

1

Against Certainty in Tort Law

KEN OLIPHANT*

I. INTRODUCTION

FOCUSING ON ENGLISH law, this chapter argues that that pursuit of ‘bright line’ rules of tortious liability in the interests of certainty is counter-productive and results in incoherence and injustice. It is counter-productive because in practice it invariably creates more uncertainty than existed before, often as to the very rules to be applied. Rules whose consequences are sometimes arbitrary are adopted in the name of certainty, but courts attempt to mitigate their effects by recognising exceptions and qualifications which, because they lack any convincing basis in principle, are themselves of uncertain scope. The pursuit of certainty also results in incoherence because a weighing of the full set of relevant considerations cannot be reduced to the mechanical application of a rule; consequently, outcomes are attained that are at odds with underlying values and fundamental principles. That the approach is productive of injustice is evident from the number of occasions in recent years when British Supreme Court justices have felt the need to express their regret at the outcome of appeals over which they have presided and their sympathy for a claimant denied a remedy in damages.

To be preferred is an approach based on the identification of relevant factors and their flexible assessment on the facts of individual cases. The exercise of judgment by the court—and the uncertainty that this necessarily entails—should be recognised as inherent in the judicial role, and as desirable rather than something to be distrusted and constrained.¹ The role of the appellate courts should be conceived as setting the parameters within which this balancing exercise is conducted, and establishing the weight that

* Some parts of this paper develop ideas previously sketched in K Oliphant, ‘European Tort Law: A Primer for the Common Lawyer’ (2009) 62 *CLP* 440.

¹ See also A Beever, *Rediscovering the Law of Negligence* (Oxford, Hart Publishing, 2007) 49–50, emphasising that judgment is required because judicial decision making cannot simply be based on the mechanical application of rules.

is to be attached to the factors considered, rather than trying to lay down rules that lower courts are constrained to apply mechanically.

Though the focus of this chapter is the English law of tort, it is hoped that the criticisms expressed of the current English approach will be of interest—and perhaps a cautionary tale—for those from other jurisdictions.

II. ON CERTAINTY IN LAW IN GENERAL

Certainty is almost universally seen as a quality to be desired in all law. It is ‘of the utmost importance’,² and to some even essential: there is a ‘measure of certainty which is necessary to all law’;³ it is ‘demanded’ in the interests of practical convenience.⁴ Typically, two different aspects are emphasised, one *ex ante*, the other *ex post*. First, before any injury has occurred, it is said that certainty in the law allows individuals to plan their affairs with the knowledge of the potential liability costs attaching to the activities in which they engage or decide not to engage, thus contributing to a healthy entrepreneurial economy built on freedom of action.⁵ It is integral to this aspect of certainty that lawyers are able to give their clients accurate advice about their rights,⁶ and that insurers can estimate their potential liabilities with reasonable accuracy.⁷ Second, after an injury has occurred, certainty in the law is considered to contribute to the swift and economical settlement of any claim that results.⁸

It has long been recognised, however, that certainty may sometimes conflict with the overriding requirements of justice. Exactly 100 years ago, a study on that very topic began with the observation that ‘[t]here is in all modern states to-day a general conflict between certainty in the law and concrete justice in its application to particular cases’.⁹ The pursuit of legal certainty tends to produce rigidity and resistance to change, and the law

² *Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1985] UKHL 10, [1986] AC 785, 817 (Lord Brandon) [*The Aliakmon*].

³ *Douglas v Hello! Ltd* [2000] EWCA Civ 353, [2001] QB 967, 1002 (Sedley LJ).

⁴ *White v Jones* [1995] UKHL 5, [1995] 2 AC 207, 290 (Lord Mustill) (‘the certainty which practical convenience demands’).

⁵ Cf M Weber, *Economy and Society: An Outline of Interpretive Sociology*, vol 1 (G Roth and C Wittich (eds), Berkeley, University of California Press, 1978) 883 (‘capitalistic enterprise ... cannot do without legal security’).

⁶ *Candlewood Navigation Corporation Ltd v Mitsui OSK Lines Ltd (The Mineral Transporter)* [1985] UKPC 21, [1986] AC 1, 25 (PC (Australia)) (Lord Fraser) [*Candlewood*].

⁷ Cf *Thing v La Chusa* 48 Cal 3d 644, 647 (Eagleson J) (1989) [*Thing*] (‘uncertainty that has troubled lower courts, litigants, and, of course, insurers’).

⁸ *Wells v Wells* [1998] UKHL 27, [1999] 1 AC 345, 397 (Lord Clyde).

⁹ FR Coudert, *Certainty and Justice: Studies of the Conflict Between Precedent and Progress in the Development of the Law* (New York, D Appleton & Co, 1913).

consequently loses touch with prevailing social standards.¹⁰ At the same time, the purportedly clearer and more predictable rules that are adopted in the name of certainty curtail the scope for the exercise of judgment on the facts of the individual case. It has been plausibly suggested that this reflects a 'judicial abhorrence of responsibility': the judge is able to 'cover up behind a doctrine proclaiming to the world that in fact he has little or no personal discretion, and that he is compelled by ineluctable logic to the conclusions which he reaches'.¹¹ The arbitrariness that results is accepted as 'unavoidable'¹² and the positive law thus comes to drift apart from the fundamental values and principles that are embedded in the legal system.

Paradoxically, certainty is itself a rather nebulous concept. What sort of certainty is to be pursued: certainty as to the principles to be applied or certainty as to outcomes? And whose perspective is to be taken: the individual litigant embroiled in a concrete dispute, the forward-planner who wants to know his or her rights and liabilities in advance of engaging in certain conduct, or the insurer who aggregates liabilities incurred by a pool of insureds? Because of the many varied ways in which the questions can be both posed and answered, it seems likely that there are some forms of certainty that are desirable, but others whose pursuit may have unfortunate repercussions. Writing extrajudicially, Benjamin Cardozo astutely noted that 'there is a certainty that is genuine and a certainty that is illusory'; the former is 'worth attaining', the latter 'should be shunned'.¹³ As he explained further:

judges strive at times after the certainty that is sham instead of the certainty that is genuine. They strive after a certainty that will keep the law consistent within their own parish, their little territorial jurisdictions, instead of the certainty that will keep it consistent with verities and principles as broad as the common law itself, and as deep and fundamental as the postulates of justice. The tendency is insidious and to some extent inevitable. Particular precedents are carried to conclusions which are thought to be their logical development. The end is not foreseen. Every new decision brings the judge a little farther. Before long he finds himself in a dilemma. He does not like the spot where he is placed, yet he is unwilling and perhaps unable to retreat from it. The certainty that is arrived at by adherence to precedent is attained, but there is a sacrifice of another certainty that is larger and more vital. This latter certainty is lost if we view the law in shreds and patches, not steadily and whole with a sweep that reaches the horizon. Often a spurious consistency is preserved by artificial and unreal distinctions. The idol is discredited, but he is honored with lip service, the rubrics of the ancient ritual.

¹⁰ Ibid, at 2.

¹¹ HWR Wade, 'The Concept of Legal Certainty: A Preliminary Skirmish' (1941) 4 *MLR* 183, 195.

¹² *Thing*, above n 7, at 666. Cf *McLoughlin v O'Brian* [1982] UKHL 3, [1983] 1 AC 410, 442 (Lord Bridge) [*McLoughlin*] ('a largely arbitrary limit of liability').

¹³ BN Cardozo, *The Growth of the Law* (New Haven, Yale University Press, 1924) 17.

4 Ken Oliphant

We must have the courage to unmask pretense if we are to reach a peace that will abide beyond the fleeting hour. The law's uncertainties are to be corrected, but so also are its deformities.¹⁴

III. CERTAINTY IN TORT LAW

The focus of this chapter is the English law of tort, more specifically the role played by the duty of care concept in establishing the boundaries of liability for negligence. The argument presented is that the duty of care concept has become the principal mechanism for the pursuit of certainty in the modern law of tort, but that the certainty that is sought is illusory in the sense conceived by Cardozo in the passage quoted above. It goes beyond the desirable certainty found when it is clear what legal principles are to be applied in the individual case, and hence what factors are to be taken into account in the court's exercise of judgment. Dissatisfied with this modest goal, some judges and commentators seek additional certainty—relating to the outcomes of individual cases. This certainty is spurious because it cannot be attained, and its pursuit is harmful because it places the positive law at odds with underlying values and principles of interpersonal justice. It entails the acceptance of arbitrariness, and the inflexibility of law to adopt to changes in society. We would therefore be wise to recognise the force of Lord Bridge's cautionary words in *McLoughlin v O'Brian*:

we should resist the temptation to try yet once more to freeze the law in a rigid posture which would deny justice to some who ... ought to succeed, in the interests of certainty, where the very subject matter is uncertain and continuously developing.¹⁵

A. The Duty of Care as Control Mechanism

The reason why the duty of care concept has been crucial to the pursuit of certainty in tort law is because it is seen as providing a mechanism for controlling the scope of liability for negligence both pre-emptively and *ex post facto*.¹⁶ It is a mechanism of pre-emptive control inasmuch as it enables courts to strike out 'unarguable' claims in preliminary proceedings on the basis that no duty of care arises on the facts the claimant alleges to have

¹⁴ Ibid, at 17–18.

¹⁵ *McLoughlin*, above n 12, at 443. See also *Canadian National Railway Co v Norsk Pacific Steamship Co* [1992] 1 SCR 1021, 91 DLR (4th) 289 (McLachlin J.).

¹⁶ For judicial recognition of this role of the duty of care concept, see eg *Candlewood*, above n 6, at 25; *Page v Smith* [1995] UKHL 7, [1996] AC 155, 189 (Lord Lloyd).

occurred.¹⁷ Despite Lord Browne-Wilkinson's prudent warning in *Barrett v Enfield LBC* that 'it is not normally appropriate to strike out where the law is uncertain and developing',¹⁸ judicial willingness to accede to striking-out applications appears to be undiminished—even in claims that are 'unarguable' only because of the weight of the policy considerations deemed to oppose the recognition of a duty of care.¹⁹

The duty concept also allows appellate courts to control decisions of trial judges who may be swayed by excessive sympathy for the injured claimants appearing before them. In strict law, an appellate court is entitled to substitute its own assessment of the proper inference to be drawn from primary facts (eg whether the damage was foreseeable or whether the defendant exercised reasonable care) for that of the trial judge.²⁰ But appellate courts frequently choose to rely instead on the absence of a duty of care because a ruling on a point of law establishes a precedent that must be followed in future cases too.

These two aspects have transformed the way in which the duty of care is conceived. Where it was once viewed as a question of mixed fact and law—in which questions of (factual) foreseeability and (legal) proximity were considered as part of one global inquiry²¹—the modern tendency is to separate out the factual and legal aspects of the duty and to treat them as independent hurdles to be surmounted.²²

The argument presented here is that these attempts to 'police' the scope of the duty of care have had unfortunate consequences for the coherence of the law and its ability to do justice. Four particular aspects may be highlighted: a focus on categories of case rather than on principle; the instrumental recourse to policy arguments; an explicit policy of incrementalism; and a succession of regrettable outcomes that testify to a judicial abdication of responsibility in this area. These will now be addressed in turn.

¹⁷ CPR 1998, r 3.4. A court may also dispose of a claim summarily if the claimant has no real prospect of success (CPR, pt 24), and this applies where the claim lacks an adequate factual foundation even if it is well conceived as a matter of law.

¹⁸ *Barrett v Enfield LBC* [1999] UKHL 25, [2001] 2 AC 550, 557 [*Barrett*].

¹⁹ See, eg, as regards the liability of childcare professionals, *JD v East Berkshire Community Health NHS Trust* [2005] UKHL 23, [2005] 2 AC 373 [*JD*] and, as regards the liability of the police, *Brooks v Commissioner of the Police for the Metropolis* [2005] UKHL 24, [2005] 1 WLR 1495 [*Brooks*] and *Smith v Chief Constable of Sussex Police* [2008] UKHL 50, [2009] 1 AC 225 [*Smith*].

²⁰ *Benmax v Austin Motor Co Ltd* [1955] AC 370, [1955] 2 WLR 418 (HL).

²¹ Cf *Elguzouli-Daf v Commissioner of Metropolitan Police* [1994] EWCA Civ 4, [1995] QB 335, 349 (Steyn LJ) ('It does not seem to me that these considerations can sensibly be considered separately ... inevitably they shade into each other').

²² *Clerk and Lindell on Torts*, 20th edn (London, Sweet & Maxwell, 2010) §§ 8-06 to 8-07, speaking of 'factual duty' and 'notional duty'. Because factual duty involves inference from primary facts, it would seem to be inappropriate to strike out a claim by reference to this factor alone, because the primary facts necessarily remain to be ascertained.

B. A Focus on Categories in Place of Principle

A defining feature of the modern law of negligence has been its disintegration into a number of barely connected ‘pigeonholes’ or ‘pockets’ of liability.²³ The duty of care is conceived as specific to particular situations,²⁴ and legal argument focuses on clusters of decided cases on similar facts as the parties attempt to draw convincing analogies or, as the case may be, to identify persuasive grounds of distinction. The task is explicitly conceived of as pragmatic²⁵ rather than principled. The positive law consequently loses contact with deep-rooted legal values and fundamental principles of interpersonal justice.

Though the way was paved by other decisions of the House of Lords,²⁶ *Caparo v Dickman plc*²⁷ stands as the decisive authority. There Lord Bridge famously suggested that the courts should abandon ‘the modern approach’ of looking for a single general principle underlying the tort of negligence and revert to ‘the more traditional categorisation of different specific situations as guides to the existence, the scope and limits of the varied duties of care which the law imposes’.²⁸ Concurring, Lord Roskill explicitly identified certainty as a key factor justifying the change in focus: ‘the traditional categorisation of cases as pointing to the existence and scope of any duty of care ... is infinitely preferable to recourse to somewhat wide generalisations which leave their practical application matters of difficulty and uncertainty’.²⁹

Though Lord Bridge pointed to three ‘necessary ingredients’ in any duty situation—namely, the foreseeability of damage, a relationship of proximity between the parties, and that it is fair, just and reasonable to recognise a duty of care³⁰—he emphasised that every potential duty situation should be assessed independently and pragmatically. Each is ‘sufficiently distinct to require separate definition of the essential ingredients by which the

²³ See, eg, J Stapleton, ‘Duty of Care and Economic Loss: a Wider Agenda’ (1991) 107 *LQR* 249 (referring to the ‘pockets of case law’ approach); KM Stanton, ‘Professional Negligence: Duty of Care Methodology in the Twenty-First Century’ (2006) 22 *Professional Negligence* 134; KM Stanton, ‘The Neighbour Principle in the 21st century: Yesterday’s Revolution’ (2012) 20 *Tort Law Review* 61.

²⁴ For an analysis of the duty of care concept in terms of recognised ‘duty situations’, see *Clerk & Lindsell on Torts*, above n 22, at § 8-05.

²⁵ *Caparo Industries plc v Dickman* [1990] UKHL 2, [1990] 2 AC 605, 618 (Lord Bridge), 628 (Lord Roskill) [*Caparo*].

²⁶ See especially *Governors of Peabody Donation Fund v Sir Lindsay Parkinson & Co Ltd* [1983] UKHL 5, [1985] AC 210; *The Aliakmon*, above n 2; *Hill v Chief Constable of West Yorkshire* [1987] UKHL 12, [1989] AC 53 [*Hill*].

²⁷ Above n 25.

²⁸ *Ibid*, at 616, 618.

²⁹ *Ibid*, at 628.

³⁰ *Ibid*.

existence of the duty is to be recognised'.³¹ This was not necessarily a complete turn away from principled analysis. Lord Bridge himself gave at least formal recognition to the importance of underlying general principles. In any case, calling off the pursuit of a single general principle that can determine the existence of a duty of care in individual cases leaves scope for the identification or development of more specific principles that can be called upon in particular types of case. As Lord Goff observed in *Smith v Littlewoods Organisation Ltd*, 'having rejected the generalised principle, we have to search for special cases in which, upon narrower but still identifiable principles, liability can properly be imposed'.³²

However, the way this has been accomplished in practice has tended towards the mere description of common elements of past cases in which a duty of care has been found to arise³³ rather than a serious attempt to identify principles which express the underlying values of the law. There has been undue reliance on factual analogy without identifying the normative significance of those features of different cases that are perceived to be on all fours or, as the case may be, to provide grounds of distinction. And, in cases falling outside the existing precedents, the courts have too readily fallen back on policy argumentation rather than seeking to develop the new mid-level principles that Lord Goff had in mind.

C. Instrumental use of Policy Arguments

While it is now generally accepted that policy issues are 'justiciable' in the modern law of negligence,³⁴ the *extent* of the reliance on policy in recent decades has been excessive. In fact, one might reasonably say that, in the period in question, UK Supreme Court decisions on the duty concept in negligence (and House of Lords' decisions before) have been typified by the ad hoc invocation of policy arguments to lend spurious support to whatever outcome is intuitively believed to be correct—without regard to the consistency with which they are deployed. Consider the following:

- First, the floodgates argument is perhaps the policy consideration that is most frequently relied on in the modern law of negligence, but it remains profoundly controversial. In *McLoughlin v O'Brian*,³⁵ Lord

³¹ Ibid, at 616.

³² *Smith v Littlewoods Organisation Ltd* [1987] UKHL 3, [1987] AC 241, 280.

³³ Cf *Hedley Byrne & Co v Heller & Partners* [1963] UKHL 4, [1964] AC 465, 526 (Lord Devlin) [*Hedley Byrne*] ('see how far the authorities have gone').

³⁴ *McLoughlin*, above n 12, at 428 (Lord Edmund Davies) (cf Lord Scarman at 430, maintaining the contrary proposition); A Robertson, 'Justice, Community Welfare and the Duty of Care' (2011) 127 *LQR* 370.

³⁵ *McLoughlin*, above n 12.

Wilberforce accepted that the fears aroused by the floodgates argument were often overstated, but nevertheless considered the argument of sufficient weight to make it necessary to impose proximity restrictions on liability for nervous shock ‘just because “shock” in its nature is capable of affecting so wide a range of people’.³⁶ Conversely, Lord Bridge observed in the same case: ‘I believe that the “floodgates” argument ... is, as it always has been, greatly exaggerated’.³⁷

- Second, the risk of overkill or detrimentally defensive conduct has led the courts to deny a duty of care in several high-profile cases,³⁸ but several judges have nevertheless expressed scepticism about the weight properly to be attached to it.³⁹ Most memorably, in *Home Office v Dorset Yacht Co Ltd*⁴⁰ Lord Reid roundly dismissed the suggestion that British public servants might be so apprehensive, easily dissuaded from doing their duty, and intent on preserving public funds from costly claims, that they could be influenced negatively in their conduct: ‘my experience’, he commented, ‘leads me to believe that Her Majesty’s servants are made of sterner stuff’.
- Lastly, in declining to recognise a duty of care on social services to the parent of a child taken into protective care, the House of Lords relied primarily on the potential conflict of duty between the interests of child and parent,⁴¹ yet equally obvious conflicts of interest in other contexts—for example, the conflict between the duty owed by an advocate or expert witness to the client and that owed to the court—have not been deemed sufficient to deny the existence of a duty of care.⁴²

Each of these examples shows that, in the absence of real evidence about the effects of the imposition of a duty of care on potential defendants, reliance upon such policy arguments can only be speculative and intuitive, and contributes to the degeneration of law into a collection of fact-specific rules, without concern for principle or coherence. Further, as the courts seem content to reassess the policy question afresh in each new factual scenario, it becomes well nigh impossible to predict which way cases on novel facts will go, or indeed to identify any rational basis for reconciling

³⁶ Ibid, at 421–22.

³⁷ Ibid, at 442.

³⁸ See especially Lord Keith in *Rowling v Takaro Properties Ltd* [1987] UKPC 2, [1988] AC 473, 502 (PC (New Zealand)); *Hill*, above n 26; *Marc Rich & Co v Bishop Rock Marine Co (The Nicholas H)* [1995] UKHL 4, [1996] AC 211; *Smith*, above n 19.

³⁹ See, eg, *Barrett*, above n 18; *JD*, above n 19, at [33] (Lord Bingham).

⁴⁰ *Home Office v Dorset Yacht Co Ltd* [1970] UKHL 2, [1970] AC 1004, 1033.

⁴¹ *JD*, above n 19. By contrast, Lord Bingham, dissenting, at [44], thought that the interests of child and parent were generally consonant or at least not sufficiently dissonant as to justify a general denial of any duty of care towards the latter, while accepting that the child’s interests had to prevail if a conflict should on occasion arise.

⁴² *Arthur JS Hall & Co (A Firm) v Simons* [2008] UKHL 38, [2002] 1 AC 615; *Jones v Kaney* [2011] UKSC 13, [2011] 2 AC 398.

divergent outcomes in past cases, except on the basis that—in the present legal climate—the conservative option normally prevails.

D. Incrementalism

A further aspect of the currently strong attachment to certainty is the explicit policy of ‘incrementalism’ that has been adopted by the courts in applying the duty of care to new situations. This approach may be traced back to an oft-cited dictum of an Australian judge, who urged that the range of duty situations should only be extended ‘incrementally and by analogy with established categories’.⁴³ However, ‘incrementalism’ does not lend itself to the coherent development of the law.⁴⁴ First, to say that extensions of the scope of the duty of care should be allowed only incrementally is not to indicate the principles which determine *whether* such extensions should be allowed: it merely prescribes that those principles should be narrowly defined. The need to identify the relevant principles remains. As Lord Bingham has observed: ‘the incremental test is of little value as a test in itself, and is only helpful when used in combination with a test or principle which identifies the legally significant features of a situation’.⁴⁵ Second, there is a danger that the principles by which step-by-step expansions of the duty are permitted will reflect arbitrary features of previously decided cases rather than the essential merits of the claimant’s action against the defendant; liability may turn upon history rather than justice. In short, as an Irish judge has astutely noted, ‘the verbally attractive proposition of incremental growth ... suffers from a temporal defect—that rights should be determined by the accident of birth’.⁴⁶ The result has been a lack of sensitivity to the underlying merits of individual claims, and the introduction of undue rigidity into the law.

E. Judicial Passivity in the Face of Unsatisfactory Outcomes

A final aspect to highlight is the passivity shown by the judiciary in the face of blatantly unsatisfactory outcomes, and its undue readiness to say that the responsibility for addressing problems lies with Parliament, not the courts.

⁴³ *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 481 (HCA) (Brennan J).

⁴⁴ A Mullis and K Oliphant, *Torts*, 4th edn (Basingstoke, Palgrave Macmillan, 2011) 22. For further criticism, see L Dolding and R Mullender, ‘Tort Law, Incrementalism, and the House of Lords’ (1996) 47 *Northern Ireland Law Quarterly* 12.

⁴⁵ *Customs and Excise Comrs v Barclays Bank plc* [2006] UKHL 28, [2007] 1 AC 181, [7].

⁴⁶ *Ward v McMaster* [1988] IR 337, 347, [1989] ILRM 400 (McCarthy J).

Evidence that outcomes have indeed been unsatisfactory is provided by the all too frequent expressions of regret from the judges who have to apply the law. Let me give just one example, out of many possible candidates.⁴⁷ In *Jain v Trent Strategic Health Authority*,⁴⁸ the claimants lost their nursing home business after the local health authority unreasonably made an ex parte, without notice application to a magistrate for cancellation of their statutorily required registration. By the time the claimants were able to present their side of the story, in the appeal hearing six months later, their business had suffered irreversible damage. They then suffered the further indignity of losing their action for damages. The Human Rights Act 1998 was not effective at the relevant time, so the claimants had relied on common law negligence. But the Law Lords rejected their claim on the basis that the authority owed them no duty of care, the loss being purely economic. Every one of their Lordships expressed regret at the outcome.⁴⁹

The judiciary's response to such unreasonable outcomes has been sadly deficient. The decision of the House of Lords in *White v Chief Constable of South Yorkshire Police*,⁵⁰ dealing with claims for post-traumatic stress disorder by police officers present at the Hillsborough football stadium disaster, represents a particular low point. The Law Lords considered the law of nervous shock to be so far beyond judicial repair that the only sensible strategy for the courts was—in Lord Steyn's words—'to say thus far and no further ... [and] by and large to leave any expansion or development in this corner of the law to Parliament'.⁵¹ As Lord Hoffmann observed, 'the search for principle' in this area of the law had been 'called off'.⁵² Faced with such intransigence, it might be well to remind ourselves who created the mess in which the House of Lords found itself. Even a child knows the maxim, 'You broke it—you fix it'.

The story does not end there. Lord Steyn's cautionary words were invoked subsequently by Lord Hope in the *Pleural Plaques* decision, which declined to extend the category of 'primary victim' to cover those suffering psychiatric illness as the result of their fear of developing cancer in the future in consequence of their past exposure to asbestos.⁵³ This delegation of responsibility to the legislature looks decidedly odd when one considers that, just five months before, the Department of Constitutional Affairs

⁴⁷ See also *JD*, above n 19, at [137] (Lord Brown) ('legitimate grievances', 'paying the price of the law's denial of a duty of care'); *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39, [2008] 1 AC 281, [59] (Lord Hope) [*Rothwell*].

⁴⁸ *Jain v Trent Strategic Health Authority* [2009] UKHL 4, [2009] 1 AC 853 [*Jain*].

⁴⁹ *Ibid*, at [40] (Lord Scott), [41] (Lord Rodger) (implicitly), [42] and [48] (Baroness Hale), [52] (Lord Carswell); [53] and [57] (Lord Neuberger).

⁵⁰ *White v Chief Constable South Yorkshire Police* [1998] UKHL 45, [1999] 2 AC 455 [*White*].

⁵¹ *Ibid*, at 500.

⁵² *Ibid*, at 511.

⁵³ *Rothwell*, above n 47.

had published a Consultation Paper on *The Law on Damages*, in which it recommended that the courts continue to take responsibility for developing the law of liability for psychiatric injury.⁵⁴ The government's expectation was that the courts would do so flexibly and incrementally; legislation, it was thought, would run the risk of imposing rigid requirements which would be unable to accommodate developments in medical knowledge and diagnoses. We seem therefore to be stuck in a game of legal pass-the-parcel in which the music never stops, and no one gets closer to unwrapping the fundamental principles upon which rational legal development depends.

IV. THE COUNTER-PRODUCTIVENESS OF THE SEARCH FOR CERTAINTY

The analysis above demonstrates that the pursuit of certainty through the predominant modern judicial approach to the duty of care—involving rigorous ‘policing’ of duty of care issues—in fact results in regrettable outcomes and a lack of fidelity to underlying principles and values. It is also counter-productive, as it has in fact produced a high degree of uncertainty, even obscurity. Issues are left unresolved; new doubts are introduced. This is evident from the repeated visits first to the House of Lords, and then to the UK Supreme Court, that have been necessary in many particular contexts in recent years, often without any final resolution of the disputed issues or clarity as to the relevant principles, sometimes with the introduction of new uncertainties through the suggestion of possible exceptions or qualifications. A few examples should make this clear.

A. The Liability of Childcare Professionals

First, in a period of just over ten years around the turn of the millennium, the House of Lords was called on no fewer than four times to determine the liabilities of childcare professionals. In *X v Bedfordshire; M v Newham*,⁵⁵ the Law Lords ruled that social workers owed no duty of care in considering whether to take into protective care children who were or might have been at risk of being abused in their homes. Conversely, in *Barrett v Enfield London Borough Council*,⁵⁶ the decision was that the social workers did owe an (arguable) duty of care once a child had been taken into protective care, and might in principle therefore be liable for psychiatric harm resulting

⁵⁴ Department of Constitutional Affairs, *The Law on Damages* (2007) (Consultation Paper CP 9/07), [94].

⁵⁵ *X v Bedfordshire; M v Newham* [1995] UKHL 9, [1995] 2 AC 633.

⁵⁶ Above n 18.

from his frequent changes of foster placement (nine in total, over 17 years). *W v Essex County Council*⁵⁷ also found an arguable duty of care in respect of a child in a foster placement—but this time to the foster parents whose own children were abused by the boy they had taken in and who suffered psychiatric injury in consequence. Finally, in *JD v East Berkshire*,⁵⁸ after the Court of Appeal had declined to follow *X v Bedfordshire; M v Newham* on the grounds that the introduction of the Human Rights Act 1998⁵⁹ had decisively changed the balance of the relevant policy considerations, and so ruled that a duty of care was owed in deciding to take a child into care, the Lords ruled that the scope of that duty did not extend to the child's parents. Precluding such a duty, in particular, was the potential conflict between the duty owed to the child and that argued to be owed to the parents.

Despite this flurry of cases, significant uncertainties remain.

A first uncertainty is whether a duty of care is owed by a care worker to a child whom the care worker decides to place in protective care because of a perceived risk of abuse. As just mentioned, the House of Lords said not in *X v Bedfordshire; M. v Newham*, but the Court of Appeal concluded in *JD v East Berkshire* that the policy considerations had shifted following the enactment of the Human Rights Act 1998, and found that there was now a duty to a child taken into care. This seems to have been accepted when the case reached the House of Lords—where only the (alleged) duty to the parent was in issue. Yet the reasoning runs counter to the analysis of the House of Lords in other cases when considering the Act's impact on the common law, in which the existence of a possible claim under the Act has been seen to reduce or even obviate the need to fashion a claim in negligence,⁶⁰ and the existence of a duty of care to the child in such circumstances has been regarded as at least open to question.⁶¹

A second uncertainty is whether, even if it is conceded that a duty is owed to a child taken into care, a duty is owed to a child whom social services mistakenly conclude is not at risk of harm, and who is consequently left in the family home, where he or she experiences abuse. These were the actual facts of *X v Bedfordshire*, which was distinguishable for that reason from *JD v East Berkshire*. It cannot be taken for granted that the Court of Appeal decision in the latter case—in favour of a duty to the child—will be treated as applicable if the Court of Appeal, or a lower court, is faced with

⁵⁷ *W v Essex County Council* [2000] UKHL 17, [2001] 2 AC 592 [*W v Essex*].

⁵⁸ Above n 19.

⁵⁹ A person whose rights under the Act are infringed by a public authority may also bring a claim for compensation under the mechanism provided by the statute, but the focus of the present chapter is on liability for negligence at common law.

⁶⁰ See especially *JD*, above n 19, at [94] (Lord Nicholls); *Smith*, above n 19, at [82] (Lord Hope), [136] (Lord Brown) ('it is quite simply unnecessary now to develop the common law to provide a parallel cause of action').

⁶¹ *Jain*, above n 48, at [25] (Lord Scott).

a claim based on a failure to remove a vulnerable child from an abusive home environment. On the contrary, it seems quite likely that even a first instance court might consider the point open to decision in the post-Human Rights Act legal world. As the law is generally reluctant to impose a duty of care that entails an affirmative obligation to intervene, a future ‘no-duty’ decision in this context is not to be discounted.

B. The Police

Next, there is the liability of the police. In just over 20 years, three police negligence actions reached the House of Lords: *Hill v Chief Constable of West Yorkshire*,⁶² *Brooks v Commissioner of Police for the Metropolis*⁶³ and *Smith v Sussex Police*.⁶⁴ In all these cases, the House of Lords ruled that no duty of care arises in respect of the police’s investigation of crime, whether to a potential victim or (in *Brooks*) a witness, because the threat of litigation might induce officers to adopt a detrimentally defensive approach to criminal investigations, which would not be fair, just, and reasonable.⁶⁵

Again, significant uncertainties remain. The last case of the three leaves open the question whether the police owe a duty of care in respect of their performance of operational tasks, for example, concerning public safety on the roads.⁶⁶ Established Court of Appeal authority says they do not,⁶⁷ but that seems now to be open to challenge. And there is still a question mark over whether the police may assume a responsibility towards a particular person, for example a witness who agrees to testify in a criminal trial. The Court of Appeal has accepted that a duty of care may *arguably* arise on this basis,⁶⁸ and this seems not yet to have been ruled out as a possibility by either the House of Lords or the Supreme Court.⁶⁹ Nevertheless, it cannot be affirmed with any measure of certainty that the Supreme Court will adopt this reasoning if called upon to decide the matter.

⁶² Above n 26.

⁶³ Above n 19.

⁶⁴ Above n 19.

⁶⁵ In *Hill*, above n 26, the claim also failed for lack of the necessary relationship of proximity between the police and the victim.

⁶⁶ *Smith*, above n 19, at [79] (Lord Hope), [109] (Lord Carswell).

⁶⁷ *Ansell v McDermott* [1993] EWCA Civ 20, [1993] 4 All ER 355.

⁶⁸ *Swinney v Chief Constable of Northumbria Police* [1996] EWCA Civ 1322, [1997] QB 464. A similar analysis was also proposed at first instance in *Van Colle v Chief Constable of Hertfordshire* [2006] EWHC 360, [2006] 3 All ER 963, [89] (Cox J) (QB). The claim was actually under the Human Rights Act, and was ultimately rejected by the House of Lords: [2008] UKHL 50, [2009] 1 AC 225 [*Van Colle*] (decided with *Smith*, above n 19).

⁶⁹ In fact, in *Van Colle*, above n 68, at [120], [135] Lord Brown considered that the argument was correct in principle.

C. Wrongful Conception

Third, we come to wrongful conception. In just a few years at the turn of the millennium, we had three major decisions, two of them (*McFarlane v Tayside Health Board*⁷⁰ and *Rees v Darlington Memorial Hospital NHS Trust*⁷¹) in the House of Lords. The first of these (*McFarlane*) decided that the liability of a health authority for the negligent performance of a sterilisation operation, which was consequently ineffective, is limited to losses directly attributable to the resulting pregnancy and birth and does not extend to the costs of the child's upbringing; the latter costs fall outside the ambit of the health authority's duty of care. In the second case (*Rees*), the Law Lords confirmed their earlier decision, and ruled that the same principle also applied where the costs of raising the child were increased by the pre-existing disability of the mother; no exception was to be admitted in respect of the additional costs she would incur as a result of her disability. Intervening between the two House of Lords decisions is the third case in the series, *Parkinson v St James and Seacroft University Hospital NHS Trust*.⁷² This did not reach the Lords, so the issue it raised—whether damages for wrongful conception extend to additional costs attributable to the disability of the 'unwanted' child—remains unresolved. The three Law Lords in the minority in *Rees* (Lord Steyn, Lord Hope and Lord Hutton) approved the decision that damages could be awarded. Of the majority, two (Lord Bingham and Lord Nicholls) were against it, and indeed opposed to any exception on grounds of the child's disability, one (Lord Scott) thought that *Parkinson* was wrongly decided but that the award of damages might be appropriate where the very purpose of the sterilisation was to protect against the birth of a child with an inherited disability. The final Law Lord (Lord Millett) expressly declined to voice an opinion.⁷³ So here too we have uncertainty, and a further trip to the Supreme Court will be necessary to resolve once and for all the issue of wrongful conception claims by disabled children.

D. Psychiatric Harm

Finally, we may turn to the law of nervous shock. In just over 20 years, we have had six major House of Lords decisions.⁷⁴ These have in no way

⁷⁰ *McFarlane v Tayside Health Board* [1999] UKHL 50, [2000] 2 AC 59.

⁷¹ *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52, [2004] 1 AC 309.

⁷² *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [2002] QB 266.

⁷³ *Rees*, above n 71, at [9] (Lord Bingham), [18] (Lord Nicholls), [35] (Lord Steyn), [57] (Lord Hope), [91] (Lord Hutton), [112] (Lord Millett), [145] (Lord Scott).

⁷⁴ *Hicks v Chief Constable of the South Yorkshire Police* [1991] UKHL 9, [1992] 2 All ER 65; *Alcock v Chief Constable of South Yorkshire* [1991] UKHL 5, [1992] 1 AC 310 [*Alcock*];

improved the law as previously laid down in *McLoughlin v O'Brian*,⁷⁵ a decision in which the majority of the House of Lords in fact adopted a commendably flexible approach to establishing a duty of care,⁷⁶ only for a later panel of Law Lords to reinterpret the decision to reflect Lord Wilberforce's more rigid, minority approach in that case.⁷⁷ According to that approach, a duty of care is generally owed to a person suffering psychiatric harm from an accident involving another person only if the claimant had a close tie of love and affection with the 'primary victim', and either witnessed the accident directly or came upon its immediate aftermath.

Again, significant uncertainties remain. One is whether an exception to the usual requirements should be admitted if the events are especially horrific. In the leading case, one Law Lord thought that such an exception might be justified, and therefore expressly declined to exclude the possibility of liability where, for example, a passer-by witnesses a petrol tanker careering out of control into a school in session and bursting into flames.⁷⁸ It is not self-evident that the imagined scenario would be any more horrific than the tragic events in the case actually before his Lordship,⁷⁹ and it seems somewhat distasteful to engage in the measurement of different degrees of horror, which was one factor that induced the Court of Appeal subsequently to reject the contemplated exception.⁸⁰ But no final court of appeal has yet ruled on the matter so—in theory at least—it remains unresolved.

A further uncertainty relates to a second possible qualification to the general approach adopted in this area. Generally, no duty of care is owed to persons who suffer psychiatric harm as the result of watching television coverage of an accident in which they know a close relative is involved, as the interpolation of television coverage—even if live—takes away the

Page v Smith, above n 16; *White*, above n 50; *W v Essex*, above n 57; and *Rothwell*, above n 47. Some other decisions in the same period (eg *Barber v Somerset County Council* [2004] UKHL 13, [2004] 1 WLR 10) may be regarded as somewhat less important in terms of legal principle. Under Scots law, see also *Simmons v British Steel plc*, 2004 SC (HL) 94, [2004] ICR 585.

⁷⁵ Above n 12.

⁷⁶ Every Law Lord except Lord Wilberforce considered that the reasonable foreseeability of psychiatric injury raised a prima facie duty of care, all but Lord Scarman accepting it might be rebutted in an appropriate case by countervailing policy considerations. See Mullis and Oliphant, above n 44, at 37–38. This interpretation is in line with that advanced by H Teff, *Causing Psychiatric and Emotional Harm: Reshaping the Boundaries of Legal Liability* (Oxford, Hart Publishing, 2009) 63–64. For a rival interpretation, see D Nolan, 'McLoughlin v O'Brian (1983)' in C Mitchell and P Mitchell (eds), *Landmark Cases in the Law of Tort* (Oxford, Hart Publishing, 2010).

⁷⁷ *Alcock*, above n 74.

⁷⁸ *Ibid.*, at 403 (Lord Ackner).

⁷⁹ The case arose out of the Hillsborough football stadium tragedy of 1989.

⁸⁰ *McFarlane v EE Caledonia Ltd* [1993] EWCA Civ 27, [1994] 2 All ER 1.

scenes' sudden impact upon the senses.⁸¹ It has been suggested, however, that there might be occasions when television pictures would have at least as great an impact on observers as actual presence at the scene, an illustration being where parents are watching live television pictures of their children travelling in a hot-air balloon when the balloon suddenly bursts into flames and plummets to the ground.⁸² The dictum seems not to have received subsequent judicial attention, so the existence of the proposed exception remains undecided.

Turning from secondary victims to primary victims, we find yet more uncertainty. In the first place, it is unclear even how the term 'primary victim' should be defined, and in particular whether it extends beyond the core category of persons who are themselves imperilled by the accident or other occurrence that the defendant has negligently caused.⁸³ Lord Oliver once posited two further categories of primary victim: rescuers and those who are the unwitting mechanism through whom another person is killed or injured.⁸⁴ The first of these suggested categories (rescuers) was rejected by the House of Lords when it was confronted by the issue shortly afterwards.⁸⁵ A few years later, however, the Law Lords declined to strike out as unarguable a claim falling under the second of Lord Oliver's proposed categories (unwitting agents of misfortune)—in a case where parents alleged they had suffered psychiatric harm after their young children were sexually abused by a foster child whom they had accepted into their household, after receiving (false) assurances from the council that the child they were fostering had no record of such conduct.⁸⁶ Because the decision was only that a duty of care was 'arguable', it again cannot be treated as definitively resolving the matter.

In any case, a more fundamental uncertainty must also be confronted, relating to the core category of primary victims—those actually imperilled by the accident. Under the approach adopted by the House of Lords in *Page v Smith*,⁸⁷ the claimant establishes a duty of care by showing the foreseeability of any personal injury, as opposed to the foreseeability of psychiatric harm in particular. The decision thus departs from the test that has long been applied in respect of secondary victims, and for that reason its correctness was subsequently doubted in more than one decision of the House

⁸¹ *Alcock*, above n 74.

⁸² *Ibid*, at 405 (Lord Ackner).

⁸³ *Cf W v Essex*, above n 57, at 601, where Lord Slynn remarked that 'the categories of those claiming to be included as primary or secondary victims are not as I read the cases finally closed. It is a concept to be developed in different factual situations.'

⁸⁴ *Alcock*, above n 74, at 407–08, referring to *Chadwick v British Railways Board* [1967] 1 WLR 912, [1967] 2 All ER 945 and *Dooley v Cammell Laird & Co Ltd* [1951] 1 Lloyd's Rep 271, respectively.

⁸⁵ *White*, above n 50.

⁸⁶ *W v Essex*, above n 57.

⁸⁷ Above n 16.

of Lords.⁸⁸ It seems likely that a full challenge to the decision—and hence to the making of any distinction at all between primary and secondary victims—will be brought to the Supreme Court in the coming years.

V. TOWARDS A MORE FLEXIBLE APPROACH

In truth, the search for certainty in an area of law where so much depends on judicial assessments of what is ‘reasonable’ is as likely to succeed as an attempt to catch a moonbeam. Uncertainty is the inevitable result of the open-textured nature, and hence the inherent instability, of the concepts employed. Apparently firm boundary walls erected by the courts are prone to subsidence because of the insecurity of their foundations. A prime example is provided by the many duty-restricting rules that, on thorough scrutiny, prove to be based on foreseeability or some variant upon it. For example, knowledge—which lies at the heart of the ‘narrow’ *ratio decidendi* of *Caparo v Dickman*⁸⁹—is simply foreseeability of greater degree than that normally required, at least if one accepts that knowledge can be imputed on the basis of what was foreseeable with a sufficient degree of probability, which is a question of fact for the tribunal of fact in every case. A rule based on (actual or imputed) knowledge can never bring the hoped-for certainty.

But *Caparo v Dickman* demonstrates that the power of a supreme court decision is not limited to its narrow *ratio decidendi*. The ‘message’ that it sends to lower courts and to litigants is equally, perhaps more, important. Thus, after *Caparo*, first instance judges and the Court of Appeal took a notably more restrictive approach to the scope of the duty of care in respect of the preparation and certification of company accounts than had previously prevailed.⁹⁰ A more recent decision that has had a comparable impact is *Tomlinson v Congleton Borough Council*,⁹¹ whose narrow *ratio decidendi* relating to the statutory duty of care owed under the Occupiers’

⁸⁸ *White*, above n 50, at 473–80 (Lord Goff); *Rothwell*, above n 47, at [52] (Lord Hope), [104] (Lord Mance). Cf *Corr v IBC* [2008] UKHL 13, [2008] 1 AC 884, [40] (Lord Walker) (‘a much simpler test’).

⁸⁹ Above n 25. See especially Lord Bridge at 621: ‘the defendant knew that his statement would be communicated to the plaintiff, either as an individual or as a member of an identifiable class, specifically in connection with a particular transaction or transactions of a particular kind ... and that the plaintiff would be very likely to rely on it for the purpose of deciding whether or not to enter upon that transaction or upon a transaction of that kind’. As I have remarked elsewhere, this language is so imprecise as to make us ask why the test was not satisfied on the facts of *Caparo* itself: Mullis and Oliphant, above n 44, at 67.

⁹⁰ See, eg, *James McNaughton Paper Group Ltd v Hicks Anderson & Co* [1990] EWCA Civ 11, [1991] 2 QB 113; *Berg Sons & Co Ltd v Adams* [1992] BCC 661.

⁹¹ *Tomlinson v Congleton Borough Council* [2003] UKHL 47, [2004] 1 AC 46 [Tomlinson].

Liability Acts⁹² seems in retrospect—and was probably envisaged by its authors at the time—to be less important than their general remarks about ‘compensation culture’⁹³ and the need to be vigilant against a decline in notions of personal responsibility in addressing the issue of *breach* of duty and the required standard of care. Although the House of Lords’ analysis of the duty issue was rather technical, and may perhaps be considered unpersuasive,⁹⁴ the main message the decision sent to lower courts and potential litigants was powerful and unambiguous—and has been influential in a wide range of contexts.⁹⁵

This suggests that the role of a final court of appeal may most usefully be conceived of in terms of ‘setting the tone’ for lower court decisions, and steering the lower courts back into line when their decisions begin to tend in the wrong direction. It seems not to be productive for them to seek to constrain the exercise of judgment in those courts by laying down detailed legal rules that attempt to specify in detail the proper scope of the duty of care. Experience shows that gaps will inevitably remain, and it is more important to state the principles according to which the existence of a duty of care should be determined, and to engage in a flexible weighing up of all normatively relevant factors, than to strive for a certainty that can never be achieved, when the effort to attain it is liable to produce incoherence and injustice.

⁹² Following Lord Hoffmann, *ibid.*, at [27], this may be said to be that the duty of care under the Occupiers’ Liability Acts is contingent on a risk of injury arising out of the state of the premises and not out of what the claimant chose to do on the premises. This was followed in *Keown v Coventry Healthcare NHS Trust* [2006] EWCA Civ 39, [2006] 1 WLR 953; *Siddorn v Patel* [2007] EWHC 1248 (QB) (the risk of falling through a skylight if one chooses to dance on a roof is not one arising from the state of the premises as such). A subtly but significantly different approach was taken by the majority of the High Court of Australia in *Vairy v Wyong Shire Council*, [2005] HCA 62, 223 CLR 422 and *Mulligan v Coffs Harbour City Council* [2005] HCA 63, (2005) 223 CLR 486, where it was held that the obviousness of the risk that attached to the claimant’s activity (diving into water of unknown depth) on the land was only one factor to consider in determining whether the occupier was required to take steps to prevent the risk from materialising, although it might be determinative in particular cases.

⁹³ See, eg, *Tomlinson*, above n 91, at [81] (Lord Hobhouse): ‘The pursuit of an unrestrained culture of blame and compensation has many evil consequences and one is certainly the interference with the liberty of the citizen.’

⁹⁴ For criticism, see K Oliphant, ‘England and Wales’ in H Koziol and BC Steininger (eds), *European Tort Law 2003* (Vienna, Springer, 2004) 132–35.

⁹⁵ Though there are a few cases that apply the narrow *ratio* of the *Tomlinson* decision (see above n 91), these are outnumbered by the substantial number of cases in a variety of different contexts that apply the Law Lords’ more general remarks regarding breach of duty and the standard of reasonable care. See, eg, *Clare v Perry* [2005] EWCA Civ 39, (2005) 149 SJLB 114; *Evans v Kosmar Villa Holidays Plc* [2007] EWCA Civ 1003, [2008] 1 WLR 297; *Poppleton v Trustees of the Portsmouth Youth Activities Committee* [2008] EWCA Civ 646, [2009] PIQR P1.