I. Introduction

The historical development of negligent misrepresentation causing financial loss has been dominated with concerns of how liability should be limited. It was immediately accepted that the “neighbour” principle elucidated by Lord Atkin in *M'Alister (or Donoghue) v Stevenson* applied in negligence claims involving injury to person and property was too broad to encompass claims involving negligent words. The courts wanted to prevent persons being sued for casual remarks made in the course of conversation and liable for an indeterminate amount to an indeterminate class. Due to a preoccupation with these concerns judges formulated their responses to negligent misrepresentation around considerations of policy and remedy. This resulted in judicial neglect of the more important prior inquiry - what gives the plaintiff the right to rely on the defendant’s statement? This article suggests an answer by arguing the plaintiff’s right to rely on the defendant’s words arises from the defendant’s assumption of responsibility to the plaintiff. The essence of this concept is that the right is derived from the defendant himself and is ascertained with reference to objective considerations.

This article further argues that it is not helpful to regard negligent misrepresentation cases as cases of economic loss. This is because the history and the substance of the action suggest a closer relationship with the law of contractual obligations than to negligence cases generally. The role of negligent misrepresentation, then, is essentially one of a gap-filler as it provides practical justice to a deserving plaintiff when strict contractual doctrines let her down. Accordingly, the proper conceptual place for the action is within a reconstituted law of agreements.

II. Historical Development

The common law was slow to recognise an actionable claim for economic loss caused by negligent words. In tort negligent words could not found a claim

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* BA/LLB(Hons). The author would like to thank Dr Allan Beever of the Faculty of Law, University of Auckland, for his helpful suggestions and support.
1 Misrepresentations which cause physical damage have never given the courts much difficulty, and they are generally treated as a variation of basic law of negligence which governs negligent acts: Bruce P Feldthuacen *Economic Negligence* (4th ed, Carswell, Scarborough, Ont, 2000) 47.
2 [1932] AC 562.
3 See *Ultramares Corporation v Touche* 174 N.E. 441 (1931) ("Ultramares").
in negligence, whether for physical or other damage. Any recovery was limited to the intentional tort of deceit, which required proof of either actual fraud or recklessness. A limited avenue of recovery was available where the parties could be said to be in a fiduciary relationship with each other, pursuant to the doctrine laid down in *Nocton v Ashburton*. As a result the law of contract remained the primary avenue for recovery, but this was only confined to situations where consideration had passed to parties in privity with one another. In any other situation, the plaintiff was remediless.

The first attempt to break with the past arose in *Candler v Crane Christmas & Co.* In this case the defendants, accountants, prepared company accounts and showed them to the plaintiff at the request of their employer. In reliance on the accounts the plaintiff invested substantial sums of money in the company. The accounts were carelessly prepared, contained numerous false statements and gave a wholly misleading picture of the financial state of the company. The plaintiff lost the whole of his investment. The majority of the English Court of Appeal held that a false statement made carelessly causing financial loss was not actionable in absence of a contractual or fiduciary relationship between the parties.

However in his dissenting judgment Denning LJ held that accountants, in preparing and rendering accounts and reports, also owed a duty of care to any third person to whom the accountants knew that their clients were going to show the accounts to and that the third person would consider the reports and accounts with a view to the investment of money or some other action to his gain or detriment. Thirteen years later, the question finally came to the House of Lords. The case was *Hedley Byrne & Co Ltd v Heller and Partners Ltd.*

III. The Rule in *Hedley Byrne*

In *Hedley Byrne* the plaintiffs (advertising agents) asked their bankers to inquire into the financial stability of a company with which they were having business dealings. Upon inquiry, the company’s bankers carelessly gave favourable references about the company’s financial position to the plaintiff’s bankers. The plaintiffs relied heavily on these representations and lost substantially when the company subsequently went into liquidation. The sole issue in the case was whether the plaintiffs could recover damages for the losses that they had suffered in reliance on the negligent misrepresentation regarding the company’s financial position. The action failed because the defendants had

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4 *Derry v Peek* (1889) 14 App Case 337.
5 [1914] AC 932 (HL). See also *Coleman v Myers* [1977] 2 NZLR 225, 298 (CA).
6 For an example see *Woods v Martins Bank* [1959] 1 QB 55.
7 [1951] 2 KB 164; 1 All ER 426 (CA) ("Candler").
8 It was suggested that negligent words causing physical harm was actionable, ibid 168.
9 [1964] AC 465 (HL) ("Hedley").
expressly disclaimed responsibility for the views put forward in a letter to the plaintiff’s bankers. So the case elucidated the simple rule that no duty of care can arise with respect to a statement given expressly “without responsibility”.

Despite the simplicity of the case all five Law Lords proceeded to re-examine the law on liability for negligent misrepresentations. The argument that there was some intelligible distinction to make between negligent acts and negligent words was expressly rejected and the Lordships determined that English law would henceforth recognise an action for negligent statements causing pure economic loss.

However, their Lordships were not prepared to apply Lord Atkin’s dictum in *Donoghue v Stevenson* literally when formulating the basis of a recovery for negligent misrepresentation. It was assumed that a duty of care based on “reasonable foreseeableability” was too broad for claims in negligent misrepresentation. Referring to *Donoghue v Stevenson*, Lord Reid said:

That is a very important decision, but I do not think that it has any direct bearing on this case. That decision may encourage us to develop existing lines of authority, but it cannot entitle us to disregard them. Apart altogether from authority, I would think that the law must treat negligent words differently from negligent acts.

Lord Reid offered two primary justifications for a restrictive or special duty of care in cases involving negligent words. The first justification was the policy concern of preventing persons being sued for representations made during the course of casual conversation:

Quite careful people often express definite opinions on social or informal occasions, even when they see that others are likely to be influenced by them; and they often do that without taking that care which they would take if asked for their opinion professionally, or in a business connection.

The second was that while a negligently made article will cause only one accident, “words can be broadcast with or without the consent or the foresight of the speaker or writer.” This was the fear summarized by Cardozo J in *Ultramares Corp v Touche* of “liability in an indeterminate amount for an indeterminate time to an indeterminate class.”

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11 Candler, supra note 7, 477.
12 Ibid 479. These justifications have not been considered adequate by some academics. In particular see W Bishop “Negligent Misrepresentation Through Economists’ Eyes” (1980) 96 LQR 360.
13 Candler, supra note 7, 479.
14 Ibid 483.
15 Ultramares, supra note 3.
16 This judicial comment has since been cited by Lord Pearce in *Hedley Byrne v Heller* [1964] AC 465; Lord Bridge in *Caparo Industries v Dickman* [1990] 2 AC 605, 621 and by Lord Griffiths in *Smith v Bush* [1990] 1 AC 831, 865.
Preoccupied by these policy concerns the House of Lords focused on formulating an appropriate test to restrict the ambit of recovery for negligent words. However, it is difficult to distil a clear definition of the circumstances giving rise to liability in negligent misrepresentation.17 According to Lord Reid, a duty to take care in words arises where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, whether it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him.”18 Lord Devlin formulated the test for the assumption of duty differently, proposing that a duty to take care in word arose where a relationship was: “equivalent to contract,19 that is to say where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract.”20

Since Hedley Byrne, common law courts have continued to search for a test for determining the existence or presence of liability in any particular circumstances. The next part of this article discusses the competing approaches to the basis of recovery in the Commonwealth. The approaches will be examined with reference to cases involving the frequently litigated issue and the liability of company auditors to third parties who rely on the financial statements.

IV. The Competing Approaches to the Basis of Recovery in Negligent Misrepresentation

1. The Anns-Derived Approach

The more conventional21 approach to the question of duty of care in negligent misrepresentation is derived from the House of Lords decision in Anns v Merton London Borough County Council.22 Here Lord Wilberforce formulated a test, intended as a general statement, which set about answering the question that encompassed all negligence claims including negligence misrepresentation. His Lordship posited that the question must be approached in two stages:23

First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a prima facie duty of care

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17 This was noted in Caparo Industrties v Dickman [1990] 2 AC 605, 631 (HL).
18 Candler, supra note 7, 528-529.
19 These words were borrowed from Lord Shaw in Nocton v Lord Ashburton [1914-15] All ER 62; [1914] AC 932, 972 (“Nocton”).
20 Candler, supra 7, 528-529.
21 See Barker “Divining an Approach to the Duty of Care” (2001) 10 OLR No1, 91 (Barker).
23 Ibid.
arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations that ought to negative or to reduce or limit the scope of the duty or the class of persons to whom it is owed or the damages to which a breach of it may give rise.

Initially 24 the New Zealand Court of Appeal received this approach to the duty of care with enthusiasm, particularly in cases involving negligent misrepresentation claims. This is most evident in the reasoning of Cooke and Woodhouse JJ in *Scott Group v McFarlane*. 26 Here the plaintiff completed a takeover bid for a public company after inspecting audited accounts prepared by the defendants, who were unaware of the takeover negotiations when the audit certificate was given. The accounts substantially overstated the assets of the company and the plaintiffs sued in negligent misrepresentation.

The majority of the court (Richmond P and Cooke J) dismissed the appeal, but the significant aspect of the judgment was the approach to the duty of care. Consistent with the approach in *Anns*, Cooke and Woodhouse JJ held the plaintiff only needed to show there was reasonable and foreseeable reliance on the audited accounts. The right to rely on the statement accrued from the mere fact the statement was made. As to the second stage of the *Anns*-inquiry, Woodhouse J considered it unwise to lay down precise rules as to when liability should be modified or waived. It was not material that the auditors, when they signed their reports, had no knowledge of any intention by the plaintiff or anyone else to formulate a takeover offer. Rather the court should have regard to the facts of each individual case, including the information’s likely circulation, its use and significance. According to the majority, the present case contained no compelling considerations to negate the finding of a prima facie duty.

A similar approach (with a different result) was taken in the leading Canadian decision *Hercules Management Ltd v Ernst & Young*. 21 In this case shareholders in two corporations brought an action against a firm of accountants alleging that the accountants had been negligent in auditing the corporations’ financial statements and that as a result they had incurred investment losses. Following the approach in *Anns*, La Forest J recognised that reliance on the audited statements by the shareholders was reasonable. However, this prima facie duty of care was cut down by a fundamental policy consideration, namely the fear of indeterminate liability. In the present case, the financial report was prepared for the purpose of assisting the collectivist of the shareholders of the audited companies in their task of overseeing management, not for the purpose of making

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24 Recent Court of Appeal decisions have suggested that New Zealand courts may be adopting the "incremental" approach elucidated in *Caparo Industries v Dickman*. For examples see *R M Turton & Co Ltd v Kerslake & Partners* [2000] 3 NZLR 406; *Boyd Knight v Purdee* [1999] 2 NZLR 278. For commentary on this see Barker, supra note 21.


26 [1978] 1 NZLR 553 ("Scott").

investment decisions or protecting the interests of individual shareholders. Moreover, allowing liability would effectively reduce the supply of accounting services to marginal companies and would increase insurance premiums for accountants resulting in increased costs for their clients. The appeal was accordingly dismissed.

This article asserts that the Anns-derived approach\(^\text{28}\) is problematic for two primary reasons. Firstly, if one takes the Anns approach seriously, it follows that by the simple act of speaking, the defendant can put herself in a position that may form the basis of her duty of care. This is inconsistent with the general approach of the common law. To be legally actionable, indeed to be legally significant at all, the injury to a claimant in negligence must be something over which the claimant has a right. There are two types of negligent misrepresentation claims, each accruing from a different right.\(^\text{29}\) The first class of case is where the defendant’s negligent misrepresentation causes damage to persons or property.\(^\text{30}\) In this class of case the basis of recovery is unproblematic, the right to sue the defendant arising from a claimant’s prior right to property and bodily integrity. The second class of case, and the focus of this article, is where the defendant’s negligent words result in “pure economic loss”. In this class of case the common law affords no prior right to the claimant for the expected or promised profit from her investment. Thus the right must be sourced from the defendant. However, at common law a gift is not to be presumed.\(^\text{31}\) Thus it is not enough that the defendant made the statement, the plaintiff must show that she had a right to rely on the statement. Rights are given to another only if it is reasonable on an objective test to interpret the givers’ actions as surrendering that right. On the balance of these considerations, the Anns-derived approach cannot be supported.

Secondly, the Anns-derived approach is nothing but a framework within which the court must develop policy considerations to define the circumstances in which a duty of care arises.\(^\text{32}\) The policy considerations are crucial because it is widely accepted (even by its biggest proponents) that liability based merely on “reasonable foreseeability” would place an intolerable burden on defendants. Admittedly, there is nothing necessarily wrong with courts making explicit reference to policy considerations. As Denning LJ noted in *Lamb v Camden London Borough Council*\(^\text{33}\), questions of policy have always lurked in the

\(^\text{28}\) And its modified forms, which can be seen in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd* [1992] 2 NZLR 282.

\(^\text{29}\) As Cardozo CJ put it “negligence is not a tort unless it results in the commission of a wrong, and the commission of a wrong imports the violation of a right.” *See Palsgraf v Long Island Railroad Co.* 162 N.E. 99 (1928).

\(^\text{30}\) Denning LJ offered the example of an analyst who carelessly certifies to a manufacturer of food that an ingredient is harmless when it is not or of an inspector of lifts who carelessly reports that a particular lift is safe when it is not. *Candler*, supra note 7.

\(^\text{31}\) This is seen most clearly in contract law where there are a number of prerequisites that must be satisfied before a court will recognize rights in an obligation.

\(^\text{32}\) See Brennan J in *Sans Sebastion Pty Ltd v Minister Administering the Environmental Planning and Assessment Act* (1986) 162 CLR 341, 367 (HCA).

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background, guiding the outcome in negligence claims. However, it cannot be said that considerations of policy provide a proper explanation for the basis of recovery in negligent misrepresentation. There must be a better and more principled explanation for the strong intuition of judges to restrict recovery in negligent misrepresentation.

2. The Alternative Approach

Richmond P in *Scott Group* and the House of Lords in *Caparo Industries v Dickman* elucidated an alternative approach to the basis of recovery in negligent misrepresentation. In *Scott Group* Richmond P reviewed the judgments in *Hedley Byrne* and rejected the proposition that foreseeability alone could found a duty of care in negligent misrepresentation. His Honour posited that the question in any negligent misrepresentation case was whether the nature of the relationship was such that one party can be held to have assumed a responsibility to the other in regard to the reliability of the advice or information. This relationship could not be found to exist unless at least two factors were evident:

(i) The maker of the statement was or ought to have been aware that his advice or information was in fact made available to and be relied on by a particular person or class of persons for the purposes of a particular transaction or type of transaction;

(ii) The maker of the statement, both in preparing himself for what he said and in saying it, must have directed his mind, and been able to direct his mind, to some specific purpose for which he was aware that his advice or information would be relied upon.

Richmond P found that in the present case the evidence did not disclose circumstances that either made the auditors aware or ought to have made the auditors aware that the accounts were required by the plaintiff as the basis for the takeover offer. Accordingly, he found that no duty of care was owed by the auditors to the plaintiff and dismissed the appeal.

In *Caparo Industries*, the House of Lords restated the duty of care in similarly limited terms. In that case the defendants were auditors who acted for a company. They had prepared annual accounts on the strength of which the plaintiff bought shares in the company and then mounted a successful takeover bid. The plaintiff alleged that the accounts were inaccurate and misleading as

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34 Ibid 636-637. One can see this ‘invisible hand’ working and a criticism of it in *White v Jones* [1995] 2 AC 207, 245-258 (*White*). Goff LJ, criticised by Mustill LJ, reverted to the need to do justice as the principle for liability. This created a “specialist pocket of tort law”.

35 [1990] 2 AC 605 (HL) (“Caparo”). See also *Esanada Finance Corp Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241, 248 (HCA) where Tookey J and Gaudron J stated “only the foreseeability of possible damage without some further control would be to create a liability wholly indefinite in area, duration and amount and would open up a limitless vista of uninsurable risk for the professional man.”

36 *Scott*, supra note 26, 567.

37 Ibid 568.
they showed a substantial pre-tax profit when they should have recorded a significant loss. Counsel for the plaintiff argued that had the plaintiff been aware of this state of affairs, they would never have bid for the company. Relying on, inter alia, the judgments of Cooke and Woodhouse JJ in *Scott Group*, counsel argued that a duty of care was owed to the plaintiff due to their position as a potential investor in the company being within a definable class of persons likely to be injured.

The *Anns*-derived approach was rejected by their Lordships, who considered that mere foreseeability of harm could never be sufficient to determine the existence of a duty of care where the claim is one for economic loss arising out of negligent misrepresentation. As Oliver LJ stated:

> [I]t is almost always foreseeable that someone, somewhere and in some circumstances, may choose to alter his position upon the faith of the accuracy of a statement or report which comes to his attention and it is always foreseeable that a report – even a confidential report - may be communicated to persons other than the original or intended recipient.

Instead there were four recognised conditions that at the very least were to be satisfied before a defendant can be liable for economic loss resulting from negligent information or advice. They are as follows:

(i) The advice must be required for a purpose, whether particularly specified or generally described, which is made known, either actually or inferentially, to the adviser at the time when the advice is given;
(ii) The adviser must know, either actually or inferentially, 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;
(iii) It is known, either actually or inferentially, that the advice so communicated is likely to be acted upon by the advisee for that purpose without independent inquiry; and
(iv) It is so acted on by the advisee to his detriment.

Essential to the decision was the finding that the auditors’ duty of care was closely circumscribed by reference to the defendant’s knowledge of the advisee and the purpose for which the advice was sought. Their Lordships considered that the purpose of the statutory requirement for an audit of public companies was the making of a report to enable the body of shareholders as a whole to exercise informed control over the company, not to enable existing share-holders or

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38 One example is Bridge LJ. See *Caparo*, supra note 35, 618.
39 Ibid 643.
40 Ibid 638. Although his Lordship disclaimed any intention to lay down conditions which were either conclusive or exclusive.
41 A Dugdale “Caparo Ten Years On” (1999) 7-8 TLR 213.
members of the public at large to buy shares with a view to make a profit.\footnote{Caparo, supra note 35, 654. The Court of Appeal held that existing shareholders were owed such a duty distinguishing the shareholder investors from other members of the public. \textit{Caparo Industries v Dickman} [1989] 1 All ER 798 (CA)} Accordingly, the auditors owed no duty of care to the respondents either as shareholders or as potential investors in the company.

The alternative approach to the basis of recovery is clearly favourable to the \textit{Anns}-derived approach. First, in treating negligent misrepresentation as a special class the alternative approach best represents that of Denning LJ in \textit{Candler Crane} and the House of Lords in \textit{Hedley Byrne}. Secondly, the approach is clearly defined and facilitates certainty in commercial transactions. Finally, the approach is in keeping with fundamental principles of the common law, particularly that the right to rely on a statement cannot be automatic or presumed, but is instead derived from the defendant.

However, it cannot be said that the alternative approach provides an entirely satisfactory explanation for the basis of recovery in negligent misrepresentation. This is because it is again evident that the judges’ primary concern is to formulate appropriate “limitation devices” to restrict the ambit of recovery. The approach tells us little about the right that the negligent misrepresentation action seeks to protect.

\section{The Right to Recovery in Negligent Misrepresentation}

This part of the article will argue that the “limitation devices” elucidated by Richmond P and the House of Lords in fact correspond to a single legal principle, the defendant’s assumption of responsibility.

As Lord Browne-Wilkinson has recently pointed out,\footnote{\textit{White v Jones} [1995] 2 AC 270, 271. (“White“).} the notion that the defendant’s assumption of responsibility is the basis of recovery in negligent misrepresentation is not a novel one. Its genesis is to be found in \textit{Nocton v Ashburton}, where Viscount Haldane LC said:\footnote{\textit{Nocton}, supra note 19, 948}

\begin{quote}
Although liability for negligence in words has in material respects been developed in our law differently from liability got negligence in act, it is none the less true that a man may come under a special duty to exercise care in giving information or advice. I should accordingly be sorry to be thought to lend countenance to the idea that recent decisions have been intended to stereotype the cases in which people can be held to have assumed such a special duty. Whether such a duty has been assumed must depend on the relationship of the parties, and it is at least certain that there are a good many cases in which that relationship may be properly treated as giving rise to a special duty of care in statement.
\end{quote}
Although there are passages pointing the other way, the reasoning of the majority in *Hedley Byrne* suggests that the crucial element in the case was by choosing to answer the enquiry, the bank had assumed to act, and this assumption created the special relationship on which the necessary duty of care was founded. This is suggested in the following passage from Lord Morris of Borth-y-Gest, who stated that:

If in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to...another person who, as he knows or should know, will place reliance on it, then a duty of care will arise.

A renewed focus on assumption of responsibility may be seen in a number of important recent cases on negligent misrepresentation. Indeed in *Williams v Natural Life Health Foods* Lord Steyn went so far as to say that “there is no better rationalization for the relevant head of tort liability than assumption of responsibility.”

It is also helpful in understanding a defendant’s assumption of responsibility to refer to criticisms of the concept. Todd espoused the central criticism when he said, “defendants never, or hardly ever, in fact agree to shoulder responsibility”. Indeed some critics have argued that the inference of an assumption of responsibility is a legal fiction, seldom warranted on the facts. For example, Gordon has said:

In practically every case where gratuitous information is given, it is distorting to facts to say that the informant has any intention of accepting responsibility...It is nearly always a moral certainty that it never occurs to the adviser that he is undertaking anything; his views are given for what they are worth.

However, this approach misses the fundamental premise of assumption of responsibility. The concept does not require that the defendant expressly undertake legal responsibility for legal information or advice. Rather, the essence of liability is a mutuality between the plaintiff and defendant ascertained on objective considerations. The mutuality “arises internally from the relationship which the parties had together chosen to place themselves” and requires that

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45 As per Goff LJ who referred to passages of Devlin and Morris LJJ in *Henderson v Merrett Syndicates* [1995] 2 AC 145 (Henderson).
46 *Hedley*, supra note 9, 503.
47 For examples see *White*, supra note 43; *Henderson*, supra note 45 and *Spring v Guardian Assurance* [1995] 2 AC 396 (“*Spring*”).
48 [1999] 1 WLR 831 (“*Williams*”)
49 Ibid 837. Extra-judicially, reference has been made to the “emerging tort of assumption of responsibility.” See R Grantham and Charles Rickett, “Director’s Tortious Liability” (1999) 62 MLR 133. (Grantham)
50 S Todd *Tod on Torts* (9th ed 2001) 227. (Todd)
52 DM Gordon, “Hedley Byrne v Heller in the House of Lords” 91964-6) 2 UBCLLR 113, 119-120.
both the plaintiff and the defendant must play an active part in the transaction from which liability arises. The primary focus is not on the state of mind of the defendant but rather on exchanges and interaction (statements and conduct) assessed from an objective viewpoint. The right of the plaintiff to rely on the statement is thus derived from the defendant. Beever provides a helpful explanation of the practical application of assumption of responsibility as follows:

If A breaches a contract with B to sell his horse for 100 pounds, B can sue for breach of contract, not because he has an antecedent right to A's horse, but because A promised B the horse. The right that A breached, then, is created by the agreement between A and B. Representations that involve assumptions of responsibility create similar though more limited rights. If D, in the knowledge that C is thinking of an investing in a company, represents to C that the company is in good financial shape, this is taken, on an objective test, to be an assumption of responsibility to C for the investment even though that investment – typically a chose in action – in itself generates no rights as against D. In such a case, the right that C holds against D is created by the representation [Emphasis added].

The assumption of responsibility concept can explain why, as indicated by the cases discussed, it is very rare that an auditor will be liable to third parties for negligently prepared accounts. This is because, notwithstanding that the third party’s reliance and loss was foreseeable, she had no right as against the defendant to rely on the statements. The concept may explain why Richmond P insisted that the maker of the statement was aware, or ought to have been aware, that his words would be available to and relied on by a particular type of person or class of persons. Without this requisite knowledge the defendant could not be said to have assumed responsibility to the plaintiff. The concept can also explain Lord Oliver’s emphasis on the purpose for which the statement was made, as in any other case the defendant did not give the plaintiff a right to rely on the statement in that particular way. To allow recovery in such cases would be to permit recovery for the “violation” of a non-right.

It is also possible to explain the treatment of the disclaimer in Hedley Byrne with the conception of an assumption of responsibility. Occasionally the disclaimer has been said to operate not to deny an assumption of responsibility but rather only as an affirmative defence to liability. It is also possible to contend, pursuant to the Anns basis of recovery, that it was not reasonable for the plaintiff in Hedley Byrne to rely on the statement. However, the correct view is that taken in Hedley Byrne itself; because of the limiting words, the defendant never acquired a duty of care in the first place. Hence there was nothing from which to disclaim.

54 Ibid 297.
55 Williams, supra note 48.
56 Allen Beever “Against Tort Imperialism” Unpublished article, 27. (Beever).
57 Ibid 28.
59 Hedley, supra note 9, 486.
Lastly, the concept explains why Denning LJ was correct to have allowed recovery in *Candler Crane*. Recall that here the accountants had knowledge that the accounts of the company were to be shown to the plaintiffs for the purpose of a potential investment in the company. By making the negligent statements in these circumstances the defendants effectively surrendered a right to the plaintiffs to rely on those statements.

VI. Negligent Misrepresentation: Contract or Tort?

The focus on assumption of responsibility means that it is not helpful to regard negligent misrepresentation cases as cases of economic loss. Accordingly, the conceptual basis of the negligent misrepresentation action closely resembles the law of contract and its proper conceptual place is within the “law of agreements”.

The close connection between tort and contract was recognised by Devlin LJ in *Hedley Byrne*, who spoke of a relationship that, but for the lack of consideration, is “equivalent to contract.”

The basis of recovery in negligent misrepresentation is not the defendant’s wrongdoing, but the defendant’s assumption of responsibility. Thus the primary right to sue in negligent misrepresentation arises from the same event as a contractual right - consent.

The most obvious reason for treating negligent misrepresentation claims differently from other negligence claims is that they raise issues which have very little to do with the problem of personal injury, which the basic rules of negligence law were designed to deal with. As Stapleton has elucidated, the tort of negligence emerged in its clearest form in the late nineteenth and early twentieth centuries as a cause of action for a stranger who had been physically injured by the negligent actions of the defendant-stranger. In contrast, negligent misrepresentation arises primarily in a commercial setting in relation to the provision of professional or quasi-professional services (including advice) about a financial transaction such as a loan, sale or investment. This is not the arena of injury, accident and duties owed to strangers, but rather that of frustrated business people and disappointed investors. This was recognised and emphasised by Denning LJ in *Candler Crane*, who, in considering what persons are under a duty to take care in words said:

My answer is those persons such as accountants, valuers and analysts, whose profession and occupation is to examine books, accounts and other things, and to

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60 Ibid 529. See also *Spring*, supra note 47, where Goff LJ remarked “the Hedley Byrne duty arises where there is a relationship which is, broadly speaking, either contract or equivalent to contract.”

61 Grantham, supra note 49, 137.


63 *Candler*, supra note 7, 179. See also Lord Bridge’s comments that litigation typically arises “in relation to statements made by a person in the exercise of his calling or profession”. *Caparo*, supra note 35, 619.
make reports on which other people — other than their clients — rely in the ordinary course of business.

The close relationship of negligent misrepresentation with contract can be further explained by an analysis of the conceptual basis of contract and tort. As Benson has explained, tort in general presupposes that a plaintiff has a protected interest that originates prior to and is independent of the parties' interaction, whereas contract supposes an interest that arises solely through their interaction.\(^\text{64}\) It cannot be said that a plaintiff in a negligent misrepresentation claim has a prior and independent interest. Rather, the assumption of responsibility concept entails that the right to rely on the defendant's words is derived from the defendant himself and arises, as in contract, solely from that interaction.

Furthermore, as a matter of law, the defendant's assumption of responsibility in negligent misrepresentation is not imposed. This was recognised by Devlin LJ in Hedley Byrne:\(^\text{65}\)

I do not understand any of your Lordships to hold it is a responsibility imposed by law upon certain types of persons or in certain sorts of situations. It is a responsibility that is voluntarily accepted or undertaken, either generally where a general relationship, such as that of a solicitor and client or banker, is created, or specifically in relationship to a particular transaction.

The concept thus puts pressure on the general distinction that duties in tort are imposed and "assumed duties are a matter of contract".\(^\text{66}\) For this reason, the validity of the concept has been criticised by a number of distinguished legal academics.\(^\text{67}\) For instance, Goodhart has questioned why the law of tort should be enforcing obligations that were historically the province of contract.\(^\text{68}\)

The novel phrase "equivalent to contract" means that "there is an assumption of responsibility in which, but for the absence of consideration there would be a contract." This, with great respect, is not an easy concept to apply for it requires an interpretation of the rules of contract. Moreover, it suggests that the liability for misrepresentation is essentially contractual in nature, although it gives rise to an action in tort.

However, such criticisms belie a more fundamental theoretical issue, specifically the role of negligent misrepresentation in the structure of the law of private obligations as a whole. This may be answered by looking to the purpose the negligent misrepresentation action serves. It is evident that the initial impetus


\(^{65}\) Hedley, supra note 9, 529.

\(^{66}\) Todd, supra note 50, 277.

\(^{67}\) Other academic writers have criticized the principle of assumption of responsibility as often resting on a fiction used to justify a conclusion that a duty of care exists. For examples see Barker, supra note 51; B Hepple "The Search for Coherence" (1997) 50 CLP 67, 88 and Peter Cane Tort Law and Economic Interests (2nd Ed, Clarendon Press, New York, 1995) 177, 200.

\(^{68}\) Arthur L Goodhart "Liability for Innocent but Negligent Misrepresentations" (1964-65) 74 YLJ 286, 287.
for an action in negligent misrepresentation was a desire to give effect to an undertaking where no consideration had passed and there was no privity between the parties. As Goff LJ has stated, the problems caused by the strict application of contractual doctrines encouraged judges to “seek a solution to problems of this kind within the law of tortious negligence.” Recently, the House of Lords has found a second purpose for the negligent misrepresentation action. This is to evade what Burrows has deemed “unwarranted disadvantages” in contract law, in particular the different rules on limitation and remoteness. Thus the role of negligent misrepresentation is essentially an interstitial or “gap-filling” one, designed to give practical justice to the plaintiff where strict contractual doctrines let her down.

What then, is the proper conceptual place for negligent misrepresentation in the law of private obligations? It may be said that the law of negligent misrepresentation sits in the space between tort and contract, filling the lacuna in the law of private obligations. Though the response must be restorative and not based on expectation, thereby resembling tort, the existence of the right relies on the acquiescence of the defendant, and hence resembles contract. Accordingly, the proper conceptual place for the law of negligent misrepresentation is within a reconstituted conception of the law of agreements. This conception would encompass those situations where strict contractual rules have been established and situations where the courts wish to give effect to an undertaking but there is no consideration or privity. Negligent misrepresentation would thus work in an analogous manner to the doctrine of promissory estoppel giving unilateral effect to the voluntary undertaking of the parties where black-letter contractual rules cannot be satisfied.

VII. Conclusion

This article has argued that the historical focus of the courts in negligent misrepresentation claims causing financial loss has been on policy and remedy. Courts were concerned about a need to prevent people being held liable for casual remarks made in the course of conversation and have liability to a limitless range of plaintiffs. Accordingly, courts have been preoccupied with formulating appropriate “limitation devices” to restrict the ambit of recovery in negligent

69 Williams, supra note 48, 837.
70 White, supra note 34, 263.
71 Henderson, supra note 45.
73 This was explicitly recognised by LJ Steyn. See Williams, supra note 48.
74 Admittedly, the principle upon which the measure of damages is based in negligent misrepresentation is the plaintiff’s reliance interest, and does not protect the plaintiffs expectation of loss. However, it would be misconceived to suggest that this makes the action a tortious claim. This is because it is clear that the damages principle in contract is not closed and reliance damages may be granted.
75 Beever, supra note 56. The right to sue in negligent misrepresentation is not reciprocal as with contracts, but is instead unilateral granted only against the defendant.
misrepresentation. This “remedial mentality” has obscured the reason the plaintiff is able to recover in cases of negligent misrepresentation causing financial loss, the defendant’s voluntary assumption of responsibility to the plaintiff. According to the concept, it is not sufficient merely that that defendant made the statement but rather requires that the defendant both made the statement and surrenders a right to rely on the statement. This concept gives a principled explanation for the strong intuition of judges to deny recovery to third parties who rely on a negligently prepared financial statement.

The focus on assumption of responsibility means that the negligent misrepresentation action resembles closely the law of contract. This is essentially because the primary right negligent misrepresentation seeks to enforce arises from the same event as in contract — consent. Accordingly, we should no longer assume that negligent misrepresentation belongs to the law of tort. Rather, the proper place for the action is within a reconstituted law of agreements. This analysis is inevitable if we view the law of private obligations not as rigidly compartmentalized causes of action, but as a conceptually seamless web.

76 Ibid 169.