THE CASE FOR CLIFF-TOP DUTIES

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Introduction

The common law has long rejected the notion of a general duty to rescue. As Lord Keith famously explained, should a man see another about to walk off a cliff-top there would be no legal duty to shout a warning or intervene.[1] This rejection reflects not only the law's commitment to maintaining the distinction between moral and legal duties, but also its strict adherence to the principled construction of positive obligations. The two greatest obstacles to such a duty are therefore the general rule relating to nonfeasance and the issue of causation. While the courts remain strong advocates of the general rule against finding positive duties, the growing number of exceptions suggest a gradual erosion of its austerity. These obstacles and the rationale behind them are discussed in the first section of this dissertation. Moving on from these issues, the second section sets out the argument for a limited duty to rescue based upon an assumption of responsibility coupled with general reliance or dependence, as proposed by James Edelman and Nathalie Gray. The authors focus on the special role that certain professionals hold within society and the expectations that society consequently places upon then in relation to effecting rescue. I argue that while this framework is compelling, it is also open to critique, most crucially in relation to their evaluation of the doctrine of general reliance. In light of the implications of a duty that necessarily arises between strangers, it is imperative that the doctrine be correctly applied. The final part of this dissertation therefore endeavours to present a logical justification for how the doctrine might be applied within the framework of the proposed duty so as to sufficiently justify an exception to the general rule against positive obligations.

[1] *Yuen Kun Yeu v Attorney General of Hong Kong* [1988] A.C. 175; [1987] 2 All E.R. 705, at 192.

I.

A. The Current Approach and the Distinction between Moral and Legal Duties

There is currently no general common law duty to aid a person in peril, regardless of the ease of rescue or the severity of the consequences. Thus the courts have held that there was no duty for a expert swimmer to rescue an intoxicated party from drowning,[2] for a bystander to come to assist a stranger bleeding to death,[3] or for a physician to answer the call of one who is dying and might be saved.[4] While in such circumstances there may be a moral duty to act, the common law has steadfastly held that moral duties, while compelling, are not legally enforceable. The distinction between moral and legal duties is founded on two connected assertions. First, that morality is an internal phenomenon and decisions to act altruistically ought therefore to be matters of free choice.[5] As Kant asserts 'law cannot make a person virtuous'.[6] Secondly, the translation of morality directly into law faces practical difficulty in light of its inherently subjective nature. In Heyman's words: [7]

> [as] morality is rooted in the inner subjectivity of the individual…the moral duty to aid others is too indefinite for legal enforcement. Although morality enjoins one to promote the well-being of others in general, it does not specify to whom this duty is owed or how much must be done to satisfy it. Therefore, insofar as the obligation to aid others is a moral one, it may not be enforced by positive law.

Accepting however that much of the law is founded upon notions of moral right and wrong, and that the lines between moral and legal wrongs inevitably overlap, the courts have imposed a number of rules

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[2] *Osterland v Hill* (1928) 160 NE 301.

[3] *Allen v Hixson*, (1990) 111 Ga 460, 36 SE 810

[4] *Hurley v Eddingfield*; (1901) 59 NE 1058l; (1901) 156 Ind. 416.

[5] Ernest J Weinrib, 'The Case for a Duty to Rescue' (1980) 90 Yale L.J. 247, at 266.

[6] I. Kant, (1797) *The Metaphysical Elements of Justice Second Edition,* (Translation by J. Ladd 1999) at 19-20, paraphrase by Weinrib, Ibid, at 266 .

[7] Steven J. Heyman, 'Foundations of the Duty to Rescue', (1994) 47 Vand. L. Rev 673, at 721

pertaining to the finding of a legal duty.[8]

When a proposed novel duty in negligence arises "one should ask not whether it is covered by authority but whether recognised principles apply to it".[9] This approach might be demonstrated by reference to Lord Atkin's interpretation of the moral and Biblical rule that one is to love thy neighbour. In the Biblical text, when posed with the question "who is my neighbour?" Jesus responded by telling the story of a man lying bleeding on the side of the road. Three strangers walked past. While two simply ignored the injured man, the third, a Samaritan,[10] came to his rescue.[11] The story suggests that all persons are morally obliged to aid a fellow human-being in peril. Within the legal context however, Lord Atkin stated in *Donoghue v Stevenson* that "the rule that you are to love your neighbour, becomes in law, you must not injure your neighbour". [12] Thus, while one is obligated to not harm another there is no general legal duty to confer a benefit. Furthermore, when asked who then is one's neighbour? Lord Atkin pointed toward the principles of foreseeability, proximity and causation, stating that such a duty was owed only to:[13]

> Persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

His Lordship's statement has since been developed by the courts into a number of tests under which the scope and existence of a duty is determined in reference to established legal principles, furnished by, but not founded on, considerations of what is moral or 'fair, just and

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[8] Arthur Ripstein, 'Three Duties to Rescue: Moral, Civil, and Criminal, (2000) 19 Law & Phil. 751, at 754.

[9] Per Lord Reid, *Home Office v Dorset Yacht Co Ltd* [1970] A.C. 1004; [1970] 2 All E.R, at 1026.

[10] Who, being an ethnic 'outsider' would have no relationship of kinship with the stranger.

[11] *The Bible,* Luke 10:25-36 (New Revised Standard Version, Division of the Christian Education of the national Council of Churches of Christ in the United States of America, 1989).

[12] *Donoghue v Stevenson* [1932] A.C. 562 (HL), at 580.

[13] Ibid 580, also see 581 where his Lordship used the term 'proximity'.

reasonable'.[14] Consequently, under the common law the first two strangers in the Biblical parable would have incurred no liability.[15] There are two major obstacles to the finding of a general duty to rescue under these current duty tests. First, the law's distinction between misfeasance and nonfeasance, and second, the requirement of a causative connection between the party's own behaviour and the loss suffered by reference to the principle of proximity. This discussion now turns to an examination of these two points.

1. Misfeasance and Nonfeasance

As Bohlen states "There is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and nonfeasance".[16] While a party will be liable for a wrongful act that renders another positively worse off, they will generally not be liable for merely declining to act so as to confer a benefit. The justification for this approach lies in the law's jealous protection of personal autonomy and the theory of the social contract.[17]

Social contract theory holds that in submitting to the governance of the state, an individual is granted the state's protection and 'the assurance that he will be free to realise his life plans'.[18] In order to effect this protection, the state requires that, all citizens, in return, consent to not actively interfere with the rights of others. The law generally imposes liability only where an individual acts contrary to this

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[14] See Lord Wilberforce's judgment in *Anns* v *London Borough of Merton* [1978] AC 728; [1977] 2 All ER 492 (HL); Lord Keith's judgment in *Yuen Kun Yeu* v *Attorney General of Hong Kong*, above n1; Lord Bridge's judgment in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 (HL); [1990] 1 All ER 568 (HL); and Cooke P's judgment in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants Ltd* [1992] 2 NZLR 282 (CA).

[15] *Home Office v Dorset Yacht Co Ltd* above n9, at 1060.

[16] Francis H. Bohlen , 'The moral Duty to Aid others as a basis of Tort Liability', (1908) 56 U. Pa. L. Rev 217, at 219.

[17] R. J Lipkin 'Beyond Good Samaritans and Moral Monsters: An Individualistic Justification of the General Legal Duty to Rescue (1983) 31 UCLA L. Rev. 278, at 277.

[18] John Rawls, *A theory of Justice*, (Harvard University Press, United States, 1971) at 407-16, paraphrase by Lipkin Ibid, at 279.

requirement, not when they simply decline to advance the interests of others, as that would constitute a more serious interference with their liberty.[19] Here the social contract represents a fine balance between protection, right, and autonomy. It is the role of the state, not the individual, to afford protection to other citizens. However, the rules and laws that are imposed in order to deter and punish individuals for unduly interfering with the rights of others in turn limit all citizens' autonomous rights. The general rule relating to nonfeasance therefore represents one mechanism by which the balance between the rights of another and the rights of an individual are set.

Two issues might be raised regarding a general duty to rescue. First, that the imposition of such a duty effectively renders the right of an individual to make autonomous decisions subservient to the needs of others in peril. This would distort the balance between protection and autonomy, and is arguably beyond the justifiable scope of the law. Secondly, because such a duty necessarily contemplates circumstances involving strangers, it would constitute a unilateral limitation on the rights of the individual on whom it is imposed. Indeed Ripstein argues that the individual's responsibility not to interfere with the rights of others includes the subsidiary requirement that one must avoid displacing the costs of one's choices onto others.[20] Thus 'equal freedom can also be described as the idea that one person's liberty will not be limited unilaterally by another's vulnerability, nor one person's security limited unilaterally by another's choices'.[21] Indeed according to early natural right theorists such as Locke the correct function of law is to protect individual rights, not to impose upon individuals affirmative duties that act to disproportionately fetter their autonomy. [22]

2. Causation, Proximity and Exceptions to the General Rule

The principle of causation is fundamental to the establishment of liability for negligence. Generally, establishing causation requires that the harm suffered be positively caused by a defendant's conduct. In

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[19] Robert L Hale, 'Prima facie Torts, Combination and Non-Feasance' (1946) 46 Colum. L. Rev. 196, at 214.
[20] Ripstein, above n8, at 757.
[21] Ibid, at 759.
[22] Heyman, above n7, at 707.

other words it must be shown that 'but for' D's conduct, P would not have suffered loss. The obstacle presented by the requirement of the causative link is therefore closely connected to that presented by the rule relating to nonfeasance. Indeed one might question how an individual's failure to act could be seen as a legal cause of loss to another. The answer stems from Lord Atkin's reference to both acts and omissions in *Donoghue*,[23] in light of which the courts have held that where there is a positive duty of care, a failure to fulfil that duty is capable of being the active cause of loss to another. However, the formulation of a positive duty, so as to constitute an exception to the general rule, is necessarily more complex than the formulation of a negative one. In developing a body of exceptions, the courts have adopted a somewhat piece-meal approach. The difficulty in finding any obvious overarching rationale for the increasing list of exceptions reflects this inherent complexity.

Non-exhaustively, the courts have found positive duties where: a party has contributed to the risk of the harm eventuating, such as where a bar manager supplied alcohol to a patron who later crashed while intoxicated;[24] where there is a special relationship between the parties, such as the paternalistic relationship between a parent and child,[25] or the relationship of control between a prisoner and gaoler;[26] where there has been an assumption of responsibility by the defendant coupled with reliance on the part of the plaintiff, such as a military base that organised return transport for soldiers from an event where excessive alcohol consumption was expected;[27] or where a party has control over property that poses a risk to others; such as the owner of a cattle-station who failed to put out a fire that then spread to

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[23] *Donoghue v Stevenson,* above n12, at 580.

[24] *Stewart v. Pettie*, [1995] 1 S.C.R. 131; also see *Crocker v. Sundance Northwest Resorts Ltd.,* [1988] 1 S.C.R. 1186 (where an organiser of a ski competition allowed another to enter whilst intoxicated).

[25] *McCallion* v *Dodd* [1966] NZLR 710 (CA).

[26] *Home Office* v *Dorset Yacht Co Ltd* , above n9; *New South Wales v Bujdoso* (2005) 227 CLR 1; Also see discussion in *C.A.L. No 14 Pty Ltd v Motor Accidents Insurance Board; C.A.L No 14 Pty Ltd v Scott [2009] HCA 47*, at para 38.

[27] *Jebson v Ministry of Defence* [2000] 1 W.L.R. 2055; also see *Barrett v Ministry of Defence* [1995] 3 All E.R. 87.

neighbouring property.[28]

As stated, there is no obvious general principle linking these categories. However, in all cases there is some direct or indirect connection or relationship of proximity between the parties, which at the very least might be distinguished from those instances of pure nonfeasance involving mere strangers. As explained in Prosser and Keeton on Torts:[29]

> The question appears to be essentially one of whether the defendant has gone so far in what he has actually done, and has gotten himself into such a relation with the plaintiff, that he has begun to affect the interests of the plaintiff adversely, as distinguished from merely failing to confer a benefit on him.

In such circumstances it is both by virtue of this proximate connection to the other party, and only to the extent determined by the nature of that relationship, that the law justifies the prioritisation of another's right to protection over the individual's right to autonomy.

In rescuer cases, a mere stranger (A) who happens to witness another (B) in peril is not responsible for the creation of any risk to B and there is no special relationship which would place an affirmative duty on A so that the failure to carry it out could be seen to cause the injury.[30] Indeed, as B's predicament arose entirely independently of A, the only arguable basis for a duty is that of means and circumstantial proximity. It is clear however, that this alone is not sufficient to give rise to a positive duty. [31] There are a number of good policy reasons for this. Firstly, unlike instances where there is a previous relationship, A would have no ability to take steps to prevent or decrease the risk of

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[28] *Goldman* v *Hargrave* [1967] AC 645 (PC); also see *Wilson & Horton v A-G* [1997] 2 NZLR 513 (CA).

[29] W Page Keeton, Dan B Dobbs, Robert E Keeton, David G Owen, *Prosser and Keeton on Torts.* (5th Ed, West Publishing Co., Minnesota, United States 1984) at 375.

[30] James Edelman, Nathalie Gray, 'Developing the law of Omission: a Common Law Duty to Rescue' (1998) 6 TLJ 240, at 241.

[31] *Home Office* v *Dorset Yacht Co Ltd* , above n9, at 1027.

B finding himself in that position of peril.[32] Secondly, as any duty to rescue would be imposed purely by B's plight, such a duty stands in clear conflict with both the rule that persons cannot unilaterally impose duties on other,[33] and the requirement that duties be founded on notions of what is fair, just and reasonable.[34] Finally, on a more practical level there is no rational justification for singling out or 'picking' A over any other stranger.[35] In Lord Reid's words: 'where a person has done nothing to put himself in any relationship with another person in distress…mere accidental propinquity does not require him to go to that person's assistance'.[36]

There is therefore no foundation on which the law can justify upsetting the aforementioned balance between autonomy and right by imposing a general duty to rescue. The current discussion does not seek to defend such a duty, but rather presents a more limited duty which rests somewhere between the rejected general duty and the accepted exceptions. It is to this more limited duty that the discussion now turns.

II.

A. *Lowns v Woods* – A good place to start?

Before addressing the specific perimeters of the proposed duty there is one case worth noting. In *Lowns v Woods*[37] the New South Wales Court of Appeal upheld the finding of a duty to rescue on the part of a doctor who failed to respond to a request to attend a 10 year old boy having an epileptic fit nearby. As a result of this failure the boy did not receive treatment in time, suffered major brain damage and consequently became permanently disabled. The Court upheld the

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[32] Clare Elaine Radcliffe, 'A Duty to Rescue: The Good, the Bad and the Indifferent: - The Bystander's Dilemma' (1985) 13 Pepp. L. rev. 387, at 396.

[33] Ripstein, above n8, at 759.

[34] *Caparo Industries Plc v Dickman*, above n14; *Rolls-Royce NZ Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 (CA).

[35] *Stovin v Wise* [1996] A.C. 923; [1996] 3 All E.R. 801, at 943.

[36] *Home Office* v *Dorset Yacht Co Ltd*, above n9, at 1027.

[37] *Lowns v Woods* (1996) Aust Torts Reports 81-376 (HCNSW). Approving the decision in *Woods v Lowns (*1995) 36 NSWLR 344.

finding of a positive duty, notwithstanding the fact that there was no previous relationship. The judgments presented in both the initial Court and on appeal have been heavily criticised for failing to appropriately address the issues of nonfeasance and causation.[38] It would appear that rather than addressing the difficulties associated with establishing a positive as opposed to negative duty, the judges misused policy as a justification for the finding of proximity, thus failing to acknowledge the distinction between moral and legal duties.[39] This dissertation argues however that the facts of the case demonstrate exactly the sort of situation in which a limited duty to rescue ought to apply. As the arguments presented in *Lowns* fail to sufficiently address the relevant issues, this discussion now turns to an academic proposal that seeks to do exactly that.

1. Edelman and Gray: A proposed Limited Duty to Rescue

In their article 'Developing the law of Omission: a Common Law Duty to Rescue',[40] Gray and Edelman propose a limited duty to rescue based upon the dual components of assumption of responsibility and reliance or dependence. They assert that the mistake that the (lack of) causation/proximity type argument makes is in assuming that, for the purposes of rescue, all bystanders are in the same position in relation to the person in peril. They suggest that 'the existence of a special relationship should not merely be determined by reference to the individual rescuer and victim but by having regard to the societal relationships that exist between classes of potential rescuers and the victims they would be capable of assisting'.[41] The author's tentatively base their proposed duty on the doctrine of general reliance, which acts to relax the specificity required for both elements of assumption and reliance, thus allowing it to be applied to circumstances involving complete strangers. Noting a number of uncertainties surrounding the validity of the doctrine, Edelman and Gray present a piecemeal

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[38] Les Habberfield, 'Lowns v Woods and the Duty to Rescue', (1998) 6 Tort L Rev 56, at 58.

[39] Thomas Fuance, Kumaralingam Amerthalingam, 'Patching up Proximity: Problems with the judicial creation of a new medical duty to rescue', (1997) 5 TLJ 27, at 31.

[40] Edelman, Gray, above n31.

[41] Ibid, at 241

justification for its application within their proposed duty. Applied to the facts of *Lowns* the authors argue that by voluntarily holding himself out to be a practising medical practitioner Dr Lowns entered a special relationship with the epileptic boy characterised by an assumption of responsibility on the part of Dr Lowns and vulnerability and dependence on the part of the boy. Consequently Dr Lowns owed a positive duty of care to the boy which he failed to fulfil, thus causing his injury.[42]

(a) Elements of Proximity - Assumption of Responsibility and Reliance

Ever since the House of Lords decision in *Hedley Byrne*,[43] the concept of an assumption of responsibility, coupled with reliance on the part of another party have been regular features of the determination of a duty of care. Here, whether in relation to a certain activity or in relation to an undertaking that affects the plaintiff, responsibility is seen as some kind of choice made and acted upon by the parties. One party consciously takes on something while another consciously relies upon that.[44] Proximity in such cases is thus 'understood as being governed on both sides by perception and intention'.[45] The application of this dual construction of proximity has been varied, and at times the courts have found sufficient proximity in circumstances where the reliance element is weaker, or indeed absent altogether. However, it is clear that in all constructions save one, the courts have held that it is crucial that there be a sufficient degree of specificity as to who the elements are directed at. The one exception, which also features in Edelman and Gray's proposed duty, is the somewhat contentious doctrine of general reliance established in *The Council of the Shire of Suntherland v Heyman*.[46]

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[42] Ibid, at 241.

[43] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465

[44] Desmond Manderson, 'The Ethics of Proximity', (2005) 14 GLR 295, at 315.

[45] Ibid, at 315.

[46] *The Council of the Shire of Suntherland v Heyman* (1985) Aust Torts Reports 80-322, at 68,324; (1985) 157 CLR 424.

(i) Doctrine of General Reliance

The reliance element of the assumption/reliance construction of proximity normally arises out of a previous relationship, or alternately, in a very limited group of cases, by way of a previous relationship by proxy, such as the relationship between a legatee of a solicitor's client and that solicitor.[47] In such cases the imposition of liability for the loss suffered is logically justified because the defendant has had the opportunity to take precautions to decrease the likelihood that harm would come to the plaintiff.[48] As stated in *Barrett v Ministry of Defence* 'The characteristic which distinguishes those relationships is reliance expressed or implied *in the relationship* which the party to whom the duty is owed is entitled to place on the other party to make provision for his safety'.[49]

Under the doctrine of general reliance however, this requirement of a prior relationship, or indeed any form of specificity as to whom an assumption of responsibility or reliance is directed at is significantly relaxed. Mason J presented the doctrine in the Australian case of *Sutherland* stating that: [50]

> There will be cases in which the plaintiff's reasonable reliance will arise out of a general dependence on an authority's performance of its function with due care…This situation generates on one side (the individual) a *general expectation* that the power will be exercised and on the other side (the authority) a *realisation* that there is a general reliance or dependence on its exercise of the power.

His Lordship further discussed the basis of the concept stating: [51]

> Reliance or dependence in this sense is in general the product of the grant (and exercise) of powers designed to prevent or minimise a risk of personal injury or disability, recognised by the legislature as being of

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[47] *White and another* v *Jones and others* [1995] 2 AC 207.

[48] Radcliffe, above n33, at 396.

[49] Per Bedlam L.J *Barrett v Ministry of Defence*, above n27, at 1224, emphasis added.

[50] *The Council of the Shire of Suntherland v Heyman*, above n47, at 463-464, emphasis added.

[51] Ibid, at 463-464

> such magnitude or complexity that individuals cannot, or may not, take adequate steps for their own protection.

Similarly, in *Parramatta City Council v Lutz* [52] McHugh J stated that the doctrine was justified by the failure of the traditional categories to give protection to individual members of the community from harm. Thus, the normal conscious assumption and reliance is, in essence, replaced by implied assumption and implied reliance on the basis of a legislative power or duty.

Under Edelman and Gray's proposed construction of proximity, rather than being the product of a legislative power general reliance arises out of the reasonable expectation that persons who constitute a particular class performing a specific role within society will act according to their skills and powers. They argue that in the same way that parties are dependent on public bodies to exercise statutory functions, so too are individuals reliant on specific skilled groups within society to assist in times of peril. It would also logically follow that such persons would be aware of those expectations and the extent to which citizens depend upon the exercise of their skills in times of emergency.[53]

The general reliance doctrine has been adopted by some courts in Australia[54] and New Zealand.[55] It was however, rejected by a 3/2 majority of the High Court of Australia in *Pyrenees v Day.*[56] While

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[52] *Parramatta City Council v Lutz* (1985) 157 CLR 424 ; (1985) 60 ALR 1.

[53] Edelman, Gray, above n31, at 243.

[54] *Casley-Smith v FS Evans & Sons Pty Ltd (No 5)* (1988) 67 LGRA 108; *Nagle v Rottnest Island Authority* (1989) Aust Torts Rep 80-298; *Hicks v Lake Macquarie City Council (No 2)* (1992) 77 LGRA 269; *Romeo v Conservation Commission of the Northern Territory* (1994) 123 FLR 71; *Alec Finlayson Pty Ltd v Armidale City Council* (1994) 51 FCR 378 ; 123 ALR 155; *Northern Territory of Australia v Deutscher Klub (Darwin) Inc* (1994) 122 FLR 135.

[55] *Invercargill City Council v Hamlin* [1996] AC 624; [1996] 1 NZLR 513, at 519 See *Hope v. Manukau City Council* (unreported), 2 August 1976; *Brown v Heathcote County Council* [1986] 1 NZLR 76, at 81; Also see statements made by Cooke P in *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd*, above n14, at 297.

[56] *Pyrenees Shire Council v Day* 192 CLR 330 [1998] Aust Torts Reports 64,673 (81-456).

Edelman and Gray acknowledge the difficulty posed by *Pyrenees*, they argue that this merely renders the approach difficult as a unitary test.[57] They assert that where coupled with additional proximity factors the doctrine may provide a powerful argument for proximity.

(ii) Assumption of Responsibility and Dependence – the Additional Proximity Factors

The concept of an assumption of responsibility first appeared within the law of negligence in the case of *Hedley Byrne* v *Heller*. In his judgment Lord Devlin described such an assumption as 'a responsibility that is voluntarily accepted or undertaken, either generally where a general relationship, such as that of solicitor and client or banker and customer, is created, or specifically in relation to a particular transaction.'[58] If established, such an assumption was capable of giving rise to a duty of care.

Under Edelman and Gray's proposal, every 'class of professional person which has rescue as an aspect of its work, and which carries on its duties in accordance with standards of conduct or specialised training,' has by taking up that position assumed responsibility for certain relevant rescue situations should they arise.[59] This would apply notably to medical practitioners and public rescue bodies such as fire-fighters and ambulance officers.[60] The finding of such an assumption is founded on the fact that such parties hold themselves out as being capable of rescuing, and from the realisation that lay persons in peril would not have the skills or ability to aid themselves.[61] Taking the example of a doctor, Edelman and Gray note both Dr Lowns' acceptance in *Lowns* that, under the ordinary standards of a medical practitioner, he would have been obliged to respond, and that the

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[57] Edelman, Gray, above n31, at 243.

[58] *Hedley Byrne & Co Ltd v Heller & Partners,* above n44, at 529.

[59] Edelman, Gray, above n31, at 246.

[60] Subject to policy considerations, for example it is clear that there are limitations on the laws willingness to impose liability on public bodies where such would adversely affect the allocation or use of resources. See *Hill v West Yorkshire Police* [1989] AC 53 (HL); *Smith v Chief Constable of Sussex* [2008] 3 WLR 593 (HL).

[61] Edelman, Gray, above n31, at 241.

Medical Practitioners Act sets out a professional obligation to assist those in need of urgent attention.[62] They argue that while these factors are neither necessary nor sufficient in themselves to establish a duty of care, they do lend support to the argument that doctors are, or could reasonably be expected to be, aware that in entering the profession they are assuming responsibilities beyond those that they have specifically contracted for. Similar legislation and general understandings of what the role entails might be noted in regards to other professional rescuers. However, as with the medical example, such factors are merely required to lend support to the argument.

Edelman and Gray then turn to a number of cases where an assumption of responsibility has been associated with the concept of induced dependence or vulnerability rather than reliance in a specific sense. In *Hawkins v Clayton*[63] a solicitor was held liable for the loss suffered by a deceased client's estate as a result of the solicitor failing to inform the executor of the existence of a will.[64] In his judgment Deane J held that there was a sufficient relationship of reliance and assumption between the solicitor and the deceased client to hold the solicitor liable for foreseeable loss to the estate even where there was no actual reliance by the estate's representative.[65] Alternately, Gaudron J held that sufficient proximity was based on the executor's 'reasonable expectation' of disclosure regardless of the fact that he had no knowledge of the existence of either the solicitor or the will and thus could not have relied on the solicitor in the specific sense.[66]

Edelman and Gray assert that this concept of 'reasonable expectation' in the absence of specific reliance might be used to justify a duty based upon an expectation that a certain class of persons would act according to their skills and powers once they have assumed responsibility for doing so.[67] The authors argue that it is difficult to distinguish between a non-specific reliance on a class of persons who hold themselves out to have certain skills (such as solicitors), and general reliance in a class

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62 See above Section 2.1.
63 *Hawkins v Clayton* (1988) 164 CLR 539.
64 Edelman, Gray, above n31, at 244.
65 *Hawkins v Clayton* , above n64, 578-9.
66 Ibid, at 596.
67 Edelman, Gray, above n31, at 242.

that claim that they will perform a certain role in society (such as rescue professionals).[68] Furthermore, persons in need of rescue are certainly vulnerable in the sense that they are necessarily incapable of assisting themselves. [69]

The authors conclude that an assumption of responsibility by one class of persons over a situation coupled with dependence on the part of another class (or the existence of a reasonable expectation as to how the former will act) is sufficient to create an overriding relationship of proximity upon which a duty to rescue might be found. In addition, they claim that such a construction of proximity is really only a one-step extension of the category of exceptions covering relationships where there has been an assertion of control over the plaintiff.[70] They argue that where there is dependence, an assertion of control is expected.[71]

2. Critique and an Alternate Argument

Two significant objections might be raised to Edelman and Gray's proximity argument. While these objections are not fatal to the duty proposed, they do render unsatisfactory the authors' justification for their construction of proximity. This part of the discussion seeks to identify and address these objections and propose and justify a slightly altered argument for proximity.

(a) *Pyrenees* – Rejection of the Doctrine

The first objection to Edelman and Gray's argument relates to the majority's rejection of the doctrine of general reliance in *Pyrenees*.[72] While the authors acknowledge that *Pyrenees* is problematic, they assert that the judgment merely renders the doctrine incapable of being utilised as a unitary test, concluding that when coupled with other elements it is still strongly arguable. This analysis is both insufficient in that it fails to address the arguments raised by the majority and

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[68] Ibid, at 244
[69] Ibid, at 243.
[70] See above section 1.3 and n26.
[71] Edelman, Gray, above n32, at 244.
[72] *Pyrenees Shire Council v Day* above n56.

incorrect in that the 'additional elements' presented by the authors are not sufficient to fulfil the proximity requirement needed to justify an exception to the rule of nonfeasance.

Pyrenees concerned the existence of a common law duty of care owed by a council to subsequent occupiers of a property it had inspected. In 1988 the Pyrenees Shire Council had inspected a chimney and discovered that it was not safe to use. The Council wrote to the occupier of the premises warning that it was not safe to be used until it was repaired. The repairs were not carried out, and the Council made no further enquiries to see if it had been repaired or ensure that it was not in use. In early 1990 the lease to the premises was assigned to the Plaintiffs who were unaware of the letter or the danger. In mid-1990 a fire broke-out destroying the premises and damaging adjoining premises. The High Court of Australia held that the Council owed a statutory duty to the Plaintiffs, but rejected the doctrine of general reliance and held that the doctrine had no part to play in the finding of the duty.[73]

Each of the three majority judges in *Pyrenees* had slightly different reasons for rejecting the doctrine. Gummow J rejected it on the basis that as there was no conscious reliance actually placed on the defendant, the doctrine represented the creation of a new legal fiction, something the law approached with hostility. He concluded that liability should not be imposed in terms that do not command an intellectual assent or refer liability directly to basal principle.[74] Alternately, Brennan J noted the practical and undesirable implication of making general community expectations the touchstone of liability. Were legislative powers and grants to be found capable of attracting common law damages, the appropriate criterion would be legislative intention.[75] Kirby J took a slightly different approach, first rejecting the doctrine as a legal fiction but then suggesting that the factors that had been thought to establish the doctrine might be viewed as "proximity factors" going to the establishment of the normal

[73] *Pyrenees Shire Council v Day* above n56.
[74] Ibid, at para 163.
[75] Ibid, at para19.

requirement.[76] It is perhaps this position that led Edelman and Gray to the conclusion that *Pyreness* posed no issue to the doctrine when combined with other elements. However, one might point out that there is nothing in Kirby J's statements to imply that by allowing factors thought to give rise to the doctrine to be counted as proximity factors, the standard of proximity would be relaxed. In fact, Kirby J cited Lord Hoffman's judgment in *Stovin v Wise* specifically criticising the doctrine for appearing to discard the requirement that a plaintiff specifically rely upon the defendant.[77] It is therefore clear that under the majority's judgment, any combination of proximity factors will still have to demonstrate a sufficient degree of proximity to justify an exception to the rule against nonfeasance, whether or not it includes those associated with general reliance.

Edelman and Gray's discussion of the various additional elements that might be combined with the doctrine to produce a convincing argument for proximity becomes confused relatively quickly. They assert that the doctrine is arguable when coupled with both an assumption of responsibility on the part of professional persons assuming certain roles within society, and dependence or 'general expectations of the community' as to the fulfilment of those roles. However, the idea of "combining" these elements with the doctrine of general reliance is difficult to conceive considering that these elements themselves would appear to be the only arguable factors that could have been seen to establish the two parts of the doctrine of general reliance in the first place. In reality there is no "combining," as these were not "additional elements". Rather there is simply an argument asserting a very unspecific assumption on the part of certain person with a very unspecific reliance or dependence on the part of society. Having rejected the assertion that the doctrine of general reliance somehow provides some additional argument for proximity over and above the proximity factors actually identified, the question becomes whether the assumption and dependence factors proposed are capable of providing a sufficient argument for proximity.

In relation to the first factor proposed, it is submitted that an assumption of responsibility by professional parties to any person

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[76] Ibid, at para 203.

[77] *Stovin v Wise* , above n36, at 464.

needing rescue in circumstances where that party is capable of carrying it out essentially amounts to an assumption of responsibility to the whole world. While the concept of an assumption has been applied in a number of different forms[78] they have always involved a specific assumption for a specific activity in relation to a specific group of persons. The concept that a duty cannot be owed to the world can be seen in a number of decisions.[79] In *Caparo,* Lord Bridge stated in that the requirement of specificity acted to prevent 'liability in an indeterminate amount for an indeterminate time to an indeterminate class'.[80] As Todd states: [81]

> Merely assuming an office or status and having the ability to help is not likely to be enough…there must at least be an assumption of responsibility for, and close control over, a *particular* activity in relation to a *particular* person or class before a duty might come to be recognised.

Accepting that an assumption of responsibility indicates proximity, the ability of the proximity requirement to act as a 'limit[ing] or control mechanism' for liability[82] would arguably be defeated if a party could be held to have assumed responsibility to all persons. The proposed assumption of responsibility is therefore incapable of providing a sufficient argument for proximity.

In relation to the second proposed proximity factor it is submitted that non-specific reliance or dependence had only ever been accepted in a very limited category of cases where there has been some form of specific assumption or control justifying the imposition of liability. Edelman and Gray point to the case of *Hawkins*[83] as providing support for their assertion that dependence alone constitutes a valid proximity factor. While the authors acknowledge that the judgments began by

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[78] Mary-Anne Simpson, 'What Amounts to an Assumption of Responsibility' [1995] 1 NZLJ 61, at 62.

[79] *Sutradhar v Natural Environment Research Council* [2006] 4 All ER 490 (HL).

[80] *Caparo Industries Plc v Dickman* above n14, at 609 citing Cardozo CJ in *Ultramares Corporation v. Touche* (1931) 174 N.E. 441, at 444.

[81] Stephen Todd, *The Law of Torts in New Zealand,* (4th ed. Brookers, New Zealand, 2005), at 155-6. Emphasis added.

[82] *Caparo Industries Plc v Dickman*, above n14, at 622.

[83] *Hawkins v Clayton* , above n64, See above section 2.2.1.2.

noting that proximity existed between the deceased and the solicitor, they fail to acknowledge the relevance of this in relation to other parties. Furthermore, both Gauldron and Deane JJ identified the relationship of control between the executor and the solicitor by way of the solicitor's assumption of control over the deceased's will and thus his testamentary intentions.[84] Here the solicitor had made a conscious undertaking toward the deceased specifically, which, when coupled with dependence, reliance or indeed 'general expectations', could be extended to those parties foreseeably affected by it.[85] Such a specific undertaking or assumption is significant in justifying an exception both because it means that the duty in question was not unilaterally imposed, and because, on the basis of this prior relationship, the defendant was capable of preventing or alleviating the risk placed upon the plaintiff. A similar objection might be raised to the authors' assertion that their construction of proximity is merely one-step beyond the category of control. At the core of the rationale for allowing an exception where there is a relationship of control is the fact that once control has been exerted the party exerting it is capable of preventing or alleviating risk.[86] Thus, the solicitor had the ability to prevent any loss to the estate simply by informing the executor of the will. Where however, as the authors propose, there is merely the potential or the expectation of an exertion of control this fundamental characteristic is lacking. It might be merely one-step, but that one-step is fundamental. In sum, the softening of the reliance requirement in *Hawkins* was based on the specific undertaking and control held by the defendant, the fact that those affected were readily ascertainable, and the unavoidable vulnerability of the plaintiff.[87] Considering that Edelman and Gray's proposed argument lacks the key elements of control and specific undertaking, *Hawkins* can provide little support. Indeed the courts have demonstrated an unwillingness to apply the exception where all these elements are not present.[88]

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[84] Ibid, Per Deane J at 579 and Per Gaudron J at 597.

[85] Per Gaudron J, *Hawkins v Clayton*, above n64, at 597.

[86] Radcliffe, above n33, at 396.

[87] Other cases demonstrating this approach are: *White and another* v *Jones and others*, above n48; *Hill v Van Erp* (1986) 162 CLR 341; *Gartside v Sheffield Young & Ellis* [1983] NZLR 37 (CA).

[88] See *Brownie Wills v Shrimpton* [1998] 2 NZLR 320 (CA); *Kapfunde v Abbey National plc* [1999] ICR 1 (CA).

Summing up the first objection: Edelman and Gray's failure to adequately deal with the rejection of the doctrine as a unitary test meant that any proposal they presented necessarily required a closer connection (proximity) between the parties than the non-specific elements provided by the doctrine. In light of the fact that no additional proximity factors connecting a rescuee and rescuer would be present in situations to which the duty would apply, their argument was necessarily based simply on a deemed assumption of responsibility to the world and non-specific reliance or general expectations. It is submitted that if specificity is unavailable then the only possible way to render the proposed duty arguable is to address the issues raised in *Pyrenees* and defend the doctrine in its unitary form. This was, I believe, successfully done by the minority judges.

In his dissent Toohey J stressed that the doctrine of general reliance is only a fiction in the sense that it is not actual reliance. He further pointed out that negligence is not a stranger to legal fictions.[89] Indeed the concept of an assumption of responsibility is itself essentially a legal fiction, as, in reality tort obligations are imposed not assumed.[90] The question therefore is whether such a "fiction" is desirable in light of the practical dangers of making general community expectations the touchstone of liability. Here McHugh J asserted in his dissent that if the limitations of the doctrine are properly understood then this danger is overstated. The doctrine applies only in cases where it can be established that individuals could not protect themselves and thus were entirely dependent on the public body and where that body knew of the danger of not exercising their powers. Furthermore, he noted that the doctrine would not lead to liability merely by reason of a failure to carry out a power, as this would depend on all the circumstances in the case including competing demands on the body in question and terms of the statutory power.[91] In sum, as the law is not adverse to legal fictions, this alone is not reason enough to reject the doctrine. Considering the practical limitations that might be applied to curtail the duty, it is arguable that the value in the protection that the doctrine provides to those members of the public who are vulnerable to loss

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[89] *Pyrenees Shire Council v Day,* above n56, at para 62.
[90] See Tipping J in *A-G v Carter* [2003] 2 NZLR 160 (CA), at 168.
[91] *Pyrenees Shire Council v Day*, above n56, at para 107-9.

justifies the fiction. Indeed one might note that the House of Lords did not hesitate to uphold the doctrine in the New Zealand case of *Invercargill City Council v Hamlin* stating that it was 'nothing new' and had been 'feature of New Zealand law for years'.[92] It is submitted that the position of the minority is to be favoured and the doctrine of general reliance is at the very least an arguable exception to the rule relating to nonfeasance.

(b) General Reliance and Professionals

The second objection to the proposed duty arises out of the exclusive application of the doctrine of general reliance to cases where reliance is placed on public bodies for the exercise of statutory powers. [93] As Edelman and Gray chose not to apply the doctrine of general reliance as a unitary test they were not required to present a justification for this extension. The construction proposed by this dissertation however rests entirely on the extension of the doctrine. This can only be achieved by referring back to the initial rationale given for the doctrine. In *Heyman* Mason J stated that general reliance was 'the product of the grant (and exercise) of powers designed to prevent or minimise a risk of personal injury or disability, recognised by the legislature as being of such magnitude or complexity that individuals cannot, or may not, take adequate steps for their own protection'.[94] Under the social contract the state is positively obliged to confer protection on citizens. The state generally achieves this through the actions of agents employed to fulfil certain protective roles. The court's softening of the requirement of specificity under the doctrine of general reliance is therefore justified because the party on whom a specific statutory power is placed is acting as the agent of the state in ensuring the protection of members of society. In the execution of their statutory power, such agents effectively stand on the other side of the social contract and, rather than being owed the protection of their autonomy, to that limited extent, they are under a positive obligation to grant protection.

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[92] *Invercargill City Council v Hamlin*, above n 56, at 519.

[93] Indeed the cases almost exclusively concern the powers of local councils or council regulatory bodies - See *Invercargill City Council v Hamlin* Ibid; *Hope v. Manukau City Council*, above n56; *Brown v Heathcote County Council* above n56.

[94] *The Council of the Shire of Suntherland v Heyman*, above n47, at 463-4.

The proposed extension of the doctrine is justifiable on the basis that certain parties within society, whose professional functions include rescue, assume the position of agents of the state to the extent of carrying out rescue. At the core of this proposition is the protective nature of the role that parties such as doctors, lifeguards and rescue services are viewed, and indeed view themselves, as fulfilling within society. Such roles are necessary to the peace of mind of citizens in any state, and therefore might be distinguished from purely professional positions such as solicitors and businesspersons. Consequently, a citizen's expectation that a doctor (B) will not stand by while he perishes is not based, as the authors assert, on the known skills and qualifications of B so much as it is based on the role that B is seen to hold within society and the understanding that by taking up that role, B has agreed to act, within limitation, for the protection of society. In sum, to the extent that a party's professional role involves rescue they might correctly be seen to be acting as agent of the state in carrying out the state's protective function. Consequently, under Mason J's explanation, when coupled with circumstances involving danger of 'such magnitude or complexity that individuals cannot, or may not, take adequate steps for their own protection'[95] the doctrine of general reliance will give rise to a positive duty to rescue.

The acceptance of this argument constitutes a clear extension of the doctrine of general reliance as it has previously been understood. However, as noted in *Soldano v O'Daniels,* "What the courts have power to create, they also have power to modify, reject and re-create in response to needs of a dynamic society. The exercise of this power …is the strength of the common law".[96]

3. Application of the Duty

Accepting that the doctrine of general reliance is based upon the recognition of a risk of 'such magnitude or complexity that individuals cannot, or may not, take adequate steps for their own protection', the duty could only logically arise in situations where the threat is: grave,

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[95] Ibid, at 463-4.
[96] *Soldano v O'Daniels* (1983) 141 Cal.App.3d 443, 190 Cal.Rptr. 310.

immediate, and where the person concerned is unable to act to protect themselves. By way of example, the duty would not arise in the case of a patient in need of a life-saving operation where the option to pay or contract for the treatment is available.[97] Such limitation is necessary on a practical level in order to protect those subject to the duty. Otherwise medical practitioners, for example, would be obliged to assist any party needing treatment regardless of the circumstances or cost, which in turn would create opportunities for free-riding and abuse of the medical profession.

One must also note that the existence of the duty does not mean that the partial or total failure to carry-out a rescue constitutes a breach of duty.[98] Rather, liability would depend upon all the circumstances of the case, and an application of the general principles of breach and the reasonable person standard.[99] Considerations such as the probability and gravity of risk; the expense, difficulty, and danger involved in attempting rescue; and any other competing interests would be taken into account. [100] Thus, as Edelman and Gray note, the duty may sometimes be an empty one.[101]

Conclusion

At the heart of the common law's rejection of a general duty to rescue is the balance between 'right' and 'autonomy' represented in the social contract. Any limitation on individual autonomy must be justified on the basis of legal principle rather than notions of morality. The greatest obstacle to a general duty is posed by the fact that any duty to rescue necessarily contemplates situations involving complete strangers. This is significant as there would appear to be no arguable proximity relationship between the parties that could justify an exception to the rule against positive duties. With no positive duty to rescue, there is no basis on which a court can find a causative link between a failure to act and the injury or death of the victim. The duty to rescue has therefore

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[97] See Weinrib, above n5, at 275.

[98] See McHugh J's discussion of the scope of the duty arising out of cases of general reliance in *Pyrenees Shire Council v Day,* above n57, at para 109.

[99] Lipkin, above n17, at 274.

[100] *Wyong Shire Council v Shirt* (1980) 146 CLR 40, at 47-8

[101] Edelman, Gray, above n31, at 248.

traditionally been viewed as merely a moral duty lacking a principled basis sufficient to render it legally justifiable.

However, as Edelman and Gray argue, the mistake that the (lack of) causation/proximity type argument makes is in assuming that, for the purposes of rescue, all bystanders are in the same position in relation to the person in peril. Their proposed framework for a limited version of the duty to rescue based upon the special role that certain parties have within society is compelling. However, I argue that their application of the assumption of responsibility/dependence exception to the rule against nonfeasance and their analysis of the doctrine of general reliance are inadequate. The authors fail to truly appreciate the significance that the required specificity as to whom each of these elements are directed has in relation to the creation of proximity, and thus to the establishment of an exception to the general rule.

If this specificity requirement is acknowledged however, the potential for its relaxation under the doctrine of general reliance is of great import. I argue that the rejection of the doctrine in *Pyrenees* is unfortunate and it is the position of the minority that ought to be favoured. While the doctrine has never been applied to private individuals, I present a rational for the doctrine that allows for its extension to certain individuals on the basis of the role that they play within society. I argue that the doctrine rests upon the law's recognition that, in some instances, certain bodies or individuals act as agents for the state in the carrying out of the state's obligation to protect members of society under the social contract. In such cases the doctrine allows a softening of the requirement of specificity because it acknowledges that such agents effectively stand on the other side of the social contract and, rather than being owed protection of their autonomy, to that limited extent, they are obliged to grant protection. Accepting this interpretation, it is then conceivable that, where particular professional roles within society are viewed as fulfilling a wider function of protection, and to the extent that the state is incapable of otherwise effecting that protection, such persons might also be regarded as acting as agents of the state in certain situations. Where this is the case, the doctrine of general reliance would apply. I argue that this is a more apt and persuasive justification for Edelman and Gray's proposed duty.

This discussion began by acknowledging that morality alone is not capable of creating a legal duty, however, that is not to say that it is not a valid reason for allowing a principled extension of the law. As Radcliffe states 'Society has changed, and so have its problems and needs. The law must also change in order to address those needs'.[102]

[102] Radcliffe, above n33, at 388.