UNRESTRAINED AUDIT LIABILITY: COMPARATIVE ANALYSIS OF THE UNITED KINGDOM AND SPANISH LEGAL SYSTEMS

Dr Sulaiman Abdussamad•

Abstract

Auditor liability has become a pressing concern in both the United Kingdom and Spain, reflecting the challenge of balancing professional accountability with the need to limit excessive exposure that could undermine the auditing function. This article examines the legal frameworks governing auditor liability in the two jurisdictions, representing common law and civil law systems, respectively. The study aims to compare statutory provisions, regulations, and judicial precedents, highlighting how each system addresses negligence and economic loss. Employing a doctrinal and comparative methodology, the article analyses legislation, case law, and scholarly commentary to identify similarities, differences, and persistent uncertainties in auditor liability. In the UK, liability centres on the auditor's duty of care to clients and, in certain circumstances, third parties, whereas in Spain, civil liability focuses on establishing causation between the auditor's conduct and economic harm. Both jurisdictions, however, share the challenge of determining the scope of recoverable economic loss, leading to inconsistencies in judicial outcomes. The findings suggest that legal reforms in both countries have aimed to prevent open-ended liability while upholding professional standards. The article recommends that the courts demonstrate the pragmatism required to expand the long arm of the law and resolve a pressing societal need without overstretching the auditors' deep pocket. By exploring these comparative insights, the study contributes to ongoing debates on reconciling auditor accountability with professional protection, offering a balanced perspective for law, policy, and practice.

Keywords: Tort law, Duty, Liability, United Kingdom, Spain

• LLB, BL, LLM and PhD, Senior Lecturer, Fac. of Law, Baze University, Abuja. samadlx@yahoo.com

1.0 Introduction

Financial information is an essential fabric of modern corporate governance and a sine qua non requirement in all public companies. Auditors play an indispensable role in ensuring that the financial statements are accurate and reliable, which guides investment decisions in the volatile corporate world. Investors who rely on the audit and suffer losses frequently sue auditors to recover their losses. Under common law, legal claims brought for compensation for damages caused by negligent acts are tried under the principles of tort of negligence.[1] However, because liability for negligent misstatement is not an autonomous category within the negligence law, it is usually analysed in the context of economic loss, which is *ipso facto* not recoverable.[2] In contrast with common law, civil law compensates for all kinds of damage, whether physical or economic. Nonetheless, the scope of auditor liability has been a subject of controversy in both the United Kingdom and Spain. This article addresses the concerns of both jurisdictions regarding unrestrained auditor liability by analysing the scope of liability, regulatory frameworks, and the evolving nature of the profession's role in providing the corporate world with a reliable audit report.

1.1 Liability under Contract and Tort

Under UK law, auditors' liability may either be contractual or tortious. Contractual liability emanates from the auditor-client relationship. Auditors must perform this duty with reasonable care and skill, as specified in the terms of their engagement letter. Their liability under tort, which extends to third parties, is the bit in this article.

Tort is originally a French word for wrong, but fortunately, not all wrongs are remedied by law.[3] God forbid that the law should furnish a remedy for all wrongs! A tort is thus defined as a violation of some private obligation by which like damage accrues to the individual.[4] It is a civil wrong

[1] Auditors may also be held liable on criminal grounds.
[2] Lara Khoury, 'The Liability of Auditors Beyond Their Clients: A Comparative Study' (2001) 46 *McGill Law Journal* 413, 427.
[3] Alastair Mullis and Ken Oliphant, *Torts* (2nd edn, Palgrave Macmillan 2011) 1.
[4] Henry Campbell Black, *A Law Dictionary* (6th edn, West Publishing Co 1995) 1161 and David G Owen, 'The Five Elements of Negligence' (2007) 35 *Hofstra Law Review* 1671, 1674. The learned author argues here that duty as an "obligation of one person to another, flows from millennia of social customs, philosophy, and religion. It serves as the glue of society and the thread that binds humans to one another in community. Duty constrains and channels behaviour in a socially responsible way before the fact, providing a basis for judging the propriety of behaviour thereafter." ibid

other than a breach of contract for which the law provides a remedy in the form of a damages action.[5] Tort law seeks to protect the rights and privileges of persons against wrongful acts by others. This is premised on the policy that a person who unreasonably interferes with the interest of another should be liable for the resulting injury and thus provides redress from wrongful acts that affect some legal interest of the complaining party. According to Winfield, negligence involves violating a legal duty to take care, which results in damages to the claimant. It is the most common area of tort law in modern jurisprudence and perhaps the broadest category of tort liability imposed for harm caused to others.

The Spanish perspective on tort law, which reflects common law, is also fault-based (culpa), premised on the tortfeasor's obligation to repair any damage their action or omission caused to the complainant.[6] The significance of fault under this system is that damage alone is insufficient to sustain a claim; there must be fault or negligence on the defendant's part as required by Article 1902 CC. However, with new technologies, the chances of massive tort have sometimes multiplied with no apparent fault. Spanish courts have therefore transformed the doctrine of fault, "culpa", to mirror the damage rather than how it was caused. Spanish courts would now compensate all torts without adhering to the strict requirement of fault, as stated in the principle "ubi jus ibi remedium."[7] Once a link is established between the complained act and the damage suffered by the complainant, this is referred to in Spanish law as "relación causa y efecto."[8]

One of the reasons adduced for refusing to impose liability for economic loss has been the need to prevent the disruption of the 'contractual structure'. Hence, the general rule under common law is that third parties can neither be bound nor be endowed by an agreement to which they are not a party. Only parties who have furnished a consideration can claim.[9] Under this rule, a disappointed beneficiary of a will that was not correctly performed cannot have a valid claim against the solicitor.[10]

[5] ibid
[6] Section 1902 of the Spanish Civil Code (Hereinafter CC).
[7] Wherever there is right, there is a remedy, as the saying goes.
[8] Francisco José Infante Ruiz, *La responsabilidad por daños: nexo de causalidad y "causas hipotéticas"* (Tirant lo Blanch 2002) 112.
[9] This rule, known as the "privity rule," has been abrogated in the UK by the Contracts (Rights of Third Parties) Act 1999 to enable third parties to enforce contracts for their benefit.
[10] *Groom v Crocker* [1939] 1 KB 194

1.2 Auditor Liability in the UK

The common law characterises the UK legal system's approach to auditor liability. It was a settled law in common law jurisdictions that liability in tort did not extend to pure economic loss, absent physical damage. The position of the law at that time was that an aggrieved person seeking to claim compensation for the loss suffered must bring an action for breach of contract or negligence. Once the plaintiff could not prove privity, the action under contract would fail. Any claim under the tort of negligence would also not succeed unless there was proximity between the plaintiff and the defendant, or the damage was reasonably foreseeable to the defendant, and must not be remote. Apart from all these, the plaintiff must also show that his loss was not a pure economic loss to be recoverable.

The common law courts viewed the allocation of risks and opportunities for pure economic loss as exclusive to the parties to the contract.[11] However, this position is no longer tenable in light of recent judicial developments, such as the locus classicus of *Caparo Industries plc v Dickman* (1990), where the court held that auditors could be liable to third parties if a proximate relationship can be established between the claimant and the auditor. Moreover, to limit the scope of auditors' liability, the Companies Act 2006 has codified auditors' responsibilities and clarified the limits of their duties to shareholders. Nonetheless, cases such as *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1964) and the subsequent development of tort law have expanded auditor liability to include third parties, under certain conditions.

Moreover, the introduction of the *Financial Services and Markets Act 2000* and the *Audit Regulation 2015* has also placed auditors under greater scrutiny, especially in the context of public interest entities and the broader scope of financial market regulation. However, unrestrained liability is of most concern, particularly for auditors who may be liable to clients and third parties in an increasingly litigious environment.

[11] This had been the state of the law until the case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

1.2.1 Proof in a Negligence Action

To prove the negligence of the defendant and, therefore, warrant the defendant being held responsible for the injuries suffered by the claimant, the claimant must establish the following:[12]

Duty of care: The defendant owes the claimant a duty of care.
Breach: The defendant breached that duty.
Damage: The breach caused a legally recognised damage to the claimant.

(a) Duty of Care

A duty of care is a legal obligation to avoid conduct that could foreseeably harm others. Fleming defines duty as "an obligation, recognised by law, to avoid conduct fraught with unreasonable risk of danger to others." The landmark case *Donoghue v Stevenson***(**1932)established the modern principle through the 'neighbour principle.' Lord Atkin held that one must take reasonable care to avoid acts or omissions likely to injure one's neighbour, defined as persons closely and directly affected by one's actions. Subsequent refinements introduced structured tests for determining duty. In *Anns v Merton LBC*(1977), Lord Wilberforce outlined a two-stage test: proximity between the claimant and the defendant, and policy considerations that might limit liability. This was further refined in *Caparo Industries Plc v Dickman*, establishing the three-stage test: foreseeability of harm, proximity, and whether it is fair, just, and reasonable to impose a duty. These criteria are now the definitive tests for establishing the duty of care. Courts apply these criteria to ensure the duty is imposed within a reasonable scope.

(b) Breach of Duty

A breach occurs when the defendant fails to meet the standard of care that a reasonable person would expect in the same circumstances. The standard is objective, based on what a reasonably prudent person would do. In *Blyth v Birmingham Waterworks Co*(1856), the defendant was held negligent for failing to prevent foreseeable water damage during a severe frost, highlighting that breach arises when conduct falls below legal standards. In professional contexts, auditors are held to the standard of a reasonably competent auditor, as illustrated in *Caparo v Dickman*, where negligent misstatements formed the basis of breach.

[12] (n 3) 10.

(c) Damage

The final element requires that the breach caused legally recognisable harm to the claimant. Damage may be physical, financial, or emotional, provided it is foreseeable. For example, in *Spartan Steel & Alloys Ltd v Martins & Co Ltd*(1973), physical damage to the plaintiff's property justified recovery of lost profits directly linked to that damage, while purely economic loss unrelated to property was not recoverable. Causation must be proven: the damage must result from the breach, rather than from independent events (Barnett v Chelsea & Kensington Hospital, 1969).

Together, duty, breach, and damage form the tripartite foundation of negligence. Courts balance foreseeability, proximity, and policy to ensure accountability while limiting open-ended liability, thereby evolving the law of negligence to meet social and legal expectations.

1.3Auditor Liability under Spanish Law

Auditor's liability, like other civil liabilities in Spain, is traditionally divided between contract law and tort. The former are the parties to the auditor's contract, and the latter are those third parties that are not parties to the contract but have suffered a loss as a result of it. These third parties could take advantage of tort law to recover their loss. Thus, pursuant to the relevant provision under the Civil Code, section 1902,anyone whose fault or negligence causes harm to someone else is legally obliged to compensate the victim. It is pertinent to point out here that this provision is a progeny of section 1382 of the French Code from which it was derived. In practice, it shares similarities with the tort of negligence under common law.

Auditor liability in Spain, unlike in common law systems, derives from written statutes rather than judge-made law. Initially absent from the Civil Code, auditors were first referenced in the 1951 *Ley de Sociedades Anónimas* (LSA), though without liability provisions. The 1988 Audit Law and the 1989 LSA revision, implementing EU Directive 84/253/EEC, formally established auditor liability under Article 11 LAC, imposing joint and several liability. Criticised for being unfair, this regime was reformed in 2002 to introduce proportionate liability. Subsequent reforms, including the 2015 Audit Law, refined liability rules, leaving it to the courts to determineissues of unlimited liability and third-party claims.

Spanish courts employ strict criteria to limit liability and distinguish between recoverable and non-recoverable damages. Central to this is causation, which requires that the damage be real, existing, and directly linked to the defendant's action or omission.Any claim that fulfils the three conditions of recovery in tort, fault, damage and the causal link between the two is *ipso facto* recoverable.

(i) Pure economic loss under Spanish Law

The legal situation in Spain paints a different picture. Unlike in the United Kingdom, where the doctrine is a settled law, Spanish tort law is neither familiar with a separate category of pure economic loss nor does the concept appear in any Spanish legal scholarship dealing with tort law.[13] It has only appeared in Spanish legal discourse, borrowed from the international debates, to refer to specific problems.[14] Hence, liability for pure economic loss is not a problem in Spanish law. The Spanish Civil Code (CC), a system of personal responsibility based on the principle of fault, is delicately managed by courts by shifting the focus to the wrongful act rather than the nature and extent of the plaintiff's right.[15] Therefore, it can be safely asserted that the classification of rights in terms of their importance in determining recoverability, prevalent in common law countries, is non-existent under Spanish law.

Section 1902 of the Spanish Civil Code provides that "any person who by action or omission causes damage to another by fault or negligence is obliged to repair the damage caused." This general clause allows the assumption of liability for any act that causes any damage and does not limit the scope of rights and interests it seeks to protect.[16] Spanish law, in principle, compensates all legitimate interests without further distinction. Any physical, non-physical, or economic injury is *prima facie* recoverable under this system.

This position, however, is by no means a carte blanche for all shades of pure economic loss. Hence, under this system, the debate over the extent and limitation of liability is ever-present. Spanish

[13] Willem H van Boom, Meinhard Lukas and Christa Kissling (eds), *Tort and Regulatory Law* (Tort and Insurance Law vol 19, Springer 2007) 62.
[14] ibid. It was mainly employed in negligent misstatement and product liability.
[15] ibid 63.
[16] ibid 65.

courts have had to limit liability to their proximate consequences, like their common law counterparts, thereby excluding the remote damages.[17] As observed by Diez-Picazo, as follows:

> *Se plantea el problema de fijar límites oportunos a la responsabilidad, el principal de los cuales es el de la selección de las consecuencias dañosas, cuya finalidad consiste en afirmar la responsabilidad en alguno de los casos y negarla en otros*.[18]

In other words, Spanish courts have also devised a method of keeping the floodgates shut.[19] They typically employ causation elements to distinguish between recoverable and non-recoverable cases, thereby restricting liability to a reasonable limit. This invariably takes the form of proof, where the damage suffered must be established to be certain and directly linked to the defendant's action or omission. The elements Spanish courts use merit a brief discussion below.

(ii) Unlawfulness (Antijurícidad)

This is not a requirement as an element of proof under Section 1902 CC. According to Martins-Casals and Ribot, it was likely borrowed from Spanish criminal jurisprudence and legal scholarship.[20] Although its exact application is hard to ascertain, courts usually refer to unlawfulness as a breach of duty not to harm, as enshrined under section 1902 CC. Oliva is of a similar opinion. The learned author traced the unlawfulness requirement back to traditional Spanish doctrine, which relates civil liability to an unlawful or illegal act, and considers its compensation a form of recompense for breaching the law.[21] It follows as well that this has been the position of the Spanish Supreme Court in some notable cases, like the Supreme Court case of October 6 2006. In this case, the court held that for a conduct to be liable for compensation, it must

[17] Luis Díez-Picazo, *Derecho de Daños* (Marcial Pons 2000) 332.
[18] ibid
[19] According to Martin-Casals & Ribot, the methods employed by Spanish courts" are usually related to the tort element "damage", in the sense that the damage suffered by the victim is not certain or has not been sufficiently proved, or to the element "causation", in the sense that, in the case at hand, the causal link between the action or omission of the tortfeasor and the resulting damage has not been established." Miquel Martín-Casals and Jordi Ribot, 'La responsabilidad objetiva: supuestos especiales versus cláusula general' in Santiago Lapuente and Santiago Cámara (eds), *Derecho privado europeo* (2003) 827.
[20] ibid 62.
[21] Oliva Blázquez, 'Responsabilidad Civil de los Jueces y Magistrados por Ignorancia Inexcusable' (2010) 1 *INDRET: Revista para el Análisis del Derecho* 37. www.indret.com accessed 20 June 2025

be unlawful. A similar opinion was reached in the *locus classicus* of March 17, 1981, where the court reasoned as follows:

> *[A]anque nuestro Código Civil, siguiendo al francés (y a diferencia del austríaco, el alemán, el suizo, el italiano y el portugués), no menciona expresamente la nota de antijuridicidad en su artículo 1902, no cabe duda que debe verse la misma no sólo en la actuación ilícita caracterizada por la falta de diligencia contraria a una disposición legal, sino también en consecuencias de actos lícitos no realizados con la prudencia que las circunstancias del caso requerían*.[22]

According to Trías, the unlawfulness referred to in Spanish tort law, as reflected in Article 1902 CC, does not need to proceed from an illegal act, strictly speaking. Still, it must be understood in the context of *alterum non laedere,* the general norm in tort law that prevents harm.[23] This argument found judicial support in the Supreme Court case of February 24, 1993, as follows:

> *[D]icho tipo de responsabilidad, que establece el artículo 1902 del Código Civil, viene condicionada por la exigencia de que el acto dañoso sea antijurídico por vulneración de la norma, aún la más genérica ("alterum non laedere"), protectora del bien agraviado, y culpable, por omisión de la diligencia exigible, que comprende no sólo las prevenciones y cuidados reglamentarios, sino todos los que la prudencia imponga para prevenir el evento*.[24]

However, many Spanish legal scholars do not consider unlawfulness necessary for proving liability. In this sense, Diez-Picazo noted that, unlike the Italian and Portuguese Civil Codes, which predicate tort liability on illicit acts, a plethora of Spanish judicial pronouncements seems to indicate that tort liability does emanate from entirely legal acts or in the exercise of one's legal rights.[25] The learned author further argued that the continued allusion to alterum non laedere under

[22] STS de 17 de marzo de 1981 (RJ 1981\1009).
[23] Roca Trías, in Luis Díez-Picazo and Antonio Gullón, *Sistema de Derecho Civil* (9th edn, vol II, 2005) 544.
[24] S*TS* de 24 de febrero de 1993 (RJ 1993/1251).
[25] (n 17) 290.

Spanish law only creates more confusion regarding the doctrine of *antijuricidad*. His reflections are reproduced below:

> *La alusión, tantas veces repetida, al brocardo o aforismo alterum non laedere, resulta enormemente perniciosa e incrementa la confusión. En su origin cuando formaba parte del tria iuris praecepta, de ULPIANO, era poco más que un precepto moral, es decir, un principio generalísimo, absolutamente necesitado de concreción o concretización. En términos estrictamente jurídicos, hay que proceder a esta concreción del non-laedere que es un concepto de daño explicito, a menos que se incurra tajantemente en la anfibología que poco más o menos seria decir que un daño es antijurídico porque se viola una regla de no causar un daño antijurídico.*[26]

Similarly, Pantaleón argues that unlawfulness is an unnecessary addendum to the explicit provision of section 1902 of the Spanish Civil Code. Pantaleón notes, "muchas veces se generan daños sin que exista una norma prohibitiva que los sancione; que algunas veces se lesionan bienes que no constituyen auténticos derechos subjetivos y que otros planteamientos adolecen de una absoluta vaguedad."[27]He argues that the general liability clause enshrined under section 1902 sufficiently covers all torts without the necessity of *alterum non laedere*. Therefore, tort liability in Spain is compensated not because of its unlawfulness but for the damage suffered by the claimant. Pantaleón sustains:

> *La inexistencia de conexión funcional entre las normas sobre responsabilidad extracontractual y las normas penales impide considerar como elemento del supuesto de hecho de las primeras la antijuricidad basada en el desvalor de la conducta. Y la ausencia de dicha conexión entre las normas sobre responsabilidad extracontractual y las normas de atribución impide lo propio para la antijuricidad basada en el desvalor del resultado, siendo evidente que no hay una norma que prohíba de manera absoluta dañar a otro. Por*

[26] ibid 292.
[27] Fernando Pantaleón, 'Causalidad y daño' in Encarnación R Trías and Mónica Navarro (eds), *Derecho de Daños* (6th edn, Tirant lo Blanch 2011) 32.

> *tanto, debe rechazarse que el supuesto de hecho de las normas sobre responsabilidad civil extracontractual requiera un elemento de antijuricidad*.[28]

Accordingly, injury is remedied not because it is an unlawful act but because of fault or damage caused by the tortfeasor, although not illegal *per se*.

(iii) Fault (Culpa)

This is why damage or injury is compensated under Spanish tort law. In the civil law legal tradition, as in common law, the existence of injury alone does not warrant a recovery unless such is demonstrated to have occurred due to the tortfeasor's fault or negligence. According to Diez-Picazo, this requires the proof of fault or negligence in the action or omission that produces the damage. This, in essence, signifies establishing a causal link between the action or omission and the personality of the tortfeasor. Even as such, the court would still have to evaluate the circumstances of the case to determine not only the fact that the defendant has caused the damage but also whether or not to hold the defendant legally responsible for the damage.

Diez-Picazo argued further that there is an implicit reproach in this assessment,[29] where the defendant is held responsible for not doing enough to avoid the damage, or otherwise the damage would not have occurred. The application of fault under Spanish law is more or less like that of foreseeability under the English common law. It amounts to acting in a negligent or improvident way.[30] The development of culpa is amply illustrated in the Spanish Supreme Court case as follows:[31]

[28] Fernando Pantaleón, *La Prevención a través de la Indemnización: Los Daños Punitivos en Derecho Norteamericano y el Logro de sus Objetivos en el Derecho Español*, in *Derecho del Consumo: Acceso a la Justicia, Responsabilidad y Garantía* (Ministerio de Sanidad y Consumo, Consejo General del Poder Judicial 2001) 31.
[29] (n 17) 351.
[30] (n 13) 65. Peña, on the other hand argues that "la calificación como culposa de la conducta de una persona depende esencialmente de que ésta haya realizado o no un comportamiento objetivamente menos diligente que aquél que le exige el Derecho." Fernando Peña López, *La culpabilidad en la responsabilidad civil extracontractual* (Editorial Comares 2002).
[31] *STS* 10 de junio de 2003 (RJ 2003/1251).

> *Laconcepción clásica de la culpa se apoya invariablemente como elemento indispensable en la omisión de la diligencia exigible al agente. La posición moderna, en cambio, caracteriza la culpa por notas distintas de esa falta de diligencia y llega a hablar de una culpa social o culpa sin culpabilidad. El sentido clásico de la culpa civil parte de identificarla con negligencia, concepto que se opone al de diligencia; basado todo ello en un criterio subjetivo. La culpa es desviación de un modelo ideal de conducta: modelo representado, una veces por la "fides" o "bona fides", y otra por la "diligentia" de un "pater familias" cuidadoso.*
>
> *En la culpa el elemento intelectual del dolo (previsión efectiva) queda sustituida por el de "previsibilidad", o sea, la posibilidad de prever, y el elemento volitivo queda reemplazado por una conducta negligente: no se ha creído efectivamente el efecto, pero se ha debido mostrar mayor diligencia para evitarlo.*
>
> *La previsibilidad del resultado es el presupuesto lógico y psicológico de la evitabilidad del mismo. La diligencia exigible ha de determinarse en principio según la clase de actividad de que se trate y de la que puede y debe esperarse de persona normalmente razonable y sensata perteneciente a la esfera técnica del caso.*[32]

It envisages the defendant's ability to predict the outcome and consequences of his action or omission. He is bound to compensate the plaintiff if he does not take steps to avoid the conduct called into question. On the contrary, if the damage is unpredictable to the defendant, such would be a motive for his exoneration.[33] Díez-Picazo, argues that:

> *En material de responsabilidad por daños, especialmente cuando se trata de responsabilidad por culpa, sólo se responde de aquéllos que hubieran podido debido preverse. De este modo, la previsibilidad y, a la inversa, la imprevisibilidad es un factor de exoneración.*[34]

[32] STS de 10 de junio 2003 (RJ 2003/6008).
[33] Section 1105 of the Spanish Civil Code is clear that there cannot be liability for unforeseeable or inevitable acts. "nadie responderá de aquellos sucesos que no hubieran podido preverse, o que, previstos, fueran inevitables."
[34] (n 17) 361.

This is not construed as a duty requirement as in common law. Nonetheless, Olmoconcluded that applying causation in law might reach the same result as a duty.[35] In determining the conduct of the defendant, the courts apply the test enshrined under Article 1104, thus:

> *La culpa o negligencia del deudor consiste en la omisión de aquella diligencia que exija la naturaleza de la obligación y corresponda a las circunstancias de las personas, del tiempo y del lugar. Cuando la obligación no exprese la diligencia que ha de prestarse en su cumplimiento, se exigirá la que corresponda a un buen padre de familia.*

This article has been duly interpreted by the court as follows:

> *La medida de la diligencia exigible es variable para cada caso; según el artículo 1104 del Código Civil, dependerá de la naturaleza de la obligación y ha de corresponder a las circunstancias de las personas, del tiempo y del lugar. Según el mismo artículo que cuando la obligación no exprese la diligencia que ha de prestarse en su cumplimiento, se exigirá la que correspondería a un buen padre de familia. Es, pues, una medida que atiende a un criterio objetivo y abstracto. Exigible según las circunstancias es la diligencia que dentro de la vida social puede ser exigida en la situación concreta a personas razonables y sensatas correspondientes al sector del tráfico o de la vida social cualificadas por la clase de actividad a enjuiciar. Según este criterio objetivo, ha de resolverse la cuestión de si el agente ha obrado con el cuidado, atención o perseverancia exigibles, con la reflexión necesaria y el sacrificio de tiempo precisos. Al respecto no es pues decisiva la individualidad del agente, sino las circunstancias que determinarán la medida necesaria de diligencia y cautela. Apunta también a un criterio de valoración de la culpa civil la facultad de moderación de la responsabilidad que procede de diligencia, concedida a los Tribunales según los casos por el artículo 1103 del Código Civil. Pero también ha de*

[35] (n 13) 65.

> *tenerse en cuenta un aspecto subjetivo, en cuanto al sujeto que obra le es posible prever las circunstancias del caso concreto.*[36]

In another case, the Spanish Supreme Court approved the Principles of European Tort Law, adopting the reasonable man test encapsulated therein. The relevant part of the judgment reads:

> *[E]n los trabajos preparatorios de los "Principios de Derecho europeo de la responsabilidad civil", actualmente en curso, se define el "Estándar de conducta exigible" como "el de una persona razonable que se halle en las mismas circunstancias, y depende, en particular, de la naturaleza y el valor del interés protegido de que se trate, de la peligrosidad de la actividad, de la pericia exigible a la persona que la lleva a cabo, de la previsibilidad del daño, de la relación de proximidad o de especial confianza entre las personas implicadas, así como de la disponibilidad y del coste de las medidas de precaución y de los métodos alternativos" (artículo 4: 102. -1).*[37]

(iv) (Daño) Certainty and Directness of Damage

Under Spanish law, a plaintiff in a tort action must satisfy a high standard of proof that requires certainty and directness of damage.[38] In other words, recovery cannot be without real and existing damage. It was held in the judgment STS of April 9 1996 (RJ 1996/4182) that for damage to be recoverable, it must be shown to exist at the time of the commencement of the legal action. In this sense, Francisco Oliva argues that "simple logic dictates that an action for recovery of damages

[36] STS de junio 10 2003(RJ 2003/6008). The same court held in the judgment STS de junio 11 2007 (RJ 2007\3570) thus, "según reiterada doctrina jurisprudencial es esencial para generar culpa extracontractual, requisito de previsibilidad del hombre medio con relación a las circunstancias del momento, no en abstracto, en que no puede estimarse como previsible lo que no se manifiesta con constancia de no poderle ser."

[37] STS de julio 17 2007 (RJ 2007/4895). The English version is quoted for ease of reference thus: "The required standard of conduct is that of the reasonable person in the circumstances, and depends, in particular, on the nature and value of the protected interest involved, the dangerousness of the activity, the expertise to be expected of a person carrying it on, the foreseeability of the damage, the relationship of proximity or special reliance between those involved, as well as the availability and the costs of precautionary or alternative methods." Art. 4:102. (1).

[38] It is relevant to point out here that although the Spanish Civil Code is silent on the proof of damage, such provision is to be found in the Civil Procedure Code, (Ley de Enjuiciamento Civil). Section 217 (2) thereof provides thus; "Corresponde al actor y al demandado reconviniente la carga de probar la certeza de los hechos de los que ordinariamente se desprenda, según las normas jurídicas a ellos aplicables, el efecto jurídico correspondiente a las pretensiones de la demanda y de la reconvención." Thus, as held in STS of February 22, 2003 (JUR 2003\198549) proof of a particular fact lies on the party who alleges that fact.

should only prosper on the proof of the existence of such damage."[39] This view concurs with the decision of the Spanish Supreme Court STS of February 21, 2003 (RJ 2003/2135), where the court concluded that:

> *Dice la sentencia de 31 de enero de 2002, siguiendo la doctrina constitucional (S. de 17-7-1995), que la carga de la prueba corresponde al reclamante del daño cuando le resulta disponible la misma. [...] Al faltar tal presupuesto necesario no puede prosperar la acción por culpa extracontractual*.[40]

A similar conclusion was reached in the case STS February 10, 2009 (J2009/50847), where an HIV patient initiated this action against the hospital authorities for failure to inform her of the condition earlier. The court refused her claim because she could not prove the damage she suffered. The court concluded thus:

> *En el proceso (...), siquiera sea de forma indiciaria, cuáles son los perjuicios concretos, singulares, tangibles (...) que le ha causado la tardanza en la toma de conocimiento de la tenencia del virus del SIDA.*

The damage must also be present, not hypothetical, as held in STS of July 20, 2009 (RJ 2009\3161) that "gastos de fisioterapeuta, clases de natación [y otros], teniendo en cuenta que se trata de unos daños, perjuicios y gastos futuros hipotéticos, que por tal circunstancia no pueden ser objeto de una condena de futuro".

The application of certainty in Spanish law is more apparent in causation. Spanish courts' requirements for causation are stringent and must be established to a level of certainty. Although it has been held that the certainty of a causal link need not always be absolute,[41] It should, however,

[39] Francisco Javier Oliva Blázquez, 'Comentario a la Sentencia de 7 de Julio de 2008' (2009) 80 *Cuadernos Civitas de Jurisprudencia Civil* 611, 621. Similarly, the PETL states, "Damage must be proved according to normal procedural standards. The court may estimate the extent of damage where proof of the exact amount would be too difficult or too costly." Art. 2:105.

[40] STS de 21 de febrero de 2003 (RJ 2003/2135).

[41] STS de 2 de Marzo 2000 (RJ 2000/1304) where absolute certainty was held to be the measure of proof, but depending on the circumstances of a particular case, the Spanish Supreme Court would weigh the type of certainty required as seen in the case STS de 30 de noviembre de 2001 (RJ 2001\9919) where the court concluded that "la determinación del nexo causal no puede fundarse en conjeturas o posibilidades, no siempre se requiere la absoluta certeza, por ser suficiente (en casos singulares) un juicio de probabilidad cualificada".

be reasonably certain.[42] This is demonstrated in the case STS of February 8 2000 (RJ 2000/1235), where the court reiterated that "in the sphere of causal relationship there is no room for deductions, guesswork or probabilities, only evidential certainty is sufficient." Thus, the standard of proof based on the "balance of probabilities" obtained in common law jurisdictions is insufficient under this system.[43]

These two requirements, originally associated with the burden of proof in contract law, are perhaps the Spanish law versions of reasonableness and fairness tests. They create a margin for manoeuvre, allowing courts to weigh the veracity of individual cases and choose which merit recovery and which do not. Applying these elements will yield similar results for systems where rights are classified as either protected or non-protected. However, it does not relate to property damage in the English law sense.

1.5 Justification for the Restriction of Pure Economic Loss

Contrary to the orthodox view, pure economic loss is recoverable, as seen in cases of consequential loss and negligent services; it is only in cases of legitimate concern for disproportionate liability that courts, on grounds of reasonability and common sense, will disallow compensation. Arguments abound for the rationale of the no-recovery rule and are so commonplace that not repeating them would be of any disservice.[44] The floodgates rationale nonetheless stands apart, especially in cases of negligent misstatements and therefore merits some attention. It's a bone of contention built on the premise that allowing recovery in pure economic loss would significantly burden the defendant and overwhelm the enterprise. Prosser observed that "it is the business of the law to remedy wrongs that deserve it, even at the expense of 'floodgate claims', and it is pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the courts too much work to do".[45] On the consequential loss, Bussani and Palmer[46] argue that "the central assertion that physical damage is different from financial damage because

[42] STS de 23 de diciembre de 2002 (RJ 2003\914).
[43] (n 19) 516.
[44] For general discussion on the rationale for no recovery rule, see Francesco Parisi, et al., 'The Comparative Law and Economics of Pure Economic Loss' (2007) 27 *International Review of Law and Economics* 29.
[45] William Prosser, 'Intentional Infliction of Mental Suffering: A New Tort' (1939) 37 *Michigan Law Review* 874.
[46] Mauro Bussani and Anthony J Sebok (eds), *Comparative Tort Law: Global Perspectives* (Research Handbooks in Comparative Law, Edward Elgar Publishing 2015) 18.

it is more contained and judicially manageable seems increasingly difficult to understand given today's mass torts….." Left to them any 'intransigent argument' that seeks to deny recovery to the victims of pure economic loss because there are so many is unsustainable in law.[47]

The above stance sounds appealing. Indeed, pure economic loss suffered in isolation is sometimes afforded no particular significance, whereas pure economic loss suffered in conjunction with physical damage is virtually always a routine element of recoverable harm. Arguably, the distinction between pure economic and physical losses is essentially technical. Foreseeability, proximity and policy tests revealed an enduring concern about tort liability limits that continues today. While none is satisfactory, and for that matter, the combination of all, to a certain extent, has been beneficial in administratively managing a balance between the desire to compensate the innocent plaintiff and the reluctance to subject the inadvertent defendant to an inordinate liability. These tests are not fool-proof, however, as observed by Lord Denning:

> Sometimes I say: "There was no duty". In others I say, "The damage was too remote". So much so that I think the time has come to discard those tests which have proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not as a matter of policy, pure economic loss should be recoverable or not.[48]

The foreseeability test cannot hold in the landmark case of *Ultramares,* where auditors were held not liable to investors, as auditors are well aware that classes like those of investors would rely on their report for judgment. It is contended that this is sheer judicial policy to limit liability. All the tests are just the means to that end. The court's view in the case of *Biakanja v Irving* better illuminates this point:*[49]*

> The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury,

[47] ibid
[48] *Spartan Steel & Alloy Ltd v Martin & Co.(Contractors) Ltd*. [1973] QB 27
[49] [1958] 49 Cal.2d 647

> the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.

There are cases of pure economic loss that have received different treatment, like the example of *J'Aire Corp. v Gregory*,[50] where the plaintiff operated a restaurant in facilities rented from the county at the Sonoma County Airport, the defendant, a building contractor, agreed with the county to renovate the restaurant's air conditioning and heating system and install insulation. Because of the defendant's delays in construction, the plaintiff suffered an unanticipated loss of profits, for which he brought suit against the builder. The court dismissed the defendant's objection that the case involved exclusively pure economic loss and held that the plaintiff stated a claim for damages in tort for the lost profits.

It is also true that for over a century, the courts have come to attach particular significance to the problem of personal injury, which is now inconsistent with the prospect of a widespread injury that a single act of negligence can cause, such as a plane crash. These are, however, situations of common harm that cannot be equated with a chain of commercial losses triggered by the closure of a main road. Consider the view of Cardozo J in *H.R.Moch Co. v Rensselaer Water Co*:[51]

> The plaintiff would have us hold that the defendant, when once it entered upon the performance of its contract with the city, was brought into such a relation with everyone who might potentially be benefited through the supply of water at the hydrants as to give to negligent performance, without reasonable notice of a refusal to continue, the quality of a tort… We are satisfied that liability would be unduly and indeed indefinitely extended by this enlargement of the zone of duty.[52]

The lines have not always been drawn; some may be indefensible. Although the courts have deliberately formulated a device to limit the scope of recovery in some areas, "economic loss

[50][1979] 24 Cal.3d 799, 804
[51] [1928] 247 N.Y. 160
[52] [1928] 247 N.Y. 160

remains recoverable in several other situations" in tort law.[53] While courts generally do not encourage claims for pure economic loss, confusing signals sometimes make it difficult to predict whether a claim will be successful. However, "the central tendency to deny liability for categories of widespread loss has appealed to an enduring sense of fairness" in the UK and Spain.[54]

1.6 Conclusion

This piece presents the application of the doctrine of pure economic loss in Spain and the United Kingdom. Although entrenched in the UK, the doctrine has just been introduced in Spain and is receiving coverage in Europe. Some principles of the doctrine have been incorporated into the Principles of European Tort Law, a soft law that, by design, is now part of Spain's law. However, it is in academia that the doctrine is making important inroads in Spain, where terms like "deep pockets,""floodgate,""negligence," and "private and social loss" are now commonplace. The article finds that although liability in Spain is of general application without any restrictions, the economic loss has become a helpful tool for interpreting and understanding tort law. The economic loss rule is understandable in the context of the natural evolution of the law to address a social need at a given time and place, like the substitution of comparative negligence with contributory negligence. Thus, even economic rules evolve with time, as seen in cases of consequential loss and liability for negligent statements, such as the case of the auditor. It is recommended that the courts demonstrate the pragmatism required to expand the long arm of the law and resolve a pressing societal need without overstretching the auditors' deep pocket.

[53] Basil Markesinis & Simon Deakin, *Tort Law* 102 (7th ed. 2013)
[54]Robert Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1538 (1985).