

THE ETHICS OF PROXIMITY

An Essay for William Deane

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This essay takes the idea of responsibility as asymmetric and infinite, developed by the great philosopher of ethics Emmanuel Levinas, and uses it as a starting point for a reflection on the history of the High Court's debates over the law of negligence in the period after 1984. In the work of Sir William Deane in particular — and in the work of Levinas no less — the key words for our responsibility to others were duty of care, neighbourhood, and most particularly proximity. The remarkable connection in language between these very different bodies of sustained reflection suggests the possibility of re-understanding the struggles of the High Court over this period, and in particular presents an opportunity to rethink the meaning and relevance of 'proximity' in the court's articulations of our relationships. I will argue that proximity explains and justifies responsibility. It also indicates precisely the direction in which the court ought to go in determining its nature and boundaries. Finally, the court's work in this area indeed came close, for a while, to providing an interpretation of proximity akin to that of Levinas. Justice Deane, in talking about proximity, perceived that something foundational and ethical was really at stake in these legal debates: the growth, learning and humility of the common law. Had he had the occasion to read Emmanuel Levinas, the court might have been better positioned to articulate these important points.

Proximity as an Approach

Emmanuel Levinas is one of the great writers on ethics of the twentieth century, but he is little known in law. His two main works, *Totality and Infinity* and *Otherwise Than Being, or Beyond Essence*,¹ offer a reconstruction of human selfhood away from questions of identity and ego and towards an 'ethics of the other'. His writing is passionate, mystical and rational, at times erudite and elsewhere downright obtuse. But as reward for this struggle, Levinas offers a sustained meditation on the relationship of ethics,

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¹ Levinas (1969, 1981).

responsibility and law, and — remarkably — he does so using the language of the duty of care. Here, then, is a philosopher largely unknown to legal theory who at last speaks the language of torts.

Central to Levinas's meditations is an idea of ethics to which I will have recourse. For Levinas, and for those who have been influenced by him, the word 'ethics' implies a personal responsibility to another that is both involuntary and singular. The demand of ethics comes from the intimacy of an experienced encounter, and its contours cannot therefore be codified or predicted in advance.² At least as opposed to the Kantian paradigm of morality as 'a system of rules',³ ethics therefore speaks about interpersonal relationships and not about abstract principles. At least as opposed to most understandings of law, ethics insists on the necessity of our response to others, and the unique predicament of each such response, rather than attempting to reduce such responses to standard instances and norms of general application applicable to whole communities and capable of being settled in advance. Indeed, ethics constantly destabilises and ruptures those rules and that settlement.⁴ Furthermore, ethics implies an unavoidable responsibility to another which Levinas exhorts as 'first philosophy'⁵ — by this he means to indicate that, without some such initial hospitality⁶ or openness to the vulnerability of another human being, neither language nor society nor law could ever have got going. At least as opposed to many understandings of justice,⁷ there is nothing logical or *a priori* inevitable about such an openness, except that without it we would not be here to talk to one another. We cannot *derive* this ethics from rational first principles. Ethics *is* that first principle.

Yet this further suggests Levinas's natural affinity to the law of negligence, for the duty of care is likewise 'involuntary' and 'singular' — singular because it too attempts to work from unique case to unique case without ever finding a rule that can or will pin it down for all time, and involuntary because it is not the outcome of a contract or an agreement but describes a *personal* responsibility we owe to others which has been placed upon us without our consent. It is a kind of debt that each of us owes to others although we never consciously accrued it. Thus it raises, in a distinctly personal way, one of the oldest questions of law itself: what does it mean to be responsible? 'Am I my brother's keeper?' This is not a question that is easier to answer for us than for Cain.

The congruity between Levinas's reflections on the origin and justification of our responsibility to others, and the law of negligence, does not stop there. Proximity in Levinasian ethics and in negligence law is (or until recently was) the indispensable term of art of their respective genres. The word

² Bauman (1993); Diamantides (2000) p 2ff.

³ It is this understanding of ethics that governs Caputo (1993). See Duncan (2001), p 141.

⁴ Bernasconi (1987), p 131; Diamantides (1995), pp 224–25.

⁵ Levinas (1998).

⁶ Derrida (2000).

⁷ Rawls (1999).

is freighted with a new set of implications in the work of Levinas, beginning with 'La Proximité' in 1971 and further amplified in *Autrefois qu'être* in 1978, translated as *Otherwise than Being* in 1981. Likewise, in the Australian context which will form the detailed subject of the case study I present here, proximity is freighted with a new set of legal implications in *Caltex Oil (Australia) Pty Ltd v The Dredge 'Willemstad'*⁸ in 1976 and further amplified in *Jaensch v Coffey* in 1984.⁹ Both disciplines seek through this word to capture a new ethics of relationship and responsibility that is not reducible to a code or a fixed rule: it is in each case phenomenological, flexible and responsive.

The idea of approaching another without appropriating or defining them was of critical importance to Levinas. He referred to it variously as *l'approche*, and of course *la proximité*.¹⁰ There, and elsewhere, he speaks of 'the neighbour' as *le prochain* — one who is nearby or proximate:

Perhaps because of current moral maxims in which the word *neighbour* occurs, we have ceased to be surprised by all that is involved in proximity and approach.¹¹

Levinas's work is marked throughout by his insistence on proximity as something non-conceptual and non-intentional — not a choice or an idea or a rule but a sensation and an experience — and by his connecting our responsibility to the neighbour, *le prochain*, with just this kind of singular experience.¹²

On the one hand, proximity stands for this intimate but unassailable distance and the ethical obligations it places upon us: 'a rapport produced by a lack of relation'.¹³ On the other hand, relationships of proximity constitute us: they do not 'collide with freedom, but invest it'.¹⁴ The approach of another awakens us from the deep sleep of introspection: it gives us an intensity, a feeling of existence, and, by the very fact of becoming aware that we are not alone and find ourselves implicated in this non-indifference, we are aroused to consciousness.¹⁵ By 'calling us in question' — by singling us out as responsible for others — we are made better aware of ourselves.

It is true that Levinas speaks of responsibility in virtually unbounded terms, as something beyond our choice and imposed upon us. Responsibility is 'unexceptionable ... preceding every free consent, every pact, every

⁸ *Caltex Oil (Australia) Pty. Ltd. v The Dredge 'Willemstad'* (1976) 136 CLR 529.

⁹ *Jaensch v Coffey* (1984) 155 CLR 549.

¹⁰ Levinas (1978), pp 129–56. This section was originally published as 'La Proximité' in *Archives de Philosophie* (1971): see Levinas (1981), p xlvii.

¹¹ Levinas (1981), p 5.

¹² Levinas (1987), pp 61, 73.

¹³ Levinas (1969), p 264.

¹⁴ Levinas (1969), p 217.

¹⁵ Levinas (1969), pp 322–23.

contract'.¹⁶ Since it is not our ego that chooses it, we may even feel hostage to it and persecuted by it.¹⁷ Neither is responsibility relative to consent or intent. Rather it is relative to a circumstance of vulnerability that may not be of our own making. In triumphal vein, he declares that we are 'chosen without assuming the choice!'¹⁸ The fundamental distinction in terms of its justification and extent between proximity and any idea of contract is in fact the central feature of Levinasian ethics.

Yet it is equally true that this circumstantial and terrifying responsibility arises from the particularity of a relationship. This is what makes Levinas's idea of proximity so relevant to tort law which similarly concerns not the state or the community but our purely *personal* relations with each other. He speaks of the 'responsibility *for* my neighbour ... *for* the stranger or sojourner'.¹⁹ Proximity, unlike Christian love or Marxist brotherhood, is a relative closeness, not a universal kinship. Levinas does not imagine that we are all neighbours all the time. Isn't that what lies behind the word 'neighbour' itself — a word at once distinctly Levinasian and decisively legal? It marks the boundary within which we find ourselves responsible. Proximity is in fact the origin of responsibility: it is the experience that leads us to catch sight of it. That is its role in ethics and in law. Proximity does not limit responsibility: it augurs and inaugurates it. It *inspires* it.

The law of negligence has also struggled to answer the question of boundaries: when and to whom are we responsible? This is what has frequently been termed 'the duty question'. And here the complex history and discourse of the Australian common law provides us with a case study of quite unparalleled richness. 'Proximity' was the principal way in which the High Court of Australia, particularly during the 1980s and 1990s, sought to develop a new answer and a radical new language concerning 'the duty question'. My argument in this essay, and at greater length in the book I have just completed,²⁰ is that the court, in so doing, gestures — no doubt unconsciously — towards the ethical framework that Levinas makes explicit. As opposed to some of the court's own language, however, in which proximity is understood as a *limit* on responsibility or as just another (and frustratingly vague) *rule*, I will argue that proximity explains and justifies responsibility. It also indicates precisely the direction in which the court ought to go in determining its nature and boundaries. What I want finally to show is that the court's work in this area indeed came close to providing an interpretation of proximity akin to that of Levinas.

Particularly in the influential judgments of Justice William Deane, the court sought to give determinate content to the duty by reference to

¹⁶ Levinas (1981), p 114.

¹⁷ Levinas (1981), pp 59, 121. 'A subject is hostage': Levinas (1981), p 112.

¹⁸ Levinas (1981), p 56.

¹⁹ Levinas (1989), p 83. Italics mine.

²⁰ Manderson (2006).

proximity.²¹ The notion of proximity was a radical and controversial jurisprudential development that led to innovation after innovation in the court's judgments. When I first read these judgments, it seemed to me that the court was groping towards a new idea of the nature of and justification for our ideas of responsibility. Then, when I read Levinas some years later, I came to appreciate much more clearly what they might have wanted to say and why it mattered. The conjunction of these two discourses, in their own ways so uniquely positioned to reflect deeply on the essence of our responsibility to others, and the connections between the language they each used, seemed to me to be so remarkable as to demand a sustained analysis. Out of that shock and surprise this research was born.

Unfortunately our short history is that of a lost opportunity. Proximity was a celebrated battleground in the Australian courts for 15 years, but finally it was as good as abandoned by Their Honours. Because the court failed to understand the term as a normative justification, and because instead its value was assessed in terms of whether it could be treated as a determinate 'rule', it was eventually dismissed as being insufficiently legally precise. The result has been, over the past few years, a turning away from proximity in two ways: substantively, by confining responsibility more closely to situations of consent and choice; and methodologically, by insisting on the need for legal judgment to provide rules capable of an entirely certain future application. Both in Levinas and in the law, these two dimensions of the 'proximity debate' are connected. Proximity stands for both an expansion of the ambit of responsibility and an expansion in our understanding of judgment. If we understand proximity in Levinasian terms — as a starting point and justification for our duties to others, on the one hand; and as an ethical or self-reflective moment that *confronts* our rules on the other and thus calls them into question — then the unique discursive contribution of proximity to the duty of care and to the common law might have been — and may yet be — better appreciated.

Proximity and Policy

Proximity is distinct from either of the two limits upon responsibility which have traditionally determined those persons to whom we owe a duty of care, namely 'policy considerations' and 'reasonable foreseeability'. Levinas would be rightly critical of these concepts in that they remove our attention from care of the *other*, and direct our attention instead to ourselves.

The phrase 'policy considerations' limits responsibility by reference to *we*. It imports the social outcome of legal judgments as a relevant constraining factor. For Levinas, this emphasis undermines the intrinsic constitutive function which responsibility serves in *relation* to this society. There is no reason to remove absolutely the relevance of general policy issues that might prevent the application of principles of tortious responsibility to certain specified areas. It is true that the imposition of liability in tort might, if carried

²¹ *Stevens v Brodribb Sawmilling Company; Gray v Brodribb Sawmilling Company* (1986) 160 CLR 16 at 52–53, per Deane J.

too far, make it impossible for governments or police to do their work at all, and would ultimately undermine the distinction between executive and judicial power.²²

But proximity and policy are concerned with quite different relationships. Proximity orients responsibility by reference to *you*, policy by reference to *us*, in terms of society's interests as a whole. There are two parties to the former equation; 'the third party' (indeed lots and lots of them) enters in the latter.²³ As elementary — meaning both facile and fundamental — as this distinction might seem, the court has not always been sensitive to it. The conflation dates even from Deane J's first discussion of proximity in *Jaensch v Coffey*. In attempting to distinguish proximity from reasonable foreseeability, Deane J proceeded immediately to conflate it with policy:

The essential function of such requirements or limitations is to confine the existence of a duty to take reasonable care to avoid reasonably foreseeable injury to the circumstances or classes of case in which it is the policy of the law to admit it. Such overriding requirements or limitations shape the frontiers of the common law of negligence.²⁴

Perilously, then, Deane J presents proximity *as* a policy or limitation upon a naturalised class of 'reasonably foreseeable injuries'. Once that approach is taken, there is no limit to the kind of policies that might be incorporated under the guise of proximity. Proximity becomes simply a limiting device and an aspect of social policy. This is an unpardonable error. Proximity, properly understood, is not a limit on a relationship which otherwise exists. It is, on the contrary, the very experience that creates the relationship in the first place. In this sense, proximity represents the core element of negligence that recognises a connection between the parties, and not simply a way of carrying out 'the policy of the law'. And, as we have seen, proximity involves a one-to-one relationship where policy imports a one-to-many relationship. The approach to be taken in their analysis is therefore and ought to remain quite distinct.

The fire of criticism which engulfed the High Court's use of proximity in the early 1990s was inflamed by this carelessness. So enamoured did the High Court become of the idea of 'proximity' as the 'touchstone for determining the existence and content of any common law duty of care'²⁵ that 'policy' itself became entirely subsumed within it. The majority in *Gala v Preston* goes so far as to describe proximity as 'includ[ing] policy considerations'.²⁶ The danger, as Brennan J and others were quick to point out, is that proximity used

²² See *Hill v Chief Constable of West Yorkshire* [1989] AC 53.

²³ Levinas (1981), p 157. Reference might also be made of the work of Charles Sandford Peirce, for whom the 'third' with all its implications and complexifications was also a critical analytical stage.

²⁴ *Jaensch v Coffey* (1984) 155 CLR 549, 583, per Deane J.

²⁵ *Jaensch v Coffey* (1984) 155 CLR 549, 583, per Deane J.

²⁶ *Gala v Preston* (1991) 172 CLR 243 at 253, per Mason CJ, Deane, Gaudron and McHugh JJ; 260, per Brennan J.

in this way provides no basis of reasoning capable of guiding future courts and future citizens. The word becomes simply the description attached to the outcome of the court's deliberations: 'Better to identify the consideration which negates the duty of care than simply to assert an absence of proximity.'²⁷

Policy considerations are by their very nature 'extra-legal values' which serve to exclude or control a personal relationship between the parties otherwise established. As exceptions, they must be explained and justified specifically and not concealed under general conclusions. But this is not to say that proximity *qua* proximity is similarly contentless. So it was that, in *Pyrenees*,²⁸ Kirby J — having dramatically declared that 'it is tolerably clear that proximity's reign ... has come to an end'²⁹ — proceeded immediately to advocate a threefold test³⁰ including, as separate matters, reasonable foreseeability, policy issues *and* proximity. Far from being 'extra-legal' or social, it is the foundational principle of closeness to whose fate responsibility must in some form be tied. This does not solve the problem of determination — of how close is close enough. The problem is inevitable and inherently insoluble, but Levinas's idea of proximity does allow us to focus on the right relationships and in the right ways. The disarticulation of proximity and policy is the first step towards such a rehabilitation.

Proximity and Foreseeability

The legal doctrine of 'reasonable foreseeability', on the other hand, limits responsibility by reference to *I*. It asks the question, what persons could *I* foresee as being affected by my actions. In the classic words of Lord Atkin, the focus in establishing whether I have breached my duty of care to another person is on whether I 'ought reasonably to have them in contemplation as being so affected'.³¹ But in this section I want to argue that responsibility is not about what I might foresee at all. Culpability might be — that is the question of fault, which is to say whether the responsible person could and would have behaved differently in all the circumstances. This is what, in negligence law, is called 'the breach issue'. Did the person live up to their responsibility? But whether they *had* such a responsibility is a prior question, governed not by concept, but by experience. For Levinas, responsibility is determined by a relational contiguity and not our perception of it. This is the consequence of his insistence on responsibility not as a choice but a predicament: I do not *take* responsibility; I am encumbered by it.³²

²⁷ *Gala v Preston* (1991) 172 CLR 243 at 261, per Brennan J.

²⁸ *Pyrenees Shire Council v Day; Eskimo Amber Pty Ltd v Pyrenees Shire Council* (1998) 192 CLR 330.

²⁹ *Pyrenees Shire Council v Day; Eskimo Amber Pty Ltd v Pyrenees Shire Council* (1998) 192 CLR 330 at 414 [238], per Kirby J.

³⁰ *Caparo Industries PLC v Dickman* [1990] 2 AC 605 at 617–18.

³¹ *Donoghue v Stevenson* [1931] AC 562 at 580.

³² Levinas (1982), p 92.

The emphasis on reasonable foreseeability derives from an insistence on individualism and theories of autonomy. It is just this enshrinement of free human agency³³ that Levinas insists responsibility is most definitely *not* about. Stephen Perry, in a recent and very helpful review of the literature, argues that ‘the key moral concept that underpins ... responsibility is, as Holmes suggested, avoidability’.³⁴ From this he concludes the centrality of reasonable foreseeability to the notion of responsibility since ‘one cannot avoid what one cannot foresee’.³⁵ This approach conflates the fundamental distinction between duty and breach.

The distinction is perhaps slight, and is made still slighter by the very broad interpretation which foreseeability has received in the common law. The law has tended to hold legally foreseeable a whole range of events that are, in practice, probably not so.³⁶ But the question remains of considerable significance because the courts, in determining the ambit of duty, are fundamentally making judgments about the relative recognition to be given to the defendant’s autonomy on the one hand, and the plaintiff’s vulnerability on the other.³⁷ As between the two, Levinas argues that responsibility is a function of the latter, not of the former.

Indeed, the essential distinction between foreseeability and responsibility emerges even in the celebrated and much-parsed passage of *Donoghue v Stevenson*. Lord Atkin there asks: ‘Who is my neighbour?’ He then remarks that: ‘You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.’ If this is intended as a definition of neighbourhood, it is transparently and woefully circular. This is precisely Justice Deane’s analysis of the text in *Jaensch v Coffey*.³⁸ The only feasible explanation is that Lord Atkin is foreshadowing the circumstances in which a duty of care will be breached, and not what gives rise to the duty at all.³⁹ It is not a definition of neighbourhood but an explanation as to its consequences. So, not having yet answered it, Lord Atkin is forced immediately to *repeat* the question: ‘Who, then, in law is my neighbour?’—that is, who are the class of persons for whom I must take reasonable care? He then answers as follows:

The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in

³³ Mackie (1979); see also the several discussion of Mackie’s work in Cane and Gardner (2001).

³⁴ Perry (1995), p 345.

³⁵ Perry (2001), pp 83–91; Vines, (2000), p 135, discussing Perry and Mackie.

³⁶ *Chapman v Hearse* (1961) 106 CLR 112, per Owen Dixon CJ.

³⁷ Vines (2000), p 135, discussing Perry and Mackie.

³⁸ *Jaensch v Coffey* (1984) 155 CLR 549.

³⁹ *Donoghue v Stevenson* [1931] AC 562 at 580, per Lord Atkin.

contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.⁴⁰

Our neighbours are those who are 'closely and directly affected' by us, 'so ... that' we ought reasonably to bear them in mind as we go about our business. The clause foreshadows the issue of breach rather than further defining the criteria of duty. Only later does Lord Atkin attempt to explain what might constitute 'closely and directly'. He does so by reference to proximity:

I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.⁴¹

Here at last Lord Atkin would appear to link proximity to some species of knowledge. Responsibility arises only if the defendant 'would know' of the person so affected. Perhaps this might fairly be construed as a requirement of personal knowledge. If this be the charter of reasonable foreseeability, it is a fairly attenuated one, and it makes its delayed appearance as the supplement of proximity and not, as most scholars would have it, the reverse.

Even within this final formulation of Lord Atkin's, our responsibility to others is clearly governed not by what we actually know or foresee, but rather by what we ought to know.⁴² Since this is determined ultimately by the court, this is simply another way of begging the question. In a society in which law helps to constitute patterns of behaviour, it is surely reasonable for us to foresee *all* those to whom we owe a duty, and it is against this rock that Lord Atkin continually stumbles. It is a rock that, in a later critique of the concept of proximity, Robert Goff LJ ignores. In a much-cited critique, he argues that 'once proximity is no longer treated as expressing a relationship founded simply on foreseeability of damage, it ceases to have an ascertainable meaning'.⁴³ But since the test is not 'simply' foreseeability, but rather reasonable foreseeability, it contains — as it must — the *same* element of subjective judgment as that of proximity; the *same* inescapable moment of indeterminacy.

For this reason, if reasonable foreseeability suddenly became the exclusive requirement of duty, it would prove every bit as troublesome as the other tests and practices that have risen to supplement it. Ironically, because the courts have invested other concepts — in particular proximity — with the element of discretion and judgment, reasonable foreseeability has not had to do

⁴⁰ *Donoghue v Stevenson* [1931] AC 562 at 580, per Lord Atkin.

⁴¹ *Donoghue v Stevenson* [1931] AC 562 at 580, per Lord Atkin.

⁴² *Vaughan v Menlove* (1837) 3 Bing NC 467; 132 ER 490.

⁴³ *Leigh & Sullivan v Aliakmon Shipping Co Ltd* [1985] QB 350 at 397, per Robert Goff LJ (English Court of Appeals).

much work. The difficulty arises from the very *idea* of attempting to determine abstractly to whom we are responsible, rather than in any linguistic formulation whatsoever. The use of the word 'reasonable' at once smuggles in the very exercise of judgment it purports to objectify.

In practice, the notion of reasonable foreseeability — particularly 'at the duty stage' — has barely limited the idea of responsibility at all. It is this reason, and not its inherent clarity, that accounts for its supposed legal viability. The concept has been rendered certain simply by being rendered anodyne. Dixon CJ remarked: 'I cannot understand why any event which does happen is not foreseeable by a person of sufficient imagination and intelligence.'⁴⁴ It is said that the common law imposes a duty only upon those persons whom we can foresee will be affected by our actions. But a closer examination reveals that this is very rarely a relevant consideration. On the one hand, one might argue that in cases of 'ordinary physical injury or damage caused by the direct impact of a positive act' the test of reasonable foreseeability is 'commonly an adequate indication' of the existence of such a relationship.⁴⁵ This is only because the responsibility owed, for example, by a driver to his passengers or other road users is self-evident, and not because it is fundamentally a question of what is foreseeable. On the other hand, the very expansiveness of the legal definition of 'foreseeability', as we have seen, has meant that the courts have had to find other ways of delimiting when and whether a duty of care is owed. To give but one significant example, the proprietor of a business can certainly foresee and may even desire that their competitive actions will harm a rival — but that hardly imposes upon them a duty of care not to do so. As Deane J notes, 'unless there be some particular relationship, personal or proprietary right or other added element, the common law imposes no liability'.⁴⁶ Either way, in the vast run of cases, reasonable foreseeability will prove surplus to the reasoning as to whether a duty of care was owed. Perhaps nothing better demonstrates the actual irrelevance of the concept of foreseeability to our understanding of responsibility than the interpretative direction the courts have taken. Because other linguistic formulations — most notably that of proximity, and most influentially in the Australian context — have been called on to do the inescapable work of judgment, foreseeability has been shorn of both content and contention.

In *Jaensch v Coffey*, Justice Deane concludes: 'Lord Atkin's notions of reasonable foreseeability and proximity were, however, distinct.'⁴⁷ I would go further. Reasonable foreseeability is best understood as a test of breach and not a test of duty at all. The judgment of duty was expressed in *Donoghue* in terms of neighbourhood, closeness, directness and proximity. And as Levinas

⁴⁴ Transcripts of *Chapman v Hearse* (1961) 106 CLR 112, quoted in Luntz and Hambly (1995), p 145.

⁴⁵ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 495, per Deane J.

⁴⁶ *Jaensch v Coffey* (1984) 155 CLR 549 at 578, per Deane J.

⁴⁷ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 495, per Deane J.

explains, this proximity cannot be placed within the boundaries of a formula about foresight. 'Proximity is not an intentionality'⁴⁸ — which is to say, it is not a question of choice or knowledge or expectations. It is a question rather of contact and experience. Where there has been physical contact — 'this face and this skin'⁴⁹ — the reality of proximity will not be at issue with or without the concept of reasonable foreseeability. Where there has not — if, for example, the harm to the plaintiff was only economic or psychological — then it is commonplace that the so-called test of reasonable foreseeability does not provide a satisfactory answer. As an index of responsibility, it turns out to be a sprinkler system that cuts out the moment the fire gets hot.⁵⁰

Instead, we need to focus on the nature of the relationship between the parties — the power and the vulnerability of their dynamic — and not the knowledge that one 'reasonably' 'ought to' possess of the other. Levinas rightly insists that the experience of proximity precedes the concepts that come to govern it. I do not *foresee* responsibility. On the contrary, it calls to me with an 'immediacy,' a 'sensitivity' and a 'vulnerability'.⁵¹ Responsibility comes to me and not the other way around. All this means is that proximity, the core of duty, cannot ever be reduced to a precise concept because it is prior to consciousness.⁵² And for that reason we experience it not in terms of anticipation, but as a surprise. Levinas argues that 'consciousness is always late for the rendezvous with the neighbour'.⁵³ We already find ourselves in a relationship before we can think about it. The value of this analysis is not that it solves the complex judgments of what counts as close enough or direct enough — it cannot — but that it captures so precisely the *experience* of responsibility that negligence addresses. Negligence is precisely about the unexpected, the careless or the thoughtless. It is a judgment passed on our responses when responsibility suddenly approaches *to us*: at a busy intersection, on a quiet road, on a train platform. In that moment, we find that we are already responsible for the welfare of another. Proximity — not foreseeability — turns out to be the central element of the duty of care. It is to a short history of this term in the period from 1984–2000 that we now turn.

The Early History of Proximity: Responsibility as a Shock

Proximity is Levinas's word, and that of the High Court of Australia over part of its influential and controversial history, to describe the origin of responsibility as it arises *outside* of us, 'without this obligation having begun in me'. It arises not from *my* choices or foresight, nor from *our* policies, but from *your* vulnerability in relation to which I find myself in a position to protect you. It is clear enough that its nature is distinct from the other

⁴⁸ Levinas (1982), p 125.

⁴⁹ Levinas (1982), p 125.

⁵⁰ Geertz (1985), p 221.

⁵¹ Levinas (1981), p 64.

⁵² Levinas (1981), p 64.

⁵³ Levinas (1982), p 119.

approaches to which the duty of care has been subject. What is not clear is how, once identified, it could ever serve as a 'criterion for liability'.⁵⁴ For this reason, the cases that originally followed *Donoghue v Stevenson* treated proximity as if it were simply a physical connection. But gradually a wider range of cases, involving relationships distant in time and place, began to come before the court. In *Caltex Oil v The Dredge 'Willemstad'*⁵⁵ the High Court recognised that one could be 'closely and directed affected' by another without actually touching them.⁵⁶ Amid a great diversity of approaches (the Privy Council chose to ignore the decision because 'their Lordships have not been able to extract ... any single *ratio decidendi*'),⁵⁷ Stephen J. sowed the seeds for the future line of cases by specifically expanding the idea of proximity beyond a physical propinquity.⁵⁸

The need is for some control mechanism based upon notions of proximity between tortious act and resultant detriment to take the place of the nexus provided by the suggested exclusory rule which I have rejected ... it may be that no more specific proposition can be formulated than a need for insistence upon sufficient proximity between tortious act and compensable detriment. The articulation, through the cases, of circumstances which denote sufficient proximity will provide a body of precedent productive of the necessary certainty.⁵⁹

In this, His Honour was perhaps a tad sanguine. Nevertheless, Stephen J's judgment is significant in bringing together the two elements around which the whole debate on proximity was to develop in future years. The first is the notion of proximity as a general principle of linkage incapable of more definite formulation. The second is the 'gradual accumulation' of 'a body of precedent' in specific areas as a means of stabilising the law. In this way, 'piecemeal conclusions arrived at in precedent cases' would serve to determine, over time, 'some general area of demarcation between what is and is not a sufficient degree of proximity'.⁶⁰

⁵⁴ *Leigh & Sullivan v Aliakmon Shipping Co Ltd* [1985] QB 350 at 397, per Robert Goff LJ (English Court of Appeals).

⁵⁵ *Caltex Oil v The Dredge 'Willemstad'* (1976) 136 CLR 529.

⁵⁶ Of course specific areas of negligence law had already been acknowledged as exceptions, for example in cases nervous shock and negligent misstatement.

⁵⁷ *Candlewood Navigation Corporation v Mitsui OSK Lines* [1986] AC 1 at 22.

⁵⁸ The fact that Caltex's oil and the damaged AOR pipeline were actually in physical contact was the basis of Jacob J's judgment: *Caltex Oil v The Dredge 'Willemstad'* (1976) 136 CLR 529 at 594-605, per Jacob J.

⁵⁹ *Caltex Oil v The Dredge 'Willemstad'* (1976) 136 CLR 529 at 575, per Stephen J.

⁶⁰ *Caltex Oil v The Dredge 'Willemstad'* (1976) 136 CLR 529 at 575, per Stephen J.

The theme of proximity was greatly developed in a series of cases decided in 1984–85, beginning with *Jaensch v Coffey*. It is significant that the case concerned that other vexed area of non-physical harm, so-called ‘nervous shock’ — that is, psychological injury unaccompanied by any physical harm to the plaintiff. Perhaps no case better demonstrates the difficulties, potential and meanings of the word proximity than this first one. A police officer had been seriously injured by a negligent driver, and his wife suffered psychiatric illness as a result. She had not witnessed the accident, but had gone to visit him in hospital ‘with all these tubes coming out of him’.⁶¹ Over the years, a disparate range of factors had been found to be relevant to determining whether a person who suffers serious psychological trauma in reaction to an injury to someone else can sue for the ‘nervous shock’ thus caused. These factors included who was injured, how the plaintiff experienced the ‘shock’, when and where. Neither could those different aspects be readily incorporated within the general framework of negligence. They seemed rather to be an arbitrary series of limitations designed simply to prevent the spread of liability that the application of a simple test of reasonable foreseeability invited.

In *Jaensch*, the court’s focus on the twin limitations of reasonable foreseeability/policy is striking. Brennan J attempted to explain the different limiting criteria as elements going to establish reasonable foreseeability. Yet it hardly seems credible to argue that ‘mere bystanders’ with no prior relationship to the injured person cannot sue for nervous shock, just because they are in some sense unforeseeable plaintiffs. In the very broad sense that the courts apply in other contexts, it is entirely foreseeable that *any* person who witnesses a serious accident might be shocked and traumatised by it.⁶²

Dawson and Murphy JJ, for their parts, contrast this supposed legalism with the dictates of policy. Dawson concludes that ‘there appear to be strictures upon liability for the infliction of nervous shock which are not readily explicable in terms of foreseeability and which may be seen to be the result of the application of policy considerations’.⁶³ This is to say that there are limits to claims of nervous shock beyond mere reasonable foreseeability. But the mantra of ‘policy considerations’ does not determine the grounds on which such limits should be imposed, unless the policy in question is simply to limit the scope of liability come what may, in which case any old criteria would do.

It is here that Deane J’s seminal analysis turns out to be of real assistance. His approach is relational. He argues that there are a number of features that might go to establish a special connection or closeness between the physical injury suffered through the defendant’s negligence, and the psychiatric injury suffered in consequence of it. These include the ‘close, constructive and loving relationship’⁶⁴ between the two; how immediately the physical injury was

⁶¹ *Jaensch v Coffey* (1984) 155 CLR 549 at 558, reported in Brennan J’s judgment.

⁶² *Chester v Waverley Municipal Council* (1939) 62 CLR 1 at 7, per Latham CJ.

⁶³ *Jaensch v Coffey* (1984) 155 CLR 549 at 612, per Dawson J.

⁶⁴ *Jaensch v Coffey* (1984) 155 CLR 549 at 600, per Deane J.

observed or experienced that led to 'nervous shock'; and the manner in which the news of the injury was learnt by the plaintiff. These elements are not part of the doctrine of reasonable foreseeability, but on the contrary, quite separate from it. Neither does he understand them as being rules that can simply be applied in an all-or-nothing fashion in every case. Again to the contrary, Deane J presents them as aspects of an overriding principle called proximity without which 'the relationship will not be adjudged "so" close "as" to give rise to a duty of care'.⁶⁵ The distinction between principle and rule that lies behind Deane's discussion and has been drawn out in some of the academic commentary on the case, is based on Ronald Dworkin's influential formulation.⁶⁶ It allows Deane J to treat the features of previous cases not as stand-alone criteria, but as elements that go towards making up something more fundamental — 'the requisite proximity of relationship'.⁶⁷

In the first place, then, the adoption of proximity was not just a way of characterising the pre-existing rules applicable in cases of nervous shock. It was a way of justifying them. The point is that our proximity to others — the shared neighbourhood of our relationship — is not just one factor among others that governs legal liability. It is the *reason* that the law recognises responsibility at all. The concepts and rules used by the courts are manifestations of an underlying norm. So too, for Levinas, proximity expresses 'the relationship with the neighbour in the moral sense of the term'.⁶⁸

Regrettably, having begun with this insight, Deane J consistently speaks of proximity as an 'operative limitation or control upon the ordinary test of reasonable foreseeability',⁶⁹ while in later cases, proximity is sometimes treated as a mere cipher for social policy. Both approaches treat proximity as a supplement for the sake of convenience. This profoundly misunderstands its role. By *Sutherland Shire Council v Heyman*,⁷⁰ decided the following year, Deane had to some extent recognised his mistake, and reversed the logical priority of the terms. There, reasonable foreseeability is described as merely an 'indication' that 'the requirement of proximity is satisfied'.⁷¹ So by *Heyman's* case, proximity had become the basal criterion for responsibility. Most clearly, he there clarified the importance of proximity 'as the unifying rationale of particular propositions of law which might otherwise appear to be disparate'.⁷² The majority judgment in *Burnie Port Authority* similarly insists that 'without it, the tort of negligence would ... rest on questionable foundations since the validity of such reasoning essentially depends upon the assumption of

⁶⁵ *Jaensch v Coffey* (1984) 155 CLR 549 at 605, per Deane J.

⁶⁶ Dworkin (1986); Vines (1993).

⁶⁷ *Jaensch v Coffey* (1984) 155 CLR 549 at 605, per Deane J.

⁶⁸ Levinas (1987), p 119.

⁶⁹ *Jaensch v Coffey* (1984) 155 CLR 549 at 591, per Deane J.

⁷⁰ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

⁷¹ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 495, per Deane J.

⁷² *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 495, per Deane J.

underlying unity or consistency'.⁷³ But Levinas would clarify the role of proximity still further, I think. Proximity is not just 'the general *conceptual* determinant and the unifying *theme*'⁷⁴ of negligence. It describes the corporeal experience of relatedness that inspires and provokes responsibility at all. This is what it means to recognise 'proximity and not the truth about proximity'.⁷⁵

Second, the adoption of proximity in *Jaensch* was not just a way of characterising the pre-existing rules applicable to cases of nervous shock. It was also a way of liberating them from 'the strait-jacket of some formularised criterion of liability'.⁷⁶ As Levinas insists, proximity, being experienced before we become aware of it, must exceed our prior categories of it. Proximity *must* come as a surprise. It is implicit in such an approach that the absence of one of these elements may not by itself prove fatal to the establishment of a 'sufficient degree of proximity' if the relationship can be shown to be close enough in *other* ways. In future cases, this was to prove both the strength of the approach and its inherent weakness.⁷⁷

What, then, will constitute kinds of relationships that will prove 'close enough'? Here too my argument will be that the 'father of proximity' does not take proximity seriously enough. The matter comes to a head in his consideration of the 'mere bystander'. The question is, can someone who 'merely' observes the negligent injury of another, no prior relationship existing between them, sue for the psychiatric illness they suffer as a result? Deane J thinks not, but his reasoning is curious. On the one hand:

a person who has suffered reasonably foreseeable psychiatric injury as the result of contemporaneous observation at the scene of the accident is within the area in which the common law accepts that the requirement of proximity is satisfied regardless of his particular relationship with the injured person.⁷⁸

On the other hand, this conclusion 'should not be seen as indicating that the relationship between the plaintiff and the injured person will be unimportant on the prior question of reasonable foreseeability of injury in that form'.⁷⁹ The reasoning, then, is parallel to Brennan J's own, with the added perplexity that Deane J thus wishes us to believe that the bystander does not fall within a

⁷³ *Burnie Port Authority v General Jones* (1994) 179 CLR 520 at 543, per Mason CJ, Deane, Dawson and Toohey and Gaudron JJ.

⁷⁴ *Cook v Cook* (1986) 162 CLR 376 at 382, per Mason, Wilson, Deane and Dawson JJ.

⁷⁵ Levinas (1981), p 120.

⁷⁶ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 497, per Deane J.

⁷⁷ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 497, per Deane J.

⁷⁸ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 497, per Deane J.

⁷⁹ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 497, per Deane J.

reasonably foreseeable class of persons *even though* they are proximate. It is hard to imagine how this could be. It is even harder, given the 'undemanding test' of reasonable foreseeability as we have already noted.⁸⁰ It is harder still given that Deane J himself had earlier described proximity as a limitation on the 'ordinary test of reasonable foreseeability'.⁸¹

Deane's solution is to emphasise that the 'prior question' is determined as 'a matter of law'. One might think that he means to distinguish it from a matter of fact to be determined by the trier of fact. But of course, proximity is also a matter of law in this respect.⁸² It begins to look like a 'matter of law' is to be distinguished not from fact but from logic. In other words, Deane J concedes here that the use of reasonable foreseeability in order to exclude the bystander can *only* be justified as a legal fiction.⁸³ Yet it is precisely Deane's argument, and that of the High Court in later cases, that the legitimacy of tort law 'depends upon [an] underlying unity or consistency'⁸⁴ rather than its mere facade. Legitimacy can hardly be inferred by a process of deeming.

Deane J struggles to distinguish the 'mere' bystander from a mother or partner, for example, or from someone who suffers nervous shock as a result of their efforts to help, rescue or comfort the victims of an accident. The law has long recognised the responsibility of the defendant for the injury, physical or psychiatric, suffered by their rescuers or the rescuers of their victims.⁸⁵ There seems to me, purely as a question of its *foreseeability*, no difference between the psychiatric harm suffered by a rescuer and a bystander. It is true that, in a situation of disaster, the involvement of rescuers may be both lengthy and harrowing. The trauma and stress that they suffer is well documented. On the other hand, there is something to be said for the view that those for whom rescue is a profession might be less likely to suffer trauma than a bystander with no experience or preparation to fall back on. Yet the law admits of no such distinction.⁸⁶ Even were one to conclude that the greater the active involvement, the greater the probability of harm, foreseeability has never been analysed in terms of degrees. It is simply a threshold test, a yes/no question — a rule — and it could hardly be said that a bystander could not be reasonably foreseen to suffer mental illness. Ironically, the very structure of 'nervous shock' would sustain such a conclusion. Shock, says Brennan J, means

⁸⁰ *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 44, per Mason J, quoting Glass JA in the New South Wales Court of Appeal: (1978) 1 NSWLR 641.

⁸¹ *Jaensch v Coffey* (1984) 155 CLR 549 at 549, per Deane J.

⁸² 'Proximity is a question of law to be resolved by the processes of legal reasoning, induction, and deduction': *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 498, per Deane J.

⁸³ Fitzpatrick (2001), pp 87–88.

⁸⁴ *Burnie Port Authority v General Jones* (1994) 179 CLR 520 at 543, per Mason CJ, Deane, Dawson and Toohey and Gaudron JJ.

⁸⁵ *Chadwick v British Railways Board* [1967] 1 WLR 912.

⁸⁶ *Ogwo v Taylor* [1988] AC 431; *Frost v Chief Constable* [1997] 1 All ER 540 (English Court of Appeals).

precisely a 'sudden sensory perception ... so distressing that [it] ... affronts or insults the plaintiff's mind and causes a recognisable psychiatric illness'.⁸⁷ Such a moment of horror could just as foreseeably befall a bystander to a tragic accident as a rescuer.

There is, however, a discourse that is both substantive, and analyzed in terms of degrees. It is not reasonable foreseeability. It is proximity. In *Sutherland Shire Council v Heyman*,⁸⁸ decided shortly after, Justice Deane was forced to defend it from criticism. He rightly conceded that it cannot 'provide an automatic or rigid formula for determining liability'.⁸⁹ In the well-known passage that follows, he attempts to define the requirement of proximity.

[Proximity] involves the notion of nearness or closeness and embraces physical proximity... [,] circumstantial proximity such as an overriding relationship of employer and employee or of a professional man and his client [,] and what may (perhaps loosely) be referred to as causal proximity.⁹⁰

Alas, in attempting to provide the Courts with rules to quell their anxiety, Deane J offers an enumeration and not an explanation. The growing chorus of criticism to which proximity has been subject was due in no small part to the circularity of Deane's discussion.⁹¹ But it is possible to pursue our thinking as to the circumstances that give rise to proximity a little further, and without recourse to the language of reasonable foreseeability on which Deane falls back.

The true distinction is this: in each case of proximity, plaintiffs find themselves vulnerable to the defendant, in a manner that is outside of their control, and to a degree that sets them apart from the world at large. In the first place, their proximity derives from the experience of relationship between the parties and not from the intentions or mind of the defendant. But at the same time the person who is responsible is called in question—called to account—by the suffering of the other. They have been rendered unique; they can field no substitutes in the fulfillment of their unchosen duty.⁹² As Levinas likewise makes clear, proximity can be understood as a way of describing a situation of distinct vulnerability: it *singles out plaintiffs* as those who are uniquely capable of making a difference. *We* do not choose to be responsible; on the contrary the vulnerable choose (though also not consciously) us.

⁸⁷ *Jaensch v Coffey* (1984) 155 CLR 549 at 567, per Brennan J. Emphasis mine.

⁸⁸ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

⁸⁹ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 497, per Deane J.

⁹⁰ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 497, per Deane J.

⁹¹ McHugh (1989), Ch 2; Amirthalingam and Faunce (1997).

⁹² See, for example, Levinas (1981), p 56.

Vicki Coffey's trauma was not just a function of seeing the accident, as might happen to anyone. On the contrary, she was placed in a circumstance where she was particularly, one might even say uniquely, vulnerable to harm by virtue of her relationship with Allan, 'close, constructive and loving'. She was not in the same category as a bystander, because she was in danger before the accident. Her relationship already exposed her to it. Her vulnerability involved a capacity to be harmed that she could not avoid. None could deny that love puts us at risk. It draws us close. And, while this intensifies joy, it intensifies pain as well. We are no longer in control of our happiness. This loss of control places us in proximity to those we love, and in proximity to those who might harm them too. All the language of Levinas insists on this. Proximity arises through 'an exposure to the other', 'an exposure to traumas', 'vulnerability'.⁹³ Exposed by her relationship, unable to avoid the gathering trauma, she had no choice but to rely on others. Her love imperilled her. In that regard, then, she was subject to a distinct vulnerability not of her making and that set her apart from the rest of the world. That proximity was the description of a state of affairs, an experience, that did not depend on the negligent driver's ability or otherwise to reasonably foresee it.

What of the rescuer? They too are distinguished from the bystander not by their foreseeability, but by their proximity. It is immaterial whether the rescuer is a professional or motivated instead by some instinctive response to need. They too are *drawn* close to the accident, answering a call that comes from outside of them and acts upon them. 'The cry of distress is the summons to relief,' as Cardozo put it. But it is not that such an instinct is 'natural and probable'.⁹⁴ It may, on the contrary, be rare and exceptional. The likelihood of rescue is surely beside the point. As Cardozo remarks: 'The wrong that imperils life is a wrong to the imperilled victim. It is a wrong also to his rescuer ... The wrongdoer *may not have foreseen* the coming of a deliverer. He is accountable as if he had.'⁹⁵ The reason is surely clear. It is the very circumstance of a rescue and not its foreseeability that establishes a bond of responsibility between the two. Rescuers are like loved ones. They find themselves endangered by an exposure and a vulnerability over which they have no control. They cannot walk away. It is this incapacity that sets them apart from the rest of the world and creates within them an intrinsic and distinct vulnerability. Not choice but the lack of it defines and limits proximity.

The explanatory model I have proposed, and which attempts to take the Levinasian notion of proximity seriously, finds most difficulty in dealing with the court's rejection of liability for those 'involved in the nursing or care of a close relative'. In legal terms, the explanation is simply that psychiatric injury suffered over time does not derive from a 'shock' and is therefore excluded.⁹⁶

⁹³ Levinas (1981), pp 49–54.

⁹⁴ *Wagner v International Railway Co* (1921) 232 NY Rep 176 (New York Supreme Court), per Cardozo J.

⁹⁵ *Wagner v International Railway Co* (1921) 232 NY Rep 176 at 176–80.

⁹⁶ *Jaensch v Coffey* (1984) 155 CLR 549 at 567, per Brennan J.

Yet, as Kirby P observes, the word 'shock' appears to enshrine an 'outmoded scientific view about the nature of' psychiatric illness — that in the nineteenth century it was thought to derive from a physical disturbance to the brain.⁹⁷ It is hard to believe that such an improbable 'subservience to nineteenth century science' can long be maintained.⁹⁸ If so, then surely there is no statute of limitations on acts of love or compassion, the compulsions I defended above? I am tempted, therefore, to suggest that nervous shock may yet expand in precisely this direction.

Yet proximity provides a clearer way of addressing the problem. The longer the time between the accident and the mental distress it occasions, the less distinct and unavoidable is the plaintiff's vulnerability to harm. This is not to say that a nurse or carer can avoid emotional commitment and emotional pain, but there are ways of managing these experiences that do not lead to psychiatric illness. In other words, if we understand proximity as based on a *lack* of choice in the plaintiff that renders them uniquely vulnerable to the defendant's actions, the more distanced and gradual the problem, the more we must conclude that the vulnerable person was not simply — and at some point, no longer — 'hostage' (as Levinas puts it) to the defendant's power. The ties that knotted together plaintiff and defendant, and that were the cause of the plaintiff's injury, are now considerably loosened. More is a function of the choices, behaviour, and particular background of the plaintiff; less is due to the irresistible force of the defendant.

One might therefore understand the requirement of 'shock'⁹⁹ not as the aetiology of a kind of injury (an approach which Kirby rightly criticises), but rather as the phenomenology of a kind of relationship. A shock suggests the immediacy of an injury that impacts on a person *unavoidably*, just as if they had been hit by the car themselves. We cannot avoid a shock — we cannot see it coming or step aside from it or guard against it or protect ourselves from it, or foresee it — no matter what kind of person we are, precisely because it comes to us, as Levinas so rightly insisted, *before* the ability of the reasoning mind to control it, 'before any understanding ... and before consciousness'.¹⁰⁰ Thus the ontological origin of proximity prior to our ability to fashion concepts about it,¹⁰¹ which might have been thought the most excessively hypothetical aspect of Levinas's ideas, is repeated every day.

Proximity, in short, always comes not as an exercise of choice or reason, but in fact as a nervous shock, to plaintiff and defendant alike. What seemed to be the most arbitrary and archaic limit on recovery turns out, properly understood, to point to the very meaning of proximity. Of course, outside the

⁹⁷ *Campbelltown City Council v Mackay* (1989) 15 NSWLR 501 at 503, per Kirby P.

⁹⁸ *Campbelltown City Council v Mackay* (1989) 15 NSWLR 501 at 503, per Kirby P; but see *Andrewartha v Andrewartha (No 1)* (1987) 44 SASR 1; *Spence v Percy* [1992] 2 Qd R 299.

⁹⁹ *Jaensch v Coffey* (1984) 155 CLR 549 at 567, per Brennan J.

¹⁰⁰ Levinas (1981), p 13.

¹⁰¹ See Caygill (2001), pp 136–37; Levinas (1981), pp 87–100.

area of psychological injury, the parameters of a relationship established by shock will inevitably change. But the idea will not: to be shocked is to be deprived of choice, to be exposed to a wound, to be inescapably vulnerable.

The Later History of Proximity: Responsibility as Vulnerability

Proximity is not just a synonym for closeness. It explains it in terms of a vulnerability that singles a person out without their choice, and *therefore* singles out the one who has a special response ability with respect to them. It determines that relationship not in terms of the intention, foresight or choice, which is to say the mental state, of the one encumbered by a duty, but rather in terms of the inescapably shocking experience of relationship they share. Proximity therefore binds together the why, who and how of the duty of care: it points to a normative foundation, a language of analysis and a mode of proof.

The High Court failed in following through on these insights. Once again, the difficulty stemmed from not taking proximity seriously enough. As I have already indicated, the confusion of proximity and policy, on the one hand, and the description of proximity as a *limit* on foreseeability on the other, manifested this failure. So too did the court's incapacity to mount any argument as to what elements might indicate the presence or otherwise of proximity. Without more, Michael McHugh was surely right to remark, adopting the celebrated phrase of Professor Julius Stone, that proximity 'is a category of indeterminate reference *par excellence*'.¹⁰² It was not, argued Brennan, a *rule*, since proximity could not be limited to any specific 'issue of fact on which a legal consequence depends ... A rule without specific content confers a discretion ...'¹⁰³

The court too often simply asserted the presence or absence of proximity, as its critics contended. Dawson J remarked in *Gala v Preston* that 'merely to describe it as a matter of proximity is to mask the problem'.¹⁰⁴ Brennan CJ was particularly critical of 'proximity in the broader sense'. By importing but never defining the diverse notions of public policy that were said to 'underlie and enlighten proximity',¹⁰⁵ the court had effectively created a 'juristic black hole into which particular criteria and rules would collapse and from which no illumination of principle would emerge'.¹⁰⁶ My point has been to argue that the equation of proximity and policy has not been a doctrinal mistake so much as a philosophical one.

Attempts to clarify the content of proximity focused, initially at least, on the related ideas of 'assumption of responsibility' and 'reliance'. These terms

¹⁰² McHugh (1989), pp 13, 36–39. 'The notion of proximity, used as a legal norm, has the uncertainties and perils of a category of indeterminate reference': *Hawkins v Clayton* (1995–96) 188 CLR 159 at 238, per Gummow J.

¹⁰³ *San Sebastian v The Minister* (1986) 162 CLR 341 at 368, per Brennan J.

¹⁰⁴ *Gala v Preston* (1991) 172 CLR 243 at 277, per Dawson J.

¹⁰⁵ *Jaensch v Coffey* (1984) 155 CLR 549 at 585, per Deane J.

¹⁰⁶ *Bryan v Maloney* (1995) 182 CLR 609 at 654, per Brennan J.

had in common the idea that proximity derived from some kind of agreement between the parties, some mutual understanding or consciousness. Like reasonable foreseeability, then, they relate responsibility to the existence of a particular mental state characterised by consent, contract and individual autonomy. Responsibility is understood as a kind of choice made and acted upon by the parties: I consciously take on something and/or you consciously rely on it.¹⁰⁷ Proximity is here understood as being governed on both sides by perception and intention. This was particularly the case in relation to liability for omissions, as in *Sutherland Shire Council v Heyman*. The court concluded that there had been no 'assumption of a particular obligation to take such action or of a particular relationship in which such an obligation is implicit'.¹⁰⁸ Proximity, then, the court supposed, involves the *taking on* of a responsibility.

But it soon became apparent that the concept could not adequately accommodate the court's instincts as to the extent of proximate relations. In *Shaddock v Parramatta City Council*,¹⁰⁹ Stephen J was forced to admit that a council might be liable, even in circumstances in which they had expressly refused to accept responsibility for the information they provided.¹¹⁰ Neither, however, did the plaintiff's actual reliance on the defendant's actions necessarily prove definitive. In *Sutherland Shire Council*, Mason J introduced the concept of 'general reliance' to cover those core functions of a council or authority that the public generally and reasonably expects will be exercised with care.¹¹¹ His examples were of fire-fighting or of air traffic control.¹¹² The argument was further developed by McHugh J in the NSW Court of Appeal.¹¹³ In such cases, according to Their Honours, the council might not actively or willingly 'assume' a particular responsibility. The obligation is foisted upon them. Neither will the plaintiff need to show that they in fact relied on the council to do its job. They may indeed be unaware of it. The relationship is somehow already proximate, *regardless* of the conscious understanding of either party to it — a very Levinasian notion.

This reasoning was vigorously criticised in *Pyrenees Shire Council v Day*. A majority of the court (Toohey and McHugh JJ dissenting) rejected its application. The problem in Mason J's formulation lay in his attempt to explain this principle in terms of implied reliance and implied consent. It was

¹⁰⁷ *White v Jones* [1995] 2 AC 207 at 274, per Lord Browne-Wilkinson, refers explicitly 'to a conscious assumption of responsibility'.

¹⁰⁸ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 502, per Deane J.

¹⁰⁹ *Shaddock & Associates Pty. Ltd. v Parramatta City Council (No 1)* (1981) 150 CLR 225.

¹¹⁰ *Shaddock & Associates Pty. Ltd. v Parramatta City Council (No 1)* (1981) 150 CLR 225 at 242 per Stephen J.

¹¹¹ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 464, per Mason J.

¹¹² *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 464, per Mason J.

¹¹³ *Parramatta City Council v Lutz* (1988) 12 NSWLR 293, per McHugh J.

this that Gummow rightly described as a 'legal fiction'. But understood instead as an actual vulnerability by the plaintiff to matters under the defendant's unique control, there is nothing fictitious about it. 'General reliance' is a misnomer, because it is not privity but proximity that grounds a responsibility 'before all assumption, all commitment consented to or refused'.¹¹⁴

That proximity cannot be reduced to mental states and conscious expectations — that it is not a species of reliance and is sometimes quite the opposite — became even clearer in *Hawkins v Clayton* and finally in *Hill v Van Erp*.¹¹⁵ In *Hawkins*, a solicitor negligently failed to contact the executor of an estate for a period of some years following the testatrix's death, causing the estate to fall into disrepair. The solicitor had not assumed any responsibility for the welfare of the executor, nor had he 'assumed the custodianship of the testatrix's testamentary intentions'.¹¹⁶ Nor, of course, had the executor, who remained ignorant of the will, in any sense actually relied on the care or skill of the solicitor.

On the contrary, Deane and Gaudron JJ's real concern lay in the exclusive control vested in the solicitor that enabled him to prevent all access to knowledge about the will. Gaudron J sees the 'exclusivity of possession of information' as central here, just as it was in *Shaddock*.¹¹⁷ Deane J speaks of proximity as emerging from 'reliance (or dependence)'.¹¹⁸ But the two are entirely different. The plaintiff had been kept in the dark. He never formed the intention to rely on the defendant because he was never given the opportunity. This was the nature of his dependence. It stemmed from an *absence* of reliance.

Justice Gaudron was right, therefore, to conclude that reliance and assumption of responsibility are not the only criteria by which to establish proximity.¹¹⁹ Indeed, as we have just seen, the language is positively misleading concerning the dynamic that proximity seeks to protect. *Hill v Van Erp* further established the point. Is a solicitor liable to a beneficiary who failed to gain an intended gift due to the solicitor's negligence in drawing it up? Again, Gaudron J (and Gummow J too) conceded that assumption of responsibility and reliance did not arise 'where, as here and as in *Hawkins v Clayton*, the plaintiff is not even aware that his or her position may be affected'.¹²⁰ McHugh J pointedly asked in dissent in *Hill v Van Erp*, 'but absent an assumption of responsibility for the beneficiary's interest or a promise or representation to the beneficiary, why should the solicitor owe a duty of care?'¹²¹

¹¹⁴ Levinas (1981), p 87.

¹¹⁵ *Hawkins v Clayton* (1988) 164 CLR 539; (1995-6) 188 CLR 159.

¹¹⁶ *Hawkins v Clayton* (1988) 164 CLR 539 at 545, per Mason CJ and Wilson J.

¹¹⁷ *Hawkins v Clayton* (1988) 164 CLR 539 at 597, per Gaudron J.

¹¹⁸ *Hawkins v Clayton* (1988) 164 CLR 539 at 576, per Deane J.

¹¹⁹ *Hawkins v Clayton* (1988) 164 CLR 539 at 593-94, per Gaudron J.

¹²⁰ *Hawkins v Clayton* (1995-6) 188 CLR 159 at 198, per Gaudron J.

¹²¹ *Cook v Cook* (1986) 162 CLR 341, per McHugh J.

This was a question that the courts had not yet answered. Their failure to do so, coupled with the rejection of reliance and assumption as appropriate explanations in their own right, led to a dramatic change of direction. Scarcely a year after the retirement of Mason CJ and Deane J during 1995, first in *Hill v Van Erp*¹²² and then later in *Pyrenees Shire Council v Day*,¹²³ a majority of the High Court confessed to apostasy, and abandoned proximity.

Proximity Lost ...

Even from a distance of several years, it remains unclear precisely what might replace proximity as the analytic basis for the court's approach to the duty of care. At the very least one might say that the 'judicial menus'¹²⁴ have turned into an eclectic smorgasbord of approaches. One approach has been to speak in terms of an 'incremental approach' such as had always been favoured by Brennan J. On this approach, the attempt to apply a universal determinant of duty would be abandoned and instead the courts would look to 'appropriate limitations in particular propositions of law, applicable to differing classes of case'.¹²⁵ The position is perhaps most forcefully expressed in McHugh J's judgment in *Perre v Apand*:

In my view, given the needs of practitioners and trial judges, the most helpful approach to the duty problem is first to ascertain whether the case comes within an established category ... The law should be developed incrementally by reference to the reasons why the material facts in analogous cases did or did not found a duty.¹²⁶

But, as Gaudron J notes, 'the proposition that the law should develop incrementally and by analogy' likewise lacks 'the specificity of a precise proposition of law'.¹²⁷ The very idea of a test formulated in terms of the 'incremental' development by 'analogy' with 'established ... categories' begs the question as to what makes a case *so close as* to justify their analogous treatment. Every case is like every other case, and every case is different. This was precisely the problem within *any* system of reasoning by analogy to which Professor Julius Stone drew our attention in his influential discussion of *Donoghue v Stevenson* itself:

¹²² *Hawkins v Clayton* (1995–96) 188 CLR 159.

¹²³ *Hawkins v Clayton* (1998) 192 CLR 330.

¹²⁴ Stapleton (1998), pp 60–62.

¹²⁵ *Hill v Van Erp* (1986) 162 CLR 341 at 369, per Brennan J; see also *Hawkins v Clayton* (1995–96) 188 CLR 159 at 177, per Dawson J.

¹²⁶ *Perre v Apand* (1999) 198 CLR 180 at 216–217 [93]–[94], per McHugh J.

¹²⁷ *Hawkins v Clayton* (1995–96) 188 CLR 159 at 199, per Gaudron J, citing Brennan J in *Hawkins v Clayton* (1988) 164 CLR 539 at 555.

THE SYSTEM OF PRECEDENT ITSELF IS BASED ON A LEGAL CATEGORY OF INDETERMINATE OR CONCEALED MULTIPLE REFERENCE, NAMELY 'THE RATIO DECIDENDI OF A CASE.'¹²⁸

It would appear that the High Court — mostly students or disciples of Professor Stone — failed to read the large print. The category of determinate reference *par excellence* is none other than the incremental approach. No amount of particularity will help us decide whether a case belongs within a certain class or not. That requires a normative judgment that proximity, for all its failings, provides.

The judges have no doubt been aware of the fundamental inadequacy that lurks within incrementalism. An alternative approach has therefore been to speak in terms of policy. Thus, as we have already seen, Dawson J speaks of analogy as 'informed by rather than divorced from policy considerations'.¹²⁹ So too McHugh J writes of an incrementalism controlled not by 'the material facts in analogous cases' *simpliciter* but rather 'by reference to the reasons why the material facts in analogous cases did or did not found a duty'.¹³⁰

The nature of these arguments points to an absence. This is to say no more than Lord Atkin, who so prophetically insisted that there 'must be ... a general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances'.¹³¹ Must be, because otherwise there would be no justification for the law's demand for responsibility upon us. Must be, because if the law of negligence were exclusively a set of policy arguments as to the social utility of the imposition of liability, the very foundation of the law as it recognises our personal responsibility to each other would be lost. Must be, because without some central argument as to why we owe duties to each other, we would have no way even of distinguishing between 'core' cases of negligence and comparatively new and 'developing' areas. Their distinction depends on their relative distance from some archetype in which responsibility can be justified as ethically necessary — an argument which proximity alone has been found to provide.

Perre v Apand acknowledges this on every page. Each of the judges (with the partial exception of Hayne J) explicitly declares that they must do more than explain to us why the practical reasons against holding the defendant responsible, do not apply. They must equally articulate a positive argument for a duty of care.¹³² I will return to the courts' attempt to rediscover some positive argument for responsibility in the following section of this chapter. Apart from

¹²⁸ Stone (1967), p 267; capitals in original.

¹²⁹ *Hawkins v Clayton* (1995-6) 188 CLR 159 at 177, per Dawson J.

¹³⁰ *Perre v Apand* (1999) 198 CLR 180 at 217 [94], per McHugh J.

¹³¹ *Donoghue v Stevenson* [1931] AC 562 at 580, per Lord Atkin. Emphasis mine.

¹³² *Perre v Apand* (1999) 198 CLR 180 at 220 [103], per McHugh J.

Kirby J,¹³³ they do so without express mention of proximity. But my argument has been that in the process they have rediscovered it. For, Deane J himself to the contrary, proximity is not a *limit* placed on responsibility understood in terms of foreseeability. Rather, as Levinas shows us, proximity is the positive argument that establishes responsibility for another in the first place — this is why it matters. It does so by reference to an experience of relationship characterised by your vulnerability on the one hand, and my response ability on the other — this is what it looks like. On both sides, one does not choose it; it chooses me: it is marked not by conscious intent but by subjection. The vulnerable are those who are *hostage* to another; the powerful, in their turn, find themselves hostage to their responsibility — this is what it feels like.

... or Only Misaid?

For another language of responsibility has gradually intruded on the deliberations of the court, imposing itself with growing insistence. This language has centred on the experience of vulnerability and the capacity to control: precisely the features that I have argued give real and recognisable content to Levinas's description of responsibility. Ironically, the renunciation of proximity coincided exactly with its redemption. As the court slowly discarded mental states, conceptual generalities and fictions in favour of phenomenology, it thought it was turning away from proximity. In fact, a trace of its true nature was to be found at every turn.

This theme can be seen in almost every significant negligence case over the past 20 years, first as a minor element and then with growing vigour. In retrospect, it forms the unspoken subtext even of those cases that did not explicitly address it. *Jaensch v Coffey* is generally thought to form a separate area of liability requiring the application of discrete principles. But I have argued that the discussion of proximity can in fact be explained in terms of the distinct vulnerability of the plaintiff to a web of harm into which they had been drawn beyond their control.

In *Sutherland Shire Council v Haymen*, Mason J subtly recognised that the question is not one of conscious knowledge or consent on either side. He phrased his argument in terms of 'general reliance', since he (wrongly) understood the law of negligent omissions to require *some* kind of reliance by the plaintiff on the council's actions. But it need not be formulated in those terms. Mason J envisaged situations in which a council or statutory body might be responsible for a harm, even though they neither represented themselves as acting in a certain way, nor were relied upon by the plaintiff to do so. Mason J speaks in terms of 'a general *expectation* that the power will be exercised' on the one hand, and 'a *realization* that there is a general reliance or dependence'

¹³³ Kirby J's threefold test, adopted from the House of Lords decision in *Caparo*, separately distinguishes and analyses foreseeability, proximity and policy: *Perre v Apand* (1999) 198 CLR 180 275 [259]; *Hawkins v Clayton* (1998) 192 CLR 330, at 419–20 [294], per Kirby J.

on the other.¹³⁴ He speaks, in other words, in the language of consciousness and choice, using the terminology of 'reliance' that takes contract as its implicit model. His examples, however, are telling:

Reliance or dependence in this sense is in general the product of the grant (and exercise) of powers designed to prevent or minimize a risk of personal injury ... of such magnitude or complexity that individual cannot, or may not, take adequate steps for their own protection ... The control of air traffic, the safety inspection of aircraft and the fighting of a fire in a building by a fire authority ... may well be examples of this type of function.¹³⁵

The common theme of these instances is better put by McHugh J in *Pyrenees Shire Council v Day*:

Thus, it applies only in those situations where individuals are vulnerable to harm from immense dangers which they cannot control or understand and often enough cannot recognize.¹³⁶

As opposed to Heyman, who could have arranged for the inspection of his own house, we cannot inspect the planes on which we fly. That is a vulnerability commensurate to another's response ability.

The significance of this new language extends still further. The notion of proximity I have outlined makes particular sense of cases of what are normally termed non-delegable duties. These refer to circumstances in which the courts have imposed positive duties of care that cannot be satisfied by the employment of a competent independent contractor. Standard examples include the responsibility of a hospital for its patients, employers for their employees, schools for their pupils, or a parent for his or her children.¹³⁷ In the past, these have been understood in terms of prior relationships that justify the imposition of 'special duties', including duties of positive action. In *Kondis*, Mason CJ describes in each case the special responsibility as arising from 'an undertaking'.¹³⁸ But it makes better sense to understand these, too, as arising from the dynamic of vulnerability and control, and not from some consensual origin. The non-delegable duty arises because:

¹³⁴ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 464, per Mason J.

¹³⁵ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 464, per Mason J.

¹³⁶ *Hawkins v Clayton* (1998) 192 CLR 330 at 370 [107], per McHugh J.

¹³⁷ See *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542; *Kondis v State Transport Authority* (1984) 154 CLR 672; *Commonwealth v Introvigne* (1982) 150 CLR 258; *Hahn v Conley* (1971) 126 CLR 276; *Robertson v Swincer* (1989) 52 SASR 356.

¹³⁸ *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687, per Mason CJ.

the employer has the exclusive responsibility for the safety of the appliances, the premises and the system of work to which he subjects his employee and the employee has no choice but to accept and rely on the employer's provision and judgment in relation to these matters. The consequence is that in these relevant respects the employee's safety is in the hands of the employer; it is his responsibility.¹³⁹

This is a powerful argument. But it speaks to a responsibility arising out of the vulnerability of a particular situation and not out of any 'undertaking' evinced by a contract of employment. Indeed, although in legal taxonomy the situation is quite separate, Mason's language here is redolent of nothing so much as his earlier argument for general reliance. A non-delegable duty is simply a private-sector corollary to the public-sector doctrine of general reliance. Both are better understood as establishing special duties of positive action that arise out of a circumstance of distinct vulnerability (on one side) and unique control (on the other). Both concern the true application of proximity.

In its 1994 decision of *Burnie Port Authority* — perhaps the most significant in the Australian common law of torts since *Jaensch* — the court moved towards a general theory of liability covering these situations.¹⁴⁰ The court sought to articulate the general duty that arises from a relational *environment* and not a specific duty arising from *behaviour* or intent. The majority judgment is both precise and prescient. In 'the principal categories of case in which the duty to take reasonable care under the ordinary law of negligence is non-delegable ... [t]he relationship of proximity ... is characterized by such a central element of control and by such special dependence and vulnerability'.¹⁴¹ So, in *Burnie Port Authority* itself:

One party to that relationship is a person who is in control of premises ... The other party to that relationship is a person, outside the premises and without control over what occurs therein, whose person or property is thereby exposed to a foreseeable risk of danger ... In such a case the person outside the premises is obviously in a position of special vulnerability and dependence. He or she is specially vulnerable to danger if reasonable precautions are not taken in relation to what is done on the premises. He or she is specially dependent upon the person in control of the premises to ensure that such reasonable precautions are in fact taken.¹⁴²

This analysis explains not a particular legal rule, but the very meaning of 'the relationship of proximity' itself. Ironically, *Burnie Port Authority*, which came so close to perceiving this in the passage quoted above, marked a turning

¹³⁹ *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687–88, per Mason CJ.

¹⁴⁰ *Burnie Port Authority v General Jones* (1994) 179 CLR 520.

¹⁴¹ *Burnie Port Authority v General Jones* (1994) 179 CLR 520 at 550–52, per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.

¹⁴² *Burnie Port Authority v General Jones* (1994) 179 CLR 520 at 551.

point in the court's deliberations. Although the court could have developed its instinct as to the essential features that mark all proximate relationships, it did not. From then on, the High Court began to emphasise the elements of control and vulnerability — albeit inconsistently — while backing away from the language of proximity. They did not appreciate what is, with the benefit of hindsight, obvious: one explains the other.

If *Burnie Port Authority* marks the turning point of the High Court's analysis, *Perre v Apand* is its apotheosis. A potato farmer in rural South Australia was unable to sell his potatoes as a result of the (negligent) contamination of a neighbouring farm with bacterial wilt. The potatoes themselves were uninfected, but the operation of Western Australia's farm quarantine laws prevented their sale in that market regardless, and so caused the farmer to suffer pure economic loss.¹⁴³ Again in this case there was no reliance or conscious relationship between those responsible for the introduction of the disease and the farmers who suffered loss. The court explicitly severs vulnerability from reliance.¹⁴⁴ Although there is a diversity of approaches in the judgments, no less than three of the judges are at pains to emphasise the unavoidable vulnerability of the farmer to the actions of the disease, their inability to protect themselves, and conversely the control exercised by the contaminator over the farmer's livelihood.¹⁴⁵ Vulnerability, says McHugh J, 'is likely to be decisive and always of relevance'.¹⁴⁶ Indeed, His Honour goes further in making sense of the logical trajectory of the High Court's approach to the determination of duty in the past 20 years:

Like proximity, reliance and assumption of responsibility are neither necessary nor sufficient to found a duty of care. In my view, reliance and assumption of responsibility are merely indicators of the plaintiff's vulnerability to harm from the defendant's conduct, and it is the concept of vulnerability rather than these evidentiary indicators which is the relevant criterion for determining whether a duty of care exists. The most explicit recognition of vulnerability as a possible common theme in cases of pure economic loss is found in the judgment of Toohey and Gaudron JJ in *Esanda Finance Corporation Ltd v Peat Marwick*

¹⁴³ *Perre v Apand* (1999) 198 CLR 180 at 191 [2], per Gleeson CJ.

¹⁴⁴ *Perre v Apand* (1999) 198 CLR 180 at 194 [11], per Gleeson CJ. In an illuminating analysis, Vines (1993), suggests that the battle in these and other cases is a question of 'individual' and 'collective' responsibility. For reasons that are I hope by now apparent, I do not think that this captures the notion of other-directed (but personal rather than collective or social) responsibility which vulnerability indicates. It seems to me that in *Perre* in particular the fact that the defendant could be singled out as uniquely capable of making a difference clarifies the issue and the reasoning much better. Responsibility is not here understood as collective; but neither is it grounded in autonomy.

¹⁴⁵ *Perre v Apand* (1999) 198 CLR 180 at 194-195 [13], per Gleeson CJ, 202 [41] per Gaudron J.

¹⁴⁶ *Perre v Apand* (1999) 198 CLR 180 at 220 [104], per McHugh J.

Hungerfords ... In terms of a duty of care, however, it is not reliance that is relevant, but its consequence, vulnerability.¹⁴⁷

The argument should be extended. It is not just in pure economic loss, but throughout the literature, that the features identified here have proven determinative. Suitably modified, it applies equally well to cases as disparate as *Pyrenees*, as *Jaensch*, as *Sutherland*, as *Hill*, as well as to *BPA* and to *Perre*. It is fair to say that the question of control by the defendant has been the predominant feature of Gaudron's analysis in several of these cases,¹⁴⁸ while McHugh J, for his part, has paid greater attention to the vulnerability of the plaintiff.¹⁴⁹ But as Levinas has made clear — and as was explicitly articulated in *Burnie Port Authority* — it is their mutuality that creates an obligation of responsibility. A distinct capacity to control particularises the defendant, while a distinct vulnerability to harm particularises the plaintiff. Both are needed to found a duty, because each position constitutes and individualises — singles out or, as Levinas says, 'calls into question' — the other.

We are singled out by the hostaged gaze of the other, made vulnerable by their very vulnerability and unfree by the other's unfreedom. The relationship is not symmetrical or reciprocal, says Levinas, because one is not free to choose or to reject responsibility — on the contrary, it chooses us. This distinguishes privity and contract from proximity and tort. In contract, we are all, at least in formal terms, on a level playing field. Not so in tort. Levinas's metaphor of 'height' — particularly in *Totality & Infinity* — is purposefully ambiguous.¹⁵⁰ How can the other be 'at once higher and poorer than I'? What does it mean to say 'the I is distinguished from the Thous, not by any sort of "attributes", but by the dimension of height'?¹⁵¹ The law of negligence shows us exactly how, for it is the very poorness and vulnerability of the other that call forth our ability and demands a response. And the greater the differential, the higher the standard of care demanded: the poorer the higher.¹⁵²

Taken together, these requisite asymmetries identified so clearly in recent cases — so much like ethics, so little like contract — are not simply features 'like' proximity: they *are* proximity. And neither is this a 'limitation' on the duty of care. It is how and why the duty emerges. Proximity does not come *after* this relationship with another, to describe or delimit it. It is the moment

¹⁴⁷ *Perre v Apand* (1999) 198 CLR 180 at 228 [124]-[126], per McHugh J. See *Esanda Finance Corporation v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 263-64.

¹⁴⁸ *Hill v Van Erp* (1986) 162 CLR 341; *Hawkins v Clayton* (1988) 164 CLR 539; *Esanda Finance Corporation v Peat Marwick Hungerfords* (1997) 188 CLR 241; and *Perre v Apand* (1999) 198 CLR 180.

¹⁴⁹ *Parramatta City Council v Lutz* (1988) 12 NSWLR 293; *Pyrenees Shire Council v Day*; *Eskimo Amber Pty Ltd v Pyrenees Shire Council* (1998) 192 CLR 330; and *Perre v Apand* (1999) 198 CLR 180.

¹⁵⁰ Levinas (1969), pp 202, 291.

¹⁵¹ Levinas (1996), pp 17, 32.

¹⁵² *Burnie Port Authority v General Jones* (1994) 179 CLR 520.

that births the relationship, and us with it. Without such an understanding, neither the law nor our own sense of self could have any normative justification. So Levinas's remark amounts to the foundation of a jurisprudence as well as an ethics: 'My responsibility for the other is the *for* of the relationship.'¹⁵³

Conclusion

I have sought to establish the distinctness of Levinas's argument for proximity as the crucial element in his ethical theory of responsibility. I have then attempted to show the relevance of this approach to the common law question of the nature of the duty of care in negligence. In the process, I have sought to rescue, through a history reflecting on a particular turbulent period in the High Court's history, the notion of proximity, and to explain its intellectual value and its profound importance in understanding and legitimating the duty of care. The loss of proximity is not a trivial loss. It is not the loss of a term. It is the loss of direction in the court, and the loss of a profound ethical insight into our relationship with others.

The well-rehearsed weaknesses in the High Court's use of the concept stem precisely from those moments where it has misunderstood or misapplied it, and where a reading of Levinas might have, and might still, help. Moreover, while in recent years the High Court has rejected the language of proximity, in reality its analyses have moved on occasion — though not all the time — towards it. Proximity is in effect indispensable to the duty of care and central to the courts' remarkable trajectory in recent years. The courts may eschew the word, yet it connotes the normative aspirations of their project, the phenomenology of asymmetry that constitutes it, and its distance from consciousness and choice. Like some intellectual virus, proximity has contaminated the law, 'which nothing could rejoin and cover over'.¹⁵⁴

It is not an adequate response to insist that proximity has no place in the law because it is not a rule. It is true that 'if judicial decisions are to be based on more than a judge's sense of justice, like cases must be decided alike and in accordance with a principle that transcends the immediate facts of the case'.¹⁵⁵

We have seen, however, two things pertinent to this critique. The first is that something more can and has been said about the nature of proximity, both in the philosophical and the judicial literature. The second is that the problem of indeterminacy is ever-present within the common law and cannot be solved simply by mandarin decretals enjoining us all to treat like cases alike. The common law is, in short, a discourse and not a machine. It is exegetical in the sense of continually teaching us something new about the world and ourselves, and not in the sense of being objective and definitive. That is one sense in which it shares a strong affinity with that other great exegetical tradition, the Talmudic.¹⁵⁶ Using the work of Emmanuel Levinas, I have tried to give some

¹⁵³ Levinas (1981), p 100.

¹⁵⁴ Levinas (1981), p 114.

¹⁵⁵ *Hawkins v Clayton* (1995–96) 188 CLR 159 at 213, per McHugh J.

¹⁵⁶ Cohen (2001).

distinct content to the terminology of proximity so that it might fulfil that function. The openness of proximity, its ability to demand an *ongoing* questioning and reassessment of us as we attempt to apply it, is both its necessary failure as a rule, and its greatest success as an ethics: it continues to demand reflection of the law itself. To expect more of it would be as impossible as it would be ultimately undesirable. The strength of the law is that this restless quest, in case after case, offers us an adaptive capacity well suited to the protean world.

For Levinas, of course, language could *not* be pinned down in this way. If language could be defined in a completely determinate way, nothing new could be discovered and we would be reduced to an understanding of the world that we already had. This intellectual stasis he called 'totality'. But our relationship with others is infinite and irreducible to any expectation or experience we might have of it. The very polysemy and ambiguity of language allow experience to enter into it; allow us to learn, and appreciate, and acknowledge something new. Consequently, proximity not only cannot be fully determined, fully reduced to rules, but *must* not be. To do so would destroy its very power to discover our responsibility anew. This is surely a truth about ethics and a truth about the common law. Both are necessarily explorations, discursively open and normatively incomplete. That is not their failure but their nature.¹⁵⁷

The porous nature of proximity is therefore no scandal. The common law of negligence rightly exemplifies in its form and its approach to the notion of responsibility — fluid, responsive, open-ended, ongoing — which it articulates. Seen in that light, it just might be the case that there are, paradoxically, structural resources within the common law that give real recognition to the 'surprise and anarchy of inter-subjectivity'.¹⁵⁸ It might even be that part of our responsibility as law teachers is to help our students to see that these resources offer the possibility of a growing and organic justice that is socially indispensable, even though they are incapable of reduction to the mere rules that students often initially imagine and desire the law to be.

Proximity must be understood to capture a distinct, crucial, though imprecise element of the constitution of responsibility. It is a goodness that exists not as an answer, but as a question, to be spoken of in certain ways but not ever to be finally answered. The gradual expansion of proximity over the past 30 or 40 years does not therefore demonstrate the failure of this approach, but its success. Proximity describes a responsibility that ramifies the more we become conscious of it. The courts have themselves been agents and arbiters of this growing awareness of our obligations to those who are close to us. If we are faced, then, with mounting responsibilities that seem to continually outstrip

¹⁵⁷ Coleman (2001), p 203 helpfully defends the discourse of tort law on just these grounds.

¹⁵⁸ On this point I do not find myself in agreement with Diamantides (2000), p 23.

our expectations, that growth is part of its organic nature.¹⁵⁹ Responsibility, as Levinas said, is not fulfilled but deepened.¹⁶⁰

And proximity likewise does not *fulfil* or *define* this search, pin it down like a rule, but actively deepens and encourages a continuous and — it is devoutly to be hoped — unceasing discourse on it. Proximity is the language that encourages the discourse to go on. Proximity invites and describes our non-indifference, but it does not do so by the finite application of a rule that already exists, enclosed within itself like a heart of stone, and simply awaiting its predestined application. Proximity is instead the place in law and in ethics wherein we *learn*. ‘The other,’ as Levinas often said, ‘is my teacher.’¹⁶¹ Surely that is true. Surely that matters. What is at stake, then, is whether the law will have the courage to position *itself* as a student, prepared to learn from the experiences of those that constantly come before it, or will instead claim to be the authoritarian instructor of the rest of us.

Neither do I think that the parallels in language and approach between Levinas and the jurisprudence of the High Court were accidental. In that watershed year 1984, the court was searching for resources to reconfigure an *ethical* coherence in law at a unique moment in its jurisprudential history. Assailed from without and derided from within, the Australian High Court *circa* 1984 seems to have been on a quest for renewed goodness in law — trying to explain to a sceptical world why law was a valuable institution despite the fact that it could no longer be defended as simply the robotic ‘application’ of objective ‘rules’. This was perhaps more than a little naïve, but faced with the growing abscesses of cynicism and hostility that encircled it, understandable and even inspiring. Neither should it surprise us that the push towards the transformation of tort law was initiated by one of the most ethically committed of judges, Sir William Deane, who later, as Governor-General of Australia, became something of a moral figurehead himself in relation to a range of socially divisive issues. I believe that Justice Deane, in talking about proximity, perceived that something foundational and ethical was really at stake: the growth, learning and humility of the common law. I think that had he had the occasion to read Emmanuel Levinas, he would have been better positioned to articulate these important points, and he would have found, perhaps, a kindred spirit.

¹⁵⁹ ‘The debt increases in the measure that it is paid’: Levinas (1981), p 12.

¹⁶⁰ Levinas (1969), p 34.

¹⁶¹ Gibbs (1991). Likewise, Roberts (2000), p 10 insists that the other is both the motivation for justice and an aspect of its content and its critique.

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