damage.[11] Reckless conduct is treated in the same way, so the consequences of such conduct, even though heedless, are compensatable as having been intended. In *Scott v Shepherd*,[12] for a joke, a person threw a lighted squib amongst a crowd of people in a covered market. In self defence the person nearest to it threw it towards someone else, who in turn picked it up and threw it away, whereupon it exploded and put out the claimant's eye. It was held that the person who started the incident by lighting and throwing the firework was liable to the claimant because he must have intended that it should explode somewhere in the crowd. Further, the risk of injury to somebody as a result of his action was at least foreseeable.

5–08 **Direct consequences.** In the case of unintended consequences of negligence, the classic case for many years was *Re Polemis*. The claimants were the owners of a ship, the *Thrasyvoulos*, which was being unloaded in Casablanca. Stevedores employed by the charterers of the ship negligently knocked a plank into the hold, where a quantity of benzine was stored. Leakage had caused benzine vapour to form, and a spark from the falling plank ignited the vapour and caused a fire which destroyed the ship. At trial it was held that the causing of the spark could not reasonably have been anticipated from the falling of the plank, although some small damage to the ship could have been contemplated. It was held by the Court of Appeal that the charterers of the vessel were liable to the owners for the loss of the ship, on the basis that this was the direct consequence of the stevedores' negligence.

5–09 Scrutton L.J. said that in determining whether an act was negligent, it was relevant to determine whether any reasonable person would foresee that the act would cause damage; if he would not, the act was not negligent. But if the act would or might probably cause damage, the fact that the damage it caused was not the exact kind of damage one would expect was immaterial, so long as the damage was directly traceable to the negligent act and not due to the operation of independent causes having no connection with the negligent act, except that they could not avoid its results. Once the act was negligent, the fact that its exact operation was not foreseen was immaterial. Applying these principles, he concluded that it was negligent in discharging cargo to knock down the plank, for it could easily cause some damage, either to workers, or cargo, or the ship. The fact that it did directly produce an unexpected result, a spark in an atmosphere of petrol vapour which caused a fire, did not relieve the person who was negligent from the damage which his negligent act directly caused.

5–10 **Foreseeable consequences.** The reasoning in *Re Polemis* was subsequently criticised on a number of grounds. First, it was said to be lacking in authority, on the basis that precedents cited by the Court of Appeal did not support the decision.[13] Secondly, the direct consequence test was seen as inherently uncertain and difficult to apply: it would provoke a "war of epithets" about what exactly

[11] *Emblen v Myers* (1860) 6 H & N 54.
[12] (1773) W Bl 892.
[13] Pollock, "Liability for consequences" (1922) 38 L.Q.R. 165.

amounted to a "direct" consequence.[14] And thirdly, the very principle of the case was attacked as misconceived, on the ground that it was illogical and inconsistent to use the concept of foreseeability to create liability in negligence but to reject it when determining the ambit of recovery for that negligence. Rather, culpability and compensation should go hand in hand.[15]

The Wagon Mound (No.1). Criticisms such as these provide the background 5–11
to the decision of the Privy Council, on appeal from Australia, in *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound (No.1)*.[16] The defendants carelessly discharged bunkering oil from a ship, the *Wagon Mound*, onto water about two hundred yards away from the claimants' wharf in Sydney harbour. The oil was carried by the tide to the claimants' wharf and fouled the slipways. Welding operations were being carried out by the claimants, and these caused the oil to ignite and the resulting fire to damage the wharf. At the trial it was found that damage to the wharf by fouling was reasonably foreseeable but damage by fire was not, and on this footing the Privy Council decided that the defendants were not liable. It was not enough that the negligence was the direct cause of the damage if that damage was not foreseeable, and *Re Polemis*, accordingly, should not be followed. Viscount Simonds explained why:

> "Enough has been said to show that the authority of *Polemis* has been severely shaken though lip service has from time to time been paid to it. In their Lordships' opinion it should no longer be regarded as good law. It is not probable that many cases will for that reason have a different result, though it is hoped that the law will be thereby simplified and that in some cases, at least, palpable injustice will be avoided. For it does not seem consonant with current ideas of justice or morality that for an act of negligence, however slight or venial, which result in some trivial foreseeable damage the actor should be liable for all consequences however unforeseeable and however grave, so long as they can be said to be 'direct'. It is a principle of civil liability, subject only to qualifications which have no present relevance, that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour."

In the result, following the decision in *The Wagon Mound (No.1)*, the test for 5–12
remoteness in actions for negligence is not directness but foreseeability: a tortfeasor is liable for damage of the kind that a reasonable person should have foreseen at the time of the negligent act or omission in question.

The Wagon Mound (No.2). The decision in *The Wagon Mound (No.1)* did 5–13
not bring all litigation resulting from the fire on Sydney harbour to an end. In *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty (The Wagon Mound*

[14] See especially Goodhart, "The imaginary necktie and the rule in *Re Polemis*" (1952) 68 L.Q.R. 514; Goodhart, "Liability and compensation" (1960) 76 L.Q.R. 567.
[15] ibid. Compare Davies, "The road from Morocco: *Polemis* through *Donoghue* to no-fault" (1982) 45 M.L.R. 534.
[16] [1961] A.C. 388, PC; Payne, "Foresight and remoteness of damage in negligence" (1962) 25 M.L.R. 1; Dias, "Remoteness of liability and legal policy" [1962] C.L.J. 178.

(No.2)[17] the claim was by the owners of two ships, the *Corrimal* and the *Audrey D*, which were tied up at the wharf at the time of the fire. The claimants adduced different evidence about the fire danger, leading the trial judge to conclude that: (i) reasonable people in the position of the officers of the *Wagon Mound* would regard the furnace oil as very difficult to ignite when on water; (ii) if they had given attention to the risk of fire, they would have regarded it as a possibility, but one which could become an actuality only in very exceptional circumstances; and (iii) they would have considered the chances of the required exceptional circumstances happening while the oil remained spread on the harbour waters as being remote. On these findings, the judge concluded that the damage was not reasonably foreseeable and that the claim in negligence failed. The Privy Council, however, reversed his decision. Lord Reid identified a foreseeable risk as a "real risk", being "one which would occur to the mind of a reasonable man in the position of the defendant's servant and which he would not brush aside as far-fetched".[18] The instant risk satisfied this test and the question then was what, if anything, the reasonable man would have done to counter it. There was no advantage in or justification for allowing the oil to escape, the damage could very easily have been prevented and in the circumstances, therefore, the risk was not one that could be neglected. The defendants accordingly were liable for the damage to the plaintiff's ships.

5–14 *The Wagon Mound (No.2)*, then, concerns the *degree* of foreseeability which can satisfy the test for remoteness of damage in *The Wagon Mound (No.1)*. The requirement that the risk be a "real risk" as explained by Lord Reid is not a demanding one, but sometimes a risk may be held to be unforeseeable in this sense and the damage too remote.

(C) Application of the foresight test

5–15 **General propositions.** Although uncertainty is inherent in the remoteness inquiry, some general propositions are possible. The defendant is liable for all damage of a kind that was reasonably foreseeable, given the scope of the duty of which he was in breach. And so long as the damage is of a kind that was reasonably foreseeable, it is not necessary that the precise mechanism by which the damage was caused was foreseeable. Again, the wrongdoer is liable for foreseeable damage even though its full extent may not have been capable of anticipation. In cases where the amount of the damage is exacerbated by the claimant's existing physical, mental or financial state, the defendant takes the claimant as he finds him and, once again, must pay the full amount of the damage.

[17] [1967] 1 A.C. 617, PC; Dias, "Trouble on oiled waters: problems of *The Wagon Mound (No 2)*" [1967] C.L.J. 62.
[18] *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty (The Wagon Mound (No.2))* [1967] 1 A.C. 617 at 643; The test also has been adopted in Australia: *Wyong Shire Council v Shirt* (1980) 146 C.L.R. 40, at 47–48, HCA; *New South Wales v Fahy* (2007) 81 A.L.J.R. 1021, at [7], [78], [133], [241], HCA; but see the criticisms of Callinan and Heydon JJ. at [216]–[227].

These propositions and their application in particular cases can be examined under three heads: (i) personal injuries, (ii) damage to property, and (iii) economic loss. **5–16**

(i) Personal injuries

Mode of infliction of injury. As a general rule the courts have not sought to distinguish between different kinds of injury to the human body. If personal injury of some kind is foreseeable then the damage usually will not be regarded as too remote, notwithstanding that the injury came about in some unforeseeable way or that the particular form of personal injury was unexpected or unforeseeable. **5–17**

Hughes v Lord Advocate. The general rule is seen in operation in the decision of the House of Lords in *Hughes v Lord Advocate*.[19] Workers maintaining telecommunications equipment in Edinburgh left an uncovered manhole surrounded by a tent and guarded by red warning lamps lit by paraffin. An eight-year-old boy entered the tent and caused one of the paraffin lamps to fall down the hole. Some paraffin escaped and vaporised, creating an explosive mixture which was detonated by the naked light of the lamp, and the boy was severely injured in the explosion which followed. The defendants' employees were found to be in breach of a duty of care to safeguard the boy against injury from the lamp, containing as it did a highly inflammable substance. It was reasonably foreseeable that if care was not taken he would be exposed to injury from that source. The argument that the *way* that the damage resulted, by an explosion, could not reasonably have been foreseen and that the damage was, therefore, too remote was rejected. Given that injury from the lamp was foreseeable, the accident in question "was but a variant of the foreseeable"[20] and it mattered not that it may have arisen in an unforeseeable manner. **5–18**

Doughty v Turner Manufacturing Co Ltd. *Hughes* may be contrasted with *Doughty v Turner Manufacturing Co Ltd.*[21] The defendants had two cauldrons in their factory's heat treatment room, in which they subjected metal parts to heat by immersing them in a hot molten solution. They provided suitable covers for the cauldrons, in order to conserve the heat, which had been made by reputable manufacturers from asbestos cement. Nobody had supposed that, if one of these covers were immersed in the cauldron, there would result any serious consequences. In fact, a cover was accidentally knocked into the cauldron, so that it slid beneath the surface of the hot liquid, which erupted violently, causing the claimant to sustain burns. It was accepted that there was a reasonably foreseeable risk to the claimant from the splashing of hot liquid if a foreign body struck its surface, but the claim nonetheless failed. The Court of Appeal held that, even if the inadvertent immersion of the cover was negligent, the defendants were not liable because the damage was not of such kind as could reasonably have been foreseen. The duty was to safeguard from splashes, but not the kind of **5–19**

[19] [1963] A.C. 837, HL.
[20] *Hughes v Lord Advocate* [1963] A.C. 837 at 858, per Lord Pearson.
[21] [1964] 1 Q.B. 518, CA.

unforeseeable explosion which actually occurred. Alternatively, the harm caused to the claimant was too remote.

5–20 On occasion the courts have taken a similarly restrictive view.[22] But it is not very easy to reconcile *Doughty* (or similar cases) with the decision in *Hughes*, for in both, foreseeable personal injury came about in an unforeseeable way. The Privy Council has raised the question whether the distinction that was taken in *Doughty* would commend itself to the courts today.[23]

5–21 **Jolley v Sutton London Borough Council.** The wider view is seen in the decision of the House of Lords in *Jolley v Sutton London Borough Council*.[24] A boat was left abandoned in the grounds of a block of flats of which the defendant was the occupier. The boat deteriorated and became rotten. The claimant, a boy of 14, and his friend jacked the boat up and attempted to repair it. While they were doing this the jack slipped and the boat fell on the claimant, causing very severe injury. At the trial the judge found that it was foreseeable that the boys would meddle with the boat in circumstances where they were at risk of physical injury, and imposed liability on the defendant. On appeal, it was conceded that the defendant had been negligent in failing to remove the boat and that the negligence had created a risk of injury from children climbing onto the boat and suffering injury from rotten planking giving way. However, the Court of Appeal allowed the appeal on the grounds that it was not reasonably foreseeable that the boys would decide to play by working under the boat whilst it was propped up. On further appeal to the House of Lords the decision of the trial judge was restored. Lord Hoffmann said that the defendant's duty was to take such care as was reasonable to see that the claimant was reasonably safe whilst he was on the defendant's premises, and the question here was whether the injury was of a description which was reasonably foreseeable so as to lie within the scope of that duty. The boys were likely to mimic behaviour of adults in the manner in which they played with the boat, and since it was reasonably foreseeable that the boys would suffer some injury from the negligent failure to remove the boat, the defendant was liable. The precise manner of the injury did not have to be foreseen. It was sufficient that there was a risk that children would meddle with the boat at the risk of some physical injury.

5–22 **Corr v IBC Vehicles Ltd.** The approach taken by the House of Lords in *Hughes* was confirmed once again in *Corr v IBC Vehicles Ltd*.[25] An employee of the defendant suffered serious head injuries in an accident at work, following which he underwent lengthy reconstructive surgery. He then began to suffer post-

[22] *Tremain v Pike* [1969] 1 W.L.R. 1556 (rare disease caused by exposure of the claimant to contact with rats' urine treated as different in kind from the effect of a rat bite or the consumption of food or drink contaminated by rats).
[23] *Attorney-General of the British Virgin Islands v Hartwell* [2004] 1 W.L.R. 1273, [29], PC.
[24] [2000] 1 W.L.R. 1082, HL; Williams, "Remoteness: some unexpected mischief" (2001) 117 L.Q.R. 30; Nolan, "Risks and wrongs—remoteness of damage in the House of Lords" (2001) 9 Tort L. Rev. 101; and see *Jebson v Ministry of Defence* [2000] 1 W.L.R. 2055, CA (defendants liable to drunken claimant who fell from the back of army lorry, because his conduct was within the general type that ought to have been foreseen, ie that, unsupervised, he and his fellows would encourage each other in foolish acts).
[25] [2008] 1 A.C. 884.

traumatic stress disorder, causing him to lapse into severe anxiety and depression, and eventually, some six years after the initial accident, he committed suicide. The issue requiring determination was whether the liability of the defendant extended to his suicide. Their Lordships held that the deceased's depressive illness had been the direct and foreseeable consequence of the accident for which the defendant was responsible, and that his suicide, although his own deliberate act, did not break the chain of causal consequences because it had been a direct result of that illness at a time when his capacity to make reasoned judgments about his future had been impaired. In so deciding, Lord Bingham recognised that it was not necessary, applying *Hughes*, that it be shown that the suicide was itself foreseeable where depression was a foreseeable consequence of the injuries and the suicide followed upon that depression. A tortfeasor who reasonably could foresee the occurrence of some damage did not have to foresee the precise form that that damage might take. Some consequences of depression might be so unusual or unpredictable as to be outside the bounds of what was reasonably foreseeable, but suicide was not.

5–23 **Different kinds of injury.** However, it may be that in some, rare, cases the courts will differentiate between different kinds of personal injury. One obvious distinction already adverted to is that between physical and mental injury. At the duty stage, as we have seen, a claimant seeking damages for psychiatric injury who is a primary victim need show only that either form of injury was foreseeable, whereas in other cases the claimant must establish specifically that psychiatric injury was foreseeable.[26] In these latter cases the further question arises whether particular forms of psychiatric injury may be treated as different in kind. In *Pratley v Surrey County Council*[27] it was held that a foreseeable risk to an employee of psychiatric injury arising at some time in the future from a continuing work overload did not include a risk of an immediate mental collapse stemming from the employer's failure to introduce a new system of work. So here the court treated a particular form of mental injury as being different in kind and the mental collapse thus as too remote.

5–24 A court may also be prepared to distinguish between different kinds of physical injury, but even then the defendant's conduct may be held to pose a risk of injury of more than one kind. In *Ogwo v Taylor*,[28] the defendant negligently started a fire in the roof of his house and the plaintiff, a fireman, was scalded by steam generated by water poured on to the fire. It was held that the defendant could foresee that the plaintiff would be subject to the risks inherent in fighting the fire, of which the risk of a scalding injury was certainly one.

5–25 **Extent of injury.** If personal injury of some kind is foreseeable, it is no answer for the defendant to claim that he could not have foreseen its extent. So requiring an employee to drive an unheated van for 500 miles in freezing conditions exposed the employee to the risk of injury from cold and fatigue, and this included injury by frostbite even though this was an unusual consequence of

[26] See paras 2–116 to 2–154; and see further paras 5–31 to 5–33, below.
[27] [2004] I.C.R. 159, CA; and see *Rowe v McCartney* [1976] 2 N.S.W.L.R. 72, NSWCA.
[28] [1988] A.C. 431.

care for the safety of the workman. The cause of action is sometimes described as statutory negligence[5] and it is said that negligence is conclusively presumed."

12–02 Historically, health, safety and similar regulatory legislation has been the dominant aspect of this tort in practice, and its interface with the law relating to employer's liability has justified it being included in a work concerned with negligence. Increasingly, however, litigation seeking to establish breaches of social welfare legislation, notably in the fields of child abuse[6] and education,[7] has occupied the House of Lords. Such litigation has brought mixed success for claimants. The trend appears to reflect a reluctance to hold that a private law right of action exists in respect of the more general, as opposed to specific, duties imposed on public authorities by statutes setting up broad schemes of social welfare. Athough this chapter will address general principles and the relationship between carelessness in this context and negligence, together with a survey of the most commonly encountered health and safety legislation, reference should be made to specialist texts for a more detailed survey of the law relating to breach of statutory duty.[8]

12–03 The existence of a statutory duty does not necessarily relieve an employer of his common law duty of care to employees although "in very many cases, it would be difficult, if not impossible, to maintain that an employer who had complied with regulations had been negligent at common law".[9] Indeed a statutory duty is likely to be higher than its common law equivalent: a claim based on a breach of statutory duty can succeed even though an employer is not liable in negligence.[10] Nevertheless, the existence of a statutory duty may indicate that a particular risk ought to have been foreseen and thus can be relied upon in order to establish negligence.[11] But this is not invariably the case, in

[5] The expression probably also derives from the fact that commonly in personal injury litigation allegations of "common law" negligence are made against the defendant which run parallel with and/or overlap the corresponding allegations of breaches of statutory duty. Many such examples may be found in *Bullen & Leake & Jacob's Precedents of Pleading* (16th edn, 2003) and *Personal Injury Pleadings*, Curran et al. (4th edn, 2008).

[6] e.g. *X (Minors) v Bedfordshire CC* [1995] 2 A.C. 633; *Barrett v Enfield LBC* [1999] 3 W.L.R. 79, HL.

[7] e.g. *M (A Minor) v Newham LBC; E (A Minor) v Dorset CC* [1995] 2 A.C. 633; *Phelps v Hillingdon LBC* [2000] 3 W.L.R. 776, HL.

[8] Stanton, Skidmore, Harris and Wright, *Statutory Torts* (2003) Sweet & Maxwell; *Clerk & Lindsell on Torts* (19th edn, 2006). See also Buckley, "Liability in Tort for Breach of Statutory Duty" (1984)100 L.Q.R. 204; Stanton, "New Forms of the Tort of Breach of Statutory Duty" (2004)120 L.Q.R. 324. In respect of health and safety legislation, see *Redgrave's Health and Safety* (6th edn 2008) Butterworths.

[9] *Franklin v Gramophone Co Ltd* [1948] 1 K.B. 542 at 558 per Somervell L.J. *N.C.B. v England* [1954] A.C. 403.

[10] *Hall v Edinburgh City Council*, 1999 S.L.T. 744, OH, in relation to the Manual Handling Operations Regulations 1992. See para.12–241, below.

[11] So, where a local authority's liability under the Housing Act 1985 s.365, was restricted to houses in multiple occupation that were three storeys in height or more, it was held not just and equitable to impose a duty of care in respect of the condition of two-storey houses: *Ephraim v Newham LBC* (1993) 91 L.G.R. 412, CA (claimant injured where no fire escape provided). A good example of a statutory duty, the breach of which did not give rise to a cause of action prior to October 31, 2003, and was regularly used by claimants to establish the standard that an employer ought to have achieved, is to be found in reg.3(1) of the Management of Health and Safety at Work Regulations 1999: see para.12–101, below.

Chipchase v British Titan Products Co Ltd,[12] it was argued unsuccessfully that, where the facts of the case lay just outside the protection of the statutory duty, the court ought to take the statutory provisions into account in deciding negligence.

The classes of breach of statutory duty must now be considered.

2.—CATEGORIES OF BREACH OF STATUTORY DUTY

12–04 **Public and private law claims.** By way of preliminary, it is important to draw a distinction between private law claims for damages and actions in public law by way of judicial review. Breach of a public law right itself gives rise to no action for damages and, thus, a claim for damages must be based on a private law cause of action. Public law rights are enforceable by judicial review.

12–05 The modern[13] categories of liability arising out of breach of statutory duty in private law claims, were identified by Lord Browne-Wilkinson in *X (Minors) v Bedfordshire County Council* as follows[14]:

(a) actions for breach of duty simpliciter (i.e. irrespective of carelessness);

(b) actions based solely on the careless performance of a statutory duty in the absence of any other common law right of action;

(c) actions based on a common law duty of care arising either from the imposition of the statutory duty or from the performance of it;

(d) misfeasance in public office,[15] i.e. the failure to exercise, or the exercise of, statutory powers either with the intention to injure the claimant or in the knowledge that the conduct was unlawful.

12–06 **Breach of duty simpliciter.** This comprises the case where the statement of case against the defendant alleges a statutory duty, breach of it and damage. The principles to be applied in determining whether such a cause of action exists are well established:

> "The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However, a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to

[12] [1956] 1 Q.B. 545.

[13] For an early attempt at categorisation see *Wolverhampton New Waterworks Co v Hawkesford* (1859) 6 C.B.(N.S.) 336 per Willes J. at 356. See further Ch.2, above, paras 2–284–2–336 generally.

[14] [1995] 2 A.C. 633, at 730.

[15] For discussion of this tort, which is outside the scope of this work, see *Clerk & Lindsell on Torts* (19th edn, 2006) Ch.14 at para.14–56 onwards.

protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory duty was intended to be enforceable by those means and not by private right of action: see *Cutler v Wandsworth Stadium Ltd*[16] and *Lonrho Ltd v Shell Petroleum Co Ltd*.[17] However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy."[18]

An important example of the latter type of statutory duty is the protection afforded workers by duties imposed on employers, breach of which gives rise to an action for damages notwithstanding the imposition of criminal sanctions for breach.[19]

12–07 Accordingly, the question is always one of statutory construction. Lord Browne-Wilkinson went on to note that the cases where a private right of action for breach of statutory duty had been held to arise were both limited and specific in scope and did not extend to cases where a breach was alleged of a provision establishing a regulatory system or a scheme of social welfare for the benefit of the public at large.[20]

12–08 **Careless performance of a statutory duty.** This category includes the case where the statement of case alleges a statutory duty and a "negligent" breach of it but does not allege that the defendant was under a coterminous common law duty of care. This distinction with breach of duty simpliciter is important. It had formerly been argued that the careless performance of a statutory duty was in itself a sufficient cause of action without the need to show a concurrent common law duty. The House of Lords has concluded that this view is mistaken and that

[16] [1949] A.C. 398: breach of the Betting, and Lotteries Act 1934 s.11(2), intended to regulate the conduct of betting on racetracks, did not give a bookmaker thereby injured any right of action. See also *R. v Deputy Governor of Parkhurst Prison Ex p. Hague* [1992] 1 A.C. 58: per Lord Jauncey: "It must always be a matter for consideration whether the legislature intended that private law rights of action should be conferred upon individuals in respect of breaches of the relevant statutory provision. The fact that a particular provision was intended to protect certain individuals is not of itself sufficient to confer private law rights of action upon them, something more is required to show that the legislature intended such conferment."

[17] [1982] A.C. 173: breach of an Order in Council (which prohibited the supply of oil to Southern Rhodesia), intended to prevent trade with an unlawful regime, did not give the owners of a pipeline thus affected a cause of action against a rival who contravened the Order. The Order had not been imposed for the benefit or protection of a particular class of persons, namely those engaged in the supply of oil.

[18] per Lord Browne-Wilkinson in *X (Minors) v Bedfordshire County Council*, n.14 above, at 731.

[19] *Groves v Lord Wimborne* [1898] 2 Q.B. 402. See also *Roe v Sheffield CC* [2004] Q.B. 653, CA: in relation to the statutory duties imposed on tramway operators under ss.25 and 28 of the Tramways Act 1870, a private law cause of action could be maintained for breach of the duties to maintain tram rails on a level with the surface of the road and to maintain and keep in good repair the road between the rails. (On the facts, no breach was made out.)

[20] *X (Minors) v Bedfordshire CC*, n.14 above at 732.

carelessness in performing a statutory duty gives a good cause of action only if the circumstances are such as to raise a duty of care at common law.[21]

12–09 In *Carty v Croydon London Borough Council*,[22] it was held that education officers performing the statutory functions of local education authorities are professional persons for whose negligence education authorities might be held liable, albeit on the facts negligence was not made out. When considering the liability of a public authority in negligence for performance of a statutory function, Dyson L.J. quoted the summary of Hale L.J. in *A. v Essex County Council*[23]:

"Where the question of a common law duty of care arises in the context of the statutory functions of a public authority, there are three potential areas of inquiry: first, is whether the matter is justiciable at all or whether the statutory framework is such that Parliament must have intended to leave such decisions to the authorities, subject of course to the public law supervision of the courts; second, whether even if justiciable, it involves the exercise of a statutory discretion which only gives rise to liability in tort if it is so unreasonable that it falls outside the ambit of the discretion; third in any event whether it is fair, just and reasonable in all the circumstances to impose such a duty of care. The considerations relevant to each of these issues overlap and it is not always possible to draw hard and fast lines between them."

In commenting on the second question, Dyson L.J. pointed out that discretion,

"is a somewhat protean word. It connotes the exercise of judgment in making choices. In a sense, most decisions involve the exercise of discretion . . . rather than focus on the elusive question of whether the decision at issue involved the exercise of discretion, it is preferable to look at the substance of the decision."

Thus, at one end of the spectrum, in the field of special education, were decisions which were heavily influenced by policy and came close to being non-justiciable. At the other were decisions involving pure professional judgment and expertise in relation to individual children, where the court would only find negligence on the part of the person who made the decision for which the authority may be vicariously liable, if he or she had failed to act in accordance with a practice accepted at the time as proper by a responsible body of persons of the same profession or skill. He saw much to be said for the view that there should only be two areas of potential enquiry where an issue arose whether a public authority was liable for negligence in the performance of its statutory function. The first

[21] *X (Minors) v Bedfordshire CC*, n.14 above. The leading speech was given by Lord Browne-Wilkinson whose analysis of the relationship between statutory and private law duties remains relevant, although the significance of the decision itself has been eroded: see Ch.2, para.2–286, above. For a case where no duty of care arose, see, e.g. *Blake and Brooks v London Borough of Barking & Dagenham* [1999] P.N.L.R. 171. See Bailey and Bowman, "Public Authority Negligence Revisited" [2000] C.L.J. 85 and Mullender, "Negligence, Public Authorities and Policy-Level Decisions" (2000) 116 L.Q.R. 40.

[22] [2005] 2 All E.R. 517, CA.

[23] [2004] F.C.R. 660 at [33].

was whether the decision was justiciable at all. The second was to apply the classic three stage test from *Caparo Industries v Dickman*.[24]

12–10 Early cases, which may appear to support an action for the careless exercise of a statutory power simpliciter, must be treated therefore with caution.[25] It is suggested that confusion originated from a dictum of Lord Blackburn in *Geddis v Proprietors of Bann Reservoir*[26] which, read in context, was dealing with the position where the defendant raised the exercise of statutory powers as a defence to a common law claim: no such defence arises where the powers have been carelessly exercised. In *Allen v Gulf Oil Refining Ltd*,[27] Lord Wilberforce treated *Geddis* as a decision that the careless exercise by a defendant of a statutory duty or power provides no defence to a claim by the claimant based on a free-standing common law cause of action:

> "It is now well settled that where Parliament by express direction or by necessary implication has authorised the construction and use of an undertaking or works, that carries with it an authority to do what is authorised with immunity from any action based on nuisance (see *Hammersmith and City Railway Co v Brand*[28]). To this there is made the qualification, or condition, that the statutory powers are exercised without 'negligence', that word here being used in a special sense so as to require the undertaker, as a condition of obtaining immunity from action, to carry out the work and conduct the operation with all reasonable regard and care for the interests of other persons."[29]

Thus whilst a statutory power can be invoked as a defence to an activity which would otherwise constitute a nuisance, if the activity authorised by the power has been carried out negligently, such a defence will not apply. Lord Browne-Wilkinson summarised the position as follows:

> "In my judgment the correct view is that in order to found a cause of action flowing from the careless exercise of statutory powers or duties, the plaintiff has to show that the circumstances are such as to raise a duty of care at common law. The mere assertion of the careless exercise of a statutory power or duty is not sufficient."[30]

12–11 **The common law duty of care.** A common law duty of care can arise as a result of the statutory duty in two ways: the statutory requirement upon the defendant to do or refrain from doing a particular act may itself gives rise to a common law obligation: alternatively, and perhaps more frequently, in carrying out the statutory duty, the defendant or the servants or agents for whom it is

[24] [1990] 2 A.C. 605.
[25] See the 8th edn of this work for a summary of the competing authorities, at Ch.11, para.11–43 et seq.
[26] (1878) 3 App.Cas. 430 at 455, 456.
[27] [1981] A.C. 1001.
[28] (1869) L.R. 4 H.L. 171.
[29] [1981] A.C. 1001 at 1011. See also *Sutherland Shire Council v Heyman* (1985) 157 C.L.R. 424 at 458 and Brennan, "Liability in Negligence of Public Authorities: The Divergent Views" (1990) 48 The Advocate 842 at 844.
[30] *X (Minors) v Bedfordshire County Council* [1995] 2 A.C. 633 at 734.

vicariously liable, may come into a relationship with the claimant that gives rise to a duty of care.[31]

12–12 In *X (Minors) v Bedfordshire County Council*,[32] in the context of claims against public authorities arising from the discharge by them of statutory functions in the fields of child care and education, Lord Browne-Wilkinson distinguished between cases where it is alleged that the authority owes a duty of care in the manner in which it exercises a statutory discretion, and cases in which a duty of care is alleged to arise from the manner in which the statutory duty has been implemented in practice.[33] So far as the former was concerned it had to be borne in mind that the discretion had been conferred by Parliament upon the authority and it was not for the courts to exercise it: only if the exercise of the discretion fell outside the statutory ambit could it give rise to a common law duty, but even then no such duty could arise in relation to the taking of decisions involving matters of policy. So far as the latter group were concerned the existence of a duty of care at common law fell to be determined by reference to the tests in *Caparo Industries Plc v Dickman*.[34]

12–13 *Caparo* may not be a useful guide where the allegation is carelessness in the purported exercise of a statutory *power*. In such a case the court is more likely to approach the existence of a duty of care by reference to the *Hedley Byrne* characteristics of responsibility and reliance.[35] So, arguably, a duty of care was owed to a child already in care to place him for adoption, find suitable foster homes and arrange his reintroduction to his mother.[36] This was so even though a claim in negligence in the taking of a decision to exercise a statutory discretion (the taking of a child into care) was likely to be not justiciable unless it was wholly unreasonable or involved the making of a policy decision involving the balancing of different public interests. In that latter case, acts done pursuant to the lawful exercise of the discretion could be found to be the subject of a duty of care, even if some element of discretion was involved.

[31] *X (Minors) v Bedfordshire County Council* [1995] 2 A.C. 633 at 735. See, in the case of public servants, the observations of Lord Woolf M.R. in *W v The Home Office*, *The Times*, March 14, 1997, CA, Ch.2, para.2–294, above. Also *S v Secretary of State for Health*, *The Times*, March 11, 2002. *A. v Essex CC* [2004] 1 W.L.R. 1881, Ch.2, para.2–000 above (duty of care to prospective adopters alongside statutory duty to provide information under the Adoption Agencies Regulations 1983). See also, in the case of dock workers working in the Liverpool Docks in the 1950s and 1960s, *Rice v Secretary of State for Trade and Industry* [2007] P.I.Q.R. P23, CA, para.12–16, below where the defendant was held potentially liable, as successor to the National Dock Labour Board, for injury resulting from the exposure of dock workers to asbestos.
[32] *X (Minors) v Bedfordshire CC* [1995] 2 A.C. 633 at 735, n.31, above.
[33] *X (Minors) v Bedfordshire CC* [1995] 2 A.C. 633 at 730.
[34] [1990] 2 A.C. 605.
[35] *Welton v North Cornwall DC* [1997] 1 W.L.R. 570, CA, (environmental health officer negligently purporting to exercise powers under the Food Safety Act 1990). See also *Gaisford v Ministry of Agriculture, Fisheries and Food*, *The Times*, July 19, 1996, CA. *Harris v Evans*, *The Times*, May 5, 1998, CA; also *Blake and Brooks v London Borough of Barking & Dagenham* [1999] P.N.L.R. 171 (not fair, just or reasonable to impose a duty of care upon a local authority when stating its opinion of the price of a property in a notice served under s.125 of the Housing Act 1985). See also Mullender, (2000) L.Q.R. 40.
[36] *Barrett v Enfield London Borough Council* [1999] 3 W.L.R. 79, HL.

12–14 In *Stovin v Wise*,[37] Lord Hoffmann said that, in making the determination as to whether the *Caparo* tests are satisfied, the policy of the statute will be crucial:

> "Whether a statutory duty gives rise to a private cause of action is a question of construction (see *R. v Deputy Governor of Parkhurst Prison Ex p. Hague*).[38] It requires an examination of the policy of the statute to decide whether it was intended to confer a right of compensation for the breach. Whether it can be relied upon to support the existence of a common law duty of care is not exactly a question of construction because the cause of action does not arise out of the statute itself. But the policy of the statute is nevertheless a crucial factor in the decision."[39]

Thus, a highway authority owed no private law duty to road users to take steps to improve visibility at a dangerous intersection where the claimant and defendant had collided. The minimum preconditions for basing a duty of care upon the existence of a statutory power in respect of an omission to exercise that power were that, in the circumstances, it would have been irrational not to have exercised it thus, in effect, creating a public law duty to act and, further, that there were exceptional grounds for holding that the policy of the statute conferred a right to compensation on those suffering a loss if the power was not exercised.[40]

12–15 Subsequently, by way of example, it has been held that it would not be fair, just or reasonable to impose a duty of care upon a district health authority or social services authority parallel to their statutory duty to provide aftercare services for any person previously detained in hospital under statutory powers and thereafter discharged into the community.[41] It was said:

> "We find it difficult to suppose that Parliament intended to create such an extensive and wide-ranging liability for breaches of responsibility under section 117 which would, of its nature apply alike to those engaged as professionals as well as those in voluntary services in many disciplines."[42]

Thus no common law duty of care was owed to provide cot-sides for the bed of a claimant who, albeit unwell, lived at home and whose needs the local authority were obliged to assess pursuant to s.29 of the National Assistance Act 1948 and s.2 of the Chronically Sick and Disabled Persons Act 1970.[43] In *O'Rourke v Camden London Borough Council*,[44] a claim for damages, brought by a homeless person on the ground that the council had failed in its statutory

[37] [1996] A.C. 923.
[38] [1992] 1 A.C. 58 at 170; followed by Wright J. in *Danns v Department of Health* [1996] P.I.Q.R. P69 in the course of a judgment dismissing a claim against the Ministry advanced upon the basis of a breach of s.2 of the Ministry of Health Act 1919, the statute by which it was established: appeal dismissed, [1998] P.I.Q.R. P226, CA: see further para.12–46, below.
[39] *Stovin v Wise* [1996] A.C. 923 at 952.
[40] *Stovin v Wise* [1996] A.C. 923 at 953.
[41] *Clunis v Camden & Islington HA* [1998] Q.B. 978, concerned with s.117 of the Mental Health Act 1983. See also Hopkins, "Ex turpi causa and mental disorder" [1998] C.L.J. 444.
[42] per Beldam L.J., *Clunis v Camden & Islington HA* [1998] Q.B. 978 at 913. See Jones, "The violent mentally disordered patient: who cares?" (1998) P.N. 99.
[43] *Sandford v Waltham Forrest LBC* [2008] EWHC 1106, Q.B., para.12–25, below.
[44] [1998] A.C. 188.

duty to provide him with accommodation, was struck out because the statute did not create a private law right of action. In *Gorringe v Calderdale Metropolitan Borough Council*,[45] the House of Lords rejected a claim that s.39 of the Highways Act 1980 elevated a highway authority's duty of care to a sufficient standard to claim that an omission to provide signage constituted a breach of duty at common law. In so doing Lord Hoffmann adopted the concept of a "target duty",[46] namely one which did no more than require the authority to exercise its powers in the manner that it considers is appropriate, which could not be construed as owing specific duties to individuals. It formed part of the body of public law and, as such, could only be enforced by procedures and remedies available for enforcing public law duties.

12–16 On the other hand, in *Rice v Secretary of State for Trade and Industry*,[47] it was held that a duty of care was owed by the National Dock Labour Board, a statutory body with some responsibility for the health and safety of dock workers from 1946 onwards, towards registered dock workers in relation to their health and safety. The workers alleged exposure to asbestos when unloading hessian sacks from certain vessels in the course of their employment in the Liverpool docks. It was held that, notwithstanding that the relationship between the Board and the dock workers was not strictly that of employer/employee it was fair, just and reasonable to impose the suggested duty. The Board knew or ought to have known of the risks associated with unloading asbestos. The policy of the statute which created the Board could only be seen as enabling such a relationship as could lead to the imposition of a common law duty of care. The duty was a specific one requiring the Board to protect individual employees from a known serious risk to their health. The scope of the duty was for later determination.[48]

12–17 Finally, in relation to the common law duty and its interaction with a public bodies' statutory duties, there can be rare situations in which a private law duty arises which requires the performance of, say, a statutory discretion. Such situations are not likely to arise often precisely because a breach will arise only where it can be said that the discretion was not exercised, in circumstances where it could have been, consistently with full performance of the public law functions by the body which owed the duty.[49]

12–18 **Vicarious liability.** The issue of vicarious liability for the acts of others, through whom a public authority discharges its statutory duty, also stands to be resolved on the usual principles. In the case of professional persons, such an authority would ordinarily be liable if the professional to whom performance of the statutory duty is delegated, or through whom it is performed, fails to exercise

[45] [2004] 1 W.L.R. 1057, HL. See Howarth, "Public authority non-liability: spinning out of control?", [2004] 63 C.L.J. 546; Morgan, "Slowing the expansion of public authorities' liability", [2005] 121 L.Q.R. 43.
[46] As described by Woolf L.C.J. in *Larner v Solihull MBC* [2001] P.I.Q.R. P17, CA, a decision on the facts disapproved in *Gorringe*.
[47] [2007] P.I.Q.R. P23, CA.
[48] See the judgment of May L.J. at [44].
[49] *Connor v Surrey CC* [2010] EWCA Civ 286, CA. See Ch.2, para.2–293, above.