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# The vulnerable subject of negligence law

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## Abstract

*The approach taken by English courts to the duty of care question in negligence has been subject to harsh criticism in recent years. This article examines this fundamental issue in tort law, drawing upon Canadian and Australian jurisprudence by way of comparison. From this analysis, the concept of vulnerability is developed as a productive means of understanding the duty of care. Vulnerability is of increasing interest in legal and political theory and it is of particular relevance to the law of negligence. In addition to aiding doctrinal coherence, vulnerability – with its focus on relationships and care – has the potential to broaden the way in which the subject of tort law is conceived because it challenges dominant assumptions about autonomy as being prior to the relationships on which it is dependent.*

## Introduction

The purposes of this article are twofold. First, I analyse the English law of negligence with respect to how we approach the question whether a duty of care exists in novel categories of case. The law in this area has generated much criticism in recent years and, in particular, the various approaches taken by the courts have led some to suggest that the law is fragmented and incoherent. I will draw upon the Canadian and Australian case-law by way of comparison because of their contrasting approaches to the issue. From this comparative analysis, I extract the concept of vulnerability as a mechanism by which we might better understand relationships giving rise to a duty of care. In addition to the aim of improving the coherence of legal doctrine, this article has another, more theoretical, aspiration. I argue that vulnerability not only has the potential to provide a useful descriptive and normative device by which to make sense of the law and to guide courts in the future. It also might help us to broaden our legal imagination regarding responsibility in tort and elsewhere. In this regard, the concept of vulnerability has had significant impact in legal and political theory as a response to the primacy of the discourse of rights. Its explicit focus on the relationality of the subject, as well as its universal quality as an aspect of the human condition, makes it a potentially powerful rhetorical tool and heuristic device. It is not by coincidence that vulnerability now makes an appearance in a field of law explicitly concerned with care and responsibility to others. Thus, my argument is that vulnerability could provide both some doctrinal order to a confused legal state, and it gives us a means by which to enrich our understanding of how we conceive of our ethical and legal obligations. Although vulnerability might not provide a ‘grand theory’ applicable to all types of negligence cases, it does widen the discussion beyond the often unduly narrow confines which have been historically dominant.

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## Principle, policy and proximity

Let me begin with my doctrinal claims regarding English tort law in relation to the duty of care in negligence. The history of the duty question has achieved folklore status in the story of the common law (van Rijswijk, 2010). It runs several chapters, highlighted by the momentous attempt to articulate a general test for duty of care through the concepts of foreseeability and neighbourhood.<sup>1</sup> This is followed by its apparently broad re-articulation as a presumption of duty for all foreseeable injury, subject to any contrary policy concerns that might negate it.<sup>2</sup> Unfortunately, this left unclear whether the foreseeability stage necessarily contained within it some additional control device on liability. We then witnessed the famous judicial retreat in favour of the incremental development of the categories of negligence liability.<sup>3</sup> Of course, while incrementalism may accurately describe a judicial philosophy of conservatism in the development of the scope of duties in novel situations, by itself it did not (nor could it) provide a test by which the duty of care could be determined (Stanton, 2007, p. 98). Finally, we arrived at the current three-stage test, which reclaims the language of proximity as a control device on factual foreseeability.<sup>4</sup> This is combined with the residual categorical requirement of ‘fair, just and reasonable’, by which policy concerns potentially can negate liability for harm that is otherwise foreseeable and proximate.<sup>5</sup> It is here that – at least in theory – broader concerns regarding distributive justice and ‘community welfare’ limit what would otherwise be duty situations (Robertson, 2011, p. 371). Not surprisingly, the characterisation of the third stage in these terms creates the almost inevitable conditions for an open-textured and sometimes apparently haphazard analysis of the appropriateness of liability (Hartshorne, 2008, p. 17).

The criticisms that have been levelled at this framework take several forms. First, it has been argued that appellate courts, in developing the law of negligence, have adopted an ad hoc approach to the determination of duty. Thus, some argue that there is now little pretence of a systematic application of the *Caparo* test (Hartshorne, 2008; Stanton, 2007). Indeed, Lord Walker described it as ‘only a set of fairly blunt tools’.<sup>6</sup> This can give rise to unpredictability, not necessarily of result, but certainly of method, leading to the duty of care being ‘reduced to the brink of incomprehensibility’ (Hartshorne, 2008, p. 8) with ‘inconsistent and contradictory reasoning’ (p. 9). For example, the concept of assumption of responsibility – which began as central to the finding of a duty of care in the context of negligent misstatement leading to economic loss<sup>7</sup> – has assumed increasing importance in the determination of duty, although ‘the nature and scope of the concept and the circumstances in which it may be applied are still a mystery’ (p. 12). In fact, to require the assumption of responsibility in order to found a duty of care misunderstands that assumption of responsibility should only be a necessary finding ‘to overcome an independent reason for denying liability, such as a pure omission or a third party intervention that would otherwise exonerate the defendant or an unrecoverable form of loss such as pure economic loss’ (Howarth, 2005, p. 24).

Moreover, the second stage requirement of proximity continues to cause judicial and academic debate over whether proximity possesses some independent, discernable meaning against which

1 *Donoghue v. Stevenson* [1932] AC 562 (HL).

2 *Anns v. Merton London Borough Council* [1978] AC 728 (HL).

3 *Murphy v. Brentwood District Council* [1991] 1 AC 398 (HL).

4 *Caparo Industries plc v. Dickman* [1990] 2 AC 605 (HL).

5 *Ibid.*, at 618.

6 *Customs and Excise Commissioners v. Barclays Bank* [2006] UKHL 28 at para. 71.

7 *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* [1964] AC 465 at 486.

facts in a novel category can be tested, or whether it represents simply a conclusion that the necessary relationship of neighbourhood exists between two parties. For critics, proximity 'has evolved, possibly unavoidably, into an *ad hoc* device, judicially micro-refined by the particular facts of cases and the particular idiosyncrasies of the judges hearing them' (Brown, 2005, p. 162) and 'gives no practical or even theoretical guidance' (p. 164). For others, it provides a useful device by which legal reasoning can be structured. It is not a formulaic test, but a 'meaningful definitional element' (Kramer, 2003, p. 72), 'a conduit for the application of community standards' about responsibility (p. 72), and '*unequivocal* as indicators of the presence or absence of a substantial ability on the part of the defendant to cause injury to the claimant' (Witting, 2005, p. 39). Furthermore, as a wrapper for a range of diverse factors, some argue that proximity has wrongly allowed policy concerns centring on distributive justice to infiltrate what should be an inquiry focused on the relationship between two parties (Beever, 2007). As a consequence, it is claimed that proximity has opened the door to the balancing of two incommensurable types of argument. But even for those sceptical of a clear-cut distinction between issues of principle and policy, proximity can be 'dangerously misleading' because it masks the inevitable exercise in judicial balancing (Stapleton, 1998, p. 61). Criticism of proximity thus comes from all sides of the theoretical spectrum.

Finally, much scepticism has been levelled at the 'fair, just and reasonable' requirement, not only because of its apparent open-endedness, but more specifically because it raises the potential for the unrestricted application of *ad hoc* public policy assertions (Hartshorne, 2008, p. 14). This argument is related to concerns about proximity. While some hold that distributive justice arguments are problematic in the determination of whether a relationship is proximate (Witting, 2005), for those who subscribe to a more thoroughgoing corrective justice theory of tort law, the invocation of distributive justice under the third stage – as a basis for the negation of a duty that otherwise exists – is regarded with deep concern (Beever, 2003; 2008). For these theorists, proximity can achieve a degree of certainty provided that it remains focused on the 'bipolar litigation' between claimant and defendant (Owen, 1995, p. 6). Policy factors create uncertainty and unpredictability because, being based upon broader arguments of distributive justice, they 'are inherently contentious and contestable' (Witting, 2005, p. 40) and 'judges should be cautious about their ability to make just determinations of liability on the basis of such arguments' (p. 40). Policy gives rise to 'legal intuitionism' rather than principled analysis (Beever, 2003, p. 147). In addition, it is argued that the failure of courts to structure their reasoning in terms of the relationship between the parties giving rise to a duty has led to a 'disintegration' of the law of negligence into a series of duties without the analytical tools to reason across different types of case (Weinrib, 2006). In this way, the law has come full circle from Lord Atkin's attempt to provide a universal touchstone for liability, because it has reverted to a series of different duties with little analytically holding the mosaic together. At the other end of the theoretical spectrum, commentators argue that, rather than fragmentation, the duties can be understood as a series of 'pockets' based upon the specific factors (of both principle and policy) which drive the determination in each type of case (Stanton, 2007, p. 98). It is claimed that this destination in the law's development may not, in practical terms, be a cause for great regret, provided that the reasoning within each 'pocket' of liability is coherent, consistent and predictable (p. 106).

In sum, while corrective justice theorists argue that the courts have strayed away from the principled arguments on which the law of negligence should exclusively be reliant, realists advocate that the development of the law will and *should* include arguments of both principle and policy, and the distinction between the two is illusory.<sup>8</sup> Of far greater importance for the realists is

8 In using this dichotomy of corrective justice and realism, I recognise that I am oversimplifying a diverse range of scholarly contributions. However, I believe that it proves a useful means by which to frame the discussion that follows.

that the courts are explicit in their reasoning, analyse the broad consequences of a finding of liability in any category of claim, and recognise that societal factors which may be dispositive in one ‘pocket’ – such as the possibility of indeterminate liability to an indeterminate class – may not be relevant in another (Stapleton, 1998). The concept of proximity provides no analytical usefulness and, at worst, can cause confusion because it hides the real arguments that are driving the development of the law (Keeler, 1989, p. 101). By contrast, for some corrective justice theorists, proximity – properly applied – signifies those ‘causal pathways’ by which the bipolar relationship between claimant and defendant is crystallised (Witting, 2005, p. 37).

## The Canadian evolution

These scholarly debates have been extensive and have been deployed, not only in England and Wales, but in other parts of the Commonwealth.<sup>9</sup> Further complicating the law on the duty of care has been the variety of ways in which Commonwealth courts have developed the framework for analysis, particularly in the light of the retreat from *Anns* in the House of Lords. In Canada, for example, the Supreme Court remained generally wedded to the *Anns* formula.<sup>10</sup> Its current articulation of the duty of care test in *Cooper v. Hobart*<sup>11</sup> replicates the two stages of *Anns*, although greater guidance has been provided into the reasoning process to be undertaken by courts:

‘At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonable foreseeable consequence of the defendant’s act? And (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognised here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of the word. If foreseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care.’<sup>12</sup>

In this passage, McLachlin CJ and Major J (in a jointly written judgment) made clear that stage one demands consideration, not only of reasonable foreseeability as a matter of fact, but also whether the relationship satisfies a legal requirement of sufficient closeness (or, as they describe it, ‘proximity’). This clarifies one point on which much confusion arose in the application of *Anns*. But the reference to policy factors at the first stage, which has created its own confusion, is explicitly tied to the relationship between the parties. As such, in theory, it should not evoke criticism from corrective justice theorists, provided that its application is limited to ‘relational criteria’ which make up the proximity analysis (Weinrib, 2006, p. 244). In practice, however, that distinction between the two ways of understanding policy – to the extent that it was ever coherent – largely has been abandoned by the Court.<sup>13</sup> In *Cooper v. Hobart*, the defendant – a public body charged with regulation of financial services – was found to owe no duty of care to an investor at stage

9 I focus here on Canada and Australia by way of contrasting examples, but there have been noteworthy developments in recent years elsewhere; see, generally, Barker (2003); Tan (2010).

10 *Kamloops (City) v. Nielsen* [1984] 2 SCR 2.

11 [2001] SCC 79. Released on the same day as *Edwards v. Law Society of Upper Canada* [2001] SCC 80.

12 *Cooper v. Hobart* at para. 30.

13 *Hill v. Hamilton-Wentworth Regional Police Services Board* [2007] SCC 41.

one, based on ‘its relationship with the claimant with reference to the statute itself’ (Gilliker, 2005, p. 62). Once again, stage two does trouble the corrective justice theorists because it has moved the analysis beyond the relational context and potentially leads to a ‘ramshackle enquiry’ for which courts are not equipped, and which is unprincipled and unpredictable (Weinrib, 2006, p. 238). For the realist, such a move provides a welcome clarity of analysis, although the distinction between the two notions of policy – like the distinction between principle and policy itself (Moyes, 2005, p. 20) – is artificial and fuzzy (Klar, 2002, p. 374; Rafferty, 2008, p. 92). Finally, for those sceptical of the value of the concept of proximity, its explicit use by McLachlin CJ and Major J is of little assistance (Brown and Brochu, 2008, p. 1081).

Although some may look at the Supreme Court of Canada’s approach with envy as an example of open judicial engagement with the underlying policy factors relevant to limiting the scope of liability for harms which were reasonably foreseeable as a matter of fact (Gilliker, 2005, p. 69), the differences between the Canadian and English approaches are largely illusory (Pitel, 2002; Rafferty, 2008, p. 79). The *Caparo* test explicitly brings out the necessary control mechanism of proximity as a separate stage of the inquiry, possibly because it had been unfortunately buried in the reasonable foreseeability requirement of *Anns* (Kidner, 1987, p. 323). In *Cooper v. Hobart*, the Court can remain loyal to *Anns* because it engages in unpacking the first stage, revealing ‘reasonable foresight of harm must be accompanied by something more’ which limits the duty through the requirement of proximity (Pitel, 2002, p. 253). Furthermore, the third limb of the *Caparo* test mirrors the residual second stage of *Cooper v. Hobart*, which leads to the same criticisms by those sceptical of extrinsic policy based justifications for limiting a duty which otherwise exists between the parties (Brown and Brochu, 2008, p. 1073). Finally, it is clear that neither approach is inherently more expansive in terms of the scope of liability. Although *Cooper v. Hobart* is generally regarded as signalling a more cautious and conservative approach to finding a duty in novel categories of case (Klar, 2002, p. 366; Barker, 2003, p. 47) – based as it is on an incremental approach to expanding categories of liability – there have also been exceptions to that rule (Rafferty, 2008, p. 79). This is particularly true in the Supreme Court’s articulation of the duty of care on the part of the police service.<sup>14</sup>

It is not at all obvious that adoption of the *Cooper v. Hobart* test necessarily, in itself, would lead to a superior body of doctrine in England and Wales. It has been sharply criticised for its failure to produce doctrinal coherence (Brown and Brochu, 2008, p. 1073). If proximity is a wrapper surrounding a range of disparate connecting factors, then perhaps inevitably the result is the fragmentation of the duty of care concept decried by corrective justice theorists. Although *Cooper* may have provided a structure through which to engage openly in the analysis, there is no inherent reason why *Caparo* could not provide an equal measure of transparency. It is the search for a unifying basis that remains elusive, although McLachlin CJ and Major J do provide a clue when they posit that ‘defining the relationship may involve looking at expectations, representations, reliance and the property or other interests involved’.<sup>15</sup> The question that is of interest in this article, however, is whether this is as far as it is possible to go in identifying the basis for a finding of sufficient neighbourhood between the parties. If proximity provides ‘a conduit for the application of community standards’ (Kramer, 2003, p. 72), is it possible to make both descriptive and normative claims regarding how we define both the ‘standards of community morality’ (p. 72) and how we understand community itself? By contrast, are we inevitably left with nothing more than a ‘stuff sack’ which holds a plethora of otherwise unconnected factors

<sup>14</sup> *Ibid.*

<sup>15</sup> *Cooper v. Hobart* [2001] SCC 79 at para. 34.

which can be applied to different categories of case (Gergen, 2006, p. 749)? These are the questions to which I now want to turn.

## The salient features of Australian negligence law

I look now at the Australian approach to the duty question, the history of which reveals a crucial role for the concept of proximity. Starting with the contribution of Deane J and other members of the High Court in a series of cases in the 1980s and 1990s, proximity found itself centre stage.<sup>16</sup> During this significant period in Australian negligence law, proximity became a 'touchstone for determining the existence and content of any common law duty of care to avoid reasonable foreseeable injury of the type sustained',<sup>17</sup> and it signified 'a separate and general limitation upon the test of reasonable foreseeability in the forms of relationships which must exist between the plaintiff and defendant before a relevant duty will arise'.<sup>18</sup> On its face, this may appear no different from the properly understood complex concept of reasonable foreseeability established in *Anns*. But its significance as a mechanism by which to understand the relationship between the parties was vital. During the high water mark of the High Court's approach to the duty question, proximity assumed the role of a general requirement 'which operated not only inside a category of negligence, but also *outside* whichever category of negligence was being considered' (Vines, 1993, p. 466). Described by Deane J as being 'physical, circumstantial or causal',<sup>19</sup> proximity was seen by its supporters as a truly *general* test. For example, at the time, Prue Vines (1993) argued that proximity was 'a category of broad reference – and that broad reference is to be seen *psycholinguistically as a reference to social understandings of culpability*' (p. 475, emphasis added); it has '*penumbral and metaphorical connotations which refer to connectedness*' (p. 479, emphasis added); and 'the power of proximity lies in the possibility of a *more relational and relationship-based understanding of the duty of care*' (p. 480, emphasis added). For its supporters, this was *not* an empty signifier.

The potential of proximity as describing an ethical relationship giving rise to legal obligations of care in novel situations – 'an overriding conceptual basis' (Vines, 1993, p. 468) – was doctrinally significant. While some commentators of the time – and some High Court judges, most notably Brennan J – were critical of proximity as a 'Delphic criterion',<sup>20</sup> the historical significance of this period should not be underestimated. As well as being a control device on the finding of factual reasonable foreseeability, proximity could signify that broad set of ethical considerations by which we have responsibility to others. Perhaps the strongest proponent of this idea(l) is Desmond Manderson (2006), who draws out the parallels between the doctrinal deployment of proximity and the philosophy of Emmanuel Levinas.<sup>21</sup> For Manderson, the High Court's invocation of the language of proximity provided 'a new answer and a *radical new language* concerning the duty question' (p. 103, emphasis added), because it signified the 'underlying norm' of a relationship giving rise to responsibility towards the 'other' (p. 121).

16 See, for example, *Jaensch v. Coffey* (1984) 155 CLR 549; *Sutherland Shire Council v. Heyman* (1985) CLR 424; *San Sebastian Pty Ltd v. Minister Administering the Environment Planning and Assessment Act 1979* (1986) 162 CLR 340; *Hawkins v. Clayton* (1988) 164 CLR 539; *Gala v. Preston* (1991) 172 CLR 243; *Burnie Port Authority v. General Jones Pty Ltd* (1994) 179 CLR 520.

17 *Jaensch v. Coffey* (1984) 155 CLR 549 at 583.

18 *Ibid.*, at 584.

19 *Ibid.*

20 *Hawkins v. Clayton* (1988) 164 CLR 539 at 555.

21 Of particular relevance are Levinas's two main works: *Totality and Infinity* (1991 [1961]) and *Otherwise than Being* (1991 [1974]) (Manderson, 2006, p. 7).

According to Manderson (2006, pp. 38–42), this rich understanding of proximity cannot be assimilated to either a corrective justice or policy-driven approach (although it can be argued that Deane J's understanding of proximity did include 'policy issues within itself' (Vines, 1993, p. 475)). The focus on responsibility and connection towards a particular claimant by a specific defendant becomes a 'singular moment' in which questions of efficiency and distributive justice are irrelevant (Manderson, 2006, p. 186). But that focus on the relationship should not be confused with corrective justice. The ethics of proximity espoused by Manderson contains within it a shift of the legal imagination away from the autonomous independent self in possession of rights which have been infringed by another. For corrective justice theorists, 'the defendant's liability is seen as following from his or her *use of the plaintiff's resources*' (Brown, 2003, p. 168). Even the physical integrity of the claimant comes to be understood in these terms: 'physical integrity assumes a proprietary aspect; as a "resource", it represents an asset that the law will protect' (p. 169). In Manderson's use of Levinas, by contrast, ethical and legal responsibility does not derive from autonomy; rather, it precedes and produces it (Manderson, 2006, p. 42). This is a vision of autonomy which flows from the experience of relationships, rather than the reverse. There are strong theoretical connections here to those feminist legal theorists who have sought to rethink autonomy in more relational terms.<sup>22</sup> It provides an alternative to the view espoused by corrective justice theorists that 'the primary right must be capable of precise definition *prior* to that interaction' between claimant and defendant (Witting, 2008, p. 627). I will return to this idea in considering the role of vulnerability in understanding the duty inquiry.

Despite its theoretical appeal, this employment of proximity as a 'universal yardstick' (Katter, 2004, p. 88) ultimately – after some doctrinal confusion<sup>23</sup> – was abandoned by the High Court.<sup>24</sup> It was perhaps because of the difficulty of articulating the concept in sufficiently pragmatic ways – except by reference to the categories in which recovery was already allowed – that the Court turned instead to its current formulation: 'a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle',<sup>25</sup> commonly known as the 'salient features' approach. In what is seen by many as a dramatic change, a unanimous High Court rejected proximity as a conceptual tool in favour of a focus on categories of negligence, in recognition of the fact that 'different classes of case give rise to different problems in determining the existence and nature or scope, of a duty of care'.<sup>26</sup> Salient features are simply those factors which the courts are to weigh and balance in determining whether there is sufficiently compelling reason to attach legal liability to a situation of harm. The features include foreseeability as well as a range of other concerns. For legal realists, this approach has the advantage of making explicit the diverse range of factors which drive the inquiry into whether a duty of care exists. In other words, it lifts the veil on proximity, producing 'an open-textured form of legal reasoning that focuses on identifying, expounding, and applying the underlying concerns guiding courts' (Stapleton, 2002, p. 535). The potential range of factors that *might* be weighed in the balance has become increasingly varied, and was spelled out in detail by the New South Wales Court of Appeal.<sup>27</sup> The lengthy list underscores the diversity of relevant features, which include both those centring upon the relationship between the parties as well as broader distributive concerns:

22 For a useful introduction to this literature, see Mackenzie and Stoljar (2000).

23 As evidenced by the seven judgments in *Perre v. Apand Pty Ltd* (1999) 198 CLR 180.

24 *Sullivan v. Moody* (2001) 207 CLR 562.

25 *Ibid.*, at 580.

26 *Ibid.*, at 579.

27 *Caltex Refineries (Qld) Pty Ltd v. Stravar* [2009] NSWCA 258.

- (a) the foreseeability of harm;
- (b) the nature of the harm alleged;
- (c) the degree and nature of control able to be exercised by the defendant to avoid harm;
- (d) the degree of vulnerability of the plaintiff to harm from the defendant's conduct, including the capacity and reasonable expectation of a plaintiff to take steps to protect itself;
- (e) the degree of reliance by the plaintiff upon the defendant;
- (f) any assumption of responsibility by the defendant;
- (g) the proximity or nearness in a physical, temporal or relational sense of the plaintiff to the defendant;
- (h) the existence or otherwise of a category of relationship between the defendant and the plaintiff or a person closely connected with the plaintiff;
- (i) the nature of the activity undertaken by the defendant;
- (j) the nature or the degree of the hazard or danger liable to be caused by the defendant's conduct or the activity or substance controlled by the defendant;
- (k) knowledge (either actual or constructive) by the defendant that the conduct will cause harm to the plaintiff;
- (l) any potential indeterminacy of liability;
- (m) the nature and consequences of any action that can be taken to avoid the harm to the plaintiff;
- (n) the extent of imposition on the autonomy or freedom of individuals, including the right to pursue one's own interests;
- (o) the existence of conflicting duties arising from other principles of law or statute;
- (p) consistency with the terms, scope and purpose of any statute relevant to the existence of a duty; and
- (q) the desirability of, and in some circumstances, need for conformance and coherence in the structure and fabric of the common law.<sup>28</sup>

For corrective justice theorists, the criticism of the High Court's approach is twofold. First, the salient features do not provide a *methodology* for determining whether there is sufficient connection between the parties to found a duty (Katter, 2004, p. 88). Rather, presumably like all exercises in judicial balancing, it is alleged that it gives rise to inevitable indeterminacy and unpredictability (despite the fact that the exercise is limited to novel categories) since 'courts will ostensibly be required to make their decisions based upon mere intuition about the overall weightiness of the factors found to be present' (Witting, 2002, p. 218). Of course, whether the application of proximity in novel categories provides any greater predictability is an open empirical question. Of perhaps greater concern, however, is the claim of the corrective justice theorists that the salient features approach blends issues of both principle and policy (in the strong sense of distributive justice concerns) (Witting, 2007, p. 581). However, this is a criticism levelled at courts more generally and is not particular to the salient features approach.

In fact, it is not obvious that *Sullivan v. Moody* represents the radical departure to the duty of care question that is sometimes claimed. Instead, it can be read as a drilling down into the concept of proximity in order to provide useful guidance for future courts: 'this multi-factoral approach was initially conceived *not* as a replacement for proximity, but to infuse meaning and provide a set of practical analytical factors into the concept of proximity' (Tan, 2010, p. 466). Granted, proximity in the sense of both the relationship between the parties and broader concerns of distributive justice are blended together. Although the courts may look to salient features to determine a duty of care, this can be understood as a re-articulation of the *Anns* test from a different vantage point

<sup>28</sup> *Ibid.*, at para. 103.

(p. 469). While it has been argued that the salient features approach leads to uncertainty in the law because it tempts courts into ad hoc balancing in every case (rather than only in novel duty situations) (Katter, 2004, p. 88), this may say more about how the legal imagination responds to a list rather than the intention behind the High Court's judgment in *Sullivan v. Moody*.

But my question is whether the salient features approach contains within it the traces of the legacy of proximity from an earlier period in the High Court's jurisprudence. In other words, the valuable insight in the reasoning in *Sullivan v. Moody*, as developed in subsequent case-law, may not be in the focus on salient features per se. That may not be the 'dramatic change of position' sometimes claimed (Barker, 2003, p. 45). Rather, I want to argue that the High Court, through the articulation of salient features, gives us fresh insight into the 'civil ethics' that are contained within the duty of care inquiry (van Rijswijk, 2010, p. 3). My particular interest is the Court's explicit focus on 'vulnerability' as a salient feature. This element has been consistently applied by the Australian courts, which 'is to be understood as a reference to the plaintiff's inability to protect itself from the consequences of a defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant' (Stapleton, 2002, pp. 558–59). For example, it has proven particularly productive in the context of economic loss, in which liability is determined by the claimant's ability to have otherwise protected itself.<sup>29</sup> But the range of situations in which the courts can turn to vulnerability is potentially wide.<sup>30</sup> Although not dispositive, it is certainly one of the most significant of factors for the courts. The concept has been described by McHugh J as applying to situations where 'by reason of ignorance or social, political or economic constraints, the plaintiff was not able to protect him or herself from the risk of injury'.<sup>31</sup> The flipside of vulnerability is control on the part of the defendant, which underscores that it is the relative power of the parties that helps us to understand the relationship, and the ethical and legal responsibilities that flow from it. Vulnerability is a broader concept than assumption of responsibility and reliance, which have also been frequently employed in the duty inquiry (Tan, 2010, pp. 476–79). This is not surprising because assumption of responsibility implies that the inquiry is centred on whether conscious acts have been undertaken by the parties (to the extent that its meaning can be ascertained), which can narrow the situations in which the finding of a relationship may be demanded. It has been criticised for producing *ex post facto* justifications and uncertainty (Barker, 1993, p. 481).

Jane Stapleton (2003–2004) has claimed that vulnerability provides the 'golden thread' and 'central organising feature' of the tort of negligence:

'Over the past 20 years, the court has identified this as a core moral concern of tort law and whatever limits may govern this vulnerability concept it certainly has a powerfully convincing core. This is represented by the most extreme form of vulnerability: namely, where a person is *exclusively* dependent on another to take care, even if that person is a total stranger.' (p. 142)

Thus, in economic loss cases, vulnerability can provide justifiable limitations on the duty of care. With respect to sophisticated commercial parties, vulnerability *may* point away from liability,

<sup>29</sup> See, e.g., *Perre v. Apand* (1999) 198 CLR 180; *Woolcock Street Investments v. CDG* (2004) 216 CLR 515; *Hill v. Van Erp* (1997) 188 CLR 159; *Esanda Finance Corporation v. Peat Marwick Hungerfords* (1997) 188 CLR 241. But as Robertson (2011, p. 379) makes clear, it is important to consider whether the claimant's available alternative remedy is protective or compensatory in character.

<sup>30</sup> See the reasoning of McHugh J in *Trustees of the Roman Catholic Church for the Diocese of Canberra v. Hadba* (2005) 221 CLR 161 at 175.

<sup>31</sup> *Woolcock Street Investments v. CDG* (2004) 216 CLR 515 at 549.

whereas in the case of an individual, it *may* point towards the imposition of a duty of care (Stapleton, 2002, p. 559). For Stapleton, substantive vulnerability explains everything from the home purchaser's relationship to the surveyor (p. 556), to the relationship of the individual to public authorities (p. 559). It provides a 'normative concern' that bridges otherwise disparate pockets of liability (p. 558). Also, it transcends the boundary between principle and policy. It is a normative, ethical concept by which we characterise a relationship between claimant and defendant but within an economic, political and social context.<sup>32</sup>

Vulnerability – like proximity before it – suggests the connectedness from which an ethical responsibility to the other arises. Returning to my earlier point regarding how we conceive of autonomy, vulnerability's powerful rhetorical resonances can shift us away from the pre-relational, self-reliant, autonomous subject. In this regard, it is no coincidence, in my view, that Manderson (2006) refers to vulnerability in his analysis of the ethics of proximity: 'in each case of proximity, plaintiffs find themselves vulnerable to the defendant in a manner that is outside their control and to a degree that sets them apart from the world at large' (p. 124); 'a distinct capacity to control particularizes the defendant, while a distinct vulnerability to harm particularizes the plaintiff. Both are needed to found a duty, because each position constitutes and individualizes the other' (p. 133). Vulnerability, then, may provide a useful clarification and advance on the earlier use of proximity as the basis upon which we understand the ethical connections between parties (and between negligence law and those who turn to it for relief) (p. 199). Duties arise from the demand upon us to be attentive to the vulnerability of others.

The criticism of the turn to vulnerability from the perspective of corrective justice demonstrates, I would argue, a misunderstanding of its significance. Allan Beever (2007) contends that determining liability by virtue of the claimant's vulnerability to harm potentially undermines the test of reasonable foreseeability itself. As Beever rightly explains, once we move outside the realm of economic loss to physical damage, vulnerability may be inversely related to foreseeability. He cites the famous case of *Doughty v. Turner Manufacturing Co*<sup>33</sup> to illustrate the point:

'The claimant was extremely vulnerable precisely because it was not foreseeable that the cement cover would cause an explosion. If that had been foreseeable, then it would have been much less likely that the claimant would have been near the vat. Vulnerability, then, is not only incompatible with reasonable foreseeability; it is often directly opposed to it.' (p. 195)

However, this is a misreading of the value of vulnerability analysis. Factual foreseeability remains a requirement in finding a duty of care. However, that requirement, by itself, is hardly a difficult hurdle for most claimants to overcome in novel cases (Klar, 2002, p. 365). The function of vulnerability is to help us to understand the ethical and legal connection between two parties – the basis of the relationship that may give rise to liability. On this claim, Beever (2007, p. 195) is particularly dismissive, describing this as simply (his) 'principled approach in disguise'. My argument, however, is that vulnerability has the potential to lift the veil – to remove the disguise – that has caused so many commentators and courts to be critical of proximity's apparent emptiness.

The significance of vulnerability goes even further because it provides insights into the interpersonal morality that leads to responsibility. It could signify a conceptual shift in emphasis away from the pretence of a pre-relational, unencumbered, autonomous subject, towards one in which relationships (and the ethical norms that attach to them) are the very conditions of autonomy. After all,

<sup>32</sup> Stapleton's evocative metaphor of the 'golden thread' potentially would suggest the appropriateness of widening the scope of liability for public authorities in English law unless competing distributive justice concerns were found to dominate.

<sup>33</sup> [1964] 1 QB 518 (CA).

vulnerability is a universal human condition and it is from that initial experience of total vulnerability in life – and the relationships which nurture us – that we come to define ourselves as autonomous. While proximity – as it was developed by the High Court of Australia – may have had the *potential* to provide a doctrinal platform on which a richer notion of autonomy in law could be built, it did not succeed in its task. Today, it may be vulnerability which can take up the challenge of creating a ‘civilizing buffer’ against unmediated self-interest in society (van Rijswijk, 2010, p. 19).

## Duty and vulnerability

The potential of vulnerability as a concept in the law of negligence can draw upon an increasingly rich literature. The scholarly interest in vulnerability arises out of the attraction of the ‘ethics of care’ as an alternative to the ‘conceptually imperialistic role’ of an ethics of justice and its focus on the autonomous subject of rights (Held, 2006, p. 141). An ethics of care, by contrast, ‘characteristically sees persons as relational and interdependent, morally and epistemologically’ (p. 13). Although some care theorists argue that an ethics of care is not well suited to the discourse of law in which justice rightly dominates (p. 17), I would argue, along with others, that an ethics of care can provide an important corrective to the formalism and abstraction of legal reasoning.<sup>34</sup> It provides the tools by which autonomy – so central to tort law – might be re-imagined in more relational terms.<sup>35</sup> This is the theoretical significance of vulnerability and it potentially marks an important departure from the hitherto dominant theoretical positions.

Vulnerability grows out of this ethical standpoint. Robert Goodin (1985), for example, has argued that responsibilities ‘derive from the fact that other people are dependent upon you and are particularly vulnerable to your actions and choices’ (p. 33). Many legal obligations traditionally explained in terms of voluntary agreement, he suggests, are more compellingly understood through vulnerability. Tort law, with its explicit focus on care, strikes me as particularly well suited to such a reformulation. More recently, Martha Fineman (2008–2009) has demonstrated that the concept of vulnerability is of wide-ranging significance for legal discourse. She posits that vulnerability is ‘inherent in the human condition’ (p. 1) and she utilises the concept as a way of understanding responsibilities of the state to the individual. Her ambitious theoretical claim is that ‘the “vulnerable subject” must replace the autonomous and independent subject asserted in the liberal tradition’ (p. 2). Vulnerability can operate as a ‘heuristic device’ by which we can shift our understanding of responsibilities towards those who are dependent upon us (p. 9).

Although Fineman’s primary focus is upon welfare and the state, the possibilities of vulnerability theory extend further. While Goodin’s concern is in contractual-type obligations, my interest is in its role in negligence law. In pursuing this approach, I am attempting to build upon the work of feminist tort theorists such as Joanne Conaghan (2003), who has argued that critical analysis of tort law needs now to focus more on the ‘key categories and fundamental concepts comprising the basic “architecture” or “anatomy” of tort law’ (pp. 181–82). Of course, there can be no more fundamental concept in tort than the duty of care, and vulnerability may provide a more ‘incremental, holistic and contextualist approach’ to understanding it (p. 196). Conaghan argues that tort law has been reliant upon an understanding of autonomy that is bounded and prior to social relations (as evidenced by its deployment by corrective justice theorists). She argues that this is to ‘misconceive the nature of the process in which agency is exercised’ (p. 203); namely, as derived from the social itself. Vulnerability, as a universal experience prior to freedom, is perhaps the concept that is best able (better even than proximity) to turn this theoretical standpoint into legal practice.

34 A claim that is not without controversy within feminist legal theory; see Drakopoulou (2000).

35 In earlier work, I have developed this point in the context of other legal fields; see Stychin (1998; 2007).

Having taken this theoretical and comparative excursion, I now turn back to the English law of negligence and the duty of care question. I began by highlighting how the law has been described as increasingly incoherent, with little conceptual basis uniting the ways in which courts approach the determination of duty. Can vulnerability not only provide theoretical insight, but also be of practical utility for English courts? Clearly, it has found favour in the Australian jurisprudence as a 'salient feature' and, as Stapleton (2003–2004) argues, it may well link different duty situations. My argument is that this may be a concept that transplants relatively easily into this jurisdiction. First, vulnerability provides a compelling explanation of many decisions of the past. Economic loss cases such as *Smith v. Eric Bush*<sup>36</sup> can be understood as determined by the vulnerability of purchasers in a particular market (Stapleton, 2002, p. 555). By contrast, in *D&F Estates v. Church Commissioners for England*,<sup>37</sup> vulnerability was not present because the claimant was able to protect itself through bargaining or by purchasing protection from loss. Vulnerability arising out of 'market conditions' also can explain *Henderson v. Merrett Syndicate*,<sup>38</sup> because 'the market conditions inflexibly prevented the Names from bargaining for protection against the risk of the managing agents and others being careless' (p. 556). As Stapleton concludes, this explains why 'commercial plaintiffs in general are finding it more difficult to recover for economic loss because they are less likely to be able to establish their vulnerability' (p. 559).

Although Beever (2007, p. 194) argues that vulnerability analysis cannot logically extend beyond the economic loss cases, its traction may be greater than that. While I would not claim that vulnerability has played an explicitly central role in English tort law, there are certainly doctrinal strands which can be drawn upon in supporting its relevance and in advocating its future application. It provides a compelling explanation in determining responsibility in negligence for a third party's actions, as in *Watson v. British Boxing Board of Control*.<sup>39</sup> It also has explanatory power in the difficult area of liability of public authority defendants. This is a field in which vulnerability may be particularly pronounced, and leads to a situation of 'exclusive dependence' (Stapleton, 2002, p. 560). This has been recognised by Lord Nicholls, who has explicitly relied upon the vulnerability of the claimant in relation to the defendant public authority as relevant to the establishment of a duty of care. In his dissenting judgment in *Stovin v. Wise*<sup>40</sup> – in which the majority held that the local authority was not responsible in negligence for its failure to carry out road improvements at a dangerous location in which the claimant was injured – he found a common law responsibility to take positive action. First amongst the factors which drove Lord Nicholls to his conclusion that proximity was present was the relationship of control and vulnerability between defendant and claimant:

'First, the subject matter is physical injury. The existence of a source of danger exposes road users to a risk of serious, even fatal, injury. *Road users, especially those unfamiliar with the stretch of road, are vulnerable. They are dependent on highway authorities fulfilling their statutory responsibilities.*'<sup>41</sup>

A majority of the House of Lords did hold that a local authority owes a duty of care when providing state education in *Phelps v. Hillingdon London Borough Council*.<sup>42</sup> The case concerned the negligent

36 [1990] 1 AC 831 (HL).

37 [1989] AC 177 (HL).

38 [1995] 2 AC 145 (HL).

39 [2001] QB 1134 (CA). For an analysis, see George (2002).

40 [1996] AC 923 (HL).

41 *Ibid.*, at 939 [emphasis added].

42 [2001] 2 AC 619 (HL).

failure to diagnose the learning difficulties of a student by an educational psychologist working for the local education authority. In his reasons, Lord Nicholls again emphasised the relationship of control and vulnerability:

‘Throughout, the child was very dependent upon the expert’s assessment. *The child was in a singularly vulnerable position.* The child’s parents will seldom be in a position to know whether the psychologist’s advice was sound or not. This seems to me to be, on its face, an example par excellence of a situation where the law will regard the professional as owing a duty of care to a third party as well as his own employer.’<sup>43</sup>

The decisions of the majority in the two cases might be reconciled on the basis of whether there was an assumption of responsibility by the defendant. But Lord Nicholls’s use of vulnerability pushes towards finding in favour of the claimant in both, underscoring how vulnerability can capture those situations in which a duty may be warranted but which are not covered by concepts such as assumption of responsibility and reliance.<sup>44</sup> The focus shifts away from conscious acts and towards the relationship of power between the parties. Finally, vulnerability could provide a link between negligence liability and the developing human rights jurisprudence on the legal responsibility of the emergency services, which is increasingly grounded in the vulnerability of the victim.<sup>45</sup>

### Vulnerability in practice: *Sutradhar v. NERC*

I now explore the potential of vulnerability analysis in negligence by reference to a decided case. My choice is one in which the House of Lords unusually relied explicitly and directly upon a lack of proximity between claimant and defendant in order to strike out a claim which concerned personal injuries rather than economic loss: *Sutradhar v. Natural Environment Research Council*.<sup>46</sup> The facts concerned a department of the defendant (the British Geological Survey (BGS)) which was involved in testing wells in Bangladesh. It prepared a report on the possible toxicity of ground water to fish and humans, but the samples were not tested for arsenic. The claimant lived in a region of Bangladesh from which some of the samples were taken and alleged that he had suffered arsenic poisoning as a result of drinking the water in his village.<sup>47</sup> Proceedings were brought against the defendant for negligence in issuing the report. It was claimed that the report had induced the health authorities in Bangladesh not to take steps which would have ensured that the drinking water was safe. The claimant alleged that the BGS had caused or materially contributed to his illness, by issuing a report which represented that his water was safe to drink. A unanimous House of Lords dismissed the appeal by the claimant, holding there was no arguable case.<sup>48</sup> Unusually, Lord Hoffmann relied explicitly upon proximity as a direct test, holding that the relationship between the parties was insufficiently proximate to found a duty of care.<sup>49</sup> There was

43 *Ibid.*, at 666 [emphasis added].

44 I am not suggesting that the test of vulnerability will not lead to factual disagreements, as witnessed by the divergence of opinion between the majority and dissent in *Woolcock Street Investments v. CDG* (2004) 216 CLR 515. My point, rather, is that it may be a more fruitful line of inquiry.

45 See *Savage v. South Essex Partnership* [2009] 2 WLR 115; *Mitchell v. Glasgow City Council* [2009] 2 WLR 481. See, generally, Williams (2008); McIvor (2010).

46 [2006] UKHL 33.

47 *Ibid.*, at para. 23.

48 *Ibid.*, at para. 39.

49 *Ibid.*, at para. 36.

neither a duty to test for arsenic (which, it was held, was not standard practice at the time) nor was there a duty not to release a report that gave the impression that the water was safe to drink without further testing by the Bangladeshi authorities.<sup>50</sup> The lack of proximity stemmed from an absence of responsibility and control for the source of the danger, namely, the supply of drinking water, rather than the issuance of the report. Thus, the Law Lords held that the case was distinguishable from those in which proximity could be established on the basis of control and assumption of responsibility.<sup>51</sup>

A more relational understanding of proximity – founded on the notion of vulnerability – might give us the means by which to approach these facts differently, leading to the conclusion that the case was wrongly decided. In their discussion of the decision of the Court of Appeal in the case, geographers Atkins, Hassan and Dunn (2006) argue that the Court might have considered ‘the reality of “action at a distance” in the worlds of environmental consultancy and international aid, or, for that matter, of the global reach of transnational capitalism’ (p. 280). A focus on the vulnerability of the claimant would fit such an analysis, opening the way for us to think more clearly about the responsibility of those who ‘undertake consultancy work in the developing world’ (p. 282). In this regard, lawyers might well benefit from turning to geographers, who increasingly analyse care and responsibility to ‘distant’ others. As John Silk (2004) argues, ‘[o]ur increasing ability to “act at a distance”, influencing the lives of those far away, places upon us a special obligation to care for those among them who are particularly *vulnerable* to our actions’ (pp. 229–30). An explicit focus on responsibility to the vulnerable might have facilitated the articulation of the underlying economic and environmental context of the case:

‘The expansion of tubewells came with the financial help of UNICEF after the independence of Bangladesh in 1971. At first sight, they seem to be the perfect development tool – a cheap and effective technology that has been received enthusiastically by the users. ... However, the result of this reliance upon tubewells – a cruel irony this – has been an environmental health disaster of unprecedented proportions, many times worse than Chernobyl and Bhopal combined. About a third of tubewells produce seriously contaminated water, with a broad swathe across the centre and south of the country being particularly at risk. One estimate is that millions of people will die or suffer from the very serious consequences of consuming the arsenic that occurs naturally in aquifers in the Holocene sediments of the Bengal delta.’ (Atkins *et al*, 2006, pp. 272–73)

Vulnerability provides a discursive means by which to articulate demands for the legal responsibility of those in positions of privilege who otherwise can claim that they have not assumed responsibility and that they are not responsible. It shifts the focus to responsibilities that arise from ‘encounters with others’ and potentially widens and enriches our understanding of the ethical and legal duties we owe (Barnett and Land, 2007, p. 1069). Vulnerability theory might take us beyond the invocation of ‘causal pathways’ (Witting, 2005, p. 37) in order to grapple more fully with ‘the complexity of causal relationships that connect people living in different places through market transactions, supply chains, or displaced pollution effects’ (Barnett and Land, 2007, p. 1067). Although there may have been issues of distributive justice that led the Law Lords to their conclusion – such as the ‘large hole in Britain’s international development budget’ that a finding for the claimant might have caused through subsequent claims by numerous other injured parties (Howarth, 2005, p. 25) – that can be dealt with openly under the third limb of the *Caparo* test (although the quantum of potential liability does not by itself raise the policy concern of

<sup>50</sup> *Ibid.*, at para. 38.

<sup>51</sup> *Ibid.*

indeterminate liability).<sup>52</sup> David Howarth (2005, p. 25) also queries whether a motivating factor was to place sole responsibility on the Bangladeshi government for the welfare of its own citizens. Vulnerability theory is useful to counter that argument, allowing us to analyse openly the imbalances of power between states in the context of the politics of international development.

## Concluding remarks

This article has focused on both doctrinal as well as theoretical questions. In writing it, I have both positive and normative aspirations. I have been drawn to the concept of vulnerability as a way of making sense of, and enriching, the duty of care enquiry in English negligence law. I have argued, utilising case-law from Commonwealth courts, that vulnerability could be set more firmly within our duty of care framework. Like others before me, I have suggested that vulnerability has an explanatory power that can make sense of what sometimes seems an incoherent body of law. But I have also turned to vulnerability as a way to broaden our legal imagination in terms of how we approach the fundamental ethical question of our responsibilities towards others in law. The power of vulnerability – as a universal experience – may stem from its rhetorical potential to make us focus squarely on relationships of care as fundamentally formative of ourselves. Vulnerability may not explain all cases, nor is it always a precondition for the finding of a duty of care. But it might make us rethink the way in which tort law has privileged an autonomous subject of rights which pre-exists the responsibilities that come with relating to others. That is, it helps us to frame arguments that are otherwise silenced in law. In advocating its relevance, I have tried to set out a potentially powerful alternative to our dominant understandings of justice.

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<sup>52</sup> Thus, I recognise the potential relevance of distributive justice concerns which might preclude a duty, but I advocate that those issues be raised explicitly. Of course, vulnerability could sometimes also inform the distributive justice inquiry.

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