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# Managing the Risks of Peer-to-Peer Goods-Sharing

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## Abstract

The peer-to-peer (P2P) goods-sharing economy has flourished into a significant economic sector. However, in the law of England and Wales, the existing legal mechanisms for managing risks to consumers, such as the Consumer Protection Act and Consumer Rights Act, are unsuitable for regulating risk in the P2P-sharing economy. Platform service providers have constructed their own risk-management systems through elaborate contracts, but these do not go far enough in protecting consumers. This paper argues that both legal and platform mechanisms face the same obstacles to scaling efficient risk management due to the atomistic way they approach risk relations. I propose that legal reforms should provide mandates on platforms to institute greater protections for their users by arranging insurance and bearing default risk.

**Keywords:** Cyberlaw; consumer law; sharing platforms; risk; insurance; tort.

## 1. Introduction

The sharing economy has grown and diversified at speed in the last decade, becoming an important sector in the production and distribution of consumer goods in society.<sup>1</sup> While the benefits of sharing have been widely discussed, regulators in England and Wales are just waking up to the challenges that sharing poses to existing risk-management mechanisms, with the Office for Product Safety and Standards explicitly identifying the sharing economy as an alternative route to market for consumer products that is inadequately regulated by existing regimes.<sup>2</sup> Aside from risks of harm to consumers, managing the risks of property damage is also fundamental to the viability of sharing, which depends on participants' willingness to stake their time, private possessions and personal responsibility in making the exchange possible.<sup>3</sup> Some US states have adopted standardised insurance regulations for car-sharing platforms,<sup>4</sup> but there is no such regulation in England and Wales, where parties rely on general tenets of tort law and consumer legislation. These tenets are largely ineffectual in managing the risks of peer-to-peer (P2P) sharing—defined as the sharing of access to tangible goods, including accommodation, without transfers of ownership.<sup>5</sup>

This paper explores the current legal mechanisms that operate to allocate and distribute risks in P2P goods-sharing, specifically the risks associated with losses caused by unfit or unsafe goods and property damage to the goods being shared. P2P goods-

<sup>1</sup> PriceWaterhouseCoopers, *Sharing or Paring?*; Fremstad, "Sticky Norms."

<sup>2</sup> Office for Product Safety and Standards, *UK Product Safety Review: Call for Evidence*, 14, states that "new models for selling and distributing products have led to blurring of lines between different actors in the supply chain ... All of this may make it less clear where responsibility for product safety lies." The call was closed on June 17, 2021, and responses are currently being analysed.

<sup>3</sup> Lloyd's, *Sharing Risks, Sharing Rewards*.

<sup>4</sup> *California Insurance Code*, s 11580.24.

<sup>5</sup> Most of the literature on this issue comes from the US context. See McPeak, "Sharing Tort Liability"; Berke, "Products Liability in the Sharing Economy," which specifically address product liability; Vazquez, "The Sharing Revolution." There is some literature from the EU context on the general topic of online platforms, legal regulation and consumer protection. See Hatzopoulos, "Caring for Sharing?"; Koolhoven, "The 'Matching' Platform and Mandatory Agency Law"; Smorto, "The Protection of the Weaker Parties in the Platform Economy"; Quarta, "Narratives of the Digital Economy." In the UK context, see Howells, "Protecting Consumer Protection Values in the Fourth Industrial Revolution"; Willett, "Re-Theorising Consumer Law."



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sharing involves the transfer of use and possession of tangible goods without the accompanying transfer of ownership, that is, lending, which is gratuitous, and hiring, which involves pecuniary benefits. I first discuss the statutory and common law regimes of consumer protection, tort and insurance, then compare the legal approach with strategies pursued on commercial sharing platforms. I will argue that current legal approaches are fundamentally inapposite to managing risk for an activity that subverts the model of businesses supplying goods to consumers and relies on single-purpose insurance for their activities.<sup>6</sup> The risk-management mechanisms adopted by commercial platforms are comparatively more successful in using insurance and contract to flexibly achieve some measure of risk collectivisation, which is when risk is spread across the parties involved in sharing rather than remaining with the owner of goods. However, their approach is constrained by doing the bare minimum possible, leaving users (meaning the private party consuming the good) exposed to risks they can neither shoulder nor mitigate. To this end, I propose that law reform that uses the platform as a medium for risk management, such as by mandating platforms to arrange basic insurance or indemnities for users, offers a more feasible solution than attempting to regulate the risks of sharing through legal duties on participants. The doctrinal analysis and examples are confined to the laws of England and Wales; however, the broader conceptual arguments around risk management on P2P platforms and my proposals on risk collectivisation are generally applicable.

## 2. Risk and the Sharing Economy

Consumers in the marketplace are protected from many risks arising from their consumption of goods and services, such as poor quality and safety. There are two notable statutory regimes in the UK. The first is the Consumer Rights Act 2015 (henceforth CRA), which regulates consumers' rights to goods of satisfactory quality,<sup>7</sup> their right to have the good repaired or replaced in the case of non-satisfactory quality,<sup>8</sup> and their right to reject the good or to receive a price reduction.<sup>9</sup> The second is the Consumer Protection Act 1987 (henceforth CPA), which primarily addresses injuries caused to persons and property by defective products.<sup>10</sup> These regimes chiefly protect consumers, as they apply chiefly to consumer transactions, defined as when the party supplying the goods and services is a 'trader ... acting for purposes relating to that person's trade, business, craft or profession'<sup>11</sup> and the party consuming the goods and services is not a trader. They protect consumers by allocating risks to the business party and making them responsible for remedying losses occasioned through consuming the good or service. For example, a consumer hiring a car from a car rental business can expect to be provided with a car fit for their stated purpose,<sup>12</sup> offered a replacement or refund in the event it is not,<sup>13</sup> and protected by third-party liability insurance cover for the car, so they are not driving illegally.<sup>14</sup> Placing stringent duties on suppliers and producers is justified by their specialised economic role as businesses serving many customers, as they are better able to bear the costs of risk mitigation compared to vulnerable individual consumers.

To what extent can users on P2P goods-sharing platforms still expect to be given the same level of protection as their peers in the marketplace? Prima facie, the CRA and CPA do not cover P2P transactions because neither party acts as a 'trader'. By extension, the protections against risks such as poor quality and safety do not operate, there is no duty on the supplier to redress losses, and their non-business status means a higher chance of non-recovery since they likely will not have liability insurance in place. These are pressing challenges that require urgent attention, without which there is a danger that a multitude of sharers will be exposed to risks from goods that are of poor quality or unsafe and will suffer losses that they neither expected nor can mitigate. These gaps also raise the risks of non-recovery for injured third parties harmed either by the goods or by the user of the goods, as the latter is likely to be uninsured for their sharing activity.

Two novel elements of P2P goods-sharing pose challenges for existing risk-management regimes: the 'peer' element, whereby private individuals supply goods to others on an ad hoc basis, and the 'collaborative' element, whereby the activity is a coordinated endeavour between provider, user and platform, depending on a large measure of cooperation between these parties. How do these elements challenge existing risk-management mechanisms? The peer element undermines the formal and practical applicability of many consumer protection regimes, as peer providers are neither formally required nor practically able to fulfil the stringent safety and quality standards mandated for business suppliers of goods. Extending the existing

<sup>6</sup> Office for Product Safety and Standards, UK Product Safety Review, 14.

<sup>7</sup> *Consumer Rights Act 2015*, s 9–11.

<sup>8</sup> *Consumer Rights Act 2015*, s 23.

<sup>9</sup> *Consumer Rights Act 2015*, s 24.

<sup>10</sup> *Consumer Protection Act 1987*, s 1–3.

<sup>11</sup> This wording is taken directly from *Consumer Rights Act 2015*, s 2(2). In contrast, *Consumer Protection Act 1987*, s 1 applies to producers and suppliers of goods.

<sup>12</sup> *Consumer Rights Act 2015*, s 9–11.

<sup>13</sup> *Consumer Rights Act 2015*, s 19–24.

<sup>14</sup> *Road Traffic Act 1988*, s 143(1)(b).

consumer and product regulations to peer providers might undermine the advantages of sharing as a relatively low-cost and flexible consumption method.<sup>15</sup> The collaborative element undermines the way private law doctrines primarily treat risk as liability attributed to individual actors through their legal relationship with shared property. Risk is atomised according to the parties' isolated liabilities and bilateral agreements rather than reflecting the risks of sharing as a discrete activity.<sup>16</sup>

The effect of these challenges on risk management mechanisms is clearly observed in how existing insurance policies, underwritten on the same presumptions of specialised economic function and liability risk,<sup>17</sup> are of limited use in P2P sharing. For individuals renting out their spare possessions on an ad hoc basis, business liability insurance is neither necessary nor cost-effective. However, damage caused by paying guests and users is often not covered by their personal home or motor insurance policies.<sup>18</sup> While these may be considered simply limitations of current underwriting practices, I believe they reveal a fundamental problem: risk mechanisms for sharing *cannot scale if they remain grounded on the premise of liability risk*.<sup>19</sup> Currently, liability risk can scale because of parties' specialised economic functions: producers can spread their (third-party) liability risks across their entire customer base, and consumers can spread their (first-party) property risks across their entire possessions by engaging exclusively in producing goods for sale and owning and using goods, respectively. In P2P sharing, participants frequently switch between providing and consuming, each time with different counter-parties and assets, so the 'function' that can scale is sharing itself, rather than the individual actions of renting or lending.

As I will explore in sections 3 and 4, legal risk mechanisms fail to address these twin challenges, mainly due to their rigid assumptions that traders primarily supply goods and that liability and property risks are individualised. Platforms can use insurance and contract more flexibly to approximate risk collectivisation, but ultimately they operate on the same assumption of individualised risk, which produces inefficiencies in their risk strategies.

## 2.1 Why Goods-Sharing?

Before moving on to substantive analysis, I first justify my focus on goods-sharing, specifically platform-mediated P2P non-ownership transfer models of exchange where the objects of exchange are tangible consumer goods, as opposed to (a) services (e.g., TaskRabbit, a platform where users offer all manner of services such as assembling furniture), (b) a mixture of goods and services (e.g., Uber, a platform providing taxi services), (c) digital goods (e.g., YouTube, a platform for user-provided video content) and (d) fungibles such as money (e.g., Peerform, a platform that allows users to lend money to other individuals). This distinction between sharing goods and services is a contrivance, as their risks overlap to some extent; the provider of ride-sharing services is risking his car as much as the provider in a car-sharing arrangement. Nevertheless, the distinction has productive and rational value, which justifies the examination of goods-sharing as a separate category.

A principal reason for focussing on goods-sharing is that the risks of harms occasioned by sharing goods are standardised because durable consumer goods, which typically make up the objects for sharing, are manufactured to similar quality and safety standards. Peer providers do not produce goods, only supply goods for sharing, so their level of control over the safeness of a product is minimal; a shared automobile would be as safe as the same model of similar age purchased on the market. In contrast, a peer provider will have maximal control over the safeness of services they personally render; the safeness of an Uber depends on each individual driver. Control matters because peer providers are not acting in the course of business, so presumably do not have the qualifications or necessary liability insurance in place.<sup>20</sup> The level of control matters less for goods, as users and providers equally rely on the manufacturer for safety. It matters more for services, where the user necessarily relies to some extent on the skills and competence of the provider, who, being prone to human error, may lack the consistency of performance compared to manufactured goods. Therefore, tangible goods present predictable and manageable risks for harms caused by shared property, thereby justifying the analysis of P2P goods-sharing as a separate category.

<sup>15</sup> Botsman, What's Mine Is Yours.

<sup>16</sup> Zhu, "Sharing Property Sharing Labour."

<sup>17</sup> The former constraint is the actuarial principle that insurable risks must be measurable and their frequency calculable: Rejda, Principles of Risk Management and Insurance, 23–24. The latter constraint comes from the rules on insurable interest, which require holding proprietary or contractual interest over insured property: *Lucena v Craufurd* (1806) 2 Bos & PNR 269; *Waters v Monarch Fire and Life Assurance Co* (1856) 5 EL & BL 870.

<sup>18</sup> Admiral's home and contents cover will not cover theft and vandalism caused by persons legally on the property, "including through a dedicated home-sharing website" (15), and insureds must inform Admiral of their home sharing activities (12): Admiral, "Guide to Your Home Insurance Cover," 12, 15. Similarly Direct Line's home insurance also does not cover vandalism and malicious or accidental damage caused by paying guests: Direct Line, "Your Home Insurance." Aviva's car insurance policy only covers purposes specified on the certificate, and then only for named drivers: Aviva, "Motor Insurance Policy."

<sup>19</sup> The concept of scale and scaling is defined as falling fixed costs at the margin. In terms of risk management, scale means the cost of insuring an extra unit, such as owning an item of personal property or hiring out a car and lowers your average cost of insurance across all units.

<sup>20</sup> Franzetti, "Risks of the Sharing Economy."

Another reason for distinguishing goods-sharing is the presence of a product liability regime in the UK, which regulates the risks of defective consumer goods. Insofar as P2P goods-sharing represents an alternative method of supplying goods, it should also be regulated under the same teleology as the statutory and common law standards. In other words, P2P goods-sharing exposes sharers to potentially unsafe products and lack of recourse because these activities fall through gaps in consumer protection, owing to their non-professional or gratuitous nature.<sup>21</sup> Therefore, there is a strong policy rationale for focussing on goods-sharing as a separate sector for risk management.

Moreover, tangible property can be damaged by those who use it, thereby diminishing its capacity to support further sharing, whereas the same cannot be said for services. Therefore, managing the risks of property damage is a fundamental condition to sustaining both sharing as a viable economic activity and realising the benefits of sustainability and economic efficiency claimed by proponents of sharing.<sup>22</sup>

Finally, what differentiates sharing—defined as short-term non-ownership transfers of tangible property—from other P2P economic exchanges, such as selling or donating, are the added complications to risk management necessitated by the ongoing relationship based on transfers of possession. In terms of product safety and harms caused by property, the risks of renting or buying from a peer provider may seem similar; however, the available legal recourses for compensation are very different. Private sellers are under very few legal duties to buyers,<sup>23</sup> especially if the sale is made without warranty,<sup>24</sup> whereas private lenders as bailors may have duties to take reasonable care to ensure minimal levels of safety.<sup>25</sup> In terms of risks of property damage, the position of P2P buyers is completely different from P2P sharers. The buyer, as the new property owner, must bear any loss as the ultimate risk bearer, but they will also have ample opportunity to insure their new property. The user as bailee will have a quasi-strict tort liability or strict contractual liability under the platform service provider (PSP) agreement (henceforth Agreement) to the owner for losses occurring during the sharing period, so bear the risk not only for their own actions but also for third-party actions, but often without the option of shifting that risk through insurance.<sup>26</sup>

## 2.2 Why Platform-Mediated?

My reason for focussing on platform-mediated P2P rather than simply P2P in general is the opportunity provided by the platform as a medium for centralising and scaling risk management for distributed sharing activities. In a purely bilateral P2P, risk can only be shifted between the two participants, and as they are both private individuals of similar financial standing, the scope for efficient transfers is very small; no one party has the means to scale the costs of risk mitigation. Nor are many risk strategies feasible for micro-transactions, which depend on minimal transaction costs to be viable. Because intermediation by a PSP as a central coordinator has already proven a successful model for reducing other transactional cost barriers to systematic P2P sharing, such as search and payments, it may be possible to apply this solution to the cost of risk management. Indeed many commercial platforms already institute internal mitigation mechanisms through a combination of guarantees and insurance. These mechanisms will be discussed in detail in section 4, but they effectively approximate risk collectivisation, which I argue can be improved.

This paper will analyse platform-mediated P2P sharing of chattels, including motor vehicles, and although I will examine home-sharing platforms in sections 4 and 5 with specific regard to their risk-management strategies, I will not refer to their legal duties, such as occupiers' liability. The 'risks' I analyse will be limited to harms caused by and caused to shared property. I will also restrict discussion to risk relations between the immediate participants, as consideration of third-party interests cannot be adequately covered in the limits of this paper. I will compare the risk-management systems of platforms hosting similar goods to account for their specific regulatory and risk contexts, especially for car-sharing, due to its stringent statutory insurance requirements. However, the proposals for risk collectivisation are applicable across all platforms regardless of the goods they host.

<sup>21</sup> There is some cover under the *Consumer Protection Act 1987* regime, as will be discussed in section 3.

<sup>22</sup> Fraiberger, "Peer-to-Peer Rental Markets."

<sup>23</sup> These duties are limited to the duty to deliver goods that correspond to their description: *Unfair Contract Terms Act 1977*, s 6(4).

<sup>24</sup> In *Hurley v Dyke* [1979] RTR 265, an "all faults" disclaimer is enough to discharge the seller's duty of care. This case today will most likely fall under *Unfair Contract Terms Act 1977*, s 13(1); however, that section has no bearing on P2P sales by virtue of that same Act, s 1(3).

<sup>25</sup> *Andrews v Hopkinson* [1957] 1 QB 229; *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1QB 694.

<sup>26</sup> They can insure the full value of the good as bailee: *A Tomlinson (Hauliers) Ltd v Hepburn* [1966] AC 451. There is no widely available insurance policy for ad hoc bailment, but sharers may have recourse under their personal contents insurance, depending on their specific policy.

### 3. Risk Management in Law

In this section, I examine the CPA product liability regime, the tort law doctrines, and the system of private insurance, which all address the risks of harms caused by and to property and where they fall short. Facilitating access to private consumption goods interrupts the stable coupling of owning and using; you no longer need to purchase an asset to access its function, and the possessions you own can now be feasibly ‘monetised’ by renting them to strangers, which was previously impractical.<sup>27</sup> This access to private consumption goods increases the probability of harms to users and third parties, mainly due to non-business suppliers providing potentially poor quality and unsafe goods, as well as their lack of insurance cover, raising the probability of non-recovery for injured parties. It also changes the risk profile of the good, which is now being used more intensively, and of the provider, who is no longer an owner–user but an amateur rental business.<sup>28</sup>

The CPA places risk onto producers under the assumption that their centralised economic activity means they are best positioned to mitigate risk and to spread the cost of that mitigation across their customer base. However, the P2P model does not conform to these assumptions, as it upsets the assumption that the supply of goods is predominantly undertaken by commercial parties. It also upsets the convenient dovetailing between legal and insurance regimes, which presume single-purpose uses of property. For privately owned consumption goods, the owner is best placed to purchase both first and third-party insurance, as reflected in the practice of covering occupiers’ liability under home insurance policies and comprehensive motor policies. For renting or purchasing goods, statutory provisions shift risk onto providers who are conventionally commercial parties, reflecting their superior ability to insure consumer losses as part of their business risk.<sup>29</sup>

#### 3.1 Product Liability

##### 3.1.1 Statute

The CPA sets up the regime for product liability in the UK, providing a system of strict liability for harms caused by defective products. Claims under the CPA are against ‘producers’<sup>30</sup> and may be brought by any person who has suffered personal injury or property damage, so includes gratuitous consumers and third-party users.<sup>31</sup> Peer providers could potentially be considered ‘suppliers’ under the Act and may be liable if they do not disclose the identity of producers of the defective goods they supplied.<sup>32</sup> However, they can avail themselves of the defence in section 4(1)(c) that they only supplied the good ‘otherwise than in the course of their business’ if they can show that they were not operating a business or trade and that their supply was not with a view to profit.<sup>33</sup> Importantly, the non-business nature of the peer provider does not defeat the liability of the original producer, who remains liable to the ultimate user, so in this sense, CPA overcomes the ‘peer’ obstacle.<sup>34</sup> It also sets a lower evidential bar than tort claims; the claimant needs only to prove that the goods are defective and that the defect caused the loss,<sup>35</sup> without proving any necessary negligence or misconduct by the producer or supplier, making recovery easier for claimants. Nonetheless, there are several reasons why recovery for third-party users may be less likely to succeed, as will be laid out below.

Despite the CPA applying equally to business and peer-supplied goods, its provisions nevertheless disadvantage P2P users compared to market consumers. The first is the presence or absence of warnings and instructions provided with the product, without which the risks of misusing or misjudging its dangers might increase. Most products carry risks if misused or simply as inherent features of their proper function, such as side-effects of pharmaceutical products.<sup>36</sup> Producers are excused from

<sup>27</sup> Fraiberger, “Peer-to-Peer Rental Markets.”

<sup>28</sup> Stabrowski, “‘People as Businesses’.”

<sup>29</sup> *Consumer Rights Act 2015*, s 29; *Consumer Protection Act 1987*, s 2.

<sup>30</sup> *Consumer Protection Act 1987*, s 2. This Act also covers those who hold themselves out to be producers and importers.

<sup>31</sup> *Consumer Protection Act 1987*, s 5(1) specifies the eligible damage, and s 41(1) states that any persons affected by a contravention in Part I of the Act may bring an action. There are no restrictions on claims for personal injury, but claims for property damage must exceed £275, and the good must have been intended for “private use, occupation or consumption”; s 5(3) and s 5(4).

<sup>32</sup> A combined reading of *Consumer Protection Act 1987*, s 2(3) and s 46(1) and (5) shows that “supply” for the purposes of Part I need not be in the course of business, which would catch peer providers who are “selling, hiring out or lending” goods, s 46(1)(a).

<sup>33</sup> This requires a case-by-case analysis of whether a provider’s activities on the platform or otherwise are sufficiently frequent or economically significant to constitute a “commercial practice”: see (C-105/17) *Komisija za zashtita na potrobitelite v Kamenova* EU: C:2018:808, [38] in the EU context.

<sup>34</sup> Compare with *Consumer Rights Act 2015*, s 3, where liability of a supplier will be undermined if they are not operating in the course of business.

<sup>35</sup> *Howmet Ltd v Economy Devices Ltd* [2016] EWCA Civ 847.

<sup>36</sup> These are “standard products” and the acceptability of their risks depends on a cost-benefit analysis of safety and utility: *A v National Blood Authority* [2001] EWHC 446. That case was doubted by *Wilkes v DePuy International* [2016] EWHC 3096 (QB) and was later

liability for these risks if they give adequate warnings and instructions when they supply the product, such as operating manuals and information leaflets.<sup>37</sup> Goods purchased new from retailers will most likely include the necessary documents; however, for goods hired or borrowed P2P, the likelihood that the provider retained all the packaging, instruction manuals and disclaimer notices is much lower. Not only does this lack of documentation increase the risk to the user, but it may also undermine their claim against the producer, who could argue that they had discharged their duty by providing warnings. At the very least, it might reduce the damages claimable by increasing the risk of contributory negligence from the user's misuse of the product.

A second potential obstacle stems from CPA section 4(1)(d) defence that the defect 'did not exist in the product at the relevant time' and was later introduced through damage, wear and tear and other intervening events. For goods purchased in new condition, there is little scope for this defence since the product likely remained in the same state from factory to shop. However, for P2P shared goods, there is ample scope given that goods will not be in their original manufactured state, and there are multiple intervening users, including the owner, but also other sharers whose actions are not accountable.<sup>38</sup> In this situation, the evidential difficulty of establishing that the defect was present at the time of production increases.

A third obstacle is the limitation period, which precludes actions arising 10 years after the last supply of the product by a defendant producer.<sup>39</sup> Users in P2P sharing have little means of knowing when the product was last supplied; hence, they have no guarantee that CPA protection has not lapsed due to time limitations.<sup>40</sup> This lack of knowledge is less pertinent for goods with transparent documentary history, such as motor vehicles, but more so for durable goods such as electrical appliances, DIY equipment and furniture.

Thus, although the CPA regime continues to regulate product risks for P2P sharing, there are potentially more obstacles facing peer users compared with market consumers, owing to non-business suppliers and the used condition of goods. These obstacles, plus unfamiliarity with and lack of instruction in using the goods, also increase peer users' actual risks, resulting in those users who use a more dangerous method of accessing products being less protected by the statutory regime.

### 3.1.2 Tort and Contract

Where CPA is inapplicable, a user harmed by a product may resort to tort claims against both the producer of the good and the peer provider: the former in negligence under the *Donoghue v Stevenson*<sup>41</sup> principle and the latter under contract or bailment.<sup>42</sup> However, like under CPA, peer users face several hurdles compared to market consumers owing to the non-business nature of peer providers and the presumption that consumer goods are only foreseeably used for private consumption by their owners.

Under negligence, the user must establish sufficient proximity between themselves and the producer, and establish that the harm caused to a person in their position was foreseeable. For manufactured goods intended for an end-user, first, the issue of proximity raises few difficulties; it is well established that manufacturers owe a duty of care to all those who may potentially use their products in the form they are produced.<sup>43</sup> Second, it does not appear necessary for the user to prove a specific product defect or manufacturer's negligence. On the first point, Lord Boyd in *GR v Glasgow and Clyde Health Board* averred that 'it is not necessary to specify a "defect" as such. The first question is whether or not the product causes injury'.<sup>44</sup> On the second point, in *Hill v James Crow (Cases)*, the manufacturer was held liable regardless of their history of good workmanship,<sup>45</sup> and in *Carroll v Fearon* the manufacturer was held liable for a specific but undiscoverable defect.<sup>46</sup> Together, these rulings suggest a standard approaching strict liability for manufacturers.<sup>47</sup> The hurdle that may preclude a claim lies in foreseeability and whether harm to the category of persons who informally hire or borrow the product from the provider would be reasonably

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confirmed by *Gee v DePuy International* [2018] EWHC 1208 (QB). However, the courts retained the opinion that there is a balance between risks and advantages that should be taken into account when assessing whether a risk is something the public is likely to accept, [96]–[100] (Andrews J).

<sup>37</sup> *Worsley v Tambrands Ltd* [1999] 12 WLUK 93.

<sup>38</sup> *Love v Halfords Ltd* [2014] EWHC 1057 (QB).

<sup>39</sup> *Consumer Protection Act 1987*, s 4(2) and Schedule 1 Part I s 1; *Wilson v Beko Plc* [2019] EWHC 3362 (QB).

<sup>40</sup> *Consumer Protection Act 1987*, s 4(2).

<sup>41</sup> *Donoghue v Stevenson* [1932] AC 562.

<sup>42</sup> *Grant v Australian Knitting Mills* [1936] AC 85.

<sup>43</sup> *Donoghue v Stevenson* [1932] AC 562, 599 (Lord Atkin); *Hill v James Crowe (Cases)* [1978] ICR 298; *GR v Greater Glasgow and Clyde Health Board* [2019] SLT 133.

<sup>44</sup> *GR v Glasgow and Clyde Health Board* [2019] SLT 133, [26].

<sup>45</sup> *Hill v James Crow (Cases)* [1978] ICR 298. See *Grant v Australian Knitting Mills* [1936] AC 85, 101 (Lord Wright).

<sup>46</sup> *Carroll v Fearon* [1999] ECC 73. Compare with *Evans v Triplex Safety Glass Co Ltd* [1936] 1 All ER 283.

<sup>47</sup> Strict liability has been discussed in the context of the digital economy and goods. See Howells, "Protecting Consumer Protection Values in the Fourth Industrial Revolution."

foreseeable to the manufacturer.<sup>48</sup> It would be uncontroversial to suggest that manufacturers owe duties to the owner's friends and family who foreseeably use the goods occasionally.<sup>49</sup> However, it may not be foreseeable that a good intended for personal consumption is regularly hired to strangers, especially if doing so intensifies wear and tear, reduces the reliability of maintenance, and leads to supplying the good without its intended warnings and instructions.<sup>50</sup>

A claim against the provider in contract or bailment also faces obstacles, particularly if the bailment was gratuitous and the damage was caused by a latent defect. Contract terms between providers and users are largely determined by Agreements, which are the terms and conditions that users must accept for using a platform's services. These usually are the general terms of service,<sup>51</sup> but they can also include terms for processing payments,<sup>52</sup> insurance,<sup>53</sup> and using the PSP's dispute resolution mechanisms.<sup>54</sup> Agreements routinely specify that providers are solely responsible for giving accurate descriptions of goods, but the platform does not endorse or verify the provider's claims.<sup>55</sup> The standard of care for gratuitous bailors has traditionally been set low,<sup>56</sup> and recent cases suggest this lenient approach remains.<sup>57</sup> Non-gratuitous bailors would be liable for faults that reasonable care could have discovered or prevented; however, Paton has noted that this leaves a gap for undiscoverable latent defects.<sup>58</sup> Moreover, the layperson status of providers means standards of care are unlikely to be very stringent. The presence of waiver clauses in Agreements, whereby the user agrees to use shared goods at their own risk, may de facto limit or exclude provider liability,<sup>59</sup> although generally, Agreements do not contain clauses where the express purpose is to limit provider liability.<sup>60</sup>

### 3.2 Property Damage

#### 3.2.1 Bailment<sup>61</sup>

Bailment functions as a means of transferring the risks of property damage from the owner to the bailee as the temporary possessor of property. The formal standard of care is reasonableness; however, the reversed onus of proof leads to a stricter effective standard.<sup>62</sup> This standard of care means a user would be liable if they failed to take reasonable care in storing, using or maintaining the shared good, and potentially even for intentional acts of third parties such as theft if their negligence contributed to the loss.<sup>63</sup> In conjunction, most Agreements place strict contractual liability onto the user for damage to shared goods. These clauses are drafted widely to cover all occurrences of damage, including theft, accidents and causes that are regardless of the user's conduct.<sup>64</sup>

Such an approach may be economically efficient if the user regularly bails other people's goods and can arrange cost-effective insurance, but it is not satisfactory for bailment on an ad hoc basis. Moreover, it merely shifts risk from one private party to another, and users are arguably in a worse position relative to providers to arrange risk mitigation since the latter may already have first-party insurance in place, either through their home insurance or their manufacturer's warranty.

<sup>48</sup> *Donoghue v Stevenson* [1932] AC 562.

<sup>49</sup> *Carroll v Fearon* [1999] EC. 73. Compare with *Hennon v Cape Building Products Ltd* [2006] 2 WLUK 23.

<sup>50</sup> *Renfrew Golf Club v Motocaddy Ltd* [2016] SLT 345.

<sup>51</sup> For example, Share Shed, "Terms and Conditions," "Liability Waiver and Indemnification Form."

<sup>52</sup> For example, Airbnb, "Payment Terms of Service."

<sup>53</sup> For example, Turo, "Protection Plans Including Insurance."

<sup>54</sup> For example, Turo, "Terms of Service," "Dispute resolution for hosts and guests residing outside the United States or Canada."

<sup>55</sup> Turo, "Terms of Service," "Eligibility, Registration, Verification"; By Rotation, "Terms," s 2.

<sup>56</sup> *Coughlin v Gillison* [1899] 1 QB 145.

<sup>57</sup> *Poole v Wright* [2013] EWHC 2375 (QB).

<sup>58</sup> Paton, *Bailment in the Common Law*, 298. However, *Carroll v Fearon* [2019] SLT 133 suggests these would also be attributed to the manufacturer.

<sup>59</sup> Share Shed, "Terms and Conditions," "Liability Waiver and Indemnification Form."

<sup>60</sup> Exemption clauses must be worded to explicitly exclude liability both in contract and in tort: *Canada Steamship Lines Ltd v The King* [1952] UKPC.

<sup>61</sup> I have written in greater detail on bailment in the sharing economy in "Bailment in the Peer-to-peer Sharing Economy" (on file with author).

<sup>62</sup> *British Crane Hire Corporation Ltd v Ipswich Plant Hire Ltd* [1975] QB 303.

<sup>63</sup> *Morris v CW Martin & Sons* [1966] 1 QB 716; compare with *Cowan v Blackwill Motor Caravan Conversions Ltd* [1978] 6 WLUK 164.

<sup>64</sup> Style Lend, "Terms of Service," s 11; By Rotation, "Terms," s 10; Getaround, "Terms and Conditions," s 9.1.



### 3.2.2 Insurance

As a default, property losses are borne by the owner as a residual risk bearer.<sup>65</sup> Many private property proponents advocate this privatisation of risk as a means of internalising resource management costs.<sup>66</sup> In practice, owners either choose to self-insure or to shift risk to an insurer. For owner-users, personal insurance is convenient as their property is used for the single purpose of personal consumption. However, in the context of sharing, personal insurance policies often will not cover damage caused in the course of sharing.<sup>67</sup> This leads to a gap in insurance for shared property, as the provider's personal insurance does not cover the property, nor is it covered by the user, who likely cannot arrange insurance for such ad hoc bailment.<sup>68</sup> In the event the provider cannot recover from the user under the latter's tort or contractual obligations, they are effectively left without recourse. Further, as I have stated above, the willingness of peers to contribute their personal property to sharing is crucial to the viability of sharing as an economic activity, so the lack of risk management for property damage represents an existential challenge to this sector.

### 3.3 Drawbacks of Legal Approach

None of the prevailing legal risk-management systems can achieve an optimal outcome in terms of spreading risk equitably between provider and user. This is because of assumptions around the specialised economic roles of actors and the bipartite structure of legal rights, which constrain strategies to shifting risk bilaterally.<sup>69</sup> The CPA is successful in collectivising risks of defective products and distributing these risks to producers who act as insurers for all potential consumers; this approach is efficient because of the specialised nature of production and supply. This same approach does not scale in P2P sharing, where the economic functions are distributed, products are differentiated, and participants have equally limited means to monitor the safety of shared goods and each other's actions.<sup>70</sup> Similarly, the tort approach of making producers and providers liable for harms caused by property is justifiable if they are able to monitor and control the safety and quality of goods and efficient if they are able to spread the costs of risk mitigation. These considerations do not apply to peer providers who are equally vulnerable to harms caused by property, have no control over how safe a product is, and have similar financial standing as the user. Making peer providers liable will not improve the quality of goods they supply, nor will it achieve a fairer distribution of loss, but will only discourage them from sharing, causing the sector to become less diversified and restricting consumers' choice.

Moreover, both CPA and tort operate on the logic of shifting risk to the party most able to scale the mitigation costs, so frames the contest as one of bilateral duties and obligations. However, when parties on either side of this bilateral risk relation are of similar financial means, the result is a zero-sum game with no efficiencies to be gained. Managing risk using private law achieves a sub-optimal outcome, not only because many of these tools are not fit for purpose but also because the fundamental bipartite structure of legal rights unduly narrows the scope of analysis and prevents economies of scale.<sup>71</sup>

These limitations are replicated in how law and insurance manage property risks. By making liability and insurance dependent upon legal interests in property and treating sharing as a series of individual actions rather than construing it as a collaborative whole, these mechanisms founder on the same obstacle of being unable to scale risk management for each granular activity of sharing.

<sup>65</sup> Honore, "Ownership," 126–128. Although Honore addresses rights rather than risk in his essay, I suggest that the residuary character of ownership also applies to risk and liability. This is supported by Honore's claim that prohibition of harmful use, liability to execution and right to income are all incidents of ownership, 117, 123–124.

<sup>66</sup> Demsetz, "Toward a Theory of Property Rights."

<sup>67</sup> Lloyd's, Sharing Risks, Sharing Rewards.

<sup>68</sup> The provider's risks can be covered by specialised insurance policies for sharing, such as offered by GuardHog for Airbnb hosting: Guardhog, "Home-Sharing Insurance." However, outside of insurance for accommodation sharing and vehicle hiring, such policies are next to non-existent.

<sup>69</sup> For example, the principle of privity in contract, which is a predominant means of allocating risk for a joint activity, means that risks arising from the contract can only be allocated among parties to the contract. This principle restricts the ability to monitor risks when goods are passed onto third parties, as evidenced in cases on bailment and sub-bailment, such as *Morris v CW Martin & Sons* [1966] 1 QB 716 and *The Pioneer Container* [1994] 2 AC 324.

<sup>70</sup> Zale, "When Everything Is Small"; Lin, "Herding Cats."

<sup>71</sup> Hohfeld, Fundamental Legal Conceptions.

## 4. Platform Risk Management

That platforms do not adequately protect users or third parties against the harms occasioned by activities they host is a widely acknowledged problem, especially since platforms benefit from the activity but escape liability by declaring themselves not parties to the transaction and extracting indemnities from users.<sup>72</sup> However, the formal dissociation between platforms and the transactions they host does not mean they have no involvement in managing risks between users. On the contrary, I have already cited many examples where Agreements explicitly allocate risks between providers and users through stipulating obligation, indemnity and waiver for specified losses. PSPs use Agreements to construct risk-management systems that circumvent many of the drawbacks of legal mechanisms by incorporating both formal and de facto indemnity relations between themselves, users and external insurers. It is these systems of contract to which I turn.

### 4.1 Damage Caused by Property

For managing losses caused by goods, either through defect or otherwise, the most popular and sophisticated strategies adopt insurance instruments. Because the regulatory context for insurance varies between types of assets, I will discuss car-sharing, home-sharing and goods-sharing separately.

#### 4.1.1 Car-Sharing

In the UK, car-sharing must have mandatory third-party insurance in place as stipulated in section 143 of the Road Traffic Act 1988; however, the majority of personal, non-commercial motor policies prohibit private hire and doing so invalidates the policy. In response, commercial car-sharing platforms, including Turo and Getaround, arrange insurance by acting as agents in procuring cover from external partners.<sup>73</sup> On Turo, both the owner, or ‘host’, and the user, or ‘guest’, are covered for third-party liability, with unlimited coverage for personal injury and up to £20 million for property damage, meaning if the guest injures a pedestrian or another driver either by their negligence or a failure of the vehicle, both host and guest are covered for the third-party claim.<sup>74</sup> Turo and Getaround offer hosts and guests different tiers of voluntary excess for which they must pay correspondingly,<sup>75</sup> but third-party liability cover is included as standard.<sup>76</sup> Moreover, although both PSPs require owners to maintain valid third-party motor insurance on the vehicle throughout the sharing period,<sup>77</sup> in the event of damage, the platform-arranged insurance is primary.<sup>78</sup>

Interestingly there is no explicit provision covering injury to the guest or damage to their property. If the guest is injured due to the fault of another driver, they may claim against the offending driver’s insurer for their loss. However, if the guest is injured due to a fault with the vehicle that either caused an accident or injured the guest in another way, it is unclear which insurance provision, if any, the guest may claim under. Guests’ insurance only covers third-party injury, not personal injury. It may be possible to claim under the host’s cover as a third party, but Turo’s policy wording is ambiguous,<sup>79</sup> and there is a similar gap in Getaround’s policy.<sup>80</sup> These gaps potentially mean that if a guest is injured by no fault of their own, they have no recourse to an insurance payout. It is always open to the guest to claim in tort either against the manufacturer of the vehicle under product liability or the host under bailment; however, I have already discussed the difficulties of doing so.

Turo and Getaround are examples of PSPs offering very comprehensive insurance cover for their users, ensuring participants comply with legal mandates and offering a measure of protection for persons and property at a potentially lower cost than if

<sup>72</sup> Koolhoven, “The ‘Matching’ Platform and Mandatory Agency Law.”

<sup>73</sup> Turo partners with Aon and Aioi Nissay Dowa; Turo, “Protection Plans Including Insurance.” Getaround partners with Allianz; Getaround, “Insurance.”

<sup>74</sup> Turo, “Protection Plans Including Insurance”; Getaround, “Peer-to-Peer Car Sharing,” s 1.

<sup>75</sup> Turo, “Protection Plans Including Insurance,” “Guest’s Responsibility for Damage to the Vehicle”; Getaround, “Terms and Conditions,” s 10.

<sup>76</sup> Turo, “Protection Plans Including Insurance,” “Third-party Auto Liability Insurance”; Getaround, “Terms and Conditions,” s 9.

<sup>77</sup> Turo, “Terms of Service,” “Physical Damage to Your Vehicle—Other Host-Specific Insurance Matters”; Getaround, “Terms and Conditions,” s 9.3, “The Vehicle must be covered by an annual insurance policy taken out by the Car Owner for periods outside of Rentals made through the Platform.”

<sup>78</sup> Turo, “Protection Plans Including Insurance,” “The third-party liability insurance coverage provided to Guests under the Aioi Nissay Dowa Insurance Policy is always primary to any other applicable insurance the Guest may have (such as a motor vehicle insurance policy covering vehicles owned by the Guest);” Getaround, “Peer-to-Peer Car Sharing,” s 1.

<sup>79</sup> Turo, “Protection Plans Including Insurance,” “the Aioi Nissay Dowa Insurance Policy provides Guests with the following kinds of coverage while they are driving the booked Vehicle during the booked trip: Bodily injury and property damage to third parties: Under UK law and the Aioi Nissay Dowa Insurance Policy, accidental death of or bodily injury to a third party receives unlimited coverage.”

<sup>80</sup> Getaround, “Terms and Conditions,” s 9.1.

users purchased insurance individually. Some platforms arrange no cover at all and rely solely on users to arrange their own insurance, which can effectively result in under-insurance for owners and users, given their relative lack of sophistication and dearth of sharing-oriented policies.<sup>81</sup>

#### 4.1.2 Home-Sharing

Another sharing sector that relies heavily on insurance is home-sharing. As previously noted, home-sharing is not technically goods-sharing, and hosts as occupiers are subject to specific regulatory and tort standards.<sup>82</sup> Nevertheless, I will examine home-sharing platforms, in particular Airbnb, as reference examples for sophisticated methods of risk management. Unlike cars, insurance for occupiers is not legally mandatory, although it can be offered as part of personal buildings or contents policies. However, these policies also disallow renting to visitors or hosting them regularly, which means an Airbnb host cannot rely on their personal home insurance for injury caused to paying guests. In response, Airbnb offers ‘Host Liability Insurance’,<sup>83</sup> which insures hosts for liability of up to US\$1 million for guests’ injury and property damage. This insurance is automatically included for all stays arranged on Airbnb’s platform, the limit is both per claim and an annual upper limit, and it excludes injuries caused otherwise than by premises, so by any movables, including furniture or appliances.<sup>84</sup> HomeAway offers a very similar insurance scheme.<sup>85</sup>

While the limits for both schemes are generous, it is not inconceivable that damage may exceed the insured amount, in which case the host may need to satisfy the outstanding claim personally. It is open to hosts to limit or restrict their occupier’s liability; however, there is no such standard exclusion or waiver clause in Airbnb’s Agreements and no option for including such a term through its listing process. The current system potentially exposes hosts to under-insurance, particularly if they host regularly. Nevertheless, these protections are generous for a sector where insurance is not mandatory, considering they are offered for no additional cost.

#### 4.1.3 Goods-Sharing

Insurance for injury or damage caused by goods on sharing platforms is much rarer compared with the other categories. One example is the Library of Things, which purchases public liability insurance to cover their hiring of goods to members.<sup>86</sup> However, their business model is a conventional business-to-consumer rental service, not a P2P facilitator; therefore, they presumably cannot limit their liability. Still, while it can be supposed that other similar PSPs such as Share Shed also purchase insurance to cover their public liability, it is rare for goods-sharing PSPs to explicitly extend cover to members who use the borrowed goods, such that a member who suffers injury can claim under insurance rather than tort.<sup>87</sup> Most PSPs adopt the opposite approach; they tend to insert waiver clauses and obligations on users to inspect and use goods safely, which means users participate on the platform at their own risk.<sup>88</sup> Waivers also potentially act as exclusion clauses by absolving providers of liability through the user’s *non volenti*, which are allowed under Unfair Contract Terms Act section 1(3) for peer providers not acting in the course of business. In short, users of P2P goods-sharing appear to have no insurance cover and must resort to claiming either under CPA or tort if they suffer damage, contractual limitations permitting.

#### 4.1.4 Contract

Agreement terms also function to allocate responsibilities for loss caused by shared property. Most Agreements examined in this paper contain general liability limitation and indemnity clauses whereby the PSP excludes all liability except for death or personal injury caused by them and their agents,<sup>89</sup> and users are bound to indemnify the PSP for any claims arising from any party in relation to the activities provided or facilitated by the PSP’s services. However, it is noteworthy that the scope and conditions attached to these clauses differ across platforms. The waiver and liability clauses on Getaround only cover the PSP–user contract and do not extend to the provider–user contract,<sup>90</sup> whereas on Turo, these clauses also extend to cover users vis-

<sup>81</sup> Rentmycamper is one such platform: Rentmycamper, “How It All Works.”

<sup>82</sup> *Occupiers’ Liability Act 1957*, s 2. Technically home-sharing hosts are not subject to fire regulations: *The Regulatory Reform (Fire Safety) Order 2005*, s 6, but Airbnb encourages hosts to install carbon monoxide and fire alarms: Airbnb, “Home Safety.”

<sup>83</sup> Arranged via Aon and underwritten by Zurich Insurance: Airbnb, “Host Liability Insurance.”

<sup>84</sup> Airbnb, “Host Liability Insurance,” “Exclusions.”

<sup>85</sup> HomeAway, “Insurance.”

<sup>86</sup> Library of Things, “Terms of Borrowing,” “Library of Things’ Responsibilities,” s 3.

<sup>87</sup> Contrast Share Shed, which obliges members to waive all claims and indemnify the PSP: Share Shed, “Terms and Conditions,” “Liability Waiver and Indemnification Form.”

<sup>88</sup> Share Shed, “Terms and Conditions,” “Liability Waiver and Indemnification Form”; Style Lend, “Terms of Service,” s 19.

<sup>89</sup> Disallowed under *Consumer Rights Act 2015*, s 63 and Schedule 2.

<sup>90</sup> Getaround, “Terms and Conditions,” s 17.

à-vis each other,<sup>91</sup> although this approach appears to be uncommon.<sup>92</sup> Airbnb's indemnification clause against users only applies to damage caused by users' breach of contract,<sup>93</sup> whereas on Turo and Getaround, there is no such condition.<sup>94</sup>

By generalising across various Agreements, it can be observed that PSPs do not provide substantive risk provisions such as warranties or indemnities between providers–users or users–third parties, except in stipulating that users must waive the platform of responsibility for the actions of other users and third parties and indemnify the platform for any claims by other users and third parties. As Agreements are silent on apportioning losses between provider, user and third parties, these claims fall to be determined by tort.

## 4.2 Damage to Property

PSPs are more sensitive to the risks of property damage and generally give more protections in this area compared with public liability, most likely because ensuring the welfare of shared goods is fundamental to sustaining their future business. If providers are not offered protection for staking their goods, there will be fewer providers and fewer goods to monetise, so it is directly in the PSPs' interest to give protection.<sup>95</sup> As such, platforms' risk management for property damage is more widespread and varied in its forms. Insurance is common, and platforms often combine in-house 'insurance' provided through contractual guarantees alongside formal insurance policies.

### 4.2.1 Car-Sharing

Unlike third-party insurance, first-party insurance covering property damage to the driver's own vehicle is not mandatory in UK law. Nevertheless, Turo and Getaround offer payouts for vehicle damage under hosts' policies, the former for amounts up to £75,000 and the latter £40,000.<sup>96</sup> Cover is important as damage done in the course of hiring out a private vehicle will not be covered by the owner's personal motor policy, many of which prohibit car-sharing. Aside from commercial car insurance, which is prohibitively expensive, there is a dearth of policies tailored for P2P hiring, which means if PSPs do arrange insurance for owners, owners may have little choice but to lend their vehicles at their own risk.<sup>97</sup> Considering the significant asset value at risk, this can effectively undermine the viability of P2P car-sharing.

Interestingly, under Turo's protection plan, the first US\$5000 for property damage to the car is paid out by Turo, with its insurer covering the excess.<sup>98</sup> This is an indemnity obligation between Turo and its hosts, which operates essentially like insurance, despite Turo's declaration that it is not. We can only speculate why Turo deems it more efficient to cover small losses from their business expenses rather than leaving it to insurers; however, the effect is striking as it represents a degree of collectivisation of property damage risk among hosts and guests through the intermediation of Turo as the underwriter. Turo is effectively coordinating mutual insurance between hosts and guests whereby both contribute towards the insurance 'pool' through their hiring and rental fees, and in return, hosts receive indemnity up to £5000, and guests receive indemnity for losses over their policy excess. Turo underwrites this scheme since they guarantee the payouts and presumably would cover any shortfall in the 'pool' of funds.<sup>99</sup>

### 4.2.2 Home-Sharing

Compared to car-sharing, home-sharing platforms offer fewer, if any, insurance covers for property damage to owners' homes and contents.<sup>100</sup> Airbnb's Host Damage Protection offers one of the most comprehensive protection schemes for hosts' property.<sup>101</sup> Under its terms, Airbnb will reimburse any loss to a host's property and possessions that occur during the rental period, regardless of fault and up to US\$1 million; in exchange, the host assigns any claims they have in respect to the loss to

<sup>91</sup> Turo, "Terms of Service," "Limitation of Liability and Waiver."

<sup>92</sup> Style Lend, "Terms of Service," s 19; By Rotation, "Terms," s 18.

<sup>93</sup> Airbnb, "Terms of Service," s 20.

<sup>94</sup> Turo, "Terms of Service," "Indemnity"; Getaround, "Terms and Conditions," "Indemnity."

<sup>95</sup> Airbnb, "Host Damage Protection Terms," s VI.

<sup>96</sup> Turo, "Protection Plans Including Insurance"; Getaround, "Terms and Conditions," s 9.

<sup>97</sup> Although stand-alone insurance for car-sharing is becoming more available: that is, Tempcover, "Sharing Insurance."

<sup>98</sup> Turo, "Protection Plans Including Insurance."

<sup>99</sup> It is highly unlikely that Turo maintains such a pool and most likely it is administered as part of Turo's general business accounts, but this does not detract from the argument.

<sup>100</sup> HomeAway offers homeowners the option of requiring guests to purchase insurance in case they damage anything and to set a damage deposit: HomeAway, "About Damage Protection for Your Property." Love Home Swap offers no protection: Love Home Swap, "What Do I Do If a Guest Causes Damage in My Home?"

<sup>101</sup> Airbnb, "Host Damage Protection Terms."

Airbnb and its insurers.<sup>102</sup> Formally, Airbnb is acting as a guarantor for guests' obligations to compensate their hosts for damage caused by them and their invitees.<sup>103</sup> Payout under the scheme is conditional upon the host pursuing avenues of redress from the guest, including deducting from their security deposit and attempting to settle privately. Airbnb will deduct from payout any compensation received from other sources, such as other insurers, the guest or another guarantor.<sup>104</sup> The overall effect is to shift some risk of non or partial recovery of loss from hosts to Airbnb.

What is interesting about Airbnb's guarantee (henceforth, the Guarantee) is how it relies on insurability to determine eligible losses, and the role played by Airbnb's own insurers in the payout process. First, Airbnb will only give cover for 'Covered Property', which is defined as any real or personal property for which the host either has an insurable interest, or is legally liable for. Since the host presumably has an insurable interest in the 'Covered Property', this means the Guarantee only covers property that the host *could* have insured privately.<sup>105</sup> The reasoning goes that a host cannot receive more generous treatment from Airbnb than if they had purchased private insurance. It is a bid to minimise potential free-riding on Airbnb protection by uninsured hosts and counter the moral hazard of hosts taking less than adequate care because they are covered by the Guarantee. That this is a bid to minimise free-riding is confirmed by Airbnb reserving the right to deduct from payouts any compensation the host receives from the guest or under any insurance payout.<sup>106</sup> Effectively, Airbnb will only pay the shortfall for any damage the host has, or could have, insured, for which the host did not receive full compensation from other sources. Secondly, unlike Turo or Getaround, where cover is provided directly by the insurance partner to users, Airbnb's Guarantee is provided by Airbnb, which would suggest that payouts come from their own business expenses. Yet, the frequent references to 'Airbnb and its insurers' and the latter's extensive role in determining the eligibility and amount of payout suggests that payouts are not within the complete discretion of Airbnb.<sup>107</sup> This wording might indicate Airbnb has (re)insured their obligations under the Guarantee separately from their other business risks, so they must involve their insurer in their dispute resolution with users as part of their obligations to the insurer. It is beyond the scope of this paper to ascertain the exact legal arrangement between Airbnb and its insurers. However, the idea of separating the risks of damage to shared property from the PSP's more general business risks and insuring the former independently is promising. It opens the possibility of a PSP acting as the primary underwriter of its users' risks, then subsequently purchasing reinsurance or acting as the primary insured for their indemnity obligations and guarantee to their users. Either way, scattered users' risks are pooled by the PSP, who can then insure these risks collectively, potentially lowering insurance costs.

#### 4.2.3 Goods-Sharing

Insurance and indemnities are much rarer in the goods-sharing sector, likely owing to the assets' low value, making risk management inefficient and costly. Nevertheless, there are examples. Style Lend and By Rotation are platforms specialising in high fashion, and both have protections for property damage in place. Style Lend operates a scheme for minor damages; users (renters) pay \$5 towards 'insurance', which covers them for minor repairs up to \$50; anything in excess, they must pay directly to the provider (lender).<sup>108</sup> By Rotation offers a guarantee to reimburse lenders for losses they could not recover from the renter in exchange for the assignment of their rights to receive compensation from the renter.<sup>109</sup> It is very similar to Airbnb's Host Damage Protection as both are measures of last resort and shift the risk of non-recovery from the lenders to the PSP.

Style Lend's internal 'insurance' scheme is significant as it is one of the few protections offered to users to cover their strict contractual liability for property damage. It does not shift the risk of property damage away from renters as they are still liable for the whole amount of loss, but it does alleviate some of the renters' burden by collectivising their risks and sharing them among each other. This loss distribution is constrained to one group, as only renters pay for and draw from the insurance to cover their liability. It is unknown whether this system is self-sustaining or subsidised by the PSP's other activities or by reinsurance; nevertheless, it is a flexible and low-cost solution to distributing risk for small-value losses.

<sup>102</sup> Airbnb, "Host Damage Protection Terms," s V.1.

<sup>103</sup> Albeit subject to a long list of limitations; Airbnb, "Host Damage Protection Terms," s III.

<sup>104</sup> Airbnb, "Host Damage Protection Terms," s I.

<sup>105</sup> Airbnb, "Host Damage Protection Terms," s II. Unlike Turo or Getaround, Airbnb does not require that hosts maintain home and contents insurance to claim under the scheme: Airbnb, "Host Damage Protection Terms," s 1.

<sup>106</sup> Airbnb, "Host Damage Protection Terms," s V, "Determination of the Amount of Covered Loss," s 4.

<sup>107</sup> For example, Airbnb, "Host Damage Protection Terms," s V.1 states "to assign to Airbnb or its insurer any rights and remedies you may have to recover amounts paid to you."

<sup>108</sup> Style Lend, "FAQs."

<sup>109</sup> By Rotation. "Terms," s 16.

#### 4.2.4 Contract

Agreements commonly place strict contractual liability onto users for damage to shared property, effectively making them insurers of the good for the duration of sharing, potentially a heavy financial obligation. A few platforms do offer means of alleviating this burden, but the relief is limited. For example, Style Lend's insurance limit is US\$50, and Turo's insurance excess ranges from £250 to £2000 and excludes interior and mechanical damage.<sup>110</sup> Other platforms such as Airbnb give guests no means of limiting their liability, and while the obligation is capped at the repair or replacement value, which may be modest in the case of used consumer goods, for homes, cars and other high-value objects, the user's potential liability is considerable.

Shifting risk away from providers who may already have insurance or warranties in place and onto users who most likely do not and cannot feasibly arrange for risk mitigation is neither fair nor efficient. Although some sharing-oriented insurance products are in the market, almost all (barring motor insurance) are sold to providers rather than users.<sup>111</sup> In light of their relative insurance positions, the fairness and logic of placing strict liability onto users must be questioned. Moreover, a provider, by receiving an insurance payout, does not extinguish their rights to claim against the user.<sup>112</sup> Instead, those rights are subrogated to the insurer, which further questions the fairness of strictly enforcing peer users' contractual obligations. While there is a danger of moral hazard should users be treated too leniently, the strictness of liability also arguably undermines its deterrence function as no amount of care is sufficient to discharge the duty, and the lack of insurance availability means users cannot take mitigatory measures even if they wanted to. Against these constraints making users insurers of shared goods is more punitive than pragmatic.

### 5. Evaluation and Proposals

Examining platforms' risk mechanisms in detail shows that most platforms use a combination of formal insurance arrangements and their role as central coordinators to overcome the challenge of scaling risk management for P2P sharing. Here, I evaluate where platform mechanisms have been most successful, where there are gaps in their approach and propose legal reforms to address these remaining gaps.

#### 5.1 Successes of Platform Risk Management

Platform risk mechanisms have been most successful in offering cost-effective insurance schemes to users on a flexible basis. Offering insurance on a transactional rather than asset basis allows policies to cover a rotating combination of different parties and assets, which is characteristic of the distributed, non-specialised and specific activities of the sharing economy. This approach overcomes the obstacle facing conventional insurance policies, which presume insured parties are either engaged in a specialised economic function, such as business liability insurance, or insured assets are put to a single-purpose use, such as personal motor or home insurance. Platform insurance policies are also potentially cheaper than users arranging individual covers, especially given the few stand-alone sharing insurance products available in the market.<sup>113</sup> Airbnb's Host Damage Protection and Host Liability Insurance are applied at no extra direct cost,<sup>114</sup> and both Turo and Getaround charge premiums as a proportion of the rental price and offer tiers of different covers,<sup>115</sup> which enable users to calibrate the costs of mitigation to suit their risk appetite and ensure that costs never exceed the expected benefits from sharing. Insuring through the platform also allows for greater convenience in streamlining purchases and claims through the platform's internal dispute resolution systems, saving the user the time and effort of gathering and communicating information between the platform and their insurer.

Platforms can provide this level of risk protection by purchasing insurance on behalf of their users and acting as an agent to arrange group insurance or acting as an underwriter and effectively collectivising users' risk. This approach is most discernible when platforms underwrite risk themselves, such as Style Lend's insurance scheme or Turo covering the first US\$5000 damage rather than insuring it externally. It is beyond the scope of this paper to ascertain the economics behind these decisions; however, it can be conjectured that platforms find it more efficient to accept these 'excess' amounts on their policy and self-insure these losses. Therefore, by acting as the medium for collectivising and distributing users' risks, platforms effectively overcome both the P2P and the collaborative obstacle to scaling risk management. Insurance is collectivised with respect to a class of participants (such as 'hosts') who face similar risk exposures, hence overcoming the granularity of sharing. This approach also

<sup>110</sup> Turo, "Protection Plans Including Insurance."

<sup>111</sup> Guardhog, "Home-Sharing Insurance"; Insurecarhire, "Self-Drive Hire Insurance."

<sup>112</sup> *Bee v Jenson* [2007] EWCA Civ 923.

<sup>113</sup> Guardhog, "Home-Sharing Insurance"; Tempcover, "Sharing Insurance."

<sup>114</sup> Airbnb, "Host Damage Protection Terms," s I; Airbnb, "Host Liability Insurance," "Coverage Eligibility."

<sup>115</sup> Turo, "Insurance."; Getaround, "Insurance."

reduces the costs of mitigation, which is subsequently spread among all participants to the activity through charging fees on transactions, hence overcoming the collaborative problem.

### ***5.2 Problems of Platform Risk Management***

The most pressing problems with platform risk management are the many gaps in their schemes, in particular lack of protection for users as a class, for harms caused by property, and the lack of an industry standard for platform protection, which leaves users vulnerable to the discretion of PSPs.

PSPs are more generous in protecting providers against damage to their property by shifting risk onto users, acting as guarantors for users' obligations and arranging insurance. They are much less generous when protecting providers against liability; although some PSPs limit providers' liability through waiver clauses or insurance, most make no provision and effectively leave providers at the mercy of legal claims. The treatment of providers contrasts with the treatment of users, who are expected to bear strict liability for property damage, waive their claims against the PSP (and sometimes the provider) for personal injury caused by the shared good and bear financial risk personally without the option of insurance. Of all the PSPs examined here, only the car-sharing platforms Turo and Getaround and the goods-sharing platform Style Lend offer some form of protection for user liability. Insurance for car renters is such a well-established category that even if PSPs did not offer it, other options are available, so they can hardly be viewed as innovative.<sup>116</sup>

PSPs are also more generous in offering protection against property damage for assets listed on their platforms compared to offering protection for harms caused to users or third parties. This propensity is evident from the many overlaps in property insurance and the practice of purchasing 'top-ups' to cover assets and interests that users could have insured themselves or have already insured. The aim is simply to insure the same assets but for the activities of hiring or lending, which are prohibited under most personal policies, while limiting the possibility for free-riding on PSP insurance. This approach leads to overlaps, such as in car-sharing, where the host's personal and top-up insurance and the guest's liability insurance all potentially cover damage to the vehicle.

Finally, although I have focussed on platforms that offer some measure of risk protection, it is important to note that these are relative rarities in a market awash with PSPs offering few or no guarantees to their users. Most goods-sharing platforms insist users participate at their own risk and encourage users to settle disputes between themselves.<sup>117</sup> HomeAway offers no protection for property damage, and even in the well-insured car-sharing sector, platforms such as Rentmycamper offer no cover. Further, there are significant differences in the conditions for protection; Turo requires that providers maintain their personal insurance, but Hiyacar does not;<sup>118</sup> Style Lend covers renters, whereas By Rotation covers lenders. The policies are completely platform-specific and voluntary, offering no guaranteed protection to users and leaving them vulnerable to risks they may not be able to afford.

### ***5.3 Proposals for Law Reform***

Given the drawbacks of current legal approaches to risk management for sharing and the problems with platform mechanisms, how might law reform redress these challenges to better protect users from the risks of P2P sharing? Here, I explore several possible ways forward to law reform and propose that measures utilising the platform as a medium for risk management are more apposite than attempting to extend existing legal regimes to cover sharing.

#### ***5.3.1 Extending Existing Legal Regimes***

One solution is to extend existing legal regimes for governing risk, namely the CPA and tort doctrines, to cover PSPs and impute liability for their participation in the harm-causing activity.<sup>119</sup>

A potential way of expanding tort liability is to make PSPs either jointly or vicariously liable under an agency, employment or common purpose relationship with the provider.<sup>120</sup> The aim is to ascribe responsibility onto PSPs and prevent them from disavowing liability for an activity they benefit from, but also to relieve some pressure on providers and ensure claimants have

<sup>116</sup> For example, Allianz, "Travel Rental Car Insurance."

<sup>117</sup> By Rotation, "Terms," s 15.

<sup>118</sup> Hiyacar, "Motor Insurance."

<sup>119</sup> Kelly, "Chapter 389: Closing the App Gap"; Traum, "Sharing Risk in the Sharing Economy."

<sup>120</sup> McPeak, "Sharing Tort Liability"; Berke, "Products Liability in the Sharing Economy"; Vazquez, "The Sharing Revolution."

a higher chance of recovery. These methods have been proposed in the context of service-based platforms such as Uber.<sup>121</sup> However, while the control exercised by Uber over its drivers feasibly justifies imposing liability, the situation is different on goods-sharing platforms, where users have much greater freedom in choosing their transaction partner, price and duration of the exchange. Treating platforms as agents, employers or common purpose parties may have unexpected consequences for other areas of commerce and agency.<sup>122</sup>

Similarly, CPA can be expanded to cover P2P sharing by treating platforms as suppliers under the statute, thus making them potentially liable in the event the producer is not found.<sup>123</sup> Unlike peer providers, platforms cannot use the section 4(1)(c) defence, and Berke has also argued that platforms ought to be strictly liable for goods they host.<sup>124</sup> However, this method may lead to prohibitive monitoring and entry costs and make participating in sharing less democratic, as only peers with relatively new goods with verifiable origin will be allowed listings, thereby replicating the exclusionary dynamics of markets and defeating a major advantage of the sharing economy.

However, a fundamental difficulty with this approach is that the structure of the specialised trader–consumer economy for which most consumer regulations were construed is arguably inapposite for the P2P context. I have demonstrated one aspect, insurance risk management, in which wholesale transplanting of existing practices leads to greater inefficiencies. Further, existing regulations are outdated in many aspects and not fit for regulating platform economies. This is attested by the Office for Product Safety and Standards consultation on updating product safety regulation for new economic models of production and distribution, such as 3D printing and sharing. It would be preferable to use this opportunity to construe more tailored regulation instead of forcing the use of unsuitable risk regimes.

### 5.3.2 *Specific Rules for P2P*

Another possible route for law reform is to alter or create legal rules for all P2P transactions, such as setting a standard of care for providers and users and specifying the conditions for passing risk. A primary advantage would be standardising legal duties across all P2P activities regardless of the platforms that host them. This approach might restrain platforms from unilaterally imposing potentially unfair contract terms on users if there are default legal norms from which platforms cannot deviate without good reason. It might also empower peers to engage in P2P activities without relying on platforms to coordinate their contracts for them. However, the difficulties of governing and enforcing a multitude of micro-transactions make this solution practically inefficient.<sup>125</sup> Peers still require centralised coordination on crucial matters such as payments, trust and logistics, and so long as platforms serve these practical demands, they will retain their power over P2P transactions.

### 5.3.3 *Mandates on PSPs*

A third and arguably most feasible solution is to mandate PSPs to provide minimal levels of downside protection for users, whether through statutory duties or by setting industry standards.

Examples of mandatory duties for PSPs are California's ordinances on terms and conditions and vehicle-listing platforms, which dictate that terms and conditions for ride-sharing platforms such as Uber and car-sharing platforms such as Turo must insure both the vehicle and the operator from the moment they are engaged in the activity hosted by the platform.<sup>126</sup> For car-sharing, the PSP is essentially treated as the owner for the purposes of insurance whenever the car leaves the control of the owner.<sup>127</sup> That both ordinances relate to motor vehicles reflects the regulatory context of mandatory insurance for driving adopted by many jurisdictions, including the UK, which is undermined by the proliferation of car-sharing platforms that offer no insurance to their users, increasing the prospect of uninsured drivers on roads. Introducing such a mandate in the UK will have the benefit of cementing current insurance practices on large commercial platforms, forcing smaller platforms to ensure their users are not driving without insurance, guaranteeing car-sharers that their activities will be compliant regardless of which platform they use, while also protecting drivers and third parties in the event of a loss. In terms of enforcing general compliance with the Road Traffic Act 1988 section 143, an insurance mandate for car-sharing platforms is highly recommended.<sup>128</sup>

<sup>121</sup> Kelly, "Chapter 389: Closing the App Gap"; Vazquez, "The Sharing Revolution"; Sachs, "The Common Carrier Barrier"; Traum, "Sharing Risk in the Sharing Economy."

<sup>122</sup> Both the US *Communications Decency Act 1996*, s 230, and the proposed EU Digital Services Act restate the rule that platforms are not responsible for content they host. But compare with *Oberdorf v Amazon.com Inc*, Third Circuit Court of Appeals, No. 18-1041, July 3, 2019.

<sup>123</sup> *Oberdorf v Amazon Inc*, Third Circuit Court of Appeals, No. 18-1041, July 3, 2019.

<sup>124</sup> Berke, "Products Liability in the Sharing Economy."

<sup>125</sup> Zale, "When Everything Is Small."

<sup>126</sup> *California Public Utilities Code*, Div 2 s 5433; *California Insurance Code*, s 11580.24. See Wyman, "The Novelty of TNC Regulation."

<sup>127</sup> *California Insurance Code*, s 11580.24.

<sup>128</sup> A similar argument has been put forward by Vazquez, "The Sharing Revolution," in the US context.



For other sectors without mandatory insurance, the argument for making PSPs carry insurance for its users is less pertinent, especially if doing so increases the costs of sharing and prices some participants out of the market. Nevertheless, the utility of the platform as a medium for collectivising and scaling risk management should not be overlooked. An effective way for law to intervene may be to set default positions on risk and responsibility to incentivise PSPs to introduce risk mitigation measures. For example, the current industry standard is for PSPs to escape liability by formally distancing themselves from the provider–user contract and extracting indemnity from their users. If the law declared these indemnities and all contract terms which place liability onto users to be *prima facie* unfair under CRA Schedule 2 to be unenforceable, that would raise the potential cost to PSPs of using these terms. This may incentivise PSPs to put in place risk mitigations if they judge the costs of doing so is less than the potential costs of claims from users. Another method for the law to intervene may be to declare that PSPs are responsible in the first instance for losses occasioned by sharing, which they can subsequently claim from the provider, user or whoever caused the loss. This approach puts the initial burden of compensation, the risk of non-recovery and administrative costs on PSPs and may be sufficient to incentivise them to either arrange more comprehensive insurance for their business activities or shoulder low-level losses that are too costly to pursue. There are already examples of PSPs opting to cover small losses as part of their business risks, as I have outlined above.

The primary advantage of such declarations or mandates is that they place the default risk onto PSPs but give them the discretion to pursue different strategies, depending on their economic model. Platforms hosting low-value assets may choose to self-insure, and those hosting high-value assets may choose to use external insurance partners. It may also push them to explore more imaginative ways of mitigating the probability of risk, such as by calibrating costs of participation based on users' risk profiles in a bid to combat moral hazard and align user interests with their own.<sup>129</sup> This strategy relieves pressure on legal regimes to regulate at the granular level while achieving a minimum level of protection for platform users by delegating actual risk management to platforms, which have much greater insight than regulators into user data and the ability to calibrate mechanisms on the micro level. It also guarantees a standard of expectation for peer sharers, potentially boosting their confidence and trust in sharing as an alternative method of accessing goods and services.

## 6. Conclusion

The sharing economy as a new way of supplying goods and services is set to grow, but as yet, no endogenous risk-management strategy capable of supporting its ongoing viability is forthcoming. In its absence, risk continues to be managed according to outdated legal regimes that pose more obstacles than help to sharing. PSPs' mechanisms take a pragmatic approach to circumventing these barriers; however, these only provide the minimum protection necessary to reassure property owners to continue contributing their resources to platforms and leave sharers open to risks they cannot mitigate.

What is at stake is not only the viability of commercial PSPs, for many of whom inflating costs are a perennial barrier to profitability,<sup>130</sup> but also the self-sustainability of collaboration as a new form of production and value. Systems of risk based on insurability and proprietary interest threaten to pose high-cost barriers and undermine the incentives to sharing. A first step is for law to recognise the challenges of risk management in this area and the limitations of the currently available legal mechanisms, such as consumer protection regimes and private law doctrines, and to explore alternative methods of incentivising and mandating best practices by platforms in the industry.

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<sup>129</sup> Gunter, "What Makes an Airbnb Host a Superhost?"

<sup>130</sup> Cusumano, "The Sharing Economy Meets Reality."

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