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Common law tort of negligence as a tool for deconstructing positive obligations under the European convention on human rights*

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ABSTRACT

This article examines how the common law tort of negligence can provide a helpful guidance for deconstructing and elucidating some of the disparate analytical issues that are subsumed under the umbrella of positive obligations under the European Convention on Human Rights (ECHR). Both frameworks, the common law and ECHR, aim to delimit the circumstances where responsibility for omissions can be found and have similar conceptual basis of protection in that they protect fundamental interests. However, in the context of the common law certain analytical elements are more thoroughly considered and better articulated. These elements are: the distinction between a duty and a breach of duty; the level of foreseeability of harm; the proximity between the state and the person who has suffered harm; the reasonableness of imposing a duty; the causation between the harm and the alleged omission. Two main arguments emerge from the juxtaposition of the ECHR analysis against the common law. First, by failing to explicitly articulate and distinguish certain analytical elements, the ECHR positive obligation judgments offer little general guidance as to the limits of responsibility. Second, the analytical inquiry applied when adjudicating positive obligations is in tension with the idea of the correlativity between rights and obligations.

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1. Introduction

This article examines how the common law tort of negligence as developed in the United Kingdom can offer a meaningful guidance for deconstructing the practice of the European Court of Human Rights (ECtHR or the Court) in one specific area, i.e. positive human rights obligations. It shows how the common law tort of negligence, as developed by the national courts, can provide a helpful guidance for elucidating some of the disparate analytical elements that are subsumed under the umbrella of positive human rights obligations. Through the lens of the common law, these elements can be separated and positive obligations deconstructed so that the limits of state responsibility under the ECHR can

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be better understood. Improved understanding will be beneficial for various parties, including the Court itself that tends to fuse in its legal reasoning various issues that are analytically rather distinct.

To avoid any misunderstanding, no claim is made that the European Convention on Human Rights (ECHR) standards have to be synchronised with the common law standards. The starting point is rather that both frameworks aim to delimit the circumstances where responsibility for omissions can be found, have similar 'conceptual basis of protection'[1] and in the context of the common law certain issues have been more thoroughly considered and more clearly articulated. The ECHR can benefit from these more lucid and explicit articulations. In this way, the juxtaposition of the two systems can help us to better understand positive obligations under ECHR. The common law of negligence can thus provide a perspective from which to evaluate positive obligations. It can trigger critical reflections upon some established principles in the ECHR judgments that are constantly repeated but never critically evaluated. Human rights law can be thus usefully informed by the common law tort of negligence. The analytical structure under the common law of negligence has been an object of sophisticated development and justification. In contrast, very little of this has happened in the area of positive human rights obligations. If an approach to positive obligations under the ECHR is to be fashioned that is more principled, reasoned and coherent, the common law is an important source of inspiration.

The focus of the comparison is not simply on the structure of the analytical enquiry adopted in each system, but on how each system has engaged with certain analytical elements and with their underlying justifications. Most important, both systems face the question as to how to find responsibility for omissions and how to limit this responsibility. By considering the justifications offered by the common law system and examining their relevance in the context of human rights law, there is some likelihood that the ECHR system may be better equipped to rationalise its own approach.

The article proceeds as follows. Section 2 explains why it is necessary to deconstruct ECHR positive obligations and to better understand the discrete analytical elements that have to be tackled for making a determination whether a state has failed to fulfil them. Section 3 outlines the existing discussions as to the relationship between the common law tort of negligence and the ECHR. It is highlighted that none of these debates has attempted to explore the value of the common law in offering a framework where certain principles and modes of reasoning can have useful analytical value for human rights law. Section 3 also stresses the similarities of the two systems, which provides the basis for the subsequent sections to distil five analytical elements from the common law against which the structure of enquiry under the ECHR positive obligations is juxtaposed. These elements are the following: the distinction between a duty and a breach of duty (Section 4), foreseeability (Section 5), proximity (Section 6), reasonableness (Section 7) and causation (Section 8).

Finally, a terminological clarification is due. When I use the terms 'duty', 'liability', 'claimant' and 'defendant' I refer to the national the common law tort of negligence. When I used the terms 'obligation', 'responsibility', 'applicant' and 'respondent (state)' I refer to the ECHR system.

2. The uncertainty of positive obligations under the ECHR

A positive obligation under the ECHR can be defined as 'one whereby a state must take action to secure human rights'.[2] The importance and the pervasiveness of positive obligations under the Convention cannot be overemphasised.[3] They might be triggered when social service departments decide to take children into care or to refrain from doing so,[4] when highway authorities provide or fail to provide warning signs,[5] when women or children are subjected to domestic violence,[6] when police investigates crimes[7] or when the state has to enforce, for example, building regulations.[8] The systems designed to protect the public from harm are extensive. Consequently, positive obligations have penetrated all provisions of the ECHR and there are 'no *a priori* limits to the contexts in which they may be found to arise'.[9]

An uncertainty clouds positive obligations in terms of the circumstances when they are triggered and how expansive they can be. The ECtHR has not developed a generally applicable framework for assessing when these obligations can be set into motion and how expansive their scope might be.[10] The Court has declined 'to develop a general theory of the positive obligations which may flow from the Convention'.[11] As a likely consequence from this approach, it has been commented that the review of positive obligations under the ECHR is 'incoherent and even arbitrary, which is not conductive to certainty and predictability'.[12] It is difficult to separate the distinctive analytical steps taken in the reasoning. The scope of positive obligations appears 'open-ended' and their general conceptual limits have remained obscured.[13]

Given the wide regulatory functions of the state and, more generally, the manifestation of the state in many aspects of our lives and the enormous breath of state activities,[14] any harm sustained by an individual could potentially be a basis for making an argument that the state failed to fulfil its positive human rights obligations since it failed to prevent or mitigate the harm or the risk of harm. The judgment in *Vilnes and Others v Nroway* can be used as an illustration.[15] The applicants complained mainly under Articles 2 and 8 of the ECHR (the right to life and the right to private life) on account of damage to their health suffered after serving in diving operations for private companies in the North Sea. Norway was found in breach of the ECHR since it did not regulate in a sufficiently robust way the usage of diving tables that governed the planning and the monitoring of the decompression after the diving. Because of this deficiency, the respondent state allowed the companies to keep the diving tables secret and the divers were not acquainted with the risks to their health from the usage of the tables.

It will often be possible to identify some act, which if the state had taken, the person would not have suffered harm or it would have been less likely for the harm or the risk to materialise. Therefore, the impact of positive obligations is potentially boundless. In addition, it is paradoxical that the more things the state does and the more measures it takes to protect, the more likely it becomes that it can be held responsible for not doing enough.[16]

Although the Court has not develop a theoretical model, different types of positive obligations applicable in different circumstances can be identified in the case law. Such types are the obligation to criminalise harmful conduct; the obligation to conduct an effective criminal investigation upon reasonable allegations of ill-treatment; the obligation of taking protective operational measures when a specific individual is at 'real and

immediate' risk of harm; and the obligation of adopting effective regulatory framework so that harm against the public at large can be prevented.[17] For making the analysis manageable, I will focus on the last two obligations as developed under Articles 2 (life), 3 (torture, or inhuman or degrading treatment) and 4 (slavery, servitude and forced labour) of the ECHR. As opposed to the positive obligations to criminalise and to conduct effective investigation that are relatively settled and applied in specific circumstances,[18] the obligations of taking protective operational measures and of adopting effective regulatory framework for general protection can be relevant in many circumstances which signifies their pervasiveness. In addition, they raise many analytical challenges that need to be distilled and explained.

Domestic legal orders have grappled with these challenges. The closest domestic analogy to invoking positive human rights obligations can be found in domestic legal proceedings against the state, state officials or state bodies in administrative law and tort law.[19] Different national jurisdictions have adopted different approaches; no attempt is intended here to describe and compare them.[20] Rather my approach is limited to contrasting positive human rights obligations with the common law tort of negligence. This contrast is restricted to the analytical questions asked and the structure of the analytical enquiry.

3. The ECHR and the common law

The engagement of the literature with the convergences and the tensions between the Convention standards and the common law has been prolific. These discussions have centred upon the questions whether the common law should be developed so that the protection that it offers mirrors that provided by the Convention and the United Kingdom Human Rights Act (HRA). Three broad approaches can be distinguished in the discussions about the relationship between human rights law and the common law of negligence.[21]

3.1. Convergence towards the ECHR standards

The first one advocates that negligence law should be developed to reflect the Convention standards.[22] Wright's position is representative here. She has argued that the common law liability of public authorities 'should be developed to accommodate ECHR standards in order to ensure effective protection of citizens in national law'. Her argument is 'driven by the lack of adequate remedies at the national level, specifically in cases that were predicated on omissions to act to protect those in vulnerable situations'.[23] Wright has emphasised the limits of human rights protection in the common law. One of these limits concerns the strict distinction between acts and omissions in English tort law[24] and the reluctance by the English courts to establish the existence of duty of care in negligence claims. One of Wright's main concern is the coherence of English law: 'denying claims in negligence on policy grounds that do not bar, but shape, claims under the HRA, threatens the coherence of English law'.[25] In Wright's view, coherence should imply convergence towards the ECHR standards.

The limits of human rights protection in the common law have become obvious with concrete cases whose factual circumstances have been litigated in both systems (i.e. at the national level as negligence cases and at the ECtHR level as positive obligation cases). *X (Minors) v Bedfordshire County Council* is an example to this effect.[26] The plaintiffs

alleged that they had been injured because the public authorities failed to carry out their duties to protect children from abuse. The House of Lords concluded that no duty of care was owned to the children by the public authority since it would not be 'fair, just and reasonable' to recognise such a duty for a range of policy reasons.[27] The case was subsequently referred the Strasbourg Court that reached a different conclusion. In *Z. and Others v the United Kingdom*, the ECtHR found that the respondent state was in breach of its positive obligations under Article 3 of the ECHR because the national social services failed to remove the children from their parents, at whose hands they suffered appalling abuses.[28] Since the case did not give rise to a duty of care in negligence, but disclosed failure upon the state to fulfil its positive obligations under the ECHR,[29] it has been argued that negligence liability should be developed to reflect the more protective ECHR standards,

Crucially, however and despite the problems ensuing from the above described discrepancy, the proponents of the approach in favour of convergence towards the ECHR standards, do not subject the ECHR standards themselves to any critical scrutiny as to whether they are an appropriate point of reference. This is problematic since given the uncertainty surrounding positive obligations, convergence might actually analytically weaken negligence law and impair its structural underpinnings.

3.2. Divergence

According to the second approach, 'liability in negligence and under the HRA should develop independently of each other, so that for the most part the substantive law of negligence ought not to be affected by human rights law'.[30] Nolan, for example, has argued that 'the disparities between the two set of norms are so extensive and so profound that in practice this would seem to leave very little scope for convergence at all'.[31] Nolan's main concern is that if the law of negligence that is private law, is developed and expanded, this expansion will have to also apply to negligence liability of private bodies, which will be arguably unfair. In alternative, distinctive tests will have to be introduced in negligence law depending on the body (public or private) against which the claim is introduced. According to Nolan, this will undermine the unity and consistency of negligence law. Bagshaw's position is identical to Nolan's in that Bagshaw has also opposed 'the development of tort duties which mirror Convention rights'.[32] Bagshaw argues that if tort law would develop different standards depending on whether it applies to private or public bodies, this will impact its consistency and efficiency: 'how could it be explained that a pupil will have greater private law entitlements against a teachers in a state-funded school as opposed to a teacher in a private school?'[33] He opposes the development of private law entitlements in such an uneven way.

Tofaris and Steel have responded to Nolan's and Bagshaw's arguments in the following way '[…] if we accept that the reasons offered for the omissions principle *within private law* apply less strongly to public authorities, then the distinction between public authorities and private individuals is one itself licensed *by private law*'.[34] Tofaris and Steel also add that '[…] the idea that a person should be subjected to more extensive duties in virtue of that person's status [as a public body] is not at all alien to tort law'.[35] It follows that Nolan's and Bagshaw's concerns as to the consistency of negligence law might not be entirely warranted.

3.3. Distinct but with common objective

A third more subtle approach to the relationship between human rights law and the common law of negligence can be finally identified. In particular, Elliott submits that 'the common law constitutes a potentially potent vehicle for the enforcement of fundamental rights, but that it is essential that points of distinction – as well as points of commonality – between the HRA-ECHR and common law regime be acknowledged'.[36] He points out that they are neither perfectly aligned nor entirely distinct.[37] Elliott acknowledges that the protective rigour of the common law is not that potent, *inter alia* for the same reasons as those invoked by Wright, namely the reluctance of establishing the existence of duty of care.[38] At the same time, Elliott highlights that the common law is 'a dynamic institution'[39] and adds that 'the protective regime enshrined in the Act [the HRA] echoes, even it is does not reproduce, that which is found at common law, in terms of conceptual basis of protection'.[40] Similarly to Elliott who draws attention to the conceptual basis of protection, Hickman has also emphasised that in cases of omissions there is 'an apparent convergence with the law of negligence'.[41]

This article is in alignment with the third approach. While acknowledging that the protective rigour of the common law might not be that potent, which has given reasons for Wright to argue for modification of its standards in accordance with the Convention standards particularly in the area of positive obligations, I highlight that the problem with the first approach is that the ECHR standards are uncritically accepted. While acknowledging the distinctive features of the common law, as outlined by the proponents of the second approach, the commonality (as underlined by the representatives of the third approach) in terms of analytical and conceptual questions that need to be tackled are at the core of my arguments. The exploration of these commonalities will help to develop the argument that positive human rights law obligations can be reconstructed by drawing inspiration from the English tort law of negligence.

Both human rights law and tort law 'perform similar functions in protecting the most fundamental of interests'.[42] There is thus an important overlap between the fundamental values underlying the two.[43] Many tort actions serve *de facto* as tools for securing the protection of human rights.[44] It is frequently tort law that will provide 'the best fit in terms of a remedy' at the national level.[45] Claims brought against public authorities in negligence can also be framed as breaches of the Convention.[46]

This comparative parallel should not be, however, oversimplified. Convention claims have different objectives from civil actions in negligence that are 'designed to essentially compensate claimants for their losses'.[47] In contrast, Convention claims aim to 'uphold minimum human rights standards' and do not imply a right to compensation, rather an award of just satisfaction. These differences have been very usefully outlined by Nolan[48] and they impact will be appreciated in the analysis below. The central point here is rather that both bodies of law are intended to protect fundamental interests. This point of convergence is also highlighted by Nolan, who challenges the assumption that 'the norms of human rights law are somehow more fundamental than the norms of negligence law'.[49]

In light of their common objective, i.e. protection of fundamental interests, and function, i.e. delimiting the circumstances where the state should be found responsible/liable for omissions, the next section will juxtapose the structure of analytical inquiry used in,

respectively, the common law tort of negligence and positive human rights obligations. The discussion will be organised around the conceptual structure of negligence law.

4. The distinction between duty and breach of duty

4.1. *No* prima facie *duty of care*

In tort law, the question of whether there is a duty of care is a separate one asked prior to the question whether this duty has been breached. This logical sequence is related to the fact that an omission is at the heart of the analysis, which raises the question as to the standard against which any omission is to be measured for finding liability. The state through its organs might commit a multiplicity of omissions and it will be absurd to suggest that each one of them should give rise to liability. Not only is the question of the duty of care central to tort law,[50] but the existence of a duty is not presumed. There is thus no *prima facie* duty of care.[51] In English tort law, the approach of incrementalism has been applied, which implies drawing analogies with established categories of liability when asking the question whether duty exists. If such analogies cannot be established, the case will be regarded as novel and it needs to be determined whether a duty should be imposed. [52] This question implies an inquiry as to whether 'as a matter of law liability in negligence is countenanced in this category of case'.[53] Section 4.3 below will explain the applicable test for responding to the question.

4.2. Prima facie *positive obligations*

In contrast, the ECtHR judgments do not maintain a clear distinction between imposition (i.e. existence) of a positive obligation upon the state and failure to fulfil the obligation. To further clarify, two levels of analysis can be discerned in the positive obligations judgments under the ECHR.[54] As to the first level, the Court has stressed that '[t]he positive obligations under Article 2 must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake'.[55] It follows that Article 2 triggers '*prima facie* positive obligations'.[56] This means that once Article 2 is engaged since a person has died or sustained life threatening injuries, positive obligations are 'automatically of relevance',[57] and the state conduct can be automatically reviewed as to whether any omissions give rise to responsibility under the ECHR. This approach has been applied, for example, to circumstances involving loss of life due to explosion at the garbage collection point that the state had failed to prevent,[58] due to freezing since the authorities had not prevented a school boy from leaving the school alone in bad weather conditions,[59] due to drowning in a water-filled hole on a construction site since the authorities did not inspect the safety on the site,[60] or due to electric shock since the authorities did not ensure the safety of electric facilities.[61]

The same approach applies in the context of Article 3 and Article 4 of the ECHR. For example, the Court has clarified that Article 3 'requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including by private individuals'.[62] It follows that Articles 3 and 4, in the same way as Article 2, activate positive obligations as a matter of principle once the definitional threshold of the provision is met.[63]

This approach that initially assumes the imposition of positive obligations appears very generous from the perspective of the applicant. The assertion that positive obligations apply in the context of any activity implies inclusiveness without any limits. Notably, the obligation is framed at a very high level of abstraction and it is divorced from the concrete facts of the case. The obligation inquiry is approach by the Court in a categorical way irrespective of the particular circumstances and of the possible risks to life or harm.

This general formula is, however, very abstract and the problem that transpires is how to actually frame what obligation the state owns to the *specific* applicant *in more concrete terms*. This bring us to the second level of analysis that can be discerned in the Court's reasoning: framing the concrete positive obligation in a more detailed fashion, one that will bring it closer to an exposition of fact. How is this expressed in the judgments? In some judgments, the Court avoids to initially frame this concrete positive obligation so that it subsequently can assess whether the state has complied with it.[64] Rather, it directly assesses whether the state has breached an obligation whose concrete contours are initially unknown. For example, in *T.M. and C.M. v the Republic of Moldova*, a domestic violence case where the applicants claimed that the authorities failed to protect them by not enforcing protection orders, the Court framed its task as determining whether the national authorities took '*all* reasonable measures' to protect.[65] This standard is, however, quite abstract; one does not know what these reasonable measures are, even less so what 'all' refers to. Ultimately, the Court's analysis zooms in on the practical problems surrounding the efficiencies of protection orders.

In many judgments, the Court does formulate a positive obligation that is less abstract that the *prima facia* positive obligation of generally protecting individuals' lives and basic wellbeing. However, this formulation is still quite abstract and can contain terms with indeterminate meaning (e.g. 'effective protection',[66] 'reasonable steps'[67] or 'adequate regulatory framework').[68]

The avoidance to initially frame in concrete terms the positive obligation and the ensuing uncertainty as to the standard against which the state conduct (i.e. the omission that arguably gives rise to a failure to comply with ECHR) is to be scrutinised, can be linked with the discretion that states have how to fulfil their *prima facia* positive obligations. The Court has repeatedly states that 'the choice of means for ensuring positive obligations under Article 2 is in principle a matter that falls within the Contracting States' margin of appreciation'.[69] If this is the case, then framing a concrete positive obligation (i.e. a concrete positive measure) that the state should have undertaken might imply erosion of the state discretion.

Overall, it follows that the existence of a concrete obligation and the measures that this positive obligation might demand, depends on what concretely the breach of the obligation is. There is no initial answer to the question what the obligation is until we know in the judgment what the alleged breach is. The inquiry as to the concrete positive obligation is merged with the inquiry as to whether this obligation has been breached.

In sum, the approach by the Court is that in which *prima facie* responsibility at the first stage is drawn very widely but could be refuted or restricted by certain considerations at the stage where a determination is made as to the existence of a violation.[70] The Court has indicated certain factors relevant for the assessment whether the obligation has been breached. A clear parallel can be discerned between these factors and the common law test for proving the existence of a duty, to which we now turn.

4.3. Determining the existence of a duty

Although the existence of a duty is not assumed in the common law tort of negligence, a duty can be found. For this purpose, a three-part test is applied that consists of asking the following questions: (i) was the harm that the claimant suffered a foreseeable consequence of the defendant's negligence; (ii) were the claimant and the defendant in a relation of proximity, i.e. were they connected in terms of time, space and relationship;[71] and (iii) is the imposition of a duty 'fair, just and reasonable', i.e. should a duty be imposed, as a matter of public policy.[72] These elements can be respectively framed as foreseeability, proximity and reasonableness. The elements have to be cumulatively fulfilled, which means, for example, that a duty cannot be established on the basis of 'fairness, justice and reasonableness' alone.

4.4. Determining a violation of a positive obligation

Questions concerning foreseeability, proximity and reasonableness are also asked in the context of the ECHR, but not for the purpose of determining whether a positive obligation exists. Rather, these questions are pertinent for determining whether the obligation has been breached. More specifically, the Court has made the following assertion that can be extracted from the Grand Chamber judgment in *O'Keeffe v Ireland,* a case in which the applicant complained under Article 3 of the Convention that the system of primary education in Ireland had failed to protect her from sexual abuse by a teacher:

> This positive obligation to protect is to be interpreted in such a way as not to impose an excessive burden on the authorities, bearing in mind, in particular, the unpredictability of human conduct and operation choices which must be made in terms of priorities and resources. Accordingly, not every risk of ill-treatment could entail for the authorities a Convention requirement to take measures to prevent that risk from materializing. However, the required measures should, at least provide effective protection in particular of children and other vulnerable persons and should include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.[73]

The element of foreseeability can be discerned from the expression 'had or ought to have had knowledge' and the reference to the unpredictability of the human conduct.[74] The element of reasonableness is reflected in the terms 'reasonable steps' and 'not imposing excessive burden'.[75] The element of proximity finds reflection in the reference to the particular category of children to which the state has a special relationship. In other judgments, proximity might have other manifestations. An example to this effect is persons in custody.[76] In the particular case of *O'Keeffe v Ireland,* the element of foreseeability was fulfilled since at the relevant time there were many prosecutions of sexual offences against children and the state, according to the Court's reasoning, should have known of the risks at schools.[77] Reasonableness was not specifically addressed by the Court, which is not an unusual way of discharging with this element.[78]

The three elements of foreseeability, proximity and reasonableness are distinguished in the analysis performed by the Court, which means that each one of seems to have its own role. As a consequence, in some judgments no violation is established since the state had no knowledge about the risk of harm.[79] At the same time, the Court tends to also bundle the three elements and it might be difficult to discern the precise role of each one of them

in the reasoning. For example, in the case of *Nencheva and Others v Bulgaria* that concerns the death of children with serious disabilities at a state-run home, proximity was present since the authorities assumed responsibility over the children and the state knew about the dire conditions (in terms of absence of heating, food and medication) in the home.[80] However, one remains to wonder whether both elements of proximity and foreseeability were dispositive and had to be necessarily cumulatively fulfilled for finding a violation. In more concrete terms, if the director of the home had not alarmed the national social ministry about the risks for the children (the basis on which the Court established state knowledge), would the finding of a violation be precluded? Could the assumption of responsibility and thus the close proximity in itself be enough for establishing a violation? Likewise, in *Dodov v Bulgaria,* the three elements were mentioned, but then the Court held that it is not necessary to review their application in the particular case, rather 'the decisive question is whether their [the authorities'] reaction was adequate in the circumstances'.[81]

4.5. Implications from the ECtHR's approach

The contrast between the analysis under the common law and the ECHR should not be interpreted to the effect that the ECtHR should adopt the strict separation between duty and breach, a separation that has been in fact criticised at the domestic level.[82] The Court's analytical framework might be warranted given the difficulty in initially framing the concrete positive measures, while at the same time, maintaining that states always have *prima facia* positive obligations, but have discretion how to fulfil them. However, this does not negate the usefulness of reflecting upon the consequences from ignoring the distinction. To perform this reflection, we need to inquire into the purposes that the duty of care question serves in the tort law of negligence.

4.5.1. Transparency and better guidance

The 'duty' concept ensures transparency. The English judges have shown willingness to 'discuss openly the policy considerations which, in their view, militate against the imposition of liability and they have done so in fairly elaborate manner'.[83] This has also made it easier to challenge and refute the arguments that might underpin non-liability in the particular case. Better transparency is achieved since '[b]y denying a duty of care the court is indicating, not that on the particular facts of a case negligence has not been established, but that in a whole category of case liability is inappropriate'.[84] If the whole enquiry were to collapse into establishment of a breach (as under the ECHR), the reasons as to the particular outcome (i.e. violation or no violation) might be obscured. As Booth and Squires clarify, if the analysis were to be restricted to whether a duty has been breached,

> the issue becomes submerged in factual analysis of whether a public authority was negligent in a particular case, and does not allow the courts to consider directly why holding public authorities liable for negligence might be undesirable, or to distinguish between those cases in which it is more or less desirable.[85]

For example, policy concerns as to why, for example, no duty should be found, can be made explicit and they can be openly contested also.[86]

Any positive determination that a duty exists has the force of a precedent that can provide prospective claimants, lawyers and judges with better guidance where the

boundaries of liability lie.[87] Hickman has observed that the question as to whether there is a duty of care 'is used to stabilize the law of negligence and to demarcate its boundaries'. He has added that '[i]t acts as a control device over lower courts. It is intrinsically connected to the common law method and the doctrine of precedent'.[88] Since the duty question is framed in relatively general and categorical terms, it is intended to cover a class of cases.[89] As a consequence, decisions as to whether there is a duty 'transcend the particular dispute and concern whether, and if so how far, the law of negligence should operate in a situation of a particular type'.[90]

4.5.2. Correlativity between rights and duties

Another purpose served by the separate duty question concerns the correlativity between duties and rights. In a Hohfeldian sense,[91] the correlativity implies that if a duty is found, individual members of the public have corresponding individual rights.[92] This needs to be distinguished from a conceptualisation where state bodies have duties towards the public at large,[93] and they do not own a duty of care in negligence towards individuals who suffer harm if these bodies fail to perform duties owned to the public. The latter duties are not translated into individual rights. If they were, this will imply a right to compensation, which might ultimately lead to the public bearing the financial burden of compensating the victim.[94]

More broadly, this concerns the justification behind the legal framework and the type of justice that finds its basis in the law: corrective or distributive justice. The first one underpins the tort law of negligence,[95] which implies a right to individual compensation. The concern of corrective justice is the harm done to individual interests as protected by individual rights, which also interrelates with the above mentioned correlativity between rights and duties. Relatedly, the main function of the common law tort of negligence is remedial, i.e. compensating the claimant.[96] In contrast, distributive justice aims at allocating responsibility for loss and focuses on the public interests.

Admittedly, tort law is also geared towards distributive justice since normative factors extraneous to the relationship between the parties are taken into account (i.e. the element of reasonableness).[97] However, the objective to achieve community welfare, to generally regulate and deter conduct that is harmful to the community and to set general standards of conduct are ancillary and incidental.[98]

4.5.3. Assessment of the ECtHR's approach

In light of these two purposes served by the analytical distinction between duty and breach of duty in the context of the common law tort of negligence, how can the ECtHR's approach that does not follow the distinction be assessed? Since in positive obligations cases the focus is on the question whether there is a violation, the analysis is submerged into *concrete* factual assessment whether the respondent state should be found responsible in the particular case. As a consequence, the boundaries of responsibility are difficult to delineate in a more principled and general fashion; little guidance is offered in the judgments for future cases. It is therefore difficult to serve the purpose of transparency.

As to the second purpose, how is the correlativity between rights and obligations performed in the context of ECHR positive obligations? Three inconsistencies here need to be openly acknowledged. First, since the existence of *prima facia* positive obligations is the starting point, under the Hohfeldian model these obligations have to correspond to

individual rights. The translation would imply that individuals have the right to measures, including measures undertaken by the state against other private individuals, designed to ensure that the former are not subjected to ill-treatment.[99] However, this formulation appears more like an obligation owned to the public at large, rather than an individual right. In addition, there cannot be correlativity since there is no right to *any* measure of protection. There are many alternative measures that could be taken by the state.[100] The absence of correlativity has been explicitly acknowledged by the Court in relation to the positive obligations of criminalising certain forms of abuses and of investigating, where the Court has repeatedly stated that these do not correspond to an individual right to have someone prosecuted[101] or to have someone punished.[102]

Second, the type of remedy extended under the ECHR (i.e. just satisfaction) also distances the positive obligation model from a model of corresponding rights and obligation. The ECHR is not designed to compensate applicants for their loss, but rather 'to uphold minimum human rights law standards'.[103] The emphasis is less on compensating individuals than on establishment of minimum human rights law standard.[104] There is thus a clear interrelationship between how responsibility is established in terms of the analytical steps followed and the purpose of the legal framework as reflected in nature of the remedy ordered if violation is found.[105] As mentioned above, the main function of the common law tort of negligence is remedial; rights and duties are by-products of this function.[106] In contrast, *prima facia* abstract positive obligations are the starting point in human rights law, from which it can be concluded that the primary objective sought is setting general standards of state conduct. However, as suggested earlier, it is difficult to correlate these obligations with individual rights.

All of these inconsistencies concern some inherent difficulties in human rights law and how this body of law that has rights as its organising principle generates positive obligations. While it might not be possible and in fact desirable to resolve the inconsistencies since they are an expression of the dynamic aspect of human rights and its ability to generate multiple and contextualised obligations,[107] it is still useful to expose them.

Having clarified the implications from the distinction between the establishment of an obligation and violation of this obligation, the next sections will delve into the concrete factors (foreseeability, proximity, reasonableness and causation) that are relevant for the establishment of a violation.

5. Foreseeability

In the tort law of negligence, the first question asked for determining whether a duty exists and it is thus owed to the claimant is whether the harm the claimant suffered was a foreseeable consequence of the defendant's negligence. The rationale is that the state bodies 'cannot be expected to exercise reasonable care towards the world at large' but only to those they can reasonable foresee could be affected by their actions. [108] There is no requirement that harm to the actual and specific claimant must be foreseeable in order for a duty to be owned. Rather 'the foreseeability requirement only requires that the defendant's conduct might foreseeably affect a person in her position, or a class of persons to which she belonged'.[109]

Rather than using the term 'foreseeability', the ECtHR refers to the standard of whether the state 'knew or ought to have known' about the risk of harm. This standard is relevant

in the assessment whether a violation of a positive obligation can be found.[110] This standard is however also used as a threshold as to whether the concrete positive obligation of taking protective operational measures exists. This means that although in abstract the state is always under a general positive obligation to ensure the right to life under Article 2 ECHR and basic wellbeing under Articles 3 and 4 ECHR, in some circumstances this obligation cannot be translated into a concrete positive obligation of taking protective operational measures, because the state did not know or ought not to have known about the harm or the risk of harm of a specific identifiable individual.[111]

The standard of 'ought to have known' has remained obscured.[112] To better understand it, the following issues needs to be probed: Is the question whether the state authorities 'ought to have known' of the existence of a risk of harm answered by asking whether (i) objectively the harm was foreseeable at the relevant point in time and therefore the state authorities should have known about it, or (ii) they should have correctly evaluated the risk based on the information they would have had if they had performed their obligations, or instead (iii) whether they should have known of the risk in light of the information that was *actually* available to them at the particular point in time?[113] The first alternative might be the most demanding for the state authorities since it presupposes, for example, reference to scientific studies about risks of harm.[114] The second alternative presupposes that the authorities actually had an obligation that they failed to fulfil. This obligation is one of taking measures to predict the possible risk of harm. The third alternative is the least demanding from the perspective of the state since the assessment of state knowledge is done with reference to the information that was actually available with no consideration as to what information could have been available or should have been sought.

Under negligence law, the second approach is applied: the risk of harm should have been appreciated by the state authorities based on the information that they *should have had if* they fulfilled their obligations.[115] This is an approach that is more beneficial for the claimant than if the risk should have been appreciated by the state on the information that was *in fact* available to the national authorities. By way of a comparison, the Court has not even appreciated the distinctions in its reasoning.

In light of the ECtHR case law, what should the state know about (or ought to know about)? In the context of the *Osman* test, the Court establishes whether the national 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 […]'.[116] The standard of 'real and immediate risk' can be expected to make the finding of a violation more difficult. For this reason, it has been argued that this standard is more difficult to satisfy than the ordinary negligence standard.[117] Under the tort law of negligence, 'it is sufficient to show that the risk of damage was reasonable foreseeable; it is not necessary to show that the risk was real and immediate'.[118] On a textual reading, the standard of 'reasonably foreseeable' risk does appear lower that the standard of 'real and immediate' risk.

It is difficult, however, to assess the stringency of the 'real and immediate' risk standard in the Court's case law. The reason is that the Court has never engaged in any in-debt elucidation as to the meaning of 'real' and 'immediate'.[119] In some cases, the risk might be specific, but not imminent. An example to this effect originates from some domestic violence cases, where women might be exposed to a specific risk by a partner, but this risk might have persistent for a prolonged period of time and it is difficult to formulate it as

an imminent risk.[120] In other circumstances the risk might be imminent, but its origins might be difficult to identity.[121] At the same time, the Court has stretched the concept of 'immediacy' to a breaking point by invoking it rhetorically in circumstances where one can barely discern any immediate risk. For example in *Öneryildiz v Turkey*, the risk of explosion at the garbage collection point was assessed by the Court as imminent years before the explosion actually materialised.[122] In *Perevedentsevy v Russia*, the general situation of psychologic instability experienced by new soldiers in the army sufficed for the Court to establish that the risk of the applicants' son to commit suicide was immediate.[123]

It has to be, however, also added that in some circumstances that Court has invoked the immediacy of the risk standard to limit the cases where the state will be found responsible for its failure to fulfil positive obligations. A prime example to this effect is *Lopes de Sousa Fernandes v Spain,* a medical negligence case, where the Court limited the circumstances where the responsibility of the state under the substantive limb of Article 2 of the ECHR may be engaged in respect to omissions of health-care providers. These circumstances were restricted to 'denial of *immediate* emergency care'.[124]

6. Proximity

In the determination whether the authorities owned a duty of care, the common law of negligence requires engagement with the question whether the defendant and the claimant were in a relation of proximity, i.e. whether in light of their closeness, the former ought to have had the latter's interest in contemplation.[125] Proximity will be denied if the claimant was an unknown member of the general public at the time of the alleged negligence or the defendant owned conflicting obligations to some party other than the claimant.[126] For example, in *Hill v Chief Constable of West Yorkshire Police* no duty of care was established since there was no proximity between the police and a member of the public killed by a criminal whose whereabouts were unknown and who randomly chose his victims.[127] The same approach has been applied to claimants who have been harmed in highway accidents or by released detainees.[128] In these circumstances, the national authorities were not held liable since at the relevant point in time they were not in a proximate relationship with the claimant; rather, the latter was an unknown member of the general public.

The Strasbourg case law is ambiguous when it comes to the proximity between the state and the concrete individual who has suffered harm. At this point, it is useful to clarify the distinction between the positive obligation of taking protective operational measures (i.e. the *Osman* test) versus the positive obligation of adopting effective regulatory framework meant to protect the society at large. The first one is triggered when the victim is identifiable in advance and there is thus a proximity between the state authorities and the specific victim.[129] The obligation of taking protective operational measures, however, can be also set into motion in relation to a whole group of victims.[130] It is not clear how far proximity can be expanded in this relation to the point of becoming irrelevant.[131] It is also not clear whether this expansion that makes proximity less relevant is somehow compensated when a determination needs to be made whether there has been a violation. This might imply, for example, that the more difficult it was for the state to identify the specific person at risk of harm, the less likely is it that a violation of the obligation of taking operation measures to protect him/her would be found.

As to the positive obligation of adopting effective regulation framework, no proximity is required. The rationale behind this obligation is affording general protection to society and the specific applicant in the case before the Court simply happened to be a representative victim.[132] *Mastromatteo v. Italy* is illustrative to this effect. The applicant's son was killed by a criminal who had been temporary released on leave. It was impossible to predict that his son would be an object of an attack. The Court stated that 'what is at issue is the obligation to afford general protection to society against the potential acts of one or of several person serving a prison sentence for a violent crime'.[133] This question was approached from two perspectives: first, did the general system for prisoner reintegration that allowed the release of prisoners on leave in Italy, provide 'sufficient protective measures for society'[134]; second, was the decision to grant the specific criminal, prison leave in compliance with 'the duty of care required in this area by Article 2 of the Convention'.[135] Both questions were answered in positive by the Court; as a consequence, Italy was not found to have failed to fulfil its positive obligations under Article 2 of the ECHR.

Although in the context of the obligation of adopting the effective regulatory framework, the state ought not to have had a particular person's interests in contemplation, if the representative victim belongs to certain groups (i.e. children as in *O'Keeffe v Ireland*) proximity emerges as a pertinent consideration. It might make a positive determination of a violation easier. However, the tendency has been not to frame this as a matter of proximity, but rather as a matter of vulnerability of certain groups.[136]

Finally, a reflection is due as to the implications from the irrelevance of proximity. This has to start with the role of proximity in the common law tort of negligence as a devise that determines the existence of a duty of care that limits circumstances where liability for omission can be found. This role is intertwined with the primary normative consideration underpinning the legal framework, namely corrective justice. More specifically, the proximity requirements ensures a focus on the bipolar relationship between the parties.[137] Once proximity is removed as a factor for grounding responsibility (as in human rights law), the bipolar relationship recedes to the background. This receding is in line with the discussion in Section 4.5.3 above, namely that rather than corrective justice, the general protective purpose of human rights law underpins the finding of responsibility for omission. At the same time, as also suggested in Section 4.5.3, this destabilises the correlativity between rights and obligations.

An argument can be also made that the social contract between the state and its citizens is the relationship from which positive obligations arise and no further requirement for proximity needs to be demanded. [138] The problem about the absence correlativity, however, still remains.

7. Reasonableness

Under tort law of negligence, policy concerns and related unfairness in holding public bodies liable for potentially enormous losses and polycentric problems, can potentially negate liability for harm that is otherwise foreseeable and proximate. Broader concerns regarding distributive justice and community welfare can be thus taken into account in the determination whether a duty should be imposed.[139] Such concerns are also of relevance in the assessment whether there has been a breach of duty. The difference is that the determination whether a duty should be imposed is considered a legal, not a

factual, issue.[140] The question whether a duty of care is owned corresponds to the question whether the national court is prepared to 'allow the reasonableness of the defendant's conduct to be discussed at all'.[141] To further clarify, a distinction is made between unreasonable conduct and holding a body liable for unreasonable conduct. If no duty is found, the defendant cannot be held liable for the consequences of its arguably unreasonable conduct.[142] If a duty is owned, the standard of reasonableness is invoked for making the assessment whether the duty has been breached: the defendant is required to take reasonable care not to harm.[143]

As already suggested above, the standard of reasonableness has been also invoked in the ECHR context and it appears that similarly to the tort law of negligence it triggers an assessment of any negative policy considerations.[144] For example, in *Keenan v the United Kingdom*, a case that concerned a suicide of a prisoner, the Court framed its task as examining 'whether they [the authorities] did all that could reasonably have been expected of them to prevent that risk [of suicide]'.[145] After reviewing the measures actually undertaken, the Court found that 'on the whole, the authorities responded in a reasonable way to Mark Keenan's conduct, placing him in hospital care and under watch when he evinced suicidal tendencies'.[146]

The Court has, however, never made it explicit what factors are relevant for assessing the reasonableness of state conduct. Issues, for example, about the delicate decision making that public authorities have to make in light of the concrete facts of the case, are not openly discussed under the reasonableness standard. The Court simply refers to reasonableness in a blank fashion. One cannot find an analytical connection between the invocation of reasonableness and the analysis in the judgments as to what positive measures the authorities undertook or could have undertaken. For example, in *O'Keeffe v Ireland*, the analysis as to whether the state failed to fulfil its positive obligation refers to foreseeability of the harm and to proximity (i.e. special responsibility towards school children), but there is no discussion of reasonableness; although, initially a reference to reasonableness can be found in the judgment. In some judgments, references are made to negative policy considerations (e.g. diverting state resources,[147] or advantages when the state refrains to undertake certain protective measures)[148] or practical obstacles;[149] however, these references are not always analytically linked with the standard of reasonableness.

In some judgments, the standard of reasonableness is mixed up and pooled together with other considerations such as legality,[150] existence of procedural safeguards,[151] or foreseeability and proximity. This makes it hard to understand what the concrete reason was for establishing or failing to establish a violation or at least what the dominant reasons were. Admittedly, in the context of tort law of negligence, it has been also acknowledged that the standard of reasonableness is interrelated with the elements of foreseeability and proximity. At the same time, however, it has been also argued that it is helpful to maintain the distinction between the different elements.[152] Reasonableness involves considerations of policy and implicates forward looking considerations about the consequences that imposing a duty might have on other cases or wider implications. Proximity, by contrast, is about the relationship between the parties at the time of the injury. So, these elements have different rationales and it is important to distinguish them so that it is clear why a court reached a particular decision in a particular case.

8. Causation

In tort law of negligence, the claimant will have to demonstrate that the breach of the duty caused the harm.[153] There needs to be accordingly a causal relationship between the breach of duty and the loss suffered by the claimant. For this purpose, a 'but for' test has been utilised: the claimant must establish that 'but for' the negligence of the defendant, he or she would not have suffered the harm for which compensation is sought.[154] This will have to be established on the balance of probabilities.[155]

In contrast, the ECtHR has explicitly rejected the 'but for' test: 'it is not necessary to show that "but for" the State omission the ill-treatment would not have happened'.[156] There is thus no requirement that but for the failure to fulfil the concrete positive obligation, harm would not have materialised. What test, if any, has the Court then formulated? It is difficult to find an answer.[157] In some judgments, the Court has referred to the following standard: '[a] failure to take reasonably available measures which could have had a *real prospect* of altering the outcome *or* mitigating the harm is sufficient to engage the responsibility of the State [emphasis added]'.[158] According to this quotation, altering the outcome that implies avoidance of harm, on the one hand, and the mitigation of harm, on the other, are framed as alternatives. This leads to additional lowering of the standard. In addition, the protective measures by the state need only have had a real prospect of avoiding or mitigating the *risk* of harm.[159] The reference to risk of harm also makes the causation test very flexible.[160]

There is no consistent and systemic application of the 'real prospect' test in the Court's judgments. The Court rather uses different tests and various terms to link harm sustained by individuals with possible omissions by the state: 'imputable to any specific shortcomings for which he [the applicant] criticized the State',[161] 'direct causal link',[162] 'strong enough link',[163] 'nexus',[164] 'significant influence'.[165]

Despite the absence of a principled approach to causation in the context of the ECHR positive obligations, it appears that the standard is more relaxed than under the domestic negligence law.[166] Explanation for this can be offered: the weaker test under the ECHR is consistent with the aims of the ECHR to promote and protect human rights, rather than to ensure compensation.[167] Accordingly, very similarly to what was discussed in Section 4.5 above, there is an interplay between the relaxed standards used by the Court and the relaxed rigour of its analysis, on the one hand, and the objectives served if responsibility established, on the other.

9. Conclusion

The methodology in the common law tort of negligence is not perfect,[168] but it does offer an articulation of analytical questions that are beneficial for the engagement with the question how to find the limits of responsibility for omissions. When positive human rights obligations as developed by the ECtHR are reviewed through the analytical framework of tort law, convergences and divergences emerge. As to the convergences, both legal frameworks have dealt with issues of foreseeability, proximity, reasonableness and causation. When the analytical inquiry under human rights law is juxtaposed with the one under tort law, it becomes clear, that the former has not appreciated important distinctions. Such distinctions concern the question whether foreseeability is measured by reference to some

objective scientific standards, by reference to what the state should have known if it had fulfilled its obligations or by reference to the information that was in fact available. As opposed to tort law, human rights law has not engaged with the level of foreseeability required. It has rather used the standard of 'real and immediate' risk; a standard that has been even found applicable in cases where one can barely discern any immediacy of the risk. As to proximity, in some circumstances it is not a relevant factor at all for finding responsibility for omission in human rights law. Reasonableness is generally invoked in the ECtHR case law; however, it is pooled together with other considerations and its role is difficult to specify.

The comparative analysis might be criticised on the basis that as a form of deconstruction, it does not provide a recipe for changes. In its defense, however, it is maintained that through the comparison, human rights law can become more explicit to itself. As importantly, the comparison provides a vehicle to explore broader issues surrounding the complexity of positive human rights obligations. In particular, given the absence of an analytical distinction between the imposition of an obligation and violation of this obligation and the absence of a proximity requirement, human rights law veers away from corrective justice as its normative underpinning. Rather than expressing legal entitlements that correlate to state obligations, human rights law as practiced by the Court aims at setting general standards for state conduct framed as positive obligations.

Notes

1. Mark Elliott, 'Beyond the European Convention: Human Rights and the Common Law', *Current Legal Problems* 68 (2015): 85, 116.
2. David Harris et al., *Law of the European Convention on Human Rights* (Oxford University Press, 2009), 18; William Schabas, *The European Convention on Human Rights. A Commentary* (Oxford University Press, 2015), 91; Vladislava Stoyanova, 'The Disjunctive Structure of Positive Rights under the European Convention on Human Rights', *Nordic Journal of International Law* 87 (2018): 344.
3. Alastair Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights* (Hart Publishing, 2004); Laurens Lavrysen, *Human Rights in a Positive State* (Intersentia, 2016).
4. *Z. and Others v United Kingdom*, App No 29392/95, 10 May 2001; *T.P. and K.M. v United Kingdom*, App No 28945/95, 10 May 2001.
5. *Fatih Çakır and Merve Nisa Çakır v. Turkey*, App No 54558/11, 5 June 2018.
6. *Opuz v Turkey*, App No 33401/02, 9 June 2009; *Talpis v Italy*, App No 41237/14, 2 March 2017.
7. Juliet Chevalier-Watts, 'Effective Investigation under Article 2 of the European Convention on Human Rights: Security the Right to Life or an Onerous Burden on a State?' *European Journal of International Law* 21(3) (2010): 701.
8. *Cevrioğlu v Turkey*, App No 69546/12, 4 October 2016; *Banel v Lithuanis*, App No 14326/11, 18 June 2013.
9. Vladislava Stoyanova, 'Causation between State Omission and Harm within the Framework of Positive Obligations Under the European Convention on Human Rights', *Human Rights Law Review* 18 (2018): 309; Jean-Paul Costa, 'The European Court of Human Rights: Consistency of its Case-Law and Positive Obligations', *Netherlands Quarterly of Human Rights* 26 (2008): 449, 453.
10. Stoyanova, 'Causation between State Omission', 309, 310.
11. *Plattform Arzte fur das Leben v Austria* App No 10126/82, 21 June 1988, para 31.

12. Stoyanova, 'Causation between State Omission', 309, 310; Monica Hakimi, 'State Bystander Responsibility', *European Journal of International Law* 21 (2012): 341, 349; P Dijk, '"Positive Obligations" Implied in the European Convention on Human Rights: Are the States Still the 'Masters' of the Convention?' in *The Role of the Nation-State in the 21st Century*, ed. Monique Castermans-Holleman, Fried van Hoof and Jacqueline Smith (Brill, 1998) 17, 22.
13. Stoyanova, 'Causation between State Omission', 309, 310; Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Routledge, 2011), 3; Pierre Thielbörger, 'Positive Obligations in the ECHR after the *Stoicescu* Case: A Concept in Search of Content?' *European Yearbook on Human Rights* (2012): 259, 261.
14. Carol Harlow, *State Liability* (Oxford University Press, 2004), 6.
15. *Vilnes and Others v Norway*, App No 52806/09 and 22703/10, 5 December 2013.
16. Patrick Atiyah, *The Damage Lottery* (Hart Publishing, 1997), 86.
17. Cordula Drőge, *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtkonvention* (Springer, 2003); Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States Positive Obligations in European Law* (Cambridge University Press, 2017), 329.
18. *DSD and NBV v The Commissioner of Police for the Metropolis* [2014] EWHC 436, 28 February 2014, para. 138-241.
19. Ewa Baginska, 'Introduction', in *Damages for Violations of Human Rights. A Comparative Study of Domestic Legal Systems*, ed. Ewa Baginska (Springer, 2016), 1, 3; Diana Shelton, *Remedies in International Human Rights Law* (Oxford University Press, 2015), 9; Stefan Somers, *The European Convention on Human Rights as an Instrument of Tort Law* (Intersentia, 2018).
20. See *Tort Liability of Public Authorities in Comparative Perspective*, ed. Duncan Fairgrieve, Mads Andenas and John Bell (British Institute for International and Comparative Law, 2002).
21. The discussion here is limited to the common law tort of negligence since positive human rights obligations are comparable to this tort. Whereas the negative obligations are comparable to torts actionable *per se*; however, these torts are beyond the scope of the article.
22. Although an oversimplification, no distinction is made here between the ECHR and the HRA.
23. Jane Wright, *Tort Law and Human Rights* (Hart Publishing, 2017), 12; Duncan Fairgrieve, *State Liability in Tort: A Comparative Law Study* (Oxford University Press, 2003), 80; *Smith v Chief Constable of Sussex Police* [2008] EWCA Civ 39, Rimer LJ, para 45.
24. Wright, *Tort Law and Human Rights*, 14.
25. Ibid, 14.
26. *X (Minors) v Bedfordshire* CC [1995] UKHL 9 (29 June 1995).
27. Jane Wright, 'Local Authorities, the Duty of Care and the European Convention on Human Rights', *Oxford Journal of Legal Studies* 18 (1998): 1.
28. *Z. and Others v the United Kingdom* [GC] App No 29392/95, 10 May 2001.
29. T R. Hickman, 'Tort Law, Public Authorities, and the Human Rights Act 1998', in *Tort Liability of Public Authorities in Comparative Perspective,* ed. Duncan Fairgrieve, Mads Andenas and John Bell (British Institute for International and Comparative Law, 2002) 17, 34.
30. Donal Nolan, 'Negligence and Human Rights Law: The Case for Separate Development', *Modern Law Review* 76, no. 2 (2013): 286, 287.
31. Nolan, 'Negligence and Human Rights Law', 313.
32. Roderick Bagshaw, 'Tort Design and Human Rights Thinking', in *The Impact of the UK Human Rights Act on Private Law*, ed. David Hoffman (Cambridge University Press, 2011), 110.
33. Bagshaw, 'Tort Design and Human Rights Thinking', 129.
34. Stelios Tofaris and Sandy Steel, 'Negligence Liability for Omissions and the Police', *Cambridge Law Journal* 75, no. 1 (2016): 128, 140.
35. Tofaris and Steel, 'Negligence Liability for Omissions', 141.
36. Elliot, 'Beyond the European Convention', 88.

37. Ibid, 95.
38. For further clarifications as to why the common law 'cannot do the work of the Human Rights Act' see also B Dickson, 'Repeal the HRA and Rely on the Common Law?', *The UK and European Human Rights: A Strained Relationship?*, ed. Katja Ziegler, Elizabeth Wicks and Loveday Hodson (Hart Publishing, 2015) 115, 118.
39. Elliot, 'Beyond the European Convention', 116.
40. Ibid, 116.
41. Hickman, 'Tort Law', 17, 39.
42. Jason Varuhas, *Damages and Human Rights* (Hart Publishing, 2016), 474.
43. Hugh Collins, 'Utility and Rights in Common Law Reasoning: Rebalancing Private Law through Constitutionalisation', *Dalhousie Law Journal* 30 (2007): 1, 20.
44. Tony Weir, *Tort Law* (Oxford University Press, 2002), 123; Donal Nolan, 'Nuisance' in *The Impact of the UK HRA on Private Law*, ed. D Hoffman (Cambridge University Press, 2011), 165; Jane Wright, *Tort Law and Human Rights* (Hart Publishing, 2017), 14; Lord Bingham of Cornhill, 'Tort and Human Rights' in *The Law of Obligations, Essays in Celebration of John Fleming*, ed. P Cane and J Stapleton (Clarendon Press, 1998), 1, 2. The same has been true for other common law jurisdictions: 'the tort of negligence has become the most important source of liability in the protection of human rights in Israel.' Iris Canor, Tamar Gidron and Haya Zandberg, 'Litigating Human Rights Violations through Tort Law: Israeli Law Perspective', in *Damages for Violations of Human Rights. A Comparative Study of Domestic Legal Systems*, ed. E Baginska (Springer, 2016), 193, 205.
45. Wright, *Tort Law and Human Rights*, 17; Robert Stevens, *Torts and Rights* (Oxford University Press, 2007), 289; Lord Bingham of Cornhill, 'Tort and Human Rights', 1, 2.
46. Cherie Booth and Dan Squires, *The Negligence Liability of Public Authorities* (Oxford University Press, 2006), 129, 325-6; Hickman, 'Tort Law', 34.
47. *Smith v Chief Constable of Sussex Police* [2008] UKHL 50, Lord Brown, para.138; *Michael and Others v the Chief Constable of South Wales Police and another* [2015] UKSC 2, 28 Jan 2015, Lord Toulson, para.127.
48. Nolan, 'Negligence and Human Rights Law', 293–7.
49. Ibid, 297.
50. Booth and Squires, *The Negligence Liability of Public Authorities*, 84.
51. *Michael and Others v the Chief Constable of South Wales police and another* [2015] UKSC 2, 28 Jan 2015, para. 97–100. It is not possible to offer a detailed and comprehensive analysis of the relevant national case law in the context of this article. For such an analysis, a reference to the following recent UK Supreme Court can suffice: *Poole Borough Council (Respondent) v GN (through his litigation friend 'The Official Solicitor') and another (Appellants)* [2019] UKSC 25.
52. Booth and Squires, *The Negligence Liability of Public Authorities*, 5; *Poole Borough Council (Respondent) v GN* [2019] UKSC 25, para. 64.
53. Donal Nolan, 'Deconstructing the Duty of Care', *Law Quarterly Review* 129 (2013): 559, 561.
54. See generally Stoyanova, 'The Disjunctive Structure of Positive Rights', 344, 366.
55. *Center for Legal Resources on behalf of Valentin Câmpeany v. Romania*, [GC] App No 47848/08, 17 July 2014, para 130
56. Stoyanova, 'The Disjunctive Structure of Positive Rights', 344, 366.
57. Ibid.
58. *Öneryildiz v Turkey* [GC], App No 48939/99, 30 November 2004.
59. *İlbeyi Kemaloğlu and Meriye Kemaloğlu v Turkey*, App No 19986/06, 10 April 2012.
60. *Cevrioglu v Turkey*, App No 69546/12, 4 October 2016.
61. *Iliya Petrov v Bulgaria*, App No 19202/03, 24 April 2012.
62. *E and Others v. the United Kingdom*, App No 33218/96, 26 Nov 2002, para 88; *Z. and Others v. United Kingdom* [GC] App No 29392/95, para 73; *O'Keefe v. Ireland* [GC] App No 35810/09, 28 January 2014, para 148; *Rantsev v Cyprus and Russia*, App No 25965/04, 7 January 2010, para 283-9. For a comprehensive analysis of positive obligations under Article 4 ECHR, see Stoyanova, *Human Trafficking and Slavery Reconsidered*, 309. For a domestic

case in which a breach of Article 4 was found for failure to protect a migrant from being trafficked, see *R(TDT) v Secretary of State for the Home Department* [2018] EWCA Civ 1395.

63. See generally, Stoyanova, 'The Disjunctive Structure of Positive Rights', 344.
64. *Eremia v the Republic of Moldova*, para.58; *Sandra Jankovic v Croatia*, App No 38478/05, para 46; *T.M. and C.M. v The Republic of Moldova*, App No 26608/11, 28 January 2014, para 45.
65. *T.M. and C.M. v The Republic of Moldova*, App No 26608/11, 28 January 2014, para 45 (emphasis added).
66. *Kolyadenko and Others v Russia*, para 166; *Öneryildiz v Turkey*, para 97; *O'Keefe v Ireland*, para 152.
67. *Dordevic v Croatia*, para 146.
68. *Lopes de Sousa Fernandes v Portugal* [GC], App No 56080/13, 19 December 2017, para 203.
69. *Öneryildiz v Turkey*, para 107*; Lambert and Others v France* [GC] App No 46043/14, 5 June 2015, para 146. For a comprehensive analysis of this margin of appreciation, see Stoyanova, 'The Disjunctive Structure of Positive Rights', 344.
70. To make a parallel with the common law tort of negligence, this formula corresponds to Lord Wilberforce two stage formula that he expressed in *Anns v Merton London Borough Council* [1978] AC 728. This two-stage formula has been abandoned in England, but it is still applied in other common law jurisdictions. See Ernest Weinrib, *Corrective Justice* (Oxford University Press, 2012), 59.
71. Carl Stychin, 'The Vulnerable Subject of Negligence Law', *International Journal of Law in Context* 8 (2012): 337, 342.
72. *Caparo Industries plc v. Dickman* [1990] 2 AC 605 (HL); Booth and Squires, *The Negligence Liability of Public Authorities*, 93–4; *Poole Borough Council (Respondent) v GN* [2019] UKSC 25, para. 64.
73. *O'Keeffe*, para 114.
74. *Nencheva and Others v Bulgaria*, para.121–23.
75. The Court has used different formulations of the reasonableness standard: 'reasonable measures' (*Center for Legal Resources on behalf of Valentin Câmpeany v Romania* [GC], App No 47848/08, 17 July 2014 para 132; *Ciechonska v Poland*, App No 19776/04, 14 June 2011, para 67), 'any means reasonable and feasible in the circumstances' (*Mikayil Mammadov v Azerbajan*, App No 4762/05, para.115).
76. Keenan v the United Kingdom, para 91; Paul and Audrey Edwards v United Kingdom App No 46477/99, 14 March 2012, paras 57–64.
77. *O'Keeffe v Ireland*, para 160–2.
78. See Section 7.
79. *Van Colle v United Kingdom* App No 7678/09, 13 November 2012, para. 96; *Hiller v Austria*, App No 1967/14, 22 November 2016, para 53; *Rantsev v Cyprus and Russia*, para 222.
80. *Nencheva and Others v Bulgaria*, para 119 and 123.
81. *Dodov v Bulgaria*, App No 59548/00, 17 January 2008, para 100-103.
82. For a critique of the duty of care concept see Nolan, 'Deconstructing the duty of care', 559; Mark Lunney, Donal Nolan and Ken Oliphnat, *Tort Law* (Oxford University Press, 2017), 125.
83. B Markesinis and A Stewart, 'Tortious Liability for Negligence Misdiagnosis of Learning Disabilities: A Comparative Study of English and American Law', in *Tort Liability of Public Authorities in Comparative Perspective*, ed. Duncan Fairgrieve, Mads Andenas and John Bell (The British Institute of International and Comparative Law, 2002), 209, 263.
84. Booth and Squires, *The Negligence Liability of Public Authorities*, 223.
85. Ibid.
86. Ibid.
87. Alastair Mullis and Ken Oliphant, *Torts* (MacMillan, 2011), 13.
88. Hickman, 'Tort Law', 17, footnote 176.

89. Jane Stapleton, 'Duty of Case: Peripheral Parties and Alternative Opportunities for Deterrence', *Law Quarterly Review* (2011): 301, 303; Nolan, 'Deconstructing the duty of care', 559, 569.
90. Markesinis and Deakin's, Tort Law (Oxford University Press, 2013), 102.
91. Wesley Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', *Yale Law Journal* 23 (1913): 16, 30–2.
92. *Michael and Others v the Chief Constable of South Wales police and another* [2015] UKSC 2, 28 Jan 2015, para. 41.
93. *Gorringe v Calderdale Metropolitan Borough Council* [2004] 1 WLR 1057, para.31-38; *Michael and Others v the Chief Constable of South Wales police and another* [2015] UKSC 2, 28 Jan 2015, para. 120.
94. *Michael and Others v the Chief Constable of South Wales police and another* [2015] UKSC 2, 28 Jan 2015, para. 114 and 122.
95. Harlow, *State Liability*, 10.
96. Varuhas, *Damages and Human Rights*, 44.
97. Wright, *Tort Law and Human Rights*, 31.
98. Andrew Robertson, 'On the Function of the Law of Negligence', *Oxford Journal of Legal Studies* 33 (2013): 31, 37 and 48; Lord Bingham of Cornhill, 'The Uses of Tort', *Journal of European Tort Law* 3 (2010): 1, 4: 'Securing compensation is, […], the primary function of tort.'
99. I take the formulation from *O'Keeffe v Ireland*, para 144.
100. Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford University Press, 2012), 88–9.
101. *Öneryildiz v Turkey*, para 96.
102. *Szula v the United Kingdom* (dec) App No 18727/06, 4 January 2007.
103. *Michael and Others v the Chief Constable of South Wales police and another* [2015] UKSC 2, 28 Jan 2015, para 127.
104. Harlow, *State Liability*, 70.
105. This interrelationship has been the main reason underlying the resistance of national courts to expand the national tort law of negligence by reference to the ECHR standards. Lady Justice Arden, 'Human Rights and Civil Wrongs: Tort Law Under the Spotlight', *Public Law* (2010): 140, 154.
106. Varuhas, *Damages and Human Rights*, 44.
107. Joseph Raz, 'On the Nature of Rights', XCIII *Mind* (1984): 194, 200.
108. James Plunkett, *The Duty of Care in Negligence* (Hart Publishing, 2018), 48.
109. Ibid.
110. *O'Keeffe v Ireland*, para 159-162.
111. *Mastromatteo v Italy*, para 69.
112. For a comprehensive analysis of this standard, see Vladislava Stoyanova, 'Fault, Knowledge and Risk within the Framework of Positive Obligations under the European Convention on Human Rights', *Leiden Journal of International Law* (forthcoming).
113. The last two distinctions have been also made in Stoyanova, 'Causation between State Omission', 309, 315.
114. This approach was applied in *Brincat and Others v. Malta*, App No 60908/11, 24 July 2014, para 106.
115. Nolan, 'Negligence and Human Rights Law', 306.
116. *Osman v United Kingdom,* App No 87/1997/871/1083, 28 October 1998, para 116; *Opuz v Turkey*, App No 33401/03, 9 June 2009, para 129.
117. Nolan, 'Negligence and Human Rights Law', 306; Tofaris and Steel, 'Negligence Liability for Omissions', 140. See also Lord Philips in *Van Colle v Chief Constable of the Hertfordshire Police* [2008] UKHL 50, para.91: the Osman test is 'much more stringent than that under the common law duty of care in negligence.' Lady Hale in *Savage v South Essex Partnership NHS Foundation Trust* [2008] UKHL 74, para 99: Osman test is 'different from and in practice more difficult to establish than negligence.'

118. *Rabone v Pennine Care NHS Foundation Trust* [2012] UKSC 2, para 37 (Lord Dyson).
119. This has led to a profound misunderstanding of the Osman test and different interpretations at national level. See, for example, Laura Hoyano and Caroline Keenan, *Child Abuse: Law and Policy Across Boundaries* (Oxford University Press, 2010), 391–3 describing the *Osman* test as requiring a 'egregious neglect of duty.'
120. For a useful discussion of the imminence of the risk requirement and arguments in favour of its rejection in the context of domestic violence see Separate Opinion of Judge Pinto de Albuquerque in *Valiuliete v Lithuania*, App No 33234/07, 26 March 2013.
121. Franz Ebert and Romina Sijniensky, 'Preventing Violations of the Right to Life in the European and Inter-American Human Rights Systems: From the *Osman* Test to a Coherent Doctrine on Risk Prevention?' *Human Rights Law Review* 15 (2015): 343–68.
122. *Öneryildiz v. Turkey* [GC], App No 48939/99, para 100
123. *Perevedentsevy v Russia,* App no 39583/05, 24 April 2014, para 95-101.
124. *Lopes de Sousa Fernandes v Spain* [GC] App No 56080/13, 19 December 2017, para 182, 191-2 [emphasis added].
125. Robertson, 'On the Function of the Law of Negligence', 31, 33.
126. Booth and Squires, *The Negligence Liability of Public Authorities*, 331.
127. *Hill v Chief Constable of West Yorkshire Police* [1989] AC 53.
128. *Gorringe v Calderdale Metropolitan Borough Council* [2004] I WLR 1057, HL; *K v Secretary of State for the Home Department* [2002] EWCA Civ 775.
129. *Osman v United Kingdom,* para 116; *Opuz v Turkey,* para 131.
130. *Chowdury and Others v Greece*, App No 21884/15, 30 March 2017, para 103 and 113 (the group consisted of migrant workers in a specific region of Greece).
131. In some judgments, the Court rhetorically invokes the *Osman* test when there has not been an identifiable victim. See *Benel v Lithuania*, App No 14326/11, 18 June 2013, para 65-69, where the risk presented by the dilapidated building concerned anybody who might pass by. For a discussion about proximity in the context of the Human Rights Act, see *Sarjantson v Chief Constable of Humberside* [2014] QB 411. See also V Wilcox, 'Expanding the Scope of Public Duties' *Professional Negligence* 30 (2014): 32.
132. For such representative victims, see *Bljakaj v Croatia*, App No 74448/12, 18 September 2014, para 111; *Mastromatteo v Italy*, para 69.
133. *Mastromatteo v. Italy*, para 69; *Rantsev v Cyprus and Russia*, para 290-293.
134. *Mastromatteo v. Italy*, para 72-3.
135. *Mastromatteo v. Italy*, para 72-3.
136. See Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law', *International Journal of Constitutional Law* 11, no. 4 (2013): 1056.
137. Carl Stychin and Clemens Rieder, 'Living With/Out Proximity: Comparing a Contested Concept in Tort', *Tulane European and Civil Law Forum* 29 (2014): 195, 199.
138. This is an oversimplification since the state has to secure the ECHR rights 'to *everybody* within their jurisdiction.' The requirement that the person whose rights are to be secured by the state has to be within this state's jurisdiction is also a manifestation of a relationship and proximity between the state and the individual. Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights', 25 *Leiden Journal of International Law* 25 (2012): 857, 860.
139. Andrew Robinson, 'Justice, Community Welfare and the Duty of Care', *Law Quarterly Review* 127 (2011): 370, 371.
140. Lunney, Nolan and Oliphant, *Tort Law*, 139.
141. Ibid, 151.
142. Ibid, 151 and 162.
143. Mark Elliott and Jason Varuhas, *Administrative Law* (Oxford University Press, 2017), 593.
144. Nolan, 'Negligence and Human Rights Law', 305; Hickman, 'Tort Law', 43.
145. Para 93 and 97.
146. Para 99.

147. *Öneryildiz v. Turkey* [GC], App No 48939/99, para 107; *Ilia Petrov v Bulgaria*, App No 19202/03, 24 April 2012, para 64.
148. *Hiller v Austria*, App No 1967/14, 22 November 2016, para 54.
149. *Dodov v Bulgaria*, App No 59548/00, 17 January 2008, para102.
150. *Fadeyeva v Russia*, para 98.
151. *Ciechonska v Poland*, App No 19776/04, 14 June 2011, para 71-78.
152. Booth and Squires, *The Negligence Liability of Public Authorities*, 97.
153. Ibid, 6; Elliott and Varuhas, *Administrative Law*, 593.
154. Sandy Steel, *Proof of Causation in Tort Law* (Cambridge University Press, 2015) 16.
155. Booth and Squires, *The Negligence Liability of Public Authorities*, 252.
156. *O'Keeffe*, para 149; *E. and Others v United Kingdom,* App No 33218/96, 26 November 2002 para 99. In *E v Chief Constable* [2008] UKHL 66, para 14, Baroness Hale said that she was troubled by the rejection of the 'but for' test by the ECtHR.
157. For a comprehensive analysis see Stoyanova, 'Causation between State Omission', 309.
158. *O'Keefee v Ireland* para 149; *Opuz v Turkey* para 136; *Premininy v Russia* App No 44973/04, 10 February 2011 para 84; *Bljakaj and Others v Croatia* App No 74448/12, 18 September 2014, para 124.
159. *O'Keeffe v Ireland,* para 166; *E. and Others,* para 100.
160. Stoyanova, 'Causation between State Omission', 309, 317.
161. *Vilnes and Others v Norway,* App No 52806/09 and 22703/10, 5 December 2013, para 225 and 229.
162. *Dodov v Bulgfaria,* App No 59548/00, 17 January 2008, para 97.
163. *Dubetska and Others v Ukraine,* App No 30499/03, 10 February 2011, para 123.
164. *Fadeyeva v Russia,* App No 55723/00, 9 June 2005, para 92.
165. *E and Others,* para 100.
166. *Van Colle v Chief Constable of the Hertfordshire Police* [2008] UKHL 50, para.138, where Lord Brown referred to 'a looser approach to causation' under the ECHR.
167. Wright, *Tort Law and Human Rights*, 197.
168. Nolan, 'Negligence and Human Rights Law'.

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