

Bailment in the Peer-to-Peer Sharing Economy

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Abstract

The rapid rise of digital platforms such as Airbnb has facilitated the growth of peer-to-peer (P2P) hires into an economy of considerable value. Despite its growing significance there has been little attention on P2P sharing from private law and regulation, resulting in a dearth of legal norms fit for governing the provision of goods and services amongst consumer peers. This regulatory gap has enabled commercial platforms to construct elaborate contractual frameworks which they use to dictate the terms of engagement for large swathes of the P2P market and impose obligations on private parties. To address this gap, this paper proposes the use of bailment as a potential instrument in governing norms for P2P sharing, with the aims of harmonising participants' legal obligations, protecting them from the vagaries of platforms' user policies, and managing their risks as they engage in sharing.

Keywords: contract law, commercial law, consumer law, bailment, tort, liability, peer-to-peer

1. Introduction

In the decade since its inception, the 'sharing economy' has both grown as an economic sector and diversified in the range of goods and services it offers to consumers.¹ Peer-to-peer sharing of tangible consumer goods is increasingly becoming a viable alternative mode of consumption to purchasing or renting goods

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¹ Defining how best to describe this new economy characterised largely by crowd-based or platform-mediated economic activity has been the subject of numerous discussions: R. Belk, 'Sharing Versus Pseudo-Sharing in Web 2.0' (2014) 18 *Anthropologist* 7; J. Schor, 'Debating the Sharing Economy' (2016) 4 *Psychosociological Issues in Human Resource Management* 7; M. M. Gobble, 'Defining the Sharing Economy' (2017) 60 *Research-Technology Management* 59. But the term 'sharing economy' is widely accepted as an umbrella term and so is the one I adopt.

from businesses on the market.² Want to use a car on a short-term basis? Platforms such as Turo and Getaround advertise a wide selection of vehicles in your vicinity which can be hired on an hourly basis.³ Have an upcoming occasion to dress for? You can hire designer clothing on Style Lend and By Rotation instead of purchasing something you will likely only wear once.⁴ Although the goods are owned and provided by peer parties, the transaction is mostly coordinated by the platform which sets the terms for sharing, manages payments, and facilitates delivery logistics. The result is a customer experience capable of rivalling any business-to-consumer service.

It is tempting to rely on commercial platforms to continue providing consumers with a consistent standard of service, such as ensuring the goods they host are safe and functional, or that they will settle disputes and compensate loss equitably. But doing so leaves two problems. The first is that consumers are necessarily reliant on the platform's discretion in setting the standards of service they receive. The P2P nature of the goods transaction means consumer protection regimes such as the Consumer Rights Act 2015 (henceforth CRA) do not apply,⁵ so issues such as quality of goods and rights to repair or refund must be assured through contract terms, which are effectively set unilaterally by platforms. This is a gap in the consumer protection regime which cannot be solved by simply forcing platforms to impose greater contractual obligations on users, because that leads to the second problem: that the burden of these more stringent obligations falls on private parties rather than the platform.⁶

This raises the question of what duties and obligations are fair to place on peer sharers. Is there a benchmark which defines what peer sharers are entitled to expect from each other, against which platforms' contractual standards may be judged and critiqued as unduly burdensome or unfair for users? I propose that common law bailment offers a suitable standard of rights and duties for sharers, and by extension a default normative benchmark against which platforms' contractual derogations can be identified and regulated. Identifying a default standard is crucial because the two parties engaged in the sharing arrangement are both private parties who would usually be considered consumers, with equal bargaining and financial power. Under

² J. Wallenstein and U. Shelat, 'Hopping Aboard the Sharing Economy' (2017) available at: <https://www.bcg.com/publications/2017/strategy-accelerating-growth-consumer-products-hopping-aboard-sharing-economy> (all URLs last accessed 15 June 2023 unless otherwise stated).

³ Turo is a US-based company which offers services in North America and the UK, available at: <https://www.turo.com>. Getaround is an EU-based company which operates in Europe (including the UK) and the US, available at: <https://uk.getaround.com>.

⁴ Style Lend is a US-based company whose services are currently only available in the US. At the time of publishing, it is unclear whether this company remains a going concern. All references in the article to Style Lend's terms and conditions are based on what was previously available at: <https://stylelend.com>, last accessed 02 October 2023. By Rotation is a UK-based company whose services are available across the UK, available at: <https://www.byrotation.com>.

⁵ Consumer Rights Act 2015, s.1.

⁶ G. Howells, 'Protecting Consumer Protection Values in the Fourth Industrial Revolution' (2020) 43 *Journal of Consumer Policy* 145.

common law, the duties expected of such parties are minimal due to their non-professional status. Derogations from the default standard led to increased benefits but also to increased costs, which I argue should be borne by the recipient of the benefit. While many of the benefits accrue to sharing parties, they also accrue to the platform coordinating the sharing, by increasing the transactions which they host and by extension their revenue. Platforms unilaterally determine how costs and benefits are apportioned as between peer sharers for the purpose of maximising benefits to the platform, and by doing so derogate from the standards of common law. It is this derogation and the lack of regulation preventing it which prejudices platform users and undermines consumer protection. And to identify and evaluate platform terms we first need to establish a suitable legal standard which can apply to P2P sharing. I argue this standard can be provided by the doctrine of bailment.

This paper presents a thorough empirical analysis of standard term User Agreements used by some of the large commercial sharing platforms on the market, focusing on how they apportion duties and risks onto peer users. As all sharing platforms utilise some form of standard Agreements, these Agreements essentially determine the conditions of the sharing market. They both set the terms and regulate the activities of peer users engaged in this market. Hence analysing these Agreements in detail can identify common terms used by platforms, their effects on users' rights and duties, and construct a holistic image of how costs and benefits are derived and apportioned in the sharing market.

While there is literature on how users of sharing and digital platforms are exploited for their free labour,⁷ there has been little empirical analysis of the legal mechanisms involved in this process.⁸ This is the first rigorous empirical analysis of platform standard term Agreements to the literature and will give valuable evidence of how exploitation and creation of value occur on sharing platforms through the lens of legal rights and duties.

I will use bailment to set the default standards for P2P sharing and analyse how platforms derogate in their contractual terms in order to derive a benefit from their users. Many who argue for using private law to regulate platforms either focus on tort

⁷ J. B. Schor and W. Attwood-Charles, 'The "Sharing" Economy: Labor, Inequality, and Social Connection on for-Profit Platforms' (2017) 11 *Sociology Compass*; F. Stabrowski, "'People as Businesses": Airbnb and Urban Micro-Entrepreneurialism in New York City' (2017) 10 *Cambridge Journal of Regions Economy and Society* 327; A. Arvidsson, 'Value and Virtue in the Sharing Economy' (2018) 66 *The Sociological Review* 289; S. Zhu, 'Sharing Property Sharing Labour: The Co-Production of Value in Platform Economies' (2020) 9 *Laws*; A. J. Ravenelle, 'Sharing Economy Workers: Selling, Not Sharing' (2017) 10 *Cambridge Journal of Regions Economy and Society* 281.

⁸ There are studies of the socio-economic mechanisms within this process. See: J. Schor, 'Does the Sharing Economy Increase Inequality within the Eighty Percent?: Findings from a Qualitative Study of Platform Providers' (2017) 10 *Cambridge Journal of Regions Economy and Society* 263; J. B. Schor et al, 'Paradoxes of Openness and Distinction in the Sharing Economy' (2016) 54 *Poetics* 66.

liability or argue for legislation to impose *sui generis* liability to platforms.⁹ This is the first argument for using the common law standards of bailment to regulate platforms. My aim is to show that while platforms may say their novel structure exempts them from existing legal regimes, the relationships they create are based on the well-developed legal form of bailment. As such, they should conform to the norms inherent in bailment and be subject to liability if they force parties to diverge from these norms.

I will focus on the sharing of tangible goods, mostly cars and clothing, and on platforms which facilitate hiring between peer parties. In section two I will examine how the web of contracts in platform-intermediated sharing evades existing regulatory regimes and pose problems of fairness. Section three sets out the rationale for using bailment to set legal standards, while section four analyses how well bailment regulates P2P sharing, identifies potential gaps which might cause problems for sharers, and examines whether platform terms ameliorate or exacerbate these problems. Finally, section five offers proposals for integrating platform contracts with the standards of common law.

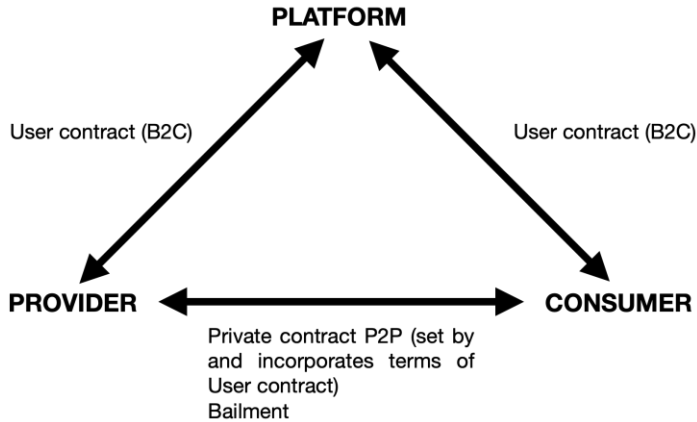
2. Legal Structure of Platform-Mediated P2P Sharing

Platform-mediated sharing is characterised by a tripartite contractual structure which is determined almost entirely by the platform. When peer parties transact through a platform, such as hiring a car via Turo, they must agree to the platform's user terms of service (Agreements). These invariably state that the platform is merely providing an online service and is not involved in the contract to exchange goods between users on its platform.¹⁰ The same Agreement will also invariably contain specific duties and liabilities for users depending on whether they are acting as a provider or consumer.¹¹ This effectively creates three contracts: between the platform and provider, platform and consumer, and provider and consumer. This causes ambiguities as to the applicability of regulations such as CRA, in particular its provisions on unfair contract terms.

⁹ D. Berke, 'Products Liability in the Sharing Economy' (2016) 33 *Yale Journal on Regulation* 603; C. Vazquez, 'The Sharing Revolution: Changing Times Call for Clarifying Tort Liability' (2020) 80 *Louisiana Law Review* 623; A. Traum, 'Sharing Risk in the Sharing Economy: Insurance Regulation in the Age of Uber' (2016) 14 *Cardozo Public Law, Policy & Ethics Journal* 511.

¹⁰ By Rotation, 'By Rotation Marketplace Terms and Conditions' (henceforth 'By Rotation Terms') section 1, available at: <https://www.byrotation.com/terms>; Turo, 'Terms of service' (henceforth 'Turo Terms'), 'Disclaimers' under 'General Provisions', available at: <https://turo.com/gb/en/policies/terms>.

¹¹ By Rotation Terms (ibid) sections 9 and 10; Turo Terms (ibid) 'Specific terms for hosts' and 'Specific terms for guests'.



2.1 Platform–User Contract

The contracts between a platform and its users are *prima facie* consumer, or B2C, contracts, as the platform is a trader acting ‘for the purposes relating to that person’s trade, business, craft or profession’, and the provider and consumer are legally consumers acting ‘for purposes wholly or mainly outside that individual’s trade, business, craft or profession’.¹² This means the provisions of CRA apply to these contracts, such as the consumer’s right to enforce terms and repeat performance,¹³ that the performance be performed with reasonable care,¹⁴ all of which are non-excludable.¹⁵ However these standards only apply to the service the platform is providing, namely operating an online forum for providers and consumers of goods to advertise, find and transact with each other. As the platform neither owns nor controls the goods being shared, the CRA offers little help when it comes to setting standards for the actual exchange of goods. In other words, simply because By Rotation’s agreement specifies that lenders must ensure that the goods being shared are ‘fit for purpose and safe to use’, does not mean that renters may enforce that term against By Rotation, especially since the same agreement states that ‘By Rotation only provides a platform that enables users to borrow and lend items. We do not regularly monitor the quality of the items made available for hire by lenders through the By Rotation Service’.¹⁶

¹² Consumer Rights Act 2015, s.2.

¹³ Platforms are better seen as providing a service (CRA, ch.4) rather than a digital content (ch.3).

¹⁴ *Ibid.*, s.40.

¹⁵ *Ibid.*, s.57.

¹⁶ By Rotation Terms (n 10) sections 2 and 9.

The only obligation which is subject to the CRA is the processing of payments. Most platforms act as agents in taking payments from consumers on behalf of providers and paying the balance to the latter, and vice versa for refunds. This means providers are entitled to expect platforms to forward payment for their goods within the period specified by the agreement (usually within twenty-four hours of consumer taking possession) or within a reasonable period of time.

2.2 Provider–Consumer Contract

The contract between providers and consumers, on the other hand, does not *prima facie* fulfil the requirements for a consumer contract, unless it can be proved that one of the parties is acting for purposes relating to their trade, business or profession. For example, if they hold themselves out as a business provider, such as a ‘commercial host’ on Turo, or if a provider’s frequency of transaction and level of income is sufficiently high as to indicate their sharing amounts to a commercial practice.¹⁷ Adjudicating whether a provider is a trader or not is a fact-based inquiry determined on a case-by-case basis. The ECJ in *Kamenova* identified several relevant factors including profit-incentive, relative expertise of the provider, and whether goods are bought explicitly for the purposes of re-selling (or lending as the case is for P2P sharing).¹⁸ The court concluded in that case that someone who advertised eight items for sale online did not constitute a trader under the Directive because the activity did not relate to their trade or profession.¹⁹ This indicates that unless a provider is using sharing platforms to further their existing trade, such as a bed and breakfast owner listing on Airbnb, or a clothing store listing on By Rotation, simply listing multiple items on sharing platforms is not by itself sufficient to classify a provider as a trader.²⁰ This may be true even if the provider is earning significant sums through their activities.²¹

Thus, for most peer sharers who engage in ad hoc hiring and lending, it is safe to assume that both are acting as non-traders. Ergo, CRA would not apply to their goods transaction because CRA by only applies to ‘consumer contracts’ which are defined as contracts where a trader provides goods and services to a consumer.²² As discussed, most providers would not be classified as traders. And even if the consumer was acting as a trader,²³ the CRA would still not apply because it is the non-trader provider that is providing the good or service. The result of CRA’s inapplicability to P2P contracts is the provider will not be under any statutory duty to ensure that the goods are fit for purpose, safe to use, and they are not debarred from excluding liability for causing death or personal injury to consumers.²⁴ There are some minimal statutory

¹⁷ Case C-105/17 *Komisia za zashita na potrebitelite v Kamenova* (2018) ECR 808.

¹⁸ *Ibid* [38].

¹⁹ *Ibid* [43]–[44].

²⁰ Case C-498/16 *Schrems v Facebook Ireland Ltd* (2018) ECR 37.

²¹ Case C-774/19 *AB v Personal Exchange International Ltd* (2020) ECR 1015.

²² CRA, s.1.

²³ Although this is not permitted on many platforms, see Turo Terms (n 10).

²⁴ CRA, s.65.

duties which apply to P2P goods sharing by virtue of implied terms under the Supply of Goods and Services Act 1982 (henceforth SGSA), specifically that the provider has the right to transfer possession of the goods, and that the goods correspond to their description.²⁵ Terms warranting quality and fitness for purpose under SGSA would not apply to P2P contracts for the same reason as CRA, because the provider is not 'acting in the course of business'.²⁶

The lack of statutory regulation of P2P sharing does not mean providers and consumers owe no duties to each other. As I will explore, the standards of bailment as well as negligence apply to all P2P sharing transactions. More importantly, the platform Agreement terms are incorporated into the provider–consumer contract, with both users explicitly consenting to abide by terms (by clicking the ubiquitous 'I agree to Terms' box), or implicitly consenting by connecting through the platform service. This means whatever obligations the users had promised to the platform, such as the provider ensuring that goods are fit for purpose, or the consumer accepting strict liability for damage, is now also owed to and potentially enforceable by their peer counterparty.

2.3 Applicability of Consumer Regulation

This raises a thorny question regarding the fairness and enforceability of terms. CRA stipulates that, in addition to non-excludable obligations relating to quality, safety and liability, terms which result in an imbalance of rights to the detriment of the consumer cannot be enforced against the consumer.²⁷

There are some terms which are clearly caught by this provision. For example, Turo's term that users must pay '\$5500 per breach in liquidated damages to compensate Turo' for engaging in activities like gray market transactions or failing to maintain current registration for vehicles. This obligation is owed directly to the platform, hence covered by CRA. This term clearly conforms to Schedule 2 Part I section 6 – 'A term which has the object or effect of requiring a consumer who fails to fulfil his obligations under the contract to pay a disproportionately high sum in compensation' – and may be regarded as *prima facie* unfair under CRA, s.63(1). It may also fail the general test of fairness under CRA, s.62 as it arguably causes 'a significant imbalance in the parties' rights... to the detriment of the consumer'. Establishing this requires examination of what rights and obligations the consumer loses due to the term, as set out in *ParkingEye v Beavis*.²⁸

Aziz stated that sums imposed should be proportionate to their purpose, and if that purpose is compensation for actual or estimated loss, then the sum should reflect that

²⁵ Supply of Goods and Services Act 1982, ss.11H–11I.

²⁶ *Ibid.*, s.11J.

²⁷ CRA, s.62.

²⁸ *ParkingEye Ltd v Beavis* [2015] UKSC 67, [107]–[109].

loss. Or if the purpose is to deter breach of contract, then the sum should not be disproportionate to that purpose.²⁹ The English Supreme Court applying *Aziz* in *Beavis* concluded that a £85 penalty for overstaying in a private carpark was not disproportionate to the purpose of deterring overstaying in an area where parking is limited, despite the penalty not being reflective of actual or estimated loss. Applying *Aziz* and *Beavis* to the Turo term indicates a high likelihood the term would be unenforceable against users under CRA, s.62.

The sum of £5,500 is payable on breach of eight specific obligations which are disparate in their purpose and effect, ranging from misuse of the Turo brand to failing to keep current registration for listed vehicles.³⁰ While Turo asserts that this is justified because ‘actual damages likely to result from your breaches of the Agreement by any of the following are difficult to estimate accurately and would be difficult for Turo to prove with certainty’, the disparate nature and potential effects of these breaches undermine the justification of imposing a single non-negotiable sum, especially considering the amount which is significantly higher than that imposed in *Beavis*. A stronger justification might be the harm done to Turo’s future business: users may not use Turo if it were known to host unsafe or stolen vehicles. However, Turo’s power to verify users and vehicles,³¹ as well as its broad indemnification and waiver clauses, would sufficiently cover such risks. It is also interesting to compare the recent case of *Armstead v Royal and Sun Alliance Insurance Co*, which involved a B2C car-rental company and an indemnification clause for consequential economic loss that was argued to contravene CRA for unfairness.³² Moreover, given the context of the clause in a standard-term contract which is not readily comprehensible to lay users, the existence of indemnification and waiver clauses in the same contract, and the arguably extravagant sum imposed, would all point to the term being potentially unfair and unenforceable under the CRA.

Beyond such clear-cut cases, the status of terms become ambiguous insofar as they relate to the P2P contract. For example, Turo’s terms contain a wide limitation of liability and waiver clause whereby users cannot sue for compensation for ‘any damages or losses, whether due to negligence or otherwise... arising out of problems with a vehicle (e.g., any malfunction of or deficiency with a vehicle)’, among others.³³ This is clearly in breach of several CRA provisions, including the non-excludable warranties regarding quality and fitness for purpose (s.31), and the consumer’s rights to refund or reduction in price for non-conforming goods (s.20 and s.24). And if Turo were acting as a car rental company, these terms will most likely be unenforceable

²⁹ Case C-415/11 *Aziz v Caixa d’Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* (2013) ECR 164, AG at [AG86] and [AG87].

³⁰ Turo Terms (n 10) ‘Liquidated damages’ under ‘General provisions’.

³¹ *Ibid*, ‘Verification’ under ‘Eligibility, registration, verification’.

³² [2022] EWCA Civ 497. This ground was not appealed so the Court of Appeal did not address it, but given its similarity to Turo’s liquidated damages clause, this case shows there is a probable argument.

³³ Turo Terms (n 10) ‘Limitation of liability and waiver’ under ‘General provisions’.

against consumers, whether under CRA or the common law rules on exemption clauses.³⁴ However, insofar as these limitations relate to peer providers who are explicitly referred to ('Any Turo user'), their enforceability becomes unclear.

As analysed above, the CRA does not apply to the P2P contract, which means there are no statutory regulations on peer parties enforcing these terms against each other. Yet beyond the formal non-consumer nature of the contract, there is little justification for allowing enforcement of these terms. The peer parties did not negotiate these terms freely, which are effectively imposed on their transaction by the platform through its standard-term Agreement, so the rationale from freedom and efficiency of contract, and equal bargaining power, does not apply.

The problem is not limited to limitation clauses, but also extends to users' positive duties. For example, Turo's terms stipulate that 'The guest... is financially responsible for all physical damage to or theft of a booked vehicle that occurs during a trip... regardless of who is found to be at fault'. This is a strict liability clause which effectively makes guests insurers of the car. There is a strong argument that such stringent duty triggers the 'imbalance in obligations' criteria and thus would be unenforceable. However, because this obligation is owed not only to Turo but also to the peer provider, CRA cannot prevent the latter from enforcing this term. Terms which place stringent duties on providers to ensure quality and safety also raise concerns for fairness in allocating responsibility, in that platforms are driving the professionalisation of P2P sharing by subjecting peer providers to similar standards of service as traders.

2.4 Benefits Received by Platforms

It might be argued that if such terms ensure that P2P consumers are receiving a higher level of service, there is no concern since it is the peer users who are benefiting from these contracts and not the platform. There are two considerations which undermine this argument.

One is that platforms do receive a direct benefit from these terms. Ensuring that providers offer a professional level of goods and services raises the price they can command for access, which raises the revenue of platforms operating a commission business model. Similarly, ensuring that consumers have strict liability for property damage gives reassurance of recovery to providers, and incentivises them to commit goods to the platform. Achieving these outcomes precipitates network effects which deepen and grow the market for multi-sided businesses, essentially driving platform growth.³⁵

³⁴ *Canada Steamship Lines Ltd v The King* [1952] AC 192.

³⁵ I have discussed elsewhere how platforms take the benefit of their users' free labour of market-making: see Zhu (n 7).

Another is how these Agreements constitute a systematic regulatory framework for P2P sharing, from standards to enforcement, which is imposed on an industry-wide scale. I have shown how platforms utilise their position as central coordinator and power as the primary commercial party to determine terms of P2P transactions. These terms are almost invariably enforced through platforms' ADR processes, which effectively shields them from legal scrutiny.³⁶ Thus the concerns surrounding fairness raised above will likely never be tested in court. Moreover, the effects of these Agreements are exacerbated by the same practice being repeated across the sharing industry, as platforms from different jurisdictions and hosting different types of goods adopt very similar contract terms. This uniformity in industry practice replicates monopolistic dynamics in the sharing economy and reduces consumer choice and power over the terms of their sharing activities.

These indicate that allowing platforms to unilaterally determine the terms of sharing amounts to the creation of an alternative jurisdiction with its own normative standards and enforcement, which derogates from the legal rights and duties of consumers for the purpose of creating revenue for sharing platforms. To evaluate where platforms impose duties on users that derogate from common law standards and how this affects users, we first need to establish a suitable standard which can apply to P2P sharing. I argue this standard can be provided by the doctrine of bailment.

3. Bailment

The discussion above has shown that CRA and much of SGSA do not apply to P2P sharing, both formally because of the peer status of parties, and substantively because their standards are arguably too demanding for non-traders. However, this does not mean P2P sharing occurs in a legal vacuum. They are private contracts and governed by the common law rules of contract and tort. More specifically, because they deal with passing possession in tangible goods, the doctrine of bailment offers a suite of semi-comprehensive duties and liabilities which are suitable for regulating the legal relationship between parties that do not fit easily within existing legal categories of trader and consumer.

Bailment embodies a concept which resonates with the underlying dynamics of sharing and renders it uniquely suitable to regulating the sharing economy, namely its capacity to facilitate different configurations of ownership and use. Where ownership denotes stability and exclusion, bailment denotes the movement of goods and the potential of achieving mutual interests through enabling others to take possession, carry, work on, and otherwise deal with our property. While ultimately the rules of bailment protect the interests of ownership, this does not discount

³⁶ Most of the platforms studied in this paper either operate a sophisticated ADR centre (Turo; Getaround; Airbnb; By Rotation; Style Lend) or contain a clause which allows the platform to determine the magnitude of loss and compensation (Front Row; Nuw).

bailment's harmony with a fundamental objective of sharing, which is to promote 'access' as a property relation.³⁷ And while personal licences may achieve the same access in many situations, bailment offers the advantage of quiet enjoyment to the user, which better reflects the exclusive possession given to and expectation of users in the sharing economy that they can use the good without interference from the owner.³⁸

3.1 Peer-to-Peer Bailment

Bailment is a legal relationship between two parties with regard to a particular tangible property. It is characterised by the separation of ownership and possession: the owner, or bailor, retains the legal title and gives possession to the bailee who gains possessory title.³⁹ A bailment may arise for various purposes. For example, storing your jacket in a cloakroom, giving your car to a garage for repairs, or handing a parcel to a courier for delivery, all give rise to a bailment. Lord Holt in *Coggs v Barnard* formulated a typology: (1) bare bailment, (2) gratuitous bailment for use, (3) hire, (4) pledge as security for debt, (5) carrying for hire, and (6) gratuitous carrying.⁴⁰ While several types imply the existence of a contract, it is important to note that bailment does not depend on there being a contract. The bailment relationship itself imposes duties on parties, namely on the bailee to take care of the property and to return the property when asked by the bailor.⁴¹ These common law duties can be altered either by unilateral undertakings of either party, or by contract.

Bailment arises from the passing of possession of tangible goods, which is precisely the underlying transaction in P2P goods sharing: the provider by passing the shared goods to the consumer becomes the bailor, and the latter the bailee.⁴² Its standards of care are not dependent on contract, so apply irrespective of platform Agreements. In other words, if we stripped away the problematic platform Agreements and simply looked at the bilateral transaction between peer sharers, bailment is the doctrine which most accurately reflects their relationship. Furthermore, where possession of goods passes between parties, the owner and the possessor will always necessarily be in a relationship of bailment. This is regardless of whether there is an underlying contract. The contract can alter the terms of bailment, but not exclude the relationship of bailment altogether. This means in P2P sharing it will necessarily be the provider who is the bailor, and consumer who is the bailee, regardless of what

³⁷ S. Krecizer-Levy, *Destabilized Property* (CUP 2019), ch.5.

³⁸ The telltale difference between the licence of a custodian and the exclusive possession of a bailee: *Ashby v Tolhurst* [1937] 2 KB 242.

³⁹ M. Bridge, *Personal Property Law* (4th ed, OUP 2015), 59–61.

⁴⁰ (1703) 1 Comyns 133 92 ER 999.

⁴¹ *Ibid.*

⁴² J. Story, *Commentaries on the Law of Bailments: With Illustrations from the Civil and Foreign Law* (Boston 1870), ch.1; G.W. Paton, *Bailment in the Common Law* (London 1952) ch.1; A. E. Tay, 'Essence of a Bailment: Contract, Agreement, or Possession?' (1966) 5 *Sydney Law Review* 239.

formal position the platform Agreement takes. Thus, bailment provides a suitable regulatory standard for P2P sharing as an economic sector, against which fairness of platform derogations can be evaluated.

Several types of bailment as listed above are pertinent to P2P sharing, namely (2) gratuitous bailment for use where a provider allows a consumer to use their property without paying, and (3) hire, where a provider allows a consumer to use their property in return for payment. Often the latter implies the necessary existence of a contract which sets the price and terms of hire, while the former does not. In this case, the terms of the contract of hire will override the common law duties if they derogate from them. I will limit my discussion to hire for valuable consideration, which raises the most concerns regarding the fairness of platforms' unilaterally determining parties' obligations.

When peers arrange for the consumer to have use of the provider's property in return for pecuniary or other compensation, they enter a hire arrangement. Generally, the price and duration of hire are determined by parties, as well as the location and method of delivery. Bailment arises upon delivery of the good to the consumer, which in P2P sharing means giving physical possession. Because peers will invariably have incorporated the platform's Agreement into their contract by clicking the ubiquitous 'I agree to terms and conditions' box on the website, this means the obligations they owe to the platform will be included in their own contract. Most likely these obligations will alter their common law duties. For example, Style Lend imposes strict liability on the renter for damage to shared goods, which is a stricter duty than the common law standard of reasonable care.⁴³ Turo requires that cars be less than ten years old with less than 130,000 miles on the clock to be eligible for listing, which is stricter than the common law of providing goods that are fit for use.⁴⁴

It is this unilateral determination by the platform of the terms of the peer sharing that is problematic. As I will analyse below, Agreements often impose duties on peers that are stricter than in common law, mostly for the purpose of increasing revenue for the platform. Within the confines of a platform-mediated P2P contractual hire, the scope for peers to agree the terms of their transaction can be narrowly restricted by both the Agreement terms and the technical capabilities of the online platform service. For example, Turo expressly prohibits certain uses of hired cars, including for commercial or racing purposes,⁴⁵ and its online platform limits providers and consumers to choosing from a pre-determined range of 'extras' to add into their contract.⁴⁶ These formal and technical limitations streamline the user experience, but also restrict the

⁴³ Style Lend, 'Terms' (henceforth 'Style Lend Terms') section 7, available at: <https://stylelend.com/terms>. Last accessed 02 October 2023.

⁴⁴ Turo, 'Vehicle Eligibility,' available at: https://help.turo.com/en_us/meeting-vehicle-requirements-or-uk-Svu3iEgv9.

⁴⁵ Turo, 'Prohibited Uses', available at: <https://support.turo.com/hc/en-us/articles/203990570-Prohibited-uses>.

⁴⁶ <https://support.turo.com/hc/en-us/articles/360001243608-Offering-Extras>.

possible configurations of contract terms and impose certain obligations on peers that derogate from their common law duties of bailment.

3.2 Platform Sub-Bailment

There is also the possibility of a sub-bailment involving the platform. Despite the ubiquitous disclaimers that platforms only provide a digital service and are not connected to users in any other capacity, if it can be established that a platform either arranges for goods to pass, or takes goods from the provider to pass to the consumer, it may be construed as an intermediate bailor.

The crux lies in whether the platform ever takes delivery or possession of the goods. There is no need for physical possession, but there does need to be 'constructive delivery', which entails an element of control over the property. Unlike intermediaries in shipping cases, platforms have no control either over the good or over the choice of sub-bailee, who in this context is the consumer, and the P2P exchange is conducted directly between users who choose their own transaction partners, so generally it would be difficult to establish platforms as bailees. However, in instances where the platform arranges for delivery of the item, such as using its nominated courier, as Style Lend does by sending prepaid postage stamps to users, there may be an argument of constructive delivery whereby the platform as bailee may be liable for the loss if the item goes missing during transit. Because Style Lend provides the delivery and return postage with the recipient's address, unlike By Rotation which specifies that delivery is arranged between sharers, there is a chance this makes Style Lend a bailee, at least for the duration of transit. Such considerations will not apply where delivery or pick-up is arranged between peers directly.

If a platform takes possession of goods from providers and distributes them to consumers either on providers' direction or its own, it would be a depositary of the provider and bailor to the consumer. Front Row takes possession of vendors' goods, lists them online, and manages the rentals to renters.⁴⁷ It also insures the goods while they are in its possession.⁴⁸ This makes Front Row a bailee of its vendors and liable to them for damage to the bailed property. In its terms, Front Row limits its liability to the lesser of '(a) present day value, or (b) resale value', both to be determined solely at Front Row's discretion.⁴⁹ In addition, Front Row as bailor to its renters should have a common law duty to provide goods fit for use.⁵⁰ Front Row attempts to limit its liability to timely delivery and that the goods conform to warranty, but explicitly excludes 'health-related complaints', which are at the risk of the renter.⁵¹ This means a renter who suffers a health-related complaint, such as a skin reaction to cleaning

⁴⁷ Front Row, 'Terms of Use & Service' (henceforth 'Front Row Terms') section 4, available at: <https://frontrow.uk.com/terms-conditions>.

⁴⁸ *Ibid*, s.4.31.

⁴⁹ *Ibid*, s.4.32.

⁵⁰ *Hyman v Nye & Sons* (1881) 6 QBD 685.

⁵¹ Front Row Terms (n 47) section 3.27.

products used by Front Row, may be barred from claiming, despite having a claim in absence of the limitation clause.

In sub-bailment situations, platforms' obligations, including their ability to limit liability, would be regulated by the CRA, since activities such as arranging courier and managing providers' inventory are closely aligned with the platform's business of facilitating P2P hiring. So, for a situation like that outlined above, the renter would have a potential challenge against the limitation clause under section 65 as health-related concerns are arguably personal injury, limitation of which is disallowed. However, it is P2P contract and platforms' ability to unilaterally determine its terms which present the most urgency in terms of regulation. Platforms can unilaterally place obligations on peers in their P2P contracts, and by extension limit their own obligations, all beyond the control of consumer regulations. In doing so they side-step consumer regulations because these potentially unfair terms are in the P2P contract and can be enforced directly by peer parties against each other. I will focus on these situations in the following section.

4. Analysis of Bailment in P2P Sharing

Having established why bailment sets a suitable legal standard for sharing, I will analyse how well bailment regulates P2P sharing and identify potential gaps which may cause problems for sharers. I will also delineate where platform Agreements derogate from common law standards, and whether these derogations improve or exacerbate the situation of sharers.

As a minimum, bailment offers a guarantee of quiet enjoyment for the consumer,⁵² and a right to repossession for the provider. The right of quiet enjoyment is a valuable right for the consumer who would be protected from interference by the provider in using the good, with a right to compensation in the event of breach. Platform Agreements do not generally stipulate for quiet enjoyment, but it may be deduced from terms which prohibit providers from double-booking the same good,⁵³ and terms which compensate consumers for incomplete enjoyment of the good.⁵⁴ The provider's right to repossession is coupled with a duty on consumers to redeliver goods on time.⁵⁵ Almost all Agreements stipulate goods must be returned on time after the agreed duration is over, and impose penalties and fines for late return.⁵⁶ Thus bailment adequately protects consumers' right to use the good free from interference, and providers' property rights in the good, and both are bolstered by platform Agreements and practices.

⁵² The fundamental difference between the licence of a custodian and the exclusive possession of a bailee: *Ashby v Tolhurst* [1937] 2 KB 242.

⁵³ Turo Terms (n 10) 'Vehicle availability' under 'Specific terms for hosts'.

⁵⁴ Turo, 'Host no-shows', available at: <https://support.turo.com/hc/en-us/articles/360060703074-Host-no-shows>.

⁵⁵ Turo Terms (n 10) 'Repossession' under 'Specific terms for guests'.

⁵⁶ By Rotation Terms (n 10) section 10.7.

Beyond these minimum expectations, there are three issues pertinent to P2P sharing: quality and fitness of goods; safety of goods; and property damage to goods. For the first two, there is a common concern that consumers of P2P sharing are not protected by the CRA, so must depend either on common law or platforms to ensure their rights.

4.1 Fitness and Safety

For providers for value, there remains some ambiguity on their duty to supply a good that is reasonably safe and fit for purpose, specifically whether there is an implied warranty in the P2P transaction. In *Hyman v Nye & Sons* it was held that the standard of care was to provide a good that is reasonably fit, not to exercise reasonable care that the good is fit for purpose.⁵⁷ Hence the standard is higher than negligence, and it is incumbent on the bailor to prove that defects are 'accidents not preventable by any care or skill'.⁵⁸ In *Robertson v Amazon Tug & Lighthouse Company* it was held there is no implied warranty of fitness where the hire is for a specific good, although in that case the judgments were not unanimous and this rule has been restricted by later cases.⁵⁹ Thus the current law may be stated as bailors of hired goods have an implied warranty to provide goods which are reasonably safe and fit for purpose, regardless of whether the hire is for a specific good, except when the bailee does not rely on the skill and judgement of the former. This means peer providers for value are subject to quite a stringent standard. They must provide a good fit for the ordinary purposes for which it is used, including any specific purpose made known to them by the consumer, and they are potentially liable for harms or losses caused by defective goods. For example, if a Turo consumer requests a car with a specific seating capacity, or for cold weather use, the provider is obliged to ensure this is met. This is regardless of its non-trader status and the legitimacy of allowing consumers to 'rely' on a provider which likely has similar levels of skill and judgement regarding the goods it provides.

However, Paton has identified that this standard of care potentially leaves a liability gap for goods with latent defects which are not reasonably discoverable, which for peer providers might be a lower standard than for traders.⁶⁰ A Turo host might discharge this duty by showing that the car has the necessary MOT certificates. Furthermore, this gap would not arise for consumers who hire from business providers who are under statutory duty to provide goods which are fit for purpose, particularly if they are also the producers of the good which would make them strictly liable under the Consumer Protection Act 1987, s.2.

⁵⁷ (1881) 6 QBD 685.

⁵⁸ Paton also argues for this standard of care in *Bailment in the Common Law* (London 1952).

⁵⁹ *Reed v Dean* [1949] 1 KB 188; *Yeoman Credit v Apps* [1962] 2 QB 508.

⁶⁰ I have discussed elsewhere whether a claim against the manufacturer under the Consumer Protection Act 1987 might be feasible for sharers, and concluded it is not, mainly due to the difficulty of showing that the defect existed at time of manufacture and was not introduced through later use: S. Zhu, 'Managing the Risks of Peer-to-Peer Goods-Sharing' (2022) 4 *Law, Technology and Humans* 197.

Taken together, this means P2P consumers are more exposed to the dangers of unsafe or unfit goods. The lack of protection from tort and consumer regulation means they are dependent on platforms to provide protection, both in ensuring that the goods being provided are of satisfactory quality and remedying adverse consequences arising from using a defective good. I will examine how platforms address these issues below.

There is a dichotomy in how platforms manage duties for quality and safety: they undertake to monitor and ensure a sufficient level of quality and fitness of goods by remedying consumer losses and improving customer experience, but give few guarantees or compensation for safety.

4.1.1 Platform Practices: Quality

Platforms formalise quality requirements by placing contractual obligations on providers to ensure their goods conform to certain objectively ascertainable standards, such as age, condition and other proxies of quality. These are conditions of eligibility for listing on the platform, but they function both as consumer notices to users, and as warranties incorporated into individual P2P transactions which are enforceable against the other party. For example, Turo specifies that eligible cars must be no more than ten years old and have less than 130,000 miles on the clock. If a guest receives a car which breaches those conditions, that would constitute a breach of the contract terms, which entitles the guest to a refund or replacement.⁶¹ Beyond these formal conditions, the bar for 'fitness' appears to include hazardous and malfunctioning goods but exclude those which the consumer simply finds unsatisfactory. As evidence, the legitimate reasons a consumer may reject a good are usually defined narrowly in the Agreement, which suggests that something which performs its basic function, was not misrepresented in the description and does not put the health of the user at risk, but lacks certain aesthetic or additional functions, unless they were part of the initial description, will not be deemed so unfit as to justify a rejection.⁶²

Essentially the listing criteria function as a base level above which all items accepted onto the platform are presumed to be of sufficient fitness until they are flagged as otherwise and cannot be rejected by consumers for poor quality without good reason. This offers a measure of protection for providers who as laypersons lack the skill or judgement to determine whether their good might be of sufficient fitness or quality. In the event a good is rejected for quality or fitness reasons, platforms often undertake the role of providing compensation, either by giving a refund, sourcing a

⁶¹ Turo, 'Reporting a car that's unsafe or unsatisfactory', available at: <https://support.turo.com/hc/en-us/articles/115015589087-Reporting-a-car-that-s-unsafe-or-unsatisfactory>.

⁶² Ibid.

replacement item from another provider, or reimbursing consumers for the cost of sourcing a replacement.⁶³

The combination of formal criteria of quality and platforms' undertaking to remedy breaches strikes a good balance of responsibilities between the parties. Consumers are guaranteed a minimal level of quality and service comparable to what they may expect under the CRA. These additional burdens are borne by the platform rather than the provider, which is not put under any greater responsibility than is expected of it in common law.⁶⁴ Thus on the issue of quality and fitness, platforms successfully facilitate peer providers in providing a level of professional service without having to bear the burdens, by undertaking many of those burdens directly.

4.1.2 Platform Practices: Safety

The analysis above identified a potential gap for latent defects which are not discoverable or preventable by reasonable care, which if not covered by contractual duties would mean the risk falls onto consumers. On this issue of safety and liability for injury caused by unsafe goods, platforms generally adopt an approach of excluding their own liability through exclusion, waiver and disclaimer clauses.⁶⁵ Some may even explicitly extend these clauses to their users, so that users are bound by these terms *vis-a-vis* each other.⁶⁶ The separation between the platform–user contract and the actual exchange of goods means the platform can legitimately exclude liability for injury and damages caused by the sharing of goods, because they are not formally party to the latter exchange. The exception would be a sub-bailment situation, such as Front Row, where the platform has physical control over the shared goods. In this case the goods exchange would be covered by CRA, and the platform would not be allowed to exclude liability for personal injury. Outside of this exception, the goods exchange is a non-consumer contract, and providers are not barred from excluding their liability for causing death or personal injury through providing the good, hence they may *prima facie* rely on any exclusion or waiver clause contained in Agreements and incorporated into the P2P contract.

It may be argued that these exemption clauses only relate to providers' contractual obligations but not their tort duties, which must be explicitly excluded by reference to negligence.⁶⁷ While most Agreements mention negligence explicitly in their

⁶³ Airbnb, 'Rebooking and Refund Policy', available at: <https://www.airbnb.co.uk/help/article/2868>.

⁶⁴ However, there may be consequences such as de-prioritisation or de-listing from the platform if a provider is flagged as providing sub-standard goods or services: Ulrich Gunter, 'What Makes an Airbnb Host a Superhost? Empirical Evidence from San Francisco and the Bay Area' (2018) 66 *Tourism Management* 26.

⁶⁵ By Rotation Terms (n 10) sections 3 and 18.

⁶⁶ Turo Terms (n 10) 'Limitation of liability and waiver' under 'General provisions' specifically mentions 'Turo user' as a class of persons covered by the limitation clause.

⁶⁷ *Canada Steamship Lines v The King: White v John Warwick & Co* [1953] 1 WLR 1285.

limitation clauses, these clauses are usually very broad in scope and arguably vague as to what negligence refers to, hence falling foul of the *Canada Steamship* criteria. This would mean providers cannot rely on simply conforming to the formal requirements of supplying a good, such as ensuring a car listed on Turo is less than ten years old, in order to avail themselves of the exemption clause. They must still prove they have discharged their tort duty of taking reasonable care to ensure the goods are safe. Nonetheless, limiting exclusion clauses can potentially protect more consumers from unsafe goods by raising the bar for reasonable care. However, as providers are already under contractual obligations to ensure their goods meet formal proxies for safety, such as age, condition and certification, coupled with their being laymen who lack special knowledge or skill on which consumers can rely,⁶⁸ it seems improbable that a provider that shared goods which were approved by the platform but caused damage to a consumer would, or even should, be held liable under its bailor's duties. There is also the concern that limiting exclusion clauses for peer providers achieves neither efficient loss-spreading, since providers have similar financial means to consumers, nor risk mitigation, since providers lack the expertise and knowledge to remedy or mitigate product safety.

While it is the case that most P2P consumers must bear the risk of injury and loss from using unsafe goods, there are several platforms which offer protection through insurance cover for their use of shared goods. A notable example is car-sharing platforms, many of which offer insurance coverage both for providers and consumers. For example, Turo and Getaround both provide hosts insurance cover for their potential liability to guests and third parties who are injured by their car, such as through an accident caused by negligent driving or other faults.⁶⁹ Guests are also insured for their liability towards third parties.⁷⁰ Both platforms provide insurance as part of the platform-user contract. The minimal level of insurance is third-party liability insurance, which is provided for free and is not optional for non-trader users, meaning they must accept. This is due to the Road Traffic Act 1988, s.143 mandating drivers on UK roads to carry third-party insurance. However, users can choose to pay extra to lower their excess liability.⁷¹ This presents a satisfactory solution to the issue of safety and consumer protection. Users may purchase insurance on a flexible basis to cover the duration of their sharing at a relatively cost-effective price, and consumers and third parties are guaranteed some compensation for losses caused by shared goods. However, such insurance schemes are a minority. Most platforms hosting personal chattels do not offer insurance or guarantees, and even for cars

⁶⁸ *Wheeler v Copas* [1981] 3 All ER 405. cf *Griffiths v Arch Engineering Co (Newport) Ltd* [1968] 3 All ER 217.

⁶⁹ Turo, 'Protection plans | UK guests', available at: <https://support.turo.com/hc/en-us/articles/360009424534-Guest-protection-plans-including-insurance-UK->; Getaround, 'Certificate of Insurance', available at: https://getaround-assets.gumlet.io/legal/2022-12-22/1_Getaround-UK-Apollo-Third-Party-Motor-Liability-and-Damage-xs-GBP-5K-Certificate-of-Motor-Insurance_22-12-22.pdf.

⁷⁰ Turo (ibid); Getaround (ibid).

⁷¹ Turo (ibid); Getaround (ibid).

where insurance is legally mandated, there are platforms which rely on users to arrange insurance.⁷²

The analysis shows that far from covering the latent defect gap and protecting consumers, platforms try to exclude both their own and providers' liabilities for causing injury and loss to consumers. Agreements derogate from the potentially quite stringent burden imposed on bailors to ensure goods are reasonably safe, by lowering the standard of care, which is favourable to providers. But they do so at the expense of consumers who are further exposed to risks and losses they cannot guard against. Limiting the scope of exclusion clauses simply shifts the burden onto peer providers and leaves platforms without liability. Thus, the bilateral structure of bailment and contract duties results in a zero-sum game where gains to one party are made at the expense of another. And in P2P contracts where neither party has the expertise or financial standing to mitigate risk and absorb loss, this tradeoff results in *prima facie* unfair and inefficient outcomes. A more promising solution is platforms coordinating insurance cover for their users, which circumvents the bilateral structure of obligations in favour of multi-party loss-spreading. Insurance on top of exclusion of liability for providers offers a better way of addressing losses from unsafe goods.

4.2 Property Damage

The bailee's, or consumer's, duty to take care of hired goods, and their liability for property damage, have undergone much change. *Coggs v Barnard* advanced a tiered system whereby the bailee's standard of care depended on who received the benefit of the bailment.⁷³ This tiered approach has been discarded in favour of single test of 'whether in the circumstances of this particular case a sufficient standard of care has been observed'.⁷⁴ In conjunction with a reversed onus of proof on the bailee to prove that damage was not caused by their negligence, the standard amounts to one of quasi-strict liability.⁷⁵ Deviation from the terms of the bailment, such as using the bailed goods in a prohibited manner, or detaining goods beyond the agreed duration, results in the bailee becoming strictly liable as insurer for the goods.⁷⁶ Thus even in common law bailees are subject to quite a stringent standard of care for ensuring the welfare of the bailed goods.

⁷² Hiremyvan, 'Terms and conditions of using this website', 'Vehicle Rental', section 2, available at: <https://hiremyvan.co.uk/terms-conditions>.

⁷³ *Coggs v Barnard* (1703) 2 Ld Raym 909, 913–920; refined by W. Jones, *An Essay on the Law of Bailments* (London 1781).

⁷⁴ *Houghland v RR Low (Luxury Coaches) Ltd* [1962] 1 QB 694, 698.

⁷⁵ *British Crane Hire Corporation Ltd v Ipswich Plant Hire Ltd* [1975] QB 303.

⁷⁶ *Mitchell v Ealing LBC* [1979] QB 1.

4.2.1 Platform Practices: Strict Liability

Platforms generally adopt a uniform approach to property damage, which is to place contractual strict liability onto the consumer for any damage arising during the sharing. All the Agreements analysed in this paper contain a strict liability clause, often drafted in wide and explicit terms, which makes consumers responsible for returning the good in same condition, or be liable for damages for ‘repairing or replacing’ it.⁷⁷ There are exceptions for existing damage and wear and tear, which consumers are responsible for documenting before the hire begins.⁷⁸ But aside from these the contractual duty on consumers appears to be more stringent than their common law duty.

4.2.2 Comparison with B2C

While it may appear that placing strict liability onto consumers constitutes an imbalance of obligations that is *prima facie* unfair under CRA, this is standard practice for many B2C hiring arrangements. Hire the Catwalk, a UK online clothing rental provider and the B2C analogue of By Rotation or Style Lend, states that ‘the customer are responsible for loss or damage to our dresses such as theft, fire, severe stains and any other causes in the hiring period’, and reserves the right to charge customers ‘the full retail price according with our price lists’ for such damage.⁷⁹ Similarly, Hertz and Europcar, car-hire companies and the B2C equivalents to Turo and Getaround, both stipulate strict liability on renters.⁸⁰ This widespread commercial practice does not prove that strict liability is legally enforceable against consumers, but does reduce the difference in treatment of consumers in B2C and P2P settings.

However, this formal equivalence must be examined against other terms which offset the consumer’s onerous duty. Specifically, the provision of insurance which brings consumers’ actual obligations closer to that in common law. The availability of insurance and other mitigatory opportunities depends on the sector. For car-hiring where insurance is both mandatory and policies are widely available, the practices of rental businesses and sharing platforms mostly converge. For example, Turo and Getaround offer insurance for their guests to cover any damage to the car, limiting guests’ financial liability to their insurance excess.⁸¹ Insurance protection is conditional upon guests conforming to the agreement terms, and is nullified if they breach the terms. If a Turo guest used the car for commercial purposes, or drove recklessly, then the insurance is nullified, and they are financially responsible for the

⁷⁷ By Rotation Terms (n 10) section 5.4.

⁷⁸ Turo Terms (n 10) ‘Condition of the vehicle and optional Extras’.

⁷⁹ Hire the Catwalk, ‘Terms and Conditions of Hire’, available at:

<https://hirethecatwalk.com/terms-of-hire>.

⁸⁰ Europcar, ‘Terms and Conditions of Hire’, section 12.2.2, available at:

https://www.europcar.co.uk/files/live/sites/Europcar/files/Conf_email_attachment/CGL_EN_GB.pdf.

⁸¹ Turo, ‘Protection plans | UK guests’ (n 69); Getaround, ‘General Insurance Policy’ (n 69).

full value of the damage. Common law dictates a similar outcome, as the guest's actions would amount to deviation from the terms of bailment, thereby making them insurers of the good. The consumer's position is the same when hiring a car from a conventional commercial renter. Hertz, a popular car-rental business in the UK, dictates in its Terms that waiver products which limit renters' liability for vehicle damage are voided if the driver was 'grossly negligent' in using the car.⁸² A driver acting in such a manner would also likely breach their bailee standard of care, so be liable for ensuing damage to the good.

Outside the car-hire sector the practices of rental businesses and platforms diverge. HireStreet, a commercial clothing hire website, offers the option of damage insurance.⁸³ Style Lend, a P2P clothing sharing platform based in the US, offers renters an option to pay \$5 per rental to cover up to \$50 of minor damage.⁸⁴ The indemnity is provided by the platform, and the effect is to alleviate some of the consumer's financial liability. Front Row covers 'minor stains and damages' for renters in return for £15 additional insurance fee.⁸⁵ In contrast, By Rotation offers no insurance or guarantee for consumers, and neither does Nuw.⁸⁶ In short, platforms which offer consumers the option of insuring or mitigating their liability bring their obligations closer to what consumers can expect from the common law and commercial providers, but this approach is far from uniform.

4.2.3 Fairness

The lack of protection for consumers saddled with strict liability raises concerns of fairness, especially given the economic dynamic underlying platform-mediated sharing. *Prima facie* the benefit of the liability goes to the provider, who is assured compensation for property damage. However, the benefit to the platform, namely using this assurance to attract more providers, raise prices, and deepen their revenue source, is of considerable commercial significance and should be not disregarded. Moreover, unlike commercial providers, which bear ownership risk for the property they rent, sharing platforms bear no such risk, but nevertheless gain from giving assurance to providers at the expense of consumers. Neither does simply disapplying the strict liability and preventing platforms from charging the consumer the total

⁸² Hertz, 'Annex 4 — Insurance and Waivers', available at: https://images.hertz.com/pdfs/RT_INSURANCE_EU_EN.pdf. Hertz gives a few examples of what it constitutes gross negligence, including overhead damage and carrying noxious substances; see Hertz, 'Collision Damage Waiver', available at: <https://www.hertz.co.uk/rentacar/reservation/policy/policy-detail/enGB/LHRT50/CDW>. Europcar offers very similar terms for insurance and damage; 'Insurance and Protection', available at: <https://www.europcar.co.uk/terms-and-conditions/insurance-and-protection>.

⁸³ Hire Street, 'What is accidental damage cover for my rental outfits?' available at https://support.hirestreetuk.com/en_gb/what-is-accidental-damage-cover-ryTRvaISt.

⁸⁴ Style Lend Terms (n 43) 'Insurance'.

⁸⁵ Front Row Terms (n 47).

⁸⁶ Nuw, 'Full Terms & Conditions', available at: <https://www.thenuwardrobe.com/tcs-updated>.

amount of loss lead to a fair outcome, given it is the provider who suffers the actual loss.

Approaching the issue of property damage as purely an aspect of the P2P exchange neglects the role and motivations of the platform. There is no configuration which achieves a fair balance between provider and consumer interests, so long as the liability, quantum of loss and terms of recovery are determined by the platform. A better method is to acknowledge that platforms have an interest in guaranteeing providers the value of their property, so should take on some of the burdens of providing that guarantee. This approach is adopted by Front Row and Airbnb, both of which guarantee that hosts will recover compensation for property damage, by directly paying out to hosts who suffer loss.⁸⁷ The platforms subsequently pursue the loss against the consumer, and since this then becomes a consumer issue there is a chance the consumer will be treated leniently. This structure of platform guarantee and subrogation shifts the risks of non-recovery from provider to platform, and better reflects the dynamic that it is the platform which benefits from providers committing their property for sharing. While this may or may not change the consumer's strict liability, it does legitimise the platform's capacity to pursue liability against the consumer, as it now stands to suffer loss in the event of non-recovery.

Another approach is to give peer parties greater freedom in setting the terms of their sharing, such that the terms meaningfully reflect an agreement between them. Doing so would address the concern that platforms can set and enforce potentially unfair terms by using their economic dominance, while hiding behind the formal status of the P2P contract. If peer parties are given the opportunity to mutually agree terms, the fairness of terms would be a lesser concern. One example of this approach is Nuw, which allows providers to set the value of their items, which the consumer would be liable for in case of major damage. This contrasts with most other agreements where the platform reserves the right to unilaterally determine fair value for compensation. While this does not change the allocation of liability, it changes the dynamics between peer parties, which can lead to a fairer outcome. Providers will be pressured by competition to refrain from setting overly optimistic valuations. Consumers will know the amount for which they are liable before entering the contract. There is also an implicit opportunity for negotiation between them. The result will be a more accurate reflection of each party's utility calculations. And, assuming fairly equal bargaining power, the result will also be *prima facie* fairer.

5. Evaluation

There are limits to using bailment, and to some extent contract, to regulate P2P sharing. Bailment's bilateral structure means it is more suitable to regulating non-platform-mediated sharing, and peers have relatively low levels of common law

⁸⁷ Front Row Terms (n 47) sections 4.31–4.33; Airbnb, 'Host Damage Protection Terms', available at: <https://www.airbnb.co.uk/help/article/2869>.

duties and can freely alter these to reflect their expertise and financial means. However, this also means peers cannot give quality assurance, customer service or protection for damage which rival B2C goods and services without placing infeasibly high demands on providers. Sharing platforms function to bridge these gaps and construct a system of peer rental which emulates features of B2C rental. Platforms begin from the position that they are not party to the P2P goods exchange, and therefore have no legal duty to undertake responsibility. But they will occasionally do so when it is necessary for their business model. This means interventions on ensuring some measure of consistent quality of goods and customer service, providers are compensated for damage to their property, and users abide by statutory duties such as driving with requisite insurance. Although their formal intermediary status means they have great freedom in shifting responsibilities and risks to peer parties, in reality practices are much more nuanced. Some platforms do undertake duties directly, such as acting as guarantor for shared property, or remedying consumers' losses caused by unfit goods. They also mitigate risks by arranging insurance for users where policies will otherwise not be available on the market. In many aspects consumers' rights and protections on sharing platforms rival those provided by conventional businesses regulated by the CRA.

Where platforms derogate from a user's common law duties, it may be assumed that they do so for commercial expediency. If they derive a measure of benefit from the derogation, they should bear the risk and cost of the derogation. Platforms should not be allowed to hide behind their formal intermediary role while dictating terms in the P2P contract that in other situations would be unfair or unduly stringent for consumers.⁸⁸

An aspect where platforms strike a good balance is stepping in to cover some potential liability on providers and helping provide consumers with a consistent quality of customer service, by providing replacements or reimbursing consumers for sourcing replacements. Platforms generally undertake this directly as part of their contractual obligations to their users. Providers' obligations should be limited to satisfying the formal eligibility criteria, which should be seen as sufficient to discharge their duty as bailor to take care in providing a reasonably safe and functional good. Provided that platforms do not extract penalties or compensation from providers who have satisfied their contractual requirements, this arrangement ensures a fair distribution of responsibility between provider and platform in offering consumers a semi-professionalised level of service.

On the issue of property damage, platforms derive an advantage from giving assurance to providers that their goods will be protected, by making consumers effectively insurers of shared goods. This means platforms should not be allowed to raise the consumer's duty of care from negligence to strict liability without offering them an option to insure or mitigate their potential loss. This entails making insurance

⁸⁸ Howells (n 6); G. Smorto, 'The Protection of the Weaker Parties in the Platform Economy', *The Cambridge Handbook of the Law of the Sharing Economy* (CUP, 2018).

available to the consumer if that is mandatory, as is the case with car-sharing platforms or Airbnb for occupiers' liability, or some form of informal relief where insurance is not mandatory, such as that operated by Style Lend. Insofar as platforms derive a benefit from inducing providers to commit resources for sharing, by offering guarantees of protecting their property and compensation, they should also bear the burden of that inducement. This entails acting as primary guarantors for property and bearing the risk of non-recovery in place of providers, such as Airbnb and By Rotation's host guarantee schemes. Offering providers insurance cover will also be a suitable alternative.

5.1 Platform Liability

The most problematic issue is safety and liability for injury and loss caused by shared goods. Under bailment rules there are notable gaps in regulating this area, in particular the low threshold of duty imposed on lay providers and gratuitous providers, and latent defects which are not preventable through reasonable care. Platforms address these gaps by monitoring proxies for safety. Turo's condition that cars be a certain age, have necessary safety certificates, and not have been written off, exemplifies this approach of attempting to ensure safety of goods through formal criteria. However, when injury and damage do occur, platforms generally take advantage of the inapplicability of CRA protections to the P2P exchange to exclude their own, and occasionally providers' liability. This means consumers and third parties harmed by shared goods have limited recourse to compensation. Disapplying exclusion clauses and reverting to bailor duties can ensure consumers benefit from a reasonable degree of safety, but raising this standard of care involves potentially subjecting peer providers to obligations they are incapable of discharging.

There have been proposals on extending tort liability to platforms in these cases, notably under a doctrine of common purpose,⁸⁹ mandating strict product liability,⁹⁰ or using the law of agency to implicate platforms in the transaction,⁹¹ in a bid to shift the burden of liability away from peer providers and onto commercial platforms. Common purpose does not fit well with the factual situation of goods-sharing, where the level of control exercised by platforms over the goods provided is minimal. More feasible is the option of treating the platform as 'supplier' in place of peer providers for the purposes of the Consumer Protection Act 1987, so that should the producer not be identifiable, strict liability will fall on the platform rather than the provider.⁹² Following the rationale of CPA, this approach would place the financial risk onto the party most able to absorb and spread loss. It would also align the obligations of

⁸⁹ A. McPeak, 'Sharing Tort Liability in the New Sharing Economy' (2016) 49 *Connecticut Law Review* 171.

⁹⁰ D. Berke, 'Products Liability in the Sharing Economy' (2016) 33 *Yale Journal on Regulation* 603.

⁹¹ R. Koolhoven, 'The "Matching" Platform and Mandatory Agency Law', in *The Cambridge Handbook of the Law of the Sharing Economy* (CUP 2018).

⁹² CPA 1987, s.2(3).

platform intermediaries with conventional commercial providers and reduce the advantage platforms derive from shifting risk onto their users.

Another way of achieving the same result is through platform-coordinated public liability insurance, as practiced by many car-sharing platforms and Airbnb.⁹³ The underlying process is similar, namely shifting the consequences of adverse eventualities which are too much for peer sharers to bear individually and spreading them across a larger population. Platforms can absorb the primary loss or shift these onto insurer partners. Both methods circumvent the bilateral structure of tort liability and achieve a fairer distribution of obligation in the circumstances. Thus, mandating that platforms carry public liability insurance for damage caused by unsafe goods is also a feasible solution.⁹⁴

The main problem is the grounds on which platforms may be fixed with direct liability or mandatory insurance for shared goods. Berke argued that this is justified because platforms can use data to monitor the condition of goods they host, which makes them akin to businesses which own their rental goods, thus subject to similar standards. While I do not doubt platforms' ability to monitor safety of goods, it remains that the nature of these goods is not the same as those provided by businesses. P2P shared goods are much more diverse in their providence, make and other attributes, unlike commercial rental goods which tend to be uniform. The ad hoc flexibility, which is one of the advantages of sharing, means a particular item may only be shared a few times on a platform, which makes estimations of their condition unreliable. Moreover, it is arguable that sharers do not expect the same service from peers as they do from businesses.⁹⁵ Sharers may be willing to take more risk in exchange for cheaper access and mandating that P2P sharing conforms to the same standards as B2C rental might result in higher prices and less choice, thereby eroding some of the unique benefits of sharing.

Ultimately, there is no solid basis to fix platforms with the same level of liability as rental businesses, which means consumers of P2P sharing will not have the same protection as B2C customers. However, beginning from the premise that platforms should undertake their users' burdens and liabilities where these confer a commercial benefit can prove a fruitful way forward. For car-sharing, it is mandated that all drivers and registered vehicle-holders must carry requisite insurance. Given the dearth of policies for sharing available on the market, car-sharing platforms must either provide insurance for their users, or accept the risk that their users are renting and driving without insurance. Since platforms benefit from car-sharing, it follows that they

⁹³ Also suggested by Vazquez (n 9) in the context of ride-sharing platforms.

⁹⁴ T. Weber, 'Intermediation in a Sharing Economy: Insurance, Moral Hazard, and Rent Extraction' (2014) 31 *Journal of Management Information Systems* 35 in the context of housing. In many US states including California TNCs such as Uber are mandated to carry insurance for their drivers; California PUC Div 2 s.5433. See Traum (n 9); Vazquez (n 9).

⁹⁵ Although see literature on attitudes in sharing: H. Guyader, 'No One Rides for Free! Three Styles of Collaborative Consumption' (2018) 32 *Journal of Services Marketing* 692.

should not benefit from an illegal activity which puts other drivers at risk. This justifies a duty on car-sharing platforms to either offer users insurance, or ensure they have requisite commercial insurance in place.⁹⁶ This argument may be extended to other forms of goods with varying degrees of pertinence. For goods which are highly complex or dangerous, such as vehicles or electrical equipment, the level of risk able to be assumed by users should fall, with a corresponding rise on the duty of platforms to ensure safety. For everyday goods such as clothing and household goods, users can assume more risk based on their judgement and familiarity with these goods. This brings regulation in line with common law duties which configure liability based on expertise and superior knowledge.

6. Conclusion

I have highlighted the bailment relationship between peer sharers as the fundamental legal relationship. It applies to all forms of P2P sharing, whether platform-mediated or not, for pecuniary exchange, or for free. I have focused on the duties of care for providers and consumers and their liability when they breach those standards of care. I have also argued that where platforms use contracts to alter these standards for their own benefit, there is a justification for placing the financial and legal burden on platforms rather than on peer users.

Recognising the bailment relationship is crucial for understanding and regulating P2P sharing. It determines who has standing to sue, who has primary liability in event of damage, and who has a right or duty to insure goods, among other important legal determinations. Platforms complicate the situation by using complex Agreements to simultaneously distance themselves from the P2P sharing and interfere in P2P bailment and contract, often to the detriment of users. The debate on regulating the sharing economy pivots between those who argue for self-regulation, and those who see platforms as profiting from a regulatory gap which gives them unfair advantage in the market.⁹⁷ Using the common law standards of bailment to evaluate where platforms should take on more responsibility recognises that the responsibility on peer sharers does not start at nil, so is a nuanced and doctrinally sound approach which can be used to regulate platform-mediated sharing on a general basis.

⁹⁶ California Insurance Code s. 11580.24. In many ways this replicates the approach adopted for ride-sharing.

⁹⁷ M. Cohen and A. Sundararajan, 'Self-Regulation and Innovation in the Peer-to-Peer Sharing Economy' (2015) 82 *University of Chicago Law Review Online* 116; M. A. Cusumano, 'The Sharing Economy Meets Reality' (2018) 61 *Communications of the ACM* 26.