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 *in*equality. 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