

LEVINAS ON LAW

A Derridean Reading of Manderson's *Proximity, Levinas, and the Soul of Law*

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In this article, Desmond Manderson's book, *Proximity, Levinas, and the Soul of Law* (2006), is analysed specifically with reference to the accuracy with which it translates Derrida's thinking into law. Manderson, in a number of instances, invokes Derrida's thinking as a 'corrective' to that of Levinas. The author shows that this invocation by Manderson of Derrida's texts is selective and does not take account of Derrida's broader 'philosophical' approach. The author points to the differences between, but also the correspondence in the thinking of, Levinas and Derrida. He contends that being true to Derrida's thinking requires that proximity be viewed not as simply making law responsive as proposed by Manderson, but as having a paradoxical structure. The latter would give expression to the distinction that Derrida draws between the conditional and the unconditional. Only if proximity is viewed in this manner will judges be faced with a true responsibility in deciding negligence cases; only then will justice stand a chance.

Introduction

Translating Levinas into law is not a task that many legal scholars undertake. There are, however, a number of scholars who in recent years have made admirable attempts to do so.¹ In this article, I reflect on some of the difficulties involved in translating Levinas into law through a 'Derridean' reading of the recently published book of Desmond Manderson, *Proximity, Levinas, and the Soul of Law*.² This book makes a valuable attempt at translating a number of

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¹ See, for example, Cornell (1992); Douzinas (2000); Diamantides (2000, 2003).

² Manderson (2006). A shorter version of Manderson's reading of Levinas within the context of tort law was published in this journal; see Manderson (2005). The reading I adopt here will not seek to establish whether Manderson remains 'true', in a traditional sense, to Levinas's philosophy. Instead it will be a reading in what could be referred to as a certain 'Derridean style' where the heterogeneity of the text that is being read is explored.

Levinasian themes into law, specifically in the context of tort law. These include the relation between the saying and the said, the distinction between law, politics and ethics, the 'Other' and the third, as well as responsibility and proximity. Manderson's book compels us to reflect on these topics as well as on important legal concepts such as reasonableness and public policy. My analysis of this book will not be restricted to tort law. I will seek to draw out the broader implications of Levinas's thinking for law. The themes referred to above will be explored by closely following Derrida's reading of Levinas, a reading which I insist is essential for Levinas's thinking to have an impact on law. I start this analysis by giving an overview of the main arguments of Manderson's book.

Proximity and (Tort) Law

The most important contribution that Manderson makes is showing how the law (the said) always contains within itself a trace of the saying. It is particularly notable that Manderson realises and acknowledges the importance of language in law and the necessity to reflect on this language.³ Manderson points us to the legal concept of proximity and shows us the radical transformative potential of this concept in relation to the law of negligence. The concept of proximity, he shows us, stands opposed to rigid rules of law which attempt at deciding the case beforehand. Proximity opens us to the event; it calls on us to put the law into question.⁴ Compared with some other authors who have translated the thinking of Levinas and Derrida into law,⁵ Manderson is much more optimistic about (case) law and the possibility of transformation on a less grand scale. Manderson, we can say, attempts to make the law of negligence more 'hospitable' with reference to the thought of Levinas and with reference to the experience or event of proximity,⁶ which he describes with reference to Levinas *inter alia* as 'a closeness to others giving rise to responsibility'.⁷

Manderson points out that proximity, as developed by the courts, is closely tied to the responsibility we owe others.⁸ This is both the case in the law of negligence and in the thinking of Levinas on proximity.⁹ Manderson mourns the fact that this concept¹⁰ is disappearing from the Australian law of negligence, because of its apparent 'vagueness', irrelevance and inadequacy as

³ See Manderson (2006), pp 17, 21–25.

⁴ Manderson (2006), pp 194–95.

⁵ See, for example, Douzinas (2000), pp 343–69. See also the discussion of Diamantides in Manderson (2006), p 10.

⁶ Manderson (2006), pp 90, 174 says that proximity is not a concept.

⁷ Manderson (2006), p 90.

⁸ Manderson (2006), p 15.

⁹ Manderson (2006), p 15.

¹⁰ This is my word, not Manderson's, also elsewhere in this article. I will also use 'notion' to refer to proximity, which is again not how Manderson would refer to proximity. My difference with Manderson in this respect will be explained below.

a 'tool'.¹¹ He argues for its retention and its central importance for the law of negligence. Manderson specifically believes that there is value in 'an idea which is not reducible to a rule'.¹² The 'incapacity of definition' of this notion, Manderson argues, is the very source of its ethical power.¹³ For Manderson, proximity is in other words the 'ethical component' of law.¹⁴ He argues that 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.¹⁵

According to Manderson, the legal notion of proximity proceeds from the Levinasian prior ethical relation found in proximity, which thus provides the foundation of law (and justice).¹⁶ The ethical notion of proximity, we can also say, is the moving force of law and justice.¹⁷ As we will see below, proximity contains its own inherent limits. In addition, the standard of care in the law of negligence (reasonableness) places limits on one's responsibility for the Other, by taking account of the interests of other Others.

Manderson's approach can, in light of the above, be summarised as follows: he translates Levinas's thinking about the ethical responsibility that is owed to the Other and the entry of the third into the responsibility of one person to another (prior to law) which the law (the third) should recognise (which indeed, according to him, happens through the legal concept of proximity (the duty of care) and reasonableness (the standard of care)). Proximity in law allows for an encounter with the Other (through the openness and responsiveness of this concept) and reasonableness (the standard of care) allows for the balancing of this responsibility with the duty that is owed to other Others. Manderson's model seems to successfully translate what Levinas says regarding the Other and the third into the law of negligence. The Other to whom an infinite responsibility is owed within this scheme is someone who is in a position of vulnerability and 'the third' is the law and legal institutions through which the concerns of other Others are dealt with. The responsibility that an individual owes to the Other is thus viewed as already existing before the law (or language or philosophy) comes into play.¹⁸ Ethics, Manderson says, inspires law from the outside.¹⁹ The judiciary (an 'institution of the third')²⁰ is necessary in order to enable us to fulfil our responsibility to other

¹¹ Manderson (2006), p 15.

¹² Manderson (2006), p 15.

¹³ Manderson (2006), p 15.

¹⁴ Manderson (2006), p 16.

¹⁵ Manderson (2006), p 16.

¹⁶ Manderson (2006), p 19.

¹⁷ Manderson (2006), p 19.

¹⁸ Manderson (2006), p 8.

¹⁹ Manderson (2006), p 183.

²⁰ See Manderson (2006), p 182.

Others; these institutions witness and bear testimony to our asymmetrical responsibility.²¹

The Saying and the Said

From the above, it should be clear that Manderson does not want to draw too rigid a distinction between the saying and the said. Manderson specifically takes issue with Levinas as the latter, according to him, treats the ethical realm 'as entirely incommensurable with the political realm'.²² There is in other words, according to Manderson and contrary to what Levinas (sometimes) asserts, something in the structure of law which reflects the saying. As indicated above, the law of proximity is, according to Manderson, the 'site' in the law of negligence where something remains of the ethical relationship. This is a remarkable insight and there is certainly a correlation here with the thinking of Derrida. Derrida insists on the fact that the tradition is not univocal but heterogeneous in its injunctions, referring here to the unconditional and the conditional.²³ In this paragraph, I want to address two issues specifically. In the first place, I want to ask the question whether Manderson's thinking in this regard corresponds fully with that of Derrida, who Manderson says he is following.²⁴ My answer to this question is in the negative. This is, of course, not fatal to Manderson's argument. The book explicitly deals with Levinas's thinking rather than that of Derrida. Manderson is therefore fully within his rights to choose to follow Levinas in this respect rather than Derrida. The second issue I want to address, which relates directly to the first issue, is to ask whether Manderson's following of Levinas rather than Derrida does not weaken his argument in relation to the 'ethical' in law and lead to inconsistencies. My answer to this question is in the affirmative.

Manderson insists on following Levinas rather than Derrida in positing a prior ethical order and then only translating it into law.²⁵ Manderson recognises that: 'Responsibility emerges with our selfhood, with relationship, with desire'²⁶ and that: 'The demand from the other that puts me on the spot ... constitutes me as a unique subject, a self'.²⁷ He, however, attempts to free law (communal subjectivity) from the same structure. This is in spite of his own acknowledgement that '*I* and *we* are two sides of the same coin, two

²¹ Manderson (2006), p 183.

²² Manderson (2006), pp 9, 12.

²³ See, for example, Derrida (1994), p 16; and Derrida and Roudinesco (2004), pp 3–4.

²⁴ Manderson (2006), p 10 says that he will rely on Derrida's reading of Levinas in this respect, specifically his views on the relation between law and justice, because of the deficiencies in Levinas's thinking in this regard.

²⁵ In the introduction, Manderson (2006) speaks of the 'impact' of ethics on law (p 8), the 'influence' of ethics on legal doctrine (p 10), and the 'inspiration' that ethics can provide for law (pp 13, 17).

²⁶ Manderson (2006), p 63.

²⁷ Manderson (2006), p 65.

expressions of the totalizing essentialism of the self²⁸ as well as his acknowledgment with reference to Derrida's *Violence and Metaphysics* that 'alterity is "already in the same," which is to say that ethics has already contaminated the alleged rigid purity of the law'.²⁹ If 'alterity is "already in the same"',³⁰ why is it still necessary to go to the effort of positing an ethical order outside of language and law?³¹ In doing this, Manderson can place only a 'moral' obligation on law to incorporate this responsibility to the Other by contending that Levinas's thinking should act as an 'inspiration', 'motivation' or 'critique' of or for law.³² The responsibility owed to the Other is therefore not an injunction, not a *must* for law, as it is in Derrida's thinking. The non-obligation or voluntary nature of the translation of 'ethics' into law that is at stake for Manderson is also evident when he says that 'institutions of the third' (such as the judiciary) 'bridge our relationships with others: they do not necessarily abandon the ethical insight of asymmetric responsibility, but witness and testify to it'.³³

According to Derrida, reading Levinas, the third is there right from the start (in the face-to-face relation).³⁴ There is thus no 'prior' ethical relation³⁵ outside of law which inspires law. As is clear from *Force of Law*, unconditional or incalculable justice, the asymmetrical relation to the Other, 'is' already in law, as its condition of possibility. It is in the initial founding *and* subsequent enforcement of law that law's infinite responsibility to the Other (justice) is instituted but at the same time deferred.³⁶ It is, in other words, unnecessary to find something outside of law in order to 'inspire' law. This 'inspiration' is a heterogeneous trace within law which simultaneously, diachronously, overflows law. Manderson knows that the third is there from the start, or at least the same view is found in his text, particularly when he quotes Levinas speaking about the need for justice and the need for the 'incessant correction of the asymmetry of proximity in the face that is looked at'.³⁷ Derrida reads this (or at least similar passages in Levinas) as Levinas acknowledging that the third is there at the origin of the face to face.³⁸

²⁸ Manderson (2006), p 26.

²⁹ Manderson (2006), p 193.

³⁰ Manderson (2006), pp 82 and 193. See also the thoughtful exposition on p 77.

³¹ Manderson (2006), pp 62–66.

³² Manderson (2006), p 183.

³³ Manderson (2006), pp 182–83.

³⁴ Derrida (1999), pp 30–33.

³⁵ See also Manderson (2006), p 49 (also on p 67) where Manderson speaks of 'an ethical relationship and ethics as preceding philosophy and knowledge of the world and ... making them possible'.

³⁶ See Derrida (1992a), pp 23 and 27.

³⁷ Manderson (2006), p 182. See also on p 81 where Manderson accurately sets out the criticism of Derrida (1978), p 79 concerning Levinas's reliance on language.

³⁸ Levinas also acknowledges that 'the law is in the midst of proximity'; see Levinas (1981), p 159.

This brings us to Manderson's phenomenology. Proximity is not a 'concept' according to Manderson, but an experience. The reason why he does not want to refer to it as a concept is because 'ethics' in Levinasian terms (which Manderson equates with proximity) precedes, founds and exceeds language, society and philosophy.³⁹ If proximity were simply a concept, it would no longer be an 'ethics'; it would simply be an economy and of the order of knowledge.⁴⁰ Manderson is aware of Derrida's criticism of Levinas regarding his views on phenomenology and language.⁴¹ He also seems to agree with this criticism. Manderson specifically expresses his agreement with Derrida saying that 'our concepts are already mixed and touched by the other'.⁴² He also refers to Derrida with approval when pointing out that:

Levinas yearned to stand 'outside', once and for all: outside his skin, outside language, outside the self. But Derrida argued that it can't be done — there is no outside.⁴³

Manderson nevertheless chooses to overlook Derrida's criticism in his own exposition of proximity. He refers to the importance of vulnerability and control as not based on imagined attitudes or concepts, but on 'real phenomena'.⁴⁴ Manderson also says with reference to Levinas that 'proximity founds responsibility not on logic but on experience' and that our relationship to others comes 'from a phenomenological connection between persons that arises out of a particular predicament that binds together the vulnerability of one to the response ability that singles out another'.⁴⁵ Manderson, as we can see here, attempts to counter existing approaches to liability⁴⁶ through phenomenology — attempting thereby to ground our knowledge (the law of negligence) in 'experience, evidence and self-presence'.⁴⁷ Stated differently, what Manderson does is to construct a new way of thinking about the law of negligence based on naked experience.⁴⁸ However, as Derrida points out, and as Manderson acknowledges: 'Empiricism is thinking *by* metaphor without thinking the metaphor *as such*.'⁴⁹ Manderson, we can also say (like Levinas), 'employs a metaphysical language haunted by metaphor but refuses to acknowledge the metaphoricity inherent within that language itself'.⁵⁰ What

³⁹ Manderson (2006), p 8.

⁴⁰ Manderson (2006), p 30.

⁴¹ Manderson (2006), pp 30–31, 80–81.

⁴² Manderson (2006), p 69.

⁴³ Manderson (2006), p 81.

⁴⁴ Manderson (2006), p 161.

⁴⁵ Manderson (2006), p 166.

⁴⁶ See the discussion in Chapter 2 of Manderson (2006).

⁴⁷ See Howells (1999), p 7.

⁴⁸ Derrida (1978), pp 82–83.

⁴⁹ Derrida (1978) 139; Manderson (2006), pp 30–31, 80–81.

⁵⁰ See Sedgwick (2001), p 220.

Manderson attempts to do, through Levinas, is to ‘dream the *dream* of a purely *heterological* thought’.⁵¹ He attempts to think the thought of a radical responsibility for the Other and the implications of proximity, both for all of us, every day, and for the law. As Manderson knows, this dream ‘must vanish at daybreak, as soon as language awakens’,⁵² and language is there from the start. We cannot find the origins of our responsibility to the Other outside of language, in experience. Manderson, despite his intentions, nevertheless succeeds in showing us how it can be found in language.

Manderson can be said to be calling for a new way of judging that entails a radical rethink of the notion of proximity in the law of negligence. This approach calls for proximity (where vulnerability and control will be key elements)⁵³ to be crucial in determining the existence of a duty of care. In the process of elaborating on this approach through phenomenology, Manderson is, despite himself, overtaken by conceptuality.⁵⁴ What Manderson effectively does regarding proximity — a concept that can be used in law, politics, and ethics — is to show that it exceeds its own conceptuality; what proximity ‘signifies’ cannot be contained within its concept. Manderson, in other words, shows us that there is something within the legal system which exceeds itself. In the words of Naas, the very energy of Manderson’s text ‘is the result of the way it inscribes traditional terms so as to break with them, or break *within* them, and thereby release what is unthought and unthematizable within the system or the text’.⁵⁵ To state it in yet other terms: there is something about proximity which no longer belongs to it. When a court thus uses the concept or language of proximity⁵⁶ to determine liability, this excess — as Manderson shows so brilliantly — lies hidden within the concept, thus making of proximity not a unitary concept as Manderson asserts, but a paradoxical one. Manderson effectively gives a different ‘meaning’⁵⁷ to proximity by drawing our attention to the trace that the ethical has left in law. He transforms the meaning of the word ‘proximity’, investing it with a new, more hospitable meaning.⁵⁸ What we had always thought of as the unitary concept of proximity contains an Other within itself that is no longer its Other.⁵⁹ It should be clear from the above that there is in fact no need for Manderson to posit a prior ethical relation in order to inspire law from the outside. What he is effectively doing is to analyse and at least partly deconstruct the concept of proximity *in* law. As we will see later, by not being sufficiently attentive to his own involvement in conceptuality, Manderson gives proximity a ‘meaning’ which

⁵¹ Derrida (1978), p 151.

⁵² Derrida (1978), 151.

⁵³ Manderson (2006), pp 127, 135–41.

⁵⁴ See Naas (2003), p 99 on Levinas.

⁵⁵ Naas (2003), p 100 on Levinas.

⁵⁶ Manderson (2006), p 172.

⁵⁷ Manderson’s concept of proximity, however, suffers from being still too ‘meaningful’.

⁵⁸ See also Naas (2003), p 101 on Levinas.

⁵⁹ See Derrida (2002a), pp 362, 364 on the concept of hospitality.

is ultimately still conceptual and which does not succeed in escaping from its own conceptuality. Proximity can only succeed in escaping its own conceptuality if it becomes meaningless, if it involves a general economy, if there is no return to the self.

Law, Politics and Ethics

It is interesting to note at this point that Manderson wants to draw a distinction between law and politics.⁶⁰ He therefore also takes issue with Levinas because of the view Levinas takes 'of law as a mere arm of politics'.⁶¹ Manderson, following Dworkin,⁶² believes that law 'serves as a separate modality of thinking about social relations, and is not merely politics by another means'.⁶³ Manderson also finds fault with Levinas's seemingly formalistic view of law 'as an entirely positivistic, codified, and rule-bound structure'.⁶⁴ Manderson rather wants to emphasise the 'fluidity and ambiguity that [particularly] marks the common law discourse on the "duty of care"'.⁶⁵ The reason for Manderson's insistence upon the distinction between law and politics appears to be that he believes that law should not simply be about politics, which he equates with power.⁶⁶ Law should be something else, something 'better' than politics. Manderson, as we saw above, wants law to be ethically inspired.⁶⁷ His views appear clearly from the following passage:

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, norms applicable to whole communities and capable of being largely settled in advance. Indeed, ethics constantly destabilizes and ruptures those rules and that settlement. Furthermore, ethics implies an unavoidable responsibility to another which Levinas exhorts as 'first philosophy': by this he means to indicate that without some such initial hospitality or openness to the inarticulate cry of another human being,

⁶⁰ Manderson (2006), pp 9, 186.

⁶¹ Manderson (2006), p 9.

⁶² In other passages, Manderson is more critical of Dworkin; see Manderson (2006), pp 23–24, 202.

⁶³ Manderson (2006), p 9.

⁶⁴ Manderson (2006), p 9.

⁶⁵ Manderson (2006), p 10.

⁶⁶ Manderson (2006), p 18. Manderson on p 185 also refers to politics as 'the judgment of effects in terms of comparative statistics generalized across masses in pursuit of collective goals such as efficiency or progress'. On p 67 he says that 'Politics is the realm of totality par excellence. It weighs and calculates — literally, totalizes — different interests on the scale of social utility, or preference, or, from time to time, just votes.'

⁶⁷ See also Manderson (2006), p 182.

neither language nor society nor philosophy could ever have got going.⁶⁸

I am sympathetic to Manderson's views with regard to a relation between 'ethics' and law. Law should not simply be about power/politics, but should indeed be more closely related to a certain Levinasian 'ethics'. I will not attempt to provide an answer here to the question of whether it is possible — or indeed wise — to draw a distinction between law and politics. In any event, I believe that when one attempts to translate the thinking of Levinas and Derrida into law, it is unnecessary to dwell too long on the possibility or wisdom of such a distinction. This is because, whether or not we distinguish between law and politics, both of these (as well as ethics) fall, in Derrida's terminology, within the sphere of a restricted economy,⁶⁹ to be distinguished from a general economy, with no return to the self. In Derrida's thinking (reading Levinas), the relation between law, ethics and politics (as restricted economies)⁷⁰ and unconditional hospitality and justice ('ethics' in the Levinasian sense) stand central. The latter will be discussed in more detail below. It nevertheless needs to be noted here that absolute or unconditional hospitality as well as justice are referred to by Derrida as a 'hyperpolitics' or a 'hyperethics',⁷¹ and that they are not without (radical) consequences for law, ethics and politics.

As we saw above, Manderson's following of Levinas rather than Derrida concerning the relation of 'ethics' to law leads him into a number of difficulties. The same may be said to be true regarding the distinction he draws between ethics, law and politics. It was noted above that Manderson views ethics as the foundation for law and politics. Because he mainly focuses on 'ethics' and 'law', however, he risks becoming complacent about the demands of a Levinasian 'ethics' on certain aspects of law which are overtly 'political' and where law's restricted economy and limited conception of equality is most evident.⁷² Manderson, despite his awareness of the feminist critique of Levinas,⁷³ appears somewhat too comfortable in speaking about fraternity,⁷⁴ the requirement of neighbourhood,⁷⁵ the neighbour principle,⁷⁶ and the neighbour as 'him'.⁷⁷ It could also be argued that the concept of 'the

⁶⁸ Manderson (2006), p 8.

⁶⁹ Manderson (2006), as is clear from pp 28, 30, 70, and 202 knows this.

⁷⁰ Derrida often speaks of the political, the juridical and the ethical in one breath; see for example, Derrida (2005), p 172 note 12.

⁷¹ See Derrida (2005), p 152.

⁷² Abel (1990) clearly shows the political nature of all of tort law and the inequalities it presently perpetrates. See also Hutchinson (1985).

See Manderson (2006), pp 56–57.

⁷⁴ Manderson (2006), p 200; see also Levinas (1981), pp 82–83, 87.

⁷⁵ Manderson (2006), p 184.

⁷⁶ Manderson (2006), p 5.

⁷⁷ Manderson (2006), p 25; see also Levinas (1981), pp 82–83, 87.

reasonable man' is not used with sufficient circumspection by Manderson.⁷⁸ Should Manderson rather have followed Derrida, with his awareness of the carno-phallogocentric nature⁷⁹ of the tradition (also evident in Levinas),⁸⁰ he would perhaps have shown a greater sensitivity to the historical plight of women within the tradition of negligence law.⁸¹ 'Animals', the environment and non-citizens are similarly pushed to or even beyond the margins by Manderson in his discussion of the law of negligence. Equality clearly has an almost insignificant role to play in Manderson's conception of ethics. In *Rogues*, Derrida speaks of absolute or incalculable equality in the same breath as absolute hospitality and unconditional justice.⁸² By also subscribing to Derrida's interpretation of Levinas, the 'ethics' that Manderson espouses may nevertheless be more influenced by '(hyper)politics' than he realises.

Responsibility

When talking about responsibility in ethical terms, something quite radical is at stake for Manderson.⁸³ Responsibility is said to emerge 'with our selfhood, with relationship, with desire'⁸⁴ and the demand from the Other is said to constitute me 'as a unique subject, a self'.⁸⁵ Responsibility is not reciprocal;⁸⁶ it is incalculable (in 'some sense', Manderson says);⁸⁷ it is 'never abstract, never conceived and predictable in advance';⁸⁸ and 'it is always a specific and contextual experience'.⁸⁹ Translated into law, responsibility (specifically insofar as proximity is concerned) is determined with reference to vulnerability and control, with closeness playing an important role.⁹⁰ Insofar as the standard of care is concerned, responsibility becomes limited by our responsibility to other Others.⁹¹ What concerns us here is the responsibility of a judge in

⁷⁸ See Manderson (2006), p 187. On p 114 Manderson uses 'sic' after referring to the 'reasonable man'.

⁷⁹ See Derrida (1992a), p 19.

⁸⁰ See Derrida (1991), p 405; and Derrida (2002a), p 363 for criticism of Levinas regarding his stance in relation to women.

⁸¹ For discussion see, for example, Wriggins (2005); Chamallas (1998); Bender (1993).

⁸² Derrida (2005), pp 48–49, 52.

⁸³ Manderson (2006), pp 5, 62–66.

⁸⁴ Manderson (2006), p 63

⁸⁵ Manderson (2006), p 65.

⁸⁶ Manderson (2006), pp 63, 64.

⁸⁷ Manderson (2006), pp 63, 190.

⁸⁸ Manderson (2006), p 65.

⁸⁹ Manderson (2006), p 65.

⁹⁰ See further below.

⁹¹ See Manderson (2006), p 188. On pp 111, 115 and 186, Manderson states that the concept of foreseeability is irrelevant to our understanding of responsibility. This is because of the distinction that he wants to draw between proximity and foreseeability. A similar distinction between wrongfulness and fault is, of course,

evaluating a claim in negligence. The responsibility that the self in Manderson's model has in relation to a vulnerable Other (proximity) obviously makes judging in the law of negligence more difficult. As we will see in more detail below, for Manderson, determining proximity does not take place in accordance with rules. Manderson describes the responsibility that this entails in the following terms:

The law of proximity set up a sympathetic resonance between the true meaning of our responsibility for others (unresolved, retrospective, nascent) and the structure through which that meaning ought to be explored (ditto). Neither should this parallel surprise us. Responsibility is always a kind of judgment in which we are confronted by difficult choices but with no choice but to make them; in the face of the other, we are indeed the chosen ones. Judges too are confronted by choices but with no choice but to make them; in the face of the parties, they too are the chosen ones.⁹²

Proximity in law, Manderson says, makes law recognise 'its own response ability'.⁹³ The way in which Manderson understands legal responsibility (the responsibility of a judge) ties in with his reading of Derrida on justice. Justice, according to Manderson, and referring in the footnotes to *Force of Law* (as well as to Sklar and Roberts) is:

internally riven between the operation of two mutually incommensurable impulses: equal treatment and singular respect. Justice embodies both an aspiration towards "law or right, legitimacy or legality, stabilizable and statutory, calculable, a system of regulated and coded prescriptions" and at the same time the desire for a unique and singular response to a particular situation and person before us. Justice is both general and unique; it involves treating everybody the same *and* treating everybody differently.⁹⁴

It is not completely accurate to state that Derrida says justice requires that everybody be treated the same and that everybody be treated differently.⁹⁵

also a feature of other jurisdictions; see for example on South African law, Van der Walt and Midgley (2005); Neethling et al (2006), but to seek to exempt foreseeability from the notion of responsibility is problematic. As will be noted in note 151, the concept of reasonableness which is an important part of the foreseeability analysis can be said to have a paradoxical structure similar to that of proximity.

⁹² Manderson (2006), p 199.

⁹³ Manderson (2006), p 199.

⁹⁴ Manderson (2006), p 194 (footnotes omitted).

⁹⁵ This reading of Manderson (2006), p 181 seems to be partly based on a misunderstanding of what Derrida (1995), pp 68 and 70 says about the Other and other Others. As Derrida has himself explained, the absolute demand of the Other (and the demands of other others) do not leave us with relativism. Instead it leaves us with an infinite responsibility to all others: not only to people, but also to

Roberts may say this. Derrida says something much more radical when he talks about the importance of singularity for justice.⁹⁶ There is a direct correlation between Levinas's ethics and this infinite 'idea' of justice, as appears from the following passage from Derrida's 'Force of Law':

infinite because it is irreducible, irreducible because owed to the other, owed to the other before any contract, because it has come, the other's coming as the singularity that is always other. This 'idea of justice' seems to be irreducible in its affirmative character, in its demand of gift without exchange, without circulation, without recognition or gratitude, without economic circularity, without calculation and without rules, without reason and without rationality.⁹⁷

Manderson also states that every case requires a judge to decide on 'the applicability of prior general norms to the necessarily different and singular situation' before him or her.⁹⁸ In this respect, Manderson says, judges have to realise that they have a choice, a choice with which the past cannot help. They have to respect the law in its generality and 'the individual in his utter specificity'.⁹⁹ Derrida is invoked as authority¹⁰⁰ for this construction of responsibility as an existential one. Manderson describes this responsibility as follows:

the moment of judgment — the answer to the question of whether and how to follow 'the rules,' which must be singular and newly minted — is a crucial moment in which the judge is singled out and rendered irreplaceable, incapable of substitution by some mere procedure. The burden is his and his alone, an inescapable responsibility.¹⁰¹

The priority given to the calculating subject in legal decision-making is clear from the above passage. In this respect, Manderson comes very close to the views of many in the Critical Legal Studies (CLS) movement,¹⁰² although, as we saw, Manderson would prefer not to see this choice as a political one as those in CLS mostly view it.¹⁰³ In the above passage we also see clearly the consequences of the kind of distinction that Manderson draws between a Levinasian ethics and law. This distinction results in law not having to deal

'animals' and not only to those (people and animals) that are close to us, but also those that are far away; see Derrida et al (2001), pp 68–69.

⁹⁶ See Derrida (1992a), p 20.

⁹⁷ Derrida (1992a), p 25.

⁹⁸ Manderson (2006), p 194. See further below where the paradoxes that Manderson sees in both justice and law are placed under scrutiny.

⁹⁹ Manderson (2006), p 194.

¹⁰⁰ Manderson (2006), pp 194–95.

¹⁰¹ Manderson (2006), p 195.

¹⁰² For critical discussion, see Van der Walt (1995), pp 329–54.

¹⁰³ For a discussion of CLS, see Manderson (2006), pp 17–18.

with the incalculability of unconditional justice; it results in law not being obliged to acknowledge unconditional justice as part of its paradoxical structure. Justice, as we see in the above passage from 'Force of Law', requires that we do not calculate.¹⁰⁴ This does not simply translate into a duty to be open and responsive, but to give oneself over to the impossible decision (that is, absolute hospitality, unconditional justice), 'while taking account of law and rules'.¹⁰⁵

Proximity

Manderson's thinking about proximity clearly shows us the transformative potential that this concept holds for the law of negligence. Manderson describes ethical proximity with reference to Levinas as follows:

For Levinas, this word [ie proximity] 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".¹⁰⁶ Our difference and distance from others gives rise to our responsibility for them. Levinas means by proximity something fundamental to who we are and why we have a responsibility to others; something which furthermore cannot be reduced to logic or knowledge or rules. Proximity is an experience, emotional and bodily, and not an idea. Incarnate in us, its implications 'exceed the limits of ontology, of the human essence, and of the world'.¹⁰⁷

A number of issues will have to be addressed here relating to Manderson's phenomenological approach¹⁰⁸ to proximity. The first issue is the accuracy of Manderson's reading of Levinas's (non-)concept of proximity and its subsequent translation into law. We also have to look here at the way in which Manderson reads Derrida on the relation between law and justice, as this fundamentally affects his translation of the notion of proximity into law. After having examined these issues, I will attempt to set out a different structure for the (non-)concept of proximity based on my reading of Derrida.

Manderson points out that Levinas's approach to proximity is marked by the fact that it is not conceptual and that it relates to the relation with the

¹⁰⁴ Manderson (2006), p 196 almost acknowledges this, but does not take it any further: 'If Levinas "includes in justice [and law] almost everything he rejected in his description of asymmetrical responsibility," thus creating an impassable barrier between the two, Derrida does not.'

¹⁰⁵ Derrida (1992a), p 24. See also Derrida (1992b), pp 71–72; Derrida and Dufourmantelle (2000), pp 77, 79.

¹⁰⁶ This is a quotation from Levinas (1981), pp 100–01.

¹⁰⁷ Manderson (2006), p 14 (footnotes omitted).

¹⁰⁸ See also the discussion above on Manderson's phenomenological approach.

neighbour.¹⁰⁹ In addition to the rather irenic or at least non-violent terms in which Manderson refers to proximity in the passage quoted above, he also points out that proximity in Levinasian terms calls me in question, it singles me out as responsible to others, it turns me into a hostage, and it persecutes me.¹¹⁰ Manderson shows some discomfort with these descriptions and he is quick to point out that proximity has inherent boundaries –¹¹¹ it arises from *vulnerability* and our own *closeness* to this vulnerability.¹¹² This understanding of proximity in Levinas makes its translation into law relatively easy. The notion of asymmetry, which is central to Manderson's description of responsibility and which seemed at first to be quite far-reaching in what it requires from us,¹¹³ is now understood as simply the relation of proximity or closeness between one person who has a distinct capacity to control or to respond and another who is vulnerable.¹¹⁴ In this sense, one can also say that the person in control or with the capacity to respond becomes 'hostage' to the one who is vulnerable.¹¹⁵ In the case of omissions in the law of negligence, the one 'in control' is obliged to assist the one who is vulnerable, and if he or she does not, they will be held liable.

Manderson may, of course, be right in his interpretation and translation of Levinas as limiting our responsibility to those that are close to us. This is something that Derrida also finds problematic in Levinas.¹¹⁶ It however needs to be pointed out that the passage from Levinas which Manderson relies on in support of this contention does not seem to justify this reading. Manderson¹¹⁷ relies on the first part of the dedication of Levinas in *Otherwise than Being*, the whole dedication of which reads as follows:

To the memory of those who were closest among the six million
assassinated by the Nationalist Socialists, and of the millions on

¹⁰⁹ Manderson (2006), p 101.

¹¹⁰ Manderson (2006), p 102. Levinas (1981) also speaks about proximity in terms of an obsession (p 87), a shuddering (p 87), and as a disturbance of the rememberable time (p 89).

¹¹¹ Manderson (2006), despite his use of the words boundary (p 103) and limit (p 156) in relation to proximity, makes a great effort to show that proximity does not limit responsibility (p 103), but that it creates the relationship of responsibility (pp 105, 141). When the criticism of Manderson's phenomenological approach as set out above is, however, accepted, this distinction can no longer stand. Proximity, as Manderson defines it, clearly does place a limit on responsibility.

¹¹² Manderson (2006), p 102–03.

¹¹³ See Manderson (2006), pp 49, 51–72, 183.

¹¹⁴ Manderson (2006), pp 93, 141, 158.

¹¹⁵ See Manderson (2006), p 124 (also p 135): 'We are proximate to those who are distinctly vulnerable to us, regardless of what we know. And those who are hostages to our fortune return the favour, making us hostage to our responsibility for them in return. *We* do not choose to be responsible; on the contrary, their vulnerability identifies us.'

¹¹⁶ Derrida (2002a), p 363.

¹¹⁷ Manderson (2006), p 102.

millions of all confessions and all nations, victims of the same hatred of the other man, the same anti-Semitism.

The dedication seems to say exactly the opposite of what Manderson asserts.¹¹⁸ If the criticism expressed above regarding the carno-phallogocentric nature of Manderson's discourse as well as of his phenomenological approach is accepted, it appears that Manderson's notion of proximity is ultimately a restricted ethical, legal and political concept. It may not be reducible to a code¹¹⁹ or to rules,¹²⁰ but it remains something calculable. It entails an economy which returns to the self. It requires only the possible from the defendant and, where its interests are at stake, the community.¹²¹ The impossible is not required.¹²² It tells us that the law that we have is essentially just, although it may require minor alterations here and there. In other words, it serves to legitimise the current legal system. It specifically serves to justify the limitations that the law places or would place on liability in terms of Manderson's model. This appears to be at odds with the disruptive practice of deconstruction which Manderson subscribes to, as well as with at least the spirit of Levinas's project. Does Manderson's approach not in the end share with those approaches that he criticises (ie corrective and distributive justice) the feature that they ensure a good conscience?¹²³ Manderson does anticipate this criticism when he says that he makes no apologies if his approach to Levinas 'has become contaminated by the pragmatics of law. That is the point of ethics: it is necessarily governed by ingratitude and betrayal if it is to be spoken at all.' Is this attempt to escape from responsibility for the Other not somewhat too glib and easy? Is betrayal already necessary when we theorise about (negligence) law?

¹¹⁸ The argument in the following passage in Manderson (2006), p 172 is also not convincing to me: 'If Levinas appears to suggest sometimes that we are all neighbours, all indistinguishably "close to me," yet he also insists here on our obligation to "those closest to us." The very idea of closeness and of neighbourhood, implies something relative. When he claims that "you personally are implicated each time that somewhere humanity is guilty," he adds, crucially but parenthetically, "especially when it's somewhere close to you." This subservient clause is key. The word "especially" ought not be treated as an afterthought that highlights the proximity of the moment; on the contrary, it expresses the condition that summons it into existence.'

¹¹⁹ See Manderson (2006), p 102.

¹²⁰ See Manderson (2006), p 112.

¹²¹ See, for example, Manderson (2006), p 96: 'In the first place, the duty of care arises from one's response ability. Though the duty may fall to any one of us, its extent will depend on our capacity. Responsibility encumbers me commensurate only with my ability and my resources.'

¹²² See Derrida (2002b), p 343 on the impossible.

¹²³ This in spite of passages that assert the contrary: see, for example, Manderson (2006), p 200 where he says that justice is always out of reach, never just enough. Proximity, he says (p 200), 'is the immanent possibility of an ongoing rebellion against complacency'.

On my reading, proximity in Levinas¹²⁴ plays a similar role as ‘the welcome’ in *Totality and Infinity*¹²⁵ which Derrida analyses in *Adieu*.¹²⁶ Proximity and the welcome consist in a responsibility for the Other, as Manderson correctly points out. This responsibility is, however, not a modest one (as the terms ‘hostage’ and ‘persecution’ clearly point out), but one where the subject is put in question in a profound manner. Proximity and the welcome entail an incalculable responsibility which makes a hostage of the host.¹²⁷ For Derrida, the welcome that Levinas speaks of is irreducibly violent.¹²⁸ Insofar as law (a restricted economy) is concerned, Derrida and Manderson clearly have different conceptions of it. Whereas Derrida focuses our minds on the violent institution and illegitimacy of all legal-political systems,¹²⁹ Manderson, as we saw, attempts to legitimise a projected future legal system (in relation to tort law). The violence that Derrida speaks of in this regard is repeated in every law-conserving act of judicial enforcement. Derrida does, of course, not make this point in order to make us sceptical about law. In every such act, as Naas points out:

the master’s authority is not simply interrupted or immobilized but is shown to be self-justifying, which is to say, ultimately unjustified, the result of a ‘mystical authority’ wherein the master — like real life — is always absent.¹³⁰

In every law-conserving act, we have a chance of considering again the unjust nature of our institutions. Manderson knows this and he calls for such an approach. There is, however, more to this point than immediately meets the eye. Every law-conserving act also gives a chance for and poses the threat of unconditional justice, of absolute hospitality. Although it would not be wrong to say that this implies that law should be ‘responsive’, it clearly entails more than this. Manderson comes close to describing the ‘monstrous’¹³¹ nature of absolute hospitality¹³² and unconditional justice when he describes with

¹²⁴ See Levinas (1981), pp 61–97.

¹²⁵ Levinas (1969).

¹²⁶ Derrida (1999).

¹²⁷ Manderson (2006), p 59 acknowledges this (also on pp 60 and 80): ‘The host may at any moment become the hostage. In the vulnerability of this interaction we may find ourselves harmed or exploited. But Levinas’ point is that the danger is necessary and inevitable. On the one hand “the self is through and through a hostage, older than the ego, prior to principles.”’

¹²⁸ See Derrida (1999), p 59. See also Bennington (2000), p 28.

¹²⁹ Derrida (1992a), pp 6, 13.

¹³⁰ Naas (2003), p 14.

¹³¹ See Derrida (2005), p 144.

¹³² See, for example, Derrida (2002a), p 361: ‘to be hospitable is to let oneself be overtaken, to not even *let* oneself be overtaken, to be surprised, in a fashion almost violent, violated and raped [*violée*], stolen [*volée*] ... precisely where one is not ready to receive — and not only *not yet ready* but *not ready, unprepared* in a mode that is not even that of the “not yet”’.

reference to Levinas the risk that we run ‘in being touched by the other ... The host may at any moment become the hostage.’¹³³ This gives expression to the ‘sense’ of the opening we are faced with in the event of law-conserving violence. Manderson nevertheless does not develop this thought to its limit in his analysis.¹³⁴ This opening, to stress the point, is not a neutral opening; it is an opening towards absolute hospitality. Derrida has stated this clearly in his reading of Levinas:

‘Openness can be understood in several senses’ ... The ‘third meaning’ is ... important for Levinas; it concerns the ‘denuding of the skin exposed,’ the ‘vulnerability of a skin exposed, in wounds and outrage, beyond all that can show itself,’ ‘sensibility’ ‘offered to the caress,’ but also ‘open like a city declared open upon the approach of the enemy.’ Unconditional hospitality would be this vulnerability — at once passive, exposed, *and* assumed.¹³⁵

Manderson is right to point us to the importance of proximity in the law of negligence. On my reading, his (non-)concept nevertheless aims at shielding itself off from its own unconditionality. As we saw above, Manderson understands the legal concept of proximity in very similar terms to Levinas’s ethical proximity.¹³⁶ This is, of course, only possible because of the rather modest meaning that he attributes to Levinas’s concept of proximity. Reading the ‘hyperethical’ or ‘hyperpolitical’ concept of proximity through the texts of Derrida, I would like to lay greater stress on its paradoxical structure as well as the excess which ‘inhabits’ that structure. Manderson does point to a paradoxical structure (in fact, three), but his structures are different from the ones I detect in the law of negligence. As we saw above, Manderson distinguishes between ethics on the one hand and law and justice on the other.¹³⁷ He consequently, following Derrida, points out that ‘there is a tension between law, in the traditional sense of a stable body of rules, and justice’.¹³⁸ Manderson, however, also detects a tension *within* justice and a tension *within* law. Justice, according to Manderson, requires both equal treatment on the one hand and singular respect or ‘treating everybody differently’ on the other.¹³⁹ Law, says Manderson, is riven by a similar tension: on the one hand it requires

¹³³ Manderson (2006), p 59.

¹³⁴ Manderson (2006), p 60 (see also above) prefers not to understand this literally. Compare in this respect Van der Walt (1998), pp 92–93.

¹³⁵ See Derrida (1999), pp 53–54 read with p 141 fn 51.

¹³⁶ See further Manderson (2006), pp 98–145.

¹³⁷ See Manderson (2006), p 19: ‘But justice and law surely *proceed* from the ethical relation found in proximity.’ On p 19 Manderson also states that ethical responsibility ‘establishes both a sense of self and a sense of relationship, and they in turn create the very possibility of agreement, and law, and justice.’

¹³⁸ Manderson (2006), p 194.

¹³⁹ Manderson (2006), p 194.

the application of prior general rules, and on the other, a unique response to a different and singular situation.¹⁴⁰

On Manderson's reading, and as stated before, the legal concept of proximity is the 'site' in law where Levinas's ethics finds its 'home':¹⁴¹

From Deane J onwards, the word 'proximity' and all the discussions that have swirled about it, have suggested precisely the operations of a judgment that cannot be entirely settled in advance and that remain sensitive to the particular and the experiential — the place of the ethical *in law*, 'the other *in the same*'.¹⁴²

The concept of proximity thus facilitates law's openness or responsiveness to the Other. We have to quote Manderson here at length:

In the law of torts, proximity is the structural site in which a receptiveness to the experience of others had been purposely kept open, an institutionalised and unstable force for change. It is the part of the 'third,' or social, realm that witnesses our rendezvous with the other, providing a space for a 'never-ending oscillation' between ethics and politics. It is the moment in our judicial reasoning wherein the 'saying' of responsibility may still surprise the 'said' of law. Proximity identifies the possibility of a non-appropriative relationship with the neighbour, or *le prochain*, and at the same time it articulates the conditions under which we find ourselves with a responsibility to respect it ... After all, the application of rules or methods is just what our response ability cannot hide behind, and just the kind of a priori reasoning that circumstance always exceeds.¹⁴³

Apart from the moderate tones within which proximity is cast in the above passage, there is nothing here that I cannot subscribe to. I nevertheless want us to rethink the legal concept of proximity by looking at what Derrida says regarding the relation between law and justice. Manderson's is an interesting interpretation of this relation in Derrida's 'Force of Law'. It is not, however, one that, on my reading, is supported by Derrida's text. The paradoxes that we find in Derrida's texts where normative concepts are analysed or deconstructed¹⁴⁴ are always between the unconditional and the conditional: the pure gift and gifts which expect a return,¹⁴⁵ absolute hospitality and conditional versions thereof;¹⁴⁶ unconditional justice and law.¹⁴⁷ It is correct to say, as Manderson does, that for Derrida, 'alterity "is

¹⁴⁰ Manderson (2006), p 194.

¹⁴¹ The word 'home' is my term, not Manderson's.

¹⁴² Manderson (2006), p 196.

¹⁴³ Manderson (2006), p 197.

¹⁴⁴ See in this regard Derrida (2002a), p 362.

¹⁴⁵ See Derrida (1992c).

¹⁴⁶ Derrida and Dufourmantelle (2000); Derrida (2002a).

¹⁴⁷ Derrida (1992a).

already *in the same*”¹⁴⁸. Derrida’s texts do not however speak of two separate spheres in tension with each other (for example law and justice) each with its own paradoxes. ‘Alterity within the same’ means that the trace of justice — the unconditional — ‘is’ the condition of possibility of law. That is that, and Manderson admirably points us to proximity in this regard.¹⁴⁹ It cannot however be said that for Derrida there is a separate sphere of justice which is riven by the same paradox.¹⁵⁰

A judge faced with a case of negligence would on my reading of Derrida be confronted with the following aporia: on the one hand, proximity as absolute hospitality (a hospitality beyond responsiveness); on the other, proximity as hospitality in a limited sense (perhaps in the sense of responsiveness).¹⁵¹ A judge would have to negotiate this aporia.¹⁵² As we saw above, the failure of Manderson to acknowledge this paradoxical structure has the consequence that his concept of proximity does not allow for the interruption of its own restricted economy. It consequently also poses no challenge to the capitalist system of Western economies, which is literally structured by the law of torts.¹⁵³ In other jurisdictions, tort law is referred to as the ‘law of delict’. Delict: ‘from Latin *delictum*: a fault, crime, from *delinquere* to fail, do wrong’.¹⁵⁴ Tort: ‘from old French, from Medieval Latin *tortum*, literally: something twisted’.¹⁵⁵ Do tort *law* and delict *law* not then speak of a promise to address *wrongs*?¹⁵⁶ Could we perhaps hear in them an echo of the saying, making us tremble¹⁵⁷ as they call on us to address the crimes, failures, wrong-doings, twisted consequences of the economic system of neo-liberalism from which many of us benefit¹⁵⁸ (apart from addressing the many other

¹⁴⁸ Manderson (2006), p 193.

¹⁴⁹ See also Derrida (1973), pp 142–43 on the trace. As I will contend in note 151, proximity is not the only trace of the unconditional in law.

¹⁵⁰ This confusion might be caused by the fact that Derrida (1992a) sometimes speaks of ‘law’ and sometimes of ‘justice as law’.

¹⁵¹ I do not have space here for a comprehensive analysis of the notions of public policy and reasonableness as employed by Manderson (2006), pp 86–90, 104–18, and 184–91. It would have to suffice here to state that these notions could, on a Derridean reading, be said to have a paradoxical structure similar to that of proximity; see in this respect Derrida (2005).

¹⁵² This is what ‘undecidability’ means in Derrida’s terminology, and not simply the difficulty or openness of judgment, as Manderson (2006), p 113 appears to believe; see Derrida (1992a), pp 24–26.

¹⁵³ See Derrida (1995), pp 85–86.

¹⁵⁴ *Collins English Dictionary*.

¹⁵⁵ *Collins English Dictionary*.

¹⁵⁶ See Derrida (1996), pp 77 at 82–83 on the promise as belonging to the structure of language.

¹⁵⁷ See Derrida (1995), p 53.

¹⁵⁸ See also Derrida (1994), pp 81–85.

'crimes', failures and wrong-doings in the world)?¹⁵⁹ Through Manderson's model, the Other would still be viewed from within a (safe) horizon which is primarily concerned with protecting the self from the Other. Through Manderson's model, absolute hospitality would stand no chance. If we follow Manderson, proximity would not allow for the interruption of the subjectivity of community.

Conclusion

To conclude, *Proximity, Levinas, and the Soul of Law* is a wonderful, soulful book, a book that everyone who has a concern for justice should read. It is Manderson's genius to construct a new and much more empathetic law of negligence through reliance on the Levinasian concept of proximity. Practically, his proposal would entail a much wider ranging duty of care where we would be liable in more instances for our omissions than is the position in many jurisdictions at present. In this article, I nevertheless raised a number of questions regarding the limits of Manderson's model through his reliance on a number of Levinasian concepts. It was argued here that any attempt to 'translate' Levinas into law has to take account of the Derridean deconstruction of Levinas's texts. Manderson unfortunately does not always do this. This leads him to posit an ethics outside of law and justice, outside of the law of negligence, outside of the law of torts, and outside of the law in general. Unlike the self, who Manderson burdens with a responsibility for the Other, the law is constructed in a way so that it is permitted to exist only for itself — that is, for the community, and especially those who benefit from the dispensation in place. In a case that comes to court the Other would, in terms of Manderson's model, still be appropriated (by the community) 'as a mere factor in a calculus of overall utility'.¹⁶⁰ It was pointed out that the law does not escape from the movement of *différance*. The trace of the Other is also to

¹⁵⁹ Many would, of course, disagree with imposing this function on tort law — see, for example, Du Bois (2000), pp 23–24. These wrongs can only be addressed through large-scale intervention. One way of addressing at least some of these would be national and international no-fault insurance schemes for certain types of injury. Such schemes could be an important means of furthering equality, thereby seeking to come as close as possible to the incalculable equality that Derrida (2005), p 49 speaks of. To ensure fairness, the size of contributions would have to be determined with reference to *inter alia* the risk created, something which would in certain instances have to be determined and paid retroactively. There would, of course, be many practical difficulties in administering such schemes, and it is always possible for such schemes to be appropriated by dominant interests, thereby maintaining the status quo. For a scheme to achieve justice in the sense described above, it would furthermore have to be able to address all wrongs (unconditional equality). Even with such schemes, the courts could still have an important function in addressing wrongs (both nationally and internationally), for example with regard to injuries not covered by such schemes and by granting punitive or exemplary damages in certain cases. For Manderson's (critical) views on no-fault schemes, see Manderson (2006), p 201.

¹⁶⁰ See Manderson (2006), p 33.

be found inside of law in the 'form' of unconditional justice or absolute hospitality. The question was raised whether judges evaluating a claim in negligence can, under Manderson's model, really be said to be hospitable when the Other is limited to the brother. The only way in which the Other can be approached as Other, welcomed as Other, is if the paradoxical and overflowing structure of legal concepts is exposed and if these paradoxes are taken seriously. It was pointed out that the notion of proximity (and possibly also some of the other key concepts of the law of negligence such as public policy, and reasonableness) has a paradoxical structure (the conditional *and* the unconditional, the calculable *and* the incalculable). This structure entails an openness towards the abyss, an abyss which any judgment relating to a claim in negligence faces: a complete selflessness, absolute hospitality, incalculable reason. Only by negotiating between these antinomies in a matter that comes to court, can communal subjectivity be interrupted; only in this way can there be a chance for absolute hospitality.

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