Sticks and Stones May Break My Bones, But How Do Careless Words Hurt Me?

Characterising the Doctrine of Negligent Misstatement in New Zealand Law

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A dissertation submitted in partial fulfilment of the Bachelor of Laws (with Honours) at the University of Otago (Te Whare Wānanga o Otago).

October 2017

Acknowledgements

To attempt to name all who have guided and supported me in my life journey, and in so doing contributed to the completion of this project, would be futile. Nonetheless, there are people who I would especially like to thank here.

To Associate Professor Jessica Palmer. Thank you for your wisdom, compassion, patience, and sharp eye for detail, and for being an inspiring role model over the past four years of my law school career. I could not have asked for better supervision during this process.

To the staff who attended my seminar. Thank you for your perceptive comments and challenging me to refine the scope of my topic. Thank you especially to Associate Professor Barry Allan for notifying me of valuable cases.

To Alex Kitson and Ben Halliday. Thank you both for being enduring friends over the course of my university career, and for filling my days with laughter.

To George Jackson. Thank you for indulging my many rants about private law, and for your invaluable and steadfast friendship and support, even from the other side of the country.

To Amy Corkery and Owen Wilkinson. Thank you both for your hawk-eyed proofreading skills, your interest and engagement in my dissertation, and your tireless encouragement.

To Kalyani Dixit, Anne Lim, Alice Tiffany and Veronica MacKenzie. You have all been the best friends to share the tumultuous journey of law school with me whom I could ask for. Thank you for tolerating me and for being with me every step of the way.

Finally, to my family, immediate and extended, especially my parents. I am where I am today because of your love and commitment to helping me to achieve my potential. (More prosaically, thank you to Dad for the several times this year that you intervened to save my computer. Without your assistance there would have been no hope for this dissertation being completed.)

All errors and omissions remain my own.

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"It is not without importance to know if the egalitarian and just State in which man is fulfilled ... proceeds from a war of all against all, or from the irreducible responsibility of the one for all, and if it can do without friendship and faces."

Emmanuel Levinas

Chapter One: Features and Development of the Negligent Misstatement Doctrine

I Introduction

This dissertation addresses an issue that tests many of our basic assumptions and understandings about how the private law is structured. The doctrine of negligent misstatement, originating in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,[1] occupies a contentious role in private law today. The doctrine establishes the duty not to cause economic loss to a plaintiff by negligently misstating information which the plaintiff relies upon (which I refer to throughout this dissertation as the "negligent misstatement duty"). It is unclear whether the duty in negligent misstatement is part of the law of negligence, imposed on citizens by the state for a particular purpose, or a duty that the law recognises as assumed or consented to. One way of understanding negligent misstatement is the orthodox view that it is a subset of the law of negligence (as the very name suggests). [2] However, some legal scholarship has challenged this view, arguing that in negligent misstatement cases the defendant assumes a duty with respect to the information they provide.[3] The primary goal of this dissertation is to evaluate each of these views, and to suggest a correct understanding of how the duty operates.

Whether the duty is consent-based or negligence-based has significant practical implications. Duties based on consent and duties which are imposed operate differently in respect of issues such as the requirements for formation of the duty, the point at which causes of action accrue for the purpose of limitation periods, the appropriate measure of damages, the rules of causation and remoteness limiting liability,[4] and the role that disclaimers ought to play in limiting or excluding the duty.

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[1] [1964] AC 465 (HL).

[2] For instance, see: Andrew Robertson and Julia Wang "The Assumption of Responsibility" in Kit Barker, Ross Grantham and Warren Swain (eds) *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Oxford, Hart Publishing, 2015) 49; Peter Cane *Tort Law and Economic Interests* (2nd ed, Oxford, Clarendon Press, 1996); Kit Barker "Unreliable Assumptions in the Modern Law of Negligence" (1993) 109 LQR 461.

[3] For instance, see: Allan Beever "The Basis of the *Hedley Byrne* Action" in Kit Barker, Ross Grantham and Warren Swain (eds) *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Oxford, Hart Publishing, 2015) 83; Allan Beever *Rediscovering the Law of Negligence* (Oxford, Hart Publishing, 2007); Mark P. Gergen "Negligent Misrepresentation as Contract" (2013) 101(4) California Law Review 953.

[4] The measure of damages, remoteness and limitation rules have been referred to as the "incidental rules" of liability: see Goh Yihan and Man Yip "Concurrent Liability in Tort and Contract: An Analysis of Interplay, Intersection and Independence" (2017) 24(2) Torts Law Journal 148 at 149.

The finding has particularly important implications for issues of concurrent liability in pre-contractual misrepresentation. This is illustrated by the recent case of *Cygnet Farms Ltd v ANZ Bank New Zealand Ltd*.[5] This decision in particular demonstrates why the nature of the duty should be clarified in New Zealand.

In *Cygnet*, Mr and Mrs Swan incorporated Cygnet Farms Ltd (Cygnet) for the purpose of purchasing a dairy farm via a loan. An employee of ANZ gave a presentation to the Swans on interest rate swap arrangements.[6] The bank's presentation emphasised that swap arrangements were appropriate for the Swans' business needs and carried no substantial risk,[7] leading the Swans to enter into two such arrangements effective June 2008.[8] As a result of the Global Financial Crisis, the Swans incurred significant loss under the swaps.[9] Palmer J accepted Cygnet's allegation that ANZ had made a series of misrepresentations about the suitability of the swaps, and that significant help and service would be available to the Swans as part of the arrangement.[10]

Cygnet pleaded causes of action on the basis of negligent misstatement, pre-contractual misrepresentation, misleading and deceptive conduct pursuant to the Fair Trading Act 1986, and breach of a collateral term regarding the level of service ANZ would provide.[11]

The contract between the parties contained a variety of clauses purporting to limit the Bank's liability. The contract, which included 22 pages of Terms and Conditions, contained a clause fully excluding any liability for the Cygnets' loss and an entire agreement clause excluding any representations from being part of the contract.[12] The Swans also signed a swap confirmation which contained a large text box stating that each party had not relied on advice from the other.[13]

Palmer J held in relation to the contractual claim that the clauses contained in the Terms and Conditions excluded all liability. In relation to the negligent misstatement claim, his Honour held that the swap confirmation text box excluded a duty to provide sound

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[5] [2016] NZHC 2838, [2017] 2 NZLR 538.
[6] At [21].
[7] At [23] – [25].
[8] At [31].
[9] At [34] – [45].
[10] At [55].
[11] At [67].
[12] At [108].
[13] At [109].

investment advice. However, his Honour held that the parties were in a relationship of proximity for the purposes of a negligence claim, because of the Swans' vulnerability and degree of trust in the information provided. This proximity was not negated by the clauses in the Terms and Conditions, because these clauses were not sufficiently clear and transparent. As such, Palmer J found that ANZ owed and breached a duty of care "to ensure a proffered explanation is accurate or its reply to any inquiry is honest and correct".[14]

Ultimately, ANZ was held not to be liable to Cygnet due to the effect of s 6(1)(b) of the Contractual Remedies Act 1979, which[15] stated that a party induced to enter into a contract by a misrepresentation "shall not, in the case of… an innocent misrepresentation made negligently, be entitled to damages from [the] other party for… negligence in respect of that misrepresentation".[16] Palmer J stated that the outcome of the case signified a "gap" in the law in that it excluded the Cygnets from any form of compensation, when in principle they were entitled to compensation in tort.[17] He observed that the purpose of the provision "was evidently to ensure that the law of contract governs damages for misrepresentation between parties to a contract and that the law of torts does not".[18] He cited David McLauchlan's statement that abolishing concurrent liability for contractual and tortious misrepresentation was "seen as essential if the objective of simplifying the law by providing a common set of remedies for misrepresentation and breach of contract were to be fully implemented".[19] Palmer J asserted that the gap created by s 6(1)(b) ought to be addressed.[20]

The existence of this gap has been questioned.[21] Given that the Swans' signature indicated on an objective analysis that Cygnet was bound by the exclusion clause, that objective analysis ought also to indicate that it was not reasonably foreseeable that Cygnet would rely on the Bank's representations.[22] But this is in tension with the orthodox view that negligent misstatement is a duty which is imposed on the basis of the defendant's reliance;

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[14] At [154]. See Palmer J's analysis from [118] – [170].

[15] At [188], now Contract and Commercial Law Act 2017, s 35(1)(b). The Fair Trading Act claim was out of time.

[16] Contractual Remedies Act, s 6(1)(b).

[17] *Cygnet Farms*, above n 5, at [190].

[18] At [91].

[19] At [96], citing Contracts and Commercial Law Reform Committee *Misrepresentation and Breach of Contract* (incorporating further report presented January 1978 and Draft Contractual Remedies Bill) at 7.

[20] At [5].

[21] See Allan Beever "*Cygnet Farms* and the State of the Law of Negligence in New Zealand" 27(3) NZULR 601 at 611 – 616.

[22] At 616.

a defendant should not be able to use exclusion clauses to escape such imposed obligations unless they genuinely exclude such reliance. This points to the problem not being s 35(1)(b) (formerly s 6(1)(b)), but with the way that clauses in contractual documents are viewed under the law's objective approach.

It is because of practical implications such as these that it is important to understand whether the duty is best characterised as assumed or imposed. This dissertation sets out to answer this question.

II Dissertation Structure

In the remainder of Chapter One, I will explain the development of the negligent misstatement doctrine, and provide an account of the key features of the case law.

Chapter Two will explain the two major contrasting theories used to explain the negligent misstatement duty: the theory characterising the duty as a subset of the law of negligence (the *negligence model*), and the theory characterising it as arising on the basis of consent (the *consent model*).

Chapter Three will evaluate each of these models according to the features of the duty explored in Chapter One. I will conclude that both models are inconsistent with the duty in significant respects, and propose an alternative model based on induced reliance which accurately characterises the duty.

Chapter Four will evaluate the various practical implications of characterising the duty as based on induced reliance. As earlier indicated, these include considerations of the appropriate remoteness rules, measure of damages, and treatment of limitation periods. They also include the issues of contracting out raised by s 35(1)(b) and *Cygnet Farms*.

III Prior to Hedley Byrne

Before examining the features of the negligent misstatement duty, it is important to trace the historical development of the duty.

In the law of negligence, the distinction between statements causing physical harm and statements causing economic loss is historically significant. Claims against a defendant for making negligent statements causing physical harm are analysed the same way as negligent

actions using the three-step[23] duty of care framework.[24] In cases of acts or statements causing physical harm, it is generally sufficient that it is reasonably foreseeable that the statement would cause harm to a person in the position of the plaintiff.[25]

However, claims against defendants for negligently causing economic loss were not available outside the purview of contract until *Hedley Byrne*. In *Old Gate Estates Ltd v Toplis*,[26] Wrottesley J stated that the application of the neighbour principle was limited to cases of acts causing physical harm.[27]

The first case in English law suggesting the existence of a duty not to carelessly cause economic loss was *Candler v Crane, Christmas & Co*.[28] In that case, the plaintiff, who wished to invest in a company, requested the company's accounts. The accounts were negligently prepared, misleadingly portraying the company as financially healthy. The plaintiff subsequently lost his entire investment. The majority did not find a duty; Asquith LJ expressly agreed with and followed Wrotessley J's view in *Toplis*.[29]

Lord Justice Denning in dissent opined that the neighbourhood principle should expand to encompass liability for negligent misstatements causing economic loss. He stated that authorities prior to *Donoghue v Stevenson* did not prohibit non-contractual liability for misstatements.[30] He also challenged Wrotessley J's view in *Toplis*, stating that when a

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[23] Christian Witting *Liability for Negligent Misstatements* (Oxford, Oxford University Press, 2004) at 82 – 83: see *Clay v AJ Crump and Sons Ltd* [1964] 1 QB 533 (CA); *Perrett v Collins* [1998] 2 Lloyd's Rep 255 (CA). Lord Atkin's neighbour principle was that defendants owe a duty of care not to harm their neighbours, those neighbours being "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question": *Donoghue v Stevenson* [1932] AC 562 (HL) at 580.

[24] A negligence claim follows the structure originally established in *Anns v Merton LBC* [1978] AC 728 (HL), whose most recent restatement in New Zealand is found in *North Shore City Council v Attorney-General (The Grange)* [2012] NZSC 49, [2012] 3 NZLR 341. In the *North Shore* formulation of the approach, the court first examines "everything bearing upon the relationship between the parties" (foreseeability and proximity) to establish a prima facie duty. It then examines policy considerations which may negate or limit the scope of the duty, specifically "the effect on non-parties and on the structure of the law and on society generally": at [156] per Blanchard J.

[25] Stephen Todd "Negligence: The Duty of Care" in Stephen Todd and others *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) 147 at 174.

[26] [1939] 3 All ER 209 (KB).

[27] At 215 – 216.

[28] [1951] 2 KB 164 (CA).

[29] At 189.

[30] *Candler*, above n 28, at 177. Prior to *Donoghue v Stevenson*, it was decided in *Derry v Peak* (1889) 14 App Cas 337 (HL) that liability was not imposed under the tort of deceit for misstatements that were merely careless rather than fraudulent. Denning LJ held that this case did not stand for the proposition that liability

relationship of proximity and a corresponding duty is established, liability should not depend on the nature of the damage; he regarded such a distinction as artificial.[31]

IV The Rule in Hedley Byrne

Lord Justice Denning's dissent in *Candler* heralded the unanimous decision in *Hedley Byrne*. Hedley Byrne, the appellant, placed advertising orders for a company called Easipower, and was personally liable for the cost of those orders. The appellant asked its bank to inquire into Easipower's financial stability. The appellant's bank consulted with the respondent and Easipower's bank, Heller & Partners Ltd. The respondent provided a favourable letter of reference regarding Easipower's finances. However, the letter stated that the reference was provided "without responsibility on the part of the bank or its officials".[32]

The House of Lords held that the letter excluded liability in this case. However, it also held that in certain cases there may be a 'special' duty not to cause economic loss by making a careless misstatement, and liability may be imposed on that basis. The House of Lords emphasised two distinctions between Hedley Byrne and cases like Donoghue v Stevenson: the distinction between negligent acts and negligent words; and the distinction between physical harm and economic loss. The House of Lords considered whether liability could be extended to negligent words as well as negligent acts, and whether it could attach to economic loss as well as physical harm.

Regarding the first distinction, Lord Devlin said that if "the tort of negligence could not extend to words... the law would be gravely defective".[33]

Lord Reid stated that what distinguishes from negligent actions is that people will often make statements on informal occasions where the statements are not made for the purpose of providing professional advice.[34] Another difference is that a statement can be broadcast to an infinitely wide audience.[35] For these reasons, to be liable for a negligent misstatement, it is not enough that a defendant contemplates that her statement could foreseeably cause

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for the proposition that a defendant can never be under a special duty not to negligently misstate information. Rather, no such duty arose on the facts of *Derry*.

[31] At 179.

[32] *Hedley Byrne*, above n 1, at 468.

[33] At 516.

[34] At 482 – 483.

[35] At 483.

harm; a 'special relationship' between the defendant and the plaintiff is required.[36] A defendant must assume some specific responsibility to the plaintiff with respect to that statement.[37]

Regarding the second distinction, the House of Lords largely agreed with Denning LJ's view in *Candler* that the nature of the damage should be irrelevant.[38] Comparatively little attention was given to the issue of economic loss, but this issue is significant and will be further discussed in subsequent chapters.

A passage from Lord Reid's judgment summarises what he saw as the requirements for the negligent misstatement duty to arise as follows:[39]

> A reasonable man, *knowing that he was being trusted or that his skill and judgment were being relied on*, would… have three courses open to him. He could keep silent or decline to give the information or advice sought: or he could give an answer with a clear qualification that he accepted no responsibility for it… or he could simply answer without any such qualification. *If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require*.

V Features of the Special Relationship

The cases since *Hedley* have elaborated on and developed the features of the negligent misstatement doctrine.[40]

The courts have subsequently emphasised that the "special relationship" referred to in *Hedley* is necessary for recognition of the duty.[41]

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[36] At 486. See also Lord Pearce's statement that the duty is created "by special relationships which, though not fiduciary, give rise to an assumption that care as well as honesty is demanded": at 539.

[37] At 486.

[38] For instance, at 509 per Lord Hodson, where his Lordship stated that "it is difficult to see why liability as such should depend on the nature of the damage", and at 517 per Lord Devlin, where his Lordship observed that it was highly incoherent that a claimant is excluded from recovering economic loss unless she gives some nominal consideration to the other party.

[39] At 487 (emphasis added).

[40] In this section I merely describe what the features of the duty are judicially understood to be *according to the case law*. I offer my own interpretation of these features of the duty in subsequent chapters.

[41] See *Scott Group v McFarlane* [1977] 1 NZLR 553 (CA) at 566; *Caparo Industries Ltd v Dickman* [1990] 2 AC 605 (HL) at 624, 632; *The Grange*, above n 24, at [165].

In *Caparo Industries Ltd v Dickman*, Lord Oliver summarised the requirements for the special relationship to arise (the "*Caparo* requirements") as follows:[42]

> [T]he necessary relationship… may typically be held to exist where (1) the advice is required for a purpose… which is made known… to the adviser at the time when the advice is given; (2) the adviser knows… that his advice will be communicated to the advisee, either specifically or as a member of an ascertainable class, in order that it should be used by the advisee for that purpose; (3) it is known… that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent inquiry, and (4) it is so acted upon by the advisee to his detriment. That is not, of course, to suggest that these conditions are either conclusive or exclusive.

Judges have viewed the presence of this special relationship as indicating that the foreseeability and proximity tests of the three-step framework of a negligence analysis have been satisfied.[43]

Despite the comment that the *Caparo* requirements are not "conclusive or exclusive", in practice they have been treated by the New Zealand courts as a necessary and sufficient requirement for proximity to arise.[44] Even if these conditions are met and the special relationship is established, the duty may be negated at the policy stage of the negligence framework.[45]

Below I discuss the major features of liability: reliance, special skill, vulnerability and the impact of contractual matrices.

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[42] At 638. Knowledge of likelihood can be interpreted to mean reasonable foreseeability; as emphasised by Lord Steyn in *Williams v Natural Life Health Foods* [1998] 2 All ER 577 (HL).

[43] *Caparo*, above n 41, at 632; *Attorney-General v Carter* [2003] 2 NZLR 160 (CA) at [27]; *The Grange*, above n 24, at [165].

[44] See *Carter*, above n 43; *The Grange*, above n 24, at [187] – [199]; *Invercargill City Council v Southland Indoor Leisure Centre Charitable Trust* [2017] NZCA 68, [2017] 2 NZLR 650. at [186] – [198]. The courts may claim that the proximity analysis in a negligent misstatement claim is a broad inquiry where the Caparo requirements are only relevant factors: see *R M Turton & Co Ltd (in liq) v Kerslake and Partners* [2000] 3 NZLR 406 (CA) at [35] – [36]. However, the factors underpinning a proximity analysis in a negligent misstatement case can all be understood as answering the question of whether the defendant would reasonably have foreseen that the plaintiff would be likely to rely on the statement without independent inquiry.

[45] *The Grange*, above n 24, at [175]. There appears to have been no negligent misstatement case in New Zealand where a prima facie duty has been established but negated purely by policy considerations in New Zealand.

A Reliance

The plaintiff must factually rely on the statement to their detriment, and the defendant must reasonably foresee that this will occur.[46] The defendant must also have foreseen that the statement would be relied upon for a specific purpose known to the defendant and by a sufficiently specific class. In *Scott Group v McFarlane*,[47] Richmond P stated in dissent that for the necessary relationship to exist, "the maker of the statement ought in all the circumstances… to have directed his mind… to some particular and specific purpose for which he was aware that his advice or information would be relied on".[48] In *Scott Group*, the plaintiff company had relied on the accounts of another company for the purposes of making a takeover bid. The defendant, who had prepared the accounts for the company to be acquired, was not aware of this specific transaction. Richmond P held that a duty could not be owed "merely because it was reasonably foreseeable, in a general way, that a transaction of the kind in which the plaintiff happened to become involved might indeed take place".[49]

This reasoning was eventually accepted in New Zealand in *Boyd Knight v Purdue*.[50] In this case, the defendants issued a prospectus pursuant to the Securities Act 1978 describing the financial records of a company issuing shares to the public. The Court of Appeal held that the defendants knew that a class of public investors would invest in the company, and that they would be likely to rely on the contents of the prospectus for the purpose for which it was issued: to help public investors make an informed investment decision.[51]

B Special Skill

In *Hedley Byrne*, Lord Morris added a requirement of 'special skill' to the requirements for negligent misstatement articulated by the other Lords. He stated that "if someone possessed

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[46] See *Attorney-General v Carter*, above n 43, at [26]. Implicit in the notion of reasonable foreseeability is that it would be reasonable for the plaintiff to rely: the requirement that reliance be reasonable is discussed in cases such as *Hercules Managements Ltd v Ernst and Young* [1997] 2 SCR 165 at 200 and *Brownie Wills v Shrimpton* [1998] 2 NZLR 320 (CA) at 324. If the statement does not provide any reasonable basis for the plaintiff's action, it cannot be said that reliance on it is reasonably foreseeable.

[47] [1977] 1 NZLR 553 (CA).

[48] At 566.

[49] At 566. This analysis was approved by Lord Bridge in *Caparo*, above n 41, at 624.

[50] [1999] 2 NZLR 278 (CA) at [45], [52].

[51] This would have been enough to establish the duty but for the factual lack of reliance by the plaintiffs, who relied only on the fact that the prospectus was issued, rather than its contents: at [58] – [60].

of a *special skill* undertakes… to apply that skill for the assistance of another person *who relies upon such skill*, a duty of care will arise".[52]

Although the need for the defendant to possess a special skill was articulated originally only by Lord Morris, later cases have elaborated upon this requirement. In *Mutual Life and Citizens' Assurance Co Ltd v Evatt*,[53] the Privy Council held that a defendant will only be liable for a negligent misstatement if he has "let it be known to the recipient of the [statement] that he claims to possess that degree of skill and competence and is willing to apply that… to the provision of any [statement] which he supplies in the course of [his]] business".[54] This suggests that a special skill will indicate that it is reasonable for the plaintiff to rely on the statement.

The requirement has been interpreted more broadly in successive cases. In *Spring v Guardian Assurance plc*,[55] the plaintiff requested a reference from a former employer, which was negative and allegedly negligently prepared. The fact that the employer did not possess any specialised skill in the practice of providing references did not prevent the recognition of a duty. Lord Goff stated that preparing a reference is a skill that falls within the expertise of an employer in a *general* sense, and this was sufficient to establish the duty.[56]

The requirement has been treated even more loosely in New Zealand. In *Meates v Attorney-General*,[57] which was about negligent statements and conduct made by the Government in respect of an agreement with the plaintiff to establish industrial production on the South Island's West Coast, the Court of Appeal held that the narrow principle in *Evatt* was limited to its own facts.[58] Although the Government's statements were not made on the basis of any specialised skill or knowledge, the "practical alliance" formed by the plaintiff and the Government "resulted in such a 'relationship of proximity or neighbourhood' that a clear duty on the Government to be careful in its… statements… was amply indicated".[59] Similarly, in *Attorney-General v Carter*, Tipping J framed special skill as a flexible

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[52] *Hedley Byrne*, above n 1, at 502 – 503. (Emphasis added). Lord Hodson agreed with Lord Morris's view at 514.
[53] (1968) 122 CLR 556 (PC).
[54] At 804, per Lord Diplock. His Lordship did note that there may be cases in which special skill is not required, such as where the defendant has a financial interest in the transaction: at 809.
[55] [1995] 2 AC 296 (HL).
[56] At 320.
[57] [1983] NZLR 308 (CA).
[58] At 333.
[59] At 333.

concept, because it is more applicable to some negligent misstatement scenarios than others,[60] and should be regarded merely as "[a] relevant ingredient of the conventional [approach to finding a duty of care]".[61]

C Vulnerability

Special skill has also been linked to the plaintiff's vulnerability and dependence on the defendant. In *Turton v Kerslake*, which was about a series of contracts for the construction of a hospital, the architect engaged an engineering firm, Kerslake, to prepare engineering specifications for the hospital including specifications for the installation of heat pumps. Kerslake contracted with Turton for work to be carried out according to these specifications. Turton sub-contracted with George Mechanical to install the heat pumps. The heat pumps functioned poorly due to incorrect specifications provided by Kerslake, and Turton sought to recover the cost of remedial work to the heating system.

The difference between the approaches to the special skill requirement of the majority and Thomas J in dissent is revealing. Thomas J stated that Kerslake, having expertise in mechanical engineering, possessed the special skill required for the duty to arise.[62] The majority, in contrast, held that Kerslake did not apply any relevant special skill because it relied on the representations about the output of the heat pumps made by the manufacturers to prepare the specifications, just as Turton relied on these specifications to prepare its tender documents.[63] The implication is that even if the defendant applies a special skill in making the statement, the role of that special skill must be to signify that the plaintiff is dependent on the defendant's advice.

This point was further reinforced by *Rolls-Royce New Zealand Ltd v Carter Holt Harvey Ltd*,[64] where Glazebrook J stated that one aspect of the proximity inquiry is to ask whether a "defendant with *special skills* has power over a *vulnerable plaintiff*".[65] In *Rolls-Royce*,

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[60] *Turton*, above n 44, was a case which explicitly applied the special skill requirement. Tipping J stated that *Turton* was a case where special skill was a matter which "the Court considered it was appropriate to focus [on] in the particular circumstances of that case and the way it was argued": *Carter* at [32].

[61] *Carter*, above n 43, at [32]. By the "two-stage approach", his Honour refers to the general approach for determining a duty of care. This was reinforced in *Rolls-Royce*, where Glazebrook J stated that the proximity inquiry generally focuses on the interdependent concepts of assumption of responsibility by a person with a special skill and foreseeable and reasonable reliance by the plaintiff": *Rolls-Royce* at [97].

[62] *Turton*, above n 44, at [83].

[63] At [28].

[64] [2005] 1 NZLR 324 (CA).

[65] At [61] (emphasis added).

Carter Holt Harvey contracted with ECNZ for the construction of a cogeneration plant. ECNZ contracted with Rolls-Royce to design, construct, and commission the plant. The plant was defective, allegedly because of negligence by Rolls-Royce. Glazebrook J held that even though Rolls-Royce applied highly specialised skills in constructing the plant, this factor was diminished because Carter Holt could exercise a degree of control over the construction process through a liaison engineer.[66]

More generally, whether the plaintiff was vulnerable because it lacked the ability to protect itself from the loss suffered has been regarded as an important consideration. This is illustrated by *Invercargill City Council v Southland Indoor Leisure Centre Charitable Trust*. In this case, the inquiry was whether the Invercargill City Council owed a duty in respect of issuing a code compliance certificate. The Southland Indoor Leisure Centre Charitable Trust was established by the Council to construct Stadium Southland. During construction, the roof sagged, which was a result of design errors on the part of the Trust's consulting engineer. An independent engineer was enlisted to make designs for remedial work. The Council required the consulting engineer to provide a producer statement certifying that the completed remedial work met the specifications set by the independent engineer. The consulting engineer made the producer statement without inspecting the work, which was defective. The Council issued a code compliance certificate before it even received the producer statement. The roof subsequently collapsed in a snowstorm. The Trust brought claims against the Council in negligence and negligent misstatement, and was successful.[67] The Council appealed the decision.

In the Court of Appeal, the majority held that the Trust had "chosen to protect itself against physical damage and economic loss by engaging professional advisers and contractors", and the purpose of a code compliance certificate is not to protect parties in such a situation.[68] The Trust was able to protect itself by contract against the negligence of the engineer by requiring him to carry insurance cover to indemnify the Trust.[69] For these reasons, the Trust was not vulnerable with respect to the Council, and therefore the Council did not owe a duty.[70]

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[66] At [102].

[67] The Trust was successful on the basis of the rule in *Body Corporate No 207624 v North Shore City Council* (*Spencer on Byron)* [2012] NZSC 83, [2013] 2 NZLR 297 that Councils owe a duty of care in respect of all buildings subject to the Building Act 1991: see *Leisure Centre*, above n 44, at [51]. The Court of Appeal unanimously distinguished *Spencer on Byron*: see the majority's analysis from [165] – [166] and Miller J's analysis from [65] – [84].

[68] At [190].

[69] At [196].

[70] At [198].

Vulnerability in this sense is intrinsically linked to reliance. In *Rolls-Royce*, Carter Holt was not vulnerable because it did not have to intrinsically rely on the application of Rolls-Royce's specialised skills. In *Leisure Centre*, the Trust was not vulnerable because it could compel its agents to indemnify it against the risk of loss. Vulnerability can be understood simply as a corollary of the *Caparo* requirements. If the plaintiff was not vulnerable in the sense that they could reasonably protect themselves from loss, then it could not be reasonably be expected that the plaintiff would detrimentally rely on the defendant's statement. The significance of this will be highlighted in Chapter Three.

D Contractual Context

The presence of a "contractual matrix" where responsibility is allocated to different parties by contract may, in some circumstances, displace a duty of care. In *Turton*, the majority held that the terms of the contracts between the various parties involved allocated risk in respect of the specifications to George Mechanical, rather than Kerslake.[71] In particular, a clause in the tender contract between Turton and the architects stated that Turton "guarantees that the equipment installed will perform as described in the Specification… and that he can provide the labour, plant, materials and equipment necessary to carry out the work…"[72]

The court claimed in *Turton* that by examining the allocation of risk in the contractual matrix the parties were in it was going beyond the *Caparo* requirements to determine proximity and policy. However, analysis of the contractual matrix can be seen simply as part of the question of determining whether the plaintiff would be likely to act on the defendant's advice without independent inquiry. According to the majority, George Mechanical should have checked whether the specifications were accurate and met the needs of the building.[73] If the contractual matrix indicates that the defendant was to bear

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[71] *Turton*, above n 44, at [24]. In his dissent Thomas J took the view that once it was shown that the *Caparo* requirements had been satisfied, this was enough to indicate that the general test for establishing a duty of care was satisfied and the contractual matrix could not displace this finding: see his Honour's analysis at [102] – [109]. Interestingly, his Honour's analysis from [78] – [101] focuses on whether a careless misstatement was made, whether Kerslake possessed special skills, and whether Turton relied on the statement, eschewing any analysis of whether Kerslake assumed responsibility in respect of the statement. This would indicate that Thomas J regarded the duty as imposed and arising on the basis of reasonable foreseeability of reliance.

[72] At [23].

[73] At [24].

the risk and responsibility for completion of their task, the plaintiff would likely rely on the defendant's advice. This becomes significant in my analysis in Chapter Three.

VI Assumption of Responsibiity: Voluntary or Deemed?

Another way the courts have asked the question of whether the special relationship exists is to ask whether the defendant assumed a responsibility to take care in making the statement.[74] The defendant must have assumed responsibility to the plaintiff to take reasonable care in making a statement.[75] The meaning of "assumption of responsibility" in this context has been understood in different ways in the case law.

In *Smith v Eric S Bush*,[76] Lord Griffiths stated that "the phrase 'assumption of responsibility' can only have any real meaning if it is understood as referring to the circumstances in which the law will *deem* the maker of the statement to have assumed responsibility to the person who acts upon the advice".[77] *Smith* was concerned with the purchase of a house with financial assistance provided by a building society. The building society enlisted a surveyor to carry out a valuation of the property for this purpose, and the surveyors' report misleadingly stated that the building was structurally sound. Lord Griffiths stated that "the purpose of providing the report [was] to advise the mortgagee but it [was]… highly probable that the purchaser [would] in fact act on its contents, although that was not the primary purpose of the report." In that situation Lord Griffiths recognised a duty to take reasonable care in preparing the report, but not on the basis that the surveyor had assumed responsibility to do so, because the purpose for which the statement was relied on was not the primary purpose for which it was made.[78]

However, in *Williams v Natural Life Health Foods* the House of Lords appeared to take the view that evidence of an actual assumption of legal responsibility was required, stating that the key inquiry was whether "the [defendant] … conveyed directly or indirectly to the [plaintiffs] that [he] assumed personal responsibility toward [them]".[79] In *Williams*, the question was whether the director of a franchisor company was personally liable for providing negligent advice to franchisees. Lord Steyn stated that the defendant could not have assumed responsibility to the plaintiffs because there had been no dealings between

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[74] *Scott Group*, above n 41 at 566; *Caparo*, above n 41, at 632; *Leisure Centre*, above n 44, at [186].
[75] See for instance *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL) at 181.
[76] [1990] 1 AC 831 (HL).
[77] At 862.
[78] At 865.
[79] *Williams*, above n 42, at 835.

the defendant in his personal capacity and the plaintiffs. Evidence of such personal dealings pointed to a factual assumption of responsibility, which was regarded as a necessary prerequisite for the duty.[80]

The New Zealand courts have adopted Lord Griffiths' view that "assumption of responsibility" refers only to the imposition of legal responsibility on the defendant as a result of the defendant's conduct. In *Carter*, Tipping J stated that "in most cases… there will be no voluntary assumption of responsibility. The law will, however, deem the defendant to have assumed responsibility … if … the defendant foresees or ought to foresee that the plaintiff will reasonably place reliance on what is said".[81]

Although the judicial consensus is that the assumption of responsibility is merely deemed by the court, it could be argued that this view misdescribes the nature of negligent misstatement cases. The defendant's making of the statement evinces evidence of an actual assumption of responsibility by the defendant. This debate is central to my inquiry, and I explore it further in Chapters Two and Three.

VII Conclusion

This chapter traced the development of the law of negligent misstatement causing economic loss. It also examined the requirements for recognition of the negligent misstatement duty as they are applied in contemporary case law. To establish the "special relationship" required for the negligent misstatement duty, the defendant must make the statement for a particular purpose and to a defined class, knowing that the plaintiff is likely to rely on the statement for that purpose. These requirements could be used to support a view of the duty either as assumed or imposed. In the next chapter I turn to explain how scholars have constructed different explanations of the nature of the duty on this basis.

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[80] At 835.

[81] *Attorney-General v Carter*, above n 43, at [26]. *Carter* has been endorsed more recently: see *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78 at [115].

Chapter Two: Models Used to Explain the Negligent Misstatement Duty

I Overview

Judges and scholars have provided two broad models under which the negligent misstatement duty is said to operate: the consent model and the negligence model. This chapter explores these broad models, and the explanations they provide for the features of the duty.

II The Negligence Model

One view is that the duty is imposed by the law within the negligence framework.[82] On this view, negligent misstatement is a mere subset of negligence, where the *Caparo* requirements are applied to establish foreseeability and proximity but policy considerations can negate the duty. The case law examined in Chapter One demonstrates that this view reflects judicial statements about the duty.[83] Scholars have made arguments defending this view and criticising the consent model.

It can be argued, in agreement with cases like *Carter*, that the notion of "assumption of responsibility" merely refers to the law having *deemed* the defendant to have assumed responsibility. It is the relationship between the plaintiff and defendant that gives rise to the duty, rather than any assumption of responsibility. It is accepted that the defendant voluntarily acts by choosing to make a statement, but it is not this voluntary act that gives rise to the duty.[84] The defendant's voluntary conduct does not indicate that the defendant has manifested consent to the obligation.[85] Indeed, voluntary conduct permeates the law of negligence generally and other categories of law, but it is not said that such conduct gives rise to the relevant obligation.[86] Instead, the *Caparo* requirements indicate that there is a relationship of sufficient proximity between the defendant and the plaintiff, and it is on this basis that the duty is imposed.

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[82] See Robertson and Wang, above n 2.
[83] With the exception of cases such as *Williams*, above n 42.
[84] See Robertson and Wang, above n 2, at 56 – 57.
[85] At 56.
[86] Barker "Unreliable Assumptions in the Law of Negligence", above n 2, at 474.

Below, I examine the role played by each of the stages of the duty of care framework in determining negligent misstatement liability under the negligence model: reasonable foreseeability, proximity and policy.

A Role of Reasonable Foreseeability

To establish a duty of care, harm to the plaintiff must be reasonably foreseeable.[87] It has been suggested that the foreseeability stage provides "a minimum basis upon which to demand that the defendant should have considered the need for, and taken reasonable steps to avoid, the causation of harm".[88] This explains the need for reasonable foreseeability of reliance by the plaintiff as a necessary, but not sufficient, condition for establishing the duty.

B Role of Proximity

In establishing a duty of care, there must be a relationship of proximity between the parties.[89] This involves considering "everything bearing upon the relationship between the parties"[90] and "balancing… the moral claims of the parties".[91] The core function of the proximity analysis can be said that it goes beyond reasonable foreseeability to determine whether there are significant causal pathways by which a defendant could harm a plaintiff by their conduct, and whether the defendant therefore has a moral obligation to take care.[92]

The *Caparo* requirements can be interpreted as the requirements in the negligent misstatement context by which proximity is established. If the defendant makes a statement to a defined class of people for a particular purpose, and can reasonably foresee that the

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[87] *The Grange*, above n 24, at [157].

[88] Witting *Liability for Negligent Misstatements*, above n 23, at 25. New Zealand courts are in agreement with this view: see *The Grange*, above n 24, at [157].

[89] *The Grange*, above n 24, at [152].

[90] At [156].

[91] At [158].

[92] Witting *Liability for Negligent Misstatements*, above n 23, at 26 – 27. In New Zealand the proximity analysis appears to be broader, allowing for consideration of "interpersonal policy considerations" such as whether holding the defendant liable would be disproportionate to the harm they caused to the plaintiff: *The Grange*, above n 24, at [159]. However, this appears to be merely a reflection of the fact that New Zealand courts are willing to consider whether policy factors negate the duty at any stage of the approach: *The Grange* at [149]. When the proximity analysis is reduced to its core, the *Caparo* requirements as the finding of a significant causal pathway to harm still appears to be the central consideration. See also Todd "Negligence: The Duty of Care" at 159, which states that proximity is a means of identifying who is most appropriately placed to take care to avoid causing harm to the plaintiff (cited in *The Grange* at [158]).

plaintiff will detrimentally rely on the statement for that purpose, this constitutes a significant causal pathway by which the defendant can harm the plaintiff.

Unlike in cases of physical harm, it is not sufficient to show reasonable foreseeability. It is not enough for the defendant to publish a statement in a forum which can be accessed by the general public and anticipate that it might be relied on for a range of purposes, as the defendant had in *Scott Group*.[93] The *Caparo* requirements must also be satisfied: it must be known that a defined class of people will rely on the statement for a known purpose. The "added stringency" of the *Caparo* requirements "reflect the need to constrain duties based on the foreseeable effects of careless behaviour for countervailing ethical or pragmatic reasons".[94] Two such reasons can be identified.

First, the law of negligence is generally averse to allowing recovery of economic loss unless there is some special justification for doing so.[95] Economic interests are generally treated as less fundamental and necessary to protect than bodily integrity and property interests.[96] Various reasons are given for this: economic interests are merely contingent, representing only the capacity to acquire goods and services in the future;[97] economic interests physical damage cases result in a net loss to social wealth while economic loss cases usually only involve a *transfer* of wealth,[98] and allowing recovery for economic loss generally can expose defendants to indeterminate liability.[99]

Second, and relatedly, words have an even higher potential to expose defendants to indeterminate liability.[100] As observed by Lord Pearce in *Hedley Byrne*, a property of words is that "they are used without being expended… if the mere hearing… of words [creates]

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[93] Such a situation might be regarded as analogous to the situation of product liability, where the defendant manufactures a product and the public at large relies on its quality so as not to cause physical harm. In such a situation, foreseeability of harm would be sufficient: see Todd "Negligence: The Duty of Care", above n 25, at 174. Such foreseeability is not sufficient in cases of negligent misstatements causing economic loss.

[94] Kit Barker "*Hedley Byrne v Heller:* Issues at the Beginning of the Twenty-First Century" in Kit Barker, Ross Grantham and Warren Swain (eds) *The Law of Misstatements: 50 Years on from* Hedley Byrne v Heller (Oxford, Hart Publishing, 2015) 3 at 16.

[95] See *Caparo*, above n 41, at 618, per Lord Bridge.

[96] Witting *Liability for Negligent Misstatements*, above n 23, at 38.

[97] At 38.

[98] *Perre v Apand* (1999) CLR 180 (HCA) cited in *Rolls-Royce*, above n 64, at [63].

[99] See *Ultramares Corporation v Touche* 174 NE 441 at 179.

[100] At 179.

proximity", there would be "no limit to the persons to whom the speaker or writer could be available".[101]

C Role of Policy

Courts will refuse to recognise a duty of care even if the foreseeability and proximity tests are satisfied when policy considerations external to the parties mean that it is not "fair, just and reasonable" to impose a duty of care.[102] Witting argues that this stage of the analysis is only to be used to "tak[e] [the duty] into new areas or withdraw… it from its current area of operation".[103] Proximity should remain the dominant criterion by which a duty is established.[104]

Proponents of the negligence model hold that policy considerations play a legitimate role in the recognition of the negligent misstatement duty, because at its essence the imposition of a duty of care is a normative decision.[105] They are candid about the notion that the negligence framework is a mechanism to determine whether it is 'reasonable' to impose the duty. An assessment of proximity according to the *Caparo* requirements, supplemented by residual policy considerations, provides internal structure to this normative enquiry.[106]

This is illustrated by *Customs and Excise Commissioner v Barclays Bank plc*.[107] In this case, the claimant obtained a freezing injunction over a debtor's accounts at Barclays Bank, the defendant. The question was whether the Bank had assumed responsibility not to allow money to leave the accounts. Lord Mance stated that it was "difficult in any meaningful sense to speak of the bank as having voluntarily assumed responsibility."[108] He added that "in a very general sense any bank… might be said to accept the risk that a third party might

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[101] *Hedley Byrne*, above n 1, at 534, per Lord Pearce.

[102] *The Grange*, above n 24, at [160].

[103] Witting "The Relationship Between Negligence and Misstatements" in "What are We Doing Here? The Relationship Between Negligence in General and Misstatements in English Law" in Kit Barker, Ross Grantham and Warren Swain (eds) *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Oxford, Hart Publishing, 2015) 223 at 240.

[104] See Witting *Liability for Negligent Misstatements*, above n 23, at 29 – 33.

[105] See Witting *Liability for Negligent Misstatements*, above n 23, ch 3. Such policy considerations include the higher importance of protecting physical and proprietary interests over economic interests, indeterminacy of liability, and risk allocation. As I later explain, the role of policy in the negligent misstatement analysis is negligible because these policy considerations are actually explicable on the basis of the *Caparo* requirements.

[106] Witting "The Relationship Between Negligence and Misstatements", above n 103, at 240.

[107] [2007] 1 AC 181 (HL).

[108] At [94].

obtain a freezing order in respect of [assets].”[109] Lord Hoffmann stated that “questions of fairness and policy will enter into the decision and it may be more useful to try to identify these questions than simply to bandy terms like ‘assumption of responsibility’ and “fair, just and reasonable.’”[110] The Bank was deemed to owe an assumption of responsibility, but this was essentially a normative decision based on policy considerations, such as the fact that a duty would interfere with the principle that the freezing order regime imposes only a duty to the court.[111]

III The Consent Model

A contrasting explanation of the nature of the duty is that it is assumed by the party providing the statement by virtue of voluntarily acting to provide the statement. Below, I examine important aspects of negligent misstatement liability: the defendant’s assumption of responsibility, the role played by reliance, special skill and vulnerability, and the explanation for the absence of consideration in negligent misstatement cases.

A Assumption of Responsibility

Beever considers that the duty is more readily explained as arising from the plaintiff’s consent and intention than within the negligence framework, and that the term “assumption of responsibility” should be understood as referring to such consent.[112] He states that the general principle that a duty of care arises on the basis of reasonable foreseeability of harm is insufficient to explain the negligent misstatement duty, because the duty is not owed to those who rely on the statement without the defendant’s specific knowledge or consent, even if such reliance was reasonably foreseeable.[113] As such, when assessing negligent misstatement under the general duty of care approach, the overwhelming focus must be on

[109] At [94].

[110] At [36].

[111] See discussion from [17] – [21].

[112] One justification that Beever provides for his view is that the fact that the negligent misstatement duty allows recovery for economic loss can only be explicable on the basis that the duty is based on consent. Beever adheres to the view that private law is structured around the protection of rights which are either personal, proprietary or based on consent: Beever *Rediscovering the Law of Negligence*, above n 3, at 311. Beever contends that a right not to be economically harmed does not exist as a personal or proprietary right: at 267. Whether this is true is a debate that I cannot feasibly evaluate in this dissertation. I do not pursue this argument further, instead focusing on other aspects of the debate between the consent and negligence models.

[113] At 275.

whether policy considerations negate the duty.[114] While the negligence framework can conceivably recognise the negligent misstatement duty, the various policy considerations limiting the circumstances in which a duty will arise erode the general principle that a duty of care will arise on the basis of reasonable foreseeability, to the point that this principle has little role to play at all. The task of finding a negligent misstatement duty therefore bears little resemblance to the process of finding a duty of care generally.[115] Applying Occam's razor, Beever states that the simpler explanation for the duty is that the defendant assumes responsibility. The *Caparo* requirements which might be applied to establish a relationship of proximity under the negligence model can simply be viewed as evidence that responsibility has been assumed.[116]

The contractual matrix cases such as *Turton* could be explained on this basis. In *Turton*, the majority held that it would not be fair, just or reasonable to impose the duty because to do so "would cut across and be inconsistent with the overall contractual structure which defines the relationships of the various parties."[117] However, the fact that the risk for the heat pump specifications was allocated to George Mechanical who installed the heat pumps, rather than Kerslake who prepared the specifications, simply indicates that George Mechanical assumed responsibility. Policy considerations would not be required to explain the outcome.

To explain this point, Beever uses an example of an economist who provides a positive economic forecast on television.[118] Policy considerations, such as the indeterminately large potential class of plaintiffs, could be used to explain why the economist does not owe a duty despite the reasonable foreseeability of the economist's audience. But Beever states that the outcome is more readily explicable on the basis that the economist did not assume responsibility with respect to the audience's reliance on the forecast. According to Beever, such situations illustrate why the consent model holds greater explanatory power than the negligence model.

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[114] In making this argument, Beever characterises the proximity requirement as so amorphous as to be akin to policy: see Beever "The Basis of the *Hedley Byrne* Action", above n 3, at 93. In Chapter Three I consider the contrasting view that proximity establishes the duty, and the neighbour principle of reasonable foreseeability is distinct from proximity because it establishes the class of people to whom the duty is owed.

[115] Beever "The Basis of the *Hedley Byrne* Action", above n 3, at 93.

[116] Beever *Rediscovering the Law of Negligence*, above n 3, at 293.

[117] *Turton*, above n 44, at [32].

[118] Beever "The Basis of the *Hedley Byrne* Action", above n 3, at 91.

The assumption of responsibility arises on the basis that implicit in the statement is an assurance that the representation is accurate and relying on it will not harm the plaintiff.[119] Beever provides the example of someone who babysits for a friend, and allows the children to drink from the liquor cabinet. As Beever observes, it would be nonsensical to claim that the promise to babysit them did not entail an implied assurance that the babysitter would not allow the children to do this.[120] The provision of information involves a similar kind of assurance.

Williams emphasises the role of communication in the assumption of responsibility, thereby reinforcing Beever's example. Lord Steyn stated that "the inquiry must be whether the director… *conveyed* an assumption of responsibility directly or indirectly towards the prospective franchisees."[121] His Lordship's emphasis on the need to *convey* an assumption of responsibility suggests that the assumption of responsibility arises as part of the defendant's statement.

B Role of Reliance

Beever considers that reliance is a requirement of negligent misstatement cases only because the defendant assumes responsibility for the claimant's reliance on the statement.[122] Detrimental reliance is therefore necessary as a matter of causation.[123] However, actual reliance is not in itself a requirement for recognition of the duty.

The need for reliance to be reasonably foreseeable, for a known purpose and by a limited class can be explained on the basis that the defendant assumes responsibility for the statement made only for that purpose.[124] The defendant does not assume responsibility for the statement being relied upon for a different purpose, because the defendant never turned her mind to such a purpose.

C Role of Special Skill and Vulnerability

Beever regards the requirement of special skill in the same broad sense as judges have in cases such as *Spring*, *Meates* and *Carter*. On Beever's view, specialised skill or knowledge

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[119] Beever "The Basis of the *Hedley Byrne* Action", above n 3, at 105 – 106.
[120] At 105 – 106.
[121] *Williams*, above n 42, at 835 (emphasis added).
[122] Beever *Rediscovering the Law of Negligence*, above n 3, at 300.
[123] At 300.
[124] At 293.

may be an important consideration in determining whether the defendant assumed responsibility.[125] However, there can be cases like *Meates*, where the Government made assurances about establishing industrial production centres. In such a case, the defendant does not possess any such skill or knowledge, but the broader context and relationship between the parties indicate that the defendant assumed responsibility.

Although Beever does not discuss the link between the defendant's special skill and the plaintiff's vulnerability,[126] such vulnerability would also appear to be analytically useful in determining assumption of responsibility. If the plaintiff is dependent on the defendant's specialised skill or knowledge, this would serve as evidence that the defendant objectively undertook responsibility to ensure the correctness of the statement.

D Absence of Consideration

It can be observed that, when conceptualised as an assumed obligation, the negligent misstatement duty closely resembles contractual duties.[127] As such, an argument that can be raised against the consent model is the absence of any requirement of consideration.[128]

Nonetheless, some have maintained that consideration does not present a barrier to other areas of law protecting assumptions of responsibility by defendants.[129] As such, even though the doctrine of consideration is held to preclude the duty from being part of contract law, it can still exist as an independent consent-based duty.[130] Although the duty may as a technical matter reside outside of contract law, Beever draws on Mindy Chen-Wishart's view that "the only reason that *Hedley Byrne v Heller* is a tort and not a contract case… is the absence of consideration"[131] to suggest that the negligent misstatement duty must be more "contract-like" than "negligence-like".[132]

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[125] At 293.

[126] See discussion of this link in Chapter One.

[127] Beever "The Basis of the *Hedley Byrne* Action", above n 3, at 98; Robert Stevens "Contract-Lite" (paper presented to Faculty of Law, University of Western Ontario, 20 November 2008) at 21 – 22.

[128] Beever has argued that the doctrine of consideration plays a negligible role and ought to be abolished: Beever "The Basis of the *Hedley Byrne* Action", above n 3, at 98 – 101. The discussion below proceeds on the assumption that the doctrine of consideration is an established substantial part of contract law.

[129] For example, Stevens refers to gratuitous bailments and obligations to rescue or protect someone where you have taken responsibility for their safety in some way: Stevens, above n 127, at 20 – 21.

[130] Beever "The Basis of the *Hedley Byrne* Action", above n 3, at 102; see discussion in Stevens, above n 127, at 20 – 22.

[131] Mindy Chen-Wishart "In Defence of Consideration" (2013) 13 Oxford University Commonwealth Law Journal 209 at 230, cited in Beever "The Basis of the *Hedley Byrne* Action", above n 3, at 102.

[132] Beever "The Basis of the *Hedley Byrne* Action", above n 3, at 102.

IV Conclusion

This chapter has sketched two positions which serve to explain the negligent misstatement duty. Both models are internally consistent and provide an account of why the *Caparo* requirements can be regarded as the elements giving rise to the duty. However, the question is whether the frameworks of proximity and assumption of responsibility, deployed by the negligence and consent models respectively, can be used to explain the *Caparo* requirements in the way that the models assume that they can. I turn to evaluate each model with this question in mind.

Chapter Three: Determining the Nature of the Duty

I Overview

The two major models used to explain the negligent misstatement duty having been established in Chapter Two, this chapter critiques each of these models. It critiques the negligence model on the basis that the duty of care framework is of limited relevance in explaining the duty. It then critiques the consent model on the basis that the duty under this model purports to protect promises, despite the fact that contract law generally requires promises to be supported by acceptance and consideration in order to be protected. The chapter then proposes a distinct model through which the duty can be understood, founded upon the defendant inducing reliance in the plaintiff. It explores the explanatory strengths of, and normative justifications for, this reliance-based model.

II Refuting the Negligence Model

A Inconsistency Between **Caparo** *Requirements and Duty of Care Analysis*

Here it is argued that the three-stage duty of care framework cannot be applied to explain negligent misstatement cases, and that the duty in this sense ought to be understood as independent of negligence law.[133]

1 Caparo *Requirements as Proximity*

As emphasised in Chapter Two, the role of proximity in a duty of care analysis can be said to be to determine the existence of significant causal pathways by which the defendant could harm someone in the position of the plaintiff, signifying that the defendant is most appropriately placed to take care to avoid causing harm to the plaintiff.[134] As established in Chapter One that the *Caparo* requirements are required to be fulfilled before a negligent misstatement claim will be made out. Foreseeability that people in the world at large will detrimentally rely on the statement for a range of purposes is not sufficient.

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[133] It is not argued that the normative considerations relevant to establishing duties of care in negligence have no role to play in establishing the negligent misstatement duty. The model I propose to explain the duty later in this chapter, based on induced reliance, relies on concepts which are often discussed in ordinary negligence cases, such as vulnerability, indeterminacy and moral responsibility. The objective here is simply to show that the duty of care framework, including the use of policy considerations to limit the duty, is not relevant to establish the duty.

[134] See discussion, above n 92, in Chapter Two.

If foreseeability of harm is insufficient to establish the negligent misstatement duty, it is unclear what role is played by the neighbour principle in determining negligent misstatement liability. If the neighbour principle does not play any meaningful role, then this suggests that negligent misstatement is incongruous with the duty of care framework.

The explanatory power and relevance of the neighbour principle as a normative basis for recognising a duty of care diminishes when it is applied beyond the strict paradigm of product liability featuring in *Donoghue v Stevenson*. The law cannot plausibly impose a duty to take care in *every* scenario where it is reasonably foreseeable that failure to do so will cause harm, as to do so would impose highly onerous obligations on citizens.[135]

On this basis, the better way to explain the neighbour principle is that that, once a duty is established through a finding of proximity, the principle is simply a mechanism for determining the class of people to whom a duty could be owed.[136] The requirements of proximity would depend on the context.[137]

For example, the requirements for a mental injury claim by secondary victims witnessing an accident, outlined in *Alcock v Chief Constable of South Yorkshire Police*[138] and accepted in New Zealand in *van Soest v Residual Health Management Unit*,[139] are necessary to establish proximity.[140] The plaintiff must have had a close tie of love and affection with the accident victim, the plaintiff must be close to the accident in time and space, and witnessing the event must have caused sudden shock to the plaintiff.[141] Even if these

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[135] Jenny Steele "Scepticism and the Law of Negligence" (1993) 52(3) CLJ 437 at 444.

[136] See Robby Bernstein *Economic Loss* at 381 – 382. Viscount Dilhorne adopted this understanding of the duty of care in *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, where he stated that "Lord Atkin's answer to the question, 'Who, then, in law is my neighbour?', while very relevant to determine to whom a duty of care is owed, cannot determine the question whether a duty of care exists." Interestingly, if this explanation is to be taken as correct, the stages of the duty of care framework are in a counter-intuitive order. Rather than determining foreseeability first and moving on to proximity, the more logical approach would be to determine whether the factors required to establish proximity exist, and then determine whether the duty is owed to the plaintiff by asking whether the plaintiff is reasonably foreseeable.

[137] See *Cooper v Hobart* [2001] 3 SCR 537, where it was stated that proximity is "the *type* of relationship in which a duty of care to guard against foreseeable negligence may be imposed": at [31].

[138] [1992] 1 AC 310 (HL).

[139] [2000] 1 NZLR 179 (CA).

[140] In cases of acts causing physical harm, the case law suggests that reasonable foreseeability of harm satisfies both the neighbour principle and proximity.

[141] *Alcock*, above n 138, at 400 – 401.

requirements are satisfied, it needs to be first established that it was reasonably foreseeable that the plaintiff would be harmed by the failure to take care.[142]

On this view, "negligence" is not a single duty founded upon the negligent misstatement, but is an umbrella term used to describe a *range* of different duties to take reasonable care, the boundaries of which are all drawn by the neighbour principle. Such duties could all be limited on the basis of policy considerations under the duty of care framework.

This explanation, however, still leaves no room for the neighbour principle in a negligent misstatement analysis. The *Caparo* requirements by themselves determine the class to whom the duty is owed. This class is narrower than the class generated by the neighbour principle, because in order for the *Caparo* requirements to be satisfied, reasonable foreseeability of harm to the plaintiff must necessarily be foreseeable. Asserting that the *Caparo* requirements are the manifestation of proximity in the misstatement context does not address how the neighbour principle is supposed to play a role in determining liability.

Smith v Eric S Bush is illustrative. In that case, although the defendant's statement was for the building society's purposes and not for the purchaser's, as would typically be required, the defendant was nonetheless liable because the purpose for which the purchaser relied was known to the defendant. In this sense, the *Caparo* requirements as they are applied in *Smith* define the outer limits of negligent misstatement liability. The neighbour principle played no role in defining the scope of the duty in *Smith*. This scope was prescribed solely by the *Caparo* requirements, even when taken to their outer limits.

It is unclear how the negligent misstatement duty should be considered part of negligence law if the neighbour principle, the idea upon which modern negligence law was founded in *Donoghue v Stevenson*, is not relevant in determining whether the duty is owed to the plaintiff. It is simpler to recognise that the duty arises independently of the three-stage framework.

2 Caparo *Requirements as Policy*

Given that the *Caparo* requirements cannot be regarded as establishing proximity under the negligence model, the only remaining avenue for the negligence model would be to characterise the requirements as policy considerations that decisively exclude a duty

[142] Perhaps a situation where this would not be the case would be where the accident occurs in a remote location, and it is not foreseeable that the plaintiff would be able to witness the event.

whenever harm is reasonably foreseeable but the requirements are not satisfied. This explanation is vulnerable to Beever's objection regarding the dominance of policy considerations outlined in Chapter Two. If the *Caparo* requirements are merely policy considerations, and the duty can be explained as otherwise arising on the basis of the neighbour principle, the neighbour principle must adequately explain why the duty arises in negligent misstatement cases. But if policy considerations deny recognition of the duty in too many situations where the duty ought to be recognised on the basis of this principle, this is thinly veiling the simple fact that the principle does not explain why the duty arises at all.[143] Given that the neighbour principle fails to do this because it is dominated by the limiting effects of the *Caparo* requirements, it is necessary to find an alternative explanation of the principle upon which the duty arises.

Furthermore, it is difficult to characterise the *Caparo* requirements as policy considerations at all, because there will be cases in which they have no relevance as policy considerations whatsoever. *Hedley Byrne* itself is a prime example. It was not a case that involved making a statement on a public register; [144] it involved the direct request and provision of information, as did cases such as *Spring* where the defendant provided a misleading employment reference, and *Turton* where the defendant provided incorrect design specifications. In such a case, indeterminacy of liability cannot function as a persuasive reason to deny liability, because the plaintiff is the only party that would foreseeably rely on and be harmed by the information. As such, the requirements can only be explained as *giving rise* to liability, rather than *limiting* it.

B Policy Considerations Do Not Play a Role in Negligent Misstatement Liability

Having established that the duty arises outside of the ordinary duty of care framework, this opens the possibility that policy considerations need not play a role in determining negligent misstatement liability. In fact, New Zealand case law suggests that, although the courts have notionally applied the duty of care framework to negligent misstatement cases, policy considerations are largely irrelevant in determining liability. There are two matters[145] which have been treated as policy considerations limiting the existence of a duty

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[143] As Beever states, a normative principle cannot sensibly explain why a duty arises if it does not reveal the appropriate scope of liability under that duty: Beever *Rediscovering the Law of Negligence*, above n 3, at 233.

[144] Neither were many other cases; negligent misstatement cases arise in a wide range of situations, such as the provision of design specifications (see *Turton*, above n 44), employment references (see *Spring*, above n 55), and certificates of seaworthiness (see *Carter*, above n 43), to name a few.

[145] It should be noted that a third policy consideration which has been considered in a New Zealand misstatement case is the interplay with statute. In *Attorney-General v Prince and Gardner* [1998] 1 NZLR

by the New Zealand courts.[146] These are more readily explicable simply on the basis that they indicate that the *Caparo* requirements have not been fulfilled.

As explained in Chapter One, the courts are concerned with whether the plaintiff was vulnerable, in the sense of whether they could be reasonably expected to protect themselves from the loss which they suffered by relying on the statement. This has often been cited as a policy concern in negligence cases.[147] But as earlier discussed, in the context of negligent misstatement, vulnerability can simply be explained as indicating foreseeability of reliance. Lack of vulnerability as a policy consideration limiting a *prima facie* duty is illusory. If the plaintiff was not vulnerable, it would not have been reasonably foreseeable that the defendant would detrimentally rely on the statement. The *prima facie* duty would not be established, and there would be no cause to resort to policy.

The same is true of the existence of a contractual matrix as a policy consideration. Courts have claimed that it is important to preserve commercial certainty by not interfering with the risk allocation achieved by the contractual matrix negotiated by the parties.[148] But, as explained in Chapter One, a contractual matrix allocating risk and responsibility for a task to the plaintiff simply indicates that it is the plaintiff's responsibility to verify the accuracy of the statement. As such, the allocation of risk shows that it would not be reasonably

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262 (CA), the plaintiff claimed that the defendant social worker negligently reported that prospective adoptive parents were suitable, leading the plaintiff to be placed in their care. Their poor parenting caused the plaintiff emotional harm. The Court of Appeal found that proximity was established, but that the duty was limited on the basis of the policy consideration that recognising a duty would conflict with the principle of the finality of adoptive decisions emphasised by the statutory adoptive regime: at 276. However, *Prince* was not an economic loss case falling within the *Hedley Byrne* principle. There hypothetically may be cases where third parties suffer economic loss as a result of a statement without relying on that statements; this dissertation does not seek to address how such cases should be characterised.

[146] Some other residual policy considerations have been applied in overseas cases, such as in *McFarlane v Tayside Health Board* [2000] 2 AC 59 (HL). In this case, the claimant parents had relied on a doctor's statement that the father's sperm counts were 'negative' following his vasectomy. The mother conceived, and the plaintiffs sued for the costs of raising the child. One policy consideration which led the House of Lords to deny the duty was that making the doctor liable for such large costs would be disproportionate to their degree of fault: at 106, per Lord Clyde. Cases applying policy considerations of this nature are few and far between, and absent in New Zealand misstatement cases.

[147] See for instance *Rolls-Royce*, above n 64, at [61] and *Carter Holt Harvey*, above n 81, at [49] – [50]. See also the closely related discussion from *Leisure Centre*, above n 44, at [177] – [185], where the Court of Appeal discussed the fact that the loss was properly attributable to the Trust because it was the negligence of the Trust's architects, contractors and engineer (regarded for present purposes as the Trust's agents) which brought about the Trust's loss. The Trust ought to have required these parties to indemnify it for any loss they caused: at [196].

[148] *Rolls-Royce*, above n 64, at [118].

foreseeable that the plaintiff would detrimentally rely on the defendant's statement. Again, the *prima facie* duty is not established, and there is no cause to resort to policy.[149]

C Summary

In summary, the duty of care framework fails to explain the negligent misstatement duty because the *Caparo* requirements for negligent misstatement liability are inconsistent with the three-stage approach for finding a duty of care. The *Caparo* requirements cannot be regarded as proximity, because of their inconsistency with the role played by the neighbour principle in the duty of care analysis. They cannot be regarded as policy considerations limiting the scope of the duty, because doing so requires an admission that the normative basis for the recognition of the duty has little explanatory power, and the requirements are not relevant policy considerations in many negligent misstatement cases.

The *Caparo* requirements can much more plausibly be explained as positive requirements leading to the establishment of a duty which is independent from negligence law. The consent model purports to do this by explaining them as evidence of assumption of responsibility by the defendant. The consent model is evaluated below.

III Refuting the Consent Model

I demonstrate here that the consent model, like the negligence model, is flawed, This leads to my argument that the duty arises on the basis of induced reliance.

A The Problem of Promise

One objection to the consent model may be that contract law governs the sphere of assumed duties, and it is unclear why the law should allow duties to be assumed in the absence of contract law's institutional requirements such as offer, acceptance and consideration. This objection, however, ignores other instances where duties are assumed outside the realm of contract law. These include obligations associated with gratuitous bailments,[150] and obligations to rescue or protect someone where you have taken responsibility for their safety in some way.[151] In the context of gratuitous bailments, at the point where someone knowingly and willingly takes another's goods into her possession, she assumes an

[149] This was noted by the Court of Appeal in *Turton*, above n 44, at [35].

[150] Gratuitous bailments may include situations in which the owner of goods leaves them in the care of another without consideration, or where the defendant finds lost goods and is obliged to take care of them for the true owner.

[151] Stevens, above n 127, at 20 – 21.

obligation to take reasonable care of those goods.[152] Similarly, where someone undertakes to ensure another's safety, they assume a duty to take reasonable care to achieve this.[153]

However, there is a crucial difference between the negligent misstatement duty and these examples of assumed duties. The negligent misstatement duty, if it is assumed, stems from a promise.[154] The defendant's statement contains an implied warranty that its contents are true and can be relied upon.[155] It is this implied promise which provides evidence that responsibility over the statement has been assumed.

In contrast, gratuitous bailment and rescue obligations do not require a promise to arise. Promises are undertakings which are communicated to the promisee.[156] But the only requirement for a gratuitous bailment is that the defendant is knowingly and willingly in possession of the plaintiff's goods; in many cases the plaintiff may be unaware of this.[157] Similarly, in a rescue situation, the defendant need not communicate to the plaintiff that she has taken responsibility for his safety; the plaintiff, after all, may be unconscious.[158]

However, the negligent misstatement duty, if assumed, must arise from communication of a promise to the promisee. It is the promise which generates the duty. It is then unclear why the law would allow promises to be enforced without acceptance and consideration in negligent misstatement cases, while requiring these elements in every other case.[159] A promise is a promise; the normative basis for the protection of a promise exists

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[152] At 21. An example of the latter type of obligation is *Horsley v MacLaren (The Ogopogo)* [1972] SCR 441, cited in Beever "The Basis of the *Hedley Byrne* Action" at 96 – 97. In this case, it was held that someone who invites another onto their boat is required to take reasonable care to ensure the passenger's safety.

[153] Stevens, above n 127, at 21. In contrast, a person who simply comes across another in need of rescue and does nothing owes no duty to rescue them at common law: Robertson and Wang, above n 2, at 68.

[154] Stevens, above n 127, at 23. This is supported by those cases which stipulate that the negligent misstatement duty arises in a situation which is equivalent to contract but for the lack of consideration: see *Hedley Byrne*, above n 1, at 529 per Lord Devlin; *Henderson*, above n 75, at 181; *Rolls-Royce*, above n 64, at [99].

[155] See Beever "The Basis of the *Hedley Byrne* Action", above n 3, at 105 – 106, where Beever discusses his negligent babysitting example (above n 120).

[156] Charles Fried *Contract as Promise: A Theory of Contractual Obligation* (2nd ed, New York, Oxford University Press, 2015) at 42 – 43.

[157] *The Pioneer Container* [1994] CLC 332 at 338.

[158] Stevens, above n 127, at 21.

[159] Beever states that "the claim that consensual agreements… are made only for consideration ignores the reality of much of the world's legal practice": Beever *Rediscovering the Law of Negligence*, above n 3, at 303. However, the question is not whether such agreements exist as a matter of practice, but whether they are agreements which the law recognises as enforceable.

independently of the context in which the promise arises.[160] The requirements of acceptance and consideration form the institutional constraints within which the law will recognise promises. Allowing promises to be enforced in other contexts undermines these institutional constraints.[161] The more plausible alternative is that the negligent misstatement duty is imposed.

There are two counter-arguments to this position. One is that contract law protects agreements rather than promises.[162] Contract law's concern with agreement explains why it only protects promises where there is acceptance and consideration. As such, there is nothing anomalous about other areas of the law protecting promises in isolation. The negligent misstatement duty may be regarded as a context in which promises are protected in the absence of acceptance and consideration.

I offer two responses to this argument. First, agreements cannot be divorced from the notion of promise; by protecting agreements, contract law necessarily also sets out to protect promises, and in doing so still defines the parameters in which promises are protected. Promises, defined as communicated undertakings, are the building blocks of agreements. An agreement occurs when one party accepts an undertaking communicated by another.[163] Given that the only difference between an agreement and a promise is the requirement that an offer stipulating the obligations of both parties be accepted, the reasons for protecting agreements and protecting promises are broadly similar.[164] It has been argued that contract is founded not upon promise but upon "the value of allowing individuals the possibility of creating or acknowledging between them special bonds capable of giving rise to obligations

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[160] The justifications for enforcing a promise may be found in the furtherance of some utilitarian pursuit or in recognising an individual's rights: see Stephen A. Smith *Contract Theory* (Oxford, Oxford University Press, 2004). In either case, the justification for enforcing the promise rests in the promise itself. Similarly, as Fried states, "contract [is] rooted in, and underwritten by, the morality of promising", indicating that the moral imperative behind protecting a promise is inherent in the promise, rather than dependent on context: Charles Fried "The Convergence of Contract and Promise" (2007) 120 Harvard Law Rev 1 at 3.

[161] See Stevens at 5 and 14, where he states that consideration provides a necessary moral reason for promises to be enforced. See also Brian Coote "The Essence of Contract" in Brian Coote and Rick Bigwood (eds) *Contract as Assumption: Essays on a Theme* (Oxford, Hart, 2010) 7 at 42, where Coote states that "a contract is a promise or undertaking in respect of which legal contractual obligation has been assumed by means which the law recognises as effective for that purpose."

[162] See J. E. Penner "Voluntary Obligations and the Scope of the Law of Contract" (1996) 2 Legal Theory 325; Anne De Moor "Are Contracts Promises?" in John Eekelaar and John Bell (eds) *Oxford Essays in Jurisprudence* (Oxford, Oxford University Press, 1987) 103.

[163] As Coote observes, unilateral contracts consist only of one promise, and can only be defined as an agreement in a looser sense than strict offer and acceptance. Standard bilateral contracts, defined by offer and acceptance, are simply "reciprocal multiples" of these: Coote "The Essence of Contract", above n 161, at 42.

[164] Smith, above n 160, at 64, 182.

in each which are claimable by the other".[165] But even if this is the primary moral imperative of contract law, it is difficult to see how contract law is not concerned with protecting promises as well. It is promises which ultimately give rise to trust, solidarity, protection of autonomy, and the other values which might be said to be protected by contract law.[166] On that basis, there still exists at least an indirect moral imperative in protecting promises, and because agreements encode promises, protecting agreements is one way to do this. Contract law should be regarded as the institutional set of constraints within which the law protects promises. The requirement that a promise be accepted is logically best viewed as a means of distinguishing between which promises are to be protected and which are not.

Secondly, regardless of whether contract law protects promises or agreements, there is no apparent justification for protecting a promise in a negligent misstatement case which is absent in all other cases where the law refuses to recognise bare promises. The only difference which could be suggested in negligent misstatement cases would be the reliance which the plaintiff relies on the promise. But if this is the case, as discussed further below, it is the reliance and not the promise which is significant in determining the duty.

The other counter-argument is that the right protected by the negligent misstatement duty, unsupported by consideration, is not a "full-blown contractual right".[167] It has been argued that the duty can be understood as "contract-lite" because it is less strict and that the correlative right of the plaintiff offers fewer entitlements; for instance, the implied promise in the misstatement is revocable up until the point it is relied upon, unlike an offer in contract law which cannot be revoked once it is accepted.[168] According to this argument, while the negligent misstatement duty is still assumed on the basis of the defendant's promise, enforcing the promise in the absence of consideration is justifiable on the fact that the duty is "contract-lite".

The problem with this argument is that it necessarily involves an admission that the duty protects less than the promise. In bailment cases, the defendant assumes responsibility over

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[165] De Moor, above n 162, at 122.

[166] See Smith, above n 160, at 138 – 140.

[167] Stevens, above n 127, at 23.

[168] At 23 – 24. One of Stevens' examples can be criticised. Stevens states that the standard of the negligent misstatement duty varies from case to case, while a contractual duty is always strict. But under the consent model, the standard of the duty can be understood simply as a reflection of what the defendant promises; the defendant does not make an *absolute* warranty that the information is correct, but merely that she has taken reasonable care to ensure that the information is correct.

the plaintiff's proprietary interests, and in rescue cases the defendant assumes responsibility over the plaintiff's rescue. In this context, the defendant assumes responsibility for the content of the promise. The promise is the manifestation of the defendant's "assumption of responsibility", and therefore these two concepts cannot be viewed in isolation. If the duty does not protect the defendant's promise, this is tantamount to saying that the duty is not generated by the defendant's assumption of responsibility. If the duty arose in recognition of the promise, then the promise should be no less fully protected than other promises.

As a particularly illustrative example, one argument that the duty ought to be regarded as "contract-lite" is that it protects only loss consequential on reliance, rather than expectation loss.[169] Under the consent model, there should be no reason why expectation losses should not be recoverable, and there should be no reason why a negligent misstatement case would require reliance, either as a matter of recognition of the duty or of causation.[170]

The better view is that the duty is imposed by the law on some basis other than the promise. There is nothing contradictory or incoherent in stating that, negligent misstatement cases always involve promises, and yet the duty is imposed on a basis other than the promise. The promise points to the fact that the defendant has assumed responsibility in a factual but not legal sense.[171] There may be situations where this factual assumption of responsibility provides the moral basis to impose a duty.[172] In the context of negligent misstatement, this situation could be where the defendant invites a dependent plaintiff to rely on a statement. I argue below that this is the basis upon which the negligent misstatement duty should be understood.

B The Breadth of Assumption of Responsibility

The consent model's other flaw is that it does not adequately explain the cases where responsibility is assumed for the correctness of the statement in situations that fall outside of the *Caparo* requirements. Although the moral culpability that accompanies the

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[169] At 24.

[170] Some consent model theorists hold that the requirement of detrimental reliance for causation is explicable on the basis that it is the plaintiff's detrimental reliance which the defendant assumes responsibility over: Beever *Rediscovering the Law of Negligence*, above n 3, at 300. This is difficult to justify; if the implied promise is that the defendant has taken reasonable care to ensure that the information is correct, then surely the defendant should be required to compensate the plaintiff for the plaintiff not being put in the position she otherwise would have been had the information been correct. See further discussion in Chapter Four.

[171] Brian Coote "Assumption of Responsibility and Pure Economic Loss in New Zealand" (2005) 1 NZ Law Rev 1 at 15 – 16.

[172] At 16.

knowledge of a specific plaintiff may indicate an assumption of responsibility, there are many situations in which one could find an assumption of responsibility without this knowledge.

For instance, it is difficult to understand how auditors do not assume responsibility over their statements regardless of their knowledge of the specific purpose for which the statement will be used. Auditors' statements are understandably treated seriously, because misstatements by auditors carry the potential for significant financial impact. In that wider social context it would appear inevitable that, viewed objectively, an auditor would assume responsibility for the truth of her statements in general. The situation is sharply distinguishable from Beever's economist example, where a listener would understand that the forecast is necessarily speculative and that the economist therefore cannot be held responsible for the listener's reliance on it. In contrast, it can be argued that there is a general social expectation that the auditor would be held responsible for reliance on the statement. If the auditor's statement is correct, it is perfectly reasonable for the plaintiff to rely on it because the statement is not speculative. If assumption of responsibility is the basis for the duty, it is difficult to understand Richmond P's refusal to recognise the duty in *Scott Group*. A focus on the defendant's act of inducing reliance, as described above, avoids this difficulty.

IV Induced Reliance as an Alternative Explanation

A plausible alternative to the consent model is that the duty arises where the defendant reasonably foresees that his statement will induce reliance by the specific plaintiff (I call this the "reliance model").[173]

It is necessary to clarify what is meant by the defendant "inducing" reliance, as inducement forms part of the normative basis for the duty. As per the *Caparo* requirements, it is not enough that the defendant reasonably foresees that someone is likely to rely on the statement for a hypothetical future purpose.

Instead, for the defendant to *induce* the plaintiff's reliance, there must be a communicative nexus between the defendant and the plaintiff. The defendant must be aware of the

[173] This model is also broadly supported in Robert Hollyman "*Hercules Managements* and the Duty of Care in Negligent Misstatement: How Dispensable is Reliance?" (2001) 34(2) University of British Columbia Law Rev 515 and Gergen, above n 3, although Gergen tends to equate induced reliance with consensual acceptance of the duty. For reasons discussed in Chapter Four, there are important points of divergence between a model based on consent and a model based on reliance.

existence of someone in the position of the plaintiff, and that the plaintiff is likely to receive and rely on the information for the purpose for which the defendant provides it.[174] By contrast, if the defendant places the information in the public sphere and someone decides to rely on it at some point in the future, the defendant can hardly be said to have induced the reliance.[175] All the defendant has done is put the information into the public sphere. It is the plaintiff who has found the information and decided to rely on it.[176] The core category of case where the defendant induces reliance is where the plaintiff has requested information from the defendant for a stated purpose, and the defendant complies with this request.[177]

It may seem that there are few differences between assumption of responsibility and invited reliance.[178] However, there are several important implications that flow from the differences between the two models, which I will explore in Chapter Four.

A Normative Basis for Protecting Induced Reliance

I briefly suggest here the normative basis on which a duty protecting induced reliance can be said to rest. Considerations of interpersonal justice and personal responsibility are often invoked as justifications for the neighbour principle from *Donoghue v Stevenson*; such considerations can be said to similarly justify protecting induced reliance.[179] The negligent misstatement duty identifies situations in which the defendant is morally obliged to take care because of their invitation to the plaintiff to rely on them, and their objective knowledge that the plaintiff will do so.

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[174] In such a situation, even though the plaintiff's reliance is the factual cause of her loss, the defendant's statement can be held to be the legal cause of the statement: see Hollyman, above n 173, at 2001.

[175] See the commonly understood definition of "induce", which is "to call forth or bring about by influence or stimulation": see "induce" (accessed on 14 September 2017) Merriam-Webster.com <https://www.merriam-webster.com>.

[176] Cases such as *Williams*, above n 42, have emphasised the importance of communications between the plaintiff and the defendant; this emphasis is explicable on the basis that inducement of reliance cannot occur unless the defendant communicates information to the plaintiff, either directly or indirectly.

[177] See Witting *Liability for Negligent Misstatements*, above n 23, at 178 – 179.

[178] In fact, some scholars hold that contractual obligations are founded upon induced reliance: see discussion from Smith, above n 160, at 78 – 97. This dissertation proceeds on the assumption that contract is founded on promise, rather than induced reliance.

[179] Robertson has argued that the role of the law of negligence is to provide an avenue of civil recourse to correct interpersonal injustices: Andrew Robertson "On the Function of the Law of Negligence" (2013) 33(1) OJLS 31. Peter Cane has argued that the moral justification for negligence liability lies in a two-sided conception of personal responsibility: see Peter Cane *The Anatomy of Tort Law* (Oxford, Hart Publishing, 1997) at 24, 120. The exact terminology used here is not important for present purposes.

The plaintiff, because of their dependence on the truth of the information, and the fact that they cannot be reasonably expected to insulate themselves from the consequences of the information being wrong, is vulnerable with respect to the defendant's actions. In light of the defendant's knowledge of that dependency, the defendant's invitation to the plaintiff to rely creates a responsibility in the defendant not to harm the plaintiff.

By contrast, in a situation where the plaintiff can be reasonably expected to have protected themselves rather than to detrimentally rely on the plaintiff's statement, the plaintiff cannot be regarded as dependent on the defendant. In such a situation, the defendant by inviting the plaintiff to rely does not owe a responsibility to look after the plaintiff's interests.

This normative focus on concepts like dependency and vulnerability is exemplified in their recent emphasis by the New Zealand courts.[180] This in turn reflects trends in the law of torts generally, where vulnerability is emerging as an increasingly central consideration.[181]

These trends are important because the private law's recognition of the moral obligations and correlative rights of citizens ought to take vulnerability into account. According to its classical conception in the liberal tradition, private law is generally concerned with the positions of "pre-relational, self-reliant, autonomous [subjects]".[182] This conception often ignores the relationships of vulnerability and dependency that do arise in the real world.[183] Recognising that a defendant owes moral obligations in situations where they invite reliance by dependent plaintiffs is consistent with conceptions of private law based on interpersonal justice and personal responsibility. It is the relationship between the parties,

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[180] See *Rolls-Royce* above n 64, at [61]; *Carter Holt Harvey*, above n 81, at [49] – [50]. See also discussion in *Leisure Centre*, above n 44, from [177] – [185], where the Court of Appeal stated that the contractors, architects and engineer could be regarded for present purposes as the Trust's agents, and the failure of these agents to verify the specifications was therefore properly attributable to the Trust. The Court of Appeal stated that the Trust was in a position to require these agents to indemnify it for the loss, and that it ought to have done so: At [196].

[181] Jane Stapleton "The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable" (2003) 24 Australian Bar Rev 135 at 142. On the whole, Stapleton's observation is apposite in New Zealand law. Although the Supreme Court expressed disdain for the concept in *Spencer on Byron*, above n 66, at [38], it was nonetheless acknowledged and analysed by the Supreme Court in *Carter Holt Harvey*, above n 81, at [43] – [55]. As discussed above, vulnerability was also an important consideration in *Leisure Centre*, above n 44.

[182] Carl F. Stychin "The Vulnerable Subject of Negligence Law" (2012) 8(3) *International Journal of Law in Context* 337 at 346.

[183] One area in which the private law can be said to recognise vulnerability and dependency is the recognition of fiduciary duties in relationships of trust and confidence, through the mechanism of equity: see for instance discussion of vulnerability in fiduciary law in *Saunders v Houghton* [2010] 3 NZLR 331 (CA) at [100].

and each party's responsibility for the plaintiff's loss, that determine whether the defendant ought to owe a duty to the plaintiff.[184]

However, vulnerability cannot extend infinitely far as a reason to take care. If the law held defendants to owe a duty to all plaintiffs who are vulnerable to suffer economic loss because of the defendant's careless actions, this would be highly onerous for defendants.[185] This is because words can be repeated and cause indeterminate economic loss.[186] Such liability would be disproportionate to their moral responsibility to take care with respect to vulnerable parties.

Vulnerability in itself, then, is not a sufficient normative basis for the duty. There must be some further reason why the defendant should be responsible not to harm the plaintiff's economic interests. In the context of negligent misstatement, this is because the defendant by inducing the reliance is the *cause* of the reliance, and therefore should be held responsible for looking after the plaintiff's interests. As Cane observes, the basis for fault-based liability is that "[morality] requires us to not to undertake tasks which we know or ought to realise we are not capable of performing without injuring others".[187] The defendant ought to refrain from inducing reliance in vulnerable plaintiffs, or else ensure that he takes care when he does so.

As with the consent model, the defendant's voluntary conduct gives rise to the obligation. The important distinction from the consent model is that the defendant by choosing to invite reliance does not *assume* legal responsibility but *comes under* such responsibility, on the basis that the defendant has placed himself in a position where she is morally obliged to look after the dependent plaintiff's interests.

The normative basis for the duty explored here serves to justify the duty's existence as independent from consensual duties and duties arising under the conventional duty of care framework. While the criticisms of the negligence and consent models explored above show why the duty cannot be understood as either consensual or based on the duty of care

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[184] Stychin, above n 182, at 346 – 347.

[185] By contrast, indeterminacy is not typically regarded as a justifiable reason not to hold the defendant responsible for physical damage: see Cane *Tort Law and Economic Interests*, above n 2, at 457. At any rate, physical damage does not generally raise problems of indeterminacy, even in the context of statements: see Todd "Negligence: The Duty of Care", above n 25, at 175. This accounts for why negligent statements causing physical harm are treated equivalently to negligent actions.

[186] See *Hedley Byrne*, above n 1, at 534, per Lord Pearce.

[187] Cane *The Anatomy of Tort Law*, above n 179, at 51.

framework, the discussion of the duty's unique normative role explored here further emphasises that it should be regarded as arising outside of these models.

V Conclusion

The purpose of this chapter has been to expose deficiencies in the dominant explanations of the negligent misstatement duty, and to propose an alternative explanation based on induced reliance. The *Caparo* requirements of foreseeable detrimental reliance on the information by the plaintiff as part of a limited class, for the purpose for which it was provided, are explicable on the reliance model. The reliance model does not protect all instances of foreseeable detrimental reliance. It protects only those instances where the plaintiff is part of a defined class and relies on the statement for the purpose for which it was made, because in such circumstances the defendant has a special moral responsibility for that reliance.

This explanation both avoids the deficiencies of the other models and addresses an important normative concern in private law. The broad theoretical findings established in this chapter have implications for more specific aspects of the negligent misstatement duty, which will be explored in the next chapter.

Chapter Four: Implications

I Overview

This chapter aims to show that, although the reliance model will in many situations generate the same result as the consent model, there are various significant practical implications of the finding that the duty is reliance-based rather than consent-based. It does not explore these implications in complete detail, and they warrant further investigation. The important point is that the reliance model has these implications.

First, the distinction matters when deciding the remoteness rule that determines what loss flowing from the breach of the duty ought to be recoverable.

Second, the distinction matters when deciding when the cause of action accrues for the purpose of assessing when the time limit on a negligent misstatement claim begins to run.

Third, the distinction is significant because it highlights that in *Cygnet Farms*, contrary to Palmer J's judgment, the same decision ought to have been reached regarding the contractual misrepresentation and negligent misstatement claims. This conclusion, however, is problematic. The so-called "signature rule" leading to this conclusion, that a signature objectively indicates consent to the terms in a document, works directly against the normative goals of the duty to protect vulnerable plaintiffs.

Fourth, the different normative roles played by the duties recognising contractual and tortious liability for misrepresentation justify the abolition of the statutory bar on tortious remedies for pre-contractual misrepresentation.

II Measure of Damages

The measure of damages awarded in a negligent misstatement case depends upon the characterisation of the duty. Under the reliance model, the duty of the defendant is not to cause economic loss by inducing reliance. As such, the defendant must compensate the plaintiff for the economic loss suffered (under the reliance measure of damages), rather than to put the plaintiff in the position they expected to be in because they relied on the statement (under the expectation measure).

By contrast, if the duty was consent-based, then expectation damages should be awarded; the plaintiff ought to be put in the position that they would expected to be in had the statement been true. Proponents of the consent model have tried to argue that the fact that the awarding of reliance damages can be explained by the consent model because of the plaintiff's detrimental reliance which the defendant assumes responsibility for.[188] But this is difficult to reconcile with the fact that the duty arises from the defendant's implied assurance that the information is correct and can be relied upon.[189] On the basis of this assurance the defendant should be held responsible for the failure to gain resulting from the information being incorrect, and the expectation loss which flows from this failure The characterisation of the duty as reliance-based is significant in clarifying the appropriate measure of damages because of the different answers to this question generated by the reliance and consent models.

III Remoteness

The reliance model has implications for the rule governing remoteness of recoverable damage that ought to be applied in negligent misstatement claims. These rules are different between contract and tort. In contract, loss will be recoverable either if "it would arise naturally, according to the usual course of things", or if "the loss was reasonably in contemplation of the parties at the time of contracting".[190] The loss must have been contemplated as a serious possibility, rather than as a slight possibility.[191] In tort, the rule is that the defendant is liable for any consequences of their tort "which would occur to the mind of a reasonable [person] in the position of the defendant's servant and which he would not brush aside as far-fetched", and which therefore ought to be guarded against.[192] On this formulation, the loss need not be a serious or likely possibility of breach; it simply needs to be a possibility that a reasonable person would guard against. The rule in tort is framed more widely than the rule in contract, and may lead to greater recovery of loss.

When determining the scope of liability from a breach of duty, whether it contractual or tortious, the courts' approach is to inquire into the extent of damage the defendant should

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[188] Beever *Rediscovering the Law of Negligence*, above n 3, at 300.

[189] See Beever's example of negligent babysitting discussed in Chapter Two, above n 120.

[190] *Hadley v Baxendale* [1854] 156 ER 45 (Exch) at 354.

[191] *Koufos v C Czarnikow Ltd (The Heron II)* [1969] 1 AC 350 (HL) at 414.

[192] *Overseas Tankship (UK) Ltd v The Miller Steamship Co (The Wagon Mound) (No. 2)* [1967] 1 AC 617 (PC) at 643.

be held responsible for.[193]To determine the extent of the defendant's liability, it is necessary to examine the scope of their duty. The rules governing the breaches of different duties can be understood to be different as a result of this principle.[194]

The question of remoteness is therefore not fully answered by putting the label of "tort" on the negligent misstatement duty and using this to assert that the tortious rule ought to apply. If the duty was correctly classified under the consent model, there may be a strong case for stating that the stricter contractual rule ought to apply. The justification for the stricter rule in *Hadley v Baxendale* may be that because the defendant has voluntarily assumed the duty, the consequences that the defendant has assumed responsibility for are also voluntarily assumed. The defendant must therefore actively contemplate the consequences of breaching his undertaking. If the defendant has not done so, then the defendant cannot be said to have assumed responsibility for those consequences.

However, given that the duty is reliance-based rather than consent-based, the more liberal rule from *The Wagon Mound* appears to be appropriate. Although the defendant has voluntarily acted in inviting the plaintiff's, the defendant has not voluntarily assumed the obligation to avoid harming the plaintiff. The defendant should be held liable for whatever consequences would result provided that those consequences are foreseeable and the defendant ought to have taken care to guard against them, even if those results are unlikely.

IV Limitation Periods

The reliance model affirms that the limitation period on negligent misstatement claims brought under the Limitation Act 1950 should be measured from the point at which the plaintiff suffers loss, rather than at the point where the defendant makes the statement.[195] For the purposes of the 1950 Act, a claim must be brought within six years of the date that

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[193] See *South Australian Asset Management Corporation v York Montague Ltd* [1997] AC 191 (HL); *Bank of New Zealand v New Zealand Guardian Trust* [1999] 1 NZLR 664 (CA); *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2009] AC 61 (HL); *Hughes-Holland v BPE Solicitors* [2017] 2 WLR 1029 (SC).

[194] Aaron Taylor "Whither Remoteness? *Wellesley Partners LLP v Withers LLP*" (2016) 79(4) Modern Law Rev at 680.

[195] Although the Limitation Act 1950 has been formally repealed by the Limitation Act 2010, the two statutes will continue to operate side by side for some time. Claims based on acts or omissions prior to 1 January 2011, falling under the 1950 Act, must be brought by the later of 15 years after the date of the act or omission on which the claim is based, or 31 December 2015 (which has now passed): Limitation Act 1950, s 23B. This means that the 1950 Act may continue to apply to some claims as late as 31 December 2025. The reliance model does not have any implications for claims falling under the Limitation Act 2010, based on statements made on or after 1 January 2011. The characterisation of negligent misstatement claims does not have any bearing on the determination of this question.

the cause of action accrues.[196] When dealing with such claims, it is necessary to determine what implications the reliance model has for when the negligent misstatement cause of action accrues.

In contract law, the cause of action accrues when the undertaking is breached or the information misrepresented.[197] This is because breaches and contractual misrepresentations are actionable *per se*; no proof of damage is required to establish that the duty has been breached.[198] In ordinary negligence claims, the cause of action accrues when damage occurs, because proof of damage is necessary for a negligence claim to be actionable.[199]

If the duty was characterised as consent-based, the limitation period from contract law ought to apply. As discussed in Chapter Three, the consent model relies on the notion that the duty is a lesser species of contractual right. It cannot be characterised as a tortious action rather than a contractual action, because it arises from a promise just as contractual duties do.[200] As such, the cause of action would be deemed to accrue when the statement is made, as this is when the assurance that the statement is correct is breached.

However, for the reasons discussed in Chapter Three, the notion that the duty is a lesser species of a contractual right fails, and the duty is better categorised as reliance-based. On that basis, the duty's domain is within tort. The cause of action in a negligent misstatement claim should be held to accrue at the point that damage is suffered. Given that the damage in negligent misstatement claims may not manifest for some time after the statement is made, this may be useful for plaintiffs who otherwise may not be able to bring a claim in time.

V The Result in Cygnet Farms *and the Signature Rule*

When negligent misstatement cases are analysed under the reliance model without reference to confusing concepts such as proximity, it becomes clear that the different outcomes of the contractual and negligent misstatement claims in *Cygnet Farms* are

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[196] Limitation Act 1950, s 4(1).

[197] Andrew Burrows "Limitation of Actions" in H. G. Beale (ed) *Chitty on Contracts* (32nd ed, London, Sweet and Maxwell, 2015) 2029 at 2043.

[198] At 2043.

[199] Stephen Todd "Discharge of Liability" in Stephen Todd and others *The Law of Torts in New Zealand* (7th ed, Thomson Reuters, Wellington, 2016) 1355 at 1367. See for contrast the intentional torts, which are actionable *per se* and where the action accrues from the commission of the tort.

[200] Stevens at 23.

inconsistent. However, this highlights that the role of signatures in determining parties' objective understanding of terms in documents is problematic, and should be reconsidered.

In contract law a well-established rule is that if a party signs a document, that party will be bound by all terms of the document[201] unless the effect of the term was misrepresented by the other party.[202] Thus, given that the Swans in *Cygnet Farms* signed the document, they should be bound by all exclusion clauses in the contract. Justice Palmer observed this rule, leading to his conclusion that the exclusion clauses excluded all contractual liability.[203]

Justice Palmer applied the three-stage duty of care framework and arrived at the conclusion that the Cygnets and the Bank could be regarded as being in a relationship of proximity because of the Swans' vulnerability and dependence on the Bank's expertise.[204] One would reach a similar conclusion by considering the *Caparo* requirements on the reliance model.

His Honour then examined the effect of the exclusion clauses on this proximity. He found that the clause printed in all caps warning the Swans not to rely on the Bank's advice negated a duty to provide sound investment advice.[205] However, he found that the other clauses in the terms and conditions of the forms signed by the Swans were on balance not sufficient to negate the duty to because they were not "clear and transparent".[206]

Justice Palmer justified the difference in result between the contract claim and the negligent misstatement claim by stating that "the effect of exclusion clauses on obligations under contract law is similar to, but different than, their effect on obligations under the law of torts".[207] His Honour assumed that the signature rule applies to incorporate all terms into an agreement regardless of the signatory's awareness of those terms, while sufficient notice is required to negate proximity.

However, this is based on a misunderstanding of the signature rule. The term "signature rule" can be said to be misleading. The so-called "rule" is simply a specific manifestation

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[201] *L'Estrange v Graucob* [1934] 2 KB 394 (DC) at 403; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 (HCA).
[202] *Curtis v Chemical Cleaning & Dyeing Co* [1951] 1 KB 805 (CA).
[203] At [90].
[204] See *Cygnet*, above n 5, at [124] – [138].
[205] At [144].
[206] At [143].
[207] At [91].

of objectivity when determining the formation and content of contracts. *Smith v Hughes*,[208] a seminal case often cited for the objective approach, states that if it appears from the perspective of a reasonable person in the position of the promisor that the promisee accepts a term of the contract, the promisee will be bound by the term.[209] The law regards a signature not as evidence that the signing party has read and *subjectively* understood every term of the document, but as evidence that the signing party has had the opportunity to read the document and is *objectively* willing to be bound by whatever terms may be in it.[210]

The problem is that it is unclear why the signature has this effect only on the contractual claim and not on the negligent misstatement claim. The requirements for negligent misstatement are also established on an objective approach. On the reliance model, if a plaintiff acknowledges the effect of an exclusion clause limiting liability, it can no longer be said that it is reasonably foreseeable that the plaintiff would detrimentally rely on the defendant's statement. The plaintiff is objectively aware that the defendant has not guaranteed the accuracy of the information. If the signature indicates that the plaintiff has objectively acknowledged the exclusion clause for the purposes of a contractual claim, there should be reason why the signature would not have the same effect in a negligent misstatement claim.[211]

As such, Palmer J's finding that the Swans' signature precluded the contractual claim should have led to the finding that it also precluded the negligent misstatement claim. The gap said to be raised by s 6 of the Contractual Remedies Act (now s 50 of the Contracts and Commercial Law Act 2017) does not exist.[212]

The significance in all this of characterising the duty as reliance-based is that it highlights and exacerbates the problematic nature of the signature rule. In the modern world of standard-form contracts, we often sign documents and tick "Terms and Conditions" boxes without reading their contents. In doing so, we understand that we are binding ourselves to the consequences of what we did not read. But this is only because we understand that this is the position that the law takes. It is the law's view of the role of the signature that shapes

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[208] (1871) LR 6 QB 597.

[209] At 607. This view of objectivity is focused on a reasonable person in the position of the promisor, as opposed to a reasonable bystander observing the parties: see John Spencer "Signature, Consent, and the Rule in *L'Estrange v Graucob*" (1973) 32 CLJ 104 at 113.

[210] *Hood v Anchor Line (Henderson Brothers)* [1918] AC 837 (HL) at 845, per Viscount Haldane, cited in Matthew Chapman "Common Law Contract and Consent: Signature and Objectivity" (1998) 49 Northern Ireland Law Quarterly 363 at 369.

[211] Beever "*Cygnet Farms*", above n 21, at 616.

[212] Beever "*Cygnet Farms*" at 616.

parties' behaviour, rather than the other way around. It has been argued that objective agreement ought to be determined on the basis of *real* and *informed* consent, where the agreement is only enforced if there is evidence that the signing party has been provided ample opportunity to understand the important terms of the document.[213] In many instances, parties with inferior bargaining power and resources will not have a real opportunity to read and comprehend the document.

The signature rule is even more unsatisfactory in the context of negligent misstatement, because it directly contradicts the normative impetus of the duty to protect vulnerable plaintiffs. As a matter of course, vulnerable and dependent plaintiffs will not have the time or resources to analyse and comprehend a complex contractual document. The defendant can simply include an exclusion clause in a complex document to evade their moral obligation to protect the vulnerable plaintiff. Such a clause is unlikely to be found, *precisely because* the plaintiff is dependent on the defendant.

For this reason, it can be argued that the distinction Palmer J drew between contract and negligent misstatement was correct as a matter of fairness. However, with respect, relying on vague conceptions of proximity and distorting the key elements of negligent misstatement liability is not a satisfactory way of solving the problem, even if s 50 is amended to allow separate claims in negligent misstatement. It is the law's approach to objectivity which needs to be addressed. It is hoped that the characterisation of negligent misstatement as reliance-based will provide an impetus for reconsideration of the signature rule in the future.

VI Recognition of Concurrent Liability in Pre-Contractual Misrepresentation

Concurrent liability in contract and tort is now generally allowed.[214] Prior to the enactment of the Contractual Remedies Act, misrepresentation was actionable in contract only if the representation amounted to a term in the contract.[215] In the context of concurrent liability in pre-contractual misrepresentation under contract and negligent misstatement law, the

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[213] Chapman, above n 210, at 371 – 372.

[214] This was originally established in *Henderson*, above n 75, which has been followed by New Zealand cases. See for example *Turton*, above n 44, at [104]; *Carter Holt Harvey v Minister of Education*, above n 81, at [42].

[215] J. F. Burrows "Misrepresentation" in J. F. Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (5th ed., LexisNexis, Wellington, 2015) 349 at 350 – 351. Misrepresentations which did not amount to a term of the contract could be actionable under negligent misstatement or the tort of deceit if it had been made fraudulently. The plaintiff also had the option of rescinding the contract in equity if a misrepresentation occurred, whether it be fraudulent, negligent or innocent.

plaintiff benefits from being able to make a negligent misstatement claim and a contractual claim side-by-side. As discussed above, the remoteness rules and limitation period are generally more favourable to the plaintiff in a negligent misstatement claim, while a contractual claim provides the opportunity to recover expectation loss which is generally greater than reliance loss.[216]

However, s 35(1)(b) of the Act precludes negligent misstatement claims in the pre-contractual misrepresentation context. Because the negligent misstatement duty is reliance-based, there does not appear to be any clear justification for doing so.

The original motive of the Contracts and Commercial Law Reform Committee for barring recovery in negligent misstatement for pre-contractual misrepresentations was to expunge negligence from all pre-contractual misrepresentation analysis.[217] The Committee stated that negligence unduly complicates misrepresentation analysis, and that the correct approach is to look "not at whether there was any fault on the part of the representor but at the expectations of the representee that naturally arise from the undertaking".[218] In accordance with this approach, all misrepresentations should be viewed through a contractual lens, whether fraudulent, negligent or innocent.

The Committee's view can be explained by the fact that, at the time, concurrent liability was not generally recognised. The Committee's position reflects a hostile view toward concurrent liability. On this view, if the parties are bound by a contractual relationship, then as a matter of principle it is the contractual relationship that should solely regulate their rights and duties.[219] However, this view was rejected in *Henderson* and the New Zealand cases which followed it, on the basis that *Hedley Byrne* itself clearly showed the

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[216] Interestingly, in *Capital Motors Ltd v Beecham* [1945] 1 NZLR 576 (SC) the reliance measure was actually greater than the expectation measure. The plaintiff purchased a second-hand car from a dealer, relying on the dealer's representation that the car had had only two prior owners. The car had had more owners, meaning that its market value was less than what the plaintiff purchased it for. However, the primary cause of the lowered market value was not the number of owners, but the fact that the first owner was a rental-car company. The misrepresentation amounting to a breach of term did not cause the loss represented by the lower market value, so the loss was not recoverable in contract. The plaintiff was able to recover in a negligent misstatement claim, because the negligent misrepresentation caused him to purchase the car for the lower market value: at 581. This relies on the debatable claim that the incorrect information needs to cause the loss: see David McLauchlan "Assessment of Damages for Misrepresentation" (1987) 6 Otago Law Rev 370 at 410 – 419.

[217] Contracts and Commercial Law Reform Committee, above n 19, at 71. See also Christine French "The Contract/Tort Dilemma" 5 Otago Law Rev 236 at 284.

[218] At 70.

[219] *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80 (HL) at 107, per Lord Scarman. See also Yihan and Yip, above n 4, at 152 - 153 for discussion.

potential for tortious and contractual relationships to arise concurrently.[220] Given that concurrent liability is accepted, there appears to be no reason to deny it in the specific context of pre-contractual misrepresentation.

If the negligent misstatement duty was consent-based, one would be able to argue that there would be no difference between the contractual and negligent misstatement claims, and s 35(1)(b) simply prunes away redundant claims. As discussed above, issues such as measure of damages, causation and remoteness would be treated the same way under each claim. This is explicable on the basis that both duties share the same normative concern with the defendant's assumption of responsibility. This shared normative concern suggests that the law ought to provide one unified response to the plaintiff's loss.

However, because the negligent misstatement duty is reliance-based, the contractual and negligent misstatement claims are governed by different rules of liability. This is as it should be, because the different duties have different normative concerns. While the negligent misstatement duty is concerned with protecting induced reliance, the contractual duty is concerned with upholding promises. As discussed when contrasting the reliance model and consent model's treatment of remoteness, measure of damages and limitation periods above, the different rules governing liability under each claim are directed toward addressing these differing normative concerns.

The availability of the two different claims thus reflects the law's recognition that the plaintiff has been wronged in two ways: she has suffered from a breach of contract and she has been induced to rely on the defendant's negligent misstatement. The plaintiff ought to be able to elect between the two different claims and the advantages provided by each. This provides an important impetus to reconsider s 35.[221]

VII Conclusion

This chapter has attempted to explain the significance of the finding that the negligent misstatement duty is reliance-based for cases of pre-contractual misrepresentation. It first explored the implications of the finding that the duty is reliance-based for the assessment of measure of damages, remoteness and limitation periods. Second, it contended that the

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[220] *Henderson*, above n 75, at 187.

[221] Given that the Contractual Remedies Act was recently consolidated with a variety of other statutes into the Contract and Commercial Law Act without any substantive revision, the chances of this occurring do not appear to be high. One can only hope that Parliament will examine the provision in the foreseeable future.

objective approach used to deny the contractual claim in *Cygnet* ought to have also denied the negligent misstatement claim. This highlights not that s 35 is a gap in the law, but rather that this objective approach is especially problematic because it subverts the normative goals of the duty. Third, it was argued that because concurrent liability recognises that parties can be wronged in multiple senses, there is no principled basis for denying claims in negligent misstatement in pre-contractual misrepresentation cases. This, rather than the outcome of *Cygnet Farms*, is an important reason to re-examine s 35.

Conclusion

This dissertation has engaged in contemporary debate surrounding the characterisation of the negligent misstatement duty. The traditional view is that negligent misstatement is a species of negligence, and that considerations of foreseeability based on the neighbour principle, proximity, and policy operate to establish the duty. Some judicial and academic writing has alternatively suggested that the duty arises from the defendant's consent.

This dissertation has argued that both conceptions are problematic, proceeding on the observation that negligent misstatement liability requires foreseeability of reliance for a known specific purpose and by a limited class. The negligence model is flawed because the role played by the neighbour principle and policy considerations in negligent misstatement cases is illusory in practice. Meanwhile, the consent model is defective because it contradicts the established principle that promises require consideration to be legally enforceable. It is also defective because circumstances can indicate that the defendant has assumed responsibility for the consequences of their statement even if the defendant has not reasonably foreseen reliance for a known purpose by a limited class.

Instead, this dissertation has proposed that the duty is imposed in circumstances where the defendant induces the plaintiff to rely on the statement. Imposing the duty in such circumstances is normatively justified because the defendant by inducing the plaintiff's reliance, where the plaintiff is vulnerable to being harmed by the defendant's statement, bears moral responsibility for the harm suffered by the plaintiff.

This dissertation has also surveyed the practical implications for negligent misstatement cases of this reliance-based model. The reliance model indicates how the limitation and remoteness rules and measure of damages operate in negligent misstatement claims. It also has wider implications that deserve further reflection. In cases of concurrent liability for pre-contractual misrepresentation, the distinct normative basis of the reliance model suggests that the plaintiff should be able to make alternate claims in contract and negligent misstatement. Furthermore, the objective analysis of signatures as indicating that the plaintiff has assented to the terms in a document, including exclusion clauses which may not be acknowledged or understood by the signing party, is problematic because it ignores the considerations of vulnerability and power asymmetry underlying the negligent misstatement duty. It is hoped that future developments in the law by law-makers and courts will bear these implications in mind.

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