Assessing the Duty of Care for Social Auditors

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This article analyses the appropriate duty of care under English tort law for social auditors towards third parties at risk of suffering damages from their negligence. After explaining the work of social auditors, the article considers whether the duty of care established for financial auditors is an appropriate one for social auditors. It concludes that a robust duty of care does exist for social auditors to guard against negligent audits that could harm workers at audited facilities. Due to differences between the financial and social audit, it further argues the duty of care for social auditors should be both broader than that required of the financial audit industry and non-delegable.

In diesem Artikel wird untersucht, welche Sorgfaltspflichten nach dem englischen Deliktsrecht für Sozialauditoren angemessen wären, die durch fahrlässige Audits Dritte in die Gefahr von schweren Schäden bringen. Nach Erläuterung der konkreten Aufgaben von Sozialauditoren prüft der Artikel, ob die für Finanzauditoren geltenden Sorgfaltspflichten auch für Sozialauditoren geeignet sind. Der Artikel kommt zu dem Schluss, dass strenge Sorgfaltspflichten für Sozialauditoren erforderlich sind, aber auch bereits existieren, um die Mitarbeiter in den geprüften Einrichtungen gegen fahrlässige Audits zu schützen. Aufgrund der Unterschiede zwischen Finanz- und Sozialaudit wird die Auffassung vertreten, dass die Sorgfaltspflichten von Sozialauditoren in ihren Anforderungen über die der Finanzauditbranche hinausgehen müssen. Zudem sollten Sozialauditoren ihre Sorgfaltspflichten nicht auf andere Akteure übertragen können.

Cet article analyse le devoir de diligence applicable aux auditeurs sociaux en vertu du droit anglais de la responsabilité délictuelle, à l'égard des tiers susceptibles de subir des dommages résultant d'une négligence. Après avoir décrit le travail des auditeurs sociaux, l'article examine si le devoir de diligence établi pour les auditeurs financiers est approprié pour les auditeurs sociaux. Il conclut qu'il existe un devoir de diligence solide pour les auditeurs sociaux en vertu duquel ces derniers doivent se prémunir contre les audits négligents potentiellement nuisibles aux travailleurs des établissements audités. Au regard des différences entre l'audit financier et social, cet article soutient en outre que le devoir de vigilance des auditeurs sociaux devrait être plus large que celui applicable au secteur de l'audit financier, ainsi que non-délégable.

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1. Introduction

1. This article analyses the appropriate duty of care under English tort law for injuries caused to others by a negligent social audit. In the textile industry, a social audit is a workplace assessment conducted over a few days by a single auditor or an auditing team. It represents a form of private regulation of corporate compliance with socially expected behaviour.[1] The need to assess social auditor liability has come to mainstream consciousness with a series of significant disasters in recent years. When French-headquartered Bureau Veritas inspected the Rana Plaza factory in Bangladesh, it failed to note that the building was not permitted for use as a factory, nor, as we learned later, was it fit to do so.[2] In 2013, the building collapsed, killing 1,134 workers.[3] A fire at an Ali Enterprises factory in Karachi, Pakistan, cost 260 workers their lives and injured another 30; weeks earlier a subcontractor of Italian firm RINA s.p.a. conducted an audit that led to the approval of an SA8000 certification. [4] The SA8000 is designed to indicate good working conditions.[5] On the day of the fire, the factory had an illegal wooden mezzanine, and did not have sufficient emergency exits.[6] These are issues that should have been, but were not, noted in the social audit. Bureau Veritas has been sued in Canadian courts for negligence, while RINA is the subject of a criminal investigation in Italy and a complaint before the Italian OECD National Contact Point.[7]

2. Social audits began in earnest in the 1990s following campaigns by consumers and unions concerned that the outsourcing of textile manufacturing came with a clear, negative impact on worker conditions in developing states.[8] The common perception of a regulatory gap in the textile industry led lead brands to commit to company, industry, multi-brand and multi-stakeholder codes of conduct based on international human rights and labour rights law.[9] To document conformity with those standards, the brands employed independent social audits and auditors to evaluate the conditions at the factories supplying their goods.[10]

3. Given the history and purpose of the social audit industry, the worker's protection is supposed to be at the heart of the process. Unfortunately, as the industry has developed, there have been

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[1] See, e.g., G. LEBARON & J. LISTER, 'Benchmarking Global Supply Chains: The Power of the 'Ethical Audit' Regime, *in* 41. *Review of International Studies* 2015, p. (905) at (906-907); G. LEBARON, J. LISTER & P. DAUVERGNE, 'Governing Global Supply Chain Sustainability through the Ethical Audit Regime' *in* 14. *Globalizations* 2017, p. 958 at 965.

[2] Ontario Supreme Court of Justice 5 July 2017, *Das v. George Weston Limited*, https://www.canlii.org/en/on/onsc/doc/2017/2017onsc4129/2017onsc4129.html.

[3] Ibid.

[4] C. TERWINDT & M. SAAGE-MAAß, 'Liability of social auditors in the textile industry', *in* ECCHR and FES Policy Paper 2016, at 11.

[5] *Responsibility Outsourced* (AFL-CIO 2013) at 33.

[6] Specific Instance Communication to the Italian OECD National Contact Point *Ali Enterprise Factory Fire Affectees Association et al. v RINA Services S.p.A.*, at 10-11, https://www.oecdwatch.org/cases/Case_514 ('OECD National Contact Point').

[7] See, *ibid*, at 10-11; Ontario Supreme Court of Justice 5 July 2017, fn 2.

[8] R. VAN TULDER, J. VAN WIJK & A. KOLK, 'From chain liability to chain responsibility,' *in* 85. *Journal of Business Ethics* 2009, p. 399.

[9] *Ibid.*

[10] CLEAN CLOTHES CAMPAIGN, *Looking for a Quick Fix: How Weak Social Auditing Is Keeping Workers in Sweatshops* 2005, at 12.

documented problems of abuse, conflicts of interest, intentional misstatements and claims of negligence.[11] As early as 2005, the Clean Clothes Campaign identified significant problems with social audits, including superficial audits and the likelihood of deception.[12] Despite this, the industry now valued at anywhere between US$15 and 80 billion annually[13] remains largely unregulated. Even the Association of Professional Social Compliance Auditors (APSCA) acknowledges that 'currently, you could ask anyone to conduct a social audit and there is nothing stopping them, and no way to verify their qualifications'.[14]

4. The lack of regulation and industry standards creates an incentive for lax standards. For-profit firms, notably financial auditing firms that have expanded into social auditing, conduct the vast majority of social audits.[15] Their clients are primarily factory owners, for whom a successful audit can ensure new and continuing partnerships with powerful purchasers.[16] When an owner wishes to receive certification without undertaking the relevant investment or modifications, there is an economic incentive to seek out lenient auditors.[17] In turn, auditing companies interested in keeping their clients in an increasingly competitive market, and unencumbered by regulation or industry standards, have been found to relax standards and to ignore compliance issues.[18]

5. Despite the concerns over social auditing, and scholarship that questions the utility and appropriateness of the industry's standards,[19] scholars have yet to examine the appropriate application of English tort law on this issue. This article initiates consideration of the liability of social auditors for negligent audits under English tort law by focusing on the duty of care, setting aside the other elements of tort law for future scholarship. This piece is intended to stimulate discussions amongst scholars of business and human rights and tort law on the current standards for social auditors and on what reforms are necessary to ensure strong social auditing standards. The piece is perhaps overdue. English law is often relied upon by courts in common law states, including Bangladesh and Pakistani law, to help clarify standards of liability in novel cases. As Bangladesh and Pakistani laws would usually govern civil claims against Bureau Veritas and RINA, respectively, identifying the appropriate duty of care under English law can have a significant impact on these pending situations. It can also be of benefit to the social auditing industry. The social auditing industry has developed as a form of private regulation but without any public regulation to control it and without significant reflection on what is being asked of or undertaken by social auditors. As such, there is a risk that auditors are performing their contractual duties without fully appreciating to whom they have assumed a duty of care under

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[11] LeBaron & Lister, fn 1, at 913-914; Clean Clothes Campaign fn 10, at 12.

[12] Clean Clothes Campaign fn 10, at 12.

[13] G. BROWN, 'Effective protection of workers' health and safety in global supply chains', *in* 7 *International Journal of Labour Research* 2015, p. 35.

[14] VERISK MAPLECROFT, *Human Rights Outlook 2017*, p. 7.

[15] F. FRANSEN & G. LEBARON, 'Big Audit Firms as Regulatory Intermediaries in Transnational Labor Governance,' *in Regulation & Governance* (first published online, 4 October 2018), *available at* https://onlinelibrary.wiley.com/doi/full/10.1111/rego.12224.

[16] LEBARON & LISTER, fn 1, at 913-914.

[17] G. JAHN, M. SCHRAMM and A. SPILLER, 'The Reliability of Certification: Quality Labels as a Consumer Policy Tool,' *in* 28. *Journal of Consumer Policy* 2005 p. 53 at 61-62.

[18] *Ibid*, at 61-62.

[19] Most recently, see, FRANSEN & LEBARON, fn 15.

tort law. Greater clarity over their obligations can lead to better auditing standards and clearer industry regulations.

6. Establishing a duty of care is the first step to establishing civil liability for negligence under English law and identifying the appropriate duty of care can have a profound impact on the viability of claims by victims. Identifying a duty of care in novel factual situations can be complex. This article develops the analysis in four parts. Part 2 explains how social audits work and the problems stemming from a lack of professional regulation over social auditors. Part 3 introduces the English approach to 'duty of care' and examines the duty of care for financial auditors as an analogous industry before Part 4 considers whether the duties of care owed by financial auditors should be extended when applied to the social auditing industry. Part 5 concludes that social auditors owe a duty of care to workers on an audited premises, and possibly more broadly. It raises outstanding questions for scholars and the industry before arguing that the UK and other states would benefit from adopting specific regulatory standards for social auditors.

2. The Problem with Social Auditors

7. To identify the appropriate duty of care, it is necessary to understand the social auditing industry and the problems within the industry, which is the focus of this section.

2.1. The Social Auditing Industry

8. During a social audit, auditors should review documentation supplied by management to check whether, for example, wages and hours are in line with the applicable labour standards, and physically inspect the factory floor to ensure the presence of requisite health and safety measures like functioning emergency exits, ventilation, cleanliness, and safety equipment.[20] Additionally, auditors should conduct interviews with management and workers to ensure the accuracy of information and practices, examining, for example, whether payslips are accurate or union activity is suppressed.[21] Diagnostic social audits are generally followed by corrective action plans. When social audits identify problematic activities, the owner should develop and implement the corrective action plan.[22] Where they fail to do so, the expectation, and business model for the industry, is that the purchasing companies will exert pressure to secure implementation of the plan.[23] The implementation of the action plans should be inspected in follow-up visits.

9. The standards employed in social audits vary widely. The SA8000 certification granted to Ali Enterprises is owned by SAI, a global NGO established to promote socially responsible workplaces, and is promoted as the 'gold standard of social auditing'.[24] The SA8000 has an 'independent accreditation body' that decides whether third-party firms are qualified to monitor and award supplier factories with an SA8000 certification.[25] It is not, however, the only standard

[20] Clean Clothes Campaign fn 10, at 23.
[21] *Ibid*.
[22] *Ibid*.
[23] *Ibid*.
[24] AFL-CIO, fn 5, at 33.
[25] SAI, "SA8000® Standard and Documents", 2016, on *SAI Website*. Available at: http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=937.

available. Bureau Veritas offered a range of social audit services, starting with a 'basic audit', which evaluated compliance with 'the client's code of conduct,' meaning the code set by the purchaser, along with a code of conduct Bureau Veritas developed, local laws and regulations, and 'industry standards established by organizations such as the International Labour Organization.'[26] The client behind its inspection of the Rana Plaza factory purchased the basic audit; an audit that would have examined the building's structural integrity would have cost an additional $5200 USD.[27]

10. Large auditing firms regularly outsource the physical inspection of supplier facilities to local firms.[28] RINA did this with the audit of the Ali Enterprises factory.[29] Studies indicate that cheating and corruption in the social auditing industry has become commonplace, as 'evasion' of negative findings 'has become more efficient and sophisticated.'[30] As the deaths at the Rana Plaza and Ali Enterprises factories have shown, unduly flattering audit reports are a real concern. It may be that in some circumstances even the best reports fail to persuade producers to change their practices, but when social auditors are negligent, the opportunity to identify and implement necessary changes is thwarted. In these cases, the negligent audit is more than simply an omission; it is a positive act that alters the course of conduct moving forward.

2.2. The Need for Civil Liability

11. Currently, there are few consequences for negligent social audits. Financial audits are usually mandated for companies, and both government regulation and industry standards identify clear standards of conduct.[31] Without government regulation or an industry standard, the social audit industry relies on external pressure and oversight. Since the lead brands are generally not held liable for subsequent harm experienced by workers of supply chain partners,[32] there is little incentive to ensure that the audits are accurate, particularly if doing so would undermine commercial interests like time or volume commitments.[33] Workers and unions do have an incentive to hold social auditors accountable but are often unable to do so. Audit reports are rarely made public.[34] Regarded as confidential and the property of the auditor's client, lead brands and retailers do not currently require social audits to be disclosed.[35] This makes it difficult for workers or unions to exert pressure or seek accountability for social auditing firms even where the workers or unions are aware of threats or lax social conditions.

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[26] Ontario Supreme Court of Justice 5 July 2017, fn 2 at para 53.
[27] *Ibid*, at para 54.
[28] *Ibid*, at para 54.
[29] See, OECD National Contact Point, fn 6.
[30] LEBARON, LISTER & P. DAUVERGNE, fn 1, at 970.
[31] See, e.g., UK Companies Act 2006, section 498; §323 HGB in Germany. In the EU, laws traditionally require that financial accounts give a "true and fair view" of a company's financial status (European Union, 1995, §3.11; e.g. UK Companies Act 2006, section 495 (3)(a)) (European Union, 2016). See also, EU Regulation No 537/2014, 16 April 2014, preliminary consideration 7 & 10, Article 4.
[32] But see, C. TERWINDT, S. LEADER, S., A. YILMAZ-VASTARDIS & J. WRIGHT, 'Supply Chain Liability: Pushing the Boundaries of the Common Law?' 8. *Journal of European Tort Law* 2018, p. 261 at 261-296.
[33] For a more robust discussion of how the auditing industry protects the commercial interests of brands while concealing ethical concerns, see LEBARON, LISTER & P. DAUVERGNE, fn 1.
[34] Terwindt & Saage Maaß, fn 4.
[35] Ibid.

12. Despite the problems, demand for social auditing is growing.[36] This is partly due to an increase in human rights due diligence and disclosure laws, a result of international efforts to better protect human rights throughout supply chains. The UN Guiding Principles on Business and Human Rights state an international expectation that businesses will identify and mitigate the human rights impacts of their operations, including those that arise through business relationships such as supply chains.[37] The expectation for greater supply chain engagement has encouraged companies, and even some non-governmental organizations, to rely more heavily on social audits.[38] As long as audits are carried out, the question is how to effectively control their quality. Scholars have recognized that tort claims can influence behaviour and deter recklessness, particularly within definable industries.[39] Tort claims are already having an impact within the social auditing industry. When German retailer KiK was sued for its alleged role in the Ali Enterprises fire, the company agreed to pay $5.15 million USD to those injured while it contests the suit in Germany.[40] It also changed its standards for social auditors. The company can now hold a social auditor 'legally liable for their findings on the ground for a period of three months following the audits.'[41]

13. It is necessary to question, however, whether lead firms should be able to set the conditions of social audits, and be the only ones capable of recovering damages caused by a negligent social audit. In considering Bureau Vertias' liability, the Canadian trial judge pointed to the contract between the auditing company and its client as evidence that the former had only a 'limited remit' and therefore did not owe a duty of care towards the plaintiffs to ensure the building's structure.[42] Upon appeal, the reasoning was upheld as the appellate court concluded that Bangladeshi law would not impose a duty of care on the social auditor to exceed the remit of the contract.[43] The decisions of the Canadian courts raise two questions: do auditing firms owe a duty of care to the client's workers, and if so, what should the standard of care be? Both questions are complex. The issue of standard of care sits outside the remit of this piece, but it is worth noting that those who hold themselves out as experts are judged against the standard of a reasonable person with their claimed expertise.[44] The next section begins to analyse the existence of a duty of care to workers on the premises of an audited property.

3. English Duty of Care Standards

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[36] VERISK MAPLECROFT, fn 14, at 7.

[37] UN Guiding Principles on Business and Human Rights, UN Doc A/HRC/17/31 (2011) at Principle 13(b) and commentary.

[38] LEBARON, LISTER & P. DAUVERGNE, fn 1, at 964.

[39] See, e.g., J. MORGAN, 'Abolishing personal injuries law? A response to Lord Sumption,' *in Professional Negligence* (2018), p.122 at 128-129; See in detail VERBRUGGEN (Introduction), LYTTON, GLINSKI & ROTT, and DE BRUYNE in this Issue.

[40] LeBaron, Lister & P. Dauvergne, fn 1.

[41] L. BARRIE, 'How KiK is raising the bar on working conditions: Interview,' Just-Style: Apparel Sourcing Strategy (11 April 2017), http://www.just-style.com/interview/how-kik-is-raising-the-bar-on-working-conditions-interview_id130409.aspx.

[42] Ontario Supreme Court of Justice 5 July 2017, fn 2 at para 59.

43 Ontario Court of Appeal, 20 December 2018, *Das v. George Weston Limited,* 2018 ONCA 1053, paras 195-200 https://www.canlii.org/en/on/onca/doc/2018/2018onca1053/2018onca1053.html.

[44] See, English High Court, 26 February 1957, *Bolam v Friern Hospital Management Committee*, [1957] 1 WLR 582. For limits to the application of this test, see, UKSC, 11 March 2015, *Montgomery v Lanarkshire Health Board*, https://www.supremecourt.uk/decided-cases/docs/UKSC_2013_0136_Judgment.pdf.

14. The English law on negligence – the notion that one owes a duty to not harm others through carelessness even absent a contractual obligation – was famously pronounced by Lord Atkins in *Donoghue v. Stevenson*: 'The [moral] rule that you are to love your neighbour becomes, in law, you must not injure your neighbour.'[45] The first step to establishing negligence is identifying a duty of care owed to the person harmed. English courts have spent much of the last 50 years attempting to clarify when a duty of care arises. This section outlines the current tests for establishing a duty of care before examining the case law on 'negligent misstatements' by auditors and others.

15. In classifying claims against a social auditor, it is necessary to briefly recognize that we are discussing cases of negligent action. Claims against social auditors should not be understood as attempting to ascribe liability for a 'pure' omission. Omissions in English case law arise when one could foresee that their failure to act would cause another harm, but they choose not to act nonetheless.[46] A common example of a pure omission is where one does not warn a stranger, or even a neighbour, of an impending danger.[47] In such cases, English courts are reticent to find a duty to undertake action unless there is a special relationship.[48] But where one undertakes an act, there is a responsibility to undertake that act with due care. In considering the responsibility of social auditors, it is not the failure to intervene that gives rise to the claim, but rather it is the negligent conduct of an inspection and certification that is the focus of the claim.

3.1. Duty of Care Principles

16. When assessing duties of care – or the application of existing duties to novel situations – English courts employ three competing tests developed for general duties of care, although exceptions to these tests are also recognized in both common law and statutes.[49] The leading approach for novel claims is the three-prong test developed in *Caparo Industries v. Dickman*, where the House of Lords concluded that a duty of care exists only when the plaintiff has shown that (1) the damage was foreseeable, (2) there was proximity between the parties, so that (3) it is 'fair, just and reasonable' for the court to impose liability on the defendant.[50] The criteria are, in fact, 'facets of the same thing.'[51] Amongst the criticisms of the *Caparo* test is that plaintiffs must now show that the imposition of liability is not only allowed but is appropriate in light of the full context and competing policy considerations.[52] This is a contentious approach as the introduction of policy suggests judges are making determinations better suited for the legislature.[53]

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[45] UKHL, 26 May 1932, *Donoghue v. Stevenson* [1932] A.C. 562 at 580, http://www.bailii.org/uk/cases/UKHL/1932/100.html.

[46] See, UKHL, 6 May 1970, *Dorset Yacht v Home Office* [1970] AC 1004 at 1060, https://www.bailii.org/uk/cases/UKHL/1970/2.html.

[47] See, Jenny Steele, Tort Law: Text, Cases and Materials (3rd ed.) (2014) at 164.

[48] Ibid; UKHL, 18 February 2009, *Mitchell v Glasgow City Council* [2009] HL 11 at para 15 (Lord Hope).

[49] See, e.g., UKSC, 8 February 2018, *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, paras 21-30, https://www.supremecourt.uk/cases/docs/uksc-2016-0082-judgment.pdf; UKHL, 28 December 1991, *Alcock v Chief Constable of South Yorkshire*, [1992] AC 310 (addressing psychiatric harm).

[50] UKHL, 8 February 1990, *Caparo Industries v. Dickman* [1990] 2 A.C. 605 at 617-618, http://www.bailii.org/uk/cases/UKHL/1990/2.html.

[51] *Ibid*, at 633.

[52] See, C. F. STYCHIN, 'The Vulnerable Subject of Negligence Law,' *in* 3. *International Journal of Law in Context* 2012, p. 337.

[53] Ibid.

17. *Caparo* has a limited purpose: addressing novel claims [54] English courts also employ two other tests. The first of these is the 'incremental approach,' which allows for the recognition of a duty of care only where a close analogy can be drawn to existing duties.[55] Courts also use the 'assumption of responsibility' test, which recognizes a relationship arises so as to create a duty of care when one party has 'voluntarily accepted or undertaken' a responsibility towards the other, either through an ongoing relationship (such as between a solicitor and her client) or for the purpose of a single transaction.[56] The corollary to the assumption of responsibility is that a party can sometimes disavow the duty of care for economic losses by issuing a reasonable disclaimer.[57]

18. While some have argued that the differences in the three tests are significant,[58] others, notably Brian Neill, LJ, have claimed that it is likely that when 'facts are properly analysed and the policy considerations are correctly evaluated the several approaches will yield the same result.' [59] Neill is responsible for identifying additional factors that should be considered specifically when deciding whether a duty of care exists between a professional advisor and a third party.[60] The factors include the purpose of the communication, the relevant relationships at play, knowledge that an advisee will rely on the advice, the size of the class of potential claimants, whether the adviser has had an opportunity to issue a disclaimer and has done so, and whether the advisee actually relied on the advice.[61]

19. Finally, and significantly for questions of social auditor liability, English courts have long distinguished between duties on the basis of the damages sustained. Where there is a risk of physical harm or property damage, there is likely to be a broader duty of care to those could foreseeably be harmed even if they do not have a previous relationship.[62] For 'purely economic' losses, an advisor is likely to have a limited duty of care only to those they knew or could reasonably foresee would rely on the advice for a particular purpose.[63] As is seen below, this

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[54] UKSC, 8 February 2018, fn 49 at paras 21-30.

[55] UKSC 28 February 2018, *NRAM Ltd (formerly NRAM plc) v Steel and another*, at para 22 https://www.supremecourt.uk/cases/uksc-2016-0111.html.

[56] UKCA 4 March 1998, Bank of Credit and Commerce International (Overseas) Ltd (In Liquidation) v Price Waterhouse (No. 2), [1998] P.N.L.R. 564 at 585.

[57] See, UKQB, 18 February 2015, *Barclays Bank Plc v Grant Thornton UK LLP* [2015] 1 C.L.C. 180 at 89. For some limitations to this rule, see, e.g., Unfair Contract Terms Act [1977] Ch 50. For more on this, see, A. BOWEN QC, 'Case Comment: "Bannerman" disclaimers and auditors' liability' – Barclays Bank Plc v Grant Thornton UK LLP [2015] 2 B.C.L.C. 537,' *in Business Law Bulletin* 2016, p. 1.

[58] See, e.g., J. HARTSHORNE, 'Confusion, Contradiction and Chaos within the House of Lords post *Caparo v Dickman*,' *in* 16. *Tort Law Review* 2008, p. 8 at 8-9; K. STANTON, 'Decision-making in the Tort of Negligence in the House of Lords,' *in* 15. *Tort Law Review* 2007, p. 93; D. HOWARTH, 'Poisoned Wells: "Proximity" and "Assumption of Responsibility" in Negligence,' *in* 62. *Cambridge Law Journal* 2005, p. 23.

[59] UKCA 4 March 1998, fn 56 at 586.

[60] UKCA 31 July 1990, *James McNaughton Paper Group Ltd. v Hicks Anderson & Co.* [1991] 2 QB 113, 125-127 https://www.bailii.org/ew/cases/EWCA/Civ/1990/11.html; UKCA 4 March 1998, fn 56 at 587-588.

[61] UKCA 31 July 1990, fn 60 at 125-127; UKCA 4 March 1998, fn 56 at 587-588.

[62] UKHL, 8 February 1990, fn 50 at 618; UKCA, 22 May 1998, *Perrett v Collins and Ors* [199] PNLR 77, 84 https://www.bailii.org/ew/cases/EWCA/Civ/1998/884.html.

[63] UKHL, 8 February 1990, fn 50 at 618; UKCA 22 May 1998, fn 62 at 84.

distinction is significant when comparing the recognized duties of care owed by financial and that which should be owed by social auditors.

20. In employing these tests and factors to a novel claim, it is necessary to next identify existing analogous duties, and then determine whether the similarities and differences in those claims justify the recognition of the duty of care in the novel situation. English courts have already addressed financial auditor liability. The same actors dominate the financial and social auditing industries, suggesting this may be an appropriate start.[64]

3.2. Responsibility for Negligent Misstatements that Harm Others

21. Negligent financial audits, which inaccurately depict a factual situation, are treated under a broader category of 'negligent misstatements,'[65] which is the focus of this section. The primary question in these cases is to which third parties did an auditor assume a duty of care when certifying as true something that turned out to be false. Similarly, a claim for social auditor liability would rest on an assertion that the social auditor knew the workers are dependent on the audit to protect them and yet the auditor still failed to appropriately identify risks that they knew or should have known existed.

3.2.1. Negligent Misstatements and Financial Auditors

22. English law recognizes that professionals who are employed for their opinion owe a duty of care to those who hire them for that opinion.[66] In addition to the direct purchaser or client, professionals asked for their advice or assessment can owe a duty of care to certain third parties, although it is rare. In *Caparo*, which relates to a financial auditor's duty of care to a prospective investor, Lord Bridge of Harwich concluded that an auditor is responsible to a third party only insofar as the auditor was aware that the third party would rely on the auditor's statement.[67] In light of the economic nature of the damages, Lord Bridge concluded that there needs to be a 'control mechanism' limiting liability only to those in a 'proximate' relationship with the auditor so that the auditor would anticipate the use of the statement. This includes those the auditor knew, or could have reasonably anticipated, would rely on the report. As such, a general audit released to the public at large without an intention of inviting investment will not trigger a duty to each member of the public.[68] Potential investors – even those who are also existing shareholders – are simply members of the general public, and the auditor cannot anticipate how each member of the public will use or rely on the report.[69] Allowing for a duty of care to each potential investor would unfairly subject the auditor to 'an indeterminate amount' of liability 'for an indeterminate time to an indeterminate class' while allowing anyone who wishes 'a quite unwarranted entitlement to appropriate for their own purposes the benefit of the expert knowledge or professional expertise attributed to the maker of the statement.[70]

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[64] See, FRANSEN & LEBARON, fn 15.
[65] See, generally, UKHL, 8 February 1990, fn 50.
[66] See, e.g., ibid.
[67] Ibid. at 621.
[68] Ibid.
[69] Ibid.
[70] Ibid.

23. In determining whom the auditor knew or should have anticipated would use the reports, English courts have mixed the general duty of care tests outlined above. Courts have found auditors owed a duty of care under the 'assumption of responsibility' test directly to shareholders where the auditors were employed for the purpose of valuing the company's shares before a compulsory acquisition,[71] and to a holding company when the auditors were aware that the accounts of a subsidiary would be given to the holding company's directors who would reasonably desire a true and accurate statement.[72] A duty of care was also owed to other companies in a closely-knit group when the auditors were employed by only one of those companies because the relationships at issue provided for 'a significant degree' of closeness between the auditor and the other companies.[73] On the other hand, auditors have been found to not owe a duty of care to a third party purchaser when that party could discern that the accounts were in draft form and could avail themselves of alternative assistance,[74] or when an audit was neither communicated directly to a bank nor prepared with the intention or knowledge that it would be shared with the bank, which was not a creditor on the day of the audit.[75]

24. To date, financial auditor liability cases have focused on the expectations of the financial auditor. Some scholars have argued that the limits outlined here create an 'expectation gap' between the public and the auditor as to the responsibility of an auditor to detect fraud or misuse.[76] Implicit in the decisions, however, appears to be concern about ensuring an efficient system of accounting that might be undermined if auditors are dissuaded from performing their duties because they will be liable for an 'indeterminate amount for an indeterminate time to an indeterminate class.'[77] Lord Sumption has stated publicly that judges remain 'sensitive to considerations of economic efficiency,' even if they 'rarely acknowledge the fact.'[78] The insistence of a control mechanism by which the courts can limit claims of an economic loss allows for financial auditors to engage in a precarious but necessary industry without being put at risk for boundless claims for their mistakes.

3.2.2. Workers as Known Third Parties

25. Financial auditors owe a duty of care to individuals or classes of persons that they know, or can reasonably anticipate, will rely on their reports. When considering whether to recognize that social auditors owe a duty of care similar to that owed by financial auditors, the first question is the extent to which workers and others routinely on the premises of an audited property might be considered known third parties akin to that owed by a financial auditor to known creditors or parent companies. The social auditor is aware of the relationship between himself, the audited

[71] UK Chancery Division 5 July 2000, *Killick v PriceWaterhouseCoopers*, [2001] P.N.L.R. 1.
[72] UKCA 18 July 2002, *Barings Plc v Coopers & Lybrand* [1997] P.N.L.R. 179, CA.
[73] UKCA 4 March 1998, fn 56 at 588-589.
[74] UKCA 31 July 1990, fn 60 at 127-128
[75] UK Chancery Division 28 July 1989, *Al Saudi Bankque v Clake Pixley* [1990] Ch 313, approved in *Caparo*, UKHL, 8 February 1990, fn 50.
[76] S. CHUA, 'The Auditor's Liability in Negligence in Respect of the Audit Report,' *in* 14. *Company Lawyer* 1993, p. 203 at 203. See, also, F. T., DEZOORT & P. HARRISON, 'Understanding Auditors' Sense of Responsibility for Detecting Fraud within Organizations,' *in* 149. *Journal of Business Ethics* 2018 p. 857; J. COHEN, Y. DING, C. LESAGE & H. STOLOWY, 'Media Bias and the Persistence of the Expectation Gap: An Analysis of Press Articles on Corporate Fraud,' *in* 144. *Journal of Business Ethics* 2017, p. 637.
[77] UKHL, 8 February 1990, fn 50 at 621.
[78] Lord Sumption JSC, 'Abolishing Personal Injuries Law: A Project,' *Journal of Personal Injury Law* 2018, p. 1 at 6.

company, and those routinely present on an audited property. After all, the social auditor should be present on the premises and interviewing workers as part of the audit.[79] Social auditors are also aware that the workers are expected to be protected by the audit, and that the workers are reliant on the audit to raise concerns about their safety and conditions. Finally, the (approximate) number of such individuals is also known to the auditor and can be reasonably identified in advance. Workers on audited premises can therefore be distinguished from the general population. As such, to the extent that workers and others routinely on the premises know and rely on the social audit, they appear to be owed a duty of care; a natural, incremental step from the recognized duty of a financial auditor to a known third party.

26. The next question, however, is the extent to which the duty of care for social auditors should be limited only to those workers or others who knowingly rely on the report or if there are other relevant factors that might extend the duty of care further. The requirement of knowledge of and reliance on the social audit may be inappropriate for workers or others in a position of vulnerability who should be protected by a social audit even if they are unaware of its specific existence or content. The strict application of the standards developed under financial auditor liability is also problematic as it would extend a limited liability designed to protect a necessary, established, and regulated industry whose negligence is likely to cause only economic loss (the financial industry) to the newer social auditing industry that remains unregulated and whose negligence is likely to cause harms resulting in personal injuries and property damage. The differences between the two industries are significant enough that the approach for financial auditors appears inappropriate for social auditors. As financial auditor liability is only a subset of negligent misstatement case law, it is worth extending out briefly to consider other factors that can influence the duty of care.

3.2.3. Implicit knowledge and reliance

27. The assumption of responsibility test does not require an explicit agreement.[80] In a negligent misstatement case involving surveyor liability, *Smith v Eric S Bush*, Lord Griffiths noted that it 'is extremely unlikely' for a professional to expressly assume responsibility to a third party, but the surrounding context can give rise to an implicit yet clear assumption of responsibility.[81] *Smith* addressed two cases in which surveyors were contracted by a banking society to inspect and value modestly priced homes.[82] In both cases, the surveyor's valuation created the basis for a mortgage. Lord Griffiths explained that it was a common practice within the industry for a building society to share a surveyor's report with the purchaser.[83] In one case, the surveyor knew that the report would be given to the purchaser. With that explicit knowledge, even the surveyor conceded that a duty of care was owed but argued instead that their disclaimer of liability absolved them of this duty.[84]

28. The second case presented a 'very much more difficult' set of facts because the surveyor did not know the report would be shared and the purchaser did not in fact receive a copy of the

[79] See, fn 21.
[80] *See*, UKHL 20 April 1989, *Smith v Eric S Bush* [1990] 1 A.C. 831 at 862.
[81] *Ibid,* at 862.
[82] *Ibid,* at 862.
[83] *Ibid,* at 855.
[84] *Ibid,* at 856.

report.[85] Yet, both Lords Templeman and Griffiths found that the assessor was aware that 'valuation will probably be relied upon by the purchaser.'[86] In approximately 90 per cent of the cases, purchasers relied on the valuations that underpin the offer.[87] For Lord Templeman, it was relevant that the valuation fee is 'paid by the purchaser' who is likely to rely on the report.[88] For Lord Griffiths, '[t]he necessary proximity arises from the surveyor's knowledge that the overwhelming probability is that the purchaser will rely upon the valuation.'[89] As the advice was given in a professional context, and the liability would be limited only to the immediate purchaser of the home, as opposed to subsequent purchasers, it seemed just and reasonable to impose the duty of care in this situation.[90] Lord Jauncey expressed some hesitations with extending the duty of care to those who have not relied on the report, but ultimately agreed with his colleagues.[91]

This case is significant as the purchasers were not required to have explicit knowledge or reliance on the assessment, nor was the surveyor required to have explicit knowledge of the purchasers' reliance on the report. Both were found to exist as a consequence of the nature and purpose of the industry and the assessment. As Lord Griffiths recognized, had the purchaser directly employed the inspector for this purpose, there would have been no doubt over the existence of the duty of care.[92] This suggests that in certain circumstances, the industry and the purpose of an activity can create an implicit reliance that creates a duty of care.

3.2.4. Purpose, Power, Control, and Vulnerability as Factors

29. English courts have also explicitly and implicitly identified power, control, and vulnerability as factors in their reasoning. This is perhaps obvious given that the *Caparo* test calls for consideration of what is just, fair, and reasonable, inherently raising issues of power, control and vulnerability as pertinent factors. As noted above, the surveyors in *Smith* argued that a disclaimer of liability precluded a duty of care.[93] To determine whether the disclaimer was valid, the House of Lords needed to decide if, *inter alia*, it was 'reasonable' to exclude liability in light of the disclaimer and its context.[94] While the case centered on the Unfair Contract Terms Act,[95] the reasonableness test employed mirrors the reasonableness standard in the *Caparo* test.[96] With the caveat that an exhaustive list may be impossible, Lord Griffiths noted some pertinent factors: '[w]ere the parties of equal bargaining power,' could the one party obtain 'advice from an alternative source taking into account considerations of costs and time,' whether the take was particularly difficult and therefore carried a 'high risk of failure' so as to justify the limitation of

[85] *Ibid,* at 875.
[86] *Ibid,* at 847, 865.
[87] *Ibid,* at 865.
[88] *Ibid,* at 847.
[89] *Ibid,* at 865.
[90] *Ibid,* at 865.
[91] *Ibid,* at 875.
[92] *Ibid,* at 859.
[93] See, fn 84.
[94] UKHL 20 April 1989, fn 80 at 862.
[95] Unfair Contract Terms Act 1977. The consumer protection aspects of the Unfair Contract Terms Act 1977 are now regulated by the Consumer Rights Act 2015, but with a 'fairness' test instead of the 'reasonableness' test of the 1977 law, http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted.
[96] UKHL 20 April 1989, fn 80 at 862.

liability, and the 'practical consequences of the decision', including who will bear the loss involved.[97]

30. Two of Lord Griffiths's four factors explicitly relate to power and control: whether one party exercises greater power and whether the other is reliant on them in the exercise of that power. A third factor, the practical consequences of the imposition of liability, relates implicitly to vulnerability. Lord Griffiths explained that professionals are expected to carry insurance.[98] As such, the professional is unlikely to be unduly burdened by the cost of compensation whereas it is 'quite possible that it will be a financial catastrophe for the purchaser who may be left with a valueless house and no money to buy another.'[99] If the case had involved more valuable homes with purchasers capable of securing independent advice, Lord Griffiths conceded there might have been a different outcome.[100]

31. Lord Giffiths listed one factor that does not relate to power and vulnerability, which is the difficulty of the task. Lord Griffiths concluded here that 'a valuation … should present no difficulty is undertaken with reasonable skill and care' as it requires only careful observation and examination; it is not reasonable to limit liability for 'the fairly elementary degree of skill and care involved in observing, follow-up and reporting on such defects.'[101] It stands to reason that it is reasonable to impose a duty of care for social audits, which also require no greater skill and care than observing, following-up, and reporting on defects through careful visual examination. In carrying out these 'fairly elementary' activities, Lord Templeman explained that the house inspectors owe two sets of duties: one arising from how the work is carried out in order to make the report, and the second in the preparation of the report.[102] Had the surveyors in these cases discharged their first duties appropriately, the second would have followed.

32. Power and purpose were factors in *Sutradhar v Natural Environment Research Council*, but in a different manner than in *Smith*.[103] The case involved a pilot study of water quality in northern Bangladesh by the British Geological Survey (BGS), a department of the UK Overseas Development Agency (ODA).[104] The study was funded with unspent money BGS had from ODA and ran alongside but was unconnected to a separate initiative from the United Nations to install new drinking supplies in rural areas.[105] The study tested 31 elements that can be hazardous to human health in 150 sites in northern Bangladesh.[106] The tested elements did not include arsenic, which turned out to be present in harmful doses.[107] A Bangladeshi man who drank from the tested sites and suffered serious health issues as a result argued that BGS failed in

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[97] Ibid.
[98] *Ibid,* at 858-59.
[99] *Ibid,* at 859.
[100] *Ibid,* at 859-60.
[101] *Ibid,* at 858.
[102] *Ibid,* at 848.
[103] UKHL 5 July 2006, *Sutradhar v Natural Environment Research Council*, https://www.bailii.org/uk/cases/UKHL/2006/33.html.
[104] *Ibid,* paras 10-13.
[105] *Ibid,* para 19.
[106] *Ibid,* para 14.
[107] *Ibid,* paras 2, 20-23.

its duty of care by not testing for arsenic or not making it clearer that arsenic was not tested.[108] The 31 elements that were tested were listed in the report, but the claimant argued that the report 'lulled' the authorities into a false sense of security over the water quality.[109]

33. At the House of Lords, Lord Hoffmann questioned whether a positive obligation to test for arsenic existed. Here, issues of power, control and authority were explicit and implicit. The purpose of the study, according to Lord Hoffmann, was to test 'the efficiency of tubewell designs.'[110] The test was not designed for examining the appropriateness of the water for human consumption. More importantly, 'BGS had no connection with the drinking water project and no one asked them to test the water for potability.'[111] The pilot study, according to Hoffmann, was simply 'an accident of the availability of the funds.'[112] In distinguishing *Sutradhar* from *Perrett v Collins*, a Court of Appeal case which focused on the liability of an airplane inspector for certifying a plane that subsequently crashed,[113] Lord Hoffmann noted that in the latter 'the inspector had complete control over whether the aircraft flew or not. If he refused a certificate it could not fly.'[114] BGS, on the other hand, had no control whatever, whether in law or in practice, over the supply of drinking water in Bangladesh, nor was there any statute, contract or other arrangement which imposed upon it responsibility for ensuring that it was safe to drink.[115]

34. Lord Hoffmann also considered whether the case was one of misrepresentation, rather than misstatement, but found that the clear statements about what was tested and what was not meant that there was no misrepresentation on the potability of the water.[116] Lord Hoffmann's position suggests that the purpose and power of the auditor should matter. If the purpose of the study had been more than simply a pilot study, the result of leftover funding that could be used to start new lines of inquiry, or had it been linked to the drinking water project, the inquiry could have been different.

35. The issue of power and oversight appears in other decisions addressing proximity. In *Watson v British Boxing Board of Control*, an injured boxer sued the professional boxing authority for negligent medical treatment when he was injured in a match.[117] While lacking control over the danger – in this case, the physical harm suffered during a boxing match and the need for medical attention – Kennedy, LJ, noted that the danger was foreseeable.[118] Were it not for the Board's role in regulating medical care, the event promoter would instead owe the duty.[119] But the Board set the rules governing medical care at boxing events.[120] In exercising this level of power and

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[108] *Ibid,* para 25.
[109] *Ibid,* para 25.
[110] *Ibid,* para 10.
[111] *Ibid,* para 27.
[112] *Ibid,* para 27.
[113] UKCA 22 May 1998, fn 62.
[114] UKHL 5 July 2006, fn 103 at para 38.
[115] *Ibid,* para 38.
[116] *Ibid,* para 29.
[117] UKCA 19 December 2000, *Watson v British Boxing Board of Control Ltd.*, [2001] Q.B. 1134.
[118] *Ibid,* at 1161.
[119] *Ibid,* at 1160-1161.
[120] Ibid.

control, the board was in 'close proximity with each individual boxer who contracts with a promoter to fight under the board's rules.'[121]

36. Finally, in *Chandler v Cape*, the Court of Appeal determined that parent companies can owe a duty of care to the employees of their subsidiaries where (1) the business of the two companies is, in a relevant aspect, the same, (2) the parent had or should have had superior knowledge of the health and safety standards for the industry, and (3) knew or ought to have known that the conditions at the subsidiary were unsafe, and (4) the parent knew or ought to have known that subsidiary and/or the employees would rely on the parent using its knowledge to protect the subsidiary's employees.[122] The parent company's superiority knowledge, a form of power, and the reliance by the subsidiary's employees on the company to use that power to influence conditions for their protection gave rise to a direct relationship between the parent and the subsidiary's employees. The English courts are still working through some of the more difficult aspects of applying *Chandler*. *Vedanta v Lungowe*, pending before the UK Supreme Court at the time of editing, may soon impact this analysis.[123]

3.2.4. Personal Injury and the Presence of Insurance

37. The limitations on financial auditor responsibility are based on the assumption that misstatements from the industry will only result in economic loss, rather than personal injury or property damage. Where negligent misstatements by professionals trusted with care have foreseeably caused physical harm and losses, the courts have found that it is just and reasonable to find a more robust duty of care. In *Perrett*, discussed above, the Court of Appeal found that the airplane inspector owed a duty of care to a passenger harmed when the plane crashed.[124] Hobhouse, LJ, rejected an attempt to draw on cases of economic loss to limit the duty of care for the inspector.[125] Instead, he declared that the reasons for limiting liability in cases of economic loss are 'not germane to [cases of] personal injury.'[126] This position underscores the importance of distinguishing duties of care based on the nature of the foreseeable harm, a position the House of Lords and others have addressed elsewhere.[127]

3.3. Conclusions on the Duty of Care for Misstatements

38. Financial auditors generally owe a duty of care only to individuals they know are likely to rely on the audit. Applying this to social auditors would limit social auditor liability to those workers who the auditor knows will rely on the audit and who, in fact, do so. As noted above, policy considerations can explain this limited duty of care for financial auditors. The limitation for purely economic loss represents an attempt to balance the need for accountability and reparations for negligence with the public interest in a viable and sustainable auditing industry. Applying this standard to social audits may be problematic for two reasons: first, vulnerable workers are unlikely to know the contents of a report even though they are reliant on it for their

[121] *Ibid,* at 1161.
[122] UKCA 25 April 2012, *Chandler v Cape plc* [2012] EWCA Civ 525 at para 80.
[123] UKSC *Vedanta v Lungowe*, 2017/0185, [2017] EWCA Civ 1528.
[124] UKCA 22 May 1998, fn 62.
[125] *Ibid,* at 92.
[126] Ibid.
[127] See above fn 62-63.

protection, and the extension would apply a limitation designed for economic loss to situations of personal injury.

39. By drawing on additional cases, it appears that duties of care may be owed to those who, by the nature of an industry or the purpose of professional advice, implicitly rely on the advice. Additionally, courts are likely to consider issues of power, control and vulnerability, and are likely to find a broader duty of care in cases where the plaintiffs suffered physical harm instead of simply economic loss. The next part considers what these additional factors might mean for social auditing.

4. Identifying an Appropriate Duty for Social Audits

40. The financial industry's duty of care in the underlying work and preparation of the report provide a foundation for the existence of a duty of care for workers who rely on the content of the report. This section questions whether the differences between financial and social auditing call for an extension of the duty of care to include even those who do not explicitly rely on the audit. It then turns to consider whether the duty should be deemed a non-delegable duty so that auditors like RINA remain liable for the actions of their sub-contractors, like the one whose conducted the audit at Ali Enterprises.

4.1. Analysing the Duty Owed

41. To conclude that social auditors owe a broader duty of care than that owed by financial auditors – that this represents an incremental step from the existing duty – English courts would need to conclude that the social auditor and the workers are in a proximate relationship, that the harm to workers by negligent social audits is foreseeable, and that it is just, reasonable and fair to impose this duty. All three of these factors are influenced by the vulnerability of the workers to abuse and negligence, which is at the heart of the social auditing industry. As explained above, social audits are primarily used in industries with documented histories of worker abuse. They have arisen as a means of responding to societal calls to protect vulnerable workers, particularly in states with weak governance mechanisms. Those harmed by a negligent social audit are likely to be individuals who are reliant on the social auditor as their primary means of protection. This vulnerability and the purpose of the audit in protecting workers and others present on an audited premises highlight three particular differences from financial auditors that suggest that the *Caparo* test is met and that the extension of responsibility is an appropriate incremental extension of the existing duty. These differences are: (1) the nature and purpose of the auditing industry generally and each audit in particular; (2) the vulnerability of those reliant on the advice, and (3) the risk of harm and the type of damage sustained as a result of negligent conduct.

42. First, the purpose of the social auditing industry, and individual audits, is to identify immediate dangers to the human health and safety of individuals in a position of vulnerability. The immediacy of the relationship – only the direct purchaser interrupts the relationship, much like *Smith* – suggests a closer proximity between the workers and the social auditor than what was present in *Sutradhar*. In *Sutradhar*, the purpose was to provide a pilot assessment of some of the contaminants that can be dangerous to human health. It was not, however, intended to assess the potability of water or the full risk the water posed to human health. While the report would be shown to authorities, it was not supposed to influence the development of the water

distribution efforts. This sits in contrast to workers who are reliant on a social audit to protect them even when they are unaware of the contents of the report. This is similar to the relationships in *Smith*, where the purpose of the report was to protect the third party. The standards in the surveying industry also suggested that implicit reliance was commonplace, justifying a duty of care even when the purchasers are unaware of the report.
The nature of the social auditing industry, and the purpose of individual audits, are both supposed to be directed at the protection of the worker. This suggests that an implicit reliance on the report – an expectation that the report will identify hazards to the worker so that they can be remediated, and that the auditor will follow up on remediation efforts – is reasonable. As the worker is also unable to secure external support or protection, or an independent assessment, it is just, reasonable, and fair to expect the social auditor to undertake their activities with the workers' safety in mind. This does not guarantee that the auditor's recommendations will be fully implemented, but that is an issue of causation to be examined in each case, rather than a factor relevant to the duty of care.

43. The position of the workers and the nature of the harm raise the second issue, which are considerations of power, control, and vulnerability. A social audit is intended to provide layers of protection for the workers' benefit and should identify deficiencies so that those with the power to fix a problem are aware that it needs to be fixed, and purchasers can exert pressure on the audited company to ensure this happens. A social audit that confirms compliance or acceptable standards communicates to those with power and influence that they need not exercise further oversight, while those that indicate deficiencies encourage greater oversight and mitigation efforts for the direct protection of the worker. This might appear on the surface to resemble the facts in *Sutradhar*, but there are significant differences in both power and control between social auditors and the researchers in *Sutradhar.* The *Sutradhar* researchers could only indirectly influence policy through their report. Social auditors exercise direct influence. Their audits are intended to lead to immediate changes not just in policy but in action, with clear remediation plans that are assessed in subsequent visits. As such, social auditors exercise significantly greater control and impact than what was exercised by the *Sutradhar* researchers through their report.

44. Third, while a negligent financial audit is likely to cause only economic injury, a negligent social audit is more likely to lead to personal injury and property damage. As noted above, English law has long distinguished duties of care based on the type of damage caused. Where an activity is likely to cause personal injuries or property damage, as opposed to purely economic loss, English case law, notably *Perrett*, suggests that the actor has a broader duty of care to those around them and likely to be harmed by the action. The policy considerations that justify a 'control mechanism' for financial audits are neither applicable nor appropriate to a social auditor. As such, a broader duty of care is appropriate.

45. If the duty of care owed by financial auditors provides an appropriate foundational analogy, the nature of the social audit suggests an incremental step away from this duty is appropriate to address issues of purpose, power, vulnerability, control, and the harm suffered. Extending social auditor responsibility to those who implicitly rely on the audit's accuracy would not create an open-ended duty. Instead, the duty of care would be owed to those routinely on the premises of an audited premises or who could reasonably be anticipated to be present in an audited facility.

While numerous, this would not become indefinite, a distinction the Court of Appeal invoked in *Watson*,[128] suggesting a broader duty of care is reasonable, just and fair.

4.2. Non-delegable Duties and Vulnerable Persons

46. Extending the duty of care raises a final question pertinent for the Ali Enterprises and Bureau Veritas cases as to whether the duty is delegable. If a social auditor sub-contracts the work, can they assign the duty of care to the subcontractor? As Lord Sumption has explained, English law has a 'long-standing policy … to protect those who are inherently vulnerable and highly dependent on the observance of proper standards of care by those with a significant degree of control over their lives.'[129] As such, certain duties of care are non-delegable where (1) there is a vulnerable claimant or one who is 'dependent on the protection of the defendant against the risk of injury,' (2) with an established relationship that is independent of the negligence and gives the defendant a form of custody or control that 'impute[s] to the defendant the assumption of a positive duty to protect the claimant from harm,' rather than simply a negative duty to refrain from causing the harm directly, (3) the claimant does not and cannot control how the defendant performs his obligations, (4) the defendant has delegated to a third party the responsibility for a function necessary to discharge the duty, and (5) the third party was negligent in the discharge of that duty.[130] For Lord Sumption, '[t]he essential element' in such cases is not control over a particular premises, 'but control over the claimant for the purpose of performing a function for which the defendant has assumed responsibility.'[131]

47. These same elements arise in the context of social auditors. The purpose of the social auditor is to monitor, identify, and recommend for correction deficiencies that endanger those in a position of vulnerability, in industries with histories of abuse, who are reliant on the auditor to carry out that assumed responsibility. The relationship between the social auditor and those harmed by a negligent audit exists before, and is independent of, any negligence in the carrying out of the audit, and the workers are unable to control or dictate the conditions of the audit or the auditor's performance. As such, social auditors assume a relationship that gives them an element of control over, and responsibility to protect, individuals in a vulnerable position who are dependent upon the auditor to fulfil their role. While one might reasonably argue that social auditors do not 'control' or exercise custody over the audited premises, control and custody can be temporary in nature, or limited to a particular place or relationship and are responsive to the particularities of the facts. As such, the UK Supreme Court found schools have a non-delegable duty of care to their students for school-related activities[132] and employers have a non-delegable duty of care to their employees for safe work conditions.[133] A duty of care could be based on a social auditor's possession of a temporally limited control over the evaluation and identification of labour, environmental, and human rights conditions within a defined area. This duty would seemingly extend further than simply employees or others routinely on the premises. It would instead extend to anyone vulnerable to the deficiencies at audited premises.

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[128] UKCA 19 December 2000, fn 111 at 1160.

[129] UKSC 23 October 2013, *Woodland v Essex County Council* [2013] UKSC 66, https://www.bailii.org/uk/cases/UKSC/2013/66.html at para 25.

[130] Ibid, at para 23.

[131] Ibid, at para 24.

[132] See, generally, Ibid..

[133] UKHL 19 July 1937, *Wilsons & Clyde Coal Co Ltd v English*, [1937] UKHL 2, https://www.bailii.org/uk/cases/UKHL/1937/2.html.

5. Conclusion

48. While the appropriateness of social auditing has been addressed in scholarship, this piece began a new line of scholarship examining the legal relationship between the social auditor and those who are supposed to be protected by their audits. The responsibility of social auditors is already before the courts in Canada and Italy, and the problems identified by numerous studies call for greater clarity on the industry's obligations. Yet, scholarship has not tackled the legal responsibility of social auditors to those harmed by negligent audits. The social auditing industry is largely unregulated, and issues of negligent or deceptive behaviour have been identified.

49. In considering the duty of care under English, this article considers not only how courts should decide disputes after a negligent audit but also how the social auditing industry itself should understand its private regulatory role. This article suggests that in addition to any contractual obligations, the social auditor owes a direct and independent duty of care to those who could foreseeably be harmed by the auditor's negligence. The article analysed the duty of care owed by financial auditors to find that it would naturally extend to those who knowingly rely on a social audit before considering whether that duty should be extended to include those who implicitly rely on the social auditor. The auditor's assumption of a positive duty to assess workplace conditions coupled with the worker's vulnerability, the nature and purpose of the industry, and the likelihood of physical, not only economic, harm justifies extending the duty not only to those who explicitly rely on a social audit but also to those implicitly do so. This would reasonably extend the duty to workers on an audited property.

50. The burgeoning nature of the social auditing industry makes this an area ripe for greater scholarly consideration. While this article focused on English tort law, it has broader implications. The business responsibility for human rights recognized in the UN Guiding Principles on business and human rights sits alongside long-standing, recognized obligations that states have to regulate businesses and industries for the protection of human rights and to provide adequate remedies for harms suffered by a business's activities.[134] Social auditors have filled a gap because states have failed to appropriately regulate own businesses and industries on their own territory. This alone is problematic as a matter of international law. Social auditors, however, represent not only a form of private regulation, but also their own industry and businesses. If social auditors are to function as private regulators, states must insist on greater clarity as to their purpose and to whom they owe their effective duty of care.

51. By discussing problems with the industry and identifying questions and uncertainty over the ability of workers to hold auditors accountable, this article serves as a call for greater legal consideration of this industry. Relying on social auditors to advance state compliance with the UN Guiding Principles on business and human rights without sufficient regulation of the industry or adequate access to remedies represents a systemic failure of the state to meet its human rights obligations. While English law provides a means for extending liability to social auditors, states, social auditors, and lead brands need to re-evaluate their assumptions about the industry and ensure proper regulation and oversight. For states, this is a human rights obligation. For social auditors and lead brands, it is sound business practice as the alternative is to leave

[134] See, UN Guiding Principles on Business and Human Rights, fn 37 at Pillars 1 and 3.

themselves open not only to criticism but to expensive litigation over the failure to appropriately secure or conduct an audit.