UNCERTAINTY IN PRIVATE LAW: RHETORICAL DEVICE OR SUBSTANTIVE LEGAL ARGUMENT?

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This article examines the normative weight of 'certainty' as a legitimate end in private law theory and adjudication. Claims of uncertainty tend to neglect or ignore a simple proposition: namely, that the same criticism could equally be levelled against many established jural concepts, and yet it is not. This article aims to demonstrate that criticism of jural concepts (principles, application criteria, etc) as too uncertain or vague is often selectively made. In many instances, the law, given its complex nature and society's expectations of what it is meant to deliver, cannot avoid resort to concepts whose meanings are unfixed and whose applications leave considerable scope for expert judgement. This article argues that courts and commentators who rely on uncertainty arguments must reflect more critically on what 'uncertainty' means, what 'too much' uncertainty is, and whether 'certainty' is a feasible juristic goal in the relevant context. The article concludes by offering some observations about the persuasive force of arguments that are directed at the legitimacy and functionality of open-textured legal concepts. It stresses that the critical issue in many instances of putative uncertainty is a failure by courts and jurists to settle upon an agreed normative grounding for the given legal concept.

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I Introduction

This article addresses arguments about 'certainty versus uncertainty' in private law. More specifically, it examines the normative weight of 'certainty' as a legitimate end in private law theory and adjudication. A perennial feature of commentary and curial judgments in private law, as in the law more generally, is an insistence, by many, on certainty and predictability as predominant juristic goals. Indeed, that a legal concept is capable of being described as 'nebulous' in its nature, 'vague' in its meaning(s), or 'uncertain' in its application(s) is often advanced as a weighty, if not decisive, reason for rejecting it. This is particularly the case where the concept is contested, emergent or operative at the fringes of the pocket of law under consideration, such as in cases involving 'lawful-act' duress.[1] Courts and jurists often assign additional force to such arguments when considering doctrines, or administering doctrinal criteria, that may impact adversely upon the enforceability of transactions that are 'commercial' in nature.[2]

Such claims of uncertainty, however, tend to neglect or ignore a simple proposition: namely, that the same criticism could equally be levelled against many established jural concepts, and yet it is not. This article aims to demonstrate that criticism of jural concepts (principles, application criteria, etc) as too

[1] See, eg, *CTN Cash & Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714, 719 (Steyn LJ) ('*CTN Cash*').

[2] See, eg, *BOM v BOK* [2019] 1 SLR 349, 412 [177] (Andrew Phang Boon Leong JA for the Court) ('*BOM*'); *Uber Technologies Inc v Heller* (2020) 447 DLR (4th) 179, 254–5 [169] (Brown J) (Supreme Court of Canada) ('*Uber Technologies*').

uncertain or vague is often selectively made:[3] that is, as nothing more than a rhetorical manoeuvre to attack a concept that a court or particular commentator does not favour.[4] Despite their similarly open-textured nature, numerous other concepts — 'reasonableness', 'seriousness' (of breach), 'in the course of employment', and the like — are, for some unarticulated reason, spared from the same level of scrutiny or scrupulous demand for legal certainty. Indeed, '[i]f vagueness were a sufficient reason for repudiating legal concepts and criteria, large portions of current law would be eviscerated'.[5] In many instances, the law, given its complex nature and society's expectations of what it is meant to deliver, cannot avoid resort to concepts whose meanings are unfixed and whose applications leave considerable scope for expert judgement — so-called 'leeway of choice'. This is especially so when adjudicating the propriety of party conduct, in the often complex matrix of circumstances within which the conduct is alleged to have occurred, and, further, in fashioning an appropriate legal response when such conduct is found wanting.

In short, arguments of 'too much uncertainty' resulting from the recognition or application of a legal concept or principle are typically enlisted for the purpose of: (1) rejecting the concept or principle as operative in the legal context under consideration; (2) expressing a preference for some alternative concept(s) or principle(s); or (3) at a minimum, exercising appropriate caution about the reception or maintenance of the concept or principle at hand. Such arguments tend not to be 'substantive' in the sense that they are neither based on methodologically robust datasets of *actual* negative impacts occasioned by the alleged or feared uncertainty, nor supported by compelling normative reasons — consequentialist or otherwise — as to why certainty should trump competing principles and purposes enlivened in the particular context.[6] Such arguments could, however, be substantive if, say, they were linked to the search for

[3] Support for this can perhaps be found in the fact that the same judge or commentator will sometimes resort to uncertainty arguments while, at other times, dismissing such concerns, with no explicit justification for the change in tack. See, eg, Lord Toulson JSC's dismissal of uncertainty arguments when supporting a flexible approach to illegality in *Patel v Mirza* [2017] AC 467, 502–3 [113]–[114] ('*Patel*'), in contrast to his Lordship's retreat, in *Michael v Chief Constable of South Wales Police* [2015] AC 1732, from a flexible, policy-based test for establishing duty of care in negligence, in favour of a narrower approach to that inquiry: see especially at 1762–5 [104]–[120].

[4] For some recent examples of this, see below Part II.

[5] Rick Bigwood, 'Throwing the Baby Out with the Bathwater? Four Questions on the Demise of Lawful-Act Duress in New South Wales' (2008) 27(2) *University of Queensland Law Journal* 41, 79 ('Throwing the Baby Out with the Bathwater?').

[6] See generally FKH Maher and RC Evans, '"Hard" Cases, Floodgates and the New Rhetoric' (1985) 8(2) *University of Tasmania Law Review* 96.

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clarification of the core normative values or conceptual boundaries of the challenged general concept or principle. Yet, in our experience, courts continue to develop and apply a number of open-textured rules, standards and criteria that remain insufficiently tethered to a convincing rationale for their existence or form. It is *that* failure — to provide cogent and coherent normative foundations for particular concepts — that might well validate fears based on uncertainty, rather than the flexibility of relevant rules, standards and criteria per se. We return to this issue in Part V(A) below.

In our view, courts and commentators who rely on uncertainty arguments of the type envisaged by this article must reflect more critically (than they currently do) on what 'uncertainty' means, what 'too much' uncertainty is, and whether certainty is a feasible — let alone desirable — juristic goal in the relevant context or connection, all things considered. Further, they ought to assess whether the same criticisms might not equally be levelled against the vast corpus of law, in so far as it is expected to justly regulate complex interactions between autonomous actors, in highly variable circumstances, within deeply intricate relationships, in the face of almost inevitable factual uncertainty. In short, in order to have genuinely persuasive force, arguments from uncertainty must credibly rise above the level of assertion or speculative fear on the part of those who advance them, and be grounded instead in either experience or fully articulated reason.

None of this, of course, is to suggest that certainty is not an important legal objective. On the contrary, (un)certainty arguments are often motivated by legitimate concerns about the preservation of the rule of law and, more specifically, ensuring that the exercise of judicial power remains predictable and constrained by legal method, as opposed to being arbitrary.[7] Still, provided they are properly understood, we doubt that concepts that unavoidably generate a level of uncertainty in their application are, for that reason alone, incompatible with the rule of law.[8] As this article seeks to demonstrate, such concepts are an important part of the legal toolkit, especially when one starts from the premise, as we do, that the primary criterion for judging the efficacy of legal rules, principles, standards and directives is that they are both rational and capable of delivering 'real justice' for those subject to them.

[7] Joseph Raz, 'The Rule of Law and Its Virtue' in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) 210, 214, 222.

[8] See generally Jeremy Waldron, 'Vagueness and the Guidance of Action' in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (Oxford University Press, 2011) 58. See also Matthew Harding, 'Equity and the Rule of Law' (2016) 132 (April) *Law Quarterly Review* 278, emphasising that 'discretion' and 'unconscionability' in equity are not inconsistent with rule of law requirements: at 284–6, 291, 294.

This article proceeds as follows. In Part II, we consider the use of uncertainty arguments in law in general and provide specific examples of uncertainty objections that have been made in the private law context. In Part III, we briefly consider the widespread use of 'general concepts' in private law adjudication before, in Part IV, supporting our observations with specific examples of rules, principles and formulations that are vulnerable to attack on uncertainty grounds, but which are nevertheless entrenched in private law. We then turn to consider a concept that has struggled to achieve the same level of acceptance among courts and (particularly) modern commentators — namely, lawful-act duress. In Part V, we offer some observations about the persuasive force of arguments that are directed at the legitimacy and functionality of open-textured legal concepts, before briefly concluding in Part VI.

II Certainty in Law in General

A *Examples of Uncertainty Arguments*

Demands for 'certainty' in the law tend to reflect at least two different, albeit interwoven, aims: (1) certainty as to the *correct formulation* of the relevant legal rules, principles or criteria *dehors* a particular case — hereinafter referred to as 'expositional certainty'; and (2) certainty as to the *outcomes* of the application of those rules, principles or criteria in a particular case — hereinafter referred to as 'predictive certainty'. Legal certainty, particularly of the predictive variety, may also be diminished not because the relevant legal rule, principle or criterion is inherently uncertain, but rather in virtue of challenges presented in ascertaining the *factual basis* of the particular dispute needing to be resolved.[9] That, however, is a matter not pursued here. All else being equal, any factual uncertainty will naturally be compounded by concurrent legal uncertainty.

Expositional uncertainty is not uncommon, although conflicting or confusing decisions as to the substantive law may, over time, become resolved. A recent example is the resolution by the United Kingdom Supreme Court in *Patel v Mirza* ('*Patel*') of ongoing uncertainty — following dissatisfaction with the decision of a divided House of Lords in *Tinsley v Milligan*[10] and conflicting statements in the Supreme Court[11] — as to the applicable test for determining

[9] See generally EW Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press, 2005) 122–3, 321–7.

[10] [1994] 1 AC 340.

[11] See *Hounga v Allen* [2014] 1 WLR 2889, 2903 [40]–[42] (Lord Wilson JSC, Baroness Hale DPSC and Lord Kerr JSC agreeing); *Bilta (UK) Ltd (in liq) v Nazir [No 2]* [2016] AC 1, 61–2 [171]–[173] (Lords Toulson and Hodge JJSC). Cf *Les Laboratoires Servier v Apotex Inc*

whether a claim is unenforceable as a result of illegality.[12] However, uncertainty in *stating* the law is unlikely the chief concern of those critical or intolerant of legal uncertainty. Rather, it is the uncertain *application*, actual or feared, of indeterminate concepts, principles and rules (etc) that is the target of much of the scrutiny and commentary in the field,[13] and which is the focus of this article. A principle or directive that 'the court *may*, in a defined circumstance, π, choose among outcomes A to Z' is certain in the expositional sense, but potentially unpredictable in the outcomes that will be produced from case to case.

Calls for greater legal certainty are ongoing across the various departments of private law. Multiple examples exist, but recent ones include:

1 A call for less discretion and more fixed rules in determining apportionment for contributory negligence.[14]

2 Rejection of a so-called 'broad doctrine of unconscionability', by reason of it being, according to the Singapore Court of Appeal, 'riddled with a lack of legal clarity' and hence too vague, uncertain and unpredictable to function as a substantive legal doctrine,[15] in favour of a 'much narrower', 'middle

[2015] AC 430, 447 [28], 449 [30] (Lord Sumption JSC, Lord Neuberger PSC and Lord Clarke JSC agreeing).

[12] In *Patel* (n 3) 499–501 [101]–[109] (Lord Toulson JSC, Baroness Hale DPSC, Lords Kerr, Wilson and Hodge JJSC agreeing), the majority of the Court adopted a flexible and multifactorial approach to determining whether illegality precludes enforcement of legal rights. That test still leaves unresolved questions as to what it precisely entails: see, eg, Ernest Lim and Francisco J Urbina, 'Understanding Proportionality in the Illegality Defence' (2020) 136 (October) *Law Quarterly Review* 575. Perhaps unsurprisingly, the majority approach has been criticised by other judges and commentators on vagueness and uncertainty grounds: see *Patel* (n 3) 529 [217] (Lord Clarke JSC), 544–7 [262]–[265] (Lord Sumption JSC, Lord Clarke JSC agreeing); James Goudkamp, 'The End of an Era? Illegality in Private Law in the Supreme Court' (2017) 133 (January) *Law Quarterly Review* 14, 16–17 ('The End of an Era?').

[13] See below Part IV.

[14] James Goudkamp, 'Apportionment of Damages for Contributory Negligence: A Fixed or Discretionary Approach?' (2015) 35(4) *Legal Studies* 621, 640–7, seemingly supported by Robert Stevens, 'Should Contributory Fault Be Analogue or Digital?' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Tort* (Hart Publishing, 2015) 247, 264 ('Contributory Fault'). See also the discussion of attempts to formulate bright-line rules for the recoverability of 'pure' economic loss in tort law: Kit Barker, 'Relational Economic Loss and Indeterminacy: The Search for Rational Limits' in Simone Degeling, Justice James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Lawbook, 2011) 163 ('Relational Economic Loss').

[15] *BOM* (n 2) 389 [121] (Andrew Phang Boon Leong JA for the Court). See also at 394 [133], 412 [176]. For commentary, see Rick Bigwood, 'Knocking Down the Straw Man: Reflections on *BOM v BOK* and the Court of Appeal's "Middle-Ground" Narrow Doctrine of Unconscionability for Singapore' [2019] (March) *Singapore Journal of Legal Studies* 29; Burton Ong, 'Unconscionability, Undue Influence and Umbrellas: The "Unfairness" Doctrines in Singapore Contract Law after *BOM v BOK*' [2020] (March) *Singapore Journal of Legal Studies* 295.

ground' doctrine of the same name.[16] The Court was scathing of an equitable exculpatory doctrine that it perceived to be

> very much like a broad discretionary legal device which permits the court to arrive at any decision which it thinks is subjectively fair in the circumstances — or, at least, does not provide the sound legal tools by which the court concerned can explain how it arrived at the decision it did based on principles that could be applied to future cases of a similar type.[17]

3 Reiteration by some of a narrow and technical approach to the 'unjust enrichment' concept in English law,[18] and a retreat by others from using that concept as a determinative principle — that is, as a standalone mechanism for deciding cases — as opposed to a general umbrella concept for rubricising multiple causes of action.[19] Although scepticism about the utility of unjust enrichment is increasingly emerging, it is important to appreciate that there are at least two distinct categories of fundamental objections to the concept: (a) criticisms that derive less from its use as a general concept, and

[16] *BOM* (n 2) 398–9 [144], 404 [158] (Andrew Phang Boon Leong JA for the Court). See also at 411–13 [175]–[180].

[17] Ibid 401 [148] (emphasis in original). Similar concerns were expressed recently by Brown J and Côté J against the majority's generous formulation of the unconscionability doctrine for Canada: *Uber Technologies* (n 2) 228 [103], 251–2 [163], 255 [170] (Brown J), 277 [237], 284 [257] (Côté J).

[18] See, eg, Graham Virgo, '"All the World's a Stage": The Seven Ages of Unjust Enrichment' (Research Paper No 51/2016, Faculty of Law, University of Cambridge, September 2016) 25–7. For a riposte, see Steve Hedley, '"And So the Legal World Goes Round": The Search for a Meaningful Law of Restitution' (Research Paper, School of Law, University College Cork, October 2016). Earlier writing of the same author had already noted the trend towards an ever-narrowing law of unjust enrichment: Steve Hedley, 'The Taxonomic Approach to Restitution' in Alastair Hudson (ed), *New Perspectives on Property Law, Obligations and Restitution* (Cavendish Publishing, 2004) 151, 151; Steve Hedley, 'The Empire Strikes Back? A Restatement of the Law of Unjust Enrichment' (2004) 28(3) *Melbourne University Law Review* 759, 762.

[19] See, most recently, Lionel Smith, 'Restitution: A New Start?' in Peter Devonshire and Rohan Havelock (eds), *The Impact of Equity and Restitution in Commerce* (Hart Publishing, 2019) 91, recanting previous enthusiasm for unjust enrichment as a single determinative concept: at 95–6. For criticism of the consequences of applying an expansionist view of unjust enrichment, see Peter G Watts, '"Unjust Enrichment": The Potion That Induces Well-Meaning Sloppiness of Thought' (2016) 69(1) *Current Legal Problems* 289; Robert Stevens, 'The Unjust Enrichment Disaster' (2018) 134 (October) *Law Quarterly Review* 574. The United Kingdom Supreme Court may now also be retreating from unjust enrichment as establishing legal tests (via its four questions) of liability: *Investment Trust Companies v Revenue and Customs Commissioners* [2018] AC 275, 295–6 [41]–[45] (Lord Reed JSC, Lord Neuberger PSC, Lords Mance, Carnwath and Hodge JJSC agreeing).

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more from attempts to subsume such a diverse range of distinct restitutionary heads within a singular claim;[20] and (b) objections to the *use* of unjust enrichment as a general principle or guide to analysis at all.[21]

4 In the remedial context, continuing criticisms of the remedial constructive trust: for example, by Lord Neuberger, writing extrajudicially, claiming that 'it is unprincipled, incoherent and impractical, [and] that it renders the law unpredictable',[22] and Sarah Worthington's description of *discretion* in the award of proprietary remedies for breach of fiduciary duty — 'just when proprietary consequences really matter' — as having little to recommend it.[23]

5 The sentiments of Lord Neuberger and Worthington reflect criticisms of the utility of equity more generally, including its liberal resort to 'unconscionability' and its tolerance of discretion in remedy selection,[24] particularly when such might impact adversely upon property rights or the finality of concluded transactions. Unsurprisingly, perhaps, it is often *equitable* concepts that are subject to the greatest scrutiny (including trenchant criticism), in contrast to other unpredictable and yet equally difficult to apply *common law* concepts, such as 'reasonableness' — on which more below.

6 The recent call by Paul Davies and William Day, among others,[25] for courts to explicitly reject lawful-act duress as a legal category — 'such an open-ended doctrine', they assert — so as to 'place the law on a more certain and

[20] See Kit Barker, 'Unjust Enrichment in Australia: What Is(n't) It?' (2020) 43(3) *Melbourne University Law Review* 903, 928–31 ('Unjust Enrichment').

[21] See, eg, Frederick Wilmot-Smith, 'Should the Payee Pay?' (2017) 37(4) *Oxford Journal of Legal Studies* 844, 849. Cf Barker, 'Unjust Enrichment' (n 20) 904–5, who is of the view that there is an increasing acceptance of such a role for unjust enrichment in the High Court of Australia.

[22] Lord Neuberger, 'The Remedial Constructive Trust: Fact or Fiction' (Conference Paper, Banking Services and Finance Law Association Conference, 10 August 2014) [6]. See also Orestis Sherman, 'Orthodoxy Reasserted: Tempering the Support for the Remedial Constructive Trust' (2018) 24(9) *Trusts & Trustees* 860, arguing that the discretionary constructive trust generates 'unacceptable uncertainty' and is 'opposed to the rule of law': at 866, 868.

[23] Sarah Worthington, 'Fiduciary Duties and Proprietary Remedies: Addressing the Failure of Equitable Formulae' (2013) 72(3) *Cambridge Law Journal* 720, 725–6 ('Fiduciary Duties'); Sarah Worthington, 'Four Questions on Fiduciaries' (2016) 2(2) *Canadian Journal of Comparative and Contemporary Law* 723, 752–3.

[24] See, eg, Virgo (n 18) 23, writing that 'it may be that conscience is simply a cypher for the exercise of arbitrary choice by the judge'. Cf Harding (n 8).

[25] See, eg, Rex Ahdar, 'Contract Doctrine, Predictability and the Nebulous Exception' (2014) 73(1) *Cambridge Law Journal* 39, 44–7, 57. While not completely rejecting lawful-act duress, Ahdar is critical of the 'nebulous' test used in determining a claim in this legal category for being founded on what is 'morally or socially unacceptable': at 44, 57.

stable footing'.[26] Such a call is specifically in defence[27] of the (in our view) lamentable decision of the England and Wales Court of Appeal in *Times Travel (UK) Ltd v Pakistan International Airlines Corpn* ('*Times Travel*').[28] Importantly, for present purposes, Davies and Day rehearse a number of assertions about the uncertainty of a range of legal concepts, including lawful-act duress.[29] The authors state that the basis for determining whether lawful pressure amounts to duress is a 'very vague test', which should be rejected because 'courts should not embark upon questions of moral entitlement'.[30] Lawful-act duress, they say, turns on 'the fuzzy idea of "morally or socially unacceptable conduct"'.[31] Suffice it for now to observe that, although this might not transpire to be the best way of formulating the test for gauging the legitimacy (or otherwise) of pressure applied by lawful means, it does seem rather odd to suggest that courts are *not* (or ought not to be) in the business of adjudging 'questions of moral entitlement' or the legitimacy or social acceptability of the conduct of those who ultimately petition them to dispense interpersonal justice. It is also worth noting that, in the United States, lawful-act duress is a well-established aspect of the general law of contract[32] — but more on duress below.

For now, it seems clear that arguments about the need for concepts that are predictable in their application reflect an emphasis on legal certainty as one of the most desirable of all legal ends. It is possibly in the nature of things that practising lawyers 'prefer rules to indeterminate standards'.[33] The late Peter

[26] Paul S Davies and William Day, '"Lawful Act" Duress' (2018) 134 (January) *Law Quarterly Review* 5, 9. See also Paul S Davies and William Day '"Lawful Act" Duress (Again)' (2020) 136 (January) *Law Quarterly Review* 7, 10. To a large extent, the authors reiterate views expressed by the New South Wales Court of Appeal in *Australia & New Zealand Banking Group v Karam* (2005) 64 NSWLR 149 ('*Karam*') 168 [66]. But see *Thorne v Kennedy* (2017) 263 CLR 85, 114–15 [71]–[73] (Nettle J); Claudia Carr, 'Lawful Act Duress in Australia' (2020) 13(3) *Journal of Equity* 292.

[27] See Davies and Day, '"Lawful Act" Duress (Again)' (n 26) 7.

[28] [2020] Ch 98, 124–6 [96]–[105] (David Richards LJ, Moylan LJ agreeing at 128 [116], Asplin LJ agreeing at 128 [117]) ('*Times Travel*') — on which more below. Note that an appeal in this case was argued before the United Kingdom Supreme Court in November 2020 but, as at the time of writing, no decision has been handed down by their Lordships: see 'Pakistan International Airline Corporation (Respondent) v Times Travel (UK) Ltd (Appellant)', *The Supreme Court* (Web Page) <https://www.supremecourt.uk/cases/uksc-2019-0142.html>, archived at <https://perma.cc/GU5M-7UUA>.

[29] See Davies and Day, '"Lawful Act" Duress (Again)' (n 26) 9–10.

[30] Ibid 9.

[31] Ibid 10.

[32] See American Law Institute, *Restatement (Second) of Contracts* (1981) § 176.

[33] See, eg, *Perre v Apand* (1999) 198 CLR 180, 212 [81] (McHugh J).

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Birks once said that '[t]he law must be so stated as to facilitate prediction and advice',[34] citing Bagnall J in *Cowcher v Cowcher*[35] to the effect that the only justice that can be achieved is that flowing 'from sure and settled principles to proved or admitted facts'.[36] Again, basic rule of law concerns may well underlie the attitude of many who distrust general concepts in the hands of society's official decision-makers. Still, others have refuted the notion that bright-line rules are perforce superior to 'vague standards' in regard to certainty and predictability.[37]

B *Flexibility in the Law as a Desirable Quality*

The pursuit of legal certainty — of either the expositional or the predictive variety — is not, however, a universally held priority. For many, it is a lower-order priority than justice and rationality. As has been argued in the context of tort liability for pure economic loss, for example, the value of rationality must be accorded priority over that of certainty:

> This is because certainty is only a relative value and can hence be outweighed by other considerations, whereas rationality is an ultimate value in the sense that it is embedded in our reason and those who make the law cannot — whatever else they do — disclaim their responsibility to reason.[38]

One consequence of such an assignment of priority away from legal certainty may be an acceptance of greater flexibility in the law and its applications[39] — an acceptance that is often associated with, but not confined to, equity. Indeed, the use of such concepts and standards as determinative juristic tools is ubiquitous at common law, in equity and under statute.[40] And it is Parliaments that

[34] Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26(1) *University of Western Australia Law Review* 1, 97 ('Equity in the Modern Law').

[35] [1972] 1 WLR 425, 430.

[36] Birks, 'Equity in the Modern Law' (n 34) 23. See also Peter Birks, 'Annual Miegunyah Lecture: Equity, Conscience, and Unjust Enrichment' (1999) 23(1) *Melbourne University Law Review* 1, 20–2 ('Equity, Conscience, and Unjust Enrichment'); Charles Rickett, 'Unconscionability and Commercial Law' (2005) 24(1) *University of Queensland Law Journal* 73.

[37] See Ofer Raban, 'The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism' (2010) 19(2) *Boston University Public Interest Law Journal* 175, 175.

[38] Barker, 'Relational Economic Loss' (n 14) 175.

[39] See, eg, Ken Oliphant, 'Against Certainty in Tort Law' in Stephen GA Pitel, Jason W Neyers and Erika Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Hart Publishing, 2013) 1, 1.

[40] See generally Joachim Dietrich, 'Giving Content to General Concepts' (2005) 29(1) *Melbourne University Law Review* 218.

often bestow the widest discretion upon adjudicators.[41] One only needs to note, for example, the statutory power conferred upon the court to apportion damages between joint wrongdoers as is 'just and equitable having regard to the extent of that person's responsibility for the damage' in question.[42] Another example is the so-called 'contract statutes' in New Zealand — a shared salient feature of a number of which is the broad discretionary power conferred upon courts to grant relief, or to authorise variation or discharge of a contract in specified circumstances, including, ultimately, ordering whatever the court thinks 'just' (or 'just and practicable').[43] Legislation, however, is not the focus of this article. Certainty advocates tend to disregard statutes, perhaps because legislatively mandated concepts cannot be made to disappear by criticism targeting uncertainty in their application and, in any case, statutes are often viewed as an inconvenience to the coherent taxonomisation of law.[44]

These private law debates sit within a much broader dialectic about the desirability of tightly circumscribed rules over more flexible and general, but consequently, perhaps, also less predictively certain, principles and standards.[45] Although calls for certainty are a dominant theme of that dialectic, the possibility remains that, regardless of the form that a regulative or adjudicative directive initially takes — that is, whether it commences as a hard 'rule' or as a flexible 'standard' — the 'adaptive behaviour' of institutions and decision-makers will eventually see most 'rules' pushed towards becoming 'more standard-like' in their application, and vice versa.[46] Moreover, it is recognised that open-ended approaches are often preferable when formulating directives aimed at

[41] See generally Justice Mark Leeming, 'Equity: Ageless in the "Age of Statutes"' (2015) 9(2) *Journal of Equity* 108, 116 ('Equity').

[42] See, eg, *Civil Liability (Contribution) Act 1978* (UK) s 2(1); *Wrongs Act 1958* (Vic) s 24(2) ('*Wrongs Act*').

[43] See, eg, *Contract and Commercial Law Act 2017* (NZ) ss 16, 28, 43, 62–4, 76; Brian Coote, *Coote on the New Zealand Contract Statutes*, ed JW Carter and John Ren (Thomson Reuters, 2017) 20–6.

[44] Some theorists oppose statutory intrusions as undermining the project to rationalise the law: see, eg, Ross Grantham, 'The Equitable Basis of the Law of Restitution' in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (Lawbook, 2005) 349, 349 n 1. But see Justice Mark Leeming, *The Statutory Foundations of Negligence* (Federation Press, 2019) v. We side with James Goudkamp and John Murphy, 'Tort Statutes and Tort Theories' (2015) 131 (January) *Law Quarterly Review* 133, who question the validity of theories of private law that discount large portions of applicable law: see especially at 136.

[45] See, eg, Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81(5) *Yale Law Journal* 823, 841–2.

[46] Frederick Schauer, 'The Convergence of Rules and Standards' [2003] (3) *New Zealand Law Review* 303, 319.

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the regulation of human conduct or social behaviour.[47] For example, broad regulative directives that afford adjudicators leeway of choice in determining whether certain conduct is, say, unconscientious in all the circumstances may result in conduct that is normatively superior to that which would result from leaving parties free to exploit bright-line rules.[48] The application of general principles may even achieve outcomes that are more certain than if an inflexible rule were adopted. John Braithwaite, for example, has argued that in regulating 'complex actions in changing environments' involving large economic interests, a mix of binding general principles and (non-binding) specific rules is more effective and more likely to lead to meaningful compliance — that is, to 'enable legal certainty' — than specific rules.[49] We merely note that significant portions of private law, such as fiduciary regulation, govern conduct subsumed by Braithwaite's category of complex, economically significant human activity.

Uncertainty, then, may have its beneficial uses.[50] In the words of Chief Justice James Allsop, writing extra-curially, '[t]rue "certainty" in many situations comes from embracing [the] uncertainty' that comes from interacting with the world in a way that is 'more experiential and contextualised, and necessarily less explicit and clear'.[51]

[47] Aristotle reminds us that

> the whole account of matters of conduct must be given in outline and not precisely, as … the accounts we demand must be in accordance with the subject-matter; matters concerned with conduct and questions of what is good for us have no fixity, any more than matters of health.

Aristotle, *The Nicomachean Ethics*, tr David Ross (Oxford University Press, 2009) bk II, 24.

[48] Henry Mather, *Contract Law and Morality* (Greenwood Press, 1999) 82. Cf Waldron (n 8) 74–5.

[49] John Braithwaite, 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 *Australian Journal of Legal Philosophy* 47, 53, 75.

[50] See, eg, Yuval Feldman and Shahar Lifshitz, 'Behind the Veil of Legal Uncertainty' (2011) 74 (Spring) *Law and Contemporary Problems* 133; Timothy Endicott, 'The Value of Vagueness' in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (Oxford University Press, 2011) 14; Ira Chadha-Sridhar, 'The Value of Vagueness: A Feminist Analysis' (2021) 34(1) *Canadian Journal of Law & Jurisprudence* 59. This is not the same as arguing that technical legal terms should be used indiscriminately, 'loosely' or 'inaccurately', or in 'different senses', the dangers of which are discussed by Sir Wilfred K Fullagar, 'Legal Terminology' (1957) 1(1) *Melbourne University Law Review* 1, 2. Similarly, general terms may be used in differential ways, creating uncertainty as to the intended meaning. As O'Connor J stated in *Bowtell v Goldsbrough, Mort & Co Ltd* (1905) 3 CLR 444, 457, 'ambiguity arises frequently from the use of general words'.

[51] Chief Justice James Allsop, 'Uncertainty as Part of Certainty: Appreciating the Limits of Definitional Clarity and Embracing the Uncertainty Inherent in Any Matter of Complexity' (Conference Paper, Australian Academy of Science and Australian Academy of Law Joint Symposium, 23 August 2018) 1 [1]. See also at 2 [5], 4 [9]; Waldron (n 8) 62, 82.

Arguments about uncertainty are also difficult to evaluate because it is never possible to articulate precisely *how much* uncertainty is acceptable or unacceptable, whether generally or in a specific case, even assuming that some reliable measure of quantitative (un)certainty is available for the purpose at all. When does the application of a jural concept cross some demonstrable boundary into excessive unpredictability? Presumably, this may depend on the type of human interaction being regulated. In short, how much 'certainty' can we reasonably expect, or even *want*, especially in those jural contexts where difficult, instance-specific and all-things-considered judgements are inevitable, particularly given the normative complexity and factual variability endemic to law and its practical applications? There are simply no ready answers to such questions; yet, this inherent inability to measure certainty (or its absence) in some exact quantitative fashion functions as a natural barrier to the ready refutation of uncertainty arguments.

That said, we would suggest that opponents and proponents of flexible standards and adjudicator discretion are not really in direct opposition; nor, indeed, are they even necessarily at respective ends of a polar spectrum. Rather, the differences between those who stress certainty over flexibility, or vice versa, appear to be more ones of emphasis and priority. For no one really argues that legal directives must invariably be black and white, rigid and inflexible, regardless of circumstance. Nor, do we hazard, would those in favour of greater flexibility reject the proposition that, to the greatest extent possible, the application of legal rules and principles should be clear, stable and conducive to predictive certainty.[52] The controversy is always going to concern the matter of where, and possibly how, the optimal balance is to be struck, if not generally then in individual cases.

Regardless, it is nevertheless pertinent to demonstrate that arguments — or, more commonly, assertions — of excessive uncertainty are selectively made, and that such arguments ignore the pervasive, and unavoidable, use of general concepts in private law adjudication.

III General Concepts in Private Law

It is uncontroversial, we hope, to observe that one of the fundamental roles of private law is to adjudicate claims involving the competing demands of parties

[52] See, eg, *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296 ('*Grimaldi*'), favouring a discretionary approach to remedies, but recognising that, nonetheless, in most factual circumstances, the remedies are self-selecting: at 402–3 [503] (Finn, Stone and Perram JJ).

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(and their interests) with regard to their interactions, transactions or relationships with each other as non-state actors,[53] based on normative (and other) considerations that underpin and constrain the law and legal reasoning. As James Penner has stated, legal principles should be

> moral truth, not just reasonable or rational. Being reasonable is better than being unreasonable, of course, but whatever the coherence or intelligibility of our reasons for instituting this norm or that, the merit in that comes a distant second to the achievement of getting it right. This is not to be regarded as an anti-intellectual posture or a claim that we should proceed on the basis of untutored intuition. It is rather to suggest that the validity of legal theories, in much the same way as scientific theories, depends not only on their intellectual coherence, though that is a minimum requirement, but also on their ability to reflect reality.[54]

Granted, the theoretical foundations of a particular liability or remedial rule may be contestable, or not always clearly articulated or understood — of which more below — but nonetheless, whatever those foundations *are* precisely, they are juristically expressed via more particularised rules, principles, doctrines and criteria that are intended to resolve disputes in a manner that coordinates with the informing foundations. And, of course, given that a dispute may engage a number of different legal principles (etc), not all of which may coexist in harmony with one another,[55] it is unsurprising that many private law disputes fall to be resolved by a common law method of rule/principle/doctrine-formulation and/or adjudication that is characterised by a 'balancing [of] competing interests', which 'recognis[es] that a just outcome may be a qualified one'.[56] Moreover, because of the need to accommodate 'a socially directed rule … to the infinite variety of human conduct', it follows that common law dispute resolution is frequently achieved via rules (etc) that are expressed essentially as 'abstraction[s]'.[57] And often relevant to the formulation and application of those abstractions are underlying normative or 'moral' considerations. As Lord Steyn observed in *Smith New Court Securities Ltd v Citibank NA*, 'I make

[53] This includes the state when acting in a non-state, rather than public, capacity.

[54] JE Penner, 'Basic Obligations' in Peter Birks (ed), *The Classification of Obligations* (Clarendon Press, 1997) 91, 121.

[55] See, eg, Stephen Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge University Press, 2003) 1–2, 14–15, 142, 165.

[56] Justice William Gummow, 'The Strengths of the Common Law' (2014) 44(3) *Hong Kong Law Journal* 773, 777, noting the administration of equity's doctrines and remedies.

[57] Justice WMC Gummow, *Change and Continuity: Statute, Equity, and Federalism* (Oxford University Press, 1999) 18.

no apology for referring to moral considerations. The law and morality are inextricably interwoven.'[58]

Legal concepts, therefore, often present as open-ended or 'open-textured' in nature and form.[59] In many instances the common law shapes the contours of private rights and obligations, and their attendant limitations, by reference to general concepts couched in the manner of abstract terms or phrases — 'reasonableness', 'good faith', 'good conscience', 'consent', 'unjust enrichment', 'fiduciary relationship', and the like.[60] In short, general concepts are an innate and indispensable part of the process of law and legal reasoning, and hence of the vocabulary of lawmakers, legal adjudicators and commentators; their use is unavoidably pervasive throughout the entire law as a system akin, in many respects, to one of practical moral reasoning.[61]

Importantly, many — perhaps most — general legal concepts are not capable of *definition*.[62] Yet this is no barrier, necessarily, to their utility as apparatus of the law: 'Many concepts in our law are vague but manageable. Indeterminacy warrants care in application rather than rejection.'[63] As the examples provided in Part IV below demonstrate, the law routinely enlists general concepts to adjudicate the rights and obligations of litigants,[64] and it remains authoritative in doing so.

[58] [1997] AC 254, 280. See also Ralph S Bauer, 'The Degree of Moral Fault as Affecting Defendant's Liability' (1933) 81(5) *University of Pennsylvania Law Review and American Law Register* 586, 588–9, quoting *Derosier v New England & Telegraph Co*, 130 A 145, 152–3 (Snow J) (NH, 1925).

[59] Allsop (n 51) 1 [2].

[60] Hence, the term 'general concepts' is here being used synonymously with some uses of the word 'principle' (eg when we refer to a 'principle of good faith'). But the term 'principle' is also used in other, narrower, ways.

[61] We do not want to be taken as suggesting that legal reasoning and moral reasoning are identical. But legal reasoning is often *like* moral reasoning — certainly in comparison to the forms of reasoning appropriate to mathematics and science: see, eg, Charles Fried, 'Right and Wrong: Preliminary Considerations' (1976) 5(2) *Journal of Legal Studies* 165, 183–4. See also Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon Press, 1978) 272, suggesting that 'legal reasoning is a special, highly institutionalized and formalized, type of moral reasoning'.

[62] Allsop (n 51) 4 [10]. See also Paul Finn, 'Unconscionable Conduct' (1994) 8(1) *Journal of Contract Law* 37, 37; Jane Stapleton, 'Good Faith in Private Law' (1999) 52(1) *Current Legal Problems* 1, 10.

[63] Rick Bigwood, 'Conscience and the Liberal Conception of Contract: Observing Basic Distinctions' (Pt 1) (2000) 16(1) *Journal of Contract Law* 1, 7 (citations omitted).

[64] Some general concepts may serve other purposes: for example, as an organising principle ordering and explaining more specific doctrines and concepts, or as merely a relevant consideration forming *part* of the adjudicative process (eg unconscionability as one element of determining, say, a claim in equitable estoppel).

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General legal concepts, it must also be acknowledged, are never 'at large' or 'free-floating'; they are constrained, hence disciplined, in their application by context, orthodox judicial methodology, precedent, and the use of standard control-devices that narrow the range of their potential operation.[65] As Sir Anthony Mason has stated, with reference to equity generally, and unconscionability specifically, criticisms of 'unconscionable conduct' as lacking in precision and certainty are exaggerated:

> In other, sometimes related, fields, we have become accustomed to dealing with concepts that do not lend themselves to precise definition — fraud, undue influence, the duty of care in negligence. Like these concepts, unconscionability involves matters of fact, degree and value judgment so that, to the extent necessary, greater guidance will come from an array of decisions in particular situations.[66]

The purpose of this article is not to ponder or belabour the merits (or demerits) of the various legal concepts that are used to exemplify the points made; rather, it is to demonstrate their pervasiveness *despite* their flexibility and hence potential instability in application, their lack of definitional precision, and their intrinsic appeal to standards of conduct or normative concerns calling for the exercise of (expert) judgement, including the balancing of competing considerations or desiderata (whether in the formulation of the legal directive itself or in its subsequent applications to concrete disputes as they arise and are ventilated before an official decision-maker). Moreover, that such concepts pervade many contexts without attracting critique or scrutiny is a reflection of the legitimacy of their use despite the predictive uncertainty that they undeniably engender.

IV Legal Concepts That Are Vulnerable to Attack on Uncertainty Grounds

As observed at the outset of this article, 'uncertainty' is often selectively used by courts and commentators as a basis for denouncing (targeted) legal concepts, doctrines, principles, criteria (etc) in private law. Although we commence this part with a concept that has doubtless attracted greater scrutiny and criticism than any other — 'unconscionability' — we shall quickly turn to other well-established legal concepts (etc) that appear to escape comparable audit and adverse commentary, despite being seemingly afflicted with the equiv-

[65] See Thomas (n 9) 241–9.

[66] Sir Anthony F Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 (January) *Law Quarterly Review* 66, 89.

alent vice of producing predictive uncertainty in application. Given space constraints, only a handful of examples from different areas of the private law must suffice to illustrate the point. The final example we discuss — that of lawful-act duress — is not yet a well-established common law doctrine; rather, it is one whose acceptance has itself been challenged resoundingly on the basis of uncertainty. But the doctrine affords a useful opportunity to reflect on the problems associated with 'lawful' pressure, and for ultimately concluding that resort to 'unlawfulness' as the test for duress in no way spares the adjudicator of having to make difficult judgements (with the consequent unpredictability that attends such a task).

The examples below illustrate that it is not application uncertainty per se that necessarily precludes the important role performed by open-textured concepts or standards in private law. Where difficulties arise, this can often stem from basic judicial failure, in advance of applying such concepts or standards, to articulate, in a convincing and coherent fashion, the normative underpinnings or animating purposes of the particular concept or standard enlisted in the resolution of the dispute brought before the court.

A *Unconscionability*

This concept has been the subject of rather heated ongoing debate, and the arguments on both sides have been well canvassed in scholarly contributions dedicated to the subject.[67] We do not intend to rehearse all of those arguments, especially since the role of *unconscionability* is itself markedly diverse. It may function, in its varying contexts, as: (1) little more than a high-level organising idea; or (2) as an aspect or ingredient of a series of more particularised inquiries that each constitute a distinct equitable cause of action or basis for intervention;[68] or (3) as a determinative substantive doctrine in its own right — that is, the specific equitable jurisdiction to relieve against an unconscionable bargain/dealing.[69] Suffice it to observe that despite the pedigree of the equitable concept of 'conscience' in centuries of equity jurisprudence, a number of legal commentators continue to treat it with distrust or disfavour, especially in connection with commercial activity.[70] Despite the criticism, however, equity's

[67] As demonstrated by the numerous citations in this article: see especially above nn 15–17, 62–63.

[68] See, eg, Dennis R Klinck, '"The Nebulous Equitable Duty of Conscience"' (2005) 31(1) *Queen's Law Journal* 206, and his discussion of 'conscience factors' or 'conscience categories' in particular: at 216–57.

[69] See, eg, Rickett (n 36) 75–81.

[70] See above nn 35, 37.

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longstanding concern with conscience has remained an integral part of modern jurisprudence and, indeed, has been enshrined in statute in Australia.[71] This is notwithstanding the obvious plasticity inherent in the concept, and is also in keeping with the generalised aim of equitable administration itself, which is to look 'to every connected circumstance that ought to influence [the court's] determination upon the real justice of the case'.[72]

Regardless of its role, it is important to stress that although unconscionability remains an open-textured notion that necessitates evaluation of a defendant's conduct against some normative standard of propriety — for example in the interpersonal treatment of another in a dealing or transaction — the question of whether conduct is *unconscionable* (or not) does not roam at large. The notion of unconscionability only comes into play by reference to the specific requirements or particularised application criteria of discrete doctrines that are themselves informed by the concept of conscience as developed by the courts over time.[73] Unconscionability, then, has developed 'in its many guises'.[74] Consequently, trenchant criticisms of unconscionability as somehow inviting or authorising undisciplined appeals to idiosyncratic notions of ('palm tree') justice are stripped of persuasive force.[75] And to the extent that scope remains for leeway of judicial choice in the determination of outcomes, it should be noted that such criticisms appear to neglect (or ignore) the fact that even discretionary decision-making is disciplined by the usual institutional and practical constraints upon judges in the performance of their normal constitutional role, not least of which is the obligation to rationally justify, with published reasons, any decisions rendered in the name of a particular legal or equitable concept or doctrine. 'Discretionary' is thus not synonymous with 'arbitrary'.[76]

[71] See, eg, *Competition and Consumer Act 2010* (Cth) sch 2 ss 20–2 ('*Australian Consumer Law*'); *Australian Securities and Investments Commission Act 2001* (Cth) ss 12CA–12CC.

[72] *The Juliana* (1822) 2 Dods 504; 165 ER 1560, 1567 (Lord Stowell). See *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113, 118–19 (Dixon CJ, McTiernan and Kitto JJ), citing Lord Stowell's statement with approval: at 119. See also *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, 401 [18], 426 [122]–[123] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

[73] See, eg, *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2000) 96 FCR 491, 498–500 [14]–[15], 502 [21] (French J), revd (2003) 214 CLR 51 ('*Berbatis (High Court)*').

[74] Paul Finn, 'Equitable Doctrine and Discretion in Remedies' in WR Cornish et al (eds), *Restitution: Past, Present and Future* (Hart Publishing, 1998) 251, 257. See also Finn, 'Unconscionable Conduct' (n 62).

[75] This assumes, however, that the criteria themselves are both accurately reflective of the underlying purpose(s) of the jurisdiction and workable.

[76] See HLA Hart, 'Discretion' (2013) 127(2) *Harvard Law Review* 652, 665. See also Harding (n 8) 284, 291, 294, doubting whether equity's 'tolerance of indeterminacy' undermines the rule of law.

B *'Reasonableness' in the Tort of Negligence*

Liability for breach of a duty of care in the tort of negligence is determined by answering the question of whether a defendant took 'reasonable' care to avoid a foreseeable — and legally cognisable — injury to the plaintiff in the circumstances of the case at hand.[77] The question is whether the defendant fell below a legally determined standard of acceptable conduct by failing to take reasonable precautions against a foreseeable risk.[78] Reasonableness of conduct is the sole criterion by which a person's actions (or omissions) are assessed and adjudged to constitute a breach of duty (or not). As Alderson B observed in *Blyth v Birmingham Waterworks Co*:

> Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.[79]

Granted, the law has laid down further factors to consider in making such a determination. In Australia, for example, the common law is encapsulated in Mason J's classic statement in *Wyong Shire Council v Shirt*, where his Honour noted that a determination of whether a reasonable person ought to have taken a particular precaution against a foreseeable risk requires

> a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have …[80]

This is generally described as the calculus of negligence.[81] Indeed, the first three considerations are occasionally presented in terms of an algebraic formula:

[77] See *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47–8 (Mason J) ('*Wyong Shire Council*'). 'Reasonableness' is used in a wide variety of contexts other than as a standard of *care* in conduct. For example, see the use of 'reasonableness' in the context of defences to racial vilification as requiring rationality and proportionality in communication: *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, 128–9 [78]–[82] (French J).

[78] *Wyong Shire Council* (n 77) 47–8 (Mason J).

[79] (1856) 11 Exch 781; 156 ER 1047, 1049.

[80] *Wyong Shire Council* (n 77) 47–8 (Mason J).

[81] In Australia, the requisite test of reasonableness in setting and applying the standard of care is now contained in statute, but the various statutory schemes largely adopt the same language as Mason J, restating the question in terms of whether 'a reasonable person would have taken precautions' against a foreseeable risk, by reference to the same (or similarly worded) calculus factors: see, eg, *Civil Liability Act 2002* (NSW) s 5B; *Wrongs Act* (n 42) s 48.

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liability depends on whether Burden is less than Probability times Gravity ($B < P \times G$).[82]

Although the considerations commonly articulated as constituting the calculus of negligence afford some guidance in determining 'reasonableness', they are both non-exhaustive and 'practically not susceptible of any quantitative estimate'; the choice is ultimately among 'incommensurables'.[83] Indeed, the 'calculus' is not a method of calculation at all; rather, it involves the exercise of expert judgement on the part of an official decision-maker.[84] Our conclusions as to whether a defendant took reasonable care are not drawn from the factors constituting the calculus and are difficult to further refine or reformulate.

In this context, 'reasonableness' permits — indeed, requires — resort to common sense, social, personal (and judicial) experience, social norms and intelligent intuition, as informed by the observer's understanding of how individuals ordinarily behave and society functions. Still, a level of predictability is achievable, we suggest, through an application of a 'mixture of learning, intuition and experience'.[85]

But this does not mean that such a process of determining reasonableness is free from danger. Determining matters such as the normality of human behaviour is influenced by a range of factors, including 'common-sense' views and 'assumptions about the world and human behaviour'.[86] Unstated assumptions and biases may reflect a particular and not universal set of experiences — ones informed by gender, race, privilege, and the like. Common-sense reasoning, too, can have serious shortcomings — it being impacted by bounded rationality, heuristics, bias, emotion and cognitive illusion.[87] Even leaving aside political and moral values, differing intuitive responses and perceptions of common

[82] For a similar algebraic formula, see *United States v Carroll Towing Co*, 159 F 2d 169, 173 (L Hand J) (2nd Cir, 1947).

[83] See L Hand J in *Conway v O'Brien*, 111 F 2d 611, 612 (2nd Cir, 1940), stating that the seriousness of harm and burden of precautions are not even 'theoretically' susceptible to 'quantitative estimate'.

[84] *Mulligan v Coffs Harbour City Council* (2005) 223 CLR 486, 490 [2] (Gleeson CJ and Kirby J). Therefore, observations about what reasonableness entails are not the product of a calculus, but rather statements 'about community standards of reasonable behaviour': at 491 [3].

[85] Justices Finn, Stone and Perram made this observation in the context of remedial discretion: *Grimaldi* (n 52) 403 [503], quoting Justice WMC Gummow, 'Equity: Too Successful?' (2003) 77(1) *Australian Law Journal* 30, 41.

[86] See Kylie Burns, 'Judges, "Common Sense" and Judicial Cognition' (2016) 25(3) *Griffith Law Review* 319, 320 ('Common Sense'). See also Kylie Burns, 'It's Not Just Policy: The Role of Social Facts in Judicial Reasoning in Negligence Cases' (2013) 21(2) *Torts Law Journal* 73.

[87] Burns, 'Common Sense' (n 86) 327. Lord Neuberger has acknowledged the possible impact of cognitive bias and illusions: Lord Neuberger, '"Judge Not, that Ye Not Be Judged": Judging

sense will produce different conclusions about the reasonableness (or otherwise) of a defendant's conduct.

Despite the determinative role of 'reasonableness' in adjudicating the success or failure of a private law negligence claim, it is notable that this aspect of the law of negligence has not provoked widespread academic anxiety over excessive discretion, idiosyncratic decision-making and consequent uncertainty. As Sir Wilfred Fullagar noted, 'negligence' is a 'somewhat vague standard, perhaps, but one which is quite susceptible of sensible and just application'.[88] Indeed, it is the concept of 'duty' that is commonly singled out for criticism based on uncertainty,[89] despite the fact that very few cases brought in the tort of negligence ever raise duty-related issues.

Perhaps the reason for the relatively ready acceptance of the reasonableness standard is that the underlying normative basis for the tort of negligence — even accepting the ongoing conflicts about which specific theory best justifies or explains it[90] — is at least broadly accepted and uncontroversial. Someone who fails to meet society's standard of care when engaging in conduct that endangers the relevant interests of another, and who thereby causes legally cognisable harm to that other, ought to bear responsibility for repairing the harm so caused. But even if the acceptance of such a principle is uncontroversial — and this may perhaps be true of many other legal concepts, broadly speaking — it does not follow that uniform views exist about what level of risk-taking society should tolerate, whether generally or in specific contexts. Where that level ought to be set and whether, for example, this depends on the interest (proprietary, personal, economic) that may be impacted by the risk, and how much self-responsibility those who are harmed ought to take for their own protection, are all contestable. Yet, such questions are all left to be determined by resort to an open-textured jural concept of *reasonableness*.

Judicial Decision-Making' (FA Mann Lecture, 29 January 2015) [24]–[29] <https://www.supremecourt.uk/docs/speech-150129.pdf>, archived at <https://perma.cc/AM6Q-LEHZ>.

88 Fullagar (n 50) 5.

89 See, eg, Oliphant (n 39) 4–5.

90 See Steve Hedley, 'The Rise and Fall of Private Law Theory' (2018) 134 (April) *Law Quarterly Review* 214, 235. Hedley rightly concludes that no single theory explains tort law — let alone private law. See also Steve Hedley, 'The Unacknowledged Revolution in Liability for Negligence' in Sarah Worthington, Andrew Robertson and Graham Virgo (eds), *Revolution and Evolution in Private Law* (Hart Publishing, 2018) 99.

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C *'Serious' Breach of an 'Intermediate' Contractual Term*

The question of whether a breach of contract is legally sufficient to justify termination of the contract by the innocent party is one with which the courts have long wrestled. They have responded by developing greater flexibility in answering that question via resort to the notion of 'intermediate' (or 'innominate') terms.[91] They have acknowledged that acceptance of such a third category of term, sitting on a classificatory spectrum between 'conditions' and 'warranties', delivers flexibility and facilitates just outcomes *inter partes*.[92] For present purposes, it is important to note that whether termination is available for breach of an intermediate term depends on the gravity or consequences of the particular breach — in particular, whether its effect was to deprive the non-breaching party of substantially the whole benefit that they were intended to receive under the contract.[93] That determination itself depends on a range of considerations: 'the nature of the contract and the relationship it creates, the nature of the term, [and] the kind and degree of the breach'.[94] While these considerations may appear commonsensical, the quoted judicial statement incorporates a number of undefinable concepts, the outcome of whose application cannot be predicted a priori and with exactitude: *nature*, *kind* and *degree*. Whether a breach is 'sufficiently serious' is, therefore, and unsurprisingly, a 'complex question'[95] that is incapable of precise exposition. Equally unsurprising is that the adoption of such a test has led to criticism based on uncertainty.[96] That uncertainty is perhaps also reflected in the varied and alternative ways in which the courts have expressed the requirement of seriousness, including whether performance of the contract was rendered 'substantially different' by the breach, or whether the breach went to 'the "root" of the contract' or produced a 'fundamentally different' situation.[97] But as John Carter has noted, an

[91] See *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, 56–7 (Sellers LJ), 62–4 (Upjohn LJ), 66, 69–71 (Diplock LJ) ('*Hongkong Fir*').

[92] *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115, 139 [51]–[52] (Gleeson CJ, Gummow, Heydon and Crennan JJ) ('*Koompahtoo*').

[93] *Hongkong Fir* (n 91) 66, 70 (Diplock LJ). See also *Koompahtoo* (n 92) 140 [55] (Gleeson CJ, Gummow, Heydon and Crennan JJ), quoting *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361, 380 (Buckley LJ).

[94] *Koompahtoo* (n 92) 140 [54] (Gleeson CJ, Gummow, Heydon and Crennan JJ).

[95] JW Carter, *Carter's Breach of Contract* (LexisNexis Butterworths, 1st ed, 2011) 242 [6-34].

[96] See, eg, Lord Devlin, 'The Treatment of Breach of Contract' (1966) 24(2) *Cambridge Law Journal* 192, 197, 200, criticising aspects of *Hongkong Fir* (n 91).

[97] See Carter (n 95) 244 [6-36].

'element of uncertainty must necessarily result from any doctrine the application of which depends primarily on factual matters':[98]

> Whether a breach is sufficiently serious is necessarily a question of degree and all such questions are a source for debate. But that is not a reason for denying the utility of the … doctrine. … The problem for the courts is to strike a proper balance between certainty and flexibility, and no doubt the emphasis given to certainty, at the expense of flexibility, will vary according to what the courts conceive as being 'just' at any particular time.[99]

Whatever one's views about the doctrine of intermediate terms, that doctrine is an entrenched part of contract law in both the United Kingdom and Australia, and it has become so despite expressed concerns as to its vagueness.

D *Vicarious Liability: 'In the Course of Employment' and the 'Close Connection' Test*

The courts have struggled in recent years in determining the circumstances in which an employer ought to be held vicariously liable for torts committed by an employee, particularly in connection with intentional wrongdoing. Different jurisdictions have utilised various formulae to establish the required link between the employment and the employee's torts. These formulae have been criticised as being too uncertain in their application. The 'close connection test' utilised in the United Kingdom[100] is 'inherently imprecise' and refined only by reference to further general descriptors.[101] Perhaps unsurprisingly, therefore, decisions applying the test appear to have significantly broadened vicarious liability and have attracted criticism for doing so.[102] In Australia, the older and

[98] Ibid 237 [6-29].

[99] Ibid 237–8 [6-29].

[100] To state the test more fully, the question of liability turns on whether

> the wrongful conduct was so closely connected with acts the employee was authorised to do that, for the purposes of the liability of his employer, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment.

Various Claimants v Wm Morrison Supermarkets plc [2020] AC 989, 1016 [25] (Lord Reed PSC, Lord Hodge DPSC, Lords Kerr and Lloyd-Jones JJSC and Baroness Hale agreeing) ('*Various Claimants*'). See also at 1014–15 [22]–[23].

[101] See James Plunkett, 'Taking Stock of Vicarious Liability' (2016) 132 (October) *Law Quarterly Review* 556, 561.

[102] See, eg, Phillip Morgan, 'Certainty in Vicarious Liability: A Quest for a Chimaera?' (2016) 75(2) *Cambridge Law Journal* 202, 205, criticising the United Kingdom Supreme Court's decision in *Mohamud v Wm Morrison Supermarkets plc* [2016] AC 677 ('*Mohamud*'), in which

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narrower historical formulation of the requisite link, referred to as the 'Salmond test', remains influential.[103] Yet, that test has also proved difficult to apply with consistency, even where the tort committed is negligence,[104] let alone one involving intentional wrongdoing. Resort to some general and flexible formulation is inevitable, irrespective of whether one supports a wide or a narrow approach to vicarious liability.

No obvious solution is available to circumvent these difficulties. To be sure, we would suggest that one reason for the intractable nature of vicarious liability and the difficulties in applying a 'course of employment' formula is that the law has struggled to articulate the underlying rationale(s) for vicarious liability itself. If a clearer and more confined rationale for vicarious liability were able to be found,[105] then perhaps a more precise formulation as to the requisite link between the employee's conduct and their employer's enterprise might correspondingly be achieved. A more coherent and better-understood law of vicarious liability would, presumably, leave less scope for variable decision-making,[106] because the requisite link could be further explained by

an employer was held liable for the racially motivated beating of a service station customer by its employee. This finding was seemingly justified by the Court using the test of a 'causal connection': Morgan (n 102) 205. In *Various Claimants* (n 100), the Court sought to explain that the application of the principle in *Mohamud* (n 102) was not extending liability in an unacceptable way: 1016–17 [25]–[28] (Lord Reed PSC, Lords Kerr and Lloyd-Jones JJSC and Baroness Hale agreeing).

[103] That test asks

> whether the act (a) is authorised by the employer; or (b) is an unauthorised mode of doing some other act authorised by the employer. … [A]n employer would also be liable for unauthorised acts provided that they are 'so connected' with authorised acts that they may be regarded as modes, albeit improper modes, of doing them.

Prince Alfred College Inc v ADC (2016) 258 CLR 134, 149 [42] (French CJ, Kiefel, Bell, Keane and Nettle JJ) (citations omitted) ('*ADC*'), citing John W Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (Stevens and Haynes, 1907) 83–4. The application of the test was refined in *ADC* (n 103) in the context of intentional wrongdoing by utilising another general concept — namely, whether the employment 'provides the occasion' for the wrongdoing: at 159 [80] (French CJ, Kiefel, Bell, Keane and Nettle JJ).

[104] Consider, for example, whether a deviation from a designated employment task is a 'frolic' of the employee's own, or whether it is still in the course of employment. See, eg, *Harvey v RG O'Dell Ltd* [1958] 2 QB 78, 102–3 (McNair J; *Chaplin v Dunstan Ltd* [1938] SASR 245, 252 (Murray CJ). Cf *Crook v Derbyshire Stone Ltd* [1956] 1 WLR 432, 436 (Pilcher J); *Hilton v Thomas Burton (Rhodes), Ltd* [1961] 1 WLR 705, 708–9 (Diplock J).

[105] Such rationales are not found in 'master's tort' theory or 'servant's tort' theory: see Joachim Dietrich and Iain Field, 'Statute and Theories of Vicarious Liability' (2019) 43(2) *Melbourne University Law Review* 515.

[106] For a recent and persuasive explanation of vicarious liability and its rationale, with a particular focus on the concept of authority as the rationale for liability, see Christine Beuermann, *Re-conceptualising Strict Liability for the Tort of Another* (Hart Publishing, 2019). That rationale

reference to particularised criteria that are themselves moulded by whatever rationale plausibly exists to justify the imposition of legal responsibility for wrongs actually committed by another. But the need to draw boundaries would, even then, continue to pose a challenge.

E *Revisiting Duress and 'Unlawfulness' of the Pressure Applied*

In closing this part of the article, let us return to 'lawful-act duress' and the earlier-noted perception, held by some, that such a concept is too uncertain and ought, therefore, to be rejected as part of the common law.[107] Our purpose in returning to lawful-act duress is to illustrate that that concept remains uncertain in its exposition primarily as a result of serial failure, on the part of courts in particular, to articulate a persuasive normative basis for intervention in cases of successful coercion by lawful means. Once those expositional uncertainties are resolved, as we believe they can be, and the relevant guiding norms and corresponding criteria are articulated, then any difficulties in applying the concept of lawful-act duress ought naturally to fall away.

One concession that we would make at the outset to the opponents of an independent doctrinal category of lawful-act duress, particularly as formulated in the United Kingdom, is that any test that simply instructs a court or arbitrator to assess the legitimacy of pressure applied by lawful means according to whether it is 'morally or socially unacceptable' or not[108] is not a test that should commend itself to anyone. And although the question of the (il)legitimacy of the pressure applied is just one part of the common law duress inquiry, it is clearly a crucial dimension of that inquiry. A test that lacks sufficient criterial clarity to adequately guide a decision-maker in the application of the doctrine to a particular claim of transaction-vitiating duress invites the exercise of excessive judicial subjectivity or discretion, meaning that it is unlikely to supply the predictive certainty expected of a substantive legal doctrine. But this is only a reason to abandon the doctrine if, after analysis, it turns out that no possible scope exists for improving upon the formulation of the test that is presently

also supports a more cohesive approach to determining the 'course of employment' requirement: see at 65–7.

[107] Such a view has found support in *Karam* (n 26) 168 [66] (Beazley, Ipp and Basten JJA), although Nettle J in *Thorne* (n 26) saw merit in the acceptance of lawful-act duress, as 'it would better accord with equitable principle, and better align with English and American authority', although he left the question open: at 114 [71] (citations omitted). In defence of a category of lawful-act duress, see Carr (n 26).

[108] *CTN Cash* (n 1) 719 (Steyn LJ).

too vague or uncertain. And we are not convinced that that can yet be said of lawful-act duress.[109]

Recent Australian authority has made progress in this area:

> If the pressure is lawful, it may be illegitimate if there is no reasonable or justifiable connection between the pressure being applied and the demand which that pressure supports …[110]

However, a more sophisticated formulation still can be found in § 176(2) of the American Law Institute's *Restatement (Second) of Contracts*.[111] Alternatively, as Leggatt LJ opined in *Al Nehayan v Kent*, the test for lawful-act duress 'could be made more precise by transposing into objective requirements the elements of the offence of blackmail':[112]

> On this basis a demand coupled with a threat to commit a lawful act will be regarded as illegitimate if (a) the defendant has no reasonable grounds for making the demand and (b) the threat would not be considered by reasonable and honest people to be a proper means of reinforcing the demand.[113]

In order to avoid the problem of curial acceptance of a category of lawful-act duress that requires courts to make 'unacceptable' judgements about the morality or social acceptability of conduct that is not illegal, Davies and Day argue that only threats to do something unlawful ought to suffice in establishing duress; they view 'unlawfulness' as a concept that delivers certainty.[114] Conduct that might notionally have been captured by a doctrine of lawful-act duress can be managed instead by the doctrines of unconscionability and/or undue

[109] Admittedly, subsequent judicial reformulations of the test for 'illegitimacy of pressure' have fared little better than the 'morally or socially unacceptable' standard — for example, whether the pressure applied 'amounts to unconscionable conduct': *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40, 46 (McHugh JA, Samuels JA agreeing at 41, Mahoney JA agreeing at 41).

[110] *Electricity Generation Corporation v Woodside Energy Ltd* [2013] WASCA 36, [25] (McLure P, Newnes JA agreeing at [44]). An appeal was allowed on a different issue: *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 661–2 [47]–[51] (French CJ, Hayne, Crennan and Kiefel JJ).

[111] Section 176(2) provides:

> A threat is improper if the resulting exchange is not on fair terms, and (a) the threatened act would harm the recipient and would not significantly benefit the party making the threat, (b) the effectiveness of the threat in inducing the manifestation of assent is significantly increased by prior unfair dealing by the party making the threat, or (c) what is threatened is otherwise a use of power for illegitimate ends.

[112] [2018] EWHC 333 (Comm) [188].

[113] Ibid.

[114] Davies and Day, '"Lawful Act" Duress (Again)' (n 26) 9.

influence in equity.[115] It is questionable, however, whether those equitable categories are any more certain than the lawful-act duress alternative denounced, as they certainly do not absolve courts from the difficult task of determining which forms of 'lawful conduct' count in equitable contemplation as unacceptable ways of causing an otherwise fully autonomous person to act in an intended direction.[116]

That aside, is the view justifiable that, for the purposes of the common law duress doctrine, 'unlawfulness' alone can determine the illegitimacy of pressure, deliberately and strategically applied, and that it is sufficiently certain? One problem with the concept of unlawfulness is that it is not always clear what, exactly, it extends to cover: criminal wrongdoing; statutory (non-criminal) wrongs, whether privately actionable or not; or civil wrongdoing such as torts, breach of fiduciary duty and breach of contract. This may necessitate a choice as to the concept's ambit, and the requisite choice may differ from one pocket of the law to another.[117] Of course, once a choice has been made, there may be no ongoing expositional uncertainty.

The problem with 'unlawful' as a delimitative criterion for duress, however, is more fundamental than what is properly covered by that term.[118] It has frequently been observed that the existence of lawful-act duress as a private law exculpatory category is supported by the criminality of blackmail. Under the criminal law, a threat to engage in what, in the normal course of things, would be perfectly lawful, even socially desirable, conduct — for example, informing

[115] Ibid 10.

[116] Indeed, many cases of actual undue influence in equity precisely concern the illegitimacy of threats to do lawful acts: see, eg, the cases noted in Bigwood, 'Throwing the Baby Out with the Bathwater?' (n 5) 60.

[117] Consider the question of whether 'unlawfulness' for the purposes of establishing unlawful-act conspiracy needs to be conduct that is *legally actionable* by the claimant against the parties to the conspiracy or whether it can be constituted by a statutory wrong to which no civil liability attaches. Courts and commentators have been divided on that question: see *Revenue and Customs Commissioners v Total Network SL* [2008] 1 AC 1174, 1235 [44]–[45] (Lord Hope), 1240–1 [56] (Lord Scott), 1253 [94]–[95], 1256 [104] (Lord Walker, Lord Neuberger agreeing at 1285 [225]), 1258 [116], 1259 [120] (Lord Mance, Lord Neuberger agreeing at 1285 [225]). This case rejected the contrary views of commentators in deciding that it need not be an actionable wrong, thereby overruling *Powell v Boldaz* (1997) 39 BMLR 35, 49 (Stuart-Smith LJ, Morritt LJ agreeing at 50, Schiemann LJ agreeing at 50).

[118] Compare also the use of the concept of wrongfulness, eg, the requirement in criminal law that an act of provocation be wrongful. In that context, 'it has been held that "wrongful" is not confined to acts that are contrary to law but includes conduct that is wrong by the ordinary standards of the community': Law Reform Commission, *Defences in Criminal Law* (Report No 95, December 2009) 142 [4.123].

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the police of a person's criminal activities — may constitute a prosecutable offence: that is, if it amounts to extortion.[119] Davies and Day, though, dismiss this argument as a 'red herring'.[120] They assert that it poses no problems for their attempt to circumscribe duress by reference to unlawfulness only, since blackmail is itself unlawful for all purposes and therefore readily satisfies the 'unlawfulness' requirement of the common law duress doctrine.[121] But this argument is not confirmation that a threat to do a criminal act is 'unlawful' for the purposes of a duress claim, since many acts or omissions that are threatened and which constitute the crime of blackmail are not of themselves unlawful. Rather, the argument is at best circular, and at worst misguided, as we shall attempt to explain below.

The law of blackmail (or extortion)[122] has 'long been regarded as "one of the most elusive intellectual puzzles in all of law"'.[123] The reason for criminalising a threat to do something that, absent the demand that the threat is applied to support, would be perfectly lawful, has been much debated.[124] Importantly, for present purposes, once the decision to recognise a crime of blackmail is made, the determination of whether a particular accused has committed that crime itself depends on the application of malleable concepts that themselves invite and demand the exercise of expert judgement in the particular case. Does the person making the threat or 'menaces' make an 'unwarranted' demand? The term 'menace', it should be noted, has been liberally construed to extend to unpleasant actions.[125] Whether a threat is 'unwarranted' in turn depends on whether the threatener had 'reasonable grounds for making the demand', and

[119] Lord Scarman, in *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] AC 366, 401 ('*The Universe Sentinel*'), famously made the same analogy in support of threats of lawful conduct constituting duress.

[120] Davies and Day, '"Lawful Act" Duress (Again)' (n 26) 10.

[121] Ibid, quoting *Times Travel* (n 28) 113 [53], where David Richards LJ makes the point that criminal blackmail must be unlawful for the purposes of duress.

[122] See, eg, *Criminal Code 1899* (Qld) s 415 ('*Criminal Code*').

[123] Einer Elhauge, 'Contrived Threats versus Uncontrived Warnings: A General Solution to the Puzzles of Contractual Duress, Unconstitutional Conditions, and Blackmail' (2016) 83(2) *University of Chicago Law Review* 503, 581, citing James Lindgren, 'Blackmail: An Afterword' (1993) 141(5) *University of Pennsylvania Law Review* 1975, 1975 ('Blackmail'). In a different article, Lindgren noted eight theories of blackmail that had been advanced: James Lindgren, 'Unraveling the Paradox of Blackmail' (1984) 84(3) *Columbia Law Review* 670, 680–701. Glanville L Williams, 'Blackmail' [1954] *Criminal Law Review* 79, 79, described this branch of the law as 'notoriously chaotic'.

[124] See Elhauge (n 123) 581–4; Lindgren, 'Blackmail' (n 123); Lindgren, 'Unravelling the Paradox of Blackmail' (n 123); Williams (n 123).

[125] *Thorne v Motor Trade Association* [1937] AC 797, 817 (Lord Wright).

whether their threat was a 'proper means' of enforcing the demand.[126] Was the demand made 'without reasonable cause'?[127]

Such questions are notoriously difficult to answer, particularly in the context of demands made in the course of business. The criminal law has largely avoided attempts at definitional precision; blackmail is a classic 'jury question', as evidenced by the definition in South Australia (for example) that a threat is 'improper', for the purposes of the offence, 'according to the standards of ordinary people'.[128] It is possible, of course, that 'jury questions' escape the close scrutiny of commentators concerned with 'legal uncertainty' because juries do not have to provide reasons for their verdicts, whereas judges do. Still, the fact remains that the existence of a serious crime here is dependent on ordinary persons' perceptions of what is 'proper', or what is a 'reasonable' ground or cause for a demand. And if the existence of a serious crime can turn on such open-textured considerations, then a fortiori the vested power of a court to order merely that a concluded transaction be set aside, or that a payment be returned, cannot be denounced simply on the ground that the threatened conduct used to compel the impugned transaction or payment was 'lawful' or, alternatively, that it was 'unlawful' because it constituted the crime of 'blackmail'.

Davies and Day's attempt to dismiss lawful-act duress on uncertainty grounds is therefore unpersuasive. It is, we believe, delusive to argue that, because blackmail is criminalised, it constitutes 'illegitimate pressure' for the purposes of a private law duress inquiry. For blackmail-style pressure is not 'duress' because it involves a crime or threatened crime; rather, it is criminalised precisely *because* it is regarded by the state as an illegitimate way of inducing another to act against their will. It is a crime because it involves improper coercion or duress. Blackmail 'represents a misuse of free speech rights'[129] — an exploitative use of normal speech liberties for reasons contrary to why freedom-of-speech rights are recognised in the first place.

Certainly, in our view, the holy grail of legal certainty ought not to lead to the vindication of arguably indefensible decisions such as *Times Travel*.[130] In that case, the defendant deliberately used its peculiar capacity — as a situational monopolist — to cripple the claimant's business, not only to renegotiate a new agency agreement at a lower rate of commission (which alone is hardly illegitimate), but also to include a release of past debts acknowledged to be owed to

[126] See, eg, *Theft Act 1968* (UK) s 21(1).

[127] See, eg, *Criminal Code* (n 122) s 415(1).

[128] *Criminal Law Consolidation Act 1935* (SA) s 171(1) (definition of 'unwarranted' para (b)(i)).

[129] *LJY v Persons Unknown* [2018] EMLR 19, 481 [29] (Warby J).

[130] *Times Travel* (n 28) 126 [104]–[105] (David Richards LJ).

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the claimant, despite earlier reassurances that those debts would be paid.[131] In our view, this distinguishes the facts in *Times Travel* from other borderline cases in which similar conduct has been found not to transgress acceptable standards of commercial behaviour.[132]

Ultimately, the law cannot avoid the thorny question of when successful acts of coercion by 'threat-and-demand' tactics overstep the line of acceptable transaction-inducing behaviour by limiting the remit of the common law duress doctrine to threats to engage in 'unlawful' conduct alone. The problem of determining whether a threat of lawful conduct (in support of some private demand) crosses the boundaries of socially unacceptable conduct remains to be, and continues to need to be, resolved.

V Substance versus Rhetoric: Putting Uncertainty Arguments into Perspective

A *Uncertainty as Rhetoric to Preserve the Status Quo*

As has been observed with our examples in Part IV above, uncertainty is frequently invoked as a rhetorical device to attack concepts that the particular court or commentator does not like. This is often reserved for concepts that have not yet become established within the legal order and that may threaten

[131] Davies and Day, '"Lawful Act" Duress (Again)' (n 26) 11, seem to under-appreciate just how outrageous the defendant's conduct was in the case. We agree with the criticisms of the *Times Travel* (n 27) decision by Carr (n 26) 318, and with the observations of Jodi Gardner, 'Does Lawful Act Duress Still Exist?' (2019) 78(3) *Cambridge Law Journal* 496, 498–9. *Times Travel* (n 28) is currently on appeal before the United Kingdom Supreme Court. In the United States, using such power to obtain a collateral advantage would probably quite readily amount to (lawful act) duress: see, eg, *McCubbin v Buss*, 144 NW 2d 175, 178 (Smith J) (Neb, 1966); *Mitchell v CC Sanitation Co, Inc*, 430 SW 2d 933, 937 (Johnson J) (Tex Ct App, 1968).

[132] See, eg, *Smith v William Charlick Ltd* (1924) 34 CLR 38, in which the monopoly power and threat not to further trade with the plaintiff was used to charge a premium on wheat already sold to, but not yet utilised by, the plaintiff: at 46–7 (Knox CJ). Some support for the decision in *Times Travel* (n 28) might be found in *Berbatis (High Court)* (n 73), concerned with unconscionability under s 51AA of the former *Trade Practices Act 1974* (Cth) (now s 20 of the *Australian Consumer Law* (n 71)): *Berbatis (High Court)* (n 73) 61 [1] (Gleeson CJ). In *Berbatis (High Court)* (n 73), the defendant lessor used its superior bargaining power to agree to a requested extension of a lease and an assignment of said lease to a purchaser of the lessees' business in exchange for a guarantee that the lessees would abandon their intended legal action: at 61 [2] (Gleeson CJ). For analysis of the case, see Rick Bigwood, 'Curbing Unconscionability: *Berbatis* in the High Court of Australia' (2004) 28(1) *Melbourne University Law Review* 203. One difference between those two cases is that there was an ongoing dispute about the lessor's liability in *Berbatis (High Court)* (n 73), whereas the defendant in *Times Travel* (n 28) had acknowledged the debt and had reassured the claimant that it would pay it.

existing legal traditions — hence the ubiquity, for example, of uncertainty objections in connection with legal, equitable or statutory directives or norms that impinge upon property rights and/or commercial activity, and the concern for ensuring predictability in relation to commercial relations and stability in relation to property rights. It is perhaps not unfair to mention that newer concepts are more vulnerable to resistance by those who represent powerful commercial interests and are suspicious of unknown quantities, the content and meaning of which await incremental supply through judicial decision-making — and hence experience — over time. Insinuating that a legal concept, principle or rule (etc) is tarred with the same brush as Lord Denning MR's overarching principle of 'inequality of bargaining power' in *Lloyds Bank Ltd v Bundy*,[133] for example, is a frequently encountered technique of denunciation.[134] However, this is an argument that is never fully teased out; almost invariably the analogy to Lord Denning MR's (ultimately never accepted)[135] principle never rises above assertion; no substantiating proof or genuine analysis is supplied. To the extent that concepts threaten predictive certainty in relation to (commercial) transactions and/or property rights, it is almost always well-resourced parties (and their professional advisers) who have an interest in constricting or denying their reach. Courts are not immune to being persuaded by arguments along these lines. But the fact that much of mainstream contract, tort and property law is vulnerable to parallel criticism demonstrates that arguments of excessive uncertainty are prone to being selectively made. They are not applied with comparable vigour to many other established legal concepts that are determinative of liability for causative events (or which are a feature of a doctrine that is so determinative). To the extent that a rational basis exists for such selectivity, it is rarely, if ever, articulated by those who engage in the practice.

In what remains of this article, we wish to offer some brief observations that, in our view, ought to inform any debate about the legitimacy (or otherwise) of the operation of individual legal concepts in private law. These observations will, it is hoped, demonstrate that arguments of uncertainty are, without more, of limited persuasive force or value in that context.

133 [1975] 1 QB 326, 339.

134 See, eg, *BOM* (n 2) 394 [133] (Andrew Phang Boon Leong JA for the Court); Davies and Day, '"Lawful Act" Duress (Again)' (n 29) 11.

135 Although the Canadian unconscionability doctrine, as formulated by the majority in *Uber Technologies* (n 2), is effectively no different than a doctrine of inequality of bargaining power: at 217–18 [62]–[65] (Abella and Rowe JJ, Wagner CJ, Moldaver, Karakatsanis, Martin and Kasirer JJ agreeing).

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B *The Critical Criterion for Scrutinising a Concept: Are There Sound Normative Foundations for It?*

Our first observation is to identify the most important questions that need to be asked to determine whether any new, emergent or peripheral doctrine or concept ought to be tolerated despite its threat to predictive certainty. These are, one, whether such doctrine is properly supported by underlying normative foundations and, two, whether the concerns reflected in those foundations are not currently enlivened through, or capable of being administered by, an existing legal, equitable or statutory doctrine. Further, it is also important to test whether those normative foundations are properly captured by — and reflected in — application criteria that are sufficiently precise and fit for purpose to be applied with a level of predictability appropriate for the context.[136] For example, we might agree that unconscionable bargains ought not to be enforced, but disagree whether the test for an unconscionable bargain is formulated by reference to criteria that do not accurately translate those normative concerns into an operational legal doctrine. An example of such inaccurate translation is one Canadian formulation: 'whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality that it should be rescinded'.[137] Similarly, it is beyond question that a person ought to take care to avoid unreasonable risks when lawfully going about their business in society, and that they should be liable for harm caused to another if the requisite standard of care has not been observed. Of course, that general normative expectation is tempered by limitations, such as remoteness and duty concepts. Consequently, the law must articulate and apply a standard of reasonableness that reflects that normative goal. It must do so even though the standard applied may be unpredictable in some cases and despite the fact that, in many instances, reasonable minds may differ as to what is expected of the party subject to the standard.[138]

[136] We need to bear in mind Aristotle's famous admonition that we ought not expect greater exactitude than the nature of the case admits: Aristotle (n 47) bk I, 4.

[137] *Harry v Kreutziger* (1978) 95 DLR (3d) 231, 241 (Lambert JA) (British Columbia Court of Appeal). The test, which received mixed reception within Canada, is now irrelevant in light of the Supreme Court of Canada's recent pronouncements on the unconscionability doctrine in *Uber Technologies* (n 2).

[138] This may also result in judges of superior courts substituting their own conclusions on factual questions for the factual opinions of lower-court judges, as Kirby J observed in *Roads and Traffic Authority (NSW) v Dederer* (2007) 234 CLR 330, 378–9 [163]–[166].

Similarly, if lawful-act duress recognises that lawful rights, powers, privileges or freedoms are capable of misuse for exploitative ends,[139] then such duress deserves recognition as a distinct legal category — or at least as a species within duress more generally. Such a doctrine serves to extend to the vulnerable protection from being used merely instrumentally by the strong. Unnecessary duplication of concepts should of course be avoided.[140]

C *The Potential Uncertainty of Bright-Line Rules*

A second observation that we wish to make is that bright-line rules, especially where they give rise to binary choice in absolute terms,[141] create their own uncertainty if there are different views as to where the line should be drawn, or if the normative foundations of the rules are themselves questionable, such that exceptions or qualifications need to be constantly introduced. One example only will be given: namely, the struggles in the United Kingdom as to the applicability of a constructive trust as a remedy where a fiduciary has profited from their breach of duty and, specifically, whether a proprietary remedy could ever arise where the fiduciary has received a bribe or secret commission paid by a third party. Until recent clarification of the issue in *FHR European Ventures LLP v Cedar Capital Partners LLC* ('*FHR*'),[142] two broad lines of authority existed.[143] The debate generated so much controversy that, at times, it provoked considerable passion and was the subject of voluminous commentary and curial remarks.[144]

[139] See generally Joseph M Perillo, 'Abuse of Rights: A Pervasive Legal Concept' (1995) 27(1) *Pacific Law Journal* 37.

[140] Lawful-act duress might well prove to be a redundant jural category if it can be demonstrated, for example, that undue influence and unconscionable dealing respond (at least as effectively) to identical normative concerns. Cf Bigwood, 'Throwing the Baby Out with the Bathwater?' (n 5) 44, 78, 82–3, doubting that those other concepts cover the same normative field, so to speak.

[141] See, eg, Gino Dal Pont, '"Fault Lines" in Certainty of Object for Private Trusts: "None the Worse for It"?' (2019) 40(3) *Adelaide Law Review* 667, 668, noting that certainty-of-objects rules are binary, in that opposing outcomes, as to whether distinct proprietary rights arise or not, depend on which side of the line a given situation falls.

[142] [2015] AC 250 ('*FHR*').

[143] Many of the authorities have been marshalled and considered in depth: see, eg, Lord Peter Millett, 'Bribes and Secret Commissions Again' (2012) 71(3) *Cambridge Law Journal* 583; *Grimaldi* (n 52) 418–23 [569]–[584] (Finn, Stone and Perram JJ).

[144] See the review of the various academic commentators in *FHR* (n 142) 262–3 [10]–[11], 266 [23], 268 [29], 269 [32] (Lord Neuberger PSC for the Court). See also the extensive list of commentaries noted by Worthington, 'Fiduciary Duties' (n 23) 723 n 6, 725 n 24.

In the United Kingdom, this ongoing controversy culminated in the decision of the Supreme Court in *FHR*, which held that a proprietary remedy is available *as of right* in all circumstances where a fiduciary profits from a breach of duty.[145] This, as a binding statement of law by an authoritative court, creates certainty of one type — expositional certainty — and further looks to be predictively certain as well. Nonetheless, it has not necessarily quelled the debate and assuaged those who preferred the alternative rule, that such a remedy should not arise for receipt of a bribe.

In our view, those competing views are a product of the reality that many are not satisfied with the choice between two unqualified rules — either that a constructive trust is always available, or that it should never be available, consistently with the United Kingdom's support for an institutional constructive trust, at least in the context of bribes. Such a choice results in a lack of flexibility or capacity to consider the full range of circumstances that may arise and which, in a nuanced and sophisticated system of justice, ought legitimately to be taken into account. Contrast the approach in jurisdictions that adopt a remedial constructive trust: that such a remedy *may* be available in appropriate circumstances.[146] We would suggest that the problem of uncertainty becomes more acute when the rejection of remedial discretion instead leads to the courts changing their approach as to which particular 'bright-line rule' is appropriate — or else creates difficult-to-reconcile, rule-based exceptions to the bright-line 'rule'.[147]

D *A Variation on Uncertainty Arguments: Arguments against Weighing Up 'Incommensurables'*

By way of a third observation, we take issue with what has become a widely asserted variation, or subset, of argument founded on predictive uncertainty. Such an argument focuses on the predictive uncertainty that is said to arise

[145] *FHR* (n 142) 274 [48] (Lord Neuberger PSC for the Court).

[146] A remedial constructive trust allows courts to weigh up a range of other factors that may be relevant to the merits (or otherwise) of a proprietary remedy. But such an approach will do little to appease those who consider that this all generates too much uncertainty: see, eg, Worthington, 'Four Questions on Fiduciaries' (n 23) 752–3, although she also criticises the failure of the Court in *FHR* (n 142) to justify the 'superior level of protection' that an institutional proprietary remedy provides: Worthington, 'Four Questions on Fiduciaries' (n 23) 753. Worthington's own solution as to where appropriate lines should be drawn is set out in Worthington, 'Fiduciary Duties' (n 23) 730–5.

[147] Witness, for example, the case law and vigorous debate among commentators leading up to *FHR* (n 142): see above nn 143–144. See also *Grimaldi* (n 52) 418–21 [569]–[577].

when courts adopt flexible, multi-factorial tests that invite or require differential 'policies' or competing normative concerns and principles (etc) to be balanced in the resolution of what falls to be officially decided. Such tests are sometimes labelled as 'proportionality' or 'balancing' tests. What critics of such an approach assert, generally speaking, is that any legal determination that depends upon the weighing up of 'incommensurable' factors is an exercise in the impossible and thereby fundamentally flawed.[148] To be sure, we accept that the precise operation of proportionality tests raises issues of predictability and uncertainty, and, in public law, a sophisticated debate about the utility of such tests is ongoing, including the difficulties associated with weighing up incommensurables.[149] In private law, however, the criticism of such tests tends to be more one-dimensional, focused on the so-called logical impossibility of the task.

A recent version of this argument can be seen in James Goudkamp's criticism of the United Kingdom Supreme Court's adoption, in *Patel*, of a policy-based weighing up of a variety of factors to determine whether a court will enforce a transaction, allow a claim in tort, equity or contract, or award restitution where the claimant's conduct was tainted by illegality.[150] Goudkamp sets out

[148] See, eg, Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights' (2009) 7(3) *International Journal of Constitutional Law* 468, 471; Laurent B Frantz, 'Is the First Amendment Law?: A Reply to Professor Mendelson' (1963) 51(4) *California Law Review* 729, 748–9.

[149] See, eg, Grant Huscroft, Bradley W Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014); Virgílio Afonso da Silva, 'Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision' (2011) 31(2) *Oxford Journal of Legal Studies* 273; Francisco J Urbina, 'Incommensurability and Balancing' (2015) 35(3) *Oxford Journal of Legal Studies* 575.

[150] *Patel* (n 3). An encapsulation of the test is provided by Lord Toulson JSC at 504–5 [120]:

> The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system … In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than [sic] the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.

The approach is similar to the test of 'coherence' in all the circumstances articulated by the High Court of Australia: *Miller v Miller* (2011) 242 CLR 446, 454 [14]–[15], 473 [74], 482 [102] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also *Nelson v Nelson* (1995) 184 CLR 538, 552, 564–7 (Deane and Gummow JJ), 595–7 (Toohey J), 598–9, 612–13 (McHugh J); Andrew Fell, 'The Concept of Coherence in Australian Private Law' (2018) 41(3) *Melbourne University Law Review* 1160, 1169–70.

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the steps of the argument as follows, applying ideas developed by Robert Stevens in another context:[151]

> This objection proceeds as follows. If factors are to be weighed against each other, there must be some common metric. However, the policy-based test identifies no such metric. Thus, the need, for example, to prevent wrongful profiting cannot be pitched against, for instance, the desirability of responding proportionately to the seriousness of the claimant's offending. The policy-based test is, therefore, flawed because it requires the courts to do the impossible. Requiring judges to compare the factors in play is akin to asking them whether five litres is greater than two meters.[152]

One immediate objection to this line of argument is that the law does indeed require this type of weighing up of so-called 'incommensurables', and probably not infrequently. For example, as already noted above,[153] the calculus of negligence requires the weighing up of factors such as the burden of taking precautions and the probability of harm.[154] Similarly, the law accepts a 'public interest' defence as justifying an infringement of private law privacy rights. Other examples could doubtless be given.

'Incommensurability' arguments rest on a conception of legal reasoning, or private law adjudication, that is either misconceived or quixotic (or both). Granted, distance and volume cannot be assimilated to each other, as they are qualitatively different things, each being capable of demonstrative proof for its own singular purpose. One does not compare five litres to two metres in the expectation of a serious answer for some meaningful purpose. The analogues of volume and distance are inapt and unhelpful beyond the context of their usual relevance. But people do expect the law to recognise and serve a variety of interests, ends or values, because that must follow from the normative pluralism that marks a mature and complex society. In no universe are qualitative matters like morality or justice settled by demonstrative proof or by reference to the expectations of the mathematician or scientist; clashing values simply cannot be weighed systematically against each other in some precise quantitative fashion. Normative incommensurables must be weighed, counterbalanced

[151] Stevens, 'Contributory Fault' (n 14) 259.

[152] Goudkamp, 'The End of an Era?' (n 12) 18.

[153] See above Part IV(B).

[154] 'Burden' encompasses potentially both questions of practicality and cost (which is measurable in monetary terms), whereas 'probability' clearly is not measurable in monetary terms. Note that formulations of the calculus also usually refer to 'social utility', which is an open-ended concept that encompasses personal preferences, such as aesthetics, or the value of playing cricket, as well as personal safety and peace of mind.

and prioritised *despite* the absence of a common yardstick that would allow us to pretend that we are functioning like mathematicians or scientists operating inside their own spheres of relevance. Granted, that legal adjudicators are expected to achieve what is considered to be a just balance among what are acknowledged to be 'incommensurables' can make for difficult, indeed rather 'untidy', work, but this does not make it 'impossible' and therefore 'flawed'; it is simply a corollary of the fact that society's institutions of justice operate in a manner that is more akin to (practical) 'moral reasoning' than 'scientific reasoning'.

But Goudkamp goes further:

> One reply to this criticism is that judges seem to have no difficulty weighing the factors to which the policy-based test is sensitive. A (compelling) retort to this, however, is that that fact is beside the point: that responses can be given to an incoherent question does not make the question coherent.[155]

Goudkamp is of course right that a rational answer presupposes a question that itself permits one to make proper sense of any response proffered. That something can be done is no justification for its actually being done. Still, it must be demonstrated here that the anterior, policy-based test is itself one that is 'incoherent' to address. Again, we doubt that the mere fact that the list of factors to be considered under the test represents an assemblage of 'incommensurables' renders the test — or question — perforce 'incoherent'.[156] It is not incoherent to deliberate on the relevant considerations at stake and to weigh up the reasons for preferring some over others.[157] Incoherence would seem to further require that at least one or more of the factors to be weighed and balanced in the calculation under the test is itself illegitimate or entirely non-legally relevant — for example, because it is purely 'political' in its orientation or, more absurdly, directed at a juridically irrelevant consideration such as the colour of the parties' hair.

In the end, and as Stephen Waddams demonstrated so successfully in his book on categories and concepts in Anglo-American private law legal reasoning, many of the law's most difficult — or 'hard' — cases earn that appellation

[155] Goudkamp, 'The End of an Era?' (n 12) 18–19. For a persuasive response to these types of criticisms, see Andrew Burrows, 'Illegality after *Patel v Mirza*' (2017) 70(1) *Current Legal Problems* 55, 67–71.

[156] On the various meanings and values that are attributed to 'coherence' itself, see generally Fell (n 150).

[157] See Burrows (n 155) 68–70.

precisely because they engage competing and differential principles or concerns simultaneously in the one factual context.[158] At times, the law simply cannot avoid weighing up rival principles and concerns and deciding which of them is to carry the greatest weight in the matter at hand. Which one or several of them ought to prevail? That question is not one that can be answered with predictive certainty in many contexts. But, still, it is not an incoherent question to ask, even if it involves, ultimately, weighing up 'incommensurables', whether in deciding the individual case or in setting the doctrinal criteria that will be applied in future cases without reference to the competing considerations that explain how the criteria were calibrated in the first place.

VI Conclusion

At no point in this article have we argued against the pursuit of legal certainty, whether expositional or predictive, as an important objective within private law. On the contrary, we believe that needless and avoidable uncertainty should be circumvented by those responsible for the current state and future direction of that body of law. Nor have we argued that the weight to be assigned to the goal of certainty ought not to vary from one legal context or connection to another within private law. That certainty cannot be pursued as an *exclusive* goal in any jural context or connection is trite, given that certainty is never an end in its own right; it is constantly, albeit in varying degrees, in competition with other, often mutually irreducible, goals, interests or desiderata that routinely feature within the vast array of real-world contexts or connections within which our appeals to 'legal certainty' inevitably feature.

Our main quarrel, rather, has been with those who cry 'too much uncertainty' as a *sufficient* reason for repudiating a legal concept, principle or set of application criteria — that is, without credible evidence or substantive legal argument rising above bare assertion or speculative fear. Too often, in our experience, arguments founded on excessive uncertainty are selectively enlisted as a mere rhetorical device to attack an established or, more usually, emergent legal or equitable concept (or doctrine, principle, exculpatory category, etc) that a court or particular commentator does not favour. Multiple other legal concepts, however, are, without explanation, spared equal adverse scrutiny despite their similarly open-textured nature. A selection of examples of such concepts has been proffered in this article.

That legal uncertainty results from unresolved disagreement over the rationale(s) or core values underlying a particular general concept, doctrine or

[158] Waddams (n 55). See especially at vi, 14–15, ch 2.

principle is naturally concerning. Of similar concern are those cases where, although some level of consensus seems to exist as to the animating reason(s) for the concept, doctrine or principle, the application criteria or legal tests formulated to administer the concept in the resolution of concrete disputes are simply too imprecisely formulated to serve as an adequate guide to legal advisers and decision-makers — that is, in a manner consistent with the announced or apparent rationale(s) of the concept. We suspect that the category of lawful-act duress, as currently formulated in the United Kingdom, for example, suffers from that problem. Still, that is no reason to jettison a concept or legal category as a first and final response. It may well be true that '[t]he difficulty of being precise cannot by itself justify abandonment of whatever precision is possible',[159] but it can supply reason for us to improve upon whatever precision currently exists, where that is possible. There can, in our view, be no justification for flatly rejecting concepts — at least those with prima facie utility — before all the anterior intellectual inquiries necessary to their success have been fully and finally exhausted. Certainly, such anterior intellectual inquiries cannot be avoided simply by shunting what we do not like sideways within private law, that is, without a compelling case for the superiority of the alternative doctrinal categories or legal departments to which difficult moral-cum-legal questions are being reassigned.

[159] John E Coons, 'Compromise as Precise Justice' (1980) 68(2) *California Law Review* 250, 261, quoted in Mather (n 48) 72.