

1 Monday, 1 December 2008

2 (10.00 am)

3 Housekeeping

4 SIR MICHAEL WRIGHT: Yes, Mr Hilliard.

5 MR HILLIARD: Sir, just by way of preface, you might think  
6 it appropriate to make an order under section 4.2 of the  
7 Contempt of Court Act, that --

8 SIR MICHAEL WRIGHT: I have that in mind.

9 MR HILLIARD: If I can spell it out, and then it will be on  
10 the record, that the submissions made today and any  
11 ruling or rulings resulting from those submissions  
12 should not be published until the jury return their  
13 verdict, and that the purpose of that is to avoid  
14 a serious risk of substantial prejudice to the jury's  
15 deliberations.

16 If you are minded to make an order in those terms,  
17 indeed if you do make it, then it can be drawn up in the  
18 usual way and provided to anybody who wants it.

19 SIR MICHAEL WRIGHT: Thank you. It will be in the same form  
20 as the order I made last week.

21 MR HILLIARD: Yes.

22 SIR MICHAEL WRIGHT: Does anybody have any submissions they  
23 wish to make on that proposal? Thank you very much. In  
24 that case I will make that order. If you will ask those  
25 instructing you to draw it up.

1 MR HILLIARD: Certainly. Perhaps we can make it plain at  
2 this stage for the avoidance of doubt that obviously  
3 nothing in that order would prevent reporting of  
4 anything that is in your summing-up.

5 SIR MICHAEL WRIGHT: No.

6 MR HILLIARD: I am very grateful.

7 Sir, the first matter just to raise is this, that  
8 I think you are aware, and as a result certainly  
9 Mr Hough and I are, that there is a juror who has  
10 a personal commitment and we can provide details in due  
11 course, that is, I think, unavoidable and will require  
12 travel out of this country, and I think I am right in  
13 saying that the last day that that juror would be  
14 available is Wednesday 10th of next week.

15 SIR MICHAEL WRIGHT: He is actually leaving on the 11th,  
16 I think.

17 MR HILLIARD: Yes. If your summing-up begins, as we  
18 anticipate that it will, tomorrow morning and as we  
19 anticipate that the jury will go out early on Wednesday  
20 morning --

21 SIR MICHAEL WRIGHT: Don't be too optimistic. It might be  
22 lunchtime on Wednesday.

23 MR HILLIARD: All right, but that would still give  
24 a substantial period, as we understand it, whilst that  
25 juror is here.

1 SIR MICHAEL WRIGHT: It will give eight days. Well, seven  
2 days at any rate. I'm aware that there has been a case  
3 in the past where a juror left or had to leave after the  
4 jury had been deliberating for some time.

5 MR HILLIARD: I think it was because of a holiday where the  
6 Court of Appeal said that that was permissible.

7 SIR MICHAEL WRIGHT: Are you proposing that he should stay  
8 effectively until the last moment?

9 MR HILLIARD: Effectively, yes.

10 SIR MICHAEL WRIGHT: That is my inclination. I do not want  
11 to lose a juror if I can possibly help it, and I do not  
12 suppose anybody else does. Does anybody see any  
13 difficulties or have any objections to raise to the  
14 proposal that the juror should be asked to remain at any  
15 rate as long as he can? I think that must be the right  
16 approach.

17 MR HILLIARD: As Mr Horwell says, it's really just to  
18 ventilate it in broad terms, so long as they all realise  
19 that they don't have to stop when he does, but we can  
20 make all those things clear.

21 SIR MICHAEL WRIGHT: They can be told about that in due  
22 course.

23 MR HILLIARD: Yes.

24 SIR MICHAEL WRIGHT: Thank you very much. That is the  
25 course I will follow in that case.

1 MR HILLIARD: I am grateful, sir. The second point is this:  
2 that Commander Stewart has, if I may say so, very  
3 helpfully provided a thorough statement dealing with  
4 a topic that I think you are -- I think both you and  
5 Mr Mansfield raised at an earlier stage, which was the  
6 question of what the Metropolitan Police response had  
7 been to these events and any steps that had been taken.

8 SIR MICHAEL WRIGHT: You are thinking in terms of rule 43?

9 MR HILLIARD: Absolutely, and that was the question it went  
10 to. That has been provided to us. Obviously, indeed he  
11 was the person who asked for it first of all, that must  
12 be provided to Mr Mansfield.

13 SIR MICHAEL WRIGHT: Yes.

14 MR HILLIARD: There is no difficulty about that. I'm told  
15 that some redaction may be required to it. Obviously if  
16 we stick to the hope that we are going to be over by  
17 midday this afternoon, it may be possible to do that  
18 this afternoon. Because obviously we are anxious that  
19 Mr Mansfield has that as soon as possible.

20 SIR MICHAEL WRIGHT: Is it a bulky document, Mr Horwell?

21 MR HORWELL: The statement isn't that long. What it  
22 exhibits fills at least two files. It's been prepared  
23 for you. We have, of course, no objection to its wider  
24 dissemination. We need to ensure that there is nothing  
25 in it that should not be made available to the public.

1 SIR MICHAEL WRIGHT: Certainly.

2 MR HORWELL: It shouldn't take too long. I will not  
3 guarantee we will have finished the process by the end  
4 of today, but I think we will be a long way there.

5 SIR MICHAEL WRIGHT: Let me tell you, first of all, I have  
6 no difficulty at all about allowing any interested  
7 person to make submissions to me as to what they suggest  
8 I ought to include in the rule 43 letter, in the light  
9 of Commander Stewart's documents. I have no doubt that,  
10 Mr Mansfield, it may be that other IPs will want to make  
11 submissions about it, and I am very happy that they  
12 should.

13 I would like to be able to do it simply for the  
14 economical use of time, really pretty soon after the  
15 jury have gone out. If those instructing you could  
16 possibly produce a document in what you would regard as  
17 a proper form, with all the necessary redactions, by  
18 tomorrow? Then given a day and a half of the  
19 summing-up, people will have had time to look at it, and  
20 I have no idea how long this jury will be out, but it  
21 may be that they may be a little time to think about  
22 these things once they have gone out.

23 MR HORWELL: By the end of the court proceedings tomorrow,  
24 we will have completed our work, I can guarantee that.

25 SIR MICHAEL WRIGHT: Very well. The sooner the better

1 I will say but that would be quite acceptable. Very  
2 well, thank you very much.

3 Yes, Mr Hilliard.

4 MR HILLIARD: The next topic convenient to deal with is  
5 Mr Mansfield and Ms Hill in their most recent document,  
6 it's paragraph 21 at page 8, just helpfully suggested  
7 some amendments to the ruling.

8 SIR MICHAEL WRIGHT: I won't disclose any secrets when I say  
9 that you and Mr Hough and I have looked at these, and  
10 some of them at any rate are correct.

11 MR HILLIARD: Yes. It really comes to this, but we will  
12 provide in due course an amended version of the ruling,  
13 but just so that Mr Mansfield and everybody know what  
14 I think your view is, number 1 is agreed; number 2,  
15 I think every time somebody says 9.33 someone else says  
16 9.34, every time somebody says 9.34, somebody else says  
17 9.33. So I think you are minded to put both times in.  
18 Then we keep everyone happy.

19 SIR MICHAEL WRIGHT: It's a fairly pusillanimous way of  
20 dealing with it, but at least it stops people arguing.

21 MR HILLIARD: That's what it's intended to do. Then number  
22 3, that is right, his evidence was that he shouted those  
23 words after Ivor took action, quite right. Number 4 is,  
24 I think, not agreed because paragraph 47 is talking  
25 about the essence of the strategy and, as I understand

1           it, you may not be minded to alter that.

2   SIR MICHAEL WRIGHT: That's right. Because by that time he  
3           was talking about (inaudible).

4   MR HILLIARD: No, not really, it's really the reason I think  
5           that I gave, which is that the way it was expressed in  
6           that paragraph is talking about the essence of the  
7           strategy, and if --

8   SIR MICHAEL WRIGHT: It's paragraph 47, isn't it?

9   MR HILLIARD: Yes.

10   SIR MICHAEL WRIGHT: Yes, that's right.

11   MR HILLIARD: I think that's the reason.

12   SIR MICHAEL WRIGHT: Sorry, that is the point, you are quite  
13           right.

14   MR HILLIARD: Then number 5, absolutely right, that  
15           "tactical" should be "strategic". So we are grateful  
16           for all of those, and that will be prepared and provided  
17           in due course.

18   SIR MICHAEL WRIGHT: Thank you.

19           Submissions on transcript availability to jury

20                   Submissions by MR HILLIARD

21   MR HILLIARD: The next matter is this: that, as you know,  
22           the jury have asked whether they can have the transcript  
23           that is obviously available of the proceedings. I think  
24           originally their note requested a copy of all statements  
25           that had been made. You answered that in the

1 traditional way.

2 SIR MICHAEL WRIGHT: I have to say I took them literally,  
3 and when they said "statements", I thought that's what  
4 they meant.

5 MR HILLIARD: Yes, but I think then as I was saying, it  
6 became plain that what they actually wanted was the  
7 transcript.

8 Can I just say this: for our part we would have no  
9 objection to them being provided with a copy of the  
10 transcript that is obviously confined to those parts of  
11 the proceedings that the jury have heard -- they  
12 obviously couldn't have any more than that -- so long as  
13 you were to give them in due course appropriate  
14 directions about, for example, it being undesirable to  
15 try to read it all through, and also that the  
16 impressions they have gained of witnesses and evidence  
17 as we have gone along are just as important as what  
18 appears in a transcript.

19 As you and others will know, those are the  
20 directions that Lord Justice Scott Baker gave.

21 SIR MICHAEL WRIGHT: I am aware that I am based on fairly  
22 sound precedent.

23 MR HILLIARD: He took a similar course when faced with  
24 a similar request. In our submission, it is potentially  
25 a very useful source of reference to the jury. The



1 alternative is that they are using their own notes or  
2 recollections which may be less than wholly accurate,  
3 and in our submission it's really desirable that they  
4 should have the best resource. Obviously the usual  
5 answer is, which is given when the jury ask for the  
6 transcript of particular witnesses' evidence, is that --

7 SIR MICHAEL WRIGHT: It's already read to them.

8 MR HILLIARD: First of all that it's not available, but  
9 secondly that if it were, it could be unbalanced because  
10 they haven't got a transcript of all the proceedings.

11 Of course the usual answers that are given just  
12 don't apply here. We have a transcript of the whole of  
13 the proceedings available, and given that they have  
14 asked for it, in our submission, to do otherwise would  
15 mean that if somebody has pretty good but not perfect  
16 shorthand, you would allow them to use that but not  
17 have --

18 SIR MICHAEL WRIGHT: I know they have been taking notes but  
19 I don't know that anybody has shorthand.

20 MR HILLIARD: Even if they had, they probably won't have  
21 been able to get down every word. So in our submission,  
22 subject to suitable directions being given, because they  
23 have asked, we would have no objection to them having  
24 it.

25 SIR MICHAEL WRIGHT: Very well. I know that people are

1           expressing concern about this, so I will invite any  
2           other submissions on that point. Mr Mansfield.

3                               Submissions by MR MANSFIELD

4 MR MANSFIELD: Yes, we would support the jury having  
5           a transcript of proceedings they have heard.

6 SIR MICHAEL WRIGHT: Yes, anything that's taken place out of  
7           their presence will be edited out.

8 MR MANSFIELD: Yes. There is a clear precedent for this.  
9           It occurred in the Diana inquest. A transcript was  
10          provided. The only addition I would --

11 SIR MICHAEL WRIGHT: That was rather more than six volumes.

12 MR MANSFIELD: Yes, I don't know how many volumes it ran to,  
13          but it was certainly provided, and of course it saved  
14          them coming back into court and asking questions, or to  
15          be reminded and so on, the usual kind of thing that  
16          often does in a long-ish case arise.

17                 One of the additional matters might be the provision  
18          of an index.

19 SIR MICHAEL WRIGHT: The LiveNote has got it. Do you mean  
20          index of witnesses?

21 MR MANSFIELD: Yes, so they can find very quickly the  
22          witness they are looking for, the cross-examination --

23 SIR MICHAEL WRIGHT: It's already there.

24 MR MANSFIELD: Then I don't object.

25 SIR MICHAEL WRIGHT: Yes. Take it in any order you like.

1 Mr Stern.

2 Submissions by MR STERN

3 MR STERN: Sir, I do have concerns about the jury having the  
4 full transcript and the concerns are in large measure  
5 practical. Although if you said that the jury are to be  
6 advised or to be directed that they shouldn't read  
7 through all the transcript, the question then of course  
8 is why bother to give them the transcript in the first  
9 place if they are not going to be able to read it all?

10 If this case is to be concluded within a reasonably  
11 short period of time, then of course giving a jury 35  
12 days of evidence is counterintuitive to that.

13 It is inevitable that the jury will spend some time  
14 looking at it. It is inevitable that they will want to  
15 read it, and my concerns which --

16 SIR MICHAEL WRIGHT: The difficulty here is that they have  
17 asked for it.

18 MR STERN: I appreciate that, but sometimes juries ask for  
19 it when there are transcripts available, for example in  
20 long fraud trials, and they are not given it. The  
21 reason they are not given it is because they are given  
22 a proper, concise and incisive summing-up, as I am sure  
23 they will in this case, in relation to the evidence that  
24 they have heard, which directs them to the issues, which  
25 points out the relevant material.

1 SIR MICHAEL WRIGHT: I would undoubtedly be minded to say to  
2 them: you have this facility, for heaven's sake don't  
3 sit down and try and read it. It's a reference book to  
4 enable you to pick up any points where there is  
5 disagreement or uncertainty as to what a witness  
6 actually said.

7 My difficulty is this: having asked, if I say, "No,  
8 you can't, you must simply do the best you can with my  
9 summing-up and your notes", the notes may or may not be  
10 accurate.

11 MR STERN: What juries, as you know, do is that they ask if  
12 there are parts of the evidence that they want to be  
13 reminded of and they come back into court and they are  
14 reminded of that evidence.

15 SIR MICHAEL WRIGHT: Yes.

16 MR STERN: The danger, of course, with having a transcript  
17 is that it may be that one or more juror is keener on  
18 reading the transcripts than others, and that that juror  
19 or the other members of the jury will have to listen to  
20 what one particular juror feels is the appropriate part  
21 of the evidence. So there is a danger that there will  
22 be a selective view of the evidence as a result of the  
23 impressions gained by one particular juror.

24 So I think there are dangers, if I may say so, with  
25 respect, in relation to this, and dangers that we will

1 never know fully how they have been dealt with.

2 The position is this: that if there are questions  
3 and they want reminding of certain evidence, then it is  
4 important the jury come back and are reminded of all the  
5 relevant evidence in relation to that particular issue.  
6 The difficulty is that if they are not reminded of all  
7 the relevant evidence by, sir, you, who is able to look  
8 at what is the relevant evidence that goes to  
9 a particular issue, it may that be the jury would be  
10 floundering, looking at considerable bodies of evidence  
11 or indeed omit various parts of the evidence that are  
12 relevant that they have just forgotten relates to  
13 a particular incident.

14 Sir, there are concerns from a practical point of  
15 view, and sir, in my submission, those concerns are felt  
16 and agreed in relation to all criminal and all civil  
17 jury trials. I don't believe it's with precedent that  
18 juries in either of those two areas that had  
19 transcripts -- it may be, I did not have the pleasure of  
20 appearing in the Princess of Wales inquest, but it may  
21 be that there was agreement by all sides and that was  
22 the reason why the transcript went before the jury,  
23 I don't know.

24 SIR MICHAEL WRIGHT: Nor do I.

25 MR STERN: But to say that there is precedent --

1 SIR MICHAEL WRIGHT: We have a number of witnesses. I dare  
2 say we could examine them all to find out what the  
3 answer was. Was it objected to? Mr Hilliard was there.  
4 Was it objected to?

5 MR HILLIARD: Mr Horwell, I think ...

6 SIR MICHAEL WRIGHT: Mr Horwell knows. Was it objected to?

7 MR HORWELL: I objected simply because my background is  
8 crime, and the thought of giving the entire transcript  
9 to a criminal jury would never occur at all. It was  
10 an intuitive objection rather than one based on the  
11 nature of the inquest.

12 SIR MICHAEL WRIGHT: Yes, I understand. Thank you. That's  
13 one way of putting it, I suppose. Yes, Mr Stern.

14 MR STERN: The point is applicable, although as I understand  
15 it, it's equally applicable to the civil jurisdiction.  
16 So there are good reasons why courts up and down the  
17 country do not give transcripts to juries.

18 SIR MICHAEL WRIGHT: I understand that. The fact is that  
19 Lord Justice Scott Baker, in a much longer inquest than  
20 this one, thought it was an appropriate thing to do.  
21 I am bound to say at the moment once we have had the  
22 request, I think it may be that I have to do something  
23 to meet that request, and this may be the only practical  
24 way of doing it.

25 MR STERN: The request can be met, in my submission, I do

1 not want to go over the same ground because the points  
2 are the same, by telling the jury that you will give  
3 them a full and proper summing-up and if there are any  
4 parts of the evidence they need to be reminded of, of  
5 course you will do so.

6 SIR MICHAEL WRIGHT: All right. I understand that.

7 MR STERN: Which is the way that it would be done in any  
8 ordinary trial.

9 SIR MICHAEL WRIGHT: I understand your point. Thank you  
10 very much. Anybody else want to say anything about  
11 this? Mr Gibbs.

12 Submissions by MR GIBBS

13 MR GIBBS: A member of the jury having asked for it, it is  
14 obviously not an attractive proposition to say, "No, you  
15 may not have it". But I would counsel you against the  
16 provision of the transcript. That they have asked for  
17 it doesn't mean to say necessarily that they will be  
18 better off with it.

19 Part, no doubt, of the purpose of a summing-up is  
20 precisely to strip out from the full transcript of the  
21 evidence not only those parts which have proven in the  
22 end to be relevant, but --

23 SIR MICHAEL WRIGHT: I have to tell the jury effectively one  
24 of the standard directions with which you are all  
25 familiar, that the fact that I might omit a piece of

1 evidence in the course of the summing-up which they  
2 think is important should not discourage them in any way  
3 or deflect them from taking that evidence into account.

4 MR GIBBS: Quite.

5 SIR MICHAEL WRIGHT: If they say in the course of their  
6 deliberations: well, so-so said such and such and I  
7 think it's important, let's have a look at it.

8 MR GIBBS: Indeed, or perhaps that one or more of them may  
9 have formed a particular impression, not a textual  
10 analysis but an impression of a witness which may be  
11 different from that which they detect, if they detect  
12 any impression at all, in the summing-up that you give  
13 them, and they will always on your direction prefer  
14 their impression to yours.

15 We have noticed, and I am not sure that we have ever  
16 seen the entire script of each of them, that the jury  
17 has asked a large number of questions.

18 SIR MICHAEL WRIGHT: Indeed they have. They are all  
19 available to be seen if you want them.

20 MR GIBBS: We have not, I think, asked to examine them, but  
21 it may be that we have detected from your reaction to  
22 some of the questions that not all of them have been  
23 acutely on point. And of course --

24 SIR MICHAEL WRIGHT: I think I will be frank about it, you  
25 are quite right, I have to say, blaming myself, that



1           every now and again I have put the question and the  
2           answer has turned out to be rather more informative than  
3           I would otherwise have expected. You can't be sure  
4           about anything, Mr Gibbs.

5 MR GIBBS: No, well, I am obviously poorly informed because  
6           I have not seen the content of all of the questions.  
7           But we have been reminded more than once that there is  
8           an important distinction to be drawn between the scope  
9           of the issues to be covered in the inquiry in evidence  
10          and the scope of the issues to be determined in verdict,  
11          and that is a distinction which will not be reflected in  
12          the provision of the entire transcript to the jury.

13                 In addition, the entire transcript, as we know from  
14          having ourselves looked back and sought to take out the  
15          parts which matter for the process of creating  
16          submissions for you as to relevant verdicts to leave,  
17          the transcript contains not only answers but some very  
18          long questions, some of which contain a number of  
19          propositions or suggestions which are not part of the  
20          evidence. So, returning to where I began, the purpose  
21          or part of the purpose, surely, of your summing-up is to  
22          strip out of the full transcript the evidence, that is  
23          the answers based on the relevant part of the question,  
24          away from the propositions or suggestions or theories  
25          advanced in the question, and only those answers which

1 go to issues which are relevant to the verdicts which  
2 are to be left.

3 SIR MICHAEL WRIGHT: Yes. Very well.

4 MR GIBBS: So it remains unattractive to say, "No, you may  
5 not", but in fact it's my submission that a jury will be  
6 better off without it. They are not best placed to know  
7 that, but we are.

8 SIR MICHAEL WRIGHT: I see, thank you very much. Anyone  
9 else? Ms Leek.

10 Submissions by MS LEEK

11 MS LEEK: Sir, I support the submissions of Mr Stern and  
12 Mr Gibbs. Sir, the fact that a jury has asked for  
13 something clearly doesn't mean that they should have it.  
14 The jury do not know the distinction necessarily between  
15 what is relevant and what is just interesting. What my  
16 learned friend Mr Gibbs has said about the distinction  
17 between long questions with theories and the actual  
18 evidence given by individuals in the witness box, in my  
19 submission, is really the beginning and end of it.

20 Sir, you, I think, have hit the nail on the head by  
21 saying that you will be saying to them, "You have got  
22 it, for heaven's sake don't sit down and try to read  
23 it".

24 SIR MICHAEL WRIGHT: I suspect that none of them will want  
25 to do that.

1 MS LEEK: Sir, the most practical way of encouraging them  
2 not to do it must surely be not to give it to them in  
3 the first place. If they do have any questions about  
4 any particular part of the evidence, then you can sum up  
5 that part of the evidence and refresh their memory about  
6 that part of the evidence in context and in connection  
7 with the issues to which it relates.

8 SIR MICHAEL WRIGHT: Very well, thank you. Anyone else?

9 MR PERRY: No, thank you, sir.

10 SIR MICHAEL WRIGHT: Mr King.

11 Submissions by MR KING

12 MR KING: Sir, briefly, if I may, the difficulty here, if  
13 I may so submit, and the distinction in this case from a  
14 criminal or civil trial such as my learned friend  
15 Mr Stern was mentioning, is that of course the entirety  
16 of the transcript has been available publicly on the  
17 website since the beginning of this inquest.

18 Now, presumably it's going to remain publicly  
19 available, so that if they are not given a copy of the  
20 transcript for all of them to look at together --

21 SIR MICHAEL WRIGHT: They can look at it later.

22 MR KING: Well, they can do teamwork: you go and look at  
23 what so-and-so said and you go and look at -- and then  
24 it will be second-hand and it will be poorly -- or there  
25 is a risk that it may be poorly transcribed or reported

1 by hand, as it were. Or indeed there may be, even if  
2 you were to say that it should now come off the website  
3 to avoid this sort of risk, it may be that individuals  
4 have taken it upon themselves for perfectly good and  
5 legitimate reasons to print off bits over the last  
6 few weeks, bits that particularly interested them.

7 Although I would submit that the practical concerns  
8 that have been voiced are very genuine ones and that it  
9 will be regrettable if the process is extended,  
10 nonetheless the better course, I would submit, is that  
11 given that they can gain access to the transcript,  
12 individually on their own time at home, as long as they  
13 have an internet connection, it's better frankly that  
14 there should be one copy of the transcript for them to  
15 use as a reference point.

16 SIR MICHAEL WRIGHT: In their room.

17 MR KING: Yes.

18 SIR MICHAEL WRIGHT: I understand that.

19 Mr Horwell.

20 Submissions by MR HORWELL

21 MR HORWELL: Sir, the answer to that is that the system is  
22 based on the proposition that a jury will follow and  
23 obey the directions of a judge or a coroner.

24 SIR MICHAEL WRIGHT: Including hopefully the direction:  
25 don't sit down and read it right through.

1 MR HORWELL: Exactly. There are advantages and  
2 disadvantages to the course that is proposed. We simply  
3 suggest that the disadvantages outweigh the advantages.  
4 We are trained and experienced in the use of  
5 transcripts. The jury almost certainly is not. It is  
6 a formidable body of evidence. Anyone who has printed  
7 each day's transcript will realise the phenomenal volume  
8 of evidence that has been heard over the last few  
9 months, and it's only if you are trained and experienced  
10 in identifying the relevant passages, if one simply goes  
11 to one cross-examination without looking at the others,  
12 then there can be unfairness, and that is why the system  
13 that does operate, certainly in the criminal courts, of  
14 a jury asking the judge to remind them of a certain  
15 section of evidence; and the judge then doesn't select  
16 just one passage of cross-examination, the judge will  
17 remind the jury of a balanced view of the evidence and  
18 if that were to happen here, that would be done.

19 So we do submit that of course there are advantages,  
20 we can all see that, but they are outweighed by the  
21 disadvantages, in our submission.

22 SIR MICHAEL WRIGHT: How long was the Princess Diana jury  
23 out?

24 MR HORWELL: They were out for about a week, I think  
25 slightly possibly more.

1 SIR MICHAEL WRIGHT: Doesn't sound as if they spent much  
2 time reading the transcripts.

3 MR HORWELL: No, but what if this jury decides to? They  
4 could be here until March of next year.

5 SIR MICHAEL WRIGHT: I can't help feeling that that was the  
6 biggest objection, unexpressed in everybody's mind.

7 MR HORWELL: It is a concern, what is the point of giving  
8 the jury all of these transcripts if one is then going  
9 to say to them, "Well, don't read them, please".

10 SIR MICHAEL WRIGHT: I understand the point. Thank you.  
11 Mr Hilliard.

12 Further submissions by MR HILLIARD

13 MR HILLIARD: Nothing to add, and no doubt you will give us  
14 the answer now or in due course.

15 SIR MICHAEL WRIGHT: Fairly shortly, yes.

16 MR HILLIARD: Can I just say this: that if your decision is  
17 that the jury should have a copy of the transcript  
18 available, as I understand it, lest that were your  
19 decision, a copy has been prepared and we have  
20 endeavoured to ensure that there is nothing in it that  
21 is a transcript of anything which occurred when the jury  
22 were not there. But we would ask that somebody on  
23 behalf of the interested persons makes that check as  
24 well, because it would obviously be disastrous if we  
25 have got that wrong and there is no harm in our work



1 know, representations have been received from Mr Stern  
2 and Mr Mansfield, and if I can perhaps just deal with  
3 Mr Stern's submissions first of all.

4 His submissions, you will recall, are directed  
5 towards what are at present questions 1, 2 and 3.

6 SIR MICHAEL WRIGHT: Yes.

7 MR HILLIARD: He, if I may say so, has kept us fully  
8 informed at all stages of his concerns and as to what  
9 his submissions might be, and we are grateful for that,  
10 and in return I am just about to make the point that  
11 I am afraid I didn't mention to him when we spoke  
12 earlier today: it does seem to us, I think, that  
13 question 1 could sensibly be confined to officer C12,  
14 and I say that because the evidence of C2 was that  
15 immediately before he fired -- so at a time when he had  
16 reached over Ivor -- that he shouted "armed police" at  
17 that stage. But it may be that that's not  
18 a particularly central line of enquiry, because plainly  
19 that is but a split second before the shots are fired.  
20 The significant question which has arisen is really as  
21 to C12, and -- I am very grateful, I think Mr Mansfield  
22 is happy and Mr Stern is. So, subject to your view and  
23 anything anybody else wants to say, that's that one.

24 Then Mr Stern has suggested that in questions 2 and  
25 3, if they both remain -- I'll come back to that in



1 a minute -- that the words "and before he was grabbed in  
2 a bear hug by Ivor" should appear at the end of  
3 questions 2 and 3. As I understand it, nobody has  
4 voiced any objection to that, and I think Mr Mansfield  
5 has explicitly said he is neutral about that.

6 SIR MICHAEL WRIGHT: Yes, he has.

7 MR HILLIARD: So in those circumstances, if you, sir, are  
8 content --

9 SIR MICHAEL WRIGHT: I am content.

10 MR HILLIARD: -- then we can add that.

11 Penultimately, I think, Mr Stern has made  
12 submissions about the way the questions are asked and  
13 the desirability of eliciting answers that: "yes,  
14 something probably did happen"; "no, it probably  
15 didn't"; or finally, "don't know".

16 Again --

17 SIR MICHAEL WRIGHT: Room for "don't know" strikes me as  
18 being sensible.

19 MR HILLIARD: We are content with all three of those  
20 versions, that you get a "probably did happen";  
21 "probably didn't happen"; or "can't say".

22 SIR MICHAEL WRIGHT: Mr Stern is also proposing that the  
23 balance of probability test should be introduced to all  
24 three questions, or is he now not bothered about that?

25 MR HILLIARD: That's really part of what -- as I say, we are

1 happy and we are going to draft matters appropriately so  
2 that we get a "probably did", "probably didn't" or  
3 "don't know", so it's really all encompassed in that.

4 Then finally, I think, unless I have missed  
5 anything, Mr Stern has raised concerns about question 2,  
6 and as to whether that question should either appear or,  
7 if it does, whether you should direct the jury if it  
8 appears that the answer to that question should be  
9 "yes".

10 So far as our submissions on that are concerned, in  
11 our submission, it's a question that should remain.  
12 It's potentially an important one. In our submission,  
13 it would not be appropriate to direct them that the  
14 answer was "yes", but it would certainly be appropriate  
15 to tell the jury that the weight of the evidence is in  
16 favour of that proposition, and to remind them of it.

17 The caveat is simply this: it may be unlikely, but  
18 in our submission it is not impossible that a juror  
19 could say: I reject the police account of events in the  
20 carriage, I'm afraid I think it is contrived; and the  
21 weight of the evidence may be in that direction but, as  
22 I say, I'm not content about the source of that  
23 evidence; and although as I say that may be unlikely, in  
24 our submission it's not completely out of the question.  
25 In those circumstances we would say it's not appropriate

1 to direct the answer, "yes", but that it would be  
2 appropriate to tell the jury, as it were, where the  
3 weight of the evidence points.

4 So it may be there is not much between us.

5 SIR MICHAEL WRIGHT: This is Mr Stern's proposal. I think  
6 most of your points have been met?

7 Submissions by MR STERN

8 MR STERN: Yes, they have, sir. Yes. I included the  
9 balance of probability because initially in your ruling  
10 I had not understood that the standard of proof was to  
11 apply to the first three questions, but in discussions  
12 with my learned friends --

13 SIR MICHAEL WRIGHT: I think it was going to go into my  
14 general directions to the jury.

15 MR STERN: Sir, I understand that, which is why I put it in  
16 that way.

17 Can I just deal with question 2, and the short point  
18 is this: that it occurred to me that once question 2, as  
19 with other questions, appear within the verdict form at  
20 paragraph 4, then they are subject to the Galbraith  
21 test.

22 If there is no evidence, and there is no evidence,  
23 that Mr de Menezes did not stand up -- I think are the  
24 words -- from his seat, then that is a question that  
25 should not be left on precisely the same principles that



1 aspect of indicating to the jury the weight of the  
2 evidence. Sir, I wonder if you would be kind enough to  
3 refer back to our original submissions, because it will  
4 save having to revisit the transcripts at this point.

5 On page 9 ...

6 SIR MICHAEL WRIGHT: Sorry, I'm rapidly disappearing under  
7 a pile of paper.

8 MR MANSFIELD: May I just make the point and save you  
9 looking it up?

10 SIR MICHAEL WRIGHT: Yes, please do.

11 MR MANSFIELD: I'll just give the reference. On pages 9 and  
12 10 of the original submissions in relation to this, we  
13 set out in considerable detail as a footnote, it's  
14 footnote number 3 on page 9 that goes on to page --

15 SIR MICHAEL WRIGHT: I remember this, yes.

16 MR MANSFIELD: A synopsis of the passenger evidence that is  
17 relevant to two issues, that is whether the words "armed  
18 police" were shouted at the pertinent moment, in other  
19 words towards Mr de Menezes, but also the other aspect  
20 is dealt with or referred to on page 10, concerning  
21 whether he got up or he didn't.

22 Now, in fact I have checked the references, and can  
23 I just expand on them now?

24 SIR MICHAEL WRIGHT: Yes, please.

25 MR MANSFIELD: Because one needs to bear in mind, when one

1 is talking about weight, this is the issue, it's not so  
2 much a question of there may be four police officers who  
3 say he did and three passengers who say he didn't, and  
4 I'll come to that, because we say that would be in part  
5 replacing the jury's function by a direction of that  
6 kind. In other words, clearly the jury would have to  
7 assess what was seen by any witness because the point  
8 that's been emphasised by everybody is of course some  
9 people might miss something, but that includes police  
10 officers as well as passengers.

11 Therefore the question is: who was in the best  
12 position to see whether something like this happened?  
13 I have concentrated primarily if one goes back to  
14 tab 35, on the three witnesses, two right opposite,  
15 that's Rachel Wilson and Ralph Livock, and the one that  
16 is adjacent in a seat alongside not immediately but  
17 maybe one or two, Anna Dunwoodie.

18 In relation to those three, none of them give  
19 evidence to the effect that he stood up.

20 SIR MICHAEL WRIGHT: Yes, I accept that.

21 MR MANSFIELD: In fact therefore there is evidence, of  
22 course the jury may consider whether all three of them  
23 missed it, but in fact, put very fairly by all three  
24 witnesses, and in particular the references for  
25 Livock --

1 SIR MICHAEL WRIGHT: In a sentence, Mr Mansfield, it's this,  
2 isn't it: you submit that you are entitled to say, or  
3 you would be if you were able to address the jury, if he  
4 stood up they would have seen it.

5 MR MANSFIELD: Yes.

6 SIR MICHAEL WRIGHT: That's it, isn't it?

7 MR MANSFIELD: It is it, and those are -- the three  
8 witnesses that I have mentioned, do not indicate -- in  
9 fact they say as far as they are concerned he was  
10 sitting. And they actually say that. Livock and Wilson  
11 actually say that. I have the references.

12 SIR MICHAEL WRIGHT: Yes, I have them in mine.

13 MR MANSFIELD: So perhaps I do not need to go further on  
14 that. That's why we say that there were three who were  
15 in the best position, there are others, but those are  
16 the three that are in that part of the carriage, and  
17 it's for the jury to decide whether they are prepared to  
18 rely on that recollection or the evidence of the police  
19 officers.

20 SIR MICHAEL WRIGHT: Very well. Mr Stern, do you want to  
21 say any more?

22 Further submissions by MR STERN

23 MR STERN: With respect, that's no evidence, because what  
24 they all say -- and I can take you to the relevant  
25 passage, we have them copied if you want them -- is that

1           they were not looking at the particular time or that  
2           they were -- they don't remember seeing it, and they  
3           accept that there were holes in the evidence. I am  
4           paraphrasing it in the round but that's essentially what  
5           it comes to. None of them have said, "I was looking at  
6           him and when I was looking at him, I didn't see him move  
7           from his seat". It's not enough to say, "Well, I did  
8           not see something and therefore it did not happen".  
9           That's not positive evidence.

10       SIR MICHAEL WRIGHT: Well, a juror might be persuaded if it  
11           had happened they would have been bound to see it,  
12           sitting directly opposite, as they were.

13       MR STERN: That is not an inference or a proper inference on  
14           the evidence of these witnesses, because, as I say,  
15           Livock says:

16                 "... I am not sure what I can say other than I don't  
17           remember seeing -- I don't remember him seeing -- I  
18           don't remember seeing him anywhere other than in the  
19           seat."

20                 That's what he said.

21       SIR MICHAEL WRIGHT: That's right.

22       MR STERN: Rachel Wilson said she didn't see that particular  
23           aspect:

24                 "I was looking at the people with guns, trying to  
25           work out what they were doing, but I wasn't aware of..."



1           Then there is a inaudible part. She was looking at  
2           the man, as you remember, with the larger gun who was by  
3           the doorway.

4           So far as Dunwoodie is concerned, she said to my  
5           learned Mr Hough, I think, that she remembers the  
6           incident in separate short images rather than  
7           a continuous flow:

8           "I was looking directly at the ... lots of men, lots  
9           of guns, sort of everything a bit fast, and then I ...  
10          saw that there was a gun pressed to the place where the  
11          neck joins the head of the passenger who was sitting  
12          down to my right ... But really what I was looking at  
13          was his face and the expression on his face..."

14          At that time.

15          So there is no evidence upon which any of these  
16          witnesses provide a foundation for a safe assertion to  
17          the Galbraith test.

18       SIR MICHAEL WRIGHT: I understand the point. It's a short  
19          and simple point. Thank you very much. Mr Hilliard.

20                        Further submissions by MR HILLIARD

21       MR HILLIARD: In our submission, there is material that does  
22          justify the question being left, but equally in our  
23          submission what it requires is a balanced direction,  
24          pointing out that there is positive evidence from some  
25          of the officers to one effect, and then referring to the

1 matters that Mr Mansfield has mentioned this morning,  
2 because in our submission there is a point there that  
3 there are limitations to it, and those ought to be  
4 expressed as well.

5 RULING

6 SIR MICHAEL WRIGHT: Thank you very much.

7 Yes, I am clear about this. This is a crucial and  
8 central assertion made by the officers as part of the  
9 circumstances that led to their doing what they did.  
10 I fully understand the point that Mr Stern makes, that  
11 such evidence as there is the other way is not  
12 particularly potent, but I don't think it's  
13 non-existent, and in any event I would be exceedingly  
14 reluctant to be seen to be directing the jury to produce  
15 a particular answer to such a central question and in  
16 the circumstances I propose to leave the question as it  
17 is.

18 Submissions on document re: questions to jury

19 Submissions by MR HILLIARD

20 MR HILLIARD: Then, sir, finally, I think for this morning,  
21 there is the document which we have received from  
22 Mr Mansfield and Ms Hill, which deals with the same  
23 general topic which is the questions. Mostly, it's  
24 right to say that they are more than drafting  
25 amendments, and you have heard argument as to the

1 principles involved, as Mr Perry has pointed out in the  
2 document which the command team have helpfully provided.

3 SIR MICHAEL WRIGHT: Yes.

4 MR HILLIARD: If, in the course of preparing the summing-up,  
5 I suppose you have a fuller appreciation and a more  
6 comprehensive overview of the central issues, then it  
7 may be that that could potentially lead to changes.

8 I appreciate of course Mr Perry's point about the loss  
9 at this stage of an opportunity to challenge a question  
10 that is included, but the loss would only be at this  
11 stage and not for all time. If any challenge were  
12 upheld in due course, then that could obviously result  
13 in a question and answer being deleted if that was the  
14 decision.

15 SIR MICHAEL WRIGHT: Yes.

16 MR HILLIARD: With that by way of preface, if I can just  
17 turn to the substance of Mr Mansfield's suggestion, the  
18 first topic I am going to deal with is the question of  
19 the language used and, in our submission, there really  
20 isn't, with great respect, anything in that.

21 You will recall, and I have the transcript here,  
22 that Mr Mansfield did say in the course of submissions  
23 that it was perfectly possible to re-word questions,  
24 changing the word "failure" to "the fact that" and said  
25 that that could be done and it wasn't difficult. He

1           said that it actually looked worse that way round but  
2           that if that was wanted, that could easily be done, and  
3           that has been done on some occasions and now complaint  
4           is made about that. So in our submission there is  
5           really not much in that point, save, there is just one  
6           aspect that needs considering, the questions, in any  
7           event where "the fact that" is used, in our submission,  
8           they already incorporate what I'll call judgmental  
9           issues, for example in (b), "better photographs" --  
10       SIR MICHAEL WRIGHT: If you get the answer "yes", there is  
11           an implicit criticism.

12       MR HILLIARD: Yes, (e), accurately communicated, (f),  
13           accurately known.

14           The only question, in our submission, that, with  
15           great respect, there may be some merit in the point, is  
16           perhaps in (g), and that could be worded -- just having  
17           given it some thought -- I think it would have to be  
18           along the following lines:

19           "The failure to decide at the time that surveillance  
20           officers should still have been used..."

21       SIR MICHAEL WRIGHT: "should" or "could"?

22       MR HILLIARD: "should":

23           "... still have been used to carry out the stop on  
24           Mr de Menezes at Stockwell station, even after it was  
25           said that S019 could perform the stop."

1           Now, that would make it plain that what was being  
2           looked at was a decision that was made at the time, not  
3           a judgment about what an outcome would probably have  
4           been with the benefit of hindsight. It may be that if  
5           (g) were put in that way, it would be a rather more  
6           informative conclusion.

7   SIR MICHAEL WRIGHT: That's very close to Mr Mansfield's  
8           proposed, I think it was (j), actually.

9   MR HILLIARD: Is it? Then that would be a double benefit.

10   SIR MICHAEL WRIGHT: What Mr Mansfield has proposed is the  
11           failure by the command team to ensure that the  
12           surveillance officers were used -- it is rather a  
13           different way round, isn't it?

14   MR HILLIARD: I think I am going to stick with mine, if  
15           I may.

16   SIR MICHAEL WRIGHT: Yes.

17   MR HILLIARD: So far as the drafting is concerned, that, in  
18           our submission, is the one question where "failure over  
19           the fact" may add something.

20           So that's the first point. Perhaps if I can just  
21           run through these and then leave others to comment.

22           So that's the drafting point.

23           Secondly, so far as further questions are concerned,  
24           if you were to entertain the possibility of this,  
25           perhaps for the reason I have given, it comes to this:

1 obviously there is a longer list but Mr Mansfield  
2 describes as the notable, I think the most notable  
3 omissions from the current draft. If I can just outline  
4 these. The first one is the content and tone of the  
5 briefings.

6 SIR MICHAEL WRIGHT: Yes.

7 MR HILLIARD: Second is the window of opportunity question.  
8 The third is inadequacy of the communications system  
9 generally. The fourth is the content and tone of the  
10 order to stop. The fifth is that the general question  
11 that it is sought to ask as to whether the jury have  
12 anything else that they wish to add. Sixth, later in  
13 the submissions document, is the question of, if there  
14 was a shout of "armed police", could Mr de Menezes have  
15 complied with that?

16 So those, and I know I will be corrected if I'm  
17 wrong, are certainly in the document, are put, and I see  
18 a nod, as the most important matters.

19 Of those six, then, in our submission if the right  
20 central questions are identified by you, with the  
21 assistance of the submissions that have been made, in  
22 our submission that really is sufficient to deal with  
23 the question of whether or not a general question should  
24 be asked at the conclusion of all that.

25 In our submission, if you have identified a broad

1 range of central issues, then in our submission there  
2 really is no need for that; and I think one only has  
3 perhaps to look at the difficulty, and here we are  
4 revisiting this question, because it's not easy, but if  
5 one looks at the time that I think the various teams  
6 have spent on these issues, they are not  
7 straightforward. To leave the jury with that general  
8 opportunity in our submission is very unlikely to be  
9 productive, as I say, particularly if you have  
10 identified the central questions.

11 SIR MICHAEL WRIGHT: I have to say that what's troubled me  
12 about that suggestion is that it's not only productive,  
13 it might be counterproductive in the sense that the jury  
14 might come up with an observation which was either  
15 irrelevant or worse still might be inconsistent with  
16 an answer that they have given previously. That's what  
17 is worrying me about it. That's why at the moment my  
18 inclination, subject to what Mr Mansfield might say to  
19 me, is at least to do what we can to direct them to the  
20 central issue.

21 MR HILLIARD: Yes. In our submission, that is the  
22 touchstone. So we would not be in favour of that  
23 question.

24 If I can just deal with two others, first of all.  
25 The question as to whether or not "armed police" was

1 an instruction with which he could reasonably have  
2 complied. In our submission, that question is really  
3 overtaken by one of the earlier questions you have  
4 asked, which are really 1, 2 and 3, where we actually  
5 have -- you, on the face of it, have the prospect of  
6 eliciting the answers from the jury as to what in fact  
7 Mr de Menezes' response was or wasn't to the shout of  
8 "armed police", and in our submission that is really  
9 more valuable material than a difficult discussion about  
10 what in the circumstances an individual could or could  
11 not be expected to do in response to that question. As  
12 I say, in very difficult circumstances. A theoretical  
13 answer to that, in our submission, is of less value than  
14 the material that should be elicited in response to  
15 questions 1, 2 and 3.

16 SIR MICHAEL WRIGHT: Yes.

17 MR HILLIARD: The content and tone of the order to stop, I'm  
18 not clear whether that is, as it were, as spoken by  
19 Commander Dick in the operations room --

20 SIR MICHAEL WRIGHT: Or Trojan 84.

21 MR HILLIARD: Or Trojan 84 as it is passed on --

22 SIR MICHAEL WRIGHT: It must be Trojan 84, I think is what  
23 it must mean.

24 MR HILLIARD: I think it must be, unless there is  
25 a suggestion that in what Commander Dick said, Trojan 84



1 I suppose that might be the suggestion, was improperly  
2 influenced.

3 But in our submission, there is no real issue as to  
4 what was said. The officers have made it plain that  
5 they didn't think they had been given an order for  
6 a critical shot, that their judgment was still in play,  
7 and that --

8 SIR MICHAEL WRIGHT: On the other hand they did also say  
9 that as soon as they heard it, it produced Ralph's order  
10 state red and everybody piled out of the cars.

11 MR HILLIARD: Yes, and in our submission it's difficult to  
12 think, so far as tone is concerned, that where one is  
13 dealing with a suicide bomber that the tone would be  
14 anything other than of a certain kind. In our  
15 submission, with great respect, we don't think that that  
16 is really either a central question --

17 SIR MICHAEL WRIGHT: I am not sure, Mr Mansfield will tell  
18 me in due course, whether the suggestion is that it was  
19 too urgent or not urgent enough.

20 MR HILLIARD: No, well, that might just illustrate the  
21 difficulty. In our submission, not really, with great  
22 respect, although it's in the top six of the omissions,  
23 not really properly described as a central question, and  
24 very difficult to extract an answer of real value from  
25 that question.

1           So the remaining three, so far as the communications  
2 system is concerned, which is, it's (i):

3           "The failure to have efficient communications  
4 systems operating between the various teams."

5           I am bound to say that for our part, we don't see  
6 much difficulty about that. It's been fairly well  
7 ventilated in the course of the proceedings. I think,  
8 indeed, you, sir, on many occasions asked witnesses  
9 about it, and if that is thought to be one of the  
10 central questions, as it were, one of the main central  
11 questions that has not been included at the moment, if  
12 that is the view about that, we don't, for our part, see  
13 any great difficulty about in fact including that.

14           Content and tone of briefings. Again, that is  
15 obviously very much a matter for you, sir, but it is  
16 an issue that has been ventilated and, again, it doesn't  
17 seem to us that that is a question that would add  
18 enormously to the jury's task. It wouldn't make it much  
19 more difficult or anything of that sort, and if you were  
20 minded to, again, although it's slightly more  
21 contentious than the communication system, but none the  
22 worse a question for that, if you think it's  
23 appropriate, again we have no great objection to that.

24           Then finally, the window of opportunity question,  
25 and I think there can be no doubt but that Mr Mansfield

1           did spend much time in the course of the proceedings --  
2   SIR MICHAEL WRIGHT: In the course of my ruling, in  
3           a different context, because I was talking of course in  
4           terms of the criminal burden of proof, I have ruled and  
5           concluded that the issues that were raised on this point  
6           are not causative.

7   MR HILLIARD: If I can just finish, that was the point I am  
8           going to come to. It certainly has been canvassed by  
9           Mr Mansfield, there is no doubt about that, that's the  
10          first point.

11           The second point, I think, is that if you were to  
12          allow a question, then I think Mr Mansfield's question  
13          is probably capable of considerable simplification.

14           But the third point to make is this: that you could,  
15          with respect, only allow a question if you took the view  
16          that, although you had ruled that causation could not be  
17          established to the criminal standard, so beyond  
18          reasonable doubt, that causation could be made out on  
19          the lower test of the balance of probabilities.

20           So that would be the first issue, but if you took  
21          that view, then certainly legally speaking it would be  
22          open to you to include a question on those lines.

23           As I understand it from Mr Mansfield, again he will  
24          correct me if I'm wrong, as I understand his, I think,  
25          explicit submission, he is not suggesting that if you

1           allowed a question of that kind on the balance of  
2           probabilities so far as causation is concerned, that  
3           that would do violence or enable him to launch an attack  
4           to your ruling, as I understand it, and I think I hear  
5           him agree that that's not suggested.

6   SIR MICHAEL WRIGHT:  It's really on the basis that --  
7           I mustn't descend to Latin -- it's a part of the history  
8           rather than part of the causation in the criminal sense.

9   MR HILLIARD:  No, I don't think so.  I think the question is  
10          simply this:  in either respect you would have to be  
11          satisfied that, as it were, the failure to take the  
12          window of opportunity or to develop the window of  
13          opportunity strategy caused or contributed to death.

14  SIR MICHAEL WRIGHT:  I follow.

15  MR HILLIARD:  What you have said in the ruling, as we  
16          understand it, is that you do not think -- you did not  
17          think that that could be established to the criminal  
18          standard.  The question here, it's still the same,  
19          causation/contribution, would still have to be  
20          established but to the lower standard.

21  SIR MICHAEL WRIGHT:  Mr Horwell may have something to say  
22          about that.

23  MR HILLIARD:  I have no idea what Mr Horwell has to say  
24          about it at all.  So the first question would be whether  
25          you were satisfied about that.  Plainly it would be --

1           it's possible, because they are different tests, and as  
2           I say, Mr Mansfield's document indicates that if you did  
3           take that view, that would not form a basis for  
4           an attack upon the other conclusion.

5   SIR MICHAEL WRIGHT: On the ruling.

6   MR HILLIARD: Yes.

7   SIR MICHAEL WRIGHT: Very well.

8   MR HILLIARD: So those are our submissions.

9   SIR MICHAEL WRIGHT: Thank you very much. Well, now,  
10       Mr Mansfield.

11                           Submissions by MR MANSFIELD

12   MR MANSFIELD: Yes, thank you, sir.

13   SIR MICHAEL WRIGHT: Would you like to deal with that last  
14       point first?

15   MR MANSFIELD: Yes, if I may. You may recall when I was  
16       first asked to give an indication, this is now some time  
17       ago, prior to any oral submissions, one of the points  
18       I made then was that, so far as duty/responsibility,  
19       duty in terms of the gross negligence argument,  
20       responsibility in terms of causal factors, although  
21       I didn't put it quite that way, I was indicating that  
22       a jury may come to a conclusion on a lesser standard of  
23       proof, and that we say particularly applies to  
24       causation.

25                           So, for example, just concentrating on the window of

1           opportunity, there are a number of factors -- and this  
2           bears upon other issues in relation to the other  
3           questions -- that bear upon the window of opportunity,  
4           on the balance of probabilities may have contributed to  
5           the death.

6           Now, the factors have been examined in the case,  
7           I perhaps don't need to list them, but one of them is  
8           the phrase that you use yourself in paragraph 54,  
9           dealing with a different standard of proof. Perhaps if  
10          you --

11       SIR MICHAEL WRIGHT: Yes, I have it.

12       MR MANSFIELD: -- go to paragraph 54, where there is the  
13          issue of an inability by, for example --

14       SIR MICHAEL WRIGHT: Of course leaving the question if you  
15          were to persuade me that it should be, doesn't depend on  
16          the existence of a duty of care.

17       MR MANSFIELD: No, but it does bear upon -- that's why  
18          I have put duty/responsibility, which hopefully  
19          delineates the separation rather more clearly. In other  
20          words, we say there was a responsibility at that stage  
21          to be assessed by this jury as to whether, if you like,  
22          an omission to ensure that the window was used given the  
23          limited number of occasions on which somebody who might  
24          be, and so forth, the arguments you have heard many  
25          times, might be a potential suspect is stopped.

1           We have always argued that this was the prime  
2 occasion, and we say it's in line -- that's why I am  
3 afraid to say we are being a bit pedantic about the use  
4 of the words "strategy" and "tactics" -- that this was  
5 in line with the strategy. The point that we have tried  
6 to make, and it may not always have necessarily been  
7 recognised as the point, is the failure to implement the  
8 strategy rather than to have a strategy.

9           There clearly was a strategy at 4.55. There was  
10 a strategy -- whether you call it a tactic or not, we  
11 say it's a strategy -- redefined by Cressida Dick after  
12 7.15, not to let the person run. The real problem  
13 arises in not perceiving, not so much a failure to  
14 perceive what the objective should be, but a failure to  
15 ensure that the objective is achieved at the best  
16 possible time. That is a combination of failures which  
17 we have mapped out on previous occasions to do with  
18 a failure to notice them even leaving, that is at the  
19 command stage, and a failure to have a location Silver  
20 and so forth.

21           So there are a number of factors that bear upon that  
22 window, and in other words a failure to implement, and  
23 a jury would be perfectly entitled to say, on the  
24 balance of probabilities, that that had a contribution  
25 into what happened thereafter. So it's the combination

1 of failures, and in this instance, because one's not  
2 dealing with the duty of care situation, the jury can  
3 aggregate a number of matters to consider whether in  
4 fact they are factors, either taken separately or  
5 collectively, that bear upon the death, that touch the  
6 death, however it's expressed.

7 So it's an entirely different context in which one  
8 is judging it at this point.

9 Sir, I don't go back through all the factors, I'm  
10 sure you are aware of them, but they do bear upon the  
11 ability of somebody to observe, the ability to have  
12 people there who would take control, like Silver and so  
13 on, and the facility of officers to report back quickly  
14 and so forth. All those factors on that five-minute  
15 window, I will call it the five-minute window, four,  
16 five, six minutes, however defined.

17 So we would say it's a perfectly legitimate  
18 question. We say in fact of the questions we have  
19 posed, it may be either the most important one, factor  
20 --

21 SIR MICHAEL WRIGHT: It's always been at the forefront of  
22 your cross-examination.

23 MR MANSFIELD: Yes, it has, and may I say, it's something  
24 the family have felt very strongly about, and clearly  
25 for other reasons, not these reasons, reasons which we



1 don't pursue, it was also of course examined in some  
2 detail, but that was in the Health and Safety trial, but  
3 that was for a different purpose. I am examining it  
4 here in relation to Jean Charles de Menezes.

5 So we would say it would be perfectly proper for you  
6 to include a question that reflects the way we have put  
7 it, even if the precise wording, as we have it at the  
8 moment, as (e), for (e).

9 SIR MICHAEL WRIGHT: Are you content, this is what I really  
10 want to know, that if you persuade me about this, that  
11 it could be included without inconsistency with the  
12 ruling?

13 MR MANSFIELD: Oh yes, because as I have indicated, we are  
14 not dealing with duty, we are dealing with  
15 responsibility. We are dealing with a situation in  
16 which a number of factors come together which are  
17 attributable to different people, and so in that sense  
18 it's not transgressing the ruling at all.

19 SIR MICHAEL WRIGHT: Very well.

20 MR MANSFIELD: Sir, can I just deal with -- it arises out  
21 of, but it's best illustrated by my coming straight to  
22 the point in the particular questions, our additional 5  
23 and 6 and 7 to some extent if one looks at the three  
24 together --

25 SIR MICHAEL WRIGHT: Are you looking in your draft

1 questionnaire?

2 MR MANSFIELD: Yes.

3 SIR MICHAEL WRIGHT: Yes.

4 MR MANSFIELD: Because, could I start with 6?

5 SIR MICHAEL WRIGHT: Yes. The open question.

6 MR MANSFIELD: The open question, and I want to illustrate  
7 why we say this is extremely important in this case, it  
8 may not arise in every case, but it certainly, we say,  
9 arises in this case, because unless the jury have the  
10 facility to clarify factors within a question, and I'll  
11 illustrate exactly what we mean: in some questions there  
12 may be no extra factors, but in some questions, it's  
13 perfectly clear there are subfactors which would inform  
14 you, sir, or the public of matters that have led them to  
15 a particular conclusion, particularly if the answer to  
16 the question is yes.

17 That's one aspect of number 6. Particular factors  
18 within a question. But there is also a much more  
19 important even than that, and that is -- perhaps prefer  
20 the wording "the level of contribution of a particular  
21 factor" but that may be a little verbose. "gravity" is  
22 the short word. The gravity or impact of the omission  
23 or failure, however it's put, and this derives plainly  
24 from the cases that you are aware of and that you have  
25 cited yourself in your ruling, namely Cash, Smith and

1 others, a jury are perfectly entitled and in fact  
2 encouraged because where you have an Article 2 case,  
3 concerned with a death at the hands of the State, and  
4 accountability, it is extremely important that if a jury  
5 wished to, they are enabled to use language which is  
6 just short of breaking the rules, is how it's put in one  
7 of the cases. Very robust language can be used and one  
8 shouldn't be afraid or "sensitive", to use a word that  
9 has been raised before, to that fact. At the moment of  
10 course the questions, although they have a judgmental  
11 element or some of them, the jury aren't, unless I am  
12 mistaken, I don't know exactly how you may decide to put  
13 it eventually, but they are not being encouraged, for  
14 example under question 7, about the words that are  
15 appropriate for them to use in qualifying matters that  
16 they found yes or no to.

17 So one will never know whether in fact they thought  
18 it was inappropriate, unsuitable, insufficient and so  
19 forth. Those are the words we have suggested. They  
20 don't have to use any particular words. Obviously they  
21 must be discouraged from using words that are tantamount  
22 to the ones we have put on the last page, which would  
23 infringe the rules. But none of that is difficult to  
24 indicate to a jury. It may take a little more time to  
25 do it, but this is extremely important that they are

1 given that facility.

2 Why do we say that that is important? May I now  
3 illustrate why we say the use of language and the use  
4 of, at least the language to give a level of  
5 contribution or gravity and also to identify factors,  
6 otherwise one runs the risk here of doing, as it was  
7 indicated in one of the cases, ending up with a rather  
8 anodyne situation.

9 Sir, may I go back therefore to some of the  
10 questions as they stand at the moment. Let us take the  
11 first question under 4. I'll come back to the first  
12 three and the case of compliance at the end. I am just  
13 dealing with paragraph 4 and the questions. Let us take  
14 4(a). Now, if they are going to be asked whether this  
15 is a cause, the suicide attacks and attempted attacks of  
16 July 2005 and the pressure placed upon the  
17 Metropolitan Police in responding to the threat.

18 Now, supposing they say "yes", what does it mean?  
19 As it stands, it's either totally meaningless or totally  
20 meaningful. It either is stating the obvious, like  
21 whenever the police investigate a crime there is  
22 pressure, particular pressure the worse it is, which  
23 doesn't tell you a great deal; or it's totally  
24 meaningful in what it's saying, namely that the attacks  
25 themselves meant that the police acted too hastily, too

1           improperly, made mistakes. What does it mean?

2           So we would submit that if a question like that is  
3 going to be answered, on the balance of probabilities  
4 "yes", and those who pose the question -- and we  
5 didn't -- undoubtedly are expecting an answer "yes" to  
6 that, well, then, the further questions that have to be  
7 asked; and this is why we say that in this kind of  
8 inquest, a jury must be left with the facility to go  
9 further. Whether they qualify it in that box, as they  
10 go through, or whether they do it at the end with  
11 a residual paragraph, in other words, "In relation to  
12 these questions, are there other matters or factors  
13 which you feel of particular importance" and so on, they  
14 could do it there. It perhaps doesn't matter where they  
15 do it. It may be preferable to do it in relation to the  
16 precise question that they are being asked.

17           You will see immediately that if the answer to this  
18 one is yes, one would want to know in what way do you  
19 say it has contributed to the death? And then you begin  
20 to get what is really needed from this inquest, in other  
21 words what is it that the jury find on the balance of  
22 probabilities has caused or contributed to the death as  
23 a result of that.

24           Then there is the further question that having  
25 decided the contribution it's made, for example a jury

1           could say: because we think on the balance of  
2           probability it's caused people to not render the kind of  
3           level of judgment that they should have had; well, then  
4           the question is obviously which judgments and what  
5           impact does that have.

6           Of course there would be -- I can't hear anybody  
7           saying it but mentally people may be saying, well, this  
8           is getting too complicated. We say not. This is  
9           precisely what this sort of inquest with this gravity of  
10          issue absolutely demands of a jury doing a narrative;  
11          unless the question is meaningless, and we don't propose  
12          for a moment that it was put forward on a meaningless  
13          basis, it must have a meaning. How do you distill the  
14          meaning? The yes/no is a useful way of triggering  
15          a response, but it's only the tip of the iceberg.  
16          That's why we say there has to be these residuals, and I  
17          call them residuals for the sake of argument.

18          When you begin to go through the questions, and I'll  
19          go through them as quickly as possible, bearing in mind  
20          time, with the similar framework placed on top of each  
21          one, taking the next one, the failure to obtain better  
22          photographic images. We are aware of some of them. One  
23          of them still has to be put before the jury but that can  
24          be done quite quickly.

25          The question here is: if they say yes, there was

1 a failure to obtain better photographic images that were  
2 available, the real question is to what extent would  
3 this have affected what happened? In other words, if  
4 they are saying it's a cause, how much of a cause, at  
5 what level does it come in?

6 Given, again, we have heard that perhaps other than  
7 attributing matters to Jean Charles de Menezes, which is  
8 the approach Mr McDowall and Cressida Dick took, the  
9 only other real matter that they pinpointed was  
10 identification. So plainly they may think that that is  
11 a serious, and I'm going to use the word failure, it's  
12 a serious failure, or omission or inability to obtain or  
13 whatever the -- however they find it.

14 Therefore once again the failure to obtain better  
15 ones is impliedly judgmental, that they failed to do it,  
16 but to what extent does it matter? They may say it  
17 wouldn't make a great deal of difference, I don't know  
18 how they will view it; they may say it makes all the  
19 difference in the world and that is really a serious  
20 failure. We say that's important not just for this case  
21 but obviously for others and any recommendations you may  
22 wish to make.

23 We say, we have put it in, obviously, provide all  
24 members of the surveillance teams with it, because we  
25 have this position in this case that not all members

1           were provided. But that's a lesser factor. The main  
2           thing is obtaining the better photographic images.

3           So I move to the next one, and that is the content  
4           and tone. It's one we have inserted. Again, we say  
5           this is important because it's clear from your own  
6           ruling that you indicated that plainly what was being  
7           said at the briefings influenced the thinking. There  
8           can't be any question about that.

9           Therefore, if the briefings influenced the thinking,  
10          there are two aspects to that. One -- they are both  
11          causative, we say, and it's not again a matter of  
12          a formality, it is saying, well, to what extent did what  
13          was said at the briefings, it's much the same, it comes  
14          back to the first question: what kind of influence was  
15          it; not just was it an influence, what kind of influence  
16          was it? Did it produce a situation in which officers  
17          had one view, which we obviously have argued they did  
18          have as a result.

19          Now, I put it to, and I mentioned it before, so I am  
20          sorry to rehearse one of the points I made before, but  
21          it's one of the first questions I asked Mr McDowall.

22       SIR MICHAEL WRIGHT: Yes, I remember it well.

23       MR MANSFIELD: He said they should have been told the other  
24          side of the question, not that they were just deadly and  
25          up for it, which was well known anyway because of what



1 had happened the previous day, but it would have been  
2 fair to say to them, well, we just don't know at the  
3 moment whether in fact one of these people coming out is  
4 or isn't.

5 So in other words a more balanced briefing, we say,  
6 might have contributed on the balance of probabilities  
7 to the death, and it would be for the jury to decide how  
8 important they think it is as a causal factor. One  
9 cannot really say it plays no part in this case at all,  
10 what they were being told before they went. In fact,  
11 the officers themselves are saying it absolutely played  
12 a major part in what they thought and what they did.  
13 That's the whole context of the arguments that were put  
14 before you in relation to what short form verdicts  
15 should be left.

16 So we say it can hardly be left out of this part of  
17 it, and on the assumption -- I hope it's a fair one --  
18 that the answer to that question would almost certainly  
19 be yes, that the content and tone did, the question is  
20 to what extent and in what way did it.

21 So the jury must be allowed an opportunity to  
22 explain in their own words, because at the moment they  
23 have no opportunity to explain in their own words. Is  
24 there a fear about what the jury may say, or is it the  
25 fear that it may be inconsistent -- I understand that --

1 with other things that they are finding?

2 One can see from the questions that they have asked  
3 that they are an interested jury and they are asking,  
4 I think, 98 per cent of the time relevant questions, and  
5 therefore they are going to be a jury, in my submission,  
6 who will listen to what you have to say very carefully,  
7 and in particular the exhortation that they should not  
8 transgress the rulings that you give, that they have to  
9 be careful that they are not producing some kind of  
10 named civil or criminal liability, all the parameters of  
11 which we are aware. Otherwise it becomes just ticking  
12 a box, and we say this kind of inquest can't be just  
13 about ticking boxes; it must be about a more  
14 sophisticated, as it were, elaboration.

15 So again we say it is a causal factor. Can I just  
16 turn it on its head for a moment? Suppose you decide it  
17 is not a causal factor. The jury are entitled  
18 themselves to say that it is. You would have to be able  
19 to say to yourself, and all of us, at this stage that no  
20 reasonable jury properly directed on the balance of  
21 probabilities could find that it was a cause in order to  
22 omit it altogether, and in my submission that puts it in  
23 stark relief, and we say it plainly meets that test, and  
24 a jury would be entitled to come back with that.

25 Therefore one moves to the next one. That is the

1 difficulty of providing an identification. Now, this  
2 raises and touches on and overlaps with the next  
3 question, over the page, because it's --

4 SIR MICHAEL WRIGHT: This is all to do with the five-minute  
5 window.

6 MR MANSFIELD: Yes. Perhaps I do not need to elaborate it,  
7 but it is important, because if it's left as it is, the  
8 general difficulty, it doesn't really tell you what the  
9 difficulty is that they see. A general difficulty is  
10 too vague and doesn't really help. What was the  
11 difficulty in this case? May I just illustrate it? It  
12 isn't here as a question, but it's sort of implied.  
13 I go back to the evidence of Ivor. Is this because the  
14 image was so poor -- which is what he was saying -- that  
15 he would never have been able to identify --

16 SIR MICHAEL WRIGHT: I think it was James who said he could  
17 have it for a week. It doesn't matter.

18 MR MANSFIELD: I think it was Ivor who went on to say he  
19 would need an ATM machine, that type of evidence, to  
20 confirm it.

21 But that was plainly the view of at least one,  
22 perhaps two surveillance officers. Now, that's quite  
23 important. In other words there was never going to be  
24 an identification that went beyond "we can't rule him  
25 out". Now, that's important, to know whether that's the

1 case, because this goes again to the heart of at least  
2 what McDowall and Dick were saying that identification  
3 was at the root of this, and it comes back to the  
4 question of what was going on in the command room  
5 knowing that it -- well, they don't admit that it was  
6 a poor image, so it's for the jury to decide as  
7 a factor, is it the poor quality of the image which is  
8 the reverse side of an earlier question about better  
9 photographic images?

10 Now, they could put it in there or they could put it  
11 in here. But there must be some reference to the fact  
12 that this whole operation was based on that one image,  
13 and at the moment it's very difficult to distill that.  
14 The question is: should it should be launched on that  
15 one image? Again, I put it, I hope, in stark relief.

16 We say that the jury must be entitled at some point  
17 to indicate their view of that on the balance of  
18 probabilities as a contributory cause, and it's  
19 a factor, in other words that's why we are saying we  
20 have got -- they must be entitled if they wish to  
21 identify particular factors, either under the question  
22 concerned or at the end if they feel it's that important  
23 that it's the factor that has led more than any other.

24 So once again, I hope I have made clear on that  
25 particular question why identification is important. Of

1 course the other problem that arises here, the general  
2 difficulty, is the general difficulty -- and I know  
3 Mr Gibbs says we know where all the red team was. We  
4 don't know where all the red team was.

5 What we know is that seven members of the red team  
6 were not in a position to identify at all. They don't  
7 claim, and we have all their statements, they even saw  
8 Jean Charles de Menezes. So we are down to three  
9 basically Harry, Edward in the car opposite and Tango 2.  
10 Three out of the ten.

11 The question the jury must be entitled to ask, not  
12 in relation obviously to the duty of care issue which  
13 I raised before, but in relation to on the balance of  
14 probabilities responsibility for the difficulty under  
15 this question, is that the lack of officers able to, as  
16 it were, provide -- the inability that you have  
17 described it as to provide an identification. They may  
18 say: nonsense, it was an impossibility, no officer  
19 could, so they don't have to do that.

20 We say there is material there on the balance of  
21 probabilities for them to identify that as a factor  
22 under that particular question, or it could come into  
23 another question. That's why there has to be, we say,  
24 a residual category, because some of these don't fit  
25 neatly into boxes and they must be able, as it were, to

1 expand if they wish.

2 I go past the next one as I have already dealt with  
3 it.

4 The innocent behaviour is again a question posed by  
5 others. Unless it is meaningless, we say it is  
6 obviously relevant, in the way that it has been posed,  
7 because they are saying it had an effect on some  
8 officers.

9 The real question here is the extent to which that  
10 played a part, so the jury should be, if they want to,  
11 in answer to that question, to what extent do the jury  
12 feel that that reasonably or unreasonably played a part  
13 in this case. They must be allowed to express that,  
14 because as members of the public, when viewing certain  
15 types of behaviour, they may wish to qualify how they  
16 think that played the role that the officers say it did,  
17 whether it's getting on and off the bus at Brixton or  
18 wherever.

19 Again, each question poses further ones, not too  
20 many but just obvious ones for distilling really what is  
21 to be gained from knowing that. In other words in the  
22 level of impact on the case as a whole.

23 The next one --

24 SIR MICHAEL WRIGHT: Pause there, if you will, Mr Mansfield.

25 I have had a plea for mercy.

1 MR MANSFIELD: I am so sorry if I have been going too fast.

2 SIR MICHAEL WRIGHT: No, we would just like a break. Ten

3 to.

4 (11.40 am)

5 (A short break)

6 (11.55 am)

7 SIR MICHAEL WRIGHT: I think I should make it clear that the

8 time restrictions are such that we must finish these

9 submissions before the midday break. That is what

10 I intend to achieve.

11 MR HILLIARD: I suspect you mean before the lunch break.

12 The midday break would be very tight indeed.

13 SIR MICHAEL WRIGHT: Yes. The short adjournment, if you

14 like. I think everybody should direct their minds to

15 submissions with that limitation in mind. Mr Mansfield.

16 MR MANSFIELD: Sir, yes. I have indicated probably ten

17 minutes more, just a bit more. I think, sir, with due

18 respect you have the points.

19 SIR MICHAEL WRIGHT: Yes, I do.

20 MR MANSFIELD: It is all on paper anyway. If I can run

21 through the remaining questions as illustrative of the

22 points we have making, it becomes rather clear how one

23 applies to each question. The one I had got to was (g),

24 the failure to communicate the views of surveillance

25 officers.

1           Well, I think we are all aware of the particular  
2 point in time to which that refers. Although it has  
3 a general application, there is a very crucial time  
4 which involves James, Lawrence and others, and questions  
5 being posed about percentages and 1 to 10 and so on.

6           There plainly was a failure. The question is, and  
7 we say it has a -- plays a part, it is causative. The  
8 question of course everyone needs to know is: to what  
9 extent did it cause and how did it cause what happened  
10 in the carriage? That's the key matter on top of just  
11 answering the question yes or no. So it's back to the  
12 level of contribution or gravity, which means  
13 considering the impact on the sequence of events of that  
14 failure to communicate.

15           The next one down, (h), the failure to know the  
16 position of the firearms teams. Again it's very  
17 obvious. I appreciate that officers have had very  
18 different views about the necessity of this. But there  
19 is on the balance of probabilities again a causal  
20 relationship because it bears upon orders that are  
21 given, either on the ground or orders that are given  
22 from the control centre at New Scotland Yard.

23           If they were to answer yes to that, we say it is  
24 a failure; to what extent did it cause? Same question,  
25 once again. So there is always a secondary question, at



1           least at the level of contribution.

2           The next one down, the communications system. We  
3           do, sir, say, and it's interesting that in a sense that  
4           wasn't a matter that was seen to be, although you have  
5           asked many, many questions yourself about this issue,  
6           and it's plain there was a totally inefficient  
7           communications system. Can I say why this is important?  
8           There may be a juror, I'm not saying that there is, who  
9           picked up on the issue I have raised, I know more than  
10          once. We say it's causative. It's capable of being  
11          causative on the balance of probabilities.

12          They had a resource available that day which perhaps  
13          would have short-circuited everything, and that's  
14          motorcycles. What on earth they were doing only being  
15          able to, as it were, communicate by mobile phone is  
16          completely pointless. They had two bikes with two  
17          officers, and in a sense they are available either at  
18          the Scotia Road end or at the other end, because they  
19          were there, they went on it, the reason they weren't  
20          actually deployed at any stage was because of  
21          communications failure.

22          We say that's extremely important that the jury  
23          should consider it, and in other words it merely  
24          illustrates that we as lawyers do not have the monopoly  
25          of what is central and what is not. Therefore it's very

1 easy to overlook something which a jury, and this comes  
2 back to the general point, a jury may say we think this  
3 is important provided it doesn't transgress any of the  
4 parameters. They should be entitled, if it doesn't fit  
5 into that one, that particular box, that they should  
6 have the facility at the end to add it. So we say  
7 that's no minor matter and we say it might well have  
8 short-circuited the whole sequence of events.

9 The final one, almost, there is one more to go, on  
10 that page, the failure to use the surveillance, S012,  
11 after he got off the bus. I appreciate Mr Hilliard's  
12 addition. Effectively we are saying, I hope clearly, it  
13 was the failure to use surveillance officers at any  
14 stage, either before C019 said they were in a position,  
15 because Ivor was plainly offering to do it even before  
16 that, as well as obviously afterwards when he's already  
17 on the escalator because of the lack of communications  
18 and all the rest of it.

19 So we are saying throughout, it's not dependent on  
20 the C019 aspect of it. So if C019's going to be  
21 inserted in there, we say it's both before and after  
22 C019 say they are available, it should have been left to  
23 the surveillance officers.

24 But again, there is an obvious rating question, in  
25 other words how important, what impact, what level of

1 contribution; obviously if it's an answer yes, we would  
2 expect it to be near the top but they may not think so.

3 Then the last question of the lettered ones that we  
4 have posed is the content and tone of the instruction.  
5 Really, in part that's based on an observation that you  
6 made yourself in paragraph 19. The sentence reads:

7 "They were then told with some force to stop the man  
8 getting on the tube, an order which can only have  
9 reinforced their belief."

10 We accept that. It's a causal factor. The moment  
11 that happens. And of course the officers pray it in aid  
12 to some extent, because it wasn't just a plain order,  
13 "stop", "stop him before he gets on the tube". TJ84 and  
14 Dick are both involved in this. Trojan 84 was saying  
15 effectively to this jury: I was going to only do one  
16 thing and that is relay religiously to the word, to the  
17 letter, exactly what I was being told by the DSO, and it  
18 was checked twice, as it were, in order for this --  
19 checked twice by the team leader, before he issued red,  
20 that this is in fact, this was the command.

21 So it was obviously regarded by the team leader as  
22 extremely important before he issued the command, of the  
23 order to state red, and plainly we say it must have had,  
24 as you have indicated, an effect.

25 Now, the question is: what effect? This is not

1           again an idle question, for this reason: one of the  
2           things that this inquest has undoubtedly brought to  
3           light, if I may put it this way, it may have changed and  
4           when I get a document tomorrow morning or whenever I get  
5           it, maybe we will be told but perhaps not, it will be in  
6           the redacted part. What it's brought to light is that  
7           there was not any clear language. There was a clear, it  
8           is said, understanding that this wasn't a critical shot  
9           being ordered, but the question was: what was the level  
10          of command that was being said; in other words, was  
11          there an urgency that was infused in the way in which it  
12          was put over the radio that actually this was somebody  
13          who had been almost accommodated there and then as  
14          a there and then bomber. I know the officers said "no  
15          preconceived ideas, we didn't go that far", but there  
16          was an urgency to such an extent that the officers --  
17          C12 had got out of the car before the order was even  
18          given.

19                 So there plainly was -- that urgency has a role.  
20                 Therefore the content and tone comes from Dick through  
21                 TJ84, through to Ralph, and obviously the officers who  
22                 are listening to whatever is being conveyed at the end  
23                 of the day. The jury may feel it doesn't rate very  
24                 highly but it plays a part, and it's important for the  
25                 future. The reason why we have posed it is this: rather

1           like the motorcycles, it may be important in future for  
2           those in command to ensure that there is no risk of any  
3           overlay of meaning being imparted, even unconsciously,  
4           and therefore there should be very clear command  
5           language.

6           So in a sense the jury may say, "No, it doesn't  
7           matter, that was fine", but on the other hand if it was  
8           not fine and the language used on the day was  
9           inappropriate or thought to be inappropriate, and this  
10          may go back to the first question, the pressure of  
11          events. That's why one needs to know how it all ties  
12          up. In other words, one doesn't want, as it were,  
13          unconnected thinking in the way that some things  
14          happened. One wants an overview here, and maybe you  
15          can't put it in both of those questions.

16          You may need what I am coming to next and finally of  
17          course are those extra paragraphs where the jury may be  
18          entitled then to look back over the factors, not just  
19          the questions but the factors contained within each  
20          question and put together a narrative, because you are  
21          probably aware -- I'm sorry to say probably, I don't  
22          mean that. You are very aware -- I'm sorry, I didn't  
23          mean probably aware -- on the balance of probabilities  
24          that the cases indicate -- you could have what's called  
25          a freestanding narrative. You could have said to this

1 jury -- and that was one of the issues, certainly in the  
2 Cash case, a freestanding narrative in which you say to  
3 the jury: provided you don't transgress, just tell us  
4 what you have found in a narrative.

5 SIR MICHAEL WRIGHT: Save a lot of time.

6 MR MANSFIELD: Save a lot of time. Here all one is doing is  
7 saying: right, we have given you guidance in the  
8 questions which contain certain factors. Now is your  
9 opportunity. First of all we could have missed some,  
10 and really as I have just illustrated, that is entirely  
11 possible, that we have missed some. We may not. On the  
12 assumption that most have been covered and you could say  
13 it in your summing-up that most have been covered, the  
14 need therefore may be much less to include factors that  
15 we have not thought of. But certainly in terms of box  
16 6, effectively, the opportunity to express it in, we  
17 call strong epithets is extremely important in  
18 identifying additional factors within the question which  
19 I have just been through, and the language we have set  
20 out at the bottom of the page is entirely permissible.

21 Without, as it were, running those three paragraphs,  
22 5, 6 and 7 together, without that facility, this inquest  
23 will have deprived this jury of their main function,  
24 which is to provide not only the short form verdicts  
25 which you will be indicating but also the narrative that

1 goes well beyond the ambit of the short form.

2 May I just go back to the short form for a moment?

3 That is question 1, and the words "armed police". If  
4 they find that these were shouted, obviously if they  
5 find they didn't, it obviously doesn't arise in quite  
6 the same way. It plainly arises if they find that these  
7 words were shouted by C12.

8 SIR MICHAEL WRIGHT: We are only leaving C12.

9 MR MANSFIELD: Yes. So that it then does arise as to  
10 whether this constitutes an instruction, it's extremely  
11 important again for the future, because the jury may  
12 have a view about that, as to whether it's enough in the  
13 context of any case that you just say you are armed  
14 police. I think the clearest rendition of what should  
15 happen was given by Andrew when I asked him the question  
16 of really the -- and it doesn't take long to say it,  
17 "armed police, stand still, sit still", whatever, "show  
18 me your hands", it can be done within seconds, certainly  
19 within the seconds that we are dealing with here.

20 As members of the public, the jury may wish to  
21 indicate whether that does afford an instruction,  
22 because of course the issue that is raised by C12 is, by  
23 claiming that he did that, was the assessment question.  
24 And the assessment question is related to compliance,  
25 and ie non-compliance. If the jury find that it doesn't

1           constitute an instruction from which he could reasonably  
2           have complied, that again would be informative not only  
3           for the present but for the future.

4           So it's in that context that we would and we are  
5           grateful for the opportunity to address you on these  
6           matters, that a reconsideration is given to the global  
7           effect of merely providing yes/no answers and actually  
8           restricting the jury from making, as it were, their  
9           assessment and their judgment in relation to what  
10          factors and to what degree.

11       SIR MICHAEL WRIGHT: Thank you very much, Mr Mansfield.

12           I know Mr Horwell will want to say something.  
13          Mr Perry probably is next, unless anybody has anything  
14          they want to add in the ordinary batting order? Very  
15          well. Mr Perry.

16                               Submissions by MR PERRY

17       MR PERRY: Sir, thank you very much. Sir, our starting  
18          point is that the matters now advanced were the subject  
19          of full submissions on the 21st and --

20       SIR MICHAEL WRIGHT: I have your point about the lateness of  
21          it.

22       MR PERRY: Yes. It's an additional point in relation to  
23          that, sir, it's the approach that now should be taken to  
24          this. I am going to adopt what we put in the written  
25          submissions to save time. But given that these matters



1           were the subject of full submissions on 20 and  
2           21 November and that those submissions were followed by  
3           a period of reflection by you, and that that period of  
4           reflection was followed by a reserved ruling, then we  
5           would submit that it would have to be on the basis of  
6           compelling reasons now for the questions to be changed  
7           from the format in which they were provided to the  
8           parties in your confidential ruling.

9           SIR MICHAEL WRIGHT: I don't pretend to be omniscient.

10          MR PERRY: I fully accept that, sir. The only point is that  
11           what we have said in our document is the whole point of  
12           having a period set aside last week was for the parties,  
13           if they were dissatisfied with any matter, for that then  
14           to form the basis of an application if necessary.

15                 Now, call me old-fashioned, but I think a ruling is  
16           a ruling. What are we going to do? Are we going to  
17           have further submissions during the course of the  
18           summing-up? Are we going to have further argument on  
19           these matters, particularly as of course the ruling on  
20           a confidential basis has been made known to the  
21           interested parties? So there is that factor. So the  
22           starting point, we would submit, is there would have to  
23           be compelling reasons. We are not submitting that you  
24           could be forced into perpetuating error by being  
25           stubborn and resistant to any form of change. We are

1 not submitting that. But we are saying that a good  
2 starting point would be there would have to be  
3 compelling reasons.

4 SIR MICHAEL WRIGHT: Yes.

5 MR PERRY: Sir, may I just deal then with the submissions by  
6 adopting the submissions document that we have prepared.

7 SIR MICHAEL WRIGHT: Yes.

8 MR PERRY: And by adding these few short points.

9 First of all, in relation to the content and tone of  
10 the order to stop, we make one short point. The  
11 submissions that have been made to you this morning  
12 overlook the fact that the command given to Trojan 84  
13 was relayed to him by Trojan 80 and not by the DSO. So  
14 that has simply been overlooked in its entirety.

15 The second point, dealing with the window of  
16 opportunity submission, may we simply invite you, sir,  
17 to see our original written submissions between  
18 paragraphs 3.8.1 to 3.8.11. The short point is that  
19 there was not any window of opportunity, it's wholly  
20 unrealistic to suggest that there was such  
21 an opportunity, and it is simply wrong to suggest that  
22 there was. There is no proper evidential basis for  
23 suggesting that there was.

24 In relation to the communications point, we do  
25 object to the form of the question. If there is to be

1 a question in relation to communications generally, it  
2 should not be premised on the suggestion that there was  
3 not an efficient communications system, and at the very  
4 least it would have to be framed in terms which referred  
5 to the operations of the communications system as it  
6 existed between the various teams.

7 SIR MICHAEL WRIGHT: Yes.

8 MR PERRY: Sir, the next point, the tone and content of the  
9 briefings, we would simply make this preliminary  
10 observation: it was not in draft 2 of the submissions  
11 that were made to you on 20 and 21 November, so it  
12 appears to be a new allegation, that that rather  
13 undermines the suggestion now that this is absolutely  
14 central to the question that the jury has to consider.  
15 We do say that it's a significant fact that, during the  
16 course of the proceedings, this was not put either to  
17 Mr Purser or to Trojan 84, and we submit as a simple  
18 aspect of fairness, it should not now be left to the  
19 jury as a potential implicit criticism of either  
20 Trojan 84 or Mr Purser.

21 However, in any event, and more fundamental  
22 an objection, it's not capable of being causative either  
23 on a criminal or civil standard of proof because the key  
24 events were between 9.33 and 10.03, and no reasonable  
25 jury could find it to have been a cause, given the

1 evidence given by the firearms officers themselves.

2 Sir, so far as the evidence given by Mr McDowall is  
3 concerned, which it's said is the basis of the  
4 criticism, may we simply refer you to 25 September this  
5 year at page 86, between lines 4 and 16 of the  
6 transcript, where some questions were put to  
7 Mr McDowall. He said he didn't know the details of the  
8 briefing, and that was simply not followed up. If it  
9 was so central and important, it should have been. If  
10 it wasn't, then it shouldn't now be left.

11 Sir, finally, in relation to the question on the use  
12 of S012, our essential submission is the current  
13 question is apt to capture the important nature of the  
14 jury's conclusions. If there is going to be a question  
15 on the potential use of S012 officers to do the stop, it  
16 would have to be much more analytical than the question  
17 as currently framed, and it would have to be broken down  
18 because it would have to deal with, first of all, the  
19 possibility that if it had been thought that C019 were  
20 in a position to conduct the stop when Mr de Menezes got  
21 off the bus, were C019 the appropriate resource to be  
22 used? So in other words you would have to have some  
23 indication of what the jury's view about all that  
24 evidence was.

25 And secondly, if it had been thought that C019 were

1           in a position to conduct the stop almost immediately  
2           after the order had been given to S012, were C019 the  
3           more appropriate resource to be used to conduct it at  
4           that stage?

5   SIR MICHAEL WRIGHT: I didn't think there was any issue  
6           about that. Everybody agrees that they were or would  
7           have been. The problem was is simply that they were not  
8           in position -- or were thought not to be in position.

9   MR PERRY: Yes. Well, if there is going to be some issue in  
10          relation to this, we would submit it has to be -- you  
11          would have to phrase the questions in a more analytical  
12          way.

13   SIR MICHAEL WRIGHT: I understand the point. They would  
14          have to be more detailed questions.

15   MR PERRY: Yes, and it's the point going back to the  
16          submissions that were made this morning in relation to  
17          the firearms officers, there would have to be a very  
18          detailed and balanced direction to the jury or reminder  
19          to the jury of what the relevant evidence was in  
20          relation to the points.

21                Of course, we do submit that infecting this type of  
22          question, although it's been disavowed as being  
23          influenced by hindsight at all, you do have to take  
24          great care when dealing with a submission of that  
25          nature, given what we all know now.



1 MR STERN: Precisely. As I say, the narrative questions  
2 that were handed out on the morning of the argument  
3 included the very question that is now sought to be  
4 included or reargued again.

5 SIR MICHAEL WRIGHT: Yes.

6 MR STERN: I assume that you, having looked at those  
7 questions, decided not to include that particular one  
8 for good reason, and it was not included in your ruling  
9 as one of the questions that ought to be left to the  
10 jury.

11 So my prime objection is that basis. The second is,  
12 if one needs any further objection, because in my  
13 submission it was for good reason that you determined  
14 not to include that question, I adopt the arguments and  
15 submissions of my learned friend Mr Hilliard in relation  
16 to the question that he has put before you this morning,  
17 and in addition to which it not only overlaps with other  
18 questions but it is -- offends against the principle  
19 that questions should be clear and simple. This again  
20 is a question that if you were to leave it, it would  
21 require a considerable number of other questions to be  
22 put and another -- a number of factors to be put before  
23 the jury in order that they could answer that question.

24 I can give you a number of examples as to why, but  
25 there are probably about nine or ten different points in

1 relation to that question that I could submit to you.

2 So for those two principal reasons -- as I say, the  
3 fact that it has already been argued, you have already  
4 determined it, and second of all, it offends against  
5 that principle of a clear and simple question, in my  
6 submission it should not be included.

7 SIR MICHAEL WRIGHT: Thank you. Ms Leek.

8 Submissions by MS LEEK

9 MS LEEK: Sir, I wonder if I might just address you very  
10 briefly on proposed questions 4(c) and 4(k), both of  
11 which have been addressed by Mr Perry.

12 SIR MICHAEL WRIGHT: Yes.

13 MS LEEK: Might I preface what I say by reiterating that the  
14 freer rein you give to the jury, of course the greater  
15 risk there is that there will be a contravention of  
16 rules 36 and 42.

17 SIR MICHAEL WRIGHT: I am very conscious of that.

18 MS LEEK: Sir, in relation to 4(k), I adopt my learned  
19 friend Mr Hilliard's submissions in relation to that  
20 question. There is no real factual issue in relation to  
21 what was said by Trojan 84 or by Mr Esposito. Likewise,  
22 there is no issue as to the tone in which --

23 SIR MICHAEL WRIGHT: Sorry?

24 MS LEEK: There is no issue, as I understand it, as to the  
25 tone in which it was said. There was no



1           misunderstanding by any officer as to what was required,  
2           and the fact that there was some urgency in the tone was  
3           natural and was required in the situation.  It's  
4           extremely difficult to see what possible criticism there  
5           could be --

6   SIR MICHAEL WRIGHT:  Or what purpose the question --

7   MS LEEK:  Or what purpose the question serves, absolutely.

8           Sir, as to 4(c), this is where I part company from  
9           what my learned friend Mr Hilliard has said, which is  
10          that this is not a question which will add to the jury's  
11          task.  I beg to differ on that.  There were a number of  
12          briefings, the first of which was at Lemn Street; there  
13          was then a briefing by Mr Purser at Nightingale Lane,  
14          and a follow-up brief briefing by Trojan 84.

15          Those briefings had a significant number of  
16          component parts.  What is it that was said to be  
17          inappropriate?  What is it that was said to be  
18          causative?  By all accounts, the officers found the  
19          briefings to be balanced, the best briefings that they  
20          had ever had was said by some, and completely measured.

21          Sir, again it's difficult to see what the purpose of  
22          this question is.  Which bit of the tone of which  
23          briefing is it said caused or contributed in a more than  
24          minimal or trivial fashion --

25   SIR MICHAEL WRIGHT:  It did make them all understand that

1           they might not be coming home that night.

2   MS LEEK:  It did, sir, but by the same token they were all  
3           told that they may or may not confront a suicide bomber  
4           and that they may or may not have to use a critical  
5           shot.  Sir, that's the whole point of the balance in  
6           these briefings which appears to have been set out to  
7           the satisfaction of all officers who understood (a) the  
8           seriousness, but (b) the possibility that they may or  
9           may not have to confront a suicide bomber at the end of  
10          the day.

11                 So the breadth of this question, in my submission,  
12                 would add significantly to the task of the jury, and  
13                 it's very difficult to break down exactly what is  
14                 required by it, and what the precise cause is.

15   SIR MICHAEL WRIGHT:  Thank you very much.  Mr Gibbs.

16                                 Submissions by MR GIBBS

17   MR GIBBS:  Sir, I have very little to say.  On the subject  
18           of the general questions which it's proposed might be  
19           asked, and questions like: to what extent did X, Y, Z  
20           cause, if you find that it did cause or contribute.

21           I have nothing to add to the submissions that my learned  
22           friend Mr Hilliard has made to you.

23                 As to specific questions, you will remember that we  
24           have made detailed submissions both in writing and  
25           orally on an earlier date about this, and we read your

1 ruling, we understood your ruling, we respected that you  
2 had thought about it, and that you were exercising your  
3 discretion as to how best to elicit the jury's verdict.  
4 That, of course, is a broad and powerful discretion.

5 We understand the temptation to come back and have  
6 another go, and I'm going to try to resist it, because  
7 I am entirely confident that you will recognise a dish  
8 that you have seen before which has been re-heated, as  
9 is only too painfully set out in my learned friend  
10 Mr Perry's written document.

11 SIR MICHAEL WRIGHT: I am not going to invite you to, but  
12 you might like to reconsider the wording. That's quite  
13 all right, Mr Gibbs.

14 MR GIBBS: I think I said what I meant, and I think I meant  
15 what I said.

16 SIR MICHAEL WRIGHT: I ask no more. Very well. Mr King?

17 MR KING: No, thank you, sir.

18 SIR MICHAEL WRIGHT: Mr Horwell.

19 Submissions by MR HORWELL

20 MR HORWELL: We don't object to the lateness of  
21 Mr Mansfield's submissions this morning. We do object  
22 to their repetition of submissions made ten days ago,  
23 and I join with the submissions that have been made,  
24 serious and significant submissions that have been made  
25 this morning, that a ruling is a ruling. We have not

1           come here to re-argue either your ruling or the  
2           questions that have been set out in the form; only to  
3           discuss their content and their specific wording, which  
4           is obviously something we have been unable to argue  
5           until today.

6           I will deal with some of the points that have been  
7           raised, but can I come to the questionnaire.

8   SIR MICHAEL WRIGHT: Yes, as redrafted?

9   MR HORWELL: Yes, as redrafted, as ruled upon by you, sir.

10           Question number 4, the general question itself, we  
11           would -- Mr Stern has redrafted the questions for C2 and  
12           C12, each of them having the standard of proof and we  
13           would welcome, I think Mr Hilliard has effectively said  
14           this this morning, that change to these questions.

15           The general question number 4, caused or contributed  
16           to the death of Mr de Menezes, the test is more than  
17           minimal and we would suggest that that be put in the  
18           question.

19           4(b), the fact that better photographic images of  
20           the suspect Hussain Osman were not obtained and provided  
21           to the surveillance team. We would suggest that that  
22           question could and should benefit from re-wording  
23           because there is no issue that the police had other  
24           photographic images of Hussain Osman. If this question  
25           has any merit at all, it has to be on the basis that the

1 police should have used those other photographs. When  
2 one looks at the evidence, there is no dispute at all  
3 that Hussain Osman had not been identified by the time  
4 of the shooting as one of those present at Ragstone.  
5 And although it was the view of one officer that it was  
6 the same man in the wedding photographs, they were not  
7 of course attributed to being Hussain Osman.

8 So we would suggest a re-wording to this extent: did  
9 the Metropolitan Police have a better photograph or  
10 photographs of the suspect Hussain Osman which could  
11 have been safely attributed to Hussain Osman by the time  
12 the surveillance officers were deployed? Because that  
13 is the test, we would submit.

14 We would further submit that the evidence is very  
15 much one way on that topic, but if the question is to be  
16 asked, it should be directed in that fashion.

17 Question (g) --

18 SIR MICHAEL WRIGHT: What about the DVLA photograph in the  
19 light of the most recent evidence?

20 MR HORWELL: We do not exclude that. That is obviously part  
21 of the photographic image issue, and of course the jury  
22 will hear further evidence on that tomorrow.

23 Question (g) was redrafted by Mr Hilliard when he  
24 was on his feet this morning, and --

25 SIR MICHAEL WRIGHT: Always a good place to do it.

1 MR HORWELL: It is. Whether it was done before or on his  
2 feet, it was redrafted and notice of it given to us at  
3 that time. It is a better question, we submit, than  
4 that which is contained there, and Mr Perry has made  
5 suggestions in addition, and we suggest that the  
6 question could also benefit from those additions. We do  
7 submit that the question as it stands serves no useful  
8 purpose.

9 Can I then come to, and only in short measure, some  
10 of the issues that have been re-heated, re-argued,  
11 re-hashed during the course of this morning. Any  
12 question that is based on the communication system, we  
13 have these concerns: the communications system that was  
14 in existence in July of 2005 was not perfect, and we all  
15 know that. But the jury has heard no evidence  
16 whatsoever, or certainly insufficient evidence, as to  
17 what other options might have been available. The jury  
18 has heard that the police in an operation of this nature  
19 have to use, in the main, an encrypted system, and  
20 therefore what else was available to the  
21 Metropolitan Police on that day? The fact that the  
22 system was not perfect, we don't need a jury to answer  
23 that. The fact is the police had no option but to use  
24 the systems that they had, and therefore this is not  
25 only in addition to your ruling and therefore falls foul

1 of that test, we would submit that the jury have not  
2 even begun to hear sufficient evidence to enable them to  
3 answer this question. If I can fall into the trap of  
4 referring to that which was argued more than a week ago,  
5 it is the point that we raised that there is only  
6 a purpose in asking this jury a question if they have  
7 heard full evidence on the topic, and they have not.  
8 Therefore the utility of any response from the jury  
9 would not simply be extremely limited. It would be  
10 worthless, in our submission.

11 The window of opportunity, the point that never ever  
12 seems to go away, notwithstanding the fact that the  
13 evidence has put an end to it on many occasions. That's  
14 not only my submission, and my repeated submission, this  
15 is the submission of your own counsel in the document  
16 that they prepared following the submissions of all  
17 interested persons, and it's at page 25, paragraph 41:

18 "It is difficult even with the benefit of hindsight  
19 to say that a plan to stop any possible suspect before  
20 they got to the nearest bus stop was practicable or  
21 desirable. One could not be sure that a person would be  
22 identified in the few minutes it would take for him or  
23 her to walk to the bus stop on Upper Tulse Hill. If  
24 a low threshold for identifications were set, then the  
25 plan would involve firearms officers performing highly

1 visible challenges at regular intervals not far from the  
2 premises. The operation would then have ceased to be  
3 covert very quickly."

4 That is a fair reflection on the evidence, and  
5 therefore what on earth is the purpose of asking this  
6 jury any question on that topic when the evidence is one  
7 way?

8 You have heard repeated submissions this morning on  
9 the basis that the Galbraith test must apply to  
10 questions that are being put to the jury, in the sense  
11 that -- a modified test, obviously -- there has to be an  
12 evidential issue for the jury to resolve. There isn't  
13 one. The point has gone. And having gone, it should  
14 remain in that position. We shouldn't try and breathe  
15 life into it, even at the 11th hour.

16 The briefing. Of course the officers believed they  
17 may not come back that night. They faced the prospect  
18 of confronting suicide bombers. There was nothing  
19 unbalanced or improper in the briefing that they  
20 received, and therefore again --

21 SIR MICHAEL WRIGHT: My question was not intended to --  
22 didn't have the implication that it did.

23 MR HORWELL: I know, sir.

24 SIR MICHAEL WRIGHT: The implication is that they were made  
25 to realise what an extraordinarily grave situation they



1           were facing.

2   MR HORWELL:   Which was the reality, and therefore how on  
3           earth can a briefing be criticised for correctly and  
4           adequately informing police officers of the  
5           extraordinary dangers they faced?

6           Contrary to your ruling, Mr Mansfield has again  
7           sought to revive the general question, his general  
8           question that he suggests to the jury that --

9   SIR MICHAEL WRIGHT:   You mean the wrap-up question?

10   MR HORWELL:   Yes.  As I have said, we have had a ruling on  
11           this already.  The purpose of the questions is to  
12           identify the relevant issues upon which you believe  
13           answers are required.  The general question is in  
14           defiance of that approach.  It's the reason why we have  
15           sent the jury away for three weeks, is for you to  
16           identify the relevant and proper questions now to ask  
17           them.  There is no need, in addition, for a general  
18           question, in our submission.

19           It can lead, as has been pointed out more than once  
20           this morning, to inconsistencies.  We submit that having  
21           decided to ask the questions that you have, that should  
22           be an end to the matter.

23           Those are our submissions.

24   SIR MICHAEL WRIGHT:   Thank you very much, Mr Horwell.

25           Mr Hilliard.

1 Further submissions by MR HILLIARD

2 MR HILLIARD: Sir, the only point to add is this: so far as  
3 the question of ascribing the degree of contribution  
4 that any factor has made, I think we would only point  
5 out that one lawyer might have considerable difficulty  
6 with that, let alone, in our submission, 11 lay persons  
7 who all have to agree.

8 SIR MICHAEL WRIGHT: The wrap-up question.

9 MR HILLIARD: It's the part of the question about ascribing  
10 a degree of causation to particular factors. Beyond  
11 that, there is nothing I wish to add.

12 SIR MICHAEL WRIGHT: Thank you very much.

13 MR HILLIARD: Can I just raise this before I sit down:

14 I hope that all my learned friends have been provided  
15 with a copy of a draft inquisition and the draft written  
16 legal directions.

17 SIR MICHAEL WRIGHT: Yes.

18 MR HILLIARD: Obviously were any of the questions to change,  
19 then that might affect possibly some of the text. There  
20 might be consequential amendments towards the end of the  
21 legal directions, but apart from that, the query really  
22 is whether there are any objections to anything in  
23 either of those documents.

24 SIR MICHAEL WRIGHT: Are there?

25 Further submissions by MR MANSFIELD

1 MR MANSFIELD: Sir, may I just note, may I just add, it's  
2 a matter that has occurred to me before today but  
3 I hadn't troubled you with it until now, and it may be  
4 that it has occurred to you as well. In fact,  
5 I remember during discussion at an earlier stage that  
6 you posed a question when dealing with the short form  
7 verdicts, particularly in relation to what happened in  
8 the carriage, where if they are going to be left with  
9 lawful and open, you were concerned about the converse  
10 arising when only lawful is being left.

11 Now, this has arisen in previous cases, whereby in  
12 our submission it is necessary to consider whether the  
13 jury should in fact, as a matter of your direction, be  
14 indicated to them why unlawful killing is not within the  
15 ambit. Otherwise they are going to wonder why it is  
16 only put one way.

17 And why it isn't --

18 SIR MICHAEL WRIGHT: The direction in law on lawful killing  
19 will have to involve the only relevant area, which is  
20 the area of self-defence.

21 MR MANSFIELD: Yes, but of course -- I appreciate that

22 I think, sir, you will see --

23 SIR MICHAEL WRIGHT: Which effectively answers the question.

24 MR MANSFIELD: Yes. Well, to some extent it does, but it  
25 raises the question as well, why are we only considering

- 1           it in that context? Because of course the standard --  
2           you are not considering it as unlawful because the  
3           standard of proof is different.
- 4   SIR MICHAEL WRIGHT: That's right, again we are in the  
5           gap -- not in the gap but we are differentiating between  
6           the two levels of proof.
- 7   MR MANSFIELD: Yes. On occasion coroners have thought it  
8           desirable at least to indicate to the jury the territory  
9           with which they are dealing.
- 10   MR HILLIARD: Can I just interrupt to help?
- 11   MR MANSFIELD: Yes, certainly.
- 12   MR HILLIARD: If the question is that -- should you be  
13           saying something somewhere in the summing-up about why  
14           the jury are not considering unlawful killing, then in  
15           my submission there is force in that, it would be wise  
16           to do it, but not in my submission, it wouldn't need to  
17           go in these written directions.
- 18   MR MANSFIELD: No, no, I am not suggesting that.
- 19   MR HILLIARD: If that's the point that's being raised, then  
20           with respect I support it, and we can leave it there.
- 21   SIR MICHAEL WRIGHT: I am giving nothing away if I tell you  
22           that what is I hope a fairly full and accurate  
23           definition of the elements of the defence of  
24           self-defence will be in the summing-up.
- 25   MR MANSFIELD: Yes, I thought I would raise it now.

1 SIR MICHAEL WRIGHT: Quite all right. Thank you all very  
2 much.

3 What I am intending to do is this: because of the  
4 constraints on time and because I need to reflect on  
5 these matters, I need to reflect quite a little on what  
6 has been said to me this morning, I'm not going to give  
7 a formal ruling but I will ask in due course for every  
8 interested party's representatives to be emailed later  
9 today with the final version of the questions, and that  
10 will in effect amount to the ruling.

11 I will, however, arrange to see -- and I will give  
12 reasons for the arrival at the final list of questions  
13 which will probably be handed down after the jury have  
14 gone out, but they will be available to all the parties  
15 in due course.

16 I hope that will meet the necessary requirements of  
17 the procedure.

18 Anything else, Mr Hilliard?

19 MR HILLIARD: No, thank you.

20 MR MANSFIELD: Sir, I'm so sorry, may I just raise one  
21 matter?

22 SIR MICHAEL WRIGHT: Yes, please.

23 MR MANSFIELD: It for obvious reasons would be important if  
24 we may have -- I'm not entirely clear, it may be my  
25 fault, I wasn't listening as carefully as I could to

1           what you were saying -- is it anticipated that we will  
2           receive today the questions ...

3   SIR MICHAEL WRIGHT: Subject to the logistics, yes.

4   MR MANSFIELD: Yes.

5   SIR MICHAEL WRIGHT: I have to look at them and if necessary  
6           do some redrafting.

7   MR MANSFIELD: Yes, I appreciate that. I'm not trying to  
8           accelerate anything. It's just that obviously for  
9           reasons that may be very clear, we would need to know  
10          today if possible.

11   SIR MICHAEL WRIGHT: I think it is intended that you  
12          should -- I'm reliant on Mr Hilliard and Mr Hough at the  
13          moment.

14   MR HILLIARD: There is no difficulty about communicating  
15          that to everybody today. That logistically can be done.

16   SIR MICHAEL WRIGHT: There you are. I don't think anybody  
17          is giving you an undertaking, Mr Mansfield, but we think  
18          you will get it.

19   MR MANSFIELD: I understand.

20   SIR MICHAEL WRIGHT: Thank you all very much. In that case,  
21          as far as we are all concerned, we will meet again  
22          tomorrow at 10 o'clock.

23   (12.45 pm)

24                   (The court adjourned until 10.00 am on  
25                   Tuesday, 2 December 2008)

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