applicant, interim relief might still properly be refused in public law proceedings—in apparent contrast with the approach in private law.

Monsanto also highlights an ongoing difficulty concerning the proper ambit of stays and interim injunctions. In *Avon County Council* (above), Glidewell L.J. ruled that stays could be used not just to halt court proceedings, but also to prevent decisions of ministers and other public law bodies from taking effect until their legality had been confirmed via judicial review—a role which might seem more naturally suited to the interim injunction. The Privy Council took a more orthodox view in *Ministry of Foreign Affairs, Trade and Industry* v. *Vehicles and Supplies Ltd.* [1991] 1 W.L.R. 550, categorising a stay as "an order which puts a stop to the further conduct of proceedings in court or before a tribunal at the stage which they have reached" and asserting that it involved a "fundamental misunderstanding" to apply a stay to an executive decision already made (at p. 556). Neither case was cited in *Monsanto,* but by carrying out the full balance of convenience test, the Divisional Court was implying that on the right facts it might have granted a stay preventing the application of the Ministry's approval decision—an approach consistent with *Avon County Council.* The difficulty here is that *Avon County Council* was decided before *M.* v. *Home Office,* and might be defended by arguing that by giving a wider role to the stay, the court mitigated the injustice caused by the unavailability of an interim injunction. Depending upon how broadly the post-*M.* jurisdiction to grant interim injunctions is interpreted, however, it is now an open question whether such a defence is sustainable.

NICHOLAS BAMFORTH

DOWN HILL—ALL THE WAY?

WHEN suit was brought against the police in the name of the Yorkshire Ripper's final victim, alleging that they were negligent in failing to catch him sooner, every single one of the nine judges who heard the claim decided that it should be struck out (*Hill* v. *Chief Constable* [1989] A.C. 53). The House of Lords gave two reasons: first, that no duty was owed to the victim because the police were in no special relationship either with her or (unlike the case where Borstal boys wrecked a yacht while on the run from their dozy warders) with the criminal; secondly, that it was contrary to public policy for any such claims to be brought against the police in respect of their handling of criminal investigations.

In *Osman* v. *Ferguson* [1993] 4 All E.R. 344 the first ground in *Hill* was arguably inapplicable, since the police were aware of the identity of both the criminal—a deranged schoolmaster—and his

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targets—a pupil whom he injured and his father who was killed. It was on the second ground that the Court of Appeal in an unreserved judgment struck out the claim: "The House of Lords decision on public policy . . . dooms this action to failure". The European Court of Human Rights in Strasbourg (ECHR) has now held that the Court of Appeal thereby put the United Kingdom in breach of the European Convention (*Osman* v. *U.K.* Case No. 87/1997, 28 October 1998, *The Times,* 5 November 1998).

The Article breached was not Article 2 which protects the right to life and is construed to entail that the authorities may under certain circumstances have to take positive steps to protect citizens against obvious and imminent threats to their safety, but Article 6(1) which reads: "In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing . . . by an independent and impartial tribunal established by law". Since the Court of Appeal—an independent and impartial tribunal established by law—had indeed in a fair and public hearing made a determination of the claimants' civil rights under English law, namely that they had not even arguably been infringed, and this on the basis that every allegation made by them was true, the holding of the Strasbourg Court may occasion some surprise, especially as it had long disclaimed the power to determine precisely what substantive rights are accorded to citizens by their domestic law.

Recently, however, it has observed that "it would not be consistent with the rule of law in a democratic society . . . if, for example, a state could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons" (*Fayed* (1994) 18 E.H.R.R. 393, 429). The first issue was therefore whether the second ground in *Hill* prevented the claimants from asserting a right which they would otherwise have. If so, Article 6(1) was applicable, and the question would be whether it had been breached, which turns on the legitimacy of the aim of the rule in question and the proportionality of its use.

ECHR held that if the applicants were in a relationship of proximity and suffered foreseeable harm, they had a right under the law of negligence to "seek an adjudication . . . that in the circumstances it was fair, just and reasonable not to apply the exclusionary rule outlined in the *Hill* case". There is a puzzle here. The Convention right is certainly a right to argue for what in domestic law are arguable rights, but these domestic rights must surely be arguable rights to succeed, not just rights to argue, as suggested. The latent view of ECHR must therefore be that under English law the applicants were entitled to *compensation* if it would

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be fair, just and reasonable to impose liability. Yet given its position that only access to a court is in issue, it disclaims concern with whether or not the claimants actually obtain compensation for their harm: under the Convention "they were entitled to have the police account for their actions and omissions in adversarial proceedings" since "the basic question" was "Why did the police not take action sooner?"—as if a tort suit were simply a fact-finding exercise, a public inquiry instigated by an individual, contrary to the view of Lord Templeman that a claim for damages was not an "appropriate vehicle for investigating the efficiency of a police force". Accordingly, the £10,000 awarded to each applicant "on an equitable basis" was not for the death or injuries, but "by way of compensation for loss of opportunity" to proceed to an actual trial of their claim that the police were negligent.

Having so dubiously found Article 6(1) applicable, ECHR held that since the second ground in *Hill* barred claims against the police however negligent they had been or however grave the harm, it was more absolute than was justified by the legitimate aim of protecting police resources and thus not "proportionate". In so holding, however, it did not advert to the considerations which militate in favour of not proceeding to a trial in the clear cases in which, alone, striking-out is practised. One wonders if the judges in Strasbourg were fully aware of quite how expensive in time and trouble litigation in England actually is, involving, as it does, discovery of documents, oral testimony of witnesses and the use of one of a small number of judges (ECHR alone has 39!) or, indeed, of how effective the threat of provoking such a waste of time and trouble can be in eliciting the reluctant settlement of an unmeritorious claim. "Striking-out" is not, after all, a specifically English disease: a Committee of ECHR itself, if unanimous, can declare an individual application inadmissible (Article 28).

Our courts will soon have to "take account" of the jurisprudence of ECHR. How will they read the present judgment? A claim may still be struck out on the first ground of *Hill* in the absence of allegations giving rise to a plausible argument that there was proximity between the police and the claimant, but given such proximity, striking out under the second ground of *Hill* is outlawed, especially if the harm is serious and the negligence alleged very gross. But may a negligence claim be struck out on the ground that it would not be "fair, just and reasonable" to impose a duty, or will "fair, just and reasonable" come to be seen as merely "public policy" in disguise, simply another exclusionary rule which prevents an individual exercising what would otherwise be his rights? After all, both are matters for argument, not evidence. Or is it that the former

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applies to individual cases, whose precise facts have to be ascertained, while the latter applies to classes of case identifiable in advance, and therefore more obviously qualifies as an unacceptable "immunity"? We shall have to wait and see.

The real question, and it is indeed a question of public policy, is whether an individual should be compensated for the negligent failure of a public authority to protect his interests. On this matter there are currently major divergences of opinion within and between courts in England. ECHR's expansive decision will gratify those who believe that *everyone* should pay for any foreseeable harm to which their unreasonable conduct has contributed, just as if we had enacted article 1382 of the French Code civil. Nor is it surprising that it should be a court of human rights which implies that this is, or should be, our law, for article 1382 is a product of natural law, of which the view that people's rights must be the same everywhere is the late twentieth century version. Nevertheless, it is unwise to endorse a dubious arrogation of power just because one approves of its use in a particular instance: power once conceded can be used for less agreeable purposes. Nations should decide for themselves whether public funds should be directed to victims of past malfunction in public services or used to reduce the number of such malfunctions in the future. It is true that national legal systems are vouchsafed a "margin of appreciation", but the margin is clearly narrowing as the page of text is filled up with extensive glosses on Article 6(1) of the Convention. In any case to answer this question in terms of "human rights" is frankly absurd.

TONY WEIR

DEFINING PROVOCATION

WHEN a defendant is charged with murder and wishes to rely on the defence of provocation, two conditions need to be satisfied. First, the provocation must have caused the defendant to lose his or her self-control suddenly and temporarily. This is the subjective condition. Secondly, the provocation must be such that the reasonable person might have reacted to it in the same way as the defendant. This is the objective condition. This condition is, however, qualified, since it is possible to imbue the reasonable person with relevant characteristics of the defendant, to see whether a reasonable person with such characteristics might have killed had he or she been provoked. Although this qualification of the objective test has been recognised for some time, it has become a matter of recent controversy as to when a particular characteristic of the defendant can be considered to be relevant and what the rationale of this qualification of the

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