

Auditors' Liability for Damages

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1 Introduction

In recent years auditors' liability has been debated more and more, both nationally and internationally, and claims against auditors for damages have increased. It can safely be said that auditors live more dangerously than company directors. Why should that be so? A number of reasons can be imagined. First, auditors are legally obliged to take out professional liability insurance policies. Under Swedish law no such obligation rests on company directors, though directors and officers liability insurance has become more and more common in recent years. In principle therefore there is always money to be won from auditors. Auditors liability for damages, in contrast to that of company directors, can thus be characterised as a professional responsibility and the auditor must always observe good auditor's and auditing practice, concepts which are quite well defined. Good practice for boards of directors has not yet been defined. That means that an injured party finds it easier to prove *culpa* (negligence) against an auditor than against a company director.

In this chapter I will deal with an auditor's liability for damages, concentrating primarily on the legal liability under the Swedish Companies Act (SFS 1975:1385, CA). Auditors' liability in connection with advisory and consultancy work will also be dealt with.

This presentation relates to auditors' liability under Swedish law.

2 Some General Remarks About Auditing and Auditors in Limited Liability Companies¹

2.1 General Remarks on Auditing

The Swedish word "revision", or "auditing", comes from the Latin word *revidere* which means "to look back". The purpose of Company auditing emerges *inter alia* in ch 10 sec 3 CA. In accordance with this provision, an

¹ The tasks of the company auditor and other matters are discussed in detail in my work *Bolagsrevisorn*, Stockholm 2003.

auditor shall, to the extent that good auditing practice enjoins, check the company's annual financial statement and book-keeping, as well as the administration of the company by the board of directors and managing director.

According to the Swedish Companies Act the auditor shall also contribute in contexts other than the control function in accordance with ch 10 sec 3 CA for example in connection with the formation of companies in accordance with ch 2 sec 9 CA.

The origin of company auditing was primarily the owners' need for control over the administration of the company's business by the management.² Nowadays auditing is carried out not only on behalf of the shareholders but also of other interested parties such as society at large, the employees and the company's creditors.³

The scope of the examination is in accordance with ch 10 sec 3 CA determined by what can be regarded as generally accepted auditing standards. No attempt has thus been made in the Swedish Companies Act to lay down detailed prescriptions regarding the scope and purpose of the examination. In earlier legislation there was a more detailed description of the scope of the audit.⁴ According to the findings of the committee set up to make proposals as regards the Swedish Companies Act, a detailed description of the scope of the audit could have a negative effect since it could not be made exhaustive.⁵ By linking the scope of the examination with the concept of good audit practice, the audit can continually be adapted, to reflect the changing conditions of business enterprises and the evolution of both theory and practice as regards its content and scope.⁶ An additional factor in mind was that the audit organisations intended to formulate statements in the form of recommendations of what was to be regarded as good audit practice in various fields.

Today the auditors' professional bodies thus have considerable importance for the development of the concept of good audit practice, as does the Supervisory Board of Public Accountants (SBPA). According to sec 3 of the Auditors Act (SFS 2001:883, AA), the SBPA has an explicit responsibility to ensure that good audit practice is developed in accordance with the objectives laid down.

2.2 *General Remarks About Auditors*

An auditor can act in various roles, which may be subdivided as follows:⁷

- 1 The auditor checks and controls the client's business activity ("the classic role of the auditor" or "the auditor in the sense of the law of association").

² Andersson, S, Johansson, S and Skog, Rolf, *Aktiebolagslagen. En kommentar. Del II*. Stockholm 2002 at 10.3.

³ Prop.1975:103 at 244, prop. 1997/98:99 at 132. Andersson and others, *op.cit.* at 10.3.

⁴ See sec 111 of the Swedish Companies Act of 1944.

⁵ SOU 1971:15 at 266.

⁶ SOU 1971:15 at 266.

⁷ Hydén, H., Svensson, L.G., *Revisorn och rätten*, in *Vänbok till Axel Adlercreutz*, Lund 1982 at 23.

- 2 The auditor gives advice to the client or to others ("the consultancy role" or "the extended role of the auditor").
- 3 The auditor carries out tasks on behalf of the client which, because of legal or other requirements, normally fall within the framework of the client's own business activity.

In this presentation it will primarily be the auditors' liability in connection with activity in accordance with points 1 and 2 which will be analysed. Auditors' liability under point 1 refers to the company limited by shares situation.

Both physical and legal persons can be auditors of a company. As regards physical persons, they must either be authorised or approved accountants. As regards legal personalities, registered audit companies can be the auditors of a company.

Sec 19 AA provides that the company auditor shall observe professional ethics for accountants.

According to the Swedish Companies Act, the auditor is the controlling organ. The auditor's rights and obligations are governed by law, the articles of association and, to a certain extent, decisions by the general meeting of shareholders. The auditor is part of a limited company's organisation and is not in an adversarial relationship with it.⁸

In legal doctrine the view has been advanced that in some respects the auditor can be regarded as a trustee.⁹ It was perhaps fruitful to pursue that view of matters when the auditors were considered to be delegates of the shareholders. Since the auditors nowadays must have regard to several different interested parties, this view of matters must be regarded as less appropriate. That does not prevent certain elements in the trustee role from being applicable to auditors. What I primarily have in mind in this is the trustee's duty of care and attention. That this must be the case emerges from a study of the liability criterion for auditors under the Swedish Companies Act which is constructed around a negligence criterion. According to this auditors' liability is an expression of the general principle of liability law, that anyone assuming a task must observe the duty of care that it demands.¹⁰

In my view, the auditor's situation under the law may be described in the following way. The auditor is one of a company's representatives, who must perform his duties with the care and attention which is characteristic of a trustee. The fact that in his work an auditor must pay regard to different interests does not mean that he can be regarded as being in an adversarial relationship with the company.¹¹ Despite the different interests which the auditors have to heed, he or she may be considered to be the company's representative.

⁸ Taxell, L.E., *Aktiebolagsstyrelsens kompetens att rättshandla*, Helsingfors 1946 at 59.

⁹ See Grandell, A., *Aktiebolagsrevisorens rättsliga ställning*, in Kongressrapport för V. Nordiska Revisorskongressen 1947 in Oslo at 131, Cederberg, L., *Om revision enligt finsk aktiebolagsrätt*, Tammerfors 1941 at 123 and Taxell, L.E., *Ansvar och ansvarsfördelning i aktiebolag*, Åbo 1963 at 108.

¹⁰ Taxell, *Ansvar och ansvarsfördelning*, op.cit. at 108.

¹¹ Taxell, L.E., *Aktiebolagets organisation*, Åbo 1983 at 130.

3 Liability Insurance

In accordance with sec 27 AA an auditor or registered audit company must take out an insurance policy or deposit with the SBPA a security for the compensation which the auditor or audit company may become liable to pay in the course of its audit business.

The SBPA has discretion to grant exceptions from the requirement for insurance or security, but there must be special reasons for doing so.

If the SBPA finds that an auditor lacks liability insurance the first step is to call for insurance to be taken out within a certain time. If that is not done the SBPA issues a warning and informs the auditor that it will revoke authorisation or approval if the auditor has not confirmed, by a given deadline, that he or she has taken out an insurance policy.¹²

4 Auditors' Liability for Damages Under the Swedish Companies Act

The criteria in ch. 15 CA on compensation are based on the negligence criterion. This is a central principle in the field of the law on damages and means that at least negligence must be shown for liability for damages to arise. In the Swedish Companies Act the negligence criterion is to be found *inter alia* in ch 5 sec 1 CA, which lays down the following provision:

“A founder, a director or a managing director who in performing his duty deliberately or negligently causes damage to the company shall compensate it for the damage caused.”

For the auditor the negligence criterion is found in ch 15 sec 2 CA, which refers to ch 15 sec 1 CA. The negligence criterion is ordinarily divided into its objective and subjective sides. In considering the objective side, it is customary to discuss the fact that an act or failure to act, in the objective sense, has caused damage; and the requirements that injury has occurred and that adequate causality is established between the injury and the commission or omission of the act.¹³

As far as the subjective side of the negligence criterion is concerned, reference is made to circumstances affecting the person who has caused the injury.¹⁴ The result of taking into account subjective factors may be that no negligence is established or that there is reason to adjust the damages.

Criteria for the liability of auditors under the Swedish Companies Act are thus found in ch 15 sec 2 CA. In that chapter are other criteria affecting auditors' liability, such as responsibility for assistants, the abatement of damages, bringing suits for damages and time-limitation. The criteria on liability for auditors in the Swedish Companies Act are far from complete. That means that when the criteria in the Swedish Companies Act give insufficient guidance in the liability

¹² SBPA, Tillsynsärende 721-95.

¹³ Dotevall, R., *Skadeståndsansvar för styrelseledamot och verkställande direktör*, Stockholm 1989 at 89.

¹⁴ Dotevall, op.cit. at 89.

case in question, it should be possible to fall back on the general principles and considerations of the Swedish law of tort.¹⁵

In this connection I would also like to mention that damages can be awarded against an auditor on the grounds of criminal offence, for example behaviour of the kind penalised in ch 9 sec 9 § of the Penal Code (SFS 1972:700) on swindle.¹⁶ That emerges from ch 2 sec 2 § of the Tort Liability Act (SFS 1972:207)(TLA). I will not here discuss this liability in greater detail. Nor will I discuss liability of internal auditors.

Under the Swedish Companies Act auditors' liability for damages can be divided into two main groups, namely the internal liability and the external liability. By the internal liability is meant liability to the company. It is the company that has suffered injury and it is the company that must receive compensation. This liability for auditors is found in ch 15 sec 1 sen 1 CA following reference from ch 15 sec 2 CA. By external liability is meant liability in regard to shareholders or "others" and by "others" is meant, for example, creditors. The external liability for auditors is found in ch 15 sec 1 sen 2 CA, following a reference from ch 15 sec 2 CA. What distinguishes internal liability from external liability is primarily that the former is based on a traditional determination of negligence, that is to say that it suffices that the auditor has been careless. For external liability the criterion applies that negligence must have been linked with a violation of this law, applicable law on annual financial statements or the articles of association. For both main groups it applies that other conditions set out in ch 15 sec 1 CA must also be met.

Under the criteria of the Swedish Companies Act, auditors' liability for damages is personal and individual. That means that if a company has two or more auditors, an auditor is answerable only for the injury that he or she has caused.

Here it must also be mentioned that if the auditor is a registered audit company, ch 15 sec 2 CA provides that liability for damages rests with the audit company and the person principally responsible for the audit.

4.1 Internal Liability

The internal liability for damages of auditors is set out in ch 15 sec 1 sen 1 CA, following reference from ch 15 sec 2 CA, and it is based on the negligence criterion. It is thus the company that suffers injury and it is the company that must be compensated. To obtain damages from the auditor four conditions must be met, namely:

- 1 Performance of duty
- 2 Negligence
- 3 Adequate causality
- 4 Damage

¹⁵ Andersson and others, op.cit. at 15.2 and Taxell, *Bolagsledningens ansvar*, Åbo 1983 at 10-11.

¹⁶ Andersson and others, op. Cit. at 15.3.

I now give a more detailed account of these four conditions.

4.1.1 Performance of duty

For damages to be awarded against an auditor it is a condition that he or she shall have acted, or omitted to act, in his/her capacity as company auditor. Internal liability thus applies in regard to damage caused to the company by the auditor in "the performance of his/her duty". Under the criteria for damages in the Swedish Companies Act, no liability can be claimed of the auditor in regard to what he/she does in relation to the company as a private person.

4.1.2 Negligence

Under the Swedish Companies Act, auditors' liability for damages is based on the negligence criterion, which should be regarded as a general legal principle of the Swedish law of damages. That means that the auditor is liable to compensate for the injury which he or she causes, whether deliberately or through negligence. The negligence criterion itself gives little guidance as to the situations in which the auditor is liable. In seeking an answer to this question it is important to establish the auditor's position, duties and obligations within the company's organisation.¹⁷ Whether or not an auditor is negligent is a question that must also be determined against the background of the value judgments that apply within the profession. That means that an attempt must be made to establish a professional yardstick for the way in which the auditor is to carry out his working tasks.

The burden of proof as to whether the auditor has been negligent rests with the claimant.

Whether or not an auditor has been negligent or not must in principle be determined in the first instance in accordance with an objective yardstick.¹⁸ That means ignoring to some extent certain factors connected with the auditor whose liability is to be assessed. The task is to make clear what care and knowledge reasonably can and should be demanded of an auditor against the background of the company's turnover, size and structure. In the literature on legal liability for damages there has been discussion as to whether in connection with an objective assessment of negligence there is scope for taking subjective factors into account.¹⁹ In my view they should be taken into account, and I return to this question below.

When determining whether an auditor's action can be considered as negligent or not, it must be kept in mind that the auditor not only performs his duties for the shareholders but must also protect the interests of creditors, employees, the

¹⁷ Taxell, *Bolagsledningens ansvar*, op.cit. at 16.

¹⁸ Taxell, *Ansvar och ansvarsfördelning*, op.cit. at 109 and Taxell, *Bolagsledningens ansvar*, op.cit. at 23. Taxell's arguments relate to the assessment of fault as regards board-members but are also valid as regards auditors.

¹⁹ See for example Dotevall, op.cit. at 104 and Taxell, *Bolagsledningens ansvar*, op.cit. at 23.

share-owning public and the general public.²⁰ In determining whether an auditor's activity or passivity can be considered negligent or not, the principles applicable for trustees also apply for auditors.²¹

I will now discuss in more detail the assessment that is made when determining whether an auditor has been negligent or not. The term used is "the determination of negligence" but the text of the law itself does not lay down how this determination is to be carried out. Nor is there much guidance in the preparatory materials. The question has thus been left to judicial practice and doctrine.

The Determination of Negligence

Historically it was considered that negligence had occurred if there had been a failure to act as a good "pater familias", or "father of the family". Today that standard is regarded as having outlived its usefulness.²²

Nowadays determination of negligence in relation to auditors appears chiefly to be conducted by a normative method. This means trying to establish an accepted standard for how a prudent auditor should act in a given situation, and then comparing it with the way in which the auditor in the case in question acted. If he/she has not acted in accordance with that norm, then there are good grounds for concluding that negligence has been established. In this context, by standards is meant legal prescriptions, the articles of association or other internal standards.²³

In the general law of damages, the normative method seems to be the primary method.²⁴ But even in the Tort Liability Act determination of negligence can be by what is known as the free assessment of fault, chiefly in the form of balancing risks.²⁵ Balancing risks means weighing the risk of causing injury against the possibility of avoiding it.

In the Swedish Companies Act there are many standards for how an auditor should act. It is above all ch 10 CA which is of interest for the auditor. But there are also regulations in other sections of the Swedish Companies Act that govern the actions of an auditor. Mention may be made of e.g. ch 4 CA and the auditor's obligations in connection with issue of shares for cash. In my opinion the criteria on trustees are also important in establishing suitable standards for auditors.²⁶

The central provision of the Swedish Companies Act as regards the actions of auditors is ch 10 sec 3 CA. According to this provision the auditor must examine the company's annual financial statement and book-keeping, and the management of the company by its board of directors and the managing director. The examination must be as thorough and extensive as required by generally

²⁰ Andersson and others, op.cit. at 15.10 and the literature referred to there.

²¹ Andersson and others, op.cit. at 15.10.

²² Hellner, J., Johansson, S., *Skadeståndsrätt*, 6 ed. Stockholm 2000 at 125.

²³ Taxell, *Bolagsledningens ansvar*, op. cit. at 28.

²⁴ Hellner - Johansson, op.cit. at 125.

²⁵ Hellner - Johansson op.cit. at 130.

²⁶ Andersson and others, op.cit. at 15.10.

accepted auditing standards. The concept of generally accepted auditing standards thus has great importance as regards determination of negligence by the normative method. The criteria of generally accepted auditing standards can also be important where tasks outside the framework of auditing proper are concerned. For auditors this means that an auditor is regarded as negligent if he/she has not followed the criteria of generally accepted auditing standards. In a Danish decision, UfR 1978.653, the Supreme Court argued that: "It must be a condition of awarding damages against an auditor that in the execution of his work he acted contrary to generally accepted auditing standards."

The standards which in the first instance govern the work of an auditor are thus set out in the Swedish Companies Act, the articles of association, decisions by general meetings of shareholders and general criteria for trustees. In the Swedish Companies Act it is chiefly the reference to the expression generally accepted auditing standards and what this concept comprehends which determine the degree of care. On analysis of what care is required it can be observed that the audit examination is undertaken on behalf of a number of interested parties. Standards for the work of auditors are also to be found in case-law and in the disciplinary proceedings of the SBPA.

Specifically this ordinarily means that in a given case it has to be determined whether an auditor has acted in accordance with the criteria of generally accepted auditing standards when deciding whether an auditor has been negligent or not. In this respect the accepted principles concerning what is essential and risk are of great importance in the assessment of whether an auditor has been negligent or not.

What is understood by the concept of generally accepted auditing standards does not emerge either in the Swedish Companies Act or in the preparatory materials. It is thus in my opinion a somewhat weakened normative method that is used, because of the reference to generally accepted auditing standards. In the preparatory materials for the current Swedish Companies Act it was argued that a more detailed definition of this expression should be provided by the auditors' professional bodies and the supervisory organ.²⁷ It is primarily the following sources that are important when determining what is generally accepted auditing standards:

- 1 Recommendations on audit matters by the auditors' professional bodies.
- 2 Disciplinary proceedings of the SBPA
- 3 Case-law

Irrespective of the source used by a Court, in the final analysis it is always the Court itself that determines what the concept "generally accepted auditing standards" means in an individual case. There must be cases and situations in which that is difficult. For example, the recommendations by the auditors' professional bodies or others may give no guidance on the matter at issue, or the regulatory organ (the SBPA) may not yet have had occasion to come to a view on it. How then is it to be determined whether or not an auditor has been

²⁷ SOU 1971:15 at 266 and *see* also Prop. 2000/01:146 at 87-88.

negligent? One possibility is to obtain information about the way in which other auditors have acted in similar situations.²⁸ Is it then the audit practice observed by the majority of auditors, or by the most perceptive of them, or is it the audit practice which, in the meaning of the law, the majority of auditors *ought* to follow, that is to be laid down as the standard? A Danish ruling, Ufr 1978.653 H, states that there are good arguments for the former alternative.²⁹ In my view, there are good grounds to believe that the Swedish perception coincides with the Danish on this point.

There have been relatively few Supreme Court cases concerned with the internal liability for damages of auditors under the Swedish Companies Act. In the section below which deals with external liability for damages I summarise some cases. An explanation for this seems to be that many suits for damages are resolved by negotiation between the plaintiff and the insurance company. I will now summarise a disciplinary case in which the SBPA deemed that the auditor had failed to follow generally accepted auditing standards. There are good reasons to hold that in the case in point the auditor was negligent. The following facts were brought up at the disciplinary hearing. The management of the company had confirmed (on oath) that, not for the first time, the number of company cars had been overstated in order to improve the out-turn in the annual account. The auditor, T, had not made any annotation on the inventory. The SBPA's ruling was as follows:³⁰

Stocks constituted an important part of the company's total assets and in the accounts for the years in question amounted, respectively, to 73% and 88% of the outturn. T was not present during the stock-taking when the account was closed on 31 August 1992. It emerges from the documents submitted in this case that during the financial year in question T made a number of limited spot-checks, *inter alia* a number of used cars were checked against the official register of vehicle-owners and the purchase price was compared with the inventory valuation. In the process T noticed certain shortcomings in the records, which were of such a kind that he ought to have made a more extensive and thorough investigation. The SBPA finds that the examination conducted by T as regards the financial year 1991/92 was wholly inadequate for him to be regarded as having been able to form a well-founded assessment of the existence and value of the stocks. ...In summary, the SBPA finds that 'T's conduct of the audit fell seriously short of the generally accepted auditing standards.

Stocks are indeed in principle always an important item in the balance sheet.

Subjective Factors

In the literature on the law of damages there has been discussion of whether, in connection with the objective determination of negligence, there is scope to take

²⁸ Dotevall, *Bolagsledningens skadeståndsansvar*, Stockholm 1999 at 46.

²⁹ Gomard, B., *Revisors stilling i retlig belysning*, Köpenhamn 1979 at 73.

³⁰ SBPA, Dnr 1995-858.

into account subjective factors.³¹ Below I discuss some subjective factors that can be of importance in the determination of negligence.

Deficiencies in knowledge or the absence of other qualifications necessary to practising the profession of auditor neither diminish nor discharge the responsibility incumbent on auditors under the Swedish Companies Act.³² Very probably, qualified auditors normally have the necessary professional competence to perform their duties. Authorisation or Approval as accountants are indeed a proof of this.

Differences in proficiency between on the one hand Authorised Accountants and Approved Accountants who have passed the Accountancy Examination, and on the other hand other approved auditors, can mean that in certain situations the former category are more stringent in their audit than the latter. That would be the case in those situations in which there is an explicit requirement for Authorised Accountants or Approved Accountants who have passed the Accountancy Examination. It is here possible to refer to expert responsibility.³³

Passivity on the part of the auditor cannot mitigate his or her liability. Here one speaks of voluntary passivity. If a passive role is forced on an auditor because he is refused access to information by, for example, the managing director of the company, his responsibility is affected. In this situation one speaks of involuntary passivity. Freezing out the auditor in that way creates a situation in which passivity cannot result in responsibility. If this state of affairs persists for any length of time without reaction from the auditor it can, however, be held against him.³⁴ In that situation he or she should therefore report the fact to the general meeting of shareholders or draw the matter to the attention of the board of directors. The auditor should also indicate in his audit report that he did not have access to all necessary information. Involuntary passivity can therefore be of importance in determining negligence.

In principle an auditor cannot avoid responsibility on the grounds that illness prevented him from performing some or all of his duties. In that situation the auditor should inform the management that he cannot perform his duties and thereby give the management the opportunity to ensure that his designated deputy takes part in the audit or, if necessary, to arrange for an altogether new auditor to be appointed.

Differences in the audit fee should not affect responsibility.³⁵ A lower fee cannot result in less responsibility. Differences in fees can, however, indicate a division of labour among the auditors.

Nowadays it often happens that auditors share out the work among themselves, to a greater or lesser degree. The Swedish Companies Act puts no obstacles in the way of such a division of labour. The following quotation from the bill introducing the current Swedish Companies Act supports this:³⁶

³¹ Dotevall, op. cit. at 104 and Taxell, *Bolagsledningens ansvar*, op. cit. at 23.

³² Taxell, *Ansvar och ansvarsfördelning i aktiebolag*, op.cit. at 109 and Gomard, B., op.cit. at 65 ff. and the cases referred to therein.

³³ Dotevall, op.cit. at 112.

³⁴ Taxell, *Bolagsledningens ansvar* at 25.

³⁵ Andersson and others at 15.5.

³⁶ Prop. 1975:103 at 434.

Each auditor is in principle responsible for the whole of the examination which forms part of the audit, even though it often seems reasonable and in practice unavoidable that there should be a division of labour among the auditors if there are several of them. Since an auditor's liability presupposes negligence, a division of labour in accordance with good audit practice can be taken into consideration in the assessment of liability for damages.

If the auditors have shared out the work in a manner consistent with generally accepted auditing standards it can thus affect the allocation of liability among them. However, even though a permissible division of labour has occurred, those auditors who have allocated certain audit tasks to other auditors still have a duty of supervision.³⁷ That means that they must ensure that the auditor to whom specific tasks have been entrusted fulfils the duties incumbent on him. Shortcomings in the supervision of that auditor can thus result in negligence.

What is the significance, as regards liability, of the fact that the division of labour does not appear in the audit report signed by all the auditors? According to Taxell it is not necessary for a permissible division of labour to be mentioned in the audit report for it to have the desired effect.³⁸ The mention of a division of labour does not mean that an auditor is relieved of his duty of supervision towards other auditors who are to be responsible for certain tasks in the audit examination.³⁹

A question for discussion is whether the general meeting of shareholders or the articles of association can prescribe a division of labour. A general meeting of shareholders cannot decide that the possibilities for sharing the tasks can be extended beyond what is set out above. Under ch 10 sec 4 CA the auditor is indeed obliged to observe the instructions issued by the general meeting of shareholders, insofar as they do not conflict with the law, the articles of association or good audit practice. A general meeting of shareholders may thus issue instructions for a division of labour which remains within the stated limits. Since the general meeting of shareholders thus has no authority to prescribe an extended division of labour going beyond what is stated above, it ought not to be possible to prescribe it in the articles of association.

4.1.3 The requirement of adequate causal connection

For damages to be awarded against an auditor it must be shown that there is a causal link between the damage that has occurred and the act or omission which constitutes negligence.

A causal connection is not considered to exist if the damage for the company would have occurred, regardless of whether the auditors had discovered the unsatisfactory state of affairs or not.⁴⁰

³⁷ Taxell, *Ansvar och ansvarsfördelning*, op.cit. at 114.

³⁸ Taxell, *Ansvar och ansvarsfördelning*, op.cit. at 115.

³⁹ Taxell, *Ansvar och ansvarsfördelning*, op.cit. at 116 and SOU 1941:9 at 476.

⁴⁰ Taxell, *Ansvar och ansvarsfördelning*, op.cit. at 111 and Dotevall, *Bolagsledningens skadeståndsansvar*, op.cit. at 48.

However, not all causal connections are accepted in the law of damages in connection with the application of the negligence criterion. It is a requirement that the causal connection is adequate.⁴¹ By means of the requirement for adequate causality, connections that are unexpected or of a remote nature can be separated out, and those that are legally relevant can be distinguished.⁴² Through the determination of adequacy, an assessment is made of the specific causal connections and of the degree to which the causal connection is adequate.

Adequate causality appears to exist if an auditor has neglected his duties under the Swedish Companies Act, applicable law on annual reports, the articles of association or according to instructions from a general meeting of shareholders, and if damage arises as a result.⁴³

4.1.4 Damage

Even if an auditor is considered negligent, it does not necessarily mean that he or she becomes liable to pay damages. There must be a demonstrable financial loss. The financial loss must result in a measurable loss of wealth for the company.⁴⁴ The loss may comprise costs or a depreciation in the value of company property.⁴⁵ Even a loss of income to the company can be considered to constitute proven financial loss.⁴⁶

The amount of the loss is normally calculated by undertaking what is known as the hypothetical test. That means that the value of the company's assets is compared with the hypothetical value of those assets, had the act which caused the loss not occurred. The difference between the two values is the loss sustained by the company.⁴⁷ The Code of Judicial Procedure (SFS 1942:740) ch 35 sec 5 can be used in cases in which it is difficult to compute the amount of the loss by this method.

It is important to note that if no loss actually occurs the auditors cannot be liable to pay damages.

4.1.5 Liability for assistants

Under ch 15 sec 2 CA an auditor is responsible also for loss that is caused either deliberately or negligently by his or her assistants. If the auditor becomes liable to damages as a result of the acts of the assistant, he or she has the right of

⁴¹ Dotevall, *Bolagsledningens skadeståndsansvar*, op.cit. at 48.

⁴² Dotevall, *Bolagsledningens skadeståndsansvar*, op.cit. at 48.

⁴³ Dotevall, *Bolagsledningens skadeståndsansvar*, op.cit. at 49.

⁴⁴ Dotevall, *Bolagsledningens skadeståndsansvar*, op.cit. at 51.

⁴⁵ Dotevall, *Bolagsledningens skadeståndsansvar*, op.cit. at 51.

⁴⁶ Dotevall, *Bolagsledningens skadeståndsansvar*, op.cit. at 51.

⁴⁷ Dotevall, *Bolagsledningens skadeståndsansvar*, op.cit, at 51.

recourse against the assistant in accordance with the criteria in the Tort Liability Act, more precisely ch 4 sec 1 TLA, when there are particularly strong reasons.⁴⁸

4.1.6 Audit companies' liability

As I mentioned above, under ch 10 sec 18 § CA a registered audit company can be appointed as the auditor of a limited company. Under ch 15 sec 2 CA liability for damages is borne by the audit company and the person chiefly responsible for the audit. Whether there is intent or negligence is normally determined taking into account the circumstances of the person chiefly responsible.⁴⁹

There has been discussion as to whether an audit company can be considered to have principal liability in relation to an auditor who is employed by that company and where the auditor is designated as auditor in a company. Case NJA 2000 p. 639 has been taken to provide justification for this view. In this case the Supreme Court deemed that a law firm had a principal liability for a lawyer in its employment who was designated as the administrator of the estate of a deceased person. I am doubtful, and can adduce arguments both for and against. Dotevall considers that there is no principal liability for an employer in respect of an employee who is designated as a director of a company.⁵⁰

4.1.7 Adjustment

If an auditor is found liable for damages, that is to say, to pay compensation pursuant to ch 15 sec 2 CA, the amount of damages can be adjusted according to what is reasonable. That is provided by ch 15 sec 5 § CA. In assessing what is reasonable, account shall be taken of the nature of the action, the extent of the loss and the circumstances in general. Among the circumstances to be taken into account are the financial means of both the person causing the loss and the injured party.⁵¹ The so-called subjective factors which I discussed above can also mean that a Court will adjust the amount of damages for an auditor.

4.1.8 Joint liability and the right of recourse

If several auditors must pay compensation for the same damage, under ch 15 sec 6 § CA they have an joint and several liability. That applies on the proviso that liability has not been adjusted for any of the auditors pursuant to ch 15 sec 5 CA.

Joint liability applies also for a registered audit company and the person chiefly responsible.

⁴⁸ Andersson and others, op. cit. at 15.12.

⁴⁹ Andersson and others, op.cit. at 15.13.

⁵⁰ Dotevall, *Liability of Members of the Board of Directors and the Managing Director*. Scandinavian Studies in Law, Volume 41 at 81.

⁵¹ Johansson, S., *Nials Svensk associationsrätt*, I huvuddrag, 8 ed, Stockholm 2001 at 357 f.

15 kap. 6 § ABL also regulates the right of recourse. The right of recourse means that, having regard to circumstances, what someone has been required to pay in damages may be reclaimed from others jointly liable. Normally this appears to entail that the amount payable should be equally shared among them.⁵²

4.1.9 Action for damages and the time-limit for institution of proceedings by the company

Action for damages against an auditor can be conducted on behalf of a company by the board of directors, in accordance with ca 15 sec 7 CA. This requires that the matter shall first have been put to a general meeting of the shareholders for approval and that the proposal to bring an action for damages has been supported by the majority or by a minority comprising the owners of not less than one tenth of all shares. If the majority approves the proposal, it is in practice the board of directors who conduct the action. If it is the owners of not less than one tenth of the shares who have supported the proposal to bring an action for damages, the minority have under ch 15 sec 9 CA an independent right to conduct the action.

A settlement between the company and an auditor as regards the auditor's liability for damages to the company may be made only by a general meeting of the shareholders and only on condition that the owners of not less than one tenth of all shares have not voted against the proposal for settlement. This is provided in ch 15 sec 6 § CA.

Ch 15 sec 13 CA provides that action not based on criminal liability may not be instituted against an auditor after five years have elapsed since the end of the financial year to which the audit report relates.

If the company has been declared bankrupt, ch 15 se 14 CA accords the administrator of the bankruptcy estate an extended time limit in certain situations.

4.2 External Liability

For an auditor to be liable for damages to shareholders or others requires, under ch 15 sec 1 sen 2 CA, as referred by ch 15 sec 2 CA, the following:

- 1 Performance of duties
- 2 Negligence (in connection with violation of this law, applicable law on annual reports or the articles of association)
- 3 Adequate causality
- 4 Damage

⁵² Andersson and others, op. cit. at 15.20.

4.2.1 Performance of duties

For damages to be awarded against the auditor it is required that he shall have acted, or omitted to act, in the capacity of company auditor. No liability can be claimed under the criteria on damages in the Swedish Companies Act for what the auditor does as a private person in relation to the company or if the company's auditor is working as a consultant or adviser to the company. This requirement accords with what applies as regards the performance of duties according to internal liability.

The question of what is to be included in the requirement for "performance of duties" has, however, been somewhat complicated in connection with the ruling in Court case NJA 1996 p. 224. The following facts were shown. Auditor A was the auditor in company B from the autumn of 1985 until the autumn of 1986. Company B was in financial difficulty and, in order to reconstruct its business, company C was formed. A was also appointed as auditor to company C in 1985 and was the company auditor until the autumn of 1986. The business of company B was to be continued in company C. In connection with this transfer A established a preliminary balance which showed that B's assets were worth approximately 2.4 million crowns. B transferred its assets to C for 2.5 million Swedish crowns. In the autumn of 1985 bank D granted company C a loan of 1.2 million crowns. An important factor for the bank in making this loan was the preliminary balance established by A. This balance was quite misleading, and B's assets were in fact worth only 350,000 crowns. Company C was unable to repay the loan to the bank. Neither company B nor company C had drawn up an annual report for either 1985 or 1986. Nor had the auditor issued any audit reports.

The bank sued the auditor for damages pursuant to the provisions on external liability in the Swedish Companies Act. In the District Court and the Court of Appeal the bank also invoked secondly the general principles in the law of damages as regards actions for damages. In the Supreme Court the bank invoked only the provisions on damages in the Swedish Companies Act.

The Supreme Court found it proven that auditor A was complicit in giving a false picture of the value of the assets transferred from company B to company C by striking the preliminary balance and that he was consequently aware that there were gaps in the balance. The Supreme Court found that he had acted contrary to generally accepted auditing standards.

After this finding the Supreme Court stated as follows:⁵³

However, for A to be found liable to pay compensation to the bank under ch 15 sec 2 § compared with sec 1 in the Swedish Companies Act, it is a precondition that he has infringed that law. The provision in the Swedish Companies Act which on this point is of particular interest is ch 10 sec 7 (now ch 10 sec 3 § CA), in which it is laid down *inter alia* that to the extent that generally accepted auditing standards enjoins the auditor shall examine the company's annual report and accounts, as well as the management of the company by the board of directors and the managing director.

⁵³ NJA 1996 at 244, 245.

Even if the contribution made by A in respect of the re-construction of B and the transfer of its assets to some degree went beyond his strict obligations as auditor, it was in his capacity as auditor that the company management turned to him for assistance in the re-construction of the company. His action must therefore be classified among such measures, relating to management, as are referred to in ch 10 sec 7 (now ch 10 sec 3) of the Swedish Companies Act. To the extent that A has acted contrary to generally accepted auditing standards, he has therefore also violated this section of the law.

One can wonder what the Supreme Court meant by its statement that the auditor's action "must therefore be classified among such measures, relating to management, as are referred to in ch 10 sec 7 (now ch 10 sec 3) of the Swedish Companies Act." Management and administration of the company are in fact not part of the auditor's duties.

If the Supreme Court was to "catch" the auditor, it was compelled to squeeze his action into one of the provisions of the Swedish Companies Act in order to apply external liability, and that is what was done. The reason for this was the way in which the bank's case came to be re-formulated in the Supreme Court, since it was then not open to the Court to resort to the general law of damages.

The Supreme Court's judgment is open to criticism.⁵⁴ In my understanding, as company auditor A can have no obligation to draw up the so-called preliminary balance, but does so as an adviser. That is, as the Supreme Court itself says, a task going beyond his commitments, strictly defined, as auditor. The Supreme Court considers however that, if a company auditor is called upon to carry out tasks that normally do not form part of the audit function, such tasks can nevertheless in certain situations be regarded as measures falling under that function. This case was dealt with during the revision of ch 15 CA. In Bill no. 1997/98:99 the Government stated the following:⁵⁵

It has been questioned whether the extension of an auditor's liability pursuant to the Swedish Companies Act, which in practice has occurred as a result of Supreme Court case NJA 1996 p. 224, is appropriate. The question whether an auditor has acted within the framework of his duties as auditor should, however, as hitherto be determined case by case. The Government therefore has no intention to take an initiative for any amendment of the law in that respect.

The Supreme Court's judgment has not assisted in clarifying the boundaries of what falls under the requirement "performance of duties". If one is appointed as the auditor of a company there is a considerable risk that if one also functions as an adviser to the company one may be exposed to liability towards persons outside the contractual relationship, because of the criteria on external liability in the Swedish Companies Act.

⁵⁴ See Pehrsson, L., *Omfattande ansvar för bolagsrevisor*, Juridisk Tidskrift, 1996-97 Volume 1, at 133 f.

⁵⁵ Prop. 97/98:99 at 193.

4.2.2 Negligence

Auditors can incur liability towards shareholders or others pursuant to ch 15 sec 1 sen 2 CA, referred from ch 15 sec 2 § CA. This relates to the external liability. By "others" is meant creditors, other persons not directly concerned, or employees of the company. This is an extension of the criteria of the Tort Liability Act. Under the Tort Liability Act, such liability becomes part in non-contractual circumstances if personal or material injury is caused deliberately or negligently, or if pure loss of wealth is sustained as a result of criminal action. The provision which limits liability for pure loss of wealth in connection with criminal action is termed the blocking rule, and appears in ch 2 sec 2 TLA.

The provisions on damage in the Swedish Companies Act thus widen the liability for auditors in regard to pure loss of wealth in non-contractual circumstances. For liability for damages to arise it is required that the loss is caused deliberately or negligently through violation of the Swedish Companies Act, applicable law on annual reports or the articles of association. It does not suffice to show solely that the auditor has been negligent, as is the case in regard to internal liability for damages. It must be shown at least that the auditor has been negligent by infringing a legal provision, the purpose of which is to protect shareholders or "others".⁵⁶ Here mention may be made of the auditor's duty of examination pursuant to ch 10 sec 3 CA and the provisions on audit reports – ch 10 sec 27-34 CA – the clear purpose of which is to protect the company's shareholders and creditors.

In NJA 1998 p. 734 negligence was dealt with in connection with the auditor's external liability. Company A became a client of bank B. The bank gave company A credits amounting in 1985 to more than 20 million crowns. In December 1985 the company was made bankrupt. The bank brought an action for damages pursuant to ch 15 sec 1 sen 2, referred from ch 15 sec 2 CA. It was thus a matter of external liability and the bank was therefore an "other". It was in this case a question of a direct loss. Important factors in the bank's decision to provide these credits were the annual reports and the inventory values given in them, and the so-called "clean" audit reports from the auditor. The Appeal Court found that the auditor had ignored the provisions in ch 10 sec 7 and sec 10 CA (now secs 3 and 30 CA) and had acted negligently in assessing the value of the inventory in the relevant annual statements of account. The Supreme Court agreed with the Appeal Court's finding.⁵⁷ The auditor was thus negligent.

See also case NJA 1996 p. 224 on negligence which I have discussed above.

4.2.3 Adequate causality

For general arguments on adequate causality I refer to para. 4.1.3 above. The question of causality in the context of external liability was dealt with in a case

⁵⁶ See Kleineman, J., *Ren förmögenhetsskada, Särskilt vid vilseledande av annan än kontraktspart*, Stockholm 1987 at 312 ff.

⁵⁷ NJA 1998 at 734, 741.

in the Appeal Court for Skåne and Blekinge.⁵⁸ The facts in the case were as follows. The matter was concerned with whether the purchase of an enterprise had taken place on 25 August or 1 December 1985. Auditor B had given a 'clean' audit report and it was absolutely clear that the auditor had been negligent in failing to see that the statement of account was deficient in the way in which tax debts and expenses had been omitted from the balance-sheet. The District Court deemed that the purchase contract had been concluded on 25 August and the company accounts and clean audit report were factors of great importance in the purchase. The necessary conditions for compensation to the purchaser were thus met. The Appeal Court found differently, deeming that the contract was concluded on 1 September and that purchaser A had learned about the deficient balance-sheet before 1 September. The Appeal Court stated as follows:

All the circumstances that have now been brought forward indicate that A did not attach decisive importance to the accounting documents and the financial situation in the Helsingborg company, and that he had other strong arguments for the acquisition of the shares in this company. The Appeal Court therefore concludes that it has not been shown that there is a causal connection between the deficiencies in B's audit of the 1985 balance-sheet and the loss suffered by the Landskrona company. On those grounds the plaintiff's case is not proven.

Despite B's negligence, the case fell on the adequate causality point.

The number of people suffering loss can become quite large when companies quoted on the Stock Exchange are concerned. That is for example the case when the information in the annual report is incorrect and the auditor has been negligent in his examination of it. Thousands of people may have bought shares on the basis of the annual report and the auditor's report approving it without comment. To obtain compensation it must be shown that there is adequate causality between the loss and the act or omission that has caused it.⁵⁹ The effect of adequate causality is to limit the number of injured parties.

In the theoretical literature there has been discussion of further limitation of the numbers of injured parties and proposals have been advanced regarding the introduction of special requirements as to the proximity between, for example, the injured party and the tortfeasor in order to avoid unreasonably large sums of damages.⁶⁰ The idea has been that damages should only be paid if there was a direct causal connection between the deficient audit and the action of the injured party. That would sharpen the requirements for adequate causality in these situations by introducing a requirement for proximity.⁶¹ This opinion has been criticised.⁶² The question was discussed in the re-drafting of the criteria on

⁵⁸ Appeal Court for Skåne and Blekinge, T 333/89.

⁵⁹ Hellner - Johansson, *op.cit.* at 203 f.

⁶⁰ See Kleineman, *op.cit.* at 307 ff. See also SOU 1995:44 at 249 f.

⁶¹ Prop. 1997/98:99 at 191.

⁶² See Roos, C.M., *Anmälan av Jan Kleineman, Ren förmögenhetsskada* in SvJT 1988 at 49ff. and Samuelsson, P., *Information och ansvar. Om börsbolagens ansvar för bristfällig informationsgivning på aktiemarknaden*, Stockholm 1991 at 107 ff.

damages in the Swedish Companies Act but the Government did not consider it appropriate to introduce any form of further limitation of the numbers of those suffering loss by requiring greater proximity between the tortfeasor and the injured parties.⁶³ The reason for this was that the criteria for damages must be designed in such a way as to give clear encouragement to auditors to fulfil their duties, at the same time as the criteria must provide some scope to avoid unreasonable claims for damages.⁶⁴ The Government was of the view that the present criteria for adjustment could solve the problem of limiting the number of injured parties on the basis of the different interests that have been put forward here.⁶⁵

4.2.4 Damage

The loss that first comes to mind in connection with external liability is direct loss and that must be a question of proven financial loss.⁶⁶ That means, to take an illustration, that a shareholder who bought a number of shares at a price of 300 crowns which later fell to 150 crowns has suffered a direct personal loss of 150 crowns per share. The fall in the stock market price was due to the fact that the company's annual report was incorrect and that the auditor had not noticed the inaccuracies.

In various legislative matters and in the theoretical literature there has been discussion of the possibility for shareholders and others to claim compensation for an indirect loss.⁶⁷ It would primarily apply to the violation of regulations the chief purpose of which is to protect the company but which are also of importance for individual shareholders and company creditors. Among them is the provision on the auditor's duties to examine the accounts. By indirect loss is meant a loss which first affects the company but which then indirectly affects third parties such as shareholders and others.

Today the perception seems to be that company creditors can have the right to compensation for indirect loss.⁶⁸ A prerequisite for this is that the company should have become insolvent, or an already existing insolvency has been aggravated by the acts or omissions of the auditor. This can be read from NJA 1979 p. 157.

In case NJA 1996 p. 224 the Supreme Court considered that there was a question of direct loss and stated that in "the present case there was namely a question of a loss for the Bank which arose directly, through the provision of credit. For loss to have arisen for the Bank it is therefore not necessary, as in the case referred to, that the injurious act should have resulted in insolvency or

⁶³ Prop. 1997/98:99 at 191-192.

⁶⁴ Prop. 1997/98:99 at 191, 193-194.

⁶⁵ Prop. 1997/98:99 at 192.

⁶⁶ NJA 1992 at 227.

⁶⁷ See Dotevall, *Bolagsledningens skadeståndsansvar*, op.cit. at 178 f and Prop. 1997/98:99 at 188 ff.

⁶⁸ Prop. 1997/98:99 at 189.

aggravated an already existing state of insolvency”.⁶⁹ By the expression “the case referred to” the Court meant Supreme Court case NJA 1979 p. 157.

It is more doubtful whether an individual shareholder should have the right to compensation for indirect loss. There are differing opinions on the matter.⁷⁰ The argument against such actions would be that under the Swedish Companies Act a minority of shareholders has the right to bring an action against the company's auditor at the company's expense.

When this question has been discussed in relation to the company management, directors and managing director, it has been considered that the possibility of claiming damages for indirect loss from members of the board of management exists through infringement of the equality principle in ch 3 sec 1 CA or of the general provisos in ch 8 sec 34 CA, in such a way that the shareholders have been treated unequally. It is precisely the latter point that is of central importance, that is to say that the shareholders have been accorded unequal treatment.

Though some uncertainty remains, there is today much to advocate that a shareholder should be regarded as having the right to bring an action for indirect loss against an auditor if the auditor's act or omission has resulted in unequal treatment for shareholders. Let us look at the following example.

Company A has two shareholders, namely B and C. In connection with a non-cash issue addressed to B, the company's auditor, D, in making comments (as provided in ch 4 sec 6 CA) on the company's report had incorrectly stated that the asset which was to be transferred to the company had not been assigned a higher value than the real value to the company. The real value of the asset was significantly lower than that stated in the report by the board of directors. In that case the shareholders have been affected unequally, when the emission was made, due to the loss inflicted on the company because of the auditor's action. In this situation shareholder C should have the right to claim compensation from the company's auditor for indirect loss.

4.2.5 Adjustment, joint liability and time-prescription etc

As regards external liability the Swedish Companies Act lays down no time-limits and it is the general limits in the Periods of Limitations Act that apply. That means a period of 10 years. Nor do the provisions in ch 15 sec 7 CA, on the treatment of the damages question at general meetings of shareholders etc., apply as regards external liability for damages. The provisions on adjustment, ch 15. sec 5 CA, and those on joint several liability, ch 15 sec 6 CA, do, however, also apply to external liability.

⁶⁹ NJA 1996 at 224, 236.

⁷⁰ See Johansson, *op.cit.* at 351 and the literature referred to in note 35.

4.2.6 Contributory negligence by an injured party

The question of contributory negligence by an injured party can also be of relevance in connection with external liability. In NJA 1998 p.734 the Supreme Court made the following statement on this matter:⁷¹

As a general matter, everybody is entitled to assume that information in a company balance-sheet is correct if it is stated that it has been drawn up in accordance with applicable law on annual reports and has been approved by an auditor. However, taking into account that the company's business was in a relatively risky branch, in which big price changes can occur over a short period of time, and that the major asset of the enterprise was stated to be a stock of metals, there was good reason in the prevailing situation for the bank to ask questions about that stock and possibly also to require that inventories should be furnished. The bank has admitted that no questions were asked about the size or content of the stock. The bank must therefore be regarded as having fallen short in its investigation of the company's credit rating.

Despite the bank's own shortcomings in investigating the creditworthiness of the enterprise there was in this case no grounds for adjusting the liability of the auditor.⁷² The Supreme Court stated as follows:⁷³

The negligence thus held against the bank must be deemed to be significantly less serious than that of Jörgen R. For reasons of legal procedure the bank has limited its claim to 600,000 crowns whereas the actual loss cited above amounted to a substantially greater sum. There is no cause to reduce the limit of Jörgen R's liability because of the contributory negligence by the bank.

The interesting point about the Supreme Court's statement is that it lays down that in certain situations a creditor has a duty of investigation, and shortcomings in that regard should, in my view, lead to a finding of contributory negligence by the injured party resulting in, for example, a reduction in the amount of damages.

4.3 *The Delimitation of Liability Between the Board of Directors/ Managing Director and the Auditor*

The board of directors and the managing director are responsible for the management of an enterprise. The directors and the managing director issue the annual report and take responsibility for ensuring that it has been drawn up in accordance with the law and generally accepted accounting principles standards. If the company has no managing director that responsibility rests entirely with the board.

⁷¹ NJA 1998 at 734, 741.

⁷² NJA 1998 at 734, 741.

⁷³ NJA 1998 at 734, 742.

It is thus the responsibility of the board to ensure that the company has an effective book-keeping system with adequate internal controls, as well as to supervise the satisfactory operation of these arrangements.

It is the responsibility of the auditor to examine whether the board and the managing director have fulfilled these duties and he must also issue an audit report.

A clean audit report from the auditor does not mean that the company's managers thereby have no further responsibility. They remain responsible for ensuring that the annual financial report has been drawn up in accordance with the law and generally accepted accounting principles.

Both the company management and the auditor can therefore be made liable to pay compensation in respect of an incorrect annual report, on the basis of the different responsibilities they bear in that regard.

In the Danish case UfR. 1982.595 both the company management and the auditor were found liable in respect of an incorrect annual report. The Danish Supreme Court found it proven that the company management and the auditor had neglected their respective duties as regards the annual report.

5 The Auditor's Liability for Damages as an Adviser or Consultant

It is very common for an auditor to serve as an adviser. A company auditor can also serve as an adviser both to that company and to others. In this section I deal with an auditor's liability for damages as an adviser serving on a contractual basis rather than with the provision of advice on a basis which falls under the terms of the Swedish Companies Act. Case NJA 1996 p. 224 shows that problems can arise in defining the dividing line between these two functions if the auditor as consultant is also the company auditor. Nor may a similar combination of functions conflict with the provisions in the Swedish Companies Act and in the Auditors Act, as regards conflict of interest and independence.

I have chosen to deal with an auditor's liability as an adviser or consultant even though it is a form of liability lying somewhat outside the various types of liability which can affect a company auditor. This must be seen against the background that it is very common for an auditor to serve as an adviser. This section will ensure that the chapter on liability provides fuller coverage from the perspective of auditors' liability for damages.

I divide this section into two main sub-sections. In the first I deal with an auditor's liability as an adviser serving on a contractual basis. In the second I discuss an auditor's liability towards parties other than those to whom he is contracted.

In our society there are many different types of adviser. The presentation will be directed towards the questions affecting the auditor as adviser.

In this section when I use the word auditor I mean that the auditor is acting as an adviser and not as a company auditor.

5.1 Consultancy and Advisers' Liability – some Introductory Words.

Consultancy is commonly met with in professional contexts. Auditors are a group, exercising a particular profession, who are frequently engaged in consultancy. Other such professions are lawyers and banking advisers.

By “advice” is normally meant a recommendation as to what should be done in a given situation. It can be to the effect that the client seeking the advice should either take, or abstain from, a given action. Its purpose is to assist the client in coming to a position, in a given situation where he himself lacks the necessary expertise.

In certain situations this function can also mean that the adviser disposes over the property or funds of another, under the obligation to render an account of his transactions. In those situations the adviser can be considered to be a trustee, with the result that ch 18 of the Book of Commerce (BC) becomes applicable. Some of the provisions of ch18 BC can also become applicable when it is solely a matter of what are known as purely advisory services, that is to say, the furnishing of no more than information to the client. The advisory function is often combined with the trustee function.⁷⁴

During the last decade consultancy work by auditors has greatly increased. As a result of this increase auditors are exposed to an increased risk of making mistakes that may come to be considered as a breach of contract, with a variety of consequences.⁷⁵ The consequence that I propose to deal with in this section is damages incurred through negligent performance of duties.

5.2 Damages to a Contracting Party/client

The following conditions must be met for an auditor in a contractual relationship to have to pay compensation:

- 1 A contract of service
- 2 Negligence
- 3 Adequate causality
- 4 Damage

5.2.1 The existence of a contract of service

It must be considered very common for an auditor to enter into a contract with a client to function as an adviser/consultant and to perform a task. This contract may be concluded either orally or in writing. If it is concluded in writing there is in most cases no doubt that there is a client relationship between auditor and principal.

⁷⁴ Kleineman, J., *Etiskt och rättsligt ansvar för skatterådgivning*. Det 35 nordiske juristmöte, Oslo 1999 at 18.

⁷⁵ Hellner, J., *Speciell avtalsrätt* 11, 1 häftet, 3 ed, Stockholm 1996 at 214-215.

But there does not have to be an explicit contract. This matter was treated by the Supreme Court in case NJA 1992 p. 243. In that case an auditor, Yngve L, had for many years had contact with company A, the owner of that company and his wife Anna-Stina H. Yngve L had for approximately 20 years been the company's auditor and in addition helped the family with *inter alia* their income tax declarations etc. The owner died and Anna-Stina H inherited the whole enterprise. In connection with her sale of the shares in the company Yngve L had several contacts with her and also took part in the negotiations with the purchasers. The Supreme Court declared as follows on this question:⁷⁶

It is clear that Anna-Stina H considered Yngve L as her economic adviser in the transaction. She also had good grounds for so thinking, given Yngve L's long involvement as the company auditor and his assistance with the family's tax declarations. ...It cannot have escaped Yngve L – who in no way seems to have indicated another view – that Anna-Stina H, who as the enquiry shows had no assistance from any other quarter, regarded Yngve L as her financial adviser in the share deal. In those circumstances a client relationship is considered to have arisen between Anna-Stina H and Yngve L.

It may be noted that in this case the client relationship is not based on a formal contractual relationship, but on a number of factors which Anna-Stina H has understood as if there was a client relationship between her and Yngve L. It is also clear that according to the Court Yngve L must have understood that Anna-Stina regarded him as her adviser.

This case prompts Kleineman to express himself as follows on this question:⁷⁷ “Against this background I am ready to draw the conclusion that as far as Swedish law is concerned it does not really require very much for a client relationship to arise between a tax adviser and ‘the client’.”

I agree with Kleineman's statement. An auditor ought therefore to be careful in his behaviour in situations like that in the above case if he wishes to avoid being regarded as an adviser.

5.2.2 The adviser's obligations

In the situation of adviser an auditor has an obligation to show care in the performance of the task entrusted to him.⁷⁸ That means that he must always think of his client's best interest and thus has an obligation to avail himself of the expertise available within the profession when acting as a consultant. It is this expertise which in the majority of cases sets the standard of care when the auditor performs his task.

What then does the standard of care mean for an auditor acting as a consultant? This is a difficult question and the answer cannot be reduced to a simple formula.

⁷⁶ NJA 1992 at 243, 255.

⁷⁷ Kleineman, *Etiskt och rättsligt ansvar*, op.cit. at 23.

⁷⁸ Hellner, op. cit. at 206.

In a number of cases the Supreme Court has discussed the standard of care for advisers. This has occurred when the question of negligence has been at issue, that is to say whether an adviser has been negligent or not. I have elected to deal with these cases together in the section below, to avoid tedious repetitions.

5.2.3 Negligence

As regards the auditor's liability for damages, under the Swedish Companies Act what is known as the normative method is adopted in the determination of negligence. In the absence of guidance in the regulations, precedents, and so on, the Courts have to rely on a more discretionary judgement.

For professional advisers, such as for example auditors, the determination of negligence is carried out more and more in accordance with the particular yardsticks existing within the respective branches, such as established professional standards, branch practice and business methods, and there is less discretionary judgement. Against that background it is possible to speak of professional responsibility.

To determine whether an auditor has been negligent or not when acting as an adviser, the auditor's behaviour should be compared with the behaviour that according to the profession optimises the client's objective in seeking advice.

For damages to be payable it is required that the auditor should have deviated from the standard in such a way that he can be considered negligent. In this the Court makes an assessment of the deviation and seeks an answer to the question whether the auditor has been negligent or not.

On this question Kleineman states that:⁷⁹

it is often difficult to make judgements of cause and effect in regard to people exercising a profession. It is reasonable first to make an attempt to establish what standard it is that the professional concerned has disregarded, thereafter to be able to determine whether it was disregarded to such a degree that the deviation from the norm can be considered negligent.

Below I give a more detailed account of a number of situations in which courts have stated opinions about careful and careless behaviour. I will also pray in aid some of the doctrine. Even though not all the cases concern auditors it is my understanding that they can be applied in regard to an auditor who acts as an adviser.

It is of great importance that the auditor should have knowledge of the legislation relevant to his profession and should use that knowledge when it is required. I will first recapitulate the classic case, NJA 1957 p. 621, which was not about the actions of auditors but which appears to be of relevance in the context of auditors, and in which the Supreme Court confirmed the District Court's judgment containing *inter alia* the following opinion:

⁷⁹ Kleineman, J., *Rådivares informationsansvar – en problemorientering*, SvJT 1998 at 189.

It is not explicit in the text of the law, that preferential rights are lost when an enterprise moves, and the 1904 judgment by the Supreme Court, in which that principle was established, was not remarked on in the 1952 edition of the law. Despite this, had H. paid the proper attention to this matter he could have obtained sufficient knowledge of it, among other reasons because as Gyllin pointed out, it is elucidated in "Svensk Sakrätt", the work published by Östen Undén in 1927 which is well known among lawyers.

This makes clear that an adviser must have knowledge of the legislation that can have reference to the field of business of the profession, and if the adviser does not have it, then he or she has an obligation to obtain it. It also emerges from this case that it is a question of procedural liability.

In the context of auditors a case which can be mentioned here is NJA 1992 p. 243, in which the Supreme Court stated the following opinion:⁸⁰

As an adviser with expert knowledge of tax questions it was incumbent on Yngve L to elucidate the tax consequences of the transaction and to give correct information about the applicable regulations. As the Appeal Court found, he fell short in this matter. Taking into account that and the further arguments adduced by the Appeal Court, Yngve L. is found liable to pay damages to Anna-Stina H.

The Supreme Court thus considers that in giving advice an auditor has an obligation to take the initiative to explain the tax consequences of a transaction. The case is also an expression of the very strict view which the Supreme Court takes of so called legal errors related to the profession.

As regards tax advice and liability for errors in this type of consultancy, it is possible to speak of a specialist liability.⁸¹ *Inter alia*, an auditor can also be regarded as having a specialist liability in the field of accountancy.

The circumstances of a particular case can however be of such a nature that great activity in the matter cannot be a requirement. In NJA p. 1992 p. 502 the Supreme Court expressed itself as follows:⁸² "One should on the other hand be cautious about holding it against an adviser as negligence that he did not put forward solutions for tax problems that are complicated in their construction or difficult to assess as regards their legality."

The same applies as regards whether the discussions occurring when advice was given were "of a general and preliminary character".⁸³ Very general advice is then quite sufficient.

Very general advice can also be adequate when the client asks for a quick response and is aware that the auditor has had no opportunity to make a thorough analysis of the matter.⁸⁴ It is however important for the auditor to make a record of the way in which the advice was tendered, in order to be able to protect himself against a claim for compensation.

⁸⁰ NJA 1992 at 243, 255.

⁸¹ See NJA 1981 at 1091.

⁸² NJA 1992 at 502, 510.

⁸³ NJA 1992 at 243, 254.

⁸⁴ Kleineman, *Rådgivares informationsansvar*, op.cit. at 191.

In NJA 1987 p 692 an official valuer had erroneously stated that there was a town plan showing that a plot on a given property could be built on. No such town plan existed. The valuation was therefore completely wrong. The Supreme Court's judgment was as follows:⁸⁵

In valuing a property it is hardly possible to arrive at the same valuation irrespective of which expert has effected it. Property valuation is indeed in many respects dependent on the valuer's view of the market and of the property in question. Considerable scope must therefore be left for the valuer's own judgement. Significant variation between the valuer's assessment and what subsequently proves to be the actual value must be permitted without the valuer's being considered to have acted without due care. In the present case, however, it is not a question of a faulty assessment but of a wrong and misleading piece of information on a point of fact, namely whether there was planning consent for building on the plot.

In this case it was not a matter of a failure of judgement but of an error resulting from the fact that the valuer had not more closely looked into what planning decisions applied to the property. The Supreme Court deemed that a valuer can with good reason be required to make such inquiries. The valuer had therefore been deficient in the method applying in the valuation of immovable property.

This case can be transposed to the audit field. If an auditor is engaged to value an enterprise, he must examine closely whether legislation, official decisions or contracts can affect its worth.

An auditor is considered also to have a pedagogical duty as an adviser. For the auditor that means *inter alia* an obligation to explain the problem at issue to his client in an understandable way.⁸⁶ This obligation emerges from case NJA 1994 p. 532. In case NJA 1995 p. 693 the Supreme Court stated as follows:⁸⁷ "a stockbroker must ascertain that a client has fully understood the risks inherent in issuing options."

In case NJA 1992 p. 502 the Supreme Court stated the following:⁸⁸ "In general an adviser with expertise in tax questions has far-reaching obligations when it comes to elucidating the tax implications of an intended transaction."

To this pedagogical duty may be added the obligation for the auditor to inform the client about the risks connected with the activities the advice relates to.⁸⁹ The point can be put in the terms that the auditor must furnish a risk analysis. In case NJA 1994 p. 598, which concerned a bank's advice on tax questions, the owner of a business enterprise had carried out certain transactions with the aim of avoiding tax. These transactions were however not approved by the tax authorities. The bank had had a certain justification for the advice it had

⁸⁵ NJA 1987 at 692, 702.

⁸⁶ Kleineman, *Rådgivares informationsansvar*, op.cit. at 188.

⁸⁷ NJA 1995 at 693, 706.

⁸⁸ NJA 1992 at 502, 510.

⁸⁹ Kleineman, *Rådgivares informationsansvar*, op.cit. at 189.

given, but in the light of subsequent case-law this was considered not to be tenable. The Supreme Court stated the following in this case:⁹⁰

Generally speaking it is necessary for anyone giving advice in complicated legal questions to draw attention the client's to the fact if there is no precedent and if the legal position may for that or any other reason be uncertain. The necessity of furnishing such information must however depend on who the client is, what qualifications he has and whether he has prior knowledge of the problems. Cases can be imagined in which it appears so obvious that the legal situation is uncertain that it can be regarded as unnecessary to draw special attention to it.

The client's lack of knowledge of the significance of certain circumstances in the matter can also be of importance for an auditor's actions as adviser. In case NJA 1992 p. 58 the Appeal Court stated, and the Supreme Court subsequently agreed, that:⁹¹

When it is a matter of judging whether in giving his advice Sven E was entitled to rely on Mr. & Mrs. B's information about the stocks, what is significant is whether or not he had reason to believe that they had adequate knowledge about this, or any insight into the importance of this information in the question of inheritance tax. It may well be maintained that an individual businessman in the retail trade will in general be quite aware of the size and value of his stocks. What Sven E has stated, however, indicates that this was not the case with Mr. & Mrs. B, who according to the information submitted carried on business in separate places. It must also be regarded as certain that they had no knowledge of the importance of the question for distribution tax. An additional factor is that the advice was given in close connection with the end of the financial year and it has not even been asserted that there was any circumstance requiring an immediate view to be taken on the question of a transition to another form of enterprise. Sven E must have realised that in a minor retail business the stock of goods is of decisive importance for the financial situation of the enterprise. In view of that it is remarkable that without making any further checks about the stocks he advised Mr. & Mrs. B to transform the business into a trading company and assisted them in putting the change-over into effect as early as 1 May 1981.

In this case it clearly emerges that because of certain circumstances the auditor should have taken more prudent measures. He did not do so, with the result that he was found to be negligent.

The cases related above give a certain understanding about when an auditor is negligent as an adviser.

5.2.4 Adequate causality and damage

For the main outlines I refer to sections 4.1.3 and 4.1.4 as regards the question of adequate causality and loss. I will, however, make the following complementary and additional points. The question often arises whether the client really has

⁹⁰ NJA 1994 at 598, 606.

⁹¹ NJA 1992 at 58, 64.

suffered any financial loss as a result of the advice given and, if so, how it is to be calculated.⁹² This applies first and foremost in connection with advice on tax questions. The Supreme Court dealt with the matter in case NJA 1991 p. 625. The question related to an estate agent's negligence and whether any loss had arisen in consequence thereof. The Supreme Court stated the following:⁹³

For incorrect information about the possibility of a deferment of capital gains tax to lead to the right to compensation the prerequisite should in principle be that the client shows that he would not have sold the property at the time when he did, if he had received correct information.

The Supreme Court considered that the client had suffered a financial loss and expressed its opinion as follows:⁹⁴

In cases such as the present one it is in general impossible to establish with any certainty what is the ultimate financial loss. It may be affected by e.g. future property sales and changes in tax legislation. Unless the estate agent's liability is to be illusory, contrary to the intention of the legislation, the client at any rate cannot bear any burden of proof in regard to such uncertain factors lying in the future. Instead the point of departure for the determination of loss must be that the estate agent has in reality caused the client a certain expense that he should not have had. It is the client's business to show that that has occurred. If that has been shown, the loss must be regarded as corresponding to the expense, to the extent that the estate agent has not shown it to be probable that in the case in question it is less.

The Supreme Court here formulates a criterion for the burden of proof as regards damage. This criterion recurs in case NJA 1992 p. 58, in which the Supreme Court stated the following:⁹⁵

In line with what has been stated by the Supreme Court (NJA 1991 p. 625), the point of departure for assessing loss must be that the Mr and Mrs B incurred a tax expense that they otherwise would not have had. The loss must be considered to correspond with that expense to the extent that (the audit firm) has not shown the probability that the loss would have been less.

Kleineman states the following on the matter:⁹⁶

The conclusion is that it must be assumed that it is incumbent on the person seeking advice to show that he undertook a transaction in reliance on the negligent advice and that he thereby incurred a tax liability that he would not otherwise have had. His loss is then considered to correspond with the tax incurred, unless the adviser can show it probable that the loss would have been less. In NJA 1991 p. 625 the Supreme Court develops certain circumstances that

⁹² Kleineman, *Rådgivares informationsansvar*, op.cit. at 199.

⁹³ NJA 1991 at 625, 631.

⁹⁴ NJA 1991 at 625, 631.

⁹⁵ NJA 1992 at 58, 66.

⁹⁶ Kleineman, *Rådgivares informationsansvar*, op.cit. at 201.

should not therefore be weighed in the calculation, while corresponding arguments are lacking in NJA 1992 p. 58.

The latter circumstance is, however, hardly to be interpreted to mean that in the latter case the Supreme Court intended to disregard the line of argument in the 1991 case.

In case NJA 1998 p. 625 an audit firm had incurred damages on the grounds of incorrect tax advice in a property transaction. Because of the general situation the value of the property subsequently declined. The Supreme Court found that that had no significance as regards the award of damages.

5.2.5 Guarantees

As a rule it should probably be rare for an adviser to guarantee the content of the advice he or she gives. However, if an adviser guarantees the facts of a situation or the outcome of a tax operation, which subsequently turn out to be wrong he/she has a strict liability.⁹⁷ In consequence an adviser should as far as possible avoid giving a guarantee.

5.2.6 Disclaimers

As mentioned earlier, an auditor can never disclaim liability as regards liability under the Swedish Companies Act . In the adviser role, however, there are certain possibilities to limit liability by means of disclaimers.

The interesting question, however, is how extensive the disclaimer can be. The legal situation must be considered somewhat unclear. I will nonetheless here give some points of view. A suitable starting point for dealing with the problem is to discuss the possibility of disclaimers in both simple and more difficult cases. Naturally the auditor has a greater need to make a disclaimer in the more complicated cases than in the more straightforward ones. On the other hand the client has a need for advice on which he or she can rely. When it is a matter of more complicated cases it is most important that the auditor furnishes a risk analysis and of course the adviser should not give advice that is firmer than can be justified against the background of the available information.⁹⁸ Despite the need for the auditor to be cautious in giving advice on complicated questions, specific disclaimers should also be accepted in these cases.⁹⁹ Kleineman considers that "disclaimers must not be in too general terms."¹⁰⁰ It is absolutely clear, as shown by general legal principles and sec 36 of the Contracts Act (SFS 1915:218), that altogether too extensive disclaimers should not be accepted.¹⁰¹

⁹⁷ Kleineman, *Rådgivares informationsansvar*, op.cit. at 188.

⁹⁸ Heuman.L. *Advokaters rättsutredningar – metod och ansvar*, Stockholm 1987 at 31.

⁹⁹ Heuman op.cit. at 31.

¹⁰⁰ Kleineman, *Rådgivares informationsansvar*, op.cit. at 205.

¹⁰¹ Heuman, op.cit, at 31.

As regards more straightforward cases within the professional field there should be no possibility of disclaiming liability.¹⁰²

An auditor can also disclaim liability indirectly, by giving a clear description of the task and of the context in which the advice furnished may be used.¹⁰³ This is an argument in favour of the auditor's keeping the fullest possible record of the matter on which he has been asked to advise, showing clearly the scope of the task and the context in which the advice may be used.

5.2.7 Time-limits

Under ch 18 sec 9 CB there is a one-year time-limit for complaints about actions by a trustee. The application of this provision has been discussed in legal theory and has been treated by the Supreme Court in a number of cases.¹⁰⁴ The condition for the establishment of a pure trustee function is that the trustee shall be given authority by the principal to dispose over his financial or other assets, and that he shall be accountable to the principal for them.¹⁰⁵

In case NJA 2000 p.137 there was question of the tax and other advice given by a lawyer C in relation to A. The lawyer was also accountable for funds received in respect of the settlement of a dispute.

The Supreme Court stated further:¹⁰⁶

Since C received the proceeds of the settlement on A's account he was accountable to A. C's handling of the proceeds of the settlement cannot, however, be regarded as affecting the essential part of his task as A's representative in the dispute with B. A's claim against C relates to his performance of his duties as legal adviser and not his handling of the proceeds of the settlement. His accountability in that regard is therefore not an applicable starting-point as regards the special time-limit prescribed in ch 18 sec 9 CB (cf. the Supreme Court's judgment of 11 January 2000 in case T 1883-98).

It follows from that argument that A's claim for damages is not time-prescribed under ch 18 sec 9 CB.

In my view that is a very interesting judgment. It appears to mean that as regards what is known as pure consultancy or advisory activities there is a time-limit of 10 years. That would be the case even when there is a certain element of accountability in the duties performed.

Lycke and others have made the following comment on the matter:¹⁰⁷ "The Supreme Court's determination may therefore mean that ordinary final accounts are never normally applicable as a starting-point for the prescription time-limit

¹⁰² Heuman, op.cit. at 31.

¹⁰³ Kleineman, Rådgivares informationsansvar, op.cit. at 205.

¹⁰⁴ See e.g. NJA 1999 at 52, NJA 1999 at 512, NJA 2000 at 31 and NJA 2000 at 137.

¹⁰⁵ Hellner, op.cit. at 219.

¹⁰⁶ NJA 2000 at 137, 142.

¹⁰⁷ Lycke, J., Runesson, E. M. and Swahn, M., *Ansvar vid finansiell rådgivning*. Stockholm 2002 at 90.

as regards the advisory aspect of a trustee function, and that in practice ch 18 sec 9 CB therefore cannot be applicable as regards advisory tasks.”

5.2.8 Compensation to others than a contractual party or client

We now enter on a question which has been debated a good deal in recent years, namely an adviser's liability towards third parties. In this case there is therefore no client relationship between the adviser and the third party.

In ch 2 sec 2 TLA we find the well-known blocking-rule which lays down that in non-contractual relationships damages may be awarded for purely capital loss only in connection with a criminal act. It is, however, a known fact that the blocking-rule referred to does not entirely exclude the possibility of awarding damages to a third party where the adviser has been negligent.¹⁰⁸

The central case on this point is NJA 1987 p. 692. The facts were as follows. A made a loan of 1 million crowns to B. As security for the loan A obtained a mortgage deed for 800,000 crowns on the property D. The basis for the decision to provide the credit to B was a certified valuation made by C at the request of B. In the certificate of valuation it was stated that there was a town-plan for the area indicating that 35 houses could be built on the site. The certificate of valuation was incorrect in a number of respects. Among other things no town-plan had been established for the area. The local planning committee had on 13 August 1981 recommended against an application for planning consent to build on the property. The decision not to allow building on the site was taken by the local authority on 28 October 1981, two days after the valuation had been issued. The Supreme Court made the following statement in its judgment:¹⁰⁹

It is scarcely possible to make general statements about the limits of a valuer's liability for damages. The further considerations concern only certified valuations, or valuation opinions as they are sometimes called, relating to immovable property given by a person who has assumed the professional duty of valuing such property. The purpose of such a valuation is often that it should serve as basis for decision in connection with legal dispositions in relation to the property, primarily purchase and loans. The person commissioning the valuation can be the owner of the property, a lender or an intended purchaser. For the valuer it must be clear that that the certified valuation may be used for various purposes and by more than one person. It is unavoidable that someone other than the person commissioning the valuation should fasten attention on it. An arrangement whereby the person making the valuation should be liable only in respect of the person commissioning it would result in numerous double-valuations without any real benefit to the property or credit markets.

Against that background the Supreme Court concluded as follows:¹¹⁰

¹⁰⁸ Kleineman, *Rådgivares informationsansvar*, op.cit. at 201.

¹⁰⁹ NJA 1987 at 692, 703.

¹¹⁰ NJA 1987 at 692, 703.

There are considered reasons why anyone who justifiably relied on a certified valuation should not bear the consequences of a loss that ultimately resulted from the fact that the person issuing the valuation acted negligently. The liability for damages of anyone who in the exercise of his profession undertakes property valuations should therefore as a rule not be limited to loss suffered by the person commissioning the valuation, but should also extend to loss caused to a third party, insofar as a reserve disclaiming such liability has not been entered on the certificate of valuation.

By means of this case the Supreme Court formulates a legal rule applicable to the liability towards third parties of persons exercising a profession, in connection with the issue of valuation certificates. The rule means that liability can be attached to an adviser in non-contractual relations if the third party belongs to a circle who justifiably "placed their trust" in a valuation certificate. The tortfeasor must have realised, or ought to have realised, that the certificate could come to be used "for various purposes and by more than one person". In the passage quoted above the Supreme Court states that the argument applies only to valuation certificates. I return to this point below.

The Supreme Court has also had occasion to deal with the liability of an adviser towards a third party in case NJA 2001 p. 878. This case also related to a statement by an official valuer which was important for a third party (a bank) as regards the provision of credit to the person commissioning the valuation. The decision in this case makes it quite clear what applies in regard to the liability in relation to a third party of a person exercising a profession, that is to say that the latter can become liable for damages in respect of a third party, under what is known as the trust theory. One of the most important statements by the Supreme Court in this judgment is that the adviser can limit "his liability by explicitly referring in the valuation statement to the purpose that led to its being issued". The valuation statement was intended to be used in a dispute involving the property. That emerged at the beginning of the statement. In the view of the Supreme Court the information was not clear but it was sufficiently so, that the bank should have reacted and satisfied itself that the statement could be used as the basis for the provision of credit. Since the bank had not done so the Supreme Court found that it was not entitled to damages despite the fact that the valuer had been negligent.

Although the Supreme Court has only given judgments about the liability of valuers in respect of third parties I am firmly convinced that the above-mentioned rules can be used as regards other professional advisers in respect of their liability towards third parties and of the various certificates and statements that they issue. That is with the proviso that the circumstances are in principle identical.

Against the background of the above case auditors should be cautious about issuing certificates/declarations. That applies particularly if there is occasion to assume that the documents may come to be used for various purposes and by more than one person. In my opinion an auditor should always indicate that the declaration may only be used for the purposes stated in it.

It is appropriate to return here to case NJA 1996 p. 224 which I discussed above. In order to "catch" the auditor the Supreme Court was compelled to

squeeze his action into ch 10 sec 3 § CA (formerly ch 10 sec 7 CA) in order to avail itself of the damages criteria in the Swedish Companies Act, more precisely the criteria on external responsibility. There might perhaps have been a possibility to apply the above-mentioned rules in that case. It is not excluded, but nor is it quite certain. The Supreme Court did not have that possibility when the suit brought before it gave scope only to determine liability in accordance with the provisions of the Swedish Companies Act. What a risk the bank's representative took in limiting his case in that way!

Advisers are also considered to be able to disclaim liability in relation to third parties. In case 1987 p. 692 the Supreme Court stated that liability for damages towards third parties can arise, "insofar as a reserve disclaiming such liability has not been entered on the certificate of valuation."