# Emmanuel Levinas and the philosophy of negligence

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*This article introduces the work of the great ethical philosopher Emmanuel Levinas as a way of understanding in a new light ideas of responsibility, proximity, and duty of care in the law. Two small case studies, taken from broader work, follow, each built on Levinasian themes: the first uses joint illegality to explore the legal implications of the foundational of nature of the duty of care to human subjectivity; the second uses the duty to rescue as an example of the legal implications of the asymmetric nature of our responsibility for others In the process the word proximity, a key term for both Levinas and the High Court, is reconsidered.*

## INTRODUCTION

Over the past hundred years, the law of negligence has transformed itself, and in the process transformed our sense of the obligations we all owe to everybody around us – local governments for the services they provide, banks and professionals for the advice they give, drivers on the road, doctors in the surgery, homeowners for their guests or visitors, and even for the trespassers who might pay them a call. Yet what is now compendiously described as "the duty of care" is in some ways an unusual obligation. It is not the outcome of an agreement founded on self-interest, like a contract. It is not a duty owed to the community as a whole and acted on by the State, like criminal law. It 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: "Am I my brother's keeper?" What does it mean to be responsible? This is not a question that is easier to answer for us than for Cain. This article will argue that the idea of responsibility articulated in the law of negligence comes from what might be termed our literal response-ability: it implies a duty to respond to others stemming not from our abstract sameness to others, but rather from our particular difference from them. Responsibility is not a quid pro quo – it is asymmetrical, a duty to listen to the breath of others just in so far as their interests diverge from our own. The duty of care emerges not because we have a will (which the law of contract respects) or a body (which the criminal law protects) but because we have a soul.

The first part of the article is philosophical in nature and develops a general argument for a relationship between negligence law and this theory of asymmetric responsibility. In the second part, which is legal in nature and traverses more familiar issues, two illustrations will be offered, drawing on cases from the Australian common law over the past 10 years, to begin to elaborate the implications of this argument for our understanding both of doctrine and of the legitimacy of the idea of this unbidden yet personal responsibility. Elsewhere, these arguments are expanded in order to develop a distinct theory of responsibility and a distinct history of Australian negligence law, in particular in order to mount a rearguard action in defence of that much maligned legal principle, "proximity".[1] The aim of the present article is to introduce the concepts and demonstrate their relevance to legal thinking.

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[1] Manderson D, *Proximity, Levinas, and the Soul of Law* (Montreal and Kingston, McGill-Queen's University Press, 2006). See also "Here I Am: Illuminating and delimiting responsibility," in Diamantides M, ed., *Levinas, Law, and the Political*

The inspiration in this endeavour has been an immensely influential and somewhat controversial modern writer on ethics, Emmanuel Levinas. Levinas,[2] a philosopher and Jewish theologian, was until recently mainly of interest to a small but influential circle of French thinkers including Maurice Blanchot, Jean-Paul Sartre, and Jacques Derrida. Now he is becoming rapidly better known. His two main works, *Totality and Infinity* and *Otherwise Than Being, or Beyond Essence*,[3] offer a reconstruction of human selfhood away from questions of identity and ego and towards an "ethics of the other". This is by no means easy work, and many readers may find themselves initially nonplussed by his style and approach, but as recompense Levinas offers a sustained meditation on the relationship of ethics, responsibility and law, and – remarkably – he does so using precisely the language of the duty of care. He writes about our duty of care to others; he seeks to understand the nature of a neighbourhood; he defends and articulates at great length the idea of "proximity" as a central ethical concept. Levinas continues, "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".[4] Here then is a philosopher, largely unknown to legal theory, who at last speaks the language of torts. The work of which this essay is a part embarks on a project quite different from that of previous scholars.[5] This article proposes to introduce Levinas to a vast area of legal scholarship that is unlikely to be familiar with him, or he with it. It will explore the relevance of his arguments at the concrete level of legal doctrine in a particular area of substantive law. The question is a simple one: how might Levinas change how we understand the law we have – here and now. And, obversely, how might our understanding of the law change Levinas.

Central to Levinas' meditations is an idea of *ethics* which implies a personal responsibility to another that is both involuntary and singular, and which is therefore peculiarly well fitted to articulate the common law duty of care. The demand of ethics comes from the intimacy of an experienced encounter, and its contours cannot therefore be codified or predicted in advance.[6] At least as opposed to the Kantian paradigm of morality as "a system of rules",[7] ethics therefore speaks about interpersonal relationships and not about abstract principles. Although it has a normative component, ethics explores who we are, and not who we ought to be.[8] At least as opposed to most understandings of rules and law, ethics insists on the necessity of our response to others, and the unique circumstances 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 largely settled in advance. Indeed, ethics constantly destabilises and ruptures those rules and that

(forthcoming)*;* "The Ethics of Proximity: An essay for William Deane" (2005) 14(2) *Griffith Law Review;* "Proximity – the law of ethics and the ethics of law," (2005) 28 *UNSW Law Journal* 697-720.

[2] It is orthodox to spell Lévinas without an accent when writing in English, and that custom is followed here.

[3] Levinas E, *Totality and Infinity,* trans A Lingis (Pittsburgh, Duquesne University Press, 1981); Levinas E, *Otherwise Than Being, or Beyond Essence*, trans A Lingis (Pittsburgh, Duquesne University Press, 1968).

[4] Levinas, *Totality and Infinity* , n 3, p 5.

[5] Of recent work drawing on Levinas and legal theory, see Fitzpatrick P, *Modernism and the Grounds of Law* (Cambridge University Press, 2001); Motha S and Zartaloudis T, "Law, Ethics and the Utopian End of Human Rights" (2003) 12 *Social and Legal Studies* 243; Motha S, "Mabo: Encountering the Epistemic Limit of the Recognition of 'Difference'" (1998) 7 GLR 79; Douzinas C, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Hart Publishing, 2000); Douzinas C, "Human Rights at the 'End of History': Justice between the Symbolic and the Ethical" (1999) 4 *Angelaki: Journal of the Theoretical Humanities* 99; Douzinas C, "Justice, Judgment and the Ethics of Alterity" in Economides K (ed), *The Deontology of Law* (Hart Publications, 1997). The work of Diamantides is particularly detailed and has been the most careful attempt to relate Levinas and law to date: Diamantides M, *The Ethics of Suffering* (Ashgate, 2000); Diamantides M, "Ethics in Law: Death Marks on a Still Life" (1995) 6 *Law and Critique* 209; Diamantides M, "The Ethical Obligation to Show Allegiance to the Un-knowable" in Manderson D (ed) *Courting Death: The Law of Mortality* (Pluto Press, 1999) pp 181-193; Diamantides M, "In the Company of Priests: Meaninglessness, Suffering and Compassion in the Thoughts of Nietzsche and Levinas" (2003) 24 *Cardozo Law Review* 1275; "The Subject May Have Disappeared But Its Suffering Remains" (2000) 11 *Law and Critique* 137.

[6] Bauman Z, *Postmodern Ethics* (Blackwel1, 1993); Diamantides, *Ethics of Suffering*, n 6, p 2 et seq.

[7] It is this understanding of ethics that governs Caputo J, *Against Ethics: Contributions to a Poetics of Obligation with Constant Reference to Deconstruction* (Indiana University Press, 1993). See Duncan DM, *The Pre-Text of Ethics: On Derrida and Levinas* (Peter Lang, 2001) p 141.

[8] Peperzak A, "Emmanuel Levinas: Jewish Experience and Philosophy" (1983) 27 *Philosophy Today* 297 at 302.

settlement.[9] Furthermore, ethics implies an unavoidable responsibility to another which Levinas exhorts as "first philosophy":[10] by this he means to indicate that without some such initial hospitality[11] or openness to the inarticulate cry of another human being, neither language nor society nor philosophy could ever have got going. At least as opposed to many understandings of justice,[12] 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 at all. We cannot *derive* ethics from universal first principles. Ethics *is* that first principle.

Moreover, the idea of responsibility offered by Levinas makes unique sense of the central insights of the duty of care: that we must put others first, and that this responsibility is not an unfortunate imposition on our naturally individual and autonomous subjectivity, but embedded in the idea of responsibility, and the *source* of our individuality. One consequence of such a view is to reclaim tort law as the expression of a distinct philosophical world-view, and to emphasise the importance of this perspective as foundational to our understanding of law itself. A more pragmatic consequence is to transform our responsibility for omissions and in particular in regards to a "duty to rescue", from an anomaly into a core element of the duty of care. On the standard view, the duty to "come to the aid of another who is in peril or distress, not caused by him" (picture a drowning child) is at least a hard case, and in the view of many writers, gives rise to no legal responsibility. On the view proposed here, it is in fact a paradigm case that sums up precisely why we are responsible for others *at all*. The second view does better justice to our instincts.

The curious resonance between Levinas and torts is not coincidental. The French call it the "air du temps", the Germans "zeitgeist"*:* both mean the spirit of the times which infuses the intellectual climate. Levinas was writing about duty and responsibility just as the law, too, was grappling with them anew. First in the English cases of *Hedley, Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 and *Anns v Merton* [1978] AC 728, and then particularly in a great line of Australian cases stretching from *Jaensch v Coffey* (1984) 155 CLR 549, and *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, to *Gala v Preston* (1991) 172 CLR 243, *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, *Pyrenees Shire Council v Day* (1998) 192 CLR 330, *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529, and *Perre v Apand* (1999) 198 CLR 180, the legal understanding of our relationship to others was undergoing a radical though poorly explicated re-evaluation. Levinas' work, and its reception into English – *Otherwise Than Being* was only translated as late as 1981 – suggest the relevance of these questions to many disciplines. Meanwhile, the Australian jurisprudence on the duty of care offers a truly unparalleled resource, in both the depth of its discourse and the scope of its reflections, on the meaning of responsibility in law. These cases are richly imagined and powerful argued. They offer an instructive and vigorous debate on the nature of law, responsibility and society, which wracked the court incessantly for almost 20 years. What better body of work could there possibly be against which to explore Levinas' ideas and to test their actual relevance to the world of law?

Ethics, of course, is not simply law, either in theory or practice. But justice and law surely *proceed* from the ethical relation found in proximity.[13] "It is not without importance", said Levinas, "to know if the egalitarian and just State in which man is fulfilled … proceeds from a war of all against all, or from the irreducible responsibility of the one for all, and if it can do without friendship and faces".[14] For Hobbes, peace and the force of law are in our mutual self-interest. But how did we ever come to know this? Without the sense of responsibility which awoke us to being, as if from a

[9] Bernasconi R, "Deconstruction and the Possibility of Ethics" in Sallis J (ed), *Deconstruction and Philosophy: The Texts of Jacques Derrida* (University of Chicago Press, 1987) p 131; Diamantides, "Ethics in Law: Death Marks on a Still Life", n 5 at 224-225.

[10] Levinas E, *Ethique Comme Philosophie Premiere* (Rivages Poches, 1998).

[11] Derrida J, *Of Hospitality* (Stanford University Press, 2000).

[12] Rawls J, *A Theory of Justice* (Belknap Press, 1999).

[13] "Justice must be informed by proximity; that is to say, the equality and symmetry of the relations between citizens must be interrupted by the inequality and asymmetry of the ethical relation. There must be a certain creative antagonism between ethics and politics": Critchley S, *The Ethics of Deconstruction* (Blackwell, 1999) p 233.

[14] Levinas, *Otherwise Than Being, or Beyond Essence*, n 3, pp 159-160.

breathless unconscious, how could we ever have begun to communicate at all? Responsibility establishes both a sense of self and a sense of relationship, and it is these in turn which create the very *possibility* of agreement, and law, and justice. Thus the personal pledge on which negligence insists is not some afterthought, some concoction of the state. On the contrary, as Sarah Roberts writes, "my relationship with the other in proximity gives meaning to my relationship to all others as 'citizens'… It is the face-to-face encounter with the other which is the moving force, demanding political justice."[15] If that is the case, then the law of negligence is not only the soul of law, but its foundation. Just as ethics, according to Levinas, is the "first philosophy", so torts is the "first law".[16]

## THE COMEDY OF ETHICS AND THE TRAGEDY OF VULNERABILITY

What does Levinas means by "asymmetric" responsibility? In the first of Levinas' two major works, *Totality and Infinity* (1961), Levinas' approach is broadly speaking phenomenological and metaphorical. He asks us to think about experiences in our life which belie the assumptions of "totality" – of the self as complete, as the origin of all knowledge and the justification for all morality. He then treats these aspects as instances which point towards a new way of thinking about what it means to be a human subject, which is not self-absorbed, but in which our responsibility to another comes before our self-interest. We are asked to *deduce* the existence of this "infinity" from the ghostly shadows and reflections it has left around us. This other way of thinking about the self becomes necessary in order to explain the life experiences upon which Levinas remarks.[17]

Herein lies one of Levinas' abiding strengths. Obscure as his writing undoubtedly is, he speaks about the stuff of life as if it mattered.[18] Suffering, pain and love, are not secondary to his philosophical hypotheses any more than they are to our own: they are precisely why thinking and living matter. Emmanuel Levinas was a survivor of Holocaust, to whose victims his work was dedicated. He began to think in the context and the wake of great trauma and violence. And his purpose is this: to explain it, and explain above all why the suffering of others matters to us. Only in a world of infinite responsibility would future oppression prove inconceivable. And it was to this end that Levinas dedicated his own fortuitous survival. Levinas is therefore not arguing that we *ought* to think more about ethics, or that we *ought* to care more about others. As if there were not already enough encomia in the world! This is why his roots in phenomenology are crucial.[19] Levinas wishes us to see that we cannot adequately explain our own experience and existence without reconfiguring our understanding of the relationship of selves to others.

For Levinas, we experience responsibility not as something rational and predictable, but on the contrary as an experience, unpredictable, that just *happens* to us without our conscious will or consent being engaged. Any parent, of course, could tell you the same thing: responsibility, by its very nature, exceeds our expectations and our decisions. Amongst the many examples of this idea which Levinas provides, that of the face is crucial. The face, he says, "*is* by itself and not by reference to a system".[20] He means by this that no amount of detail about the way someone looks can ever capture what it *is* to be that person; there is always something left over from such calculations, and what is left over is precisely and simply them – their uniqueness.

Murder attempts to destroy the face; but even murder cannot obliterate resistance. Indeed, the whole rage to murder wells up with the realisation that another being will in some sense *never* be entirely "mine". This fury expresses itself as a final desperate effort to eliminate that resistance but even when it physically succeeds, it fails psychologically. Death, far from being the final possession of a person, manifests its ultimate impossibility.

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[15] Roberts S, "Rethinking Justice: Levinas and Asymmetrical Responsibility" (2000) 7 *Philosophy in the Contemporary World* 59.
[16] Levinas, n 10; Peperzak A (ed), *Ethics as First Philosophy: the Significance of Emmanuel Levinas for Philosophy, Literature and Religion* (Routledge 1995).
[17] Levinas, *Totality and Infinity*, n 3, p 28: "a deduction - necessary yet non-analytical".
[18] For further on the "is" which grounds ethics, as opposed to the "ought" which grounds morality, see Peperzak, n 8, p 302.
[19] Levinas E, *Théorie de l'intuition dans la phénmonénologie de Husserl* (Vrin, 1930, 1963) ; Levinas E, *En découvrant l;existence avec Husserl et Heidegger* (Vrin, 1949, 1967).
[20] Levinas, *Totality and Infinity*, n 3, p 75.

> To kill is not to dominate but to annihilate; it is to renounce comprehension absolutely … This infinity, stronger than murder, already resists us in his face, is his face, is the primordial *expression*, is the first word: "you shall not commit murder". The infinite paralyses power by its infinite resistance to murder, which, firm and insurmountable, gleams in the face of the Other, in the total nudity of his defenceless eyes … There is here a relation not with a very great resistance but with something absolutely *other:* the resistance of what has no resistance–the ethical resistance.[21]

We can kill the other but in that very moment they escape their subjection once and for all and haunt our dreams forever. A face, for Levinas, demonstrates for us the impossibility of totalisation: no balancing of interests, no accountant's ledger of facts and figures could ever wholly sum it up. The face resists appropriation, but it does so in a totally passive way, as a pure vulnerability.[22]

There is a remarkable artwork by Antony Gormley that captures the ethical demand of the face. *Field* comprises almost 40,000 clay figurines in a vast room.[23] They are hand baked and of the crudest formulation. Nothing but a rough shape, elongated and bulbous, with two indentations, probably fashioned by skewering them with a stick before they were baked. But it is enough. Just the presence of the two points makes eyes. Just the presence of the eyes makes a face. Just the presence of a face makes a figure. These are beings, although perhaps not human. They are small – maybe knee high – and infinitely, though subtly distinct. The clay and the different firing conditions have given them slightly varied colouring. The heads are each slightly different, the eyes different distances apart, different sizes, angled differently.

To enter a large room, crowded to overflowing with a city of little people, clumsy and naked, is an overwhelming experience: 40,000 unique beings *look* at you. And in that gaze there is something else: an ethical entreaty. Just by looking, they are calling for help; because that is what a face is. It looks at you. "The face is not a metaphor. It is not a figure."[24] It just *is* this demand.

> twenty-five tons of clay, energised by fire, sensitised by touch and made conscious by being given eyes … a field of gazes which looks at the observer making him or her its subject.[25]

The surprise and *inequality* we experience at that moment – our capacity and their incapacity – which standard theories of the law of torts by and large fail to capture, seems to me precisely what the "duty of care" expresses. It's not something you think about – the duty of care just *happens* to you. Before you know anything at all about another being, prior to language or any connection whatsoever, and indeed *in* the ineffable otherness and vulnerability of a face, there resides already a demand.[26]

Responsibility is not a matter of a meeting of minds, then, not a question of *contract*. On the contrary, it emerges precisely as something which comes from the other to me, as a way of putting me in question; as a shock. I am not a free and spontaneous being. I am being called to account, prior to my freedom of choice: asymmetrically, involuntarily. "One calls this putting into question of my spontaneity by the [mere] presence of the Other, ethics."[27]

Levinas makes the same point – that we do in fact find ourselves encumbered with responsibility before any content, any rules, any agreements – in relation to language. In order to explain this point, he distinguishes "le dire", the act of "saying", from "le dit", the actual content of what is said. There can be no agreement on the meaning of a word without an initial trust – a trust that we mean well and that we mean what we say – and this initial trust cannot, by definition, be an exchange or a contract: it must be a sacrifice given *without* hope of an exchange.[28] Language is born out of a promise of

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[21] Levinas, *Totality and Infinity*, n 3,, pp 198-199).
[22] "The 'resistance' of the other does not do violence to me, does not act negatively; it has a positive structure: ethical … The face resists possession, resists my powers": Levinas, *Totality and Infinity*, n 3, p197.
[23] Gormley A, *Field for the British Isles* (London, Hayward Gallery, 1993)
[24] Derrid J, "Violence and Metaphysics: An Essay on the Thought of Emmanuel Levinas" in *Writing and Difference,* trans Alan Bass (Routledge, 1978) pp 125-126.
[25] On-line review, Royal Festival Hall/South Bank Centre, accessed 20 August 2000, in http://www.sbc.org.uk/home/newsroom/sub_newsroom/main/archive/9746637.
[26] Lingis A, "Translator's Introduction" in Levinas, *Otherwise Than Being, or Beyond Essence*, n 3, p xxxiii.
[27] See Levinas E, *Le visage de l'autre,* dessins de Martin tom Dieck (Editions Seuil, 2001). For a recent discussion, Duncan, n 7, p 41.
[28] Levinas, *Otherwise Than Being, or Beyond Essence*, n 3, p 49.

responsibility and not the other way around. During a helpful series of interviews broadcast on Radio-France, Levinas and Philippe Nemo clarified this point succintly.

> *Le dire* is a way of greeting an other person, but to greet him is already to respond to him. Of course we speak of some *thing*, of the rain or the fine day, it doesn't matter, but to speak is already to reply. It's the presupposition of all human relations … It's that original "after you, sir" that I've tried to describe.[29]

The face, in its nudity and expectation, demands a response. The response is in the form of language which already promises a trust before it says any *thing* at all. Neither are accomplished by a system of meaning of which we are already the master. The "I" to which these things happen is therefore not captain of its own identity. The other is already in me, making me responsible with his vulnerability, dragging me out of myself. For Levinas, we are all ec-centric beings because our centre of gravity is outside of us.[30] If it were not, we would have no weight at all.[31] Gravity, after all, as Einstein told us, exists only inter-subjectively.

In the second of Levinas' two major works, *Otherwise Than Being* (1971), Levinas investigates similar themes, but this time in a distinctly minor key. Perhaps one might even say that whereas Levinas' early work was comedy, his later work moved towards tragedy. But the recognition of the tragic in our lives is by no means a denial of truth. The shift can be observed in the theme of hospitality. In *Totality*, hospitality is the welcome we provide to the other's residence in us and the other's calls upon us.[32] It too is an obligation prior to all agreement, like the guest who arrives hungry and unbidden (can I come in?). Hospitality is a key ethical trope. But of course not all guests are welcome, and few (just for the record) remain so indefinitely. In his second major work Levinas recognises the reality of the risk we run in being touched by the other. Not all infections are benign. The host may at any moment become the hostage. Our trust *might* be abused or betrayed. In the vulnerability of this interaction, we may find ourselves harmed or exploited. But Levinas' point is that the danger is necessary and inevitable. On the one hand "the self is through and through a hostage, older than the ego, prior to principles". Yet on the other,

> It is on the condition of being hostage that there can be in the world pity, compassion, pardon and proximity – even the little there is, even the simple "after you, Sir".[33]

Because an ethical relationship with another is prior to any condition or formulation which might govern or control it, we find ourselves *both* host to the demands which the other levels at us, and hostage to them. How on earth could we find ourselves held hostage by another's vulnerability? This is of course the very essence of responsibility. In fact – once again – the experience is quite everyday. Ask a parent. Ask a child. Ask a friend. Ask a teacher.[34] Here we might have the definition of what is sometimes termed a "calling": a relationship with the vulnerable that calls *us,* that cannot be circumscribed in advance ("I'll only help you so far and no further"), and that therefore inevitably places demands upon us that we may not wholly welcome and do not wholly expect. So the *premise* of human responsibility is reversed. In Hobbes, one starts from the lone wolf, and ask "why be responsible?" In Levinas, one starts from the hostage, and asks "why not?"

In Hobbes, responsibility is justified as an *exchange*: it comes into being as a quid pro quo that an autonomous and self-interested being decides on. For Levinas, as for the law of torts, it does not.

> EL: Subjectivity is not one for myself; it is, one more time, initially for the other. To say: "here I am". To do something for an other. To give.
>
> PN: But the other one, isn't he equally responsible in the face of my gaze?

[29] Levinas E, *Éthique et Infini: Dialogues avec Philippe Nemo* (Fayard/Radio-France, 1982) pp 83-84. Translation mine.
[30] Levinas, *Totality and Infinity*, n 3, pp 290-291.
[31] Levinas, *Totality and Infinity*, n 3, p 200.
[32] Levinas, *Totality and Infinity*, n 3, p 27.
[33] Levitas, *Otherwise Than Being, or Beyond Essence*, n 3, p 117.
[34] Levinas, *Totality and Infinity*, n 3, p 101.

> EL: Maybe so, but that's *his* business. The inter-subjective relation is not symmetrical. I am responsible for the other without waiting for any reciprocity.[35]

Again the establishment of some equivalence comes after and as a limitation upon obligation and not as the condition of its establishment. From a theoretical point of view, nothing could be more important.

At the same time as we do undoubtedly experience a world of knowledge and control, and a psyche subject to the authority of the ego – a world which the standard articulations of responsibility and justice take as their alpha and their omega – we also inhabit this very different world, beyond or as Levinas sometimes says, "on the hither side" of being.[36] Hither (meaning nearest), because it is closer to us than our ego and older than our self. In this other world, we do not *choose* the mode and experience of our subjectivity. We are singled out, from the outside: as death singles us out irreplaceably, as does love, and as does the original entreaty of the other. Each are the midwives of our responsibility. Whether this proves a boon or a bane will depend upon the nature of our response, but here too we do not have an option to decline the burden. One way or the other, it cannot be ignored. Once the nucleus of the atom has been split apart by its exposure to exteriority, there is no gluing it back together again. Levinas sometimes refers to this is a "denucléation", or hollowing out, of the ego.[37] The wind of death, the storm of desire, the breath of others has blown over us once and for all.

## A SYNOPSIS OF RESPONSIBILITY

"Respons-ability" means the ability to respond to the predicament of another person. About this radically different understanding of our responsibility to others – of the duty of care, in other words – Levinas makes the following points.

First, responsibility is inherent in the first encounter between persons. The obligation to respond is intrinsically prior to any specific response and therefore, any pre-existing rules of limitation. Contrary to some rather severe criticism that is at times directed at him, Levinas is not simply condemning the realm of the said, or logic, or rules.[38] Rather he attempts to demonstrate the conditions necessary for their appearance. And fundamental to those conditions are both an openness to discourse and an awareness that something within us and critical to our existence is not ours and not reducible to our interests.[39] It is not sameness or difference but what Levinas sometimes calls "non-indifference"[40] that founds the symbolic order.

I am summoned to this assignation without choice or predeliction. Responsibility is the *opposite* of contract or commitment: I do not agree to it, but *find* myself responsible; it is not a way of advancing the ego's purposes, but rather disrupts them.

> Strictly speaking, the other is the end; I am a hostage, a responsibility and a substitution supporting the world in the passivity of assignation, even in an accusing persecution, which is undeclinable. Humanism has to be denounced only because it is not sufficiently human.[41]

Responsibility is not a choice. This "unexceptionable responsibility, preceding every free consent, every pact, every contract"[42] is not a tragedy or an unpleasant necessity. On the contrary it lies at the very core of those experiences that constitute us. It is not as if we were free, and then a responsibility was imposed upon us against our will. Responsibility emerges *with* our selfhood, *with* relationship.[43]

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[35] Levinas, *Totality and Infinity*, n 3, *Totality and Infinity*, n 3, pp 93-94.
[36] Levinas, *Otherwise Than Being, or Beyond Essence*, n 3, pp 92-93.
[37] For example Levinas, *Otherwise Than Being, or Beyond Essence*, n 3, p 64.
[38] See, in particular, Rose G, "New Political Theology" in Rose G, *The Broken Middle* (Blackwell, 1992).
[39] On this point, see particularly Levinas, *Otherwise Than Being, or Beyond Essence,* n 3, pp 45-48.
[40] For example, Levinas *Otherwise Than Being, or Beyond Essence*, n 3, pp 138-139. See Libertson J, *Proximity – Levinas, Blanchot, Bataille and Communication* (Martinus Nijhoff, 1982) p 90.
[41] Levinas, *Otherwise Than Being, or Beyond Essence,* n 3, p 128.
[42] Levinas, *Otherwise Than Being, or Beyond Essence,* n 3, p 128.
[43] Levinas, *Otherwise Than Being, or Beyond Essence,* n 3, p 86.

Second, responsibility is not reciprocal.[44] It has nothing to do with social contracts or legal policies. It arises foremost from the vulnerability with which the other approaches us, and which places a demand on us and in us. In some sense, then, this responsibility always remains incalculable and hence cannot be measured against any responsibilities that the other might owe to me or that I might owe to others. Now Levinas is forced to admit that this creates a problem in any society in which many different and over-lapping relationships are implicated.

> It is troubled and becomes a problem when a third party enters. The third party is other than the neighbour, but also another neighbour, and also a neighbour of the other, and not simply his fellow. What are the other and the third party for one another? What have they done to one another? Which passes before the other?[45]

The fact that we are all responsible for *each other* renders law and justice necessary as a practical matter: "comparison, coexistence … order" – some measurement or limitation must be placed on the infinite demands of infinite others.[46] So the application of the absoluteness of Levinasian ethics to the world of law is by no means a straightforward matter, a question that has been addressed elsewhere.[47] But the initial point, the fact of our responsibility and its philosophical form and origin, are not undermined by these later problems of limitation. To begin with, my responsibility for another person is not dependent on any reciprocity of obligation. He may be responsible for me too, but as Levinas curtly remarks, "that's *his* business".[48]

Third, it follows that in the challenge with which responsibility confronts us, we are singled out. This means to be made individual. The other chooses *us* because, in the face of their vulnerability, we are singled out as the one or ones who can most make a difference. There is no deferral. No one else will do, and we cannot simply hide behind some pre-existing rule to shirk our responsibility. I think the experience of charity brings home the point. When I meet a beggar on the street, there is nothing I can say to escape the moment. There is no point saying "I gave at the office" or "I don't believe you". No rule of my own devising can protect me from the demand of an immediate decision that is mine and mine alone. I can give, or I can not give. But no one can do this for me; no one (no prior rule nor even a government or a social service) can take my place. This is what Levinas means when he says that the relationship with another "is not a species of consciousness whose ray emanates from the I; it puts the I in question. This putting in question emanates from the other."[49] The demand from the other that puts me on the spot likewise constitutes me as a unique subject, a self.

> Uniqueness signifies through the non-coinciding with oneself, the non-repose in oneself, restlessness … For it is a sign given of this giving of signs, the exposure of oneself to another[.][50]

So in stark opposition to the standard view, responsibility is not *derived* from our individual autonomy. It is the cause of it. The demand of the other individualises *me*.

Finally, the exercise of responsibility is always changing. As desire, which draws us forth towards others, responsibility deepens with practice and awareness (and this is as true of communities as it is of people). This, too, it seems to me, describes very well the actual experience of responsibility. The relationship of responsibility "is not a return to oneself" but on the contrary "disengages the *one* as a term, which nothing could rejoin".[51] Once undone, the knot that rejoins us to ourselves nevertheless preserves the discontinuity as part of us.[52] Furthermore, since we are continually being constituted and re-constituted through responsibility, no formula of words, system or rules, could entirely determine the conditions of its future exercise. We always remain open to future and unknowable obligations of responsibility . It is the "question mark" of duty.

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[44] Amongst other places, see Levinas, *Otherwise Than Being, or Beyond Essence*, n 3,, p 85.
[45] Levinas, *Otherwise Than Being, or Beyond Essence,* n 3, p 157.
[46] Levinas, *Otherwise Than Being, or Beyond Essence*, n 3, p 157
[47] Manderson D, "The Ethics of Proximity: An essay for William Deane", n 1..
[48] Levinas, n 29, p 94.
[49] Levinas, Totality and Infinity, n 3, p 195. Translation corrected.
[50] Levinas, Levinas, *Otherwise Than Being, or Beyond Essence*, n 3, p 56.
[51] Levinas, Levinas, *Otherwise Than Being, or Beyond Essence*, n 3, p 114.
[52] Levinas, Levinas, *Otherwise Than Being, or Beyond Essence*, n 3, p 170.

The necessarily *responsive* and developing nature of responsibility is a problem for law, which after all seeks to write down the "full stop" of duty; a debate we have seen take place in the Australian High Court over many years.[53] But at the same time it provides a justification which other models do not address for the flexibility and change that imbues the common law of negligence. Indeed, most articulations of the law do not even recognise that responsiveness and responsibility are connected. If the principles of responsibility are simply rules laid down in order to stabilise expectations and put our social interactions on a more predictable footing, then the constant reassessment and transformation that marks the jurisprudence of the common law duty of care can only be seen as a failure. But, as Levinas suggests, such fluidity and openness are necessary to the very idea of responsibility.

## THE ORIGIN OF RESPONSIBILITY IN TORTS: A CASE STUDY ON PROXIMITY

Having introduced the reader to an alternative justification for and articulation of responsibility, let us begin to explore how it might throw light on various aspects of everyday law. Two small case studies, taken from broader work, follow, each built on themes we have drawn from Levinas: first, an example of the legal implications of the foundational of nature of the duty of care to human subjectivity; and second, an example of the legal implications of the asymmetric nature of our responsibility for others.[54]

Surely the starting point we take, our initial orientation, matters.[55] From within the orthodox common law tradition of negligence, as elaborated elsewhere,[56] responsibility must be justified by something within *me:* my conduct, my consent. But for Levinas, responsibility comes from something outside of me: *her* gaze, *his* vulnerability. While conceding that absolute responsibility must be limited, one immediately has, therefore, a different premise.

> It is then not without importance to know if the egalitarian and just State in which man is fulfilled (and which is to be set up, and especially to be maintained) proceeds from a war of all against all, or from the irreducible responsibility of the one for all, and if can do without friendship and faces.[57]

This argument legitimates personal obligations in tort with reference neither to social policy nor to any theories of contractual bargaining. Negligence law reflects not some artificial limitation on our imagined natural freedom, but our initial indebtedness to "a neighbour". It is in fact a profound statement of the human necessity of what has come to be known, broadly, as the "duty of care". Tort law captures something that "obliges beyond contracts". Its one-sidedness is a strength not a problem: the duty of care is an oath not a contract, "anachronously prior to any commitment".[58] Levinas tells us how this could be and why it matters.

This provides us with an attractive justification for the nature and concerns of tortious obligation, and particularly of the duty of care. It suggests the philosophical origin of these obligations in terms which speak persuasively to our instincts and emotions, and which draw on vital elements of the human experience that matter to us and about which many contemporary theories of law are oddly silent. Levinas' theory of responsibility connects law to ourselves, our feelings, and our relationships even as it calls on us to strive gladly towards goodness and not to flee from it.

Neither is the question of law's origins of only theoretical interest. On occasion, the law finds itself – somewhat, perhaps, to its own surprise – required to seriously reflect on those origins. As an example, consider negligent acts committed in the course of illegal conduct. Common law jurisdictions have often had cause to reflect on the conditions under which a "criminal" can sue in tort. No doubt "there is no rule denying to a person who is doing an unlawful thing the protection of

[53] See *Pyrenees Shire Council v Day* (1998) 192 CLR 330. That law needs to provide determinate rules of conduct was indeed a constant theme of the dissents by Brennan CJ in relation to the doctrine of proximity.
[54] See Manderson, n 1.
[55] This argument of justice as a second step, is further developed in P Atterton, "Levinas and the Language of Peace", (1992) 36(1) *Philosophy Today* 59 at 64-67.
[56] See Manderson, n 1, Ch 2.
[57] Levinas, *Otherwise Than Being, or Beyond Essence*, n 3, pp 159-160.
[58] Levinas, *Otherwise Than Being, or Beyond Essence*, n 3, p 101.

the general law imposing upon others duties of care for his safety".[59] But the court has had more difficulty with what is called "joint illegality". The problem has been to determine the boundaries of illegal conduct. On the one hand, it would hardly seem fair to prevent a plaintiff from suing a defendant for their negligent driving just because the driver was unlicensed to the knowledge of the passenger.[60] Although both parties are engaging in illegal conduct – "joint illegality" – this seems no reason to deny them the protection of the normal law of negligence. On the other hand, to give an oft-cited example, it would seem invidious for the courts to decide whether one bank robber was negligent to another as they prepared to blow a safe. But how are we to distinguish the types of illegality in these cases? What allows us to permit the first cause of action and strike out the second?

In the High Court of Australia, which will later be compared to the approach of the Supreme Court of Canada, the problem came to a head in *Gala v Preston* (1991) 172 CLR 243. A group of young men stole a car after an extended bout of drinking. They headed off up the Queensland coast around 8 pm. Some hours later, while the plaintiff was asleep in the back seat, the car crashed into a tree. One of the passengers, Ray Simms, was killed, while Preston was injured. "If it were not for the joint criminal activity of the four young men who were unlawfully using the vehicle, there would be no doubt but that the first defendant as driver owed a duty of care to the plaintiff as passenger".[61] Yet the court held unanimously that the boy could not sue. The majority of the court focused on the extent to which the illegal context would affect the court's ability to determine the relationship between the parties. It may be, for example, that the illegal enterprise "absolves the one party from the duty towards the other to perform the activity with care for [their] safety".[62] A getaway driver can hardly be sued for driving dangerously when that is the point of the relationship.[63] But in contrast, the fact that the drivers in *Jackson v Harrison* (1978) 138 CLR 438 were unlicensed did not impinge upon the expectation of safety that the passenger surely demanded. The "joint illegality" in such a case, concluded the court in *Gala v Preston* "had no bearing at all on the standard of care reasonably to be expected of the driver".[64]

The problem was that this case, like *Smith v Jenkins* (1970) 119 CLR 397 before it, fell somewhat between the two extremes. The boys were not "on the run" in circumstances in which dangerous driving was only to be expected. On the contrary, the driving took place some hours later, under no pressure, and with the plaintiff simply asleep. The boy reposed his trust in the driver to get him to Gladstone safely, notwithstanding that the car was stolen. Nevertheless, the court decided that the relationship between the parties was subsumed by the illegality that gave rise to it.

> The joint criminal activity … gave rise to the only relevant relationship between the parties and constituted the whole context of the accident. That criminal activity was of its nature, fraught with serious risks. The consumption by the participants … of massive amounts of alcohol for many hours prior to the accident would have affected adversely the capacity of a driver to handle the motor vehicle competently … Each of the parties to the enterprise must be taken to have appreciated that he would be encountering serious risks in travelling in the stolen vehicle[.][65]

The majority therefore concluded that there was no duty owed by the driver to the passenger because "it would not be possible or feasible for a court to determine what was an appropriate standard of care to be expected" without reference to their criminality. This the court in *Gala* refused to do.[66] Accordingly, "there was no relationship of proximity" between the parties.[67]

Merely to express the argument in these terms exposes the fragility of its logic. It is simply bizarre to try and claim that there is no "proximate relationship" between the parties. On the contrary,

[59] *Henwood v Municipal Tramways Trust (SA)* (1938) 60 CLR 438 at 462 (Dixon and McTiernan JJ).
[60] *Jackson v Harrison* (1978) 138 CLR 438; *Cook v Cook* (1986) 162 CLR 376.
[61] *Gala v Preston* (1991) 172 CLR 243 at 263 (Brennan J).
[62] *Progress and Properties v Craft* (1976) 135 CLR 651 at 668 (Jacobs J).
[63] *Hall v Hebert* (1993) 101 DLR (4th) 129; 2 SCR 159 (Sopinka J) (SC Canada).
[64] *Gala v Preston* (1991) 172 CLR 243 at 252 (Mason CJ, Deane, Gaudron and McHugh JJ).
[65] *Gala v Preston* (1991) 172 CLR 243 at 254 (Mason CJ, Deane, Gaudron and McHugh JJ).
[66] *Gala v Preston* (1991) 172 CLR 243 at 254-255.
[67] *Gala v Preston* (1991) 172 CLR 243 at 254.

the relationship of two people in a car is "a textbook example".[68] Indeed, the majority is confusing whether a duty of care existed with the "standard of care", that is, with the factual assessment of how a reasonable driver might be expected to act in all the circumstances. Even if we accept that sometimes the relationship will be so bound up with the perils of illegal conduct that we cannot say that there is any expectation of safety at all, this is surely not the case here. Although the majority emphasises the "actual relationship between the parties", it does not make a convincing case as to why this relationship does not import a "duty of care", or why its determination "would not be possible or feasible".[69]

The majority consciously eschewed an analysis based on "public policy" in relation to illegal conduct, in favour of an attempt to demonstrate that a lack of responsibility was inherent within the terms of the relationship itself. But as we have seen this argument is difficult to maintain. To shore up its position, the majority judgment emphasises the drunkenness of the boys even though, and for reasons that need not detain us, the law has long recognised that a drunk driver normally still has a responsibility to drive safely.[70] The effect, nevertheless, was to characterise the boys in terms of their (undoubted) irresponsibility so as to sustain the public policy argument, implicit but necessary.[71]

This argument found direct expression in the concurring judgments of Brennan and Dawson JJ, which manifest greater coherence. Both indicate that the duty of care founders not just because the boys were behaving illegally but because of the type of illegality. Thus Brennan suggests that to allow the plaintiff to recover for their injuries in such a case, or indeed in a case such as *Gala v Preston*, would "condone a breach of the criminal law".[72] "It is only where the admission of a duty of care impairs the normative influence of the law creating an offence that the civil law can be said to condone a breach of that law. In such cases, it would be contrary to public policy to admit a duty of care."[73] Justice Dawson's argument is similar. The recognition of a duty of care "gives validity to the criminal enterprise by using it as the foundation for erecting a standard of care".[74] This is clearly the policy of the court, and it is only by reference to such a policy that even the majority decision makes sense.

Underneath all the analyses of the court lie two simple propositions. One is that it would be undignified for the courts to acknowledge the relationship between two criminals, even long after they were in flagrante delicto as it were. The second is that the normative value of the criminal law takes priority over the purely instrumental value of tort law. Crime trumps tort. In support of these ideas the courts are prepared effectively to outlaw certain persons, or at least to withdraw from them the support of the law of torts. In this case, for example, a 19-year-old boy with serious injuries was denied any compensation or support. The High Court appears to think he deserved it.[75]

The author disagrees. There are two relevant relationships in a situation like *Gala v Preston*: that between the boys and the state was breached by criminal conduct (and will, we imagine, be punished accordingly); and that between the two boys themselves was breached by negligent conduct and is no less deserving of recognition. The High Court of Australia suggests that to give respect to the relationship between the parties would amount to "condoning a breach of the criminal law".[76] In what sense, *condoning*? One might as well suggest that the present interpretation of the law, by throwing out the action in negligence, is "condoning" a breach of the civil law. Each action is independent of the other. Should we continue to be blind to the actual suffering and needs of the plaintiff, and to the actual relationship which gave rise to it? The court seems to think here that it must make a choice

[68] *Gala v Preston* (1991) 172 CLR 243 at 277 (Dawson J).
[69] *Gala v Preston* (1991) 172 CLR 243 at 254 (Mason CJ, Deane, Gaudron and McHugh JJ).
[70] The matter is otherwise if the passenger soberly accepts the risks of travelling in the car with a drunkard, but this "specific and exceptional relationship" does not apply if the passenger is also inebriated and not therefore in a position to choose, although the behaviour may still constitute contributory negligence: *Insurance Commissioner v Joyce* (1948) 77 CLR 39 at 39 (Dixon J; cf Latham CJ); *Preston v Gala* [1990] 1 Qd R 170; *Cook v Cook* (1986) 162 CLR 376.
[71] *Hall v Hebert* (1993) 101 DLR (4th) 129 (McLaughlin J) (SC Canada).
[72] *Gala v Preston* (1991) 172 CLR 243 at 273. See in identical terms Dawson J at 279.
[73] *Gala v Preston* (1991) 172 CLR 243 at 271 (Brennan J).
[74] *Gala v Preston* (1991) 172 CLR 243 at 279.
[75] *Hall v Hebert* (1993) 101 DLR (4th) 129 at 195 (Cory J) (SC Canada).
[76] *Gala v Preston* (1991) 172 CLR 243 at 273. See in identical terms Dawson J at 279.

between "real" law – crime – and the expendable superstructure of civil compensation. They have chosen, in other words, to accept a theory of responsibility that draws on Hobbes and which imagines civil responsibility for another as basically a convenient social fiction and nothing more.

In *Hall v Hebert*, the Supreme Court of Canada was faced with a broadly similar situation involving "a souped-up muscle car" that exuded, in the ironic commentary of Cory J, "a compelling seductive charm that would attract young men of all ages".[77] An accident on Graveyard Road (no less) took place when the defendant allowed the plaintiff to drive while drunk. Yet the court in that case rejected the idea that to recognise a duty of care in such circumstances would somehow undermine the criminal law. Justice McLachlin compared those situations in which one might seek to enforce an illegal contract or a secret trust in the courts,[78] or as in the celebrated US New York Court of Appeals case of *Riggs v Palmer* 22 NE 188 (1889), to probate a testament having murdered the testator. In those cases, the "fabric of the law" is compromised because it is being used to allow someone to profit from their illegal conduct. But a negligence action is not about profit: it is about responsibility for harm actually suffered.

The hypothetical burglar in the midst of a job might be placed within this category of profit. One might convincingly argue that, with respect to the getaway driver, there is no expectation of safety and therefore no duty of care. As Justice Brennan suggests, the situation of the safe-cracker is rather different.[79] There probably *are* well understood safeguards and practices to reduce the risk of injury, and it would not be beyond the wit of the legal process to uncover them, though the experts who would be called to give evidence would present quite a spectacle. Nevertheless, to ask the court to make such a judgment might, in some cases, amount to laying down standards of "reasonable criminality". This is what the court in *Gala v Preston* means when it points to the impossibility of determining a standard of care that "would require modification by reference to the criminal aspects of the venture",[80] as in situations "necessitating secrecy, subterfuge, or haste".[81]

There is a difference between asking the court to define standards *of* illegal conduct, and standards of general conduct that take place illegally. The court in *Gala v Preston* was not being asked to lay down standards of "reasonable joy riding"; just to insist upon the normal standard of care for driving. To sustain the action would not have encouraged, condoned, justified, or validated the boys' criminal conduct. It would merely have recognised that there was also, *and no less significantly*, a personal relationship between them that did not disappear the moment they transgressed the margins of the state. This responsibility is not conditional on good conduct, or posited by the state as a reward for law-abiding behaviour. It deserves our respect regardless of the circumstances. The duty of care expresses our recognition of a kind of ethical relationship between two persons that exists prior to any substantive law and is of the utmost and foundational importance to it. This personal relationship is, says Levinas, not a legal invention but the foundation of our ethics and our society. Suppose, in an illegal injecting room set up by a charitable organisation somewhere in defiance of the law, a doctor or a nurse were to inject a user negligently, inducing an overdose or a seizure. The personal duty of care is surely real and intimate in such a circumstance. It does not do any good to deny it, or to deny the injured person long term support in consequence of that denial. The Australian courts, presumably, would.

On the High Court's view, the criminal law is the first creation of the state; a tort action would be an appeal for the assistance of some system *invented* by the state, by one who has otherwise felt free to disregard it. Yet, as McLachlin J argues in the Supreme Court of Canada:

> Tort … does not require a plaintiff to have a certain moral character in order to bring an action before the court. The duty of care is owed to *all* persons who may reasonably be foreseen to be injured by the

[77] *Hall v Hebert* (1993) 101 DLR (4th) 129 at 195.
[78] *Nelson v Nelson* (1995) 184 CLR 538.
[79] *Gala v Preston* (1991) 172 CLR 243 at 269 (Brennan J).
[80] *Gala v Preston* (1991) 172 CLR 243 at 279 (Dawson J).
[81] *Gala v Preston* (1991) 172 CLR 243 at 269 (Brennan J).

> negligent conduct …This follows from the fact that the justice which tort law seeks to accomplish is justice between the parties to the particular action.[82]

McLachlin J goes on to insist that, because it derives from distinct normative foundations, the civil law does not outlaw wrongdoers, recalling in the process the old Latin term for an outlaw, "caput lupinum", or "wolf's head".[83] Levinas, it will be recalled, remarks that "it is extremely important to know if society, as currently constituted, is the result of a limitation of the principle that man is a wolf for man, or if on the contrary it results from a limitation of the principle that man is *for* man".[84] *Gala v Preston* establishes the proposition that a criminal is no longer entitled to the protection imposed by the civil law, and returns to the state of a wolf. But Levinas argues that our personal responsibility to others *is* our state of nature. It is personal, ineluctable, and itself the origin of a social legal system. It is a mistake to believe that law has invented this responsibility, and finds itself at liberty to withhold such recognition at will. Law is an attempt to express this responsibility, on which the foundations of its own legitimacy depend. The gravity of the approach adopted by *Gala v Preston* becomes clear once we appreciate that by creating outlaws we are withholding not just an instrumental convenience granted by the state, but an ethical principle – care, trust, our personal responsibility for others – that *sustains* it.

Ironically, the joint majority judgment in *Gala v Preston* does not despise this principle. The judges dismissed the lure of "public policy" and sought instead to ground the pertinent legal principles exclusively in the internal logic of a duty of care itself.[85] They did so because, in a celebrated series of cases over several years, the Australian courts had recognised the importance to be attached to the independent normative edifice of negligence principles. Under the intellectual leadership of Justice William Deane, the court's defence of "proximity" insistently (though not always successfully) sought to define what it was about particular relationships that necessarily attracted legal responsibility – not just because the law says so but because our ethical instincts demand it. But in *Gala v Preston*, the court concluded that "the requirement of proximity … will include policy considerations".[86] These policy considerations, foremost among them the court's recognition of the primacy of the criminal law, then proved so determinative that "the parties were not", by judgment's end, "in a relationship of proximity to each other" after all.[87] Such a conclusion would seem to be a nonsense. It has received much well-directed criticism[88] because in the process the word proximity – a closeness to others giving rise to responsibility – lost all meaning. Many critics have concluded therefore that proximity itself is surplus to reasoning.[89] But, on the contrary, the case demonstrates an insufficient respect for the value of the ethical relationship between the boys, which their "proximity" is meant to describe.

Remarkably, proximity was for Levinas the key word to describe our ethical responsibility for others. For Levinas, this implies a closeness to others who can be approached but never reached. We are never exactly the same as another person, and in the trauma of that distance lies summoned our responsibility.

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[82] *Hall v Hebert* (1993) 101 DLR (4th) 129 at 182.
[83] *Hall v Hebert* (1993) 101 DLR (4th) 129 at 183.
[84] Levinas, n 29, pp 74-75.
[85] *Gala v Preston* (1991) 172 CLR 243 at 250 (Mason CJ, Deane, Gaudron, and McHugh JJ).
[86] *Gala v Preston* (1991) 172 CLR 243 at 253.
[87] *Gala v Preston* (1991) 172 CLR 243 at 254.
[88] Kostal R, "Currents in the Counter-Reformation: Illegality and the Duty of Care in Canada and Australia" (1995) 3 Tort L Rev 100.
[89] See McHugh M, "Neighbourhood, Proximity and Reliance" in Finn P (ed), *Essays on Torts* (Law Book Co, 1989); Kramer A, "Proximity as Principles: Directness, Community Norms and the Tort of Negligence" (2003) 11 Tort L Rev 70; Vines P, "The Needle in the Haystack: Principle in the Duty of Care in Negligence" (2000) 23 UNSWLJ 35; Yeo S, "Rethinking Proximity: A Paper Tiger?" (1997) 5 Tort L Rev 174; Vines P, "Fault, Responsibility and Negligence in the High Court of Australia" (2000) 8 Tort L Rev 130.

> The relationship of proximity cannot be reduced to any modality of distance or geometrical contiguity, or to the simple "representation" of a neighbour; it is already an assignation, an extremely urgent assignation – an obligation, anachronously prior to any commitment.[90]

Our difference and distance from others gives rise to our responsibility for them. Levinas means by proximity something fundamental to who we are and why we have a responsibility to others; something which furthermore cannot be reduced to logic or knowledge or rules. Proximity is an experience, a bodily moment, a "shock", and not an idea.[91] Incarnate in us all, its implications "exceed the limits of ontology, of the human essence, and of the world".[92]

In and after 1984, the Australian High Court was on the same track.[93] Particularly in the influential judgments of Justice William Deane, the court sought to give determinate content to the duty by reference to the concept of proximity.

> I have, in *Jaensch v Coffey* and *Heyman*, endeavoured to explain what I see as the essential content of the requirement of neighbourhood or proximity which Lord Atkin formulated as an overriding control of the test of reasonable foreseeability. So understood, the requirement can, as Lord Atkin pointed out, be traced to the judgments of Lord Esher MR and AL Smith LJ in *Le Lievre v Gould*. In my view, that requirement remains the general conceptual determinant and the unifying theme of the categories of case in which the common law of negligence recognizes the existence of a duty to take reasonable care to avoid a reasonably foreseeable risk of injury to another.[94]

The notion of proximity was a radical and controversial jurisprudential development that led to innovation after innovation in the court's judgments. On first reading these judgments seemed to be groping towards a new idea of the nature and the legitimacy of our ideas of responsibility. On reading Levinas some years later, the present author came to appreciate much more clearly what they might have wanted to say and why it mattered. But in *Gala* and like cases, the majority did not follow through on its insights. First, rather than a "conceptual determinant",[95] proximity, that is to say the closeness between persons, is a fact: a relationship of vulnerability and response ability. The *event* of proximity, not the *concept* or "truth" of proximity,[96] is what determines its parameters. It is clear enough that this relationship actually existed between the driver in the front seat and the passenger asleep behind him. Second, rather than smuggling public policy in under the capacious folds of proximity, the court could have decided that, except in the very limited circumstances recognised by the Canadian Supreme Court in *Hall v Hebert*, it had no part to play at all. The effect of these two approaches, which are implicit in the majority judgment's own underlying reasoning, would have been to give added weight to the ethical cornerstone that alone makes sense of the law of torts.

## APPLYING ASYMMETRIC RESPONSIBILITY: A CASE STUDY ON THE DUTY TO RESCUE

One strength of an ethical approach is that it explains and legitimates the asymmetry inherent in tortious obligation. The law of negligence is therefore worthy of our respect because it recognises that we emerge, as responsible individuals, from this structure of asymmetry rather than from a contractual realm of freedom and equivalence: we do not and never have existed "in and for oneself". "Before the neighbour I am summoned and do not just appear; from the first I am answering an assignation."[97] Moreover, it is neither the state nor contract that *constitutes* us, but rather this unique and primary responsibility to an other. It is the foundation of our consciousness, our society – and our selves.

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[90] Levinas, *Otherwise Than Being, or Beyond Essence*, n 3, pp 100-101.
[91] Levinas, *Otherwise Than Being, or Beyond Essence*, n 3, 63-97.
[92] Levinas E, "Beyond Intentionality" in Montefiore A (ed), *Philosophy in France Today* (Cambridge University Press, 1983) p 112.
[93] For a detailed analysis relating Levinas' discussion of proximity to the history of the High Court's use of the word in the period 1984–2000, see Manderson, n 1, Ch 5; and see also Manderson, "The Ethics of Proximity", n 1.
[94] *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 52-53 (Deane J), citations omitted.
[95] *Cook v Cook* (1986) 162 CLR 376.
[96] Levinas E, *The Levinas Reader*, Hand S (ed), (Blackwell, 1989) p 120.
[97] Levinas E, "God and Philosophy" in *Collected Philosophical Papers*, trans A Lingis (Martinus Nijhoff, 1987) p 167.

> Already the stony core of my substance is dislodged. But the responsibility to which I am exposed … does not apprehend me as an interchangeable thing, for here no one can be substituted for me … It obliges me as someone unreplaceable and unique, someone chosen.[98]

This responsibility is not merely social and expedient but personal and ethical. It is directed not towards the preservation of autonomy, but instead towards the recognition of suffering. The combination of these two features provides us with a new way of conceiving of the justification of a system of private actions in tort law.

In this framework, the personal nature of the relationship remains crucial, as it does in corrective justice models. No system of social security could adequately express our personal and unique obligation to care for those around us. The symbolic and detailed meditation about responsibility the law of negligence has developed is therefore of enormous and enduring importance. But if we focus on the "other", the way in which suffering is alleviated is not as important as our duty to ensure that it is. Insurance, then, appears in a somewhat different and more attractive light. From a self-centred perspective, it might seem to be a way of protecting myself from the perils of a legal action, and therefore to some extent undermine the idea of corrective justice. That is, naturally enough, how insurance companies persuade us to buy their products. It is *my* insurance against the liability I may incur. But from this alternative perspective, insurance is instead a way of protecting others from the perils of my carelessness. It is *their* insurance against the damage they may suffer through me: and it is my responsibility to provide it *for them*. Insurance, then, is an important way in which I protect the vulnerable in advance. This argument connects together personal responsibility and the alleviation of suffering, while recognising the new conditions of a modern world in which the many prosthetics of technology – ever more powerful, ever more dangerous – have allowed us to inflict a great deal more suffering with a great deal less effort.

Above all, if we focus on a model of humanity that takes suffering as its primary characteristic rather than one that takes autonomy and freedom as its primary characteristic, the question of whether we have caused suffering by our behaviour or merely let it happen by our indifference assumes far less significance. At the moment, the law is committed to a model of responsibility that strongly distinguishes actions from omissions.[99] As Deane J noted:

> It is an incident of human society that action or inaction by one person may have a direct or indirect effect on another. Unless there be more involved than mere cause and effect however, the common law remains indifferent … In that regard, the common law has neither recognized fault in the conduct of the feasting Dives nor embraced the embarrassing moral perception that he who has failed to feed the man dying from hunger has truly killed him.[100]

Law's commitment to the autonomy of the self, and to maximizing the sphere of its freedom, demands nothing less. To be responsible for an omission is to be responsible for what one *hasn't done.* This principle has been the graveyard road of the "duty to rescue". If I come across a child drowning through no fault or action of my own, why on earth should I find myself foisted with a responsibility to him?

> The law casts no duty upon a man to go to the aid of another who is in peril or distress, not caused by him. The call of common humanity may lead him to the rescue. This the law recognizes, for it gives the rescuer its protection when he answers that call. But it does not require that he do so.[101]

As Deane J indicated, there must be a pre-existing relationship of care before a mere omission will be culpable. An omission is only liable in relation to what Tony Honoré termed "distinct duties".[102] In this way, the notion of consent is preserved as an autonomous act that justifies the imposition of a responsibility. The general principle was stated by Windeyer J in *Hargrave v Goldman* (1963) 110 CLR 40 at 66: "The trend of judicial development of the law of negligence has been, I think, to found

[98] Levinas, n 97.
[99] Atiyah P, *Accidents, Compensation and the Law* (4th ed, Weidenfeld and Nicholson, 1987) pp 63-72; Shapo M, *The Duty to Act* (University of Texas Press, 1977); Weinrib E, "The Case for a Duty to Rescue" (1980) 90 *Yale Law Journal* 247.
[100] *Jaensch v Coffey* (1984) 155 CLR 549 at 578 (Deane J).
[101] *Hargrave v Goldman* (1963) 110 CLR 40 at 66.
[102] Honoré T, "Are Omissions Less Culpable?" in *Responsibility and Fault* (Hart, 1999) p 44.

a duty of care either in some task undertaken, or in the ownership, occupation, or use of land or chattels." "There is no general duty to help a neighbour whose house is on fire",[103] unless some prior undertaking or agreement has lead to an expectation of intervention.[104] The question in every case will be, what responsibilities of positive conduct were voluntarily assumed or undertaken by the defendant?[105] Conversely, if there has been no prior relationship and no agreement to take care can be inferred, an omission will not be culpable.[106]

But what if responsibility is constituted not by choice but by the call of the other? What if the duty of care is not something we choose but something that *chooses us*? If it is the need of the other person, coupled with the capacity of the defendant to respond, that determines the ambit of the relationship, then the duty to rescue is no longer an anomaly or an exclusion; it is on the contrary the very paradigm for the duty of care.

The duty to rescue *is* the duty of care: they are examples of the same fundamental and soul-searching thing. The reason that we owe a duty of care on the roads, for example, is just the same as the reason that we owe a duty to rescue someone in trouble in circumstances in which only we can help. The real practical *asymmetry* of the relationship, the vulnerability of the one to the actions of the other, and not their purely theoretical equality or their purely hypothetical agreement, draws forth that duty in each case. The closer we are, conceptually speaking, to the paradigm case of that drowning baby or that house on fire, the *stronger* the call of the duty of care. That is exactly opposite to the view of most orthodox commentators on the duty of care. A failure to recognise the real ethical significance of that asymmetry,[107] and to see the underlying truth about the nature of responsibility which the "duty to rescue" actually points us towards, is the fatal and irreparable flaw of such a view, and cannot be made plausible to our instincts or our beliefs.

In many cases this will parallel the reasoning to which the courts have been drawn. Indeed, in the 1980s and 1990s the High Court of Australia significantly moved away from the language of "assumption of responsibility" and towards a distinct emphasis on elements of the defendant's "control" – which is to say, their response-ability – and the plaintiff's "vulnerability" – which is to say, the call or gaze of the other.[108] The court itself came to recognise that responsibility cannot be understood in terms of the autonomous decision of the defendant alone, but the situation in which they find themselves; although with the decline of the language of proximity over the past few years it is apparent that the notion of choice and assumption has regained its priority at the expense of this more expansive and persuasive reading of the nature of responsibility.

From an ethical starting point, the question of how the relationship began is no longer material to the question of whether my intervention was able to make the difference. The device of act/omission is replaced by the question of the importance and closeness of the actual relationship. Responsibility-as-autonomy decrees that I have no obligation to help a neighbour whose house is on fire because *I* have done nothing to establish the relationship. The situation is not "mine". But responsibility-as-ethics declares that proximity is the description of an event, not an intention; asymmetry is its nature and its justification, not its problem. This is why Levinas argues so insistently that what matters is "proximity and not the truth about proximity".[109] The origin of responsibility is contact – a fact about the world – and not contract – a theory about it.[110] "We do not conceive of relations. We *are* in relation."[111] It is not choice but predicament that generates a responsibility.

[103] *Hargrave v Goldman* (1963) 110 CLR 40 at 66 (Windeyer J).
[104] *Home Office v Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 (Lord Reid).
[105] *Geyer v Downs* (1977) 138 CLR 91.
[106] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.
[107] See the discussion of responsibility as death and as gift in Burggraeve R, "Violence and the Vulnerable Face of the Other: The Vision of Emmanuel Levinas on Moral Evil and Our Responsibility" (1999) 30 *Journal of Social Philosophy* 29; Derrida J, *The Gift of Death*, trans D Wills (University of Chicago Press, 1995).
[108] See in particular the remarks of Chief Justice Gleeson and Justice McHugh in *Perre v Apand Pty Ltd* (1999) 198 CLR 180.
[109] Levinas, n 96, p 120.
[110] Levinas, "Language and Proximity," in *Otherwise Than Being, or Beyond Essence*, n 3, pp 109, 125.
[111] Levinas E, *Difficult Freedom: Essays on Judaism*, trans S Hand (Athlone, 1990) p 140.

A relatively recent case decided by the New South Wales Court of Appeal provides a salutary example of the difference between these two models of duty. *Lowns v Woods* [1996] Aust Torts Reports ¶81-376 involved a medical emergency.[112] An eleven-year-old boy named Patrick had an epileptic seizure. By the time his mother discovered him, his condition was serious. She sent her 14-year-old daughter, Joanna, to get Dr Lowns, whose practice was located nearby. But according to the evidence accepted by the court, Joanna could not persuade the doctor to come and render assistance.[113] As a result, the child suffered profound and irreparable brain damage. The question for the court was: did Dr Lowns have a duty of care in this situation? The majority held that he did but conceded that the main barrier to the action was the principle of non-liability for negligent omissions. Dr Lowns was not the family physician. He had never treated Patrick before. Kirby P (and Cole JA agreed) held that a relationship had been established "notwithstanding their lack of previous professional or personal association".[114] But the judge did so principally by reference to the *Medical Practitioners Act 1938* (NSW), which imposed a statutory obligation on doctors to come to the aid of "persons … in need of urgent attention".[115] In other words, Kirby P attempted to make the situation fit the norm of a pre-existing consensual relationship constituting an expectation of positive conduct. While granting that Dr Lowns had not himself consented to a particular responsibility with this family, the judge instead held that the very nature of "the noble profession of medicine" as established in New South Wales had imposed that expectation upon him.[116] Merely by becoming a doctor, Dr Lowns had voluntarily undertaken a general responsibility. In the words of Windeyer J, Dr Lowns was responsible because of the nature of the "task undertaken".[117]

Mahoney JA dissented on just this point. He noted that the court was creating a new duty in this case, pointing out that the professional obligations created under the *Medical Practitioners Act* did not import obligations in tort. There is no duty of care owed by a doctor, argued Justice Mahoney, "if that person is one to whom the doctor has not and never has been in a professional relationship of doctor and patient".[118] Both sides, therefore, agreed that the issue was one of an omission in the absence of any prior relationship. They disagreed as to whether some prior "assumption of responsibility" could somehow be inferred.

Starting from the idea of autonomy, the doctor's lack of agreement to act is decisive. That is why Kirby P and Cole JA attempted to construct an implicit "contract to rescue" from the nature of the profession and the terms of the *Medical Practitioners Act.* Starting from the idea of ethics, the lack of prior contact is hardly relevant. Contact now, at this very moment, *is* responsibility.[119] A duty to rescue, which is to say, a duty of care relating to positive conduct, arises out of the immediacy of a crisis into which both parties – child and doctor alike – are thrown without their consent. What matters is the *fact* of proximity that Joanna, by asking for his help, had established; the extent of the emergency, that was readily apparent; and the doctor's response ability, that was of course significant. Understood in this way, the majority's reasoning fails not because the duty they propose is too wide but because it is too narrow! Again, my argument is that the court has not followed its logic far enough. Rather than single doctors out as the subject of special obligations, the court would have done better to think of responsibility as an event that might single any one of us out at some moment. Someday, we might all be called on to render such a service.

The difficulty with this case is that the notion of a duty to rescue was treated, by both the majority and the minority, as entirely irreconcilable with standard negligence principles. Both sides sought to shoehorn the doctor's predicament into established principles assuming equality and requiring consent to the burdens of responsibility. But Levinas points us to an alternative theory in which the duty to rescue is central to the duty of care by which we all find ourselves from time to

[112] See Haberfield L, "Lowns v Woods and the Duty to Rescue" (1998) 6 Tort L Rev 56.
[113] *Lowns v Woods* [1996] Australian Torts Reports ¶81-376 at 63,172 (Cole JA).
[114] *Lowns v Woods* [1996] Australian Torts Reports ¶81-376 at 63,155 (Kirby P).
[115] *Medical Practitioners Act 1938* (NSW), s 27(2).
[116] *Lowns v Woods* [1996] Australian Torts Reports ¶81-376 at 63,155 (Kirby P).
[117] *Hargrave v Goldman* (1963) 110 CLR 40 at 66 (Windeyer J).
[118] *Lowns v Woods* [1996] Australian Torts Reports ¶81-376 at 63,166 (Mahoney JA).
[119] Levinas,"Language and Proximity" in *Otherwise Than Being, or Beyond Essence*, n 3, p 116.

time burdened. Responsibility is always a surprise, never entirely chosen, and never – indeed by its very nature – a symmetrical exchange. That Dr Lowns did not want this responsibility, did not choose it or expect it, was perhaps his bad luck. But that is the way of responsibility. Its always singular demands often arrive unexpectedly; arriving unexpectedly or with unexpected dimensions or aspects, they cannot therefore be completely consented to; not being consented to, they may sometimes prove burdensome. Responsibility, in short, is never entirely predictable and never entirely convenient. We would not feel or be truly responsible otherwise. Yes, responsibility is a kind of intrusion on our solipsism: surely that's the whole point. And the duty to rescue is *not* alone in possessing these features; it shares them will all aspects of the duty to care, though in stark and clarified form.

Justice Mahoney insisted that "moral obligations are not legal obligations".[120] But of course some are. Law inevitably bears the trace or scar[121] of ethics. The question is, why or why not? In confronting this question, Justice Mahoney indicates the difficulty of establishing the parameters of a duty to rescue. These difficulties would, no doubt, be even greater if one were to concede that the duty arose not out of the profession of medicine, nor out of the requirements of legislation, but out of the nature of humanity. What if the doctor were not experienced in the particular specialty involved? What if he or she were too busy with their own practice? What if they judged that they were not needed? What if the rescue were to place their own lives at risk?[122]

These are important matters of limitation, but the law is capable of their accommodation. In the first place, the duty of care arises from one's response ability. Though the duty may fall to any one of us, its extent will depend on our capacity.[123] Responsibility *encumbers* me commensurate only with my ability and my resources.[124] Perhaps I can do no more than lend someone a mobile phone, or call an ambulance. Perhaps if someone is drowning, I can do no more than raise the alarm. But if I can do more, I must. There is no *symmetry* in responsibility. On the contrary, responsibility derives from the asymmetrical nature of the relationship – power and capacity on the one hand, and vulnerability or dependence on the other. Colin Davis remarks that "the decoupling of responsibility from reciprocity has been described as the decisive act which distinguishes Levinas' ethical theory from all others".[125] So the special situation of a doctor arises not from statute but from the fact that they can make a difference. From those who have more to give, more will be asked.

Second, the establishment of an obligation of responsibility does not yet determine whether the duty has been *breached*. We must still determine the nature of a reasonable response in all the circumstances. But this will in turn depend on our own expertise and the other demands upon us. This is what Levinas means when he indicates that justice still requires "comparison, coexistence, assembling, order".[126] We must balance our responsibility to the other against our responsibility to "the third party" who is also a neighbour.[127] And, of course, our own security is not irrelevant. "The ego can, in the name of this unlimited responsibility, be called upon to concern itself also with itself."[128] Undoubtedly, these are difficult questions to balance. Yet this is not surprising. In its stuttering way, the law has always determined the unpredictable and complex factual questions of reasonableness by reference to just such circumstantial and unpredictable specifics.

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[120] *Lowns v Woods* [1996] Australian Torts Reports ¶81-376 at 63,166 (Mahoney JA).
[121] Derrida J, *Positions*, trans Alan Bass (University of Chicago Press, 1981) writes of philosophical texts as carrying "the cicatrice of alterity".
[122] *Lowns v Woods* [1996] Australian Torts Reports ¶81-376 at 63,168-63,169 (Mahoney JA).
[123] *Goldman v Hargrave* (1966) 115 CLR 458. In *Geyer v Downs* (1977) 138 CLR 91, Stephen J categorically rejected the argument that a school's responsibility to its students could be limited by its resources. The school, said the court, has a choice as to the time at which it will open its doors and commence its duties. But here we are speaking of a responsibility that arises from a predicament or a crisis in which I find myself without action on my part.
[124] Levinas, n 29, p 92.
[125] Davis C, *Levinas: An Introduction* (Polity Press 1996) p 51.
[126] Levinas, Otherwise Than Being, or Beyond Essence, n 3, p 157.
[127] Levinas, Otherwise Than Being, or Beyond Essence, n 3, p 157.
[128] Levinas, Otherwise Than Being, or Beyond Essence, n 3, p 128.