form of liability that one could potentially assert against Amazon is agency by estoppel. The Restatement of the Law of Agency states:

A person who has not made a manifestation that an actor has authority as an agent and who is not otherwise liable as a party to a transaction purportedly done by the actor on that person's account is subject to liability to a third party who justifiably is induced to make a detrimental change in position because the transaction is believed to be on the person's account, if

- (1) the person intentionally or carelessly caused such belief, or
- (2) having notice of such belief and that it might induce others to change their positions, the person did not take reasonable steps to notify them of the facts.²⁵²

Like negligent entrustment, determining the existence of agency by estoppel is a fact-bound exercise.²⁵³ And, "[w]here a person by words or conduct represents or permits it to be represented that another person is his agent, he will be estopped to deny the agency as against third persons who have dealt, on the faith of such representation, with the person so held out as agent, even

²⁵⁰ *Adames v. May Furniture, Inc.*, 2019 U.S. Dist. LEXIS 206068, at *8. (M.D. Pa. Nov. 26, 2019).

²⁵¹ *Hoffeev. AAC Transp. LLC*, No. 1:18-CV-01908, 2019 U.S. Dist. LEXIS 107641, at *8 (M.D. Pa. June 26, 2019).

²⁵² RESTATEMENT (THIRD) OF AGENCY § 2.05 (AM. L. INST. 2006).

²⁵³ *Id.*

if no agency existed in fact.”²⁵⁴ “The rule is equally applicable when a corporation holds out or permits a person to hold himself out as its agent.”²⁵⁵

As Amazon asserts that DSP drivers are not its agents, the question of liability will likely have to be determined on a case-by-case basis. However, certain factors could weigh more in one direction than the other. For example, the fact that Amazon provides branded vans, labeled vests, and phones, and it controls DSP drivers’ routes weighs in favor of liability through agency by estoppel. But the fact that Amazon does not market DSP drivers as employees and does not always provide DSP drivers with vehicles weighs against agency liability.

Likewise, even if Amazon’s conduct were found to have created an apparent agency relationship with its DSP drivers, it must still be established that a detrimental change occurred as a result of the apparent authority. This, in itself, could prove difficult because DSP drivers are charged with making pickups and deliveries and do not usually have consumer interaction. Therefore, other than the belief that a DSP driver may be insured by Amazon, establishing a detrimental change based on the reliance that a DSP driver was acting as an agent of Amazon could prove difficult.

F. Piercing the Corporate Veil

Piercing the corporate veil, a sixth potential form of liability that a party could attempt to assert against Amazon, “is an equitable remedy through which a court may impose liability on an individual or entity normally subject to the limited liability protections of the corporate form.”²⁵⁶ Although there is no uniform test for piercing the corporate veil, most jurisdictions turn on the existence of two elements: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, and (2) the circumstances must indicate that adherence to the fiction of separate corporate existence would sanction fraud or promote injustice.²⁵⁷

Like the previous theories, whether the corporate veil should be pierced is heavily dependent on the circumstances. In cases where Amazon is a DSP’s only client, monitors the books, fires drivers and monitors drivers, controls drivers’ routes, and provides vehicles and trainings, the factors

²⁵⁴ *Daniel Boone Complex, Inc. v. Furst*, 43 N.C. App. 95, 258 S.E.2d 379, 388 (1979) (citing *Ferguson v. Amusement Co.*, 89 S.E. 45 (N.C. 1916)).

²⁵⁵ *Id.*

²⁵⁶ *Mall at IV Group Props., LLC v. Roberts*, No. 02-4692, 2005 U.S. Dist. LEXIS 31860, at *7-8 (D.N.J. Dec. 8, 2005).

²⁵⁷ *Id.* at *8.

weigh in favor of such a unity of interest and ownership that separate personalities no longer exist. But in instances where some or all of the aforementioned elements are not satisfied, the issue of separate personalities becomes less clear. This is especially the case in circumstances where Amazon may not be able to fire or hire drivers, but only restrict certain drivers from being used for its deliveries.

Even if a court were to determine Amazon and its DSPs have such a unity of interest and ownership that separate personalities no longer exist, the circumstances must also indicate that adherence to the fiction of separate corporate existence would sanction a fraud or promote injustice. Satisfying this element could prove even more difficult than the separate personalities element. One reason for this is that Amazon could argue that it is not keeping the DSPs from contracting with other clients. Likewise, Amazon could assert that if it was not able to keep certain drivers from being used and did not provide training, then it would be subject to liability via other theories, like negligent entrustment.

Conversely, the argument could be made that Amazon's use of DSPs undoubtedly sanctions fraud and promotes injustice. One could allege that Amazon only uses DSPs to circumvent laws. The argument could be made that by using DSPs Amazon not only avoids having to abide by federal and state safety standards, but it also avoids having to provide employee benefits to DSP drivers. Amazon thus commits fraud, because the DSPs drivers truly are employees, and promotes injustice by allowing Amazon a loophole to avoid costs associated with adhering to federal and state safety regulations. While the merits and effectiveness of such an argument seems questionable given Amazon's practices do not appear to violate any existing legal framework, this type of argument could be asserted.

Regardless of one's stance, such arguments are available. Until a court decides these issues, whether the corporate veil can be pierced remains an open question.

G. Trademark Liability

Trademarks can be any word, symbol or logo, slogan, color, design element, or a combination of these that indicates the source of a product or service.²⁵⁸ Trademarks serve a multitude of purposes including identifying the party or source responsible for goods or services bearing the mark, guaranteeing the quality of goods or services bearing the mark, and serving as an effective advertising device linking consumer demand with the marked

²⁵⁸ 74 AM. JUR. 2D *Trademark* § 1 (2022).

goods or services.²⁵⁹ When it comes to imputing liability to licensors like Amazon, courts may consider the direct theories of liability of negligence and strict liability versus the indirect theory of agency.

1. Negligence

In *Kosters v. The Seven-Up Co.*, the Sixth Circuit stated: “a franchisor [or licensor], like a manufacturer of supplies, may be liable to the consumer for its own negligence, without regard to privity[.]”²⁶⁰ In finding Seven-Up liable, the Sixth Circuit referenced Seven-Up’s control over the product coupled with its inspection and approval could be sufficient for liability.²⁶¹ In *Patterson v. Central Mills, Inc.*, the court declined to impose liability on Warner Bros., even though Warner Bros. had the right to exercise quality control over a shirt bearing Looney Tunes artwork and brandings.²⁶² Thus, where a licensor can control the quality of products bearing its marks and exercises that control if done so negligently and without regard to potentially dangerous defects, liability may extend beyond the licensee.²⁶³ Whether liability extends beyond the licensee is dependent on the level of control asserted by the licensor.²⁶⁴ Consequently, whether Amazon asserts enough control over the DSP drivers and the vehicles which they drive, is a fact-dependent question that has not yet been addressed by courts.

2. Strict Liability

A second and perhaps more applicable form of trademark liability is strict liability. Under the principle of strict trademark liability, some courts have found licensors to be strictly liable where they have supplied ingredients to their licensee or otherwise exercised a high degree of control over the design, manufacture, or distribution of the goods sold under the licensor’s mark. In *Hartford v. Associated Constr. Co.*, the Connecticut Superior Court stated, “as long as the franchisor or trademark licensor can be said to be a link in the marketing enterprise which placed a defective product within the stream of commerce, there is no reason in logic for refusing to apply strict liability in tort to such an entity.”²⁶⁵

²⁵⁹ *Id.*

²⁶⁰ 595 F.2d 347, 352 (6th Cir. 1979).

²⁶¹ *Id.* at 352-53.

²⁶² 112 F. Supp. 2d 681, 684 (N.D. Ohio 2000).

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ 384 A.2d 390, 394 (Conn. Super. Ct. 1978).

Conversely, where a licensor's involvement in the production of goods is minimal, entirely passive, or otherwise outside the chain of distribution, strict liability will not apply. For instance, in *Dzhunaydov v. Emerson Electric Co.*, the court declined to find a licensor liable when its only involvement applied to certain graphic design choices related to the manual, labels, etc. of the table saws.²⁶⁶ Likewise, the Ninth Circuit refused to hold Du Pont strictly liable where its products were used as an ingredient in a defective product with which Du Pont otherwise was not involved.²⁶⁷ Therefore, similar to the negligence theory of trademark liability, the turning point is dependent upon the level of control asserted over the product. Whether Amazon could be found liable under strict trademark liability is a heavily fact intense inquiry contingent upon Amazon's relationship with its DSP.

3. Agency

The third and final form of trademark liability that could potentially be applied against Amazon and its DSPs is agency theory. Like the other two theories, the primary question comes down to how much control the licensor exerts over the licensee.²⁶⁸ Courts, however, differ in applying agency theory via trademark liability. For example, in *Drexel v. Union Prescription Ctrs.*, the Third Circuit reversed the lower court's grant of summary judgment against a franchisor who maintained significant control over the franchisee, including store location, the right to inspect the premises to ensure it "conform[ed] strictly" to "national standard," the hiring of union members for construction work, inventory requirements, record keeping, and equipment designations.²⁶⁹

Likewise, in *Lopez*, the Georgia Court of Appeals reversed the lower court's dismissal where a licensor taxi signed an individual as an independent contractor taxi driver.²⁷⁰ Although the driver was permitted to work when he chose as long as the taxi bore the company's mark, the driver did not smoke in the car, and passengers were asked to wear seatbelts, the Court of Appeals held sufficient questions of fact were present to preclude summary judgment in favor of the licensor.²⁷¹ The Court based its holding

²⁶⁶ No. 12-CV-2188, 2013 U.S. Dist. LEXIS 179875, at *1 (E.D.N.Y. Dec. 23, 2013).

²⁶⁷ *Kealoha v. E.I. du Pont de Nemours & Co.*, 82 F.3d 894, 903 (9th Cir. 1996).

²⁶⁸ David J. Franklyn, *Toward A Coherent Theory of Strict Tort Liability for Trademark Licensors*, 72 S. CAL. L. REV. 1, 34-5 (1998).

²⁶⁹ 582 F.2d 781, 787 (3d Cir. 1978).

²⁷⁰ *Lopez v. El Palmar Taxi, Inc.*, 676 S.E.2d 460, 465 (Ga. Ct. App. 2009).

²⁷¹ *Id.* at 462, 465.

on the fact that after the plaintiff called the licensor for a taxi, the licensor responded by providing a taxi displaying its own branding and the licensor provided branded business cards to drivers.²⁷²

Dissimilarly, the California Court of Appeals dismissed a claim against Visa where mailed solicitations for illegal foreign lottery tickets could be purchased with Visa credit cards, and were advertised as such.²⁷³ The court reasoned that, although the solicitations were sent by lottery operators who were licensed merchants of Visa, “[a] trademark owner’s grant of permission to another to use the owner’s mark, combined with efforts to ‘police’ such use, do not make the user an agent or intermediary of the owner.”²⁷⁴

Because no court, to the author’s knowledge, has addressed trademark liability and agency theory specifically about Amazon and its DSPs, all one can do is speculate. At first glance, it appears that Amazon undeniably exerts sufficient control to create sufficient questions of fact regarding liability like *Lopez*. A closer examination shows that Amazon could also be shielded from liability as it “polices” its DSPs and their drivers by conducting background checks, offering trainings, and monitoring/controlling routes. Moreover, courts are likely to reach different conclusions. Therefore, absent a Supreme Court decision, a true test as to when liability applies may never be had.

H. Punitive Damages

If Amazon were found liable under any of the aforementioned theories, the question remains: what would be the appropriate remedy? Would it be restitution to make the injured party whole? Should Amazon be punished for its past conduct to deter it from engaging in similar conduct in the future? Although few are likely to argue that the injured party should not be made whole if Amazon were to be found liable, whether punitive damages should be assessed against Amazon is likely to be a more heavily debated topic.

The Second Restatement of Torts states:

- (1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.
- (2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others. In assessing

²⁷² *Id.* at 465.

²⁷³ *Emery v. Visa Int’l Service Ass’n.*, 95 Cal. App. 4th 952, 954-55 (2002).

²⁷⁴ *Id.*

punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.²⁷⁵

Thus, to award punitive damages, it must be shown that Amazon's conduct was outrageous, and Amazon had an evil motive or acted with reckless indifference to the rights of others. Proving either of these elements could be exponentially more difficult than proving Amazon's liability in general.

On the one hand, it could be alleged that Amazon acted with reckless indifference because it knew or should have known about the likelihood of accidents. Additionally, it could be argued that Amazon failed to properly investigate claims brought about by internal staff regarding the lack of safety standards. And, despite knowledge and internal claims being made, Amazon failed to take adequate measures to assess safety procedures, train drivers, and implement safety standards.

Inversely, it can be asserted that Amazon's conduct was not outrageous, nor did Amazon act with any indifference to the rights of others. The premise of this argument is that Amazon provides a public good via its delivery service. Even if Amazon's conduct was considered outrageous, Amazon took appropriate precautions to avoid recklessness. Amazon provides drivers with training and technology to limit left-hand turns and make delivery routes safer, and it funds safety initiatives.

While punitive damages can be awarded against an individual or entity, they may also be assessed against a principal based on the actions of its agent. The Second Restatement of Torts and Agency states:

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,

- (a) the principal or a managerial agent authorized the doing and the manner of the act, or
- (b) the agent was unfit and the principal or managerial agent was reckless in employing or retaining him, or
- (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or

²⁷⁵ RESTATEMENT (SECOND) OF TORTS § 908 (AM. L. INST. 1965).

(d) the principal or a managerial agent of the principal ratified or approved the act.²⁷⁶

Therefore, if it could be shown that Amazon recklessly employed or retained a DSP or DSP driver, punitive damages could be awarded. For example, if Amazon knew a DSP driver did not conduct proper safety checks, background checks, or had a history of poor safety ratings but retained the DSP and the DSP then caused an injury, then Amazon could potentially have punitive damages assessed against it. Likewise, if it could be shown that Amazon or a managerial agent ratified or approved an act that caused harm, then punitive damages could be assessed against Amazon. An example of this would be something like Amazon telling a DSP to “do whatever it takes to deliver all the packages on time, including speeding and not taking breaks.”

In sum, whether Amazon could be held liable or have punitive damages awarded against it is a game of hypotheticals. Until a court truly rules on Amazon’s liability and weighs each factor, no answer exists. Certain factors weigh heavily in favor of each argument. Amazon provides safety training, technology to make deliveries safer, and continues to fund safety research, all while offering speedy delivery on millions of products, creating jobs, and stimulating the economy—thereby arguably offering a large public benefit.

Despite these positive contributions, Amazon has managed to avoid liability for injuries as a resulting from a component of its business model, which can leave injured parties without sufficient recourse. This reality may be doing more societal harm than good. Thus, there is an apparent need to reconsider where the liability line should be drawn.

VI. CONCLUSION

Throughout the past century, tort law in the United States has continued to adapt and develop to ensure that the goals and purposes of the civil justice system were being accomplished. Primary among these objectives is the need to compensate blameless third parties who suffer injuries as a result of actions that are undertaken as part of a for-profit business venture. Most notably, around the mid-twentieth century, courts recognized that persons injured by defective products were often left without a viable way of seeking recompense.²⁷⁷ As a result, courts and state legislatures acted and create a products liability system that de-emphasizes the identifiable negligence of a product manufacturer or seller as a basis for the imposition of legal liability

²⁷⁶ *Id.* § 909; RESTATEMENT (SECOND) OF AGENCY § 217(C) (AM. L. INST. 1958).

²⁷⁷ *See, e.g.,* *Greenman v. Yuba Power Products, Inc.* 377 P.2d 897, 899 (Cal. 1963).

and prioritizes the goal of compensating injured persons.²⁷⁸ The underlying analysis motivating the creation of this new form of imposing liability was recognition of the fact that it was unjust to allow a business to derive substantial economic benefit from making and selling products while simultaneously avoiding the societal cost created when persons were injured by a defective product.

The creation of a system of strict liability for defective products was a substantial departure from prior legal precedent, which utilized a fault-based system for injuries caused by products.²⁷⁹ A similar fundamental shift in how the law views allocating liability may be needed to address the concerns created by Amazon's DSP system and other previously unseen business relationships that utilize new technologies to facilitate remote oversight of purportedly independent workers. In fact, judges are beginning to recognize that the old tools used to apportion liability have become less useful and a new method may be needed.²⁸⁰ And the harm caused by the absence of the new tools is clear. As one Judge observed, new business relationships in the gig economy "threaten to shield business from liability for the harm those workers caused while laboring on their behalf."²⁸¹

Fundamentally, the same concerns that led to the development of a strict liability system for defective products are present for injuries caused by negligent Amazon DSP drivers. It is inarguably true that Amazon derives an economic benefit from the operation of its DSP system. Yet, through the creative use of separate legal entities and exercising oversight in an opaque manner, Amazon has largely remained able to avoid bearing its share of the costs and liability resulting from this system. This situation is likely untenable. While the various theories discussed above present options decision makers may employ in addressing the gap in the justice system that exists, it will ultimately be left to courts, legislators, and regulators to decide how best to balance the need to provide compensation to injured parties without stifling innovation and economic growth.

²⁷⁸ *Id.* at 901.

²⁷⁹ *See MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1055 (1916).

²⁸⁰ *Bolen v. Marada Indus., Inc.*, No. 348765, 2021 Mich App. LEXIS 1147 at *31 (Feb 18, 2021) (stating, "[f]inally, it is evident that the nature of some employment relationships has changed...The 'gig' economy has blurred the lines between employers, contractors, employees and labor brokers.").

²⁸¹ *Gil v. Clara Maass Med. Ctr.*, 450 N.J. Super. 368, 162 A.3d 1093, 1106-07 (2017).

