underlying principles of negligence law. This change of approach is evident in
the Lords' speeches in Caparo, particularly that of Lord Bridge, with whom the
other Lords agreed:22

Whilst recognising, of course, the importance of the underlying general principles
common to the whole field of negligence, I think the law has now moved in the
direction of attaching greater significance to the more traditional categorisation of
distinct and recognisable situations as guides to the existence, the scope and the limits
of the varied duties of care which the law imposes.

Indeed, Lord Oliver compares the search for a single approach with pursuing
a 'will-o-wisp'.23 Therefore, in Caparo, the House of Lords approached the
question of liability less by principle, than by a detailed analysis of similar cases.
Other than the change from a general to a more specific approach to the duty
question, three important points can be taken from this case.

First, all the Lords make it clear that foreseeability alone is not enough to
impose liability, as foreseeability without limits would impose too wide a duty.
The limits that they considered necessary were considerations of “proximity” and
whether imposing liability would be “just and reasonable”.24 It is not enough
simply to consider whether a duty exists, as the existence of a duty is bound up
with the scope of that duty and the damage it is imposed to avoid.25 Therefore,
in order to determine the existence of a duty it is necessary to look at the purpose
for which information was supplied. Given this, it is not surprising that the Lords
praised the decision of Richmond P in Scott Group, while discrediting those of
Woodhouse and Cooke JJ.

Secondly, Lord Bridge, Lord Roskill and Lord Oliver all questioned the use
of the phrase “assumption of responsibility”. In their speeches, Lord Bridge and
Lord Roskill both referred to the decision in Smith v Eric S. Bush,26 in which Lord
Griffiths stated:27

The phrase “assumption of responsibility” can only have any real meaning if it is
understood as referring to circumstances in which the law will deem the maker of the
statement to have assumed responsibility to the person who acts upon the advice.

Similarly, in both Hedley Byrne and Scott Group, it is clear that an objective
standard should be used to determine whether someone has assumed
responsibility. This is not surprising as an objective standard is always used in
negligence cases, as well as in contract, because the tort of negligence is based on
a departure from the behaviour of a reasonable person.

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22 Supra note 19, 618.
23 Ibid.
24 Ibid 633.
25 Ibid 627.
26 [1990] 1 AC 831.
27 Ibid 862.
Thirdly, Lord Oliver set out the situations in which the Court will imply an assumption of responsibility. These are: 28

(1) The purpose for which the information is used must be known or ought to have been known by the defendant;
(2) The defendant must know of the plaintiff as an individual or as a member of a set class;
(3) The defendant must know or ought to have known that the plaintiff would act on the information without independent inquiry; and
(4) The plaintiff must have acted on the information and suffered loss as a result.

Following Caparo the approach to negligent misstatement cases in England has been reasonably settled. However it is clear from the decisions in Price Waterhouse and Turton that this is not the case in New Zealand.

III. Negligent Misstatement in New Zealand

1. Price Waterhouse v Kwan

Price Waterhouse were auditors of a firm of solicitors, some of whose clients suffered loss on investments in the solicitors' nominee company. Knowing that they were unlikely to recover these losses from the solicitors, they sued Price Waterhouse who was responsible for auditing the relevant trust accounts. The plaintiffs alleged that their losses were caused, or at least contributed to, by negligently prepared audits. Subject to the Solicitors Audit Regulations 1987, the Law Society could, following an audit, intervene in the affairs of a solicitor if the Society considered this to be warranted. The plaintiffs thus claimed that had the audits not been prepared negligently, the Law Society would have intervened and their losses would have been minimised. There were contractual relations between Price Waterhouse and the solicitors, and between the solicitors and the plaintiffs. However, there was no contractual relationship between Price Waterhouse and the plaintiffs.

In giving the judgement of the Court, Tipping J followed the Anns test to determine whether a duty was owed. After examining the legislative scheme, he concluded that one of its main purposes was to protect solicitors' clients. Therefore, his Honour found that a sufficient relationship of proximity existed for a duty to be owed. To not impose a duty would be to undermine the protection envisaged in the legislation. 29

28 Supra note 19, 638.
29 Supra note 1, 43.
Against that background, and in light of the relationships between the auditor, the solicitor, and the latter’s clients, there is in our view sufficient proximity between the auditors and the clients to justify the imposition of a duty of care in tort, subject to such policy considerations as may suggest otherwise. The regulatory regime, under which audits of solicitors’ trust accounts are conducted, confirms what is inherent anyway, that the purpose of the audit, at least in significant part, is to protect solicitors’ clients from loss as a result of improper conduct in relation to the solicitors’ trust accounts.

His Honour then considered policy reasons for and against imposing a duty, before concluding that there were no policy reasons against imposing a duty, and strong policy reasons for imposing one. Therefore, the plaintiffs were successful in their claim that a duty was owed by the defendants.

Two observations can be taken from this case. The first is the recognition by the Court that there can be concurrent liability in tort and contract. Counsel for Price Waterhouse argued that to impose a duty of care would circumvent existing contractual relations that the parties had assumed. However, the Court recognised that the plaintiffs were not limited to their contractual claim against the solicitors and that this was especially important where insolvencies were involved. As Tipping J stated in his decision:

30 To hold that a party who enjoys sufficient proximity with A to raise a prima facie duty of care in tort should be confined to a contractual remedy against B, when the efficacy of that remedy is dubious, hardly seems a good policy reason for denying the existence of a duty of care in A.

Secondly, had this case been heard according to either Lord Reid or Lord Devlin’s approach in Hedley Byrne, the plaintiffs would not have succeeded. Neither actual reliance, nor even knowledge of the audit regime by the plaintiffs was considered necessary. While the Court held that the plaintiffs were entitled to rely in a general sense on the audit regime, it is dubious whether a person can reasonably rely on something of which they have no knowledge. It is similarly strange that a defendant can assume responsibility to a person who has no knowledge of that assumption. Shortly after the decision in Price Waterhouse, the Court of Appeal had to consider another negligent misstatement case with a similar pattern of facts. In Turton the approach to whether a duty was owed and the conclusion drawn from this were very different to that in Price Waterhouse.

2. R.M. Turton & Co. Ltd. (In Liquidation) v Kerslake

Kerslake contracted with the Southland Area Health Board (the Health Board) to provide specifications for building a new hospital. Kerslake’s
subcontractors provided the engineering specifications, and Turton successfully tendered for the contract with the Health Board to build the hospital. In constructing the hospital, Turton employed subcontractors for the mechanical services as required by their contract. However, following installation, it became evident that the specifications given by Kerslake for the heating system were inaccurate. Therefore, Turton had to undertake remedial work in order to fulfill their contractual requirements. As a result, Turton suffered loss and commenced proceedings against Kerslake. Kerslake was in a contractual relationship with the Health Board, as was Turton. However, no contractual relation existed between Turton and Kerslake. The contract between Kerslake and the Health Board set out where liability should fall, and specifically excluded liability for the accuracy of the mechanical specifications. As in *Price Waterhouse*, the main argument for the defendant was that imposing a duty of care would be inconsistent with the contractual relations the parties had assumed. However, in this case, confining the plaintiff to a contractual remedy would be ineffective.

The two judges in the majority, Henry and Keith JJ, gave a joint judgment that differed greatly to that of Thomas J. in dissent. Following the English approach, they held that a general test of liability was not possible and that the case should be decided according to its specific facts, including the contractual matrix. Their Honours considered that the contractual matrix denied any duty because:

1. Kerslake did not have any special skill over Turton;
2. Turton did not gain the information directly from Kerslake, who undertook no "voluntary assumption of responsibility" to Turton; and
3. There was no clear indication that Turton would rely on the information, but rather that they would rely on the expertise of their subcontractors for mechanical services.

The clearest sign that a duty would be inconsistent with the contractual matrix was that the contract between Kerslake and the Health Board, which specifically disclaimed any responsibility for the accuracy of the report. Therefore Henry and Keith JJ came to the following conclusion:

In our view the duty contended for in respect of the alleged representation that the componentry would achieve the required output would cut across and be inconsistent with the overall contractual structure which defines the relationships of the various parties to this work, and in the circumstances of this case it would not be fair, just or reasonable to impose the claimed duty of care.

31 Supra note 2, 413-414.
32 Ibid 417.
The majority went on to say:\textsuperscript{33}

There are, here, no broad policy issues to be considered. In a case such as this, therefore, we would not endorse the concept of a two-stage inquiry, which somehow first considers the general criteria (possession of skill, foreseeability, reasonable reliance) as establishing a prima facie duty of care, and then goes on to consider whether the contractual matrix negates the prima facie duty. There is no prima facie duty in that sense. The imposition of a duty will depend upon a consideration of all of the circumstances, which must include the contractual matrix.

Their Honours did not deny the possibility of concurrent liability in tort and contract, but said that the contractual matrix needs to be taken into account when considering the relationships of responsibility and reliance between the parties. That Kerslake denied responsibility to the Health Board for the accuracy of the report shows that they could not have assumed responsibility to Turton. Their Honours did not consider the fact that this would effectively provide no remedy as a reason to impose a duty, as the possibility of insolvency is irrelevant in deciding whether or not to impose a duty; insolvency being a known commercial risk.

In his dissent, Thomas J claimed to apply the Ann\textsuperscript{34}ns test, but actually used Lord Reid's \textit{Hedley Byrne} criteria as the sole determinate of the existence of a duty. In referring to \textit{Hedley Byrne}, his Honour stated:\textsuperscript{34}

[I]t is generally accepted that a duty of care will arise under \textit{Hedley Byrne} where the relationship between the parties manifest the following criteria:
- The maker of the statement possesses a special skill;
- He or she voluntarily assumes responsibility for the statement and it is foreseeable that the recipient will rely on it;
- It is reasonable for the recipient to rely on the statement and he or she does so; and
- The recipient suffers loss as a result.

Therefore Thomas J held that a “special relationship” existed between Kerslake and Turton because:

(1) The wording of the specifications for installation were mandatory;
(2) Kerslake had special skill over Turton;
(3) Given the little time available in the tendering process, and therefore Turton’s inability to check the specifications, it was reasonable for Turton to rely on the specifications; and
(4) Turton did in fact rely on these specifications and as a result suffered loss.

\textsuperscript{33} Ibid 418.
\textsuperscript{34} Ibid 425-426.
Thus, he concluded that Kerslake owed Turton a duty of care. In commenting on the approach taken by the majority, Thomas J stated that the difference was essentially one of approach, and that either approach should give the same result. However, as has been seen they did not. As His Honour put it: 35

But the inquiry whether the consulting engineer has assumed responsibility to the contractor for a statement which the contractor then relied upon for the purposes of *Hedley Byrne* is effectively the question whether the parties are in sufficient proximity to each other for a duty of care to arise. As I have said... questions of proximity and foreseeability are subsumed in the questions posed by *Hedley Byrne*: whether a person possessed of special skills has assumed responsibility for his or her statement and is able to perceive that the recipient may reasonably rely upon it. If the answer to that question is in the affirmative, the question is then whether there is anything in the contract or contractual matrix which negates or is inconsistent with that liability. It is not good enough to say that, because of the contractual matrix, no duty of care arises but fail to recognise this conclusion with the fact that the consulting engineer has assumed responsibility to the contractor for his statement and that the contractor has relied upon it.

His Honour went on to say that the approach of the majority was fundamentally flawed because it did not take into account the implications of *Donoghue v Stevenson*. 36 In *Donoghue*, the contractual matrix was held to be “irrelevant or, at least, neutral.” 37 Therefore, it did not impose a bar to the plaintiff suing the manufacturer in negligence in a situation where there was a contractual matrix, but no contractual relationship between the plaintiff and the defendant. Basically, this serves as an acknowledgement that there can be concurrent liability in contract and tort.

Given this, Thomas J must have erred in saying that the majority failed to consider the decision in *Donoghue*. As mentioned earlier, the majority did not contend that no duty would be owed in situations where a contractual matrix, but no contractual relationship, existed between the plaintiff and the defendant. Rather, they held that the wording of the contract in this specific case shows that there could be no liability. Given this, it seems that the differences between the decisions of the majority and that of Thomas J are deeper than a mere difference in approach to the duty question. The author contends that this difference is instead due to the course of the evolution of this branch of the law both in England and in New Zealand.

Thomas J approached the basis of liability in *Turton* as a question of “reasonable and foreseeable reliance” – as Lord Reid did in *Hedley Byrne*, and Woodhouse and Cooke JJ did in *Scott Group*. Therefore, without inquiring into the contractual matrix, Thomas J held that it was reasonable and foreseeable that Turton would rely on the specifications provided by Kerslake as this was the

36 [1932] AC 562 (HL) ["Donoghue"].
37 Supra note 2, 441.
purpose for which the specifications were produced. Hence a "special relationship" existed between Kerslake and Turton that was not negated by the contractual matrix. On this approach, it is likely that the contract would only be relevant if it specifically excluded tortuous actions – mere inconsistency with the contract would not be enough.

In contrast, Henry and Keith JJ approached the case by determining whether Kerslake had undertaken a "voluntary assumption of responsibility" to Turton. This approach was based on the approach of Lord Devlin in *Hedley Byrne*, and Richmond P in *Scott Group* – the latter cited with approval in *Caparo*. Their Honours examined the contractual matrix, not as an exclusive factor in determining liability, but as an indicator of the parties' intentions as to where responsibility for loss should lie. The author agrees that, in light of the contractual matrix, it would be farfetched at least to say that Kerslake had assumed responsibility to Turton, when the former had specifically excluded liability to the Health Board. The approach of the majority, in terms of their treatment of the contractual matrix, is supported by English decisions such as *British Telecommunications Plc v James Thompson & Sons (Engineers) Ltd* and *Simaan General Contracting Co v Pilkington Glass Ltd (No2).*

### IV. The Determination of Liability

1. "Reasonable and Foreseeable Reliance" or "Voluntary Assumption of Responsibility"?

There is a deeper difference underlying these two approaches. The "reasonable and foreseeable reliance" approach is similar to the approach taken in most tortuous actions in that it enforces a duty that is imposed by law. In contrast, the "voluntary assumption of responsibility" approach is based on consent.

At first appearance it seems unusual for the law of torts to be enforcing agreements that are generally covered by the law of contract. The answer to this, as Lord Devlin acknowledged in *Hedley Byrne*, is that the tort of negligent misstatement can be better understood when seen as a by-product of the doctrines of consideration and privity in the law of contract. First, for an agreement to be a legal contract there must be adequate and sufficient consideration. Secondly, other than in certain circumstances covered by the Contracts Privity Act 1982, only a party to a contract may sue for damages or specific performance. As many cases of negligent misstatement involve situations where no formal contract exists due to lack of consideration, or the plaintiff is not a party to the contract, a plaintiff cannot succeed through contract law. Nevertheless the advice or

38 [1999] 2 All ER 241 (HL).
39 [1987] 1 All ER 345 (QB).
information may still have been given on the understanding that the plaintiff was entitled to rely on it.

Therefore the tort of negligent misstatement can be viewed primarily as having a ‘gap filling’ role between the law of tort and the law of contract, allowing the law of contract to provide discrete and clear rules. This will suffice in the majority of cases.\(^4\) In situations where a plaintiff has a valid claim to compensation for loss suffered through reliance on a defendant who has assumed responsibility to them, the tort of negligent misstatement provides recourse where the claim would otherwise fail under the law of contract.

Although there are safeguards on both approaches, the author contends that the “voluntary assumption of responsibility” approach is likely to provide a narrower scope of liability and should therefore be considered more desirable than a broad approach. Certainly it is true that a broader liability may encourage care without being too onerous on potential defendants, as regardless of whether a duty is owed, liability will only follow if there has been negligence on the part of the defendant. However, there are also strong views that this will lead to economic problems such as an increase in the cost, and decrease in the availability of indemnity insurance.\(^4\) It would also necessarily follow that this cost would, in turn, be passed onto clients. As many situations where the tort arises involve information or advice given gratuitously, it would be undesirable to increase the cost of paid services in order to enable reliance for the recipients of this free advice or information.

Two further implications need to be considered in relation to the fact that these cases often involve advice or information given gratuitously. First, as the recipient is paying no fee for it, the scope of liability should be narrow. If the recipient requires a guarantee that they can rely on the information, this can be obtained through an agreement or contract with the provider. Secondly, the imposition of a heavy burden on people who are acting gratuitously is unreasonable and would tend to discourage these types of transactions. If the “assumption of responsibility” approach is taken, it will ensure that potential defendants are able to choose who can rely on their statements.

Finally, the “voluntary assumption of responsibility” approach provides greater certainty than the “reasonable and foreseeable” approach in an area of law that is at present characterized by an unsatisfactory level of uncertainty. Under this approach, potential defendants are better able to predict and control to whom they owe a duty of care.

2. *Carter Holt Harvey Ltd v Genesis Power Ltd*

Recently, New Zealand has revisited some of these issues in a judicial review of a strike out application. *Carter Holt Harvey v Genesis Power*\(^{43}\) was an application in the New Zealand High Court for judicial review of a striking out order. Carter Holt Harvey (CHH) had contracted with ECNZ (the predecessor of Genesis) to construct and install a cogeneration plant, while ECNZ had contracted with Rolls-Royce for the latter to design, construct and install various works in the plant. As in *Price Waterhouse* and *Turton*, there were no contractual relations between CHH and Rolls-Royce.

CHH claimed that the plant was defective. It sued ECNZ/Genesis in contract, alleging that Rolls-Royce owed CHH a duty of care in tort. In response, Rolls-Royce applied to have the case struck out, arguing that it could not possibly succeed as the contractual relations adopted by the parties clearly excluded the alleged tortuous duty. The Master declined the strike-out application and Rolls-Royce sought a review of that decision in the High Court. On review, Randerson J held that it was necessary for the court to consider not merely the contract, but also all the surrounding facts and circumstances — thus following the majority judgment in *Turton*:\(^{44}\)

I do not read the Court of Appeal’s approach in *Turton* as deciding that the provisions of the contract were decisive. They were considered to be no more than a factor, albeit an important one in that case, in determining whether a duty of care existed.

Therefore, it seems that the New Zealand courts will take the following approach to negligent misstatements. The basis of liability will be determined by an investigation into whether the defendant has voluntarily assumed responsibility to the plaintiff and liability will be imposed in situations where a reasonable person would think that the defendant had assumed responsibility. In this inquiry, it is necessary to look at all the surrounding facts and circumstances of the case. Analysing any contractual matrix is an important element of this. However, a contractual matrix is not determinative of a duty or lack of a duty — it is merely a factor to consider, albeit sometimes a very important one.

V. Conclusion

Within the space of a few weeks in 2002, *Price Waterhouse* and *Turton* were decided by the New Zealand Court of Appeal. Although these cases had similar fact patterns, they were approached in different ways and subsequently the judgments differed. The undesirability of this is obvious, as people (at least

\(^{43}\) [2003] 1 NZLR 272 ["CHH"].

\(^{44}\) Ibid 278.
theoretically) plan their actions and business practices according to the law, and this cannot be done where the law is so drastically uncertain. For this reason it is necessary to consider why these two cases have been treated so differently.

The author has premised that these differences are due to the historical development of the law relating to negligent misstatement. Although the law on this matter is now reasonably settled in England, the differences of approach that have arisen in the evolution of this branch of law have had a lasting effect on New Zealand law. This effect is evidenced by the fact that some New Zealand judges have insisted on continuing to apply the Anns test, while others apply a modified version of this test, and others still have followed England’s lead and discarded it altogether. Additionally, uncertainty remains as to whether the basis of liability in negligent misstatement cases is a “voluntary assumption of responsibility” by the defendant, or “reasonable and foreseeable reliance” by the plaintiff.

The “reasonable and foreseeable” reliance approach is typical of tort law in that it enforces an obligation imposed by law. In contrast, the “voluntary assumption of responsibility” approach is quasi-contractual; it enforces an obligation that arises out of consent and has essentially a gap-filling role. Such a role is necessary due to the doctrines of consideration and privity in the law of contract. The author considers the “assumption of responsibility” approach to be the more desirable of the two, as it has the ability to be clear and certain, thus allowing potential defendants to control the extent of the responsibility they undertake to third parties.

It seems likely from the recent decision in CHH that New Zealand Courts will favour the approach taken by the majority in Turton. This approach bases liability on a “voluntary assumption of responsibility” by the defendant, which is determined by considering all the relevant factors in the case. This includes any contractual matrix, although this matrix will not be determinative.