

Proximity: Ethics, and the soul of law

I Introduction

In fact take my body who will, take it I say, it is not me. And therefore three cheers for Nantucket; and come a stove boat and stove body when they will, for stave my soul, Jove himself cannot.

—Herman Melville, *Moby Dick*.¹

1 The question: does law have a soul?

In Latin the word *spiritus* described something akin to the soul, the breath of the world upon us. In Greek it was *pneuma*, and likewise meant wind or breath. The Hebrew *ruah* has similar connotations.² These words all circle around a cluster of ideas which are neither Christian nor religious. It is surely meaningful to talk about a soul or spirit distinct from our material form.³ The soul is a word that describes what we feel to be a kind of force that animates us, filling us with an *inner* life.

L. *animatus* filled with life... f. *animare* to breathe, to quicken; f. *anima* air, breath, life, soul, mind

Even someone as implacably materialistic, in his own way, as Michel Foucault, granted the psychological existence of something like a soul.

It would be wrong to say that the soul is an illusion, or an ideological effect. On the contrary, it exists, it has a reality, it is produced permanently around, on, within the body... This real, non-corporeal soul is not a substance; it is the element in which are articulated the effects of a certain type of power...⁴

But this hardly tells us what we mean when we ourselves speak of and value the soul. The playwright and author Michael Frayn, for example, once said that the soul was to be found in “the little back garden of the English.”⁵ While suggesting the depths of our attachment to some secret place within us, the image is, to my mind, far too solitary in orientation. “You cannot hide the soul,” writes Herman Melville in a key chapter of *Moby Dick*.⁶ If the soul is a kind of inwardness, nevertheless we value it because of the way in which it manifests itself in our relations with others. Sometimes we speak of those who care for others as having a soul. Yet it seems to me that this concept of generosity does not go far enough. In fact the obverse is more nearly true—the soul does not give to others, which would already entail a free choice and a decision, but is rather constituted by a kind of responsiveness and vulnerability to them.⁷

The relationship that Melville describes between his narrator, Ishmael, and the “pagan” Queequeg, convincingly and dramatically portrays the sudden love between them in just this way. There is no activity at first, no discovery by them of what the other is or thinks.

Conversation – the routine exchange of knowledge or biography, of ‘who’ and ‘what’ they are -- comes long after their love takes hold. On the contrary it is Queequeg’s quiet presence that touches Ishmael directly. “I felt a melting in me,” he says. “No more my splintered heart and maddened hand were turned against the wolfish world. This soothing savage had redeemed it.”⁸ We mean by soul the place we hold open, deep within ourselves, for *others* to enter. This openness, this hospitality,⁹ does not impose itself on others but allows itself to be redeemed and reformed by difference. Melville knows it is the proof of the soul of both his characters, the cannibal and the sailor alike.

Not to have a soul is to be a self-enclosed fur-ball of ego. The soul is the garden within, that allows us to inhale the breath of others. Our soul is vulnerable precisely because it remains open to inspiration. This brings us full circle:

L. *inspirare* to blow or breathe into, f. *in* - +
spirare to breathe¹⁰

An inspiration breathes life into something, a breath which comes from outside or beyond us, arriving unbidden and filling us with a power we never knew we had.¹¹

If law has a soul, then for reasons that I hope this book will justify, it is to be found in the law of tort, and more particularly in the far-reaching doctrines of negligence. Over the past hundred years, the law of negligence has transformed itself, and in the process transformed our sense of the obligations we each 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 the guests or visitors—even for the trespassers who 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 we owe 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? It is not a question that is easier to answer for us than for Cain. Essentially it is my position 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 brain (which the law of contract respects) or a body (which the criminal law protects) but because we have a soul.

2 The argument: torts and ethics

The structure of this book is in two parts. In the first part I develop a general argument for a relationship between negligence law and this theory of asymmetric responsibility. In the second part, I will explore and develop a detailed application of this argument drawing on, as a complex case study, the specific history of the doctrine of the duty of care in the common law. The starting point, which I will develop in Chapter 2, is that the common law and its legal theorists have always struggled in attempting to articulate and justify the notion of a duty of care.¹² It received, of course, its paradigmatic expression in *Donoghue v. Stevenson*.¹³ Lord Atkin's 1932 judgment contains perhaps the most celebrated passage in the common law:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts and omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.¹⁴

Yet the debate on the meaning of this 'neighbour principle' has never been entirely comfortable. The law, we are oft told, imposes a distinction between the moral and the legal.

The dictates of charity and of compassion do not constitute a duty of care. 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... A man who, while travelling along a highway, sees a fire starting on the adjacent land is not, as far as I am aware, under any common law duty to stop and try to put it out or to warn those whom it may harm. He may pass on, if not with a quiet conscience at least without a fear of legal consequence... I do not find such questions easy.¹⁵

It is perhaps a truism, but nonetheless true for that, that the common law as it emerged from the industrial revolution was framed in terms of individual rights, freedom, and contract.¹⁶ The law of torts, imposing on individuals unchosen obligations to think of others, sits uneasily on this edifice. Further, the common law is not a statutory code: it responds to events and casts judgments on their legitimacy *post*, if not *ad, hoc*. Typically, then, the duty of care has been justified either as the State's restriction on our individual freedom in order to protect our collective well-being, or as the articulation of a complex web of implicit agreements amongst us all: either as social contract or as social power. Both conceptions stretch back at least as far as Thomas Hobbes. The origin of law as force; the use of that force to require of men that they keep their promises; the use of those promises to enhance the autonomy of individuals—all this can already be found in *Leviathan*.

Hereby it is manifest, that during, the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man, against every man... Therefore before the

names of Just, and Unjust can have place, there must be some coercive Power, to compell men equally to the performance of their Covenants, by the terrour of some punishment, greater than the benefit they expect by the breach of the Covenant; and to make good that Propriety, which by mutuall Contract men acquire... And first it is manifest, that Law in generall, is not Counsell, but Command; nor a Command of any man to any man; but only of him, whose Command is addressed to one formerly obliged to obey him.¹⁷

So within the orthodox philosophy of the common law, the duty of care stands, awkwardly, as a collective restraint upon that individual freedom which lies, at least rhetorically, at the heart of our legal subjectivity. Instead, I propose in this book to start from a completely different perspective, in which the autonomy of individuals is questioned, in which responsibility is *by its very nature* unpredictable, unchosen, and asymmetrical.

My guide in this endeavour has been an immensely influential and somewhat controversial modern philosopher of ethics, to whose work I offer a preliminary introduction in Chapter 3. Emmanuel Levinas,¹⁸ a Jewish philosopher and 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 steadily better known. In his two main works, *Totality and Infinity* and *Otherwise Than Being, or Beyond Essence*,¹⁹ he offers a reconstruction of human selfhood away from questions of identity and ego and towards an 'ethics of alterity'. Forming a vital link between the phenomenology of Heidegger, Merleau-Ponty, and

Husserl on the one hand, and the post-structuralism of Derrida on the other,²⁰ his are passionate, mystical, rational texts, at times bewitchingly erudite and elsewhere bewilderingly obtuse. I cannot promise the reader an easy ride, 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. Here then is a philosopher, virtually unknown to legal theory, who at last speaks the language of torts.

Neither are *Totality and Infinity* and *Otherwise Than Being* removed from the contemporary world. Originally published in 1961 and 1974, these books are haunted by the ashen memory of holocaust, and for the purpose of undermining as powerfully as he could the ego-driven and pragmatic system-building which he believed helped to create to bring it about. It seemed then as it seems now that the most crucial question in the world is the question that the law of negligence has taken on itself: *why* should we care for others? and *how much*? In what does our soul consist?

Central to Levinas' meditations is an idea of ethics to which I will have frequent recourse. For Levinas, and 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.²¹ At least as opposed to the Kantian paradigm of morality as "a system of rules,"²² ethics therefore speaks about inter-personal relationships and not about abstract principles. Although it has a normative

component, ethics explores who we are, and not who we ought to be.²³ At least as opposed to most understandings of rules and 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 largely settled in advance. Indeed, ethics constantly destabilizes and ruptures those rules and that settlement.²⁴ Ethics implies an unavoidable responsibility to another which Levinas exhorts as “first philosophy”:²⁵ by this he means to indicate that without some such initial hospitality²⁶ 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,²⁷ 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* ethics from universal first principles. Ethics *is* that first principle.

One of the key questions of this book will therefore be whether and if so how such an ethics – spontaneous, uncodifiable, and singular – could have any impact on the *law*, which seems to be just the opposite of these things. In Chapter 4, which serves as the last of the generalist chapters of this book, I begin to defend the idea of responsibility offered by Levinas and show how it makes sense of the central insight of the duty of care: that we must put others first, and that this responsibility is not an unfortunate imposition on our individual and autonomous subjectivity, but embedded in the idea of responsibility, and the *source* of our individuality and

our subjectivity. One consequence of such a view is to reclaim tort law as the expression of a distinct philosophical world-view, and to emphasize the importance of this perspective as foundational to our understanding of law itself. Another 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. In the standard view, the duty to “come to the aid of another who is in peril or distress, not caused by him” (imagine a drowning baby) is at least a hard case, and in the view of many writers, gives rise to no responsibility at all. On the view I propose here, it is in fact a paradigm case that sums up precisely why we are responsible for others at all. I believe the second view does better justice to our instincts.

Although we shall see that Levinas has very much to say that is pertinent to our thinking about responsibility, neighbourhood, and duty, he is by no means without his problems. Later in the book, particularly in the last two chapters, I will try to come to terms with some of the aspects of his writing which make his application to legal questions particularly troublesome. Yet these are the very aspects that are the central focus of contemporary scholarship on his work. The present study therefore comes at an opportune time: it speaks to very important debates in the on-going reception of Levinas.

The first difficulty lies in his insistence on treating the ethical realm, in which responsibility is unique, unbidden, and infinite, as entirely incommensurable with the political realm, in which responsibility is made

subject to definite, finite, rules, and moreover subordinated to the pragmatic demands of the State and social policy. Questioners like Derrida, Rose and Habermas have wondered how it could ever be possible for Levinas' notion of an ethics of absolute and infinite responsibility towards others to communicate with a political world inevitably governed by regulation on the one hand and imperfection on the other.²⁸ To compound the problem, Levinas' own limited forays into the application of his ethics to political questions have not been entirely convincing.²⁹ This question, which asks what a Levinasian 'applied ethics' might look like, has been subject to considerable recent analysis.³⁰ It is a question this book must take up.

The second difficulty lies in Levinas' own relative silence on the question of law itself. In his major works, he says very little about the relationship of law to the ethics of alterity, and what he does say suggests that he thinks of law as a mere arm of politics, on the one hand, and as an entirely positivistic, codified, and rule-bound structure on the other. In other words, law seems for Levinas to be synonymous with politics and justice synonymous with rules.³¹ Yet this conception fails to capture the way in which law serves as a separate modality of thinking about social relations, and is not merely politics by other means.³² As Sarah Roberts writes, "if one takes seriously Levinas' claim that asymmetrical ethical responsibility is the origin of justice then one must also reject Levinas' suggestion that justice [merely] involves viewing persons and responsibility as comparable and symmetrical."³³ Furthermore, as the common law of negligence makes abundantly clear, neither can we simply characterize law as the

application of 'rules'. Jacques Derrida's thinking about law and justice is clearly inspired by Levinas' own writing, of whom he is the best known as well as the most sympathetic critic,³⁴ but offers a much more elaborate and sophisticated account of their interaction.³⁵ Drawing on Derrida and on other recent work on Levinas,³⁶ I wish to offer here an account of law – *particularly* in reference to the fluidity and ambiguity that marks the common law discourse on the 'duty of care' – that both captures and justifies its distinct form, and does so in a way that in fact makes a more convincing case for the possible influence of Levinas' ethics on legal doctrine, than his own much narrower conception of law can provide.

In order to try and apply Levinas, we have to think more carefully about law. This book therefore makes its contribution to a field of critical legal theory which has, over the past few years, been steadily drawn to Levinasian ethics. We see this in recent work by Peter Fitzpatrick and Stewart Motha, for example, and as well as in that of Costas Douzinas.³⁷ This work, however, addresses the concept of law and the idea of justice at a very high level of abstraction. In most cases, furthermore, the references to Levinas are allusive, and at the very least presume a considerable prior acquaintance with the 'ethics of alterity' that Levinas presents.

I do not think it unfair to similarly characterize the work of Marinos Diamantides, whose engagement with the relationship of Emmanuel Levinas and law has been sustained over many years. In *The Ethics of Suffering* and in several related articles,³⁸ Diamantides takes on not

only Levinas' understanding of responsibility, but does so in a specific legal context, namely bio-medical law. Yet in some ways the purpose of Diamantides' analysis is to show us the *impossibility* of the relationship of ethics to law. Throughout a wise and careful reading of cases confronting the margin of life and death, Diamantides insists on demonstrating for us "the structural difficulty with articulating legal principles and norms that would *not* stifle the surprise and anarchy of inter-subjectivity."³⁹

The point is well made, but I will nevertheless argue in the last chapter that there are in fact *structural resources* within the common law of negligence, in particular, that allow something of that surprise to endure. The argument responds to a certain view of the hierarchical and systemic nature of "the western juridico-political order"⁴⁰ that can I think be vastly overstated. But those who have been most guilty of attempting to reduce the discourse of law to a structure of rules in which singularity and response would be largely banished, are the common law judges themselves. In striving to implicate Levinas' ideas of ethical responsibility right into the body of legal discourse, my approach to the nature of law finds itself in disagreement not only with Levinas, and with some of his interpreters, but with lawyers themselves.

And this marks a further point of departure from the work of others in the field. Diamantides, in particular, shows a particular interest in the affectivity of the judge, and its failure to find adequate expression. It is the judges' impatient "attempt to flee from" their emotional response to the unique, uncategorizable, and

unassimilable instance before them that interests him.⁴¹ The present analysis is centred less upon the phenomenology of judgment as on the constitution of subjectivity. What story does the doctrinal corpus that has grown up around the duty of care tell us, about *our* responsibility in the face of this constant surprise of inter-subjectivity? And my claim is that this story owes a surprising debt to the perspectives and experiences defended by Levinas. This is, no doubt, a charitable view of the jurisprudence, and my scholarship is constructivist in the tradition defended by writers as otherwise divergent as Ronald Dworkin, Jules Coleman, or Ernest Weinrib.⁴² I aim to construct a view of the law of negligence that provides a persuasive argument by which to understand its key insights, and yet which gives us serious critical purchase against which we can test, challenge, and develop it. So like all good interpretations, my analysis has both a descriptive and a normative dimension. In this, I confess I am an incorrigible optimist. Where others see an abscess, a hole to worry, I see a tunnel, a new path to illuminate.

So this book embarks on a project quite different from that of previous scholars. I propose to introduce Levinas to a vast area of legal scholarship that is unlikely to be familiar with him, or he with it. And I wish to explore the relevance of his arguments at the concrete level of legal doctrine in a particular area of substantive law. My 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. This is an effort at translation, dialogue, and an engagement with actual legality that marks, I think, a departure from the scholarly work that

precedes it. No doubt there will be those who think the effort demeaning to Levinas' beautiful ideas. Perhaps; Levinas himself insisted, for reasons which will require further discussion later in the book, that 'the saying' and 'the said' – the first our spontaneous ethical responsibility for another, and the second our attempts to reduce it to a rule or form of words – are irreducible and incommensurable modes.⁴³ But the peril of such an approach is that it leads to precisely the sanctified quietism which Gillian Rose accused Levinas of indulging.⁴⁴ If there is one thing which Levinas stood against all his life, it was *purity*, a hermetic closure which, in the preservation of perfection, would set itself up as a totality. Ethic purity is no better than ethnic purity. Levinas believed in contamination, in imperfection, and in knotty and chaotic failure. Betrayal and ingratitude are necessary to learning;⁴⁵ more, if we love too much, we will be too scared to keep learning. It is in that spirit, by offering a welcome corruption that will not reduce Levinas to a holy scripture but keep his words in motion, that I take up my interpretive task.

3 The study: proximity

In order to push the limits of Levinas, and in order to push the limits of the law, the second part of this book offers a case study in the recent history of the discourse of the duty of care in the common law. My focus throughout is on doctrinal developments which took place between 1984 and 2000 in the High Court of Australia. Chapter 5 is the most detailed and legalistic section of the book, and it provides a careful re-reading

of this legal history with a view to understanding its doctrinal to-ing and fro-ing as a mighty struggle that took place between distinct conceptions of the nature of responsibility in the law. Levinas' ideas can help us both analyze and decide between them.

In part, this methodological choice is simply a flag of convenience, since I taught the law of negligence, in Australia, for several years, and its complex discourse has fascinated me for even longer. It is the case, moreover, that the parallels and borrowings within the Anglo-American common law jurisdictions are closer in the field of negligence than in any other area of law. On the one hand, the connections I am trying to establish between Levinasian ethics and the duty of care could be satisfactorily adapted to the Canadian, or English, or American jurisprudence, and indeed I refer to this case law periodically. On the other hand, the doctrinal developments in Australia which I explore are well known in these other jurisdictions and will already be familiar to many scholars of tort law.

But there is much more at stake than convenience and coincidence. 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 v. Heller*, *Dorset Yacht Co.*, and *Anns v. London Borough of Merton*, and then particularly in a great line of Australian cases stretching from *Jaensch v. Coffey*, and *Sutherland Shire Council v. Heyman*, to *Gala v. Preston*, *Burnie Port Authority v. General Jones*, *Pyrenees Shire Council v. Day*, and *Perre v. Apand*, the legal

understanding of our relationship to others was undergoing a radical though poorly explicated re-evaluation.⁴⁶ Levinas' work, and its reception into English—*Otherwise Than Being* was first translated as late as 1981—suggest the relevance of these questions to many disciplines. Meanwhile, the Australian jurisprudence on the duty of care offers an 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 powerfully argued. They serve as an instructive debate on the nature of law, responsibility and society, which wracked the Court intensely and incessantly for almost twenty 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?

It is not too much to suggest that the High Court of Australia seemed at times to have been unwittingly inspired by the secret breath of Levinas. To draw forth these parallels, and to try and provide them with a more secure basis, recognizes and gives greater depth to the context which informed the work of the Court. That is the task I attempt in Chapter 5. Chapter 6 takes the argument one step further, exploring the limits of the duty of care, and touching in the process on problem areas such as our responsibility for our words, for the economic consequences of our actions, and over the actions of others. This discussion will force us to consider in greater depth the following criticism: Levinas' work, by offering up the promise of an "infinite" responsibility, is incapable of providing us with the substantive limits to responsibility that law requires, if it is to provide us with principles and not just

homilies. Indeed, when confronted with questions requiring political judgment in his own work, Levinas demonstrated precisely that incapacity. In order to defend our theory of responsibility from this charge, I will be forced to develop and extrapolate beyond Levinas' own fragmentary reflections on law and justice.

In these chapters, the key word that will serve as the hinge connecting Levinas' explanation of the parameters of ethics to the High Court's explanation of the parameters of the duty of care, is the word *proximity*. 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 soul.

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.⁴⁷

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, emotional and bodily, and not an idea.⁴⁸ Incarnate in us all, its implications 'exceed the limits of ontology, of the human essence, and of the world.'⁴⁹

Remarkably, in and after 1984, the Australian High Court was on the same track. Particularly in the influential judgments of Justice 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 M.R. and A.L. Smith L.J. 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.⁵⁰

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 struggling to articulate a new idea of the nature and the legitimacy of 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 the 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 so astonishing as to demand a sustained analysis. Out of that shock and surprise this book was born.

Proximity, seen as a way of describing those to whom we owe a duty such that 'I ought reasonably have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question,'⁵¹ has come in for trenchant criticism.

Its vagueness and its irrelevance have alike been attacked.⁵² Indeed, following the departure of Justice Deane from the bench, the concept rapidly declined in significance. In 1998, Justice Kirby went so far as to conclude 'it is tolerably clear that proximity's reign in this Court, at least as a universal identifier of the existence of a duty of care at common law, has come to an end.'⁵³ Nevertheless, it is too soon to bury the corpse. Proximity continues to be of central relevance in the judicial analysis of the duty of care, not least in the judgments of Justice Kirby himself. This book is in part a rearguard action which seeks to understand and defend the idea of proximity, and to explain why it might still matter despite the High Court's own dramatic disavowals of recent years.

What Levinas brings to this discussion is a very detailed understanding of proximity as a kind of relationship that gives rise to responsibility, that cannot be codified, and yet must inevitably find expression in words (legal or otherwise) whose function is to define and to conceptualise. In the period under review, the High Court of Australia struggled with and eventually failed to come to terms with the very same paradox, rejecting proximity just because it was 'a legal rule without specific content, resistant to precise definition and therefore inadequate as a tool...'⁵⁴ Yet here Levinas points to the way in which the Court has missed the point. The challenge of this essay is to *defend* the role of this paradox in the law – the value of an idea which is not reducible to a rule – and to demonstrate that proximity's incapacity of definition does not strip it of – on the contrary, is the very source of -- its ethical power.

That argument I develop in Chapter 7, where my attention turns beyond the duty of care, and again to the more general implications of the case study. In the first place, I discuss what Levinas calls 'the third', which is to say the problem that arises due to the fact that a legal system is not simply concerned with our relationships, as T S Eliot put it, 'each to each,' but with a world in which we have many responsibilities to many different people. This reality will lead us to consider, legally, whether Levinas' ideas can offer us any insights into judgments not only of whether a duty of care is owed but whether it has, in a particular circumstance, been breached. And it will lead us to consider, philosophically, how Levinas attempts to deal with the necessary balancing and limiting of apparently illimitable obligations of care. Ultimately, we will consider what it means to think of law as embodying something *more* than a collection of defined 'rules', and how ethics might thus be figured in law. As we will see, that will take us beyond Levinas' own conception of law, but not, I will argue, beyond the resources of the common law. In rejecting the criticism, which we find in both the High Court and in Levinasian studies, that proximity is irrelevant to law because it is incapable of reduction to a rule, I will be trying to show that the best understanding of law itself has an ethical component and that proximity is that component. Proximity, like ethics, is no doubt always 'asking for trouble'. I will contend that that is its strength and its purpose not its weakness.

Ethics, says Roger Burggraeve, is about scruples, and he reminds us that a *scruple* was originally a pebble or sharp stone in one's foot that forced us, through our

discomfort, to continually keep moving.⁵⁵ To be scrupulous, to be ethical, is to be uncomfortable, off balance: and never to stand still. That seems to me a perfect image to describe what proximity does to our own sense of responsibility, and to the court's judgments about it too. In keeping the jurisprudence of negligence off balance, proximity also ensures that our law keeps moving. Proximity institutionalizes a kind of permanent revolution in the law, and a refusal to be satisfied with the present order. It institutionalizes a constant doubt and questioning that makes justice possible.⁵⁶ The High Court's endless struggle with the doctrinal uncertainties of the duty of care have exposed it not only to a different way of thinking about responsibility, but a new way of thinking about its own practice too.

The study of proximity will return an illuminating language to the law of negligence. Levinas' vocabulary provides a particular perspective on important issues in the operation of the 'neighbour principle', and suggests both new ways to frame the law, and new reflections on perennial problems. Proximity, duty, responsibility, vulnerability. The ideas I wish to explore do not form a complete system; such a system would be anathema to a philosophy in which paradox and incompleteness take their place as fundamental ethical principles.⁵⁷ I do not intend to rewrite the duty of care or the law of torts—an act of hubris as arrogant as it would be unwise—but only to suggest how to understand and to develop the asymmetrical obligations it entails, and the relationship of those obligations to what we mean by and expect from law itself. Levinasian ethics does not tell us how to end these debates, but it does give us a new place to start.

4 The methodology: interdisciplinarity

All law embodies philosophy. The question is: which. In choosing Levinas, I hope to offer the analysis of tort law a novel language that captures something of its distinct blend of uncertainty, judgment, and compassion – something of the truth embedded in its unique discourse. Law is emotional and not just logical; its stuttering uncertainty is a failure if what you want from law is efficiency, but a success if what you want from it is honesty. Above all, the common law offers us an ethical ideal of *teaching* in which law's instability, its constant reassessment and transformation of its own principles, allows us all, judges and citizens alike, to keep learning from a process that is never entirely settled or rigid.⁵⁸ That seems to me the very heart of both the common law and ethics. Both are practices which are essentially exegetical and therefore dialogic and responsive, rather than monologic and declaratory⁵⁹– despite law's increasingly anxious and, particularly in the case of the jurisprudence of negligence, hopelessly untenable self-image to the contrary.⁶⁰ The notion of ethics then, as I am proposing to use it here, acknowledges and relies on the undeniably muddy reality of law's practices in order to begin to construct a possible justification for them.

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. In legal theory, 1984 was the zenith of the school of 'critical legal studies',⁶¹ a brash and relentless outpouring by (mainly) US academics that insisted on the absolute impossibility of the coherence of rules or meaning within the law. Law: was power. In philosophy, aspects of the emerging field of post-structural theory (on which CLS drew rather clumsily) were also casting doubt on the legitimacy and interpretative stability of institutions of authority.⁶² Power: was law. In society as a whole, the myth that judges do not 'make' law, the bread-and-butter of judicial authority since the time of Coke and then of Blackstone, had been comprehensively debunked. This gradually exposed courts around the world to an increasingly virulent criticism, in light of which judges were undoubtedly facing growing pressure from social critics to find new ways to justify and explain their craft. In Australia, the appointment of left-leaning politician Lionel Murphy to the High Court was like a red rag to the bull of orthodox theories of judicial legitimacy. On and off the Bench, he had, more than any judge, espoused a critical and social realist approach to law. Yet ironically he had personal reason to come to regret the demystification of the judiciary. 1984 was the very year the 'Murphy affair' broke, and there followed the shameless excoriation of a High Court judge, in the media, parliament, and through judicial proceedings.⁶³ This is not the place to recount that history and that scandal, except to say that Lionel Murphy was pursued as much for his resistance to the conservative norms of the legal and judicial profession as for his own behaviour.⁶⁴ Within two years he had died of cancer. We can well imagine the shattering effect that these events might have had on Murphy's friends

and perhaps even his colleagues on the bench. Where now was the line between law and politics?

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 – for a reason to explain to a skeptical 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, served as something of a moral touchstone himself in relation to a range of socially divisive issues. Nor should we be puzzled that these developments flourished in a court led from 1987 by one of the most scholarly of judges, Chief Justice Sir Anthony Mason, later Chancellor of the University of New South Wales.⁶⁵ Undoubtedly they detected in the doctrine of proximity, this radical approach to the jurisprudence of responsibility, an ethical sensibility and an intellectual complexity respectively. This book attempts to illuminate their radicalism by the light of an equally radical philosophy. ‘A light is needed to see the light.’⁶⁶

So the inter-disciplinarity of this project is at least plausible. Its aim is to offer a new theory to the common law and a new case study to ethics, and to critique each

by the application of the other. Ultimately I wish to defend proximity, not privity, as the foundational ethical principle of the law: a relationship built on a covenant *to* and not a contract *with* the other.⁶⁷ The language of proximity—even in its imprecision, especially in its imprecision—alludes to a kind of relationship which would justify our responsibility to others neither in terms of an implicit exchange nor as the exercise of sovereign power. Rather it would build on human experience: the experience of the soul, in which, from the moment of consciousness, from the very moment in which I experience myself as a self, I am already imbued with the breath of others and already possessed of a responsibility to them. Individual freedom would be the product of and not the problem with this responsibility.

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.⁶⁸

It is not without importance to know if the egalitarian and just State in which man is fulfilled... proceeds from a war of all against all, or from the irreducible responsibility of the one for all, and if it can do without friendship and faces.⁶⁹

For Hobbes, peace and the force of law are in our mutual self-interest. But how did we ever come to know this? How did we ever find a language of communication in the first place? Without the sense of responsibility which awoke us to being, as if from a 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 covenant on which negligence insists is not some afterthought, some invention 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.'⁷⁰ If that is the case, then the law of negligence is not only the soul of law, but its foundation.

There is another level of inter-disciplinarity that pervades this work. The arguments of this book are sustained and justified not just by reference to abstract philosophy but through the insights into our lives revealed and rendered richly complex by works of art and literature. My scholarly work has always treated law as a cultural practice with closer connections to the arts than the sciences.⁷¹ In drawing on works of art and literature in this way, I believe that they not only provide evidence for the claims about human experience that I will be hoping to elicit from Levinas and from the law. They also provide us with case studies through which we develop a subtler understanding of the ideas and points at issue. In drawing on a Borges short story or a Moore sculpture, I am not attempting to illustrate something, but to learn something. And these works, in their complexity and their humanity and their beauty, allow us to establish, on an affective level, a connection between our legal practices and the manifold other ways by which we come to both comprehend and to develop – to value and to critique – our societies. Art and literature are two of the most important ways in which we make sense of the world; so too, and in similar and not less imaginative ways, is law.

In defending what some might take to be an eclectic scholarship, I draw some reassurance from Levinas' own approach. It is true that his path wound through biblical exegesis.⁷² But it is also true that he defends his use of scripture *not* 'by the dogmatic story of their supernatural or sacred origin, but by the expression and illumination of the face of the other human' in them.⁷³ One might say therefore that if there is a god of the Bible then it is also the god of literature; and indeed Levinas elsewhere talks of the convergence of the ethical principles to be gleaned from the great literatures and the great religions alike.⁷⁴ All speak with the voice of the other, and this voice is as near as we will ever get to god.⁷⁵ In the law, too, we can hear this voice.

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- ⁷ See, *inter alia*, Emmanuel Levinas, *Otherwise Than Being, or Beyond Essence*, trans. Alphonso Lingis (The Hague: Martinus Nijhoff, 1981), 75. “The psyche in the soul is the other in me, a malady of identity”: *ibid.* 69.
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