

HUMAN RIGHTS AND THE TORT LIABILITY OF PUBLIC AUTHORITIES

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I. Introduction

Perhaps it is true, as Lord Bingham of Cornhill observed:

“... one would normally be surprised if conduct which violated a fundamental right or freedom of the individual did not find reflection in a body of law as sensitive to human needs as the common law.”¹

But this did not convince his fellow law lords that the tort liability of public bodies should be expanded in the wake of the Human Rights Act (HRA) 1998. Shortly before its transformation into the Supreme Court, the Appellate Committee of the House of Lords settled on the view that, at least in this field, tort law and the HRA have separate spheres of operation.² In doing so, their Lordships confounded the expectations of a significant body of opinion, including in the Court of Appeal.³ At least since the decision of the European Court of Human Rights (ECtHR) in *Osman v United Kingdom*,⁴ the view had come to be rather widely held that the HRA would lead to a convergence of the tort liability of public authorities and human rights principles.⁵ Little wonder, then, that the issue continues to attract controversy.⁶

This article defends the choice made by the House of Lords and explores its implications. Part II shows that the effect of this choice is to direct a particular set of claims away from the tort route and into the HRA route. These are claims that arise from the special responsibilities imposed by human rights law on the state

¹ *Van Colle v Chief Constable of Hertfordshire*; sub nom. *Smith v Chief Constable of Sussex Police* [2008] UKHL 50; [2009] 1 A.C. 225 at [58]. This was a consolidated appeal. To aid clarity of exposition, citations of the *Smith* appeal hereafter omit reference to the *Van Colle* appeal and vice versa.

² Most prominently in *Smith v Chief Constable of Sussex Police* [2009] 1 A.C. 225. See also *Wainwright v Home Office* [2003] UKHL 53; [2004] 2 A.C. 406; *Watkins v Secretary of State for the Home Department* [2006] UKHL 17; [2006] 2 A.C. 395; *Jain v Trent SHA* [2009] UKHL 4; [2009] 1 A.C. 853; *R. (on the application of Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14; [2005] 1 W.L.R. 673.

³ See especially *Smith v Chief Constable of Sussex Police* [2008] EWCA Civ 39; [2008] H.R.L.R. 23 at [27]–[28] per Sedley L.J., [45] per Rimer L.J. and [55]–[57] per Pill L.J.

⁴ *Osman v United Kingdom* (1998) 29 E.H.R.R. 245 ECtHR.

⁵ See especially T. Bingham, “Tort and Human Rights”, in P. Cane and J. Stapleton (eds), *The Law of Obligations, Essays in Celebration of John Fleming* (Oxford: Clarendon Press, 1998), at p.1; J. Wright, *Tort Law and Human Rights* (Oxford: Hart Publishing, 2001), at pp.21–33; *Clerk and Lindsell on Torts* 18th edn (London: Sweet & Maxwell, 2000), at pp.1–73, 1–77; T.R. Hickman, “Tort Law, Public Authorities, and the Human Rights Act 1998”, in D. Fairgrieve, M. Andenas and J. Bell (eds), *Tort Liability of Public Authorities in Comparative Perspective* (London: BHCL, 2002), at p.17; D. Fairgrieve, *State Liability in Tort* (Oxford: Oxford University Press, 2003), at p.80; C. Booth and D. Squires, *The Negligence Liability of Public Authorities* (Oxford: Oxford University Press, 2006), at pp.379–385; S. Deakin, A. Johnston and B. Markesinis, *Markesinis and Deakin’s Tort Law*, 6th edn (Oxford: Clarendon Press, 2007), at pp.425, 438–445, 469; R. Clayton and H. Tomlinson, *The Law of Human Rights*, rev. edn (Oxford: Oxford University Press, 2003), at paras 5.74–5.99.

⁶ See especially J. Steele, “Damages in Tort and under the Human Rights Act: Remedial or Functional Separation?” [2008] C.L.J. 606; C. McIvor, “Getting Defensive About Police Negligence: the *Hill* principle, the Human Rights Act 1998 and the House of Lords” [2010] C.L.J. 133; Dame Mary Arden, “Human Rights and Civil Wrongs: Tort Law Under the Spotlight” [2010] P.L. 140 at 153; Lord Bingham, “The Uses of Tort” (2010) 1 J.E.T.L. 3.

and its constituent authorities. Part III demonstrates why tort law, despite its long history of involvement with the liability of public authorities, fails to provide a suitable framework for resolving the questions raised by this set of claims. In concluding the article, Part IV points out that the approach developed by the House of Lords appears also to have broader ramifications: the tentative emergence of a distinctive public law of liability.

II. Tort Law and Human Rights

Human rights norms may, in principle, interact with the tort liability of public authorities in several, sometimes overlapping, ways.⁷ (1) Most straightforwardly, the range of right-holders entitled to sue in tort might be expanded due to the enjoyment of human rights by a wider range of people. Some nuisance cases attest to this possibility.⁸ (2) Where the outcome of a tort claim is influenced by considerations concerning the public interest, human rights norms might result in a re-assessment of what is in the public interest, thereby affecting the outcome.⁹ *D v East Berkshire*¹⁰ falls into this category, as does *Dennis v MOD*.¹¹ These two cases show that this may affect both the question whether a duty was owed to the claimant and the standard of liability. (3) That a human right is at stake might support a lower threshold of liability, for example by favouring liability despite a claimant's failure to establish that the defendant had acted unreasonably.¹² Extensive and long-established strict liability in tort, especially for trespass, limits the potential practical significance of this form of influence.¹³ (4) Non-tortious conduct might be turned into a tort when engaged in by a public official because it then infringes a human right.¹⁴ This is arguably what the claimants sought to achieve in

⁷ This list focuses on what is most relevant to the issue explored in this article. It ignores, for example, the important role that tort law can play in the development of human rights law, e.g. in respect of remedies. On the latter, see J.N.E. Varuhas, "A Tort-Based Approach to Damages under the Human Rights Act 1998" (2009) 72 M.L.R. 750.

⁸ *Pemberton v Southwark LBC* [2000] 1 W.L.R. 1672 CA (a tolerated trespasser may sue in nuisance) judgment of Clarke L.J.; compare also *McKenna v British Aluminium Ltd* [2002] Env. L. Rev. 30 Ch D (residents of a home who lack a proprietary interest therein may have standing to sue in nuisance in order to give effect to art.8 ECHR). See also the minority view of Lord Cooke in *Hunter v Canary Wharf Ltd* [1997] A.C. 655 HL.

⁹ K. Oliphant, "European Tort Law: a Primer for the Common Lawyer" [2009] C.L.P. 440 at 464.

¹⁰ *D v East Berkshire Community Health NHS Trust* [2003] EWCA Civ 1151; [2004] Q.B. 558; *D v East Berkshire Community Health NHS Trust* [2005] UKHL 23; [2005] 2 A.C. 373 (a duty of care is owed by childcare professionals to children in their care).

¹¹ [2003] EWHC 793 (QB); [2003] Env. L.R. 34 (noise from a military airfield constitutes both a nuisance and interference with Convention rights and this influences the way in which the public interest should affect the claim).

¹² *R. v Governor of Brockhill Prison Ex p. Evans (No.2)* [2001] 2 A.C. 19 HL (unreasonable conduct is not a requirement for liability under the tort of false imprisonment).

¹³ *Austin v Commissioner of Police of the Metropolis* [2009] UKHL 5; [2009] 1 A.C. 564 is rather worrying here inasmuch as it suggests that whether a deprivation of liberty occurs under art.5(1) ECHR depends on a balancing of the claimant's interest against those of the public, in sharp contrast to the strict protection of liberty provided by the tort of false imprisonment. But this decision appears to be out of line with the approach of the ECtHR—for searching criticism of this decision, see H. Fenwick, "Marginalising Human Rights: Breach of the Peace, 'Kettling', the Human Rights Act and Public Protest" [2009] P.L. 737.

¹⁴ Section 6(1) of the HRA imposes on public authorities only a duty to act compatibly with the ECHR.

Wainwright,¹⁵ and also in *Watkins*,¹⁶ *Jain*¹⁷ and *Mitchell*.¹⁸ If such a claim succeeds, the effect would be the addition of a new item to the list of interests protected by tort law. (5) A duty that would otherwise be conceptualised as being owed to the public at large rather than to individuals and thus not giving rise to liability in tort might be transformed into a tortious duty of care, because the HRA grants individual rights in the circumstances. In *Smith*¹⁹ the Court of Appeal did just that, while the majority in the House of Lords declined an invitation from Lord Bingham to fashion a new principle for determining the liability of the police in the tort of negligence by drawing on the jurisprudence of the ECtHR.²⁰

The courts have generally been receptive to convergence between tort law and human rights in the first three of these ways. It is only in respect of cases falling in the fourth and the fifth categories that the House of Lords has unequivocally opted for separation. Here the established position may be summarised as follows: while liability can be imposed in tort when a damages claim against a public authority would have succeeded on that basis prior to the enactment of the HRA, tort law will not be developed so as to allow claims not already covered independently of the HRA. The practical effect of this approach is to direct a significant class of cases away from the tort law route and into the HRA route. Of course, no one is prohibited from framing claims falling into these categories as tort claims, but everyone is deterred from doing so. This squarely raises the question whether there are differences between these two routes that render the tort route less suitable than the HRA for the resolution of cases in categories (4) and (5).

The answer to this question must start with clarifying the difference between those disputes that this approach allows onto to the tort route and those it assigns exclusively to the HRA route. That difference is tied up with the historical evolution of the common law tort liability of public authorities. With the exception only of the special tort of misfeasance in public office, which has a narrow compass of application,²¹ the tort liability of public authorities has developed out of, and is parasitic upon, the principles governing the liability of private persons and can only be understood on the basis of such principles and their justification.²² After a sometimes shaky journey, the common law has reached a point where the same “ordinary” principles apply to claims against public authorities as would apply to

¹⁵ *Wainwright v Home Office* [2004] 2 A.C. 406 (House of Lords declining invitation to recognise a tort of invasion of privacy on the back of the Convention right to private life).

¹⁶ *Watkins v Secretary of State for the Home Department* [2006] 2 A.C. 395 (unanimous refusal by House of Lords to develop the tort of misfeasance in public office so as to cover wrongful acts not resulting in legally recognised harm in the form of financial loss or physical or mental injury).

¹⁷ *Jain v Trent SHA* [2009] 1 A.C. 853 (House of Lords held that no duty of care in negligence is owed by a regulatory authority to the owners of a nursing home, although the procedure by which the authority had cancelled the registration of the nursing home appeared to be in breach of the owners’ rights under the ECHR).

¹⁸ *Mitchell v Glasgow City Council* [2009] UKHL 11; [2009] 1 A.C. 874 (local housing authority landlord held by House of Lords to have been under no duty either in negligence or under the HRA to warn a neighbour that an abusive tenant had been threatened with eviction).

¹⁹ *Smith v Chief Constable of Sussex Police* [2008] EWCA Civ 39.

²⁰ *Smith v Chief Constable of Sussex Police* [2009] 1 A.C. 225.

²¹ See *Three Rivers DC v Bank of England (No.3)* [2001] UKHL 16; [2003] 2 A.C. 1.

²² Law Commission, *Administrative Redress: Public Bodies and the Citizen* (HMSO, 2008), C.P. No.187, at para.3.105. There is a rich literature on the tort liability of public bodies. See especially P.W. Hogg and P.J. Monahan, *Liability of the Crown*, 3rd edn (Scarborough, Ontario: Carswell, 2000); Fairgrieve, *State Liability in Tort*, 2003 (above, fn.5); C. Harlow, *State Liability: Tort Law and Beyond* (Oxford: Oxford University Press, 2004); Booth and Squires, *The Negligence Liability of Public Authorities*, 2006 (above, fn.5). See also the publications cited in the footnotes immediately below.

a tort claim brought by one private person against another.²³ Indeed, the integration of public and private tort liability is so extensive that the common-law tort liability of public authorities is routinely assigned to private law rather than public law.²⁴ Although the functions entrusted to public authorities mean that their potential tort liability inevitably stretches to encompass scenarios in which no private person is likely to find himself, and also that the courts accordingly take account of considerations that do not figure when claims against private persons are adjudicated, the same basic framework of tort concepts and principles applies to public and private defendants.²⁵

The practical operation of this approach is especially noticeable in two features of tort law. The first concerns claims in negligence founded on alleged omissions by public authorities. The fact that public authorities are, unlike private persons, meant to serve the interest of the public rather than their own,²⁶ is not enough to render them liable in tort when they negligently fail to exercise their functions. Like private persons, public authorities are liable for omissions only by way of exception, on the basis of considerations such as assumption of responsibility, statutory provisions specifically imposing liability, or a particular link with the victim or the perpetrator of the harm.²⁷ The second feature relates to “commissions”, situations where public authorities have chosen to act. Statutory provisions apart, public authorities are not liable in tort for acts which are not tortious if committed by private persons; and they do not owe duties of care whenever they exercise public functions.²⁸ Illustrated most notoriously by *Malone v Commissioner of Police of the Metropolis*,²⁹ where Megarry V.-C. took the absence of a prohibition against listening devices to mean that it was as lawful for the police to use them as for anyone else, this sits uneasily with the modern principle of public law that “a public body has no heritage of rights which it enjoys for its own sake” so that

²³ See especially, S.H. Bailey and M.J. Bowman, “Public Authority Negligence Revisited” [2000] C.L.J. 85; S. Bailey, “Public Authority Liability in Negligence: the Continued Search for Coherence” (2006) 26 L.S. 155; T. Cornford, *Towards a Public Law of Tort* (Burlington, Vermont: Ashgate, 2008), which is highly critical of the current law.

²⁴ See, for example, *Smith v Chief Constable of Sussex Police* [2009] 1 A.C. 225; M.K. Woodall, “Private Law Liability of Public Authorities for Negligent Inspection and Regulation” (1992) 37 McGill L.J. 83; Law Commission, *Monetary Remedies in Public Law: A Discussion Paper* (October 11, 2004); Bailey and Bowman, “Public Authority Negligence Revisited” [2000] C.L.J. 85; T. Hickman, “The Reasonableness Principle: Reassessing its Place in the Public Sphere” [2004] 63 C.L.J. 166.

²⁵ See J. Bell, “Governmental Liability in Tort” (1995) 6 N.J.C.L. 85 especially at 96; P. Cane, “Damages in Public Law” (1999) 9 Otago L. Rev. 489 especially at 490–491; and the literature cited in fnn.23 and 24 above. This is not to overlook that the doctrines developed to take account of such differences (notably the policy/operational dichotomy and justiciability) are frequently controversial—see, e.g. T. Weir, “Governmental Liability” [1989] P.L. 40.

²⁶ W. Wade and C. Forsyth, *Administrative Law*, 9th edn (Oxford: Oxford University Press, 2004), at pp.354–356; D. Oliver, *Common Values and the Public-Private Divide* (London: Butterworths, 1999), at pp.112–116. But note that this was expressly left open by the Court of Appeal in *Shrewsbury and Atcham BC v Secretary of State for Communities and Local Government* [2008] EWCA Civ 148; [2008] 3 All E.R. 548, Richards L.J. rejecting the view of Carnwarth L.J. that the powers of the Crown had to be exercised for the public benefit and for identifiably governmental purposes.

²⁷ “No one is under a duty to shout a warning to a stranger about to walk over a cliff”, per Lord Keith of Kinkel in *Yuen Kun Yeu v Att Gen of Hong Kong* [1988] A.C. 175 PC (HK) at 192. On tort liability for omissions generally, see especially *Smith v Littlewoods* [1987] A.C. 241; sub nom. *Maloco v Littlewoods* [1987] A.C. 241 HL. On the liability of public bodies for omissions, see especially *East Suffolk Rivers Catchment Board v Kent* [1941] A.C. 74 HL; *Stovin v Wise* [1996] A.C. 923 HL; *Gorringe v Calderdale MBC* [2004] UKHL 15; [2004] 1 W.L.R. 1057; *Mitchell v Glasgow City Council* [2009] 1 A.C. 874; and *X v Hounslow LBC* [2009] EWCA Civ 286; [2009] P.T.S.R. 1158.

²⁸ See *Rowling v Takaro Properties Ltd* [1988] 1 A.C. 473 PC (NZ).

²⁹ *Malone v Commissioner of Police of the Metropolis* [1979] Ch.344.

“any action to be taken must be justified by positive law”.³⁰ It is nevertheless affirmed by the fate of *Wainwright*³¹ as well as *Jain*³² in the House of Lords. Both these features are crucial to understanding the difference in the nature of the disputes that are channelled along the tort law route and the human rights route respectively.

Omissions

The divergence between the treatment of acts and omissions is a pervasive and fundamental feature of tort liability. That omissions do not as a rule lead to liability in tort means that tort law is concerned with the protection of liberties rather than claim rights, with “negative” rather than “positive” rights.³³ Tort law provides a remedy in the event of invasions of rights to bodily integrity and freedom,³⁴ to property and its enjoyment,³⁵ and of wrongful inflictions of harm,³⁶ but not for failures to bestow a benefit.³⁷ This is true even in those cases where tort law does seemingly impose liability for omissions. Putting to one side express statutory provisions leading to liability under the tort of breach of statutory duty, these are all cases where there are factors present that would justify describing the relevant events in terms of acts by the defendant.³⁸ The upshot is that it is claims alleging the violation of “negative” rather than “positive” rights that lead to the liability of public authorities under the tort of negligence. In the words of Lord Atkin: “The rule that you are to love your neighbour becomes in law, you must not injure your neighbour”.³⁹

The HRA, however, makes public authorities answerable for the infringement of extensive “positive” rights.⁴⁰ This is so because the source of its rights, the ECHR, goes well beyond prohibiting the infliction of harm. As Mowbray points out, the ECtHR “may demand that states take protective action to safeguard a variety of Convention rights”.⁴¹ All of the major substantive Convention rights

³⁰ Laws J. in *R. v Somerset CC Ex p. Fewings* [1995] 1 All E.R. 513 QBD at 524; decision affirmed by the Court of Appeal in *R. v Somerset CC Ex p. Fewings* [1995] 1 W.L.R. 1037 CA.

³¹ *Wainwright v Home Office* [2004] 2 A.C. 406.

³² *Jain v Trent SHA* [2009] 1 A.C. 853.

³³ I here take for granted the correctness of Lord Hope of Craighead’s statement in *Chester v Afshar* [2004] UKHL 41; [2005] 1 A.C. 134 at [87] that “the function of the law [of tort] is to enable rights to be vindicated and to provide remedies when duties have been breached”. For convincing support hereof, see esp. E.J. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard University Press, 1995); A. Beever, *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007); R. Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007); N.J. McBride and R. Bagshaw, *Tort Law*, 2nd edn (Harlow: Pearson, 2005). Of course, one need not subscribe to these authors’ accounts of the precise role played by rights in tort law, of what these rights are and of the manner in which such rights are to be identified. The distinction between claim rights and liberties follows W.N. Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1913) 23 Yale L.J. 16; the terminology of “negative” and “positive” rights seems to be more common in literature on human and constitutional rights.

³⁴ Trespass to the person.

³⁵ Trespass to land, conversion and nuisance.

³⁶ Negligence.

³⁷ See the discussion of cases in fn.27 above.

³⁸ What are usually described as exceptions to the omissions rule are not true exceptions but are cases where the defendant is engaged in an activity (the control of property, or dangerous persons subject to his control) or has undertaken responsibility for the relevant task. This is also hinted at in *Smith v Littlewoods* [1987] A.C. 241 at 77; *Stovin v Wise* [1996] A.C. 923 at 944–949; and *Gorringe v Calderdale MBC* [2004] 1 W.L.R. 1057 at [17].

³⁹ *Donoghue v Stevenson* [1932] A.C. 562 HL at 44. Or, as Lord Hoffmann has put it more recently in *Customs and Excise Commissioners v Barclays Bank Plc* [2006] UKHL 28; [2007] 1 A.C. 181 at [38] et seq.: a duty of care is normally generated by what the defendant has decided to do.

⁴⁰ On this aspect of human rights generally, see S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008).

⁴¹ A. R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing, 2004), at p.4.

have such a “positive” dimension alongside their “negative” dimension, imposing extensive duties on states to take positive measures to the benefit of right-holders.⁴² Here there is a stark divergence between the HRA and the tort of negligence, famously demonstrated by the contrasting decisions that were handed down in the *Osman* case by the Court of Appeal and the ECtHR respectively on the duties of the police to members of the public whose lives were known to be at risk from the unlawful acts of identified individuals.⁴³ These two decisions show that, applied in its pure essence to such duties, the tort approach—no duty of care in respect of omissions—results in a refusal to examine the reasonableness of failures to comply with such positive duties, while human rights law engages in such an examination as a matter of course.⁴⁴

This, then, is one vital difference between the tort route and the HRA route: the former generally excludes liability for omissions, while the latter draws no distinction in principle between “negative” and “positive” rights and duties.⁴⁵ Indeed, it is this difference that typically lies behind attempts to draw on the HRA/ECHR in order to justify the expansion of tort liability for negligence.⁴⁶ Importantly, this difference is attributable to the fact that while tort law safeguards people against injustices that may be inflicted by anyone, human rights law is specifically concerned with the state and its constituent public authorities. The prevalence of “positive” duties in human rights law reflects an understanding of the state as bearing special responsibilities in respect of those over whom it exercises authority, differing from the responsibilities individuals owe one another.⁴⁷

Commissions

The notion that the state bears special responsibilities is also present in “negative” human rights against the state, with the result that the content and approach of tort law and human rights law also differ when it comes to commissions. For example, whereas the common law tort of false imprisonment requires actual restraint and thus cannot be committed against a compliant person, the right to liberty protected

⁴² Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, 2004 (above, fn.41), analyses positive obligations under arts 2, 3, 5, 6, 8, 9, 10, 11, 13, and 14.

⁴³ See *Osman v Ferguson* [1993] 4 All E.R. 344 CA; and *Osman v United Kingdom* (1998) 29 E.H.R.R. 455.

⁴⁴ This is confirmed by a comparison of the speeches in the House of Lords in the two appeals reported together as *Van Colle v Chief Constable of Hertfordshire* [2009] 1 A.C. 225; sub nom. *Smith v Chief Constable of Sussex Police* [2009] 1 A.C. 225. *Van Colle* was argued on the basis of art.2 of the ECHR, and the speeches accordingly take the existence of a duty to the claimant for granted and concentrate on determining whether the police broke their art.2 duty. *Smith*, however, was framed as a claim based on the tort of negligence, and all their lordships’ attention is focused on whether a duty of care was owed at all by the police. As this receives a negative answer, no evaluation of the conduct of the police is undertaken.

⁴⁵ This is deliberately expressed in general terms. Although the distinction between acts and omissions appears to be fundamental to all legal systems, they can and do differ in the degree of significance attached to this distinction, and this can result in the drawing of different boundaries between tort law and human rights—see F. du Bois, “State Liability in South Africa—a Constitutional Remix” (2010) 25 Tul. Eur. & Civ. L.F. 139.

⁴⁶ See *D v East Berkshire Community Health NHS Trust* [2004] Q.B. 558; Lord Bingham’s powerful dissenting speeches in *D v East Berkshire Community Health NHS Trust* [2005] 2 A.C. 373; and *Smith v Chief Constable of Sussex Police* [2009] 1 A.C. 225; and the judgments in the Court of Appeal in the latter case (*Smith v Chief Constable of Sussex Police* [2008] EWCA Civ 39). Of course, it is a separate matter whether this guarantees a different result: both routes may end up with no liability—see the lack of success of the claimants in both appeals reported as *Van Colle v Chief Constable of Hertfordshire*; sub nom. *Smith v Chief Constable of Sussex Police* [2009] 1 A.C. 225.

⁴⁷ See especially Freedman, *Human Rights Transformed*, 2008 (above, fn.40), at Ch.1; and R. Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002), at pp.159–162, 294–295, according to whom such constitutional entitlements must be added to defensive rights in order to produce a “complete constitutional right”. This is discussed further below.

by art.5(1) of the ECHR is already infringed if the detention took place under flawed procedures.⁴⁸ The explanation for this lies in the fact that, while the tort can be committed by anyone, the ECHR only binds states (or, via the HRA, public authorities). The human rights approach to the deprivation of liberty reflects the idea that the state's authority, which is manifested especially in its powers lawfully to detain people, and distinguishes it from even the most powerful private persons and institutions, brings with it special responsibilities to those over whom it exercises such authority.⁴⁹ Indeed, it is the realisation of this special normative relationship between states and their citizens that lies at the heart of the emergence and growth of human rights instruments and institutions. It is also for this reason that human rights law may provide a remedy for "mere" maladministration,⁵⁰ something the common law of tort resolutely refuses to do.⁵¹

Thus, because the state occupies a special role in society bringing with it special responsibilities, individuals sometimes enjoy "negative" rights against the state which they do not have against other individuals, or have "negative" rights that have a greater reach against the state than against private persons. This is again brought home by the contrast between the treatment of claims in England and at the ECtHR. The outcome in Strasbourg of both *Malone* and *Wainwright* was the exact opposite of their fate before the English courts.⁵² As *Wainwright* shows, some attempts to expand tort liability on the back of human rights are attributable to such gaps between the "negative" rights recognised in these two fields.

The upshot is that, in respect of omissions as well as commissions, the approach adopted by the House of Lords funnels claims based on alleged failures to comply with rights and duties that are rooted in the special position of the state away from the tort route and into the HRA route. This is what unites categories (4) and (5), identified at the start of this section, and sets them apart from the remaining categories. It is of these claims specifically that one may say with Dame Mary Arden that public bodies' tort liability "has not been qualified so as to provide a remedy where Convention rights have been violated".⁵³ Hence the justifiability of this approach turns on whether there is good reason for thinking that tort liability is ill-suited to resolving claims of this particular kind.

III. Comparing the Routes

The special duties imposed by the HRA on public authorities to provide benefits, protection and security, or indeed simply to treat people with concern and consideration, are premised on the notion that membership of a political community entitles individuals to certain services by the state just as it obliges them to contribute to the maintenance of the state and its services. The source, justification

⁴⁸ *R. v Bournemouth Community and Mental Health NHS Trust Ex p. L* [1999] 1 A.C. 458 HL; *HL v United Kingdom* (45508/99) (2005) 40 E.H.R.R. 32 ECtHR. See on this A. Pedain, "Requiem for a Fairytale" [2005] 64 C.L.J. 11.

⁴⁹ The relationship between the tort of false imprisonment and deprivation of liberty under the ECHR is complex. According to Fenwick, "Marginalising Human Rights" [2009] P.L. 737 at 756–758 (above, fn.13), the tort may often have a broader field of application but the ECHR imposes higher standards.

⁵⁰ See *Anufrijeva v Southwark LBC* [2003] EWCA Civ 1406; [2004] Q.B. 1124.

⁵¹ See *Harris v Evans* [1998] 1 W.L.R. 1285 CA; *Neil Martin Ltd v Revenue and Customs Commissioners* [2007] EWCA Civ 1041; [2007] All E.R. (D.) 393.

⁵² *Malone v United Kingdom* (A/95) (1991) 13 E.H.R.R. 448 ECtHR; *Wainwright v United Kingdom* (12350/04) (2007) 44 E.H.R.R. 40 ECtHR.

⁵³ Arden, "Human Rights and Civil Wrongs" [2010] P.L. 140 at 153.

and extent of such entitlements and duties are undoubtedly hotly disputed,⁵⁴ but that need not detain us here. It is sufficient to note that to the extent that they exist (and in the ECHR this is only at a rather low, minimal level), society is conceived of as a joint enterprise engaged in by its members for their common good. This means that questions about who should benefit from such services and how such services, including the consequences of their failures, are best organised, are questions that concern the management of society's common resources. Claims for compensation for their breach therefore raise questions of distributive justice.⁵⁵ Can such questions be addressed adequately within the framework of the tort liability of public authorities?

There is reason to be sceptical. Although the cases do show the courts attaching great significance to the social cost of liability, their approach is a strikingly one-sided one. The House of Lords has consistently enumerated the costs of imposing liability on public authorities without attempting to balance these against the benefits of doing so,⁵⁶ *Smith v Chief Constable, Sussex Police* following suit.⁵⁷ This appears to leave half the task undone, a point forcefully made by Lord Bingham in this subsequent extra-judicial defence of his unsuccessful attempt in *Smith* to blend human rights law with tort liability:

“If the virtual immunity now extended by English law to large areas of police activity were removed, there would no doubt be a cost falling, directly or indirectly, on the community who fund the service. If economy were all, the present law has its virtue. But if a member of the public whom a public service exists to serve suffers significant injury or loss through the culpable fault or reprehensible failure of that service to act as it should, is it not inconsistent with ethical and, perhaps, democratic principle that the many, responsible for funding the service, should bear the cost of compensating the victim?”⁵⁸

This seeming deficiency in the courts' reasoning has frequently been criticised.⁵⁹ But such criticism is misplaced. The courts' failure to engage in a fully-fledged distributive justice analysis does not result from a lack of rigour. To the contrary, it is due to an implicit understanding that such an analysis is peripheral to the central task of the court in such cases, which is to ensure corrective justice. And it is for this reason that tort law cannot adequately accommodate human rights claims.

⁵⁴ Compare, for example, J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971); and R. Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974).

⁵⁵ J.R. Spencer, “Tort Law Bows to the Human Rights Act” [2008] C.L.J. 15 at 17; and Spencer, “Suing the Police for Negligence: Orthodoxy Restored” [2009] C.L.J. 25 at 26 also takes the view that issues of distributive justice are raised here.

⁵⁶ For an overview of the topic, see H. Wilberg, “Defensive Practice or Conflict of Duties? Policy Concerns in Public Authority Negligence Claims” (2010) 126 L.Q.R. 420.

⁵⁷ See *Smith v Chief Constable of Sussex Police* [2009] 1 A.C. 225 at [73]–[76] (Lord Hope), [97] (Lord Phillips), [108] (Lord Carswell), and [132]–[134] (Lord Brown).

⁵⁸ Lord Bingham, “The Uses of Tort” (2010) 1 J.E.T.L. 3 at 15.

⁵⁹ See, e.g. the comparative case studies of English and civilian approaches in B. Markesinis, J-B. Auby, D. Coester-Waltjen and S. F. Deakin, *Tortious Liability of Statutory Bodies* (Oxford: Hart Publishing, 1999); Cornford, *Towards a Public Law of Tort*, 2008 (above, fn.23), at pp.205–206.

The tort liability of public authorities

According to the classical distinction inaugurated by Aristotle, corrective justice is directed at rectifying an injustice that has occurred between the doer and the sufferer of harm, while distributive justice specifies the distribution of goods according to some criterion, such as desert or need.⁶⁰ Corrective justice is therefore bilateral in structure, focusing on whether a harm-inflicting interaction involved an injustice perpetrated by one party to the interaction on the other party which the doer must now make good to the sufferer. It is accordingly concerned with the particular relationship between the parties, their correlative rights and duties, not their general entitlements.⁶¹ Distributive justice, being concerned with what each member of a community should have, is, in contrast, multilateral in form. Its focus is the proper distribution of the benefits and burdens that are held in common by all who belong to a community, and its solutions to injustices involve multilateral measures such as taxation and the use of governmental resources.⁶² Corrective justice is interpersonal; distributive justice is social.⁶³

The tort liability of individuals is a prototypical instance of corrective justice.⁶⁴ Public authority liability cases could be understood as turning on distributive justice instead,⁶⁵ but it is also possible to see them as simply pitching claimant against defendant in a purely bilateral relationship. This is in fact the normal approach of the common law, which, in applying Dicey's equality principle, holds that public officials are in principle subject to the same tort liabilities as private persons.⁶⁶ The treatment of public authorities' tort liability for omissions confirms this.⁶⁷ The dominance of the corrective justice perspective is also illustrated more directly by cases such as *X (Minors) v Bedfordshire CC*,⁶⁸ *Phelps v Hillingdon LBC*⁶⁹ and *D v East Berkshire*,⁷⁰ where such purely bilateral considerations as the relationship between professionals and the recipients of their advice, assumption of

⁶⁰ See Aristotle, *Nicomachean Ethics*, trans. T. Irwin (Indianapolis, Ind.: Hackett Publishing Co, 1999), Book V, Chs 3 and 4. My understanding of this distinction is deeply influenced by L. Smith, "Corrective Justice and Public Law" (paper presented at the conference on "Rights and Private Law", Oxford, July 15, 2010).

⁶¹ See esp. E.J. Weinrib, "Corrective Justice in a Nutshell" (2002) 52 U. Toronto L.J. 349, who explains: "Corrective justice is the idea that liability rectifies the injustice inflicted by one person on another."

⁶² See J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), at pp.165–188. On how distributive justice differs from corrective justice, see also E. Weinrib, "Corrective Justice" (1992) 77 Iowa L. Rev. 403 at 415; D. Klimchuk, "On the Autonomy of Corrective Justice" (2003) 23 O.J.L.S. 49.

⁶³ Of course, questions of distributive justice can arise in communities of any size, and thus also between two people. Moreover, someone may have identical bilateral relationships with any number of people. The contrast between these forms of justice does not lie in the number of people implicated, but in how the demands of justice are determined. Aristotle sought to capture this by describing distributive justice as geometrical and corrective justice as arithmetical. It should also be pointed out that, contrary to the view expressed by Lord Hoffmann in *Matthews v Ministry of Defence* [2003] UKHL 4; [2003] 1 A.C. 1163 at [26], distributive justice is not restricted to economic resources.

⁶⁴ See R. Wright, "Substantive Corrective Justice" (1992) 77 Iowa L. Rev. 625; Weinrib, *The Idea of Private Law*, 1995, esp. Chs 6 and 7 (above, fn.33); J. Coleman, *The Practice of Principle* (Oxford: Oxford University Press, 2001); Beever, *Rediscovering the Law of Negligence*, 2007 (above, fn.33); Stevens, *Torts and Rights*, 2007 (above, fn.33); McBride and Bagshaw, *Tort Law*, 2008 (above, fn.33). It is possible to accept the claim that tort liability instantiates corrective justice without also agreeing with the implausible insistence in some of these works that tort law has no connection at all to distributive justice.

⁶⁵ See P. Cane, *Responsibility in Law and Morality* (Oxford: Hart Publishing, 2002), Ch.8 "Responsibility in Public Law".

⁶⁶ Cane, "Damages in Public Law" (1999) 9 Otago L. Rev. 489.

⁶⁷ See D. Nolan, "The Liability of Public Authorities for Failing to Confer Benefits" (2011) 127 L.Q.R. 260; and the discussion of cases in fn.27 above.

⁶⁸ [1995] 2 A.C. 633 HL. The only claims upheld were those based on the vicarious liability of education authorities for the negligence of educational professionals employed by them.

⁶⁹ [2001] 2 A.C. 619 HL.

⁷⁰ [2005] 2 A.C. 373.

responsibility and reliance, were used to justify the existence of duties of care.⁷¹ Indeed, the pattern of the outcomes of public authority liability cases suggests that it is considerations of this kind that are, usually, decisive.⁷² The impact of the corrective justice perspective can also be seen when the courts bypass objections to liability deriving from the public character of the defendant's functions.⁷³ Crucially, this understanding of the nature of the tort liability of public authorities renders the specifically public context and impact of the defendant's functions irrelevant.⁷⁴

This is not to say that judges *never* do or should address distributive justice in tort cases. The duty of care in the tort of negligence is a sufficiently protean concept to accommodate a broad range of social considerations if need be, and several law lords have in the recent past appealed to distributive justice when denying the existence of such a duty.⁷⁵ Contrary to the view held by some scholars,⁷⁶ this is perfectly compatible with the idea that tort law is an institution of corrective justice that serves to vindicate individual rights.⁷⁷ Law and its institutions are *social goods*, and so it may sometimes be justifiable to restrict the availability of the service they provide in light of the social costs attached to its availability.⁷⁸ But it is one thing to treat distributive justice as a constraining value, sometimes inhibiting the pursuit of corrective justice and so preventing the imposition of a duty of care, and quite another to promote it to the status of the basic criterion for determining liability. Yet this, as we have seen, is what the integration of the state's special responsibilities flowing from human rights law would require. The vindication of these through tort liability would turn it from a companion to the pursuit of distributive justice into a means to that end.⁷⁹

And that is the problem. When assigned this elevated role, considerations of distributive justice stand in tension with the basic structure of tort law. Tort law addresses the question whether a given defendant should be made to compensate

⁷¹ This was effected by employing the individualising technique of treating the cases as turning on vicarious liability for the negligence of employees rather than the direct liability of the public authorities in question. This is noted and ably criticised by Cornford, *Towards a Public Law of Tort*, 2008 (above, fn.23), at pp.209 et seq.

⁷² There are of course too many such cases to list all here. The following cases indicate that the imposition of liability depends on whether a court is willing to find that there had been an assumption of responsibility or at least reliance: *Kent v Griffiths* [2001] Q.B. 36 CA; *Carty v Croydon LBC* [2005] EWCA Civ 19; [2005] 1 W.L.R. 2312 esp. at [83]; *Neil Martin Ltd v Revenue and Customs Commissioners* [2006] EWHC 2425 (Ch); [2007] All E.R. (D.) 39 at [95]–[97]. Also, in *Gorringe v Calderdale MBC* [2004] 1 W.L.R. 1057 at [38]–[40] Lord Hoffmann suggests that if the authority had entered into a relationship with the claimant or undertaken responsibilities towards the claimant, a duty of care would “rest upon a solid, orthodox common law foundation”.

⁷³ This is most clearly visible in *X (Minors) v Bedfordshire CC* [1995] 2 A.C. 633, where there is a stark contrast between the treatment of claims based on direct public authority liability (struck out) and vicarious liability (allowed to continue).

⁷⁴ Thus Lord Browne-Wilkinson in *X (Minors) v Bedfordshire CC* [1995] 2 A.C. 633 at 762–763 and 765 emphasises that the educational professionals whose carelessness can give rise to vicarious liability on the part of the public authorities employing them owe duties of care that are wholly independent of the statutory environment governing these authorities. This is also emphasised by Mummery L.J. in *Carty v Croydon LBC* [2005] 1 W.L.R. 2312; and Nolan, “The Liability of Public Authorities for Failing to Confer Benefits” (2011) 127 L.Q.R. 260 at 285.

⁷⁵ In *White v Chief Constable of South Yorkshire* [1999] 2 A.C. 455 HL (Lord Hoffmann); *McFarlane v Tayside Health Board* [2000] 2 A.C. 59 HL at 82–83 (Lord Steyn), and 96 (Lord Hope); *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 A.C. 309 at [121]–[122] (Lord Millett).

⁷⁶ Weinrib, *The Idea of Private Law*, 1995; Beever, *Rediscovering the Law of Negligence*, 2007; Stevens, *Torts and Rights*, 2007.

⁷⁷ See also, e.g. Coleman, *The Practice of Principle*, 2001, at pp.34–35.

⁷⁸ In relation to tort law specifically, this point is insisted on by T. Honoré in his *Responsibility and Fault* (Oxford: Hart Publishing, 1999), at pp.71 and 90–91. See also S.A. Smith, “The Rights of Private Law” in A. Robertson and T.H. Wu (eds), *The Goals of Private Law* (Oxford: Hart, 2009), at p.113.

⁷⁹ Contrast the classical treatment of these two “forms” of justice in Aristotle, *Nicomachean Ethics*, trans. T. Irwin, 1999, Book V, where they are presented as complementary.

a given claimant. This fastens attention on the parties and their conflicting interests that produced the harmful outcome.⁸⁰ The pursuit of distributive justice, however, directs attention beyond the parties and determines their rights and duties to each other on the basis of their location in the broader social context. Tort liability is therefore, as many have pointed out before, a far from suitable mechanism for pursuing distributive justice.⁸¹ Its bilateral nature, its focus on whether a particular defendant wronged a particular claimant, contributes nothing to distributive justice.

This tension is perhaps most evident when two central features of tort law are assessed in terms of their relationship to distributive justice. Both the requirement that the tortfeasor must have caused the harm or infringed the right, and the acts/omissions distinction, are intrinsic features of tort law. This is because they connect the claimant and the defendant to each other in a manner that simultaneously distinguishes the link between them from their relationships with the rest of society. They therefore make an essential contribution to the justification of imposing liability on the given defendant to the given plaintiff. However, both run counter to the pursuit of distributive justice. From a distributive justice point of view it matters not whether A has too much as a result of taking more than his share or as a result of failing to give away an extra portion freely given to him by another: if he has too much, he is duty bound to give up any excess however that came into being. Nor is distributive justice concerned with whether any diminution in A's holdings was caused by B; if A has less than he should have and B more than *she* should have, then B's excess should go to A even if it was A's generosity or own foolishness in dealings with C that brought about the imbalance. What matters for distributive justice is the distribution, and neither the acts/omissions distinction nor causation pertain to that; in fact, both would frustrate the pursuit of distributive justice.

Moreover, the cost-benefit assessment required by distributive justice is incompatible with the moral structure of tort law.⁸² That tort liability is by virtue of the acts/omissions distinction confined to "negative" rights⁸³ shows that tort law is concerned with a particular type of moral issue: the resolution of conflicts between the clashing interests of normative equals. It is premised on the moral commitment that in their direct interactions individuals are entitled to equal freedom. Neither is entitled to harm the other, but also, neither is obliged to use his resources in the interest of the other.⁸⁴ The resources of each are his own—this is why tort law holds both that one may not infringe the rights of another and that beyond this everyone is entitled to devote his resources to his own benefit rather than that of others. And this is also why a distributive cost-benefit analysis is anathema to tort law as a ground of liability. If the reasonableness of A's behaviour

⁸⁰ This feature of tort law is brought out particularly well by Weinrib, *The Idea of Private Law*, 1995.

⁸¹ See, e.g. J. Coleman, *Risks and Wrongs* (Cambridge: Cambridge University Press, 1992); R. Wright, "Rights, Justice, and Tort Law", in D.G. Owen (ed.), *The Philosophical Foundations of Tort Law* (Oxford: Clarendon Press, 1995); Coleman, *The Practice of Principle*, 2001.

⁸² This is brought out well in critiques of the law-and-economics approach to tort law such as J. Coleman, "The Structure of Tort Law" (1988) 97 *Yale L.J.* 1233 and the literature cited in the preceding footnote.

⁸³ See above at p.593.

⁸⁴ Lord Hoffmann brings this out particularly clearly in *Stovin v Wise* [1996] A.C. 923; *Gorringe v Calderdale MBC* [2004] 1 W.L.R. 1057; and *Tomlinson v Congleton BC* [2003] UKHL 47; [2004] 1 A.C. 46. This does not presuppose a commitment to right-wing libertarianism, since it is entirely compatible with the view that citizens owe each other very extensive duties that are to be fulfilled via the public institutions of their society—see A. Ripstein, "The Division of Responsibility and the Law of Tort" (2004) 72 *Fordham L. Rev.* 1811.

is made to turn on whether a fair balance is achieved between the benefits derived by A and the costs imposed on B, rather than on whether A has invaded B's rights, then neither A nor B is treated as master of his own resources.⁸⁵ Instead, their resources are pooled and are treated as the common property of both: neither may benefit himself over the other, and the permissibility of behaviour depends not on whether A infringes B's rights but rather on whether A devotes sufficient of his resources to B. This incongruity between distributive justice and the moral structure of tort law is enhanced when, as in Lord Bingham's proposal, the community at large enters the picture and the question becomes whether A, the public authority, achieves the right balance between the interests of B, the actual victim, and the rest of society, C ... Z. Under this proposal the public authority is treated as having no interests of its own but as dedicated to serving the public interest, and the question actually being asked is whether A appropriately managed resources to which B ... Z are entitled in common.⁸⁶ This is certainly a suitable question to ask, but it is fundamentally different from tort law's question whether A wrongfully invaded B's "negative" rights.

This leaves us with the conclusion that the framework of tort liability is ill-suited to providing remedies in respect of breaches by public authorities of their duties under the HRA. One possible response to this is to turn instead to human rights law, and to direct the relevant cases down that route. This is the option taken by the House of Lords. Since there is no intrinsic value in keeping things as they are, it is, however, also possible to respond that tort law should itself be remoulded into a shape better suited to the demands made upon it in a modern state. Indeed, several leading speeches in earlier cases before the House of Lords on the liability of public authorities can be understood as having sought to do just that.⁸⁷ The same can be said of a significant body of the relevant academic literature.⁸⁸ Why, then, choose redirection over reform?

The superiority of the human rights route

The difference between the question whether a public authority failed to manage public resources properly and the question whether someone (including a public authority) invaded another's "negative" rights has long been manifested in the fabric of the law, and with good reason. It lies at the heart of the divergence between the tests developed in the common law for determining (un)reasonableness in tort law and in public law respectively. The fact that liability for negligence turns on the "mere" unreasonableness of the defendant's conduct, while the public law test requires what one might roughly term "excessive" unreasonableness on the part

⁸⁵ This effect is very clear from Rawls, *A Theory of Justice*, 1971: the basic goods that are to be distributed fairly are treated by Rawls as belonging to no one, a point emphasised (and attacked) in Nozick, *Anarchy, State and Utopia*, 1974. See also Finnis's discussion of distributive justice in his *Natural Law and Natural Rights*, 1980, at pp.165–188.

⁸⁶ This is noticed by Lord Hope in *Smith v Chief Constable of Sussex Police* [2009] 1 A.C. 225 at [75]–[76].

⁸⁷ See especially, *Home Office v Dorset Yacht Co* [1970] A.C. 1004 HL at 1067–1068 (Lord Diplock); *Ann v Merton LBC* [1978] A.C. 728 HL at 757 (Lord Wilberforce); *Stovin v Wise* [1996] A.C. 923 (Lord Hoffmann); *X (Minors) v Bedfordshire CC* [1995] 2 A.C. 633 (Lord Browne-Wilkinson).

⁸⁸ See P. Craig and D. Fairgrieve, "Barrett, Negligence and Discretionary Powers" [1999] P.L. 626; Fairgrieve, *State Liability in Tort*, 2003 (above, fn.5), esp. at pp.84–87, 278–284; Cornford, *Towards a Public Law of Tort*, 2008, Ch.12; R. Mullender, "Negligence, Public Bodies, and Ruthlessness" (2009) 72 M.L.R. 961; see also Law Commission, *Administrative Redress: Public Bodies and the Citizen* (HMSO, 2008), C.P. No.187.

of the defendant,⁸⁹ reflects the realisation that in tort cases the court is tasked with fixing the boundaries between the parties' conflicting interests, whereas in public law cases it is assessing decision-making by another authority. That is, the divergence gives effect to the difference between the courts' roles as primary decision-makers and as reviewing, supervisory entities. Realising this, members of the House of Lords have over the years employed various doctrinal devices designed to ameliorate the resulting tension between the tort approach and the public law approach.⁹⁰ Indeed, concern that Lord Bingham's proposal would apply a test for liability that ignores the distinctive position of public authorities appears to have been one reason for its rejection by his colleagues in the House of Lords.⁹¹

This difference remains as important now that the HRA has added an additional layer of control over public authorities. Human rights norms bring about a more intense scrutiny of public authorities' functioning than the *Wednesbury* test, even in its more demanding contemporary incarnation.⁹² However, the human rights approach differs not only from common-law public law but also from the common law of tort. The core difference revolves around the use in human rights law of the requirement of proportionality between the aim pursued by an interference with a Convention right and the extent of the interference.⁹³ No such requirement exists in respect of any of the "rights-based torts", such as trespass and conversion.⁹⁴ Any invasion of a right protected by such torts is actionable; liability is strict, and the purpose and extent of an invasion are irrelevant. The difference is less stark in respect of the torts of negligence and nuisance, where the claimant does have to show that the defendant acted unreasonably, but it is no less fundamental. Here the divergence can be expressed by saying that while tort law focuses on the reasonableness of behaviour, human rights law focuses on the reasonableness of outcomes.⁹⁵

⁸⁹ This is true of both *Wednesbury* unreasonableness and the enhanced *Wednesbury* test. Cf. Hickman, "The Reasonableness Principle: Reassessing its Place in the Public Sphere" [2004] C.L.J. 166.

⁹⁰ Some cases sought to align the tort liability test with the public law test. See *Home Office v Dorset Yacht Co* [1970] A.C. 1004 at 1067–1068 (Lord Diplock); and *Anns v Merton LBC* [1978] A.C. 728 at 757 (Lord Wilberforce); *Stovin v Wise* [1996] A.C. 923 (Lord Hoffmann). In *X (Minors) v Bedfordshire CC* [1995] 2 A.C. 633 at 736–737 Lord Browne-Wilkinson favoured a distinction between justiciable and non-justiciable matters. These approaches have lost favour—see *Barrett v Enfield LBC* [2001] 2 A.C. 550 HL; *Phelps v Hillingdon LBC* [2001] 2 A.C. 619; Hickman, "The Reasonableness Principle: Reassessing its Place in the Public Sphere" [2004] 63 C.L.J. 166 at 173–176; Bailey, "Public Authority Liability in Negligence" (2006) 26 L.S. 155 at 163–171. Dicta in some recent cases (e.g. by Lord Steyn in *Brooks v Commissioner of Police of the Metropolis* [2005] UKHL 24; [2005] 1 W.L.R. 1495 at [34]; and Lord Bingham in *D v East Berkshire Community Health NHS Trust* [2005] 2 A.C. 373 at [49]) nevertheless echo the speeches of Lord Diplock and Lord Wilberforce in that they envisage that particularly egregious negligence might lead to the imposition of a duty of care. The Law Commission recently expressed the same view in *Administrative Redress: Public Bodies and the Citizen*, at para 2.9.

⁹¹ In Lord Hope's words (*Smith v Chief Constable of Sussex Police* [2009] 1 A.C. 225 at [76]): "The judgment as to whether any given case is of that character [as to require immediate action] must be left to the police". See also the speeches of Lord Carswell at [108] and Lord Brown at [129].

⁹² *R. (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 A.C. 532 at [26]–[28] per Lord Steyn; *Hatton v United Kingdom* (36022/97) (2003) 37 E.H.R.R. 611 ECtHR at [141]. See further H. Fenwick, *Civil Liberties and Human Rights*, 4th edn (New York: Routledge-Cavendish, 2007), at pp.265–291, esp pp.282 et seq. Fenwick observes at p.283 that the leading "decisions indicate that the discretionary area of judgment accorded to the executive or legislature is narrowing considerably, in some contexts almost to vanishing point, which is in accordance with s 6 HRA".

⁹³ On the proportionality test, see D. Feldman, "Proportionality and the Human Rights Act 1998", in E. Ellis (ed.), *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing, 1999), at p.117; T. Hickman, "The Substance and Structure of Proportionality" [2008] P.L. 694; J. Rivers, "Proportionality and Variable Intensity Review" [2006] 65 C.L.J. 174; M. Taggart, "Proportionality, Deference, *Wednesbury*" [2008] N.Z. L. Rev. 423.

⁹⁴ See P. Cane, *The Anatomy of Tort Law* (Oxford: Hart Publishing, 1997), Chs 2 and 3 on rights-protecting torts. McBride and Bagshaw, *Tort Law*, 2005 has a section headed "Rights-Based Torts".

⁹⁵ As R. Mullender, "Negligence, Public Bodies, and Ruthlessness" (2009) 72 M.L.R. 961 at 978 puts it, proportionality "inject[s] a qualified consequentialist counter-current".

Liability in negligence and nuisance does not turn on whether the defendant produced a net gain through causing loss to the plaintiff; instead, the court considers how the defendant acted, asking itself whether the defendant took reasonable care or used his land reasonably.⁹⁶ Although the value of a defendant's activities and the seriousness of their impact on the plaintiff do feature in the court's reasoning, they do so as part of an evaluation of the reasonableness of the defendant's conduct rather than a calculation of the net outcome produced by that conduct.⁹⁷ When it comes to proportionality, however, outcome dominates. The proportionality test focuses the court's assessment on the significance of the objective pursued by the defendant public authority and the seriousness of its impact on the right-holder.⁹⁸ Here the court is not assessing the public authority's decision-making process, but whether its decision was indeed a necessary and proportionate interference with the relevant right.⁹⁹ Although the reasonableness of a public authority's conduct is certainly relevant to determining whether the interference with a right was proportionate, a deficient decision-making process does not necessarily fall foul of the proportionality test, nor is it satisfied simply by reasonable conduct on the part of a public authority.¹⁰⁰

These divergences between tort law and human rights law are not accidental. They exist because while human rights law is designed to supervise the exercise of authority, tort law serves to resolve conflicts among right-holders. The features of tort law highlighted above ensure that individuals are not left free to impose the cost of their activities on others, not even if their gains exceed those costs: direct invasions of rights are always actionable, and harm must be compensated whenever it is caused by unreasonable behaviour. By imposing strict liability in some categories of cases and in other cases mediating conflicting interests through setting a standard of behaviour that applies equally to all, tort law ensures that neither side is allowed to determine what the other must endure. In this way, tort law treats individuals as normative equals, neither having authority over the other.¹⁰¹ Human rights law, on the other hand, finds its *raison d'être* in the existence of a relationship of normative inequality. It is ultimately anchored in the notion that states, and the public authorities of which they consist, do have authority over their subjects. It is this exceptional position of the state that explains the emergence and development, through constitutional law and public international law, of the special set of rights and principles that are variously referred to as "natural", "fundamental" or "human" rights in order to signal that they are binding upon states, as well as

⁹⁶ See esp. Weinrib, *The Idea of Private Law*, 1995, at pp.147–152; R.W. Wright, "Negligence in the Courts: Introduction and Commentary" (2002) 77 *Chicago-Kent L. Rev.* 425; R.W. Wright, "Justice and Reasonable Care in Negligence Law" (2002) 47 *American Journal of Jurisprudence* 143; R.W. Wright, "Hand, Posner, and the Myth of the 'Hand Formula'" (2003) 4 *Theoretical Inquiries in Law* 145; and, from a very different theoretical starting point, A. Ripstein, *Equality, Responsibility and the Law* (Cambridge: Cambridge University Press, 1999), at pp.58–60.

⁹⁷ See *Bolton v Stone* [1951] A.C. 850 HL; *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound)* [1967] 1 A.C. 617 PC (Aust.) (speech of Lord Reid); *Hollywood Silver Fox Farm Ltd v Emmett* [1936] 2 K.B. 468 KBD; *Miller v Jackson* [1977] Q.B. 966 CA; *Tomlinson v Congleton BC* [2004] 1 A.C. 46 at 82 (Lord Hoffman). Section 1 of the Compensation Act 2006 appears not to change the existing law in this regard.

⁹⁸ *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 A.C. 69 PC (Ant. & Barb.) at 80 (Lord Clyde); approved by Lord Steyn in *R. (on the application of Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 A.C. 532 at [27].

⁹⁹ *Huang v Secretary of State for the Home Department* [2007] UKHL 11; [2007] 2 A.C. 167.

¹⁰⁰ See, respectively, *R. (on the application of Begum) v Denbigh High School Governors* [2006] UKHL 15; [2007] 1 A.C. 100; and *HL v United Kingdom* (45508/99) (2005) 40 E.H.R.R. 32.

¹⁰¹ On the notion of normative equality and its link to corrective justice, see Weinrib, *The Idea of Private Law*, 1995, at pp.76–83.

the catalogue of such rights, including the existence of positive duties.¹⁰² The state's status as an authority also explains why human rights law focuses on the justifiability of outcomes in light of their impact on individuals. As Joseph Raz points out, the "role and primary normal function" of authorities "is to serve the governed".¹⁰³ This means that its instructions "should require action which is justifiable by the reasons which apply to the subjects".¹⁰⁴ This is why the goals pursued by public authorities can (and must) be evaluated in light of their effect on interests of the persons affected thereby.

Importantly, this distinction between tort law and human rights law holds true despite the fact that tort law also governs the liability of public authorities. The common law's assimilation of public and private liability is not present in all legal systems and is the product of history rather than principle.¹⁰⁵ It simply reflects the fact that public authorities' liability for infringements of "negative" rights has the same bilateral structure as the tort liability of private persons and is therefore entirely suitable for the tort route.¹⁰⁶ Against the backdrop of English law's failure to develop a distinctive notion of the state,¹⁰⁷ and the rarity until fairly recently of positive public duties, it is not at all surprising that the same principles came to be employed for determining the liability of private persons and of public officials and bodies. Remedies against public authorities that have unlawfully invaded rights to property or personal freedom and security, or have wrongfully caused harm, are not aimed at ensuring the proper exercise of public functions or at securing a just distribution of society's common resources but at vindicating rights in exactly the same way as remedies granted against private persons in such circumstances. They are therefore easily accommodated in the normative structure of tort law, especially since doing so has the added advantage of emphasising the values of equality and the rule of law.¹⁰⁸

This remains the case when such rights are protected by the "negative" dimension of Convention rights. In such cases there is accordingly no reason to be disconcerted by any overlap between tort liability and the HRA.¹⁰⁹ But the same cannot be said of public authorities' liability for failures to satisfy "positive" Convention rights

¹⁰² This is not to overlook the large overlap between the rights individuals have against each other and the human rights they have against state authorities. The point is that the notion of natural or human rights was needed to make such rights binding upon states because of their status as authorities, i.e. as specifiers of rights and duties. It is also this status that explains why human rights frequently impose positive duties: as authorities, states can marshal the co-operation and resources needed to fulfil such duties.

¹⁰³ J. Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), at p.56.

¹⁰⁴ Raz, *The Morality of Freedom*, 1986, at p.51.

¹⁰⁵ For comparative surveys of the liability of public authorities, see J. Bell and A.W. Bradley (eds), *Governmental Liability: a Comparative Study* (Edinburgh: UKNCCL, 1991); Fairgrieve et al., *Tort Liability of Public Authorities in Comparative Perspective*, 2002 (above, fn.5); Fairgrieve, *State Liability in Tort*, 2003 (above, fn.5); also R. Rebhahn, "Public Liability in Comparison: England, France, Germany" in H. Koziol and B. Steininger (eds), *European Tort Law 2005* (Vienna: Springer, 2006), at p.68.

¹⁰⁶ Conversely, this is also why tort claims against public authorities fail when they are based on omissions—such cases do not exhibit a bilateral structure. See the hostility to such claims in, e.g. J.C. Smith and P. Burns, "*Donoghue v Stevenson*—the Not so Golden Anniversary" (1983) 46 M.L.R. 147; J. Stapleton, "Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence" (1995) 111 L.Q.R. 301.

¹⁰⁷ See especially M. Loughlin, "The State, the Crown and the Law", in M. Sunkin and S. Payne (eds), *The Nature of the Crown* (Oxford: Oxford University Press, 1999), at p.33; See further J.W.F. Allison, *A Continental Distinction in the Common Law* (Oxford: Oxford University Press, 1996), Ch.5; J.W.F. Allison, *The English Historical Constitution* (Cambridge: Cambridge University Press, 2007), esp. Ch.3. For the European contrast, see D. Grimm, *Recht und Staat der bürgerlichen Gesellschaft* (Frankfurt am Main: Suhrkamp, 1987), esp. Ch.2.

¹⁰⁸ A.V. Dicey, *The Law of the Constitution*, 10th edn (London: Macmillan, 1959), at p.193 already made this point.

¹⁰⁹ This explains Lord Rodger's observation in *Watkins v Secretary of State for the Home Department* [2006] 2 A.C. 395 at [64] that such cases are not problematic.

to benefits, protection, security and the like, or for breaches of rights that can only be committed by public authorities and have no private parallel. These are based on the premise that the state has special responsibilities in virtue of its special role in society as authoritative manager of common resources. The Diceyan equality principle therefore has no purchase here; indeed, it poses the danger of letting public authorities off too easily.¹¹⁰ There is accordingly no reason to expect that claims such as these should also be treated in accordance with that principle. To the contrary, there is good reason for funnelling cases based on this premise away from the tort route.

The divergences just noted between tort law's reasonableness test and human rights law's proportionality test provide that reason. The tort law test is highly suited to the context of interpersonal justice, but not to questions of distributive justice. Asking whether someone took reasonable care in view of the reasonable foreseeability that harm might ensue if she failed to do so is certainly an apt way of determining the balance between security and freedom that ought to govern the relations of people who are each entitled to pursue their own interests. But it does not help to answer the question whether responsibility should be imposed on institutions that exist to serve the interests of others. The state and its public authorities do not have lives of their own: morally, their function is to serve those over whom they exercise authority; they are means rather than ends.¹¹¹ Here there is no freedom of the doer that can be balanced against the interests of the sufferer. Instead, the question is whether the doer did justice to the interests of all those over whom he has authority—did he achieve the right balance between their interests? This is simply another way of asking: does his decision meet the proportionality test? The human rights approach is therefore, in contrast with the tort test, designed precisely to deal with claims premised on the special responsibilities of the state in modern society and the distributional questions that arise therefrom.¹¹² Little wonder then that in the cases surveyed in this article the House of Lords was unwilling in tort proceedings to engage with the substance of claims it would so assess if brought via the human rights route.

All this is reflected in the ECtHR jurisprudence about liability for the breach of a state's positive human rights obligations.¹¹³ In *Osman*, for example, the court stated that art.2 ECHR must be interpreted "in a way that does not impose an impossible or disproportionate burden on the authorities" with the result that a breach will only have taken place if it is established that the authorities,

"... knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals".¹¹⁴

¹¹⁰ See discussion at fn.106 above. Significantly, in *Smith v Chief Constable of Sussex Police* [2009] 1 A.C. 225, the law lords who refused to impose liability in negligence indicated that they would have imposed liability on these facts under the HRA. The danger here lies less in the substantive test for liability (carelessness v. proportionality) than in the demarcation of the scope of liability (duty of care v. the existence of a positive duty).

¹¹¹ This understanding of the state has a long history in political thought. See, for example, the work of Hobbes, Locke, Kant and Bentham. It cannot be defended here, so I simply assert it, confident that it accords with the contemporary understanding of the legitimacy of states and all our political practices.

¹¹² See Cane, *Responsibility in Law and Morality*, 2002, at p.261; Mullender, "Negligence, Public Bodies, and Ruthlessness" (2009) 72 M.L.R. 961 at 977–979.

¹¹³ Cf., however, Hickman, "The Reasonableness Principle: Reassessing its Place in the Public Sphere" [2004] C.L.J. 166 at 189–192.

¹¹⁴ *Osman v United Kingdom* (1998) 29 E.H.R.R. 455 at [116]; *Mastromatteo v Italy* (37703/97) [2002] ECHR 694 ECtHR at [68]. The threshold required by the *Osman* test is very difficult to satisfy: apart from *Osman* and

At the same time, the court made it clear that liability depends also on the extent of the public authority's negligence and the gravity of the harm suffered.¹¹⁵ This is a considerably broader range of concerns than is present in the test for negligence, and underlines the difference between that test and the notion of proportionality outlined above.¹¹⁶ This difference explains why someone who thinks that the *Osman* test "looks much like the sort of test the English courts would apply in deciding if the police were negligent" would be surprised that the House of Lords in *Van Colle* refused to impose liability on *Osman* grounds.¹¹⁷ Although some factors feature in both tests, the focus of the enquiry is different—and it is this that makes the human rights route better suited to such claims.¹¹⁸

Significantly, the *Osman* approach matches the jurisprudence on state liability in EU law. The test employed by the European Court of Justice (ECJ) also does not turn on fault as conceived in the common law. It requires a "sufficiently serious breach", which takes account of the degree of fault exhibited but also much besides that.¹¹⁹ This similarity is no coincidence; it is attributable to the state-focused concern of the obligations enforced by both the ECtHR and ECJ. Perhaps most importantly, neither the ECtHR nor the ECJ simply require an enhanced degree of fault on the part of public authority defendants, which is what the Law Commission recently proposed and what American courts have favoured when extending tort liability into the realm of (constitutional) human rights.¹²⁰ This, too, is no coincidence: as the previous paragraph showed, any fault test misses its target when it comes to liability questions arising from the state's unique place in modern society. Perhaps the clearest evidence of this is provided by the inability of the English courts to find a stable demarcation of the boundaries of public authority tort liability despite four decades of effort since *Dorset Yacht*.¹²¹

In view of the significance of the decision in *Smith*, it is worth observing that the superiority of the human rights approach is most evident when it comes to settling the limits of public authorities' liability for omissions. It is clear that there must be such limits, as in the case of private persons. If the state were liable whenever anyone is harmed by another, individual autonomy would as assuredly

Mastromatteo, see *Re Officer L* [2007] UKHL 36; [2007] 1 W.L.R. 2135 at [20]; *Van Colle v Chief Constable of Hertfordshire* [2009] 1 A.C. 225; and *Mitchell v Glasgow City Council* [2009] 1 A.C. 874.

¹¹⁵ In *Osman v United Kingdom* (1998) 29 E.H.R.R. 455 at [151] the ECtHR, when considering the art.6 ECHR issue, observed that liability should not be denied without a court taking account of factors such as these. This requirement appears to survive the revision of the art.6 analysis in *Z v United Kingdom* (29392/95) [2001] ECHR 333. See Hickman, "Tort Law, Public Authorities, and the Human Rights Act 1998", in Fairgrieve et al., *Tort Liability of Public Authorities in Comparative Perspective*, 2002 (above, fn.5), at p.17.

¹¹⁶ *Mitchell v Glasgow City Council* [2008] CSIH 19; 2008 S.C. 351 at [63] Lady Paton (in one of the Scottish courts) also confirms that these two tests differ. Dicta in *D v East Berkshire Community Health NHS Trust* [2005] 2 A.C. 373 at [49]; and *Brooks v Commissioner of Police of the Metropolis* [2005] 1 W.L.R. 1495 at [34] suggesting that a particularly egregious failure by a public authority might lead to liability in tort where mere negligence would not. But this has not had any practical impact so far, and Arden L.J. roundly rejected counsel's argument to this effect in *Jain v Trent SHA* [2007] EWCA Civ 1186; [2008] Q.B. 246 at [85]–[87]. This is correct. The suggestion in *D* and *Brooks* runs counter to the general approach in tort law.

¹¹⁷ Spencer, "Suing the Police for Negligence: Orthodoxy Restored" [2009] C.L.J. 25 at 26. Interestingly, in *Smith v Chief Constable of Sussex Police* [2009] 1 A.C. 225 at [56] Lord Bingham indicated that he would have imposed liability in tort on the facts in *Osman v United Kingdom* (1998) 29 E.H.R.R. 455.

¹¹⁸ The difference between the *Osman* test and the duty of care weighed against convergence in the judgment of Arden L.J. in *Jain v Trent SHA* [2008] Q.B. 246 at [85]–[87].

¹¹⁹ See *Brasserie du Pêcheur SA v Germany* Cases C-46 and 48/93 [1996] ECR I-1029 at [55]; *R. v Secretary of State for Transport Ex p. Factortame Ltd (No.5)* [2000] 1 A.C. 524 HL.

¹²⁰ See *Administrative Redress: Public Bodies and the Citizen*. This is wrongly presented in para.4.4 as a transplantation of the ECJ test. The US law of constitutional torts contains a "qualified immunity" that has the same general effect: see, e.g. *Richardson v McKnight* 521 U.S. 399 (1997).

¹²¹ See esp. Harlow, *State Liability: Tort Law and Beyond*, 2004, Ch.1.

be compromised as it would be if every private person were liable for failing at all times to put the interests of others first.¹²² But tort law's acts/omissions distinction, which secures autonomy in interpersonal interactions, is just not fit for this purpose when it comes to the liability of the state and the public authorities of which it consists for breaches of their special duties under the HRA. That distinction safeguards individual autonomy by preventing one person from successfully pressing claims against another that would infringe the latter's freedom to live a life of his own.¹²³ However, as pointed out above, public authorities do not have lives of their own. This means, on the one hand, and as human rights law shows, that within the functions assigned to public authorities, no principled distinction is to be made between acts and omissions.¹²⁴ On the other hand it means that the potential threat to individual autonomy posed by state liability is a different one and requires a different approach. In this context it is the autonomy of the beneficiary rather than of the bearer of the duty that is potentially threatened, for, as Lord Hoffmann has pointed out, such duties may discourage people from taking responsibility for their own behaviour.¹²⁵ This kind of threat can be restrained by appropriately limiting the functions that are in fact entrusted to public authorities in order to leave sufficient scope for individual initiative and responsibility. And that is a matter of determining what demands individuals should be able to make on common resources and the public authorities that manage them. In other words, it requires reflection on human rights and their reach.¹²⁶

Finally, the difference between the courts' tort law role as primary decision-making authorities fixing the boundaries between conflicting interests and their public law role of assessing the decisions of other authorities has important implications regarding remedies. This is so because, as pointed out above, the first of these roles involves the pursuit of corrective justice while the second serves distributive justice.¹²⁷ Rectifying a "distributive injustice" is very different from rectifying a "corrective injustice". Being multilateral rather than bilateral in focus, the former task requires that the injustice be remedied in a manner that produces a socially just result, a consideration that is anathema to corrective justice, with its focus on the bilateral relationship between the parties.¹²⁸ For this reason the remedy and the harm, which are closely correlated in the remedying of corrective injustices, may well come apart when a distributive injustice is rectified. The pursuit of distributive justice may not need—may indeed countermand—the payment of damages. Hence damages should not be the primary remedy for breaches of duties that emanate from the state's special role in society.¹²⁹

This is indeed the position under the HRA, which, in requiring a court to be satisfied that an "award is necessary to afford just satisfaction to the person in

¹²² See Lord Hoffmann in *Gorringe v Calderdale MBC* [2004] 1 W.L.R. 1057 at [35]–[36].

¹²³ See the discussion by Lord Hoffmann in *Stovin v Wise* [1996] A.C. 923 at 930–931.

¹²⁴ See Alexy, *A Theory of Constitutional Rights*, 2001, Ch.9; Fredman, *Human Rights Transformed: Positive Rights and Positive Duties*, 2008.

¹²⁵ *Gorringe v Calderdale MBC* [2004] 1 W.L.R. 1057 at [35]–[36].

¹²⁶ This is precisely what the ECtHR has done in *Osman v United Kingdom* (1998) 29 E.H.R.R. 455 and other cases on positive obligations.

¹²⁷ See above at pp.599–560.

¹²⁸ See above at p.597 and especially Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), at pp.165–188; E. Weinrib, "Corrective Justice" (1992) 77 Iowa L. Rev. 403 at 415; D. Klimchuk, "On the Autonomy of Corrective Justice" (2003) 23 O.J.L.S. 49.

¹²⁹ See also Cane, "Damages in Public Law" (1999) 9 Otago L. Rev. 489.

whose favour it is made”,¹³⁰ has been held to grant the court a discretion to award a remedy other than damages and to award a sum differing from what would be payable as tort damages.¹³¹ It is a sense of the difference just outlined that underlies (and justifies) the courts’ interpretation of the remedial provisions of the HRA¹³²—as well as the judiciary’s otherwise puzzling use of the term “vindication” to describe the nature and purpose of remedies for human rights awards.¹³³ Most importantly, this difference affirms the superiority of the human rights route for resolving claims arising from the special responsibilities of public authorities: its remedial structure is better attuned to the exigencies of such cases than tort law.

IV. Conclusion

Public authorities in the United Kingdom have for quite a long time now been governed by both human rights and tort law. As long as human rights law remained institutionally separated by the jurisdictional monopoly of the Strasbourg court, these routes to liability ran happily in parallel. Their joinder came into question only once the enactment of the HRA ensured that the same, domestic, courts would become involved in both. This raised a challenge which has received contrasting answers: should the liability of public authorities now in all cases converge with human rights law or should their liability in tort continue to cohere with general tort principles? The latter view gained the upper hand in the courts, but without convincing explanation.

A justification is possible, however. It lies in the fact that each route is focused on a different dimension of justice. The fundamental importance to the common law of tort of the distinction between acts and omissions reveals its concern with “negative” rights, with liberties, rather than claims to benefits. In treating this distinction as insignificant, human rights law (at least in its European variant) shows itself to be concerned instead with what ties people together into a political community: the management of their common resources by the state and its constituent authorities. Given its bilateral structure, tort law is not a suitable vehicle for determining whether liability should be imposed for breaches of rights and duties that derive specifically from public authorities’ character as such. This is true not only of cases like *Smith*,¹³⁴ where it is sought to impose liability in tort for the breach of positive duties, but also of cases where it is argued, as in *Wainwright*¹³⁵ and *Jain*,¹³⁶ that tort liability should be imposed for the breach of a “negative” right that would be binding only on public authorities. Cases falling in these two

¹³⁰ Human Rights Act 1998 s.8(3). Note that a court is enjoined to take account not only of “any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court)” but also of “the consequences of any decision (of that or any other court) in respect of that act”.

¹³¹ *R. (on the application of Greenfield) v Secretary of State for the Home Department* [2005] 1 W.L.R. 673; *Anufrijeva v Southwark LBC* [2004] Q.B. 1124; *Watkins v Secretary of State for the Home Department* [2006] 2 A.C. 395.

¹³² For that reason, the critique of the courts’ approach by Varuhas, “A Tort-Based Approach to Damages under the Human Rights Act 1998” (2009) 72 M.L.R. 750 goes too far. Varuhas elides the difference between human rights claims which fit into the corrective justice structure of tort law, in respect of which the tort measure should indeed be followed, and claims seeking distributive justice.

¹³³ See generally Steele, “Damages in Tort and under the Human Rights Act: Remedial or Functional Separation?” [2008] C.L.J. 606.

¹³⁴ *Smith v Chief Constable of Sussex Police* [2009] 1 A.C. 225.

¹³⁵ *Wainwright v Home Office* [2004] 2 A.C. 406.

¹³⁶ *Jain v Trent SHA* [2009] 1 A.C. 853.

categories pose questions about how social resources are to be distributed and managed.

It is better to face this openly, funnelling such cases into the human rights route, than to tinker with tort law in an effort to keep them in the common law route. The various proposals that have been made for modifying the tort of negligence in order to accommodate post-Diceyan changes in the role and understanding of the state have the significant practical drawback that they necessitate the development of a workable notion of activities that are “truly public”.¹³⁷ It seems highly unlikely that this will ever be achieved.¹³⁸ The HRA concept of “public authorities” is admittedly no clearer¹³⁹ but it is already part of the law and has the advantage of being surrounded by a set of norms providing a context for its interpretation and elaboration. Moreover, the ECHR provides a ready-made criterion for identifying the relevant activities. Most importantly, while these proposals seek, as the Law Commission has acknowledged, merely to modify corrective justice,¹⁴⁰ such cases require a direct engagement with distributive justice. As this article has shown, this can only be achieved by employing the broader focus of human rights law.

It is because tort law and human rights law are designed to serve these different though complementary functions that it makes sense to maintain the integrity of both routes.¹⁴¹ This is not to say that such a division is inevitable or mandatory. Clearly, the invasion by public authorities of “negative” rights that are held against other individuals are also infringements of human rights and are treated as such in human rights law.¹⁴² Moreover, there are categories of tort cases—especially those concerning the range of right-holders, the interpretation of public interest or public policy, and the threshold of liability—where the influence of human rights law is often to be welcomed. But in the context of a legal tradition that has long subsumed the liability of public authorities under the general principles of tort law, the separation endorsed by the House of Lords is commendable.¹⁴³ Its practical result is to channel liability for breaches of duties owed by public authorities specifically because of their public character into the route best suited to determining the grounds, bounds and remedial consequences of such liability. In this way the courts may indeed be said to pursue the vindication of rights rather

¹³⁷ See especially the proposals by the Law Commission in *Administrative Redress: Public Bodies and the Citizen*, at paras 2.9, 4.146, 77(4) (introduction of a “serious fault” test); Cornford, *Towards a Public Law of Tort*, 2008, especially at pp.198–217 (breach of duty to depend on the relevant norms of public law); and Mullender, “Negligence, Public Bodies, and Ruthlessness” (2009) 72 M.L.R. 961 at 977 (proportionality to be integrated into the third stage of the *Caparo* test).

¹³⁸ See, e.g. C. Harlow, “‘Public’ and ‘Private’ Law: Definition without Distinction” (1980) 43 M.L.R. 241; Allison, *A Continental Distinction in the Common Law*, 1996 (above, fn.107); Oliver, *Common Values and the Public-Private Divide*, 1999; J.W.F. Allison, “Variations of View on English Legal Distinctions Between Public and Private” [2007] C.L.J. 698.

¹³⁹ See, e.g. S. Palmer, “Public, Private and the Human Rights Act 1998: an Ideological Divide” [2007] C.L.J. 559.

¹⁴⁰ Law Commission, *Administrative Redress: Public Bodies and the Citizen* (HMSO, 2008), C.P. No.187, at para.2.8.

¹⁴¹ The complementarity of distributive and corrective justice, and thus of human rights and tort law, should be stressed. The argument presented in this article does not seek to keep distributive justice out of the law or out of the courts, but merely to assign each to the route best suited to its pursuit.

¹⁴² Note that in the context of art.2 ECHR the courts differentiate between a “mere” *Osman*-type failure to protect someone and situations where the police through their own acts exposed a person to the risk of injury. Liability is imposed more easily in the latter type of case—see *Van Colle v Chief Constable of Hertfordshire* [2009] 1 A.C. 225 at [69]–[70], and [75](4) and (5). This underlines the suitability of tort law for holding public authorities liable for infringements of negative rights.

¹⁴³ See also Nolan, “The Liability of Public Authorities for Failing to Confer Benefits” (2011) 127 L.Q.R. 260 at 285–286.

than simple compensation — and thus to serve what has been contended to be the real motivation of claimants in bringing these cases.¹⁴⁴

This approach nevertheless also represents a new departure for the legal system. Because the HRA requires only public authorities to act compatibly with Convention rights, the Act provides the beginnings of what has hitherto been rejected: a specifically public law of liability.¹⁴⁵ Given the apparently continuous evolution of positive obligations in the ECHR as interpreted by the Strasbourg court, this may in time grow to encompass a very wide field. That maladministration, such as culpable delay, can amount to the breach of a Convention right and result in monetary compensation¹⁴⁶ provides some indication of the potential for such a development. It is impossible to know where it will terminate; arguably, however, such an incremental judicial development of the law holds out more promise than the Law Commission's recently abandoned attempt to formulate legislative proposals to this end.¹⁴⁷ Ultimately, the development surveyed in this article shows that human rights law provides a vital service to a legal system in which the tort liability of public authorities piggy-backs on principles designed for resolving disputes among private persons. [Ⓞ]

¹⁴⁴ Spencer, "Suing the Police for Negligence: Orthodoxy Restored" [2009] C.L.J. 25 at 27.

¹⁴⁵ On the need for such a development, see esp. Cornford, *Towards a Public Law of Tort*, 2008.

¹⁴⁶ See *Anufrijeva v Southwark LBC* [2004] Q.B. 1124.

¹⁴⁷ The Law Commission eventually concluded in its Report No.322, *Administrative Redress: Public Bodies and the Citizen* (May 26, 2010) that its preliminary proposals for reforming this area of the law should not be taken forward, in view of the strong opposition thereto. For critiques of the Law Commission's proposals, see R. Bagshaw, "Monetary Remedies in Public Law—Misdiagnosis and Misprescription" [2006] L.S. 4; T. Cornford, "Administrative Redress: the Law Commission's Consultation Paper" [2009] P.L. 70; and Mullender, "Negligence, Public Bodies, and Ruthlessness" (2009) 72 M.L.R. 961.

[Ⓞ] Human rights; Public authorities; Tortious liability