

1 Friday, 21 November 2008

2 (9.30 am)

3 SIR MICHAEL WRIGHT: Yes, Ms Leek.

4 Submissions by MS LEEK

5 MS LEEK: Sir, those I represent support in their entirety
6 the submissions made by Mr Stern. We agree with the
7 submission that even if unlawful killing is not left to
8 the jury, then the jury ought to be asked to return
9 a verdict setting out their conclusion as to whether the
10 officers were justified in shooting Mr de Menezes.

11 The most convenient way to do this is by leaving the
12 traditional short form verdicts of lawful killing and
13 open.

14 Sir, in paragraph 14 of Middleton, referring to the
15 case of McCann, the Death on the Rock case, Lord Bingham
16 said this:

17 "The central question was whether the soldiers had
18 been justified in killing the deceased."

19 Sir, should you not use the traditional short form
20 lawful and open verdicts you will need in any event to
21 elicit the jury's response to this issue in their
22 verdict.

23 Sir, we agree with Mr Stern that the central issue
24 is not the precise sequence of facts and the precise
25 sequence of events, and who said what in the carriage,

1 but the issue of honest belief.

2 Sir, contrary to paragraph 55 of Mr Hough and
3 Mr Hilliard's submissions, we submit that there is no
4 difficulty whatsoever presented by directing the jury as
5 to the constituents of lawful killing and an open
6 verdict, and in directing the jury on self-defence.

7 You would have to do this in any event if you were
8 to ask the question about whether the shots were
9 justified, because justification would be justification
10 in law and the same test would apply.

11 Sir, there would be no requirement to give any sort
12 of direction as to gross negligence manslaughter if you
13 were solely leaving verdicts as to lawful killing and
14 open, and that is --

15 SIR MICHAEL WRIGHT: If I were to leave lawful killing,
16 don't I have effectively to direct the jury as to the
17 matters about which they have to be satisfied, on the
18 balance of probabilities?

19 MS LEEK: Yes, absolutely, on the balance of probabilities
20 and that would be the honest belief.

21 SIR MICHAEL WRIGHT: Might be thought to be a rather high
22 risk tactic.

23 MS LEEK: Sir, that is --

24 SIR MICHAEL WRIGHT: They might not agree.

25 MS LEEK: They might not, in which case they would return

1 an open verdict.

2 SIR MICHAEL WRIGHT: Is there a logical gap between lawful
3 and unlawful killing?

4 MS LEEK: I am not sure I understand.

5 SIR MICHAEL WRIGHT: Is there a grey area into which you can
6 fall? I don't see that there is myself, but between
7 a lawful killing and an unlawful killing.

8 MS LEEK: Sir, you would determine not to leave unlawful on
9 the basis that there was no evidence that a properly
10 directed jury could return that verdict to the relevant
11 standard.

12 SIR MICHAEL WRIGHT: That is the approach I am being asked
13 to take, yes.

14 MS LEEK: But you would still have to ask them whether or
15 not they found the shots were justified.

16 SIR MICHAEL WRIGHT: I could understand it if you were to
17 say I should direct a lawful killing verdict on the
18 basis that where one ends the other begins.

19 MS LEEK: Sir, I'm sure Mr Stern would have no objection to
20 that, and for my part neither would I or my clients.

21 SIR MICHAEL WRIGHT: I daresay he wouldn't, but the question
22 is whether it's right in law to do it.

23 MS LEEK: To direct them to do so?

24 SIR MICHAEL WRIGHT: Yes.

25 MS LEEK: Sir, if you decide not to leave unlawful, then

1 they have to be able to return to answer the question as
2 to whether they consider the shots were justified to the
3 relevant standard.

4 SIR MICHAEL WRIGHT: That may depend upon the drafting of
5 the questions, of narrative verdict form questions.

6 MS LEEK: Yes.

7 SIR MICHAEL WRIGHT: All I am really cavilling about -- I am
8 not really cavilling. All I am really wondering about
9 is whether even on your approach, the formalistic short
10 form verdict is the right answer; whether it isn't in
11 fact a preferable way to do it and certainly the modern
12 thinking is to draft a series of questions which may
13 well produce in the end the answer.

14 MS LEEK: Sir, I am not sure that's been the thinking so far
15 as shooting cases is concerned --

16 SIR MICHAEL WRIGHT: No, I understand that.

17 MS LEEK: Because as Mr Stern said -- well, between Mr Stern
18 and me, we have been involved in eight of these cases
19 I think between us, in which on every single occasion,
20 lawful killing and open have been left.

21 SIR MICHAEL WRIGHT: Bennett?

22 MS LEEK: Yes. And in a number of others, sir, and in the
23 only one in which lawful killing and open weren't left
24 was a case that Mr Davies and I were involved in, and
25 that was a case in which a specific question was asked

1 as to whether the shots were justified. The reason that
2 was left as opposed to lawful killing was that there
3 were very, very complicated issues of causation but the
4 question was still asked as to whether or not the
5 officers honestly believed that they were in imminent
6 danger of attack.

7 SIR MICHAEL WRIGHT: Yes, all right.

8 MS LEEK: But for those issues of causation, lawful killing
9 and open would have been left.

10 SIR MICHAEL WRIGHT: What is the -- I am a very, very long
11 way away from making up my mind about how I am going to
12 approach this, believe you me. What would be the
13 objection as one of the questions left to the jury: did
14 Charlie 2 and Charlie 12 honestly and genuinely believe
15 they were under immediate threat of attack?

16 MS LEEK: There would be no objection to that.

17 SIR MICHAEL WRIGHT: Right. It achieves what you are asking
18 me to do, doesn't it?

19 MS LEEK: Yes. But, sir, that would be subject to
20 directions, the usual directions on self-defence, and
21 the Palmer direction as to being able to weigh to
22 a nicety, et cetera.

23 SIR MICHAEL WRIGHT: Yes. I am not sure about that.

24 MS LEEK: It wouldn't deal with the reasonableness of the
25 use of force unless it were accepted that if they

1 honestly believed that they were under attack,
2 everything they did was obviously reasonable.

3 Sir, it would be our submission that there would be
4 no requirement to give any sort of direction as to gross
5 negligence manslaughter if you were only leaving
6 verdicts of lawful and open, because that would only
7 relate to the honest belief of the officers.

8 Sir, there would be no confusion as suggested by
9 your counsel in doing that, because you would simply
10 give the standard direction as to lawful killing and
11 open.

12 SIR MICHAEL WRIGHT: As to self-defence, really.

13 MS LEEK: Yes.

14 Sir, I make no submissions as to narrative verdicts
15 in the light of two matters. First of all,
16 Mr Mansfield's, if I can call it informal commendation
17 of my client, Trojan 84, for which we are very grateful,
18 and his recognition that the issue of who said what as
19 between Alan and Inspector ZAJ is overtaken by
20 subsequent events.

21 SIR MICHAEL WRIGHT: Thank you very much. Yes, Mr Gibbs.

22 Submissions by MR GIBBS

23 MR GIBBS: Sir, as to short form verdict you won't expect to
24 hear very much from me. It's enough perhaps if I say
25 that for the reasons which they have given, we support

1 the submissions which have been made to you on behalf of
2 the Metropolitan Police Service and C2 and C12.

3 May I add to my written submissions, our written
4 submissions, about the narrative in three areas. The
5 first is as to questions of fact in the carriage after
6 the follow; secondly as to questions of fact at
7 Scotia Road before the follow; and, thirdly, and very
8 shortly, on the subject of the vocabulary to be used
9 generally in the propositions in the form of
10 a questionnaire or however else to be left to the jury.

11 Firstly as to the questions of fact in the carriage
12 after the follow, could I invite your attention to your
13 counsel's submissions at paragraph 51 which are on
14 page 30 of the document. I say nothing about (i) and
15 its appropriateness because the evidence of the
16 surveillance officers in that regard is helpful but
17 equivocal.

18 As to (ii) and (iii), in my submission the evidence
19 of Ivor was clear but, more important than its clarity,
20 it was not challenged. I have prepared -- and I hope
21 you have a copy in front of you -- just a very short set
22 of excerpts of some of the evidence. On this topic it's
23 the first page. You will find there three excerpts, two
24 from Ivor and one from Geoff.

25 In the first, which is on page 2 of Day 24, if you

1 allow your eye just to run down it, you will see that
2 you are asking Ivor questions designed to get in
3 a little more detail exactly what Mr de Menezes did in
4 the seconds before he was grabbed.

5 SIR MICHAEL WRIGHT: Yes.

6 MR GIBBS: You then have in the second excerpt my learned
7 friend Mr Mansfield asking him some questions on the
8 same topic, and in particular, as it were, putting,
9 insofar as the family of Mr de Menezes has case, putting
10 the case to him.

11 SIR MICHAEL WRIGHT: Yes.

12 MR GIBBS: It's a statement of the case, if that's the right
13 way to describe it, which doesn't suggest that
14 Mr de Menezes didn't stand up and does not suggest that
15 he didn't move.

16 The same is true if one looks at the third excerpt
17 which comes from the evidence of Geoff, and again it's
18 during the questioning by my learned friend
19 Mr Mansfield. You can see again what is put.

20 SIR MICHAEL WRIGHT: Yes. Effectively it's being accepted
21 as a starting point that he came out of his seat.

22 MR GIBBS: Yes.

23 SIR MICHAEL WRIGHT: Which of course would be the
24 explanation as to how Ivor was able to get him into
25 a bear hug, couldn't do it otherwise.

1 MR GIBBS: Yes. My submission is that it would be wrong in
2 principle to leave to a jury a factual finding which
3 would necessarily involve a conclusion of untruthfulness
4 against a witness --

5 SIR MICHAEL WRIGHT: Sorry, where are you now, Day 21?

6 MR GIBBS: No, I am making a submission to you.

7 SIR MICHAEL WRIGHT: Sorry, you correctly reprove me. Go
8 on.

9 MR GIBBS: It's a proposition which I commend to you. It's
10 this: that it would be wrong in principle to leave to
11 a jury a factual finding which would necessarily involve
12 a finding of untruthfulness against a witness who was
13 not given a chance to deal with it. A factual finding
14 which, if returned by the jury, would by implication or
15 necessarily involve a finding of perjury against the
16 witness.

17 If there had genuinely been perceived to be any risk
18 of such a finding being left to a jury as a question of
19 fact, then I have no doubt that even if it had not been
20 put by my learned friend Mr Mansfield, those who
21 represent you in these proceedings or you yourself would
22 have intervened to make sure that the witness had
23 an opportunity to deal with it. And the explanation for
24 why you didn't, of course, is plain, because the
25 evidence of Ivor has never been doubted on the subject;

1 indeed this is something, as you will remember from the
2 family's submissions, which you opened as a fact to the
3 jury at the very outset of this inquiry.

4 SIR MICHAEL WRIGHT: Insofar as I used the word "walked",
5 it's criticised --

6 MR GIBBS: Yes.

7 SIR MICHAEL WRIGHT: I have no difficulty with that, it may
8 well be right. The point you are presently making, does
9 it go any further than the question as to whether or not
10 Jean Charles de Menezes stood up?

11 MR GIBBS: Yes, whether he -- I am looking, as I said, at
12 paragraph 51(ii) and (iii) and they are being floated,
13 as of course it's all very provisional at this stage, as
14 two issues of fact which might be candidates for being
15 left for the jury's determination. In my submission
16 they should not be so left and they should not be so
17 left because if they were found, as it were, against the
18 officer, that would involve a finding by implication or
19 expressly that Ivor and, I suppose, Geoff also had lied.

20 SIR MICHAEL WRIGHT: We can discuss the precise format of
21 the questions hereafter.

22 MR GIBBS: Of course.

23 SIR MICHAEL WRIGHT: But I suppose your point would be met
24 if, in the second and third question in paragraph 51, if
25 (ii) and (iii) were run together on the basis that

1 having stood up did Mr de Menezes, and then you consider
2 what the format of the question should be. In other
3 words what you are really saying to me is that the
4 questions as formulated should effectively conclude that
5 he did.

6 MR GIBBS: I'm asking that no question be left to the jury
7 which, if concluded in a particular way, open to the
8 jury so to conclude, would involve by implication --

9 SIR MICHAEL WRIGHT: I understand precisely what you say.

10 MR GIBBS: A finding of untruthfulness against a witness --

11 SIR MICHAEL WRIGHT: As to which your submission, there is
12 no room on the evidence.

13 MR GIBBS: No room on the evidence, never challenged on the
14 subject, either here or when he gave evidence
15 previously, indeed having left the
16 Central Criminal Court having given evidence with
17 a formal commendation from Mr Justice Henriques as to
18 his actions at that specific moment.

19 SIR MICHAEL WRIGHT: Yes.

20 MR GIBBS: The second area on which I add to my written
21 submissions, if I may, is the questions of fact at
22 Scotia Road before the follow. It arises, if I could
23 invite you to look at it, at the suggested provisional
24 draft questionnaire which my learned friend Ms Hill has
25 provided to us all, and it's on page 3 at

1 paragraph 5(vi).

2 SIR MICHAEL WRIGHT: Say again, please.

3 MR GIBBS: Page 3 of the suggested provisional draft
4 questionnaire.

5 SIR MICHAEL WRIGHT: Yes.

6 MR GIBBS: (vi) at the top, and it's the only one I think
7 really which deals much with surveillance evidence and
8 it's the failure to provide the tight control of
9 Scotia Road. I confess that when I included it in my
10 document as one of the matters which have been traversed
11 during the course of the inquiry, I did it slightly
12 mischievously, not anticipating that it would ever find
13 its way as far as this, but then that's my fault, isn't
14 it.

15 As a question of fact, my submissions are these:
16 that any question which is left to the jury will have to
17 be, will require them to be directed as to the law which
18 obtains in relation to that question and will require
19 you to summarise at the very least all the evidence
20 which impacts upon that question. Therefore, all
21 unnecessary questions should be avoided. This, in my
22 submission, is --

23 SIR MICHAEL WRIGHT: Not at all sure, I only saw this paper,
24 this document this morning, I'm afraid that's my fault,
25 I am not at all sure what the distinction is between (v)

1 and (vi).

2 MR GIBBS: I think that (v) it might be said was in its
3 language directed more at those who weren't at
4 Scotia Road and that (vi) is perhaps directed more at
5 those who were.

6 SIR MICHAEL WRIGHT: Yes, maybe.

7 MR GIBBS: But my submissions are these: that one should, if
8 possible, avoid unnecessary questions for all the usual
9 reasons.

10 Secondly, that no question should be included which
11 is not a central issue of fact concerning the death,
12 because that's the law, and this in my submission is not
13 a central issue of fact.

14 Thirdly, that no matter should be submitted for jury
15 determination which is causally irrelevant because,
16 certainly until a court in the case of
17 Lewis v Shropshire or some other case determines
18 otherwise, that is also, in my submission, the law, and
19 it would require some ingenuity, I suggest, to turn this
20 question of the tightness of the control of the premises
21 into a causally relevant matter.

22 The fourth, more practical proposition, is that in
23 my submission the answer is already plain. If one looks
24 at what we have in (vi) it's actually two questions or
25 two propositions: it's the failure to provide tight

1 control, and then the failure to provide a sufficient
2 level of identification --

3 SIR MICHAEL WRIGHT: Not limited to what was happening
4 around Scotia Road.

5 MR GIBBS: No, quite. As to the failure to provide
6 a sufficient level of identification upon which
7 an informed decision as to intervention could be taken,
8 it's plain on the evidence that such identification was
9 indeed provided because "possible" was a sufficient
10 trigger, and "possible" was given within five minutes of
11 exit from the premises.

12 As to tight control, you have evidence, in my
13 submission, from a number of witnesses, most obviously
14 Derek, who were in the best position, equipped with the
15 best experience, to answer this question.

16 If one stands back a moment and thinks about leaving
17 the first half of (vi) to the jury, are we to ask the
18 jury to substitute their view of how an experienced
19 Special Branch surveillance team, led by a man who had
20 been doing this job for years, against all sorts of
21 enemies, many almost as dangerous as those that they
22 faced that day, here, there, at home, abroad, at night,
23 in daylight, in towns, in the country, in all sorts of
24 different situations, each of which requires a judgment
25 on the ground as to how forces should be deployed.

1 Are we to invite the jury to substitute their view
2 on the basis that it might be a better view, as to how
3 the red team should have been deployed in the streets
4 around this property, especially where we don't actually
5 know where they were. I think it was you who elicited
6 that on this subject almost determinative fact. If
7 I could invite you, in the excerpts bundle I have given
8 you, to the bottom of page 3. Here we are on Day 21 in
9 the evidence of Derek, and at page 21. You will see on
10 the last line your intervention. Could I ask you to
11 just let your eye rise and fall above and below that?

12 SIR MICHAEL WRIGHT: Just a moment. (Pause).

13 MR GIBBS: As you will remember, we have evidence from, is
14 it four members of the red team out of a total of 10 or
15 11?

16 SIR MICHAEL WRIGHT: I am just thinking, Frank, Edward and
17 Tango 2 are accounted for.

18 MR GIBBS: Yes, three then.

19 SIR MICHAEL WRIGHT: Then of course Derek as well.

20 MR GIBBS: Oh, and Derek, yes. So as to where the other six
21 were, we don't know, and yet we would be asking the
22 jury, not knowing where the others were, to say that
23 they were not tight enough on the basis that they can
24 guess that that might be so.

25 What you have, in my submission, is -- and I have

1 given you the excerpts here from Derek's evidence on the
2 subject and you will remember, should there have been
3 someone in the playground, and your interruption,
4 I think, as to what a burly gentleman in a children's
5 playground on this morning --

6 SIR MICHAEL WRIGHT: I am not terribly proud of it,
7 Mr Gibbs.

8 MR GIBBS: I think Mr Horwell's response, which may have
9 been amusing, but was also accurate, was that he
10 probably would have been arrested.

11 SIR MICHAEL WRIGHT: Pretty fair chance, anyway.

12 MR GIBBS: It shows, in my submission, doesn't it, that it
13 would be ill advised at the very lowest to invite the
14 jury, on a subject like this which is not causally
15 relevant, not central, which must rank very low amongst
16 other questions here, to substitute their view of how
17 the team should have been deployed for the views of
18 those who really know about these things.

19 One can be, as a lawyer, as sceptical as one likes,
20 but ultimately it may on occasions just be better to
21 admit that the people who do this for a living sometimes
22 know best, and there would be no shame in coming to that
23 conclusion, and to drafting the questionnaire in a way
24 which is informed by that approach.

25 It may be that that applies to a number of the other

1 propositions in the draft suggested provisional
2 questionnaire, but I do not address them because they
3 impact on the evidence which was given by those whom
4 I represent.

5 As a matter of fact, if one thinks what happened on
6 this day, within five minutes of Mr de Menezes having
7 come out of his front door, no fewer than seven
8 surveillance officers had managed to bring themselves to
9 bear upon him, in circumstances where all the usual
10 tensions about not too close, not too far, the
11 possibility of not just someone realising that they
12 might be being followed, but that being followed by some
13 crazy detonation and the public being put at risk, that
14 it might be possible just to stand back from it and to
15 say, although we would like to criticise this, and there
16 are a lot of things we would like to criticise, actually
17 they didn't do at all a bad job, and one doesn't need to
18 leave it to a jury to recognise that that's the case.

19 The third area, the final area, very briefly, upon
20 which I add to my written submissions, is as to the
21 general vocabulary which might be employed in the
22 drafting of the questionnaire. Failure is a word which
23 presently occurs in a number of various people's
24 draftings. I just flag up for later consideration, when
25 we come to it, whether that is in fact the most helpful

1 language to use, particularly if you were to be
2 interested insofar as it were possible in achieving some
3 sort of consensus, at least as to some of the questions
4 which might be left.

5 Of course there is no legal bar against using
6 judgmental, normative language, but my submission is
7 that you may conclude that such language is better
8 avoided where it can be. If one thinks about the draft
9 inquisition which was left to the jury enquiring into
10 the death of the Princess of Wales, it is in my
11 submission notable for the neutral and yet entirely
12 informative phraseology which was used and indeed
13 adopted by that jury.

14 When we come to consider if -- maybe I won't be
15 called upon, but when others come to consider the
16 precise questions which might be left, I ask you to ask
17 others why it is, if they are saying to the contrary,
18 that non-judgmental, neutral and yet informative
19 language should not be used.

20 SIR MICHAEL WRIGHT: You would be looking for propositions,
21 if you like, opening with some such wording as "the fact
22 that".

23 MR GIBBS: Yes, exactly. Binary propositions for the jury
24 which return a conclusion about the facts rather than
25 something else. As soon as one gets into normative

1 language, my submission is it is open to -- one doesn't
2 actually know what it means, or, put it another way,
3 different people may take it to mean different things,
4 and I don't just have the media in mind.

5 If one wants to maximise the informative nature of
6 the inquisition, in my submission it is best to be
7 neutral and to concentrate upon facts rather than upon
8 judgments, save where judgments -- if that's right --
9 can't be avoided. In my submission, here, as was the
10 case in the death of the Princess --

11 SIR MICHAEL WRIGHT: That of course is unavoidable where
12 there is conflict. The word "failure" doesn't
13 necessarily arise, but there have to be questions left
14 to the jury when they have to determine between two
15 different accounts.

16 MR GIBBS: Yes, subject to the centrality of the issue and
17 its causal relevance. Yes. But that doesn't prescribe
18 the use of the word failure.

19 Those are my submissions.

20 SIR MICHAEL WRIGHT: Thank you very much, Mr Gibbs.

21 Yes, Mr Perry.

22 Submissions by MR PERRY

23 MR PERRY: Thank you very much, sir.

24 Sir, may I, at the outset, give a broad outline or
25 overview of our oral submissions and they are really

1 divided into seven parts. First, I intend to make some
2 general observations on our approach, and the
3 conclusions that we invite you to reach in the cases of
4 the three officers that we represent.

5 Secondly, we intend to address the matters raised in
6 the letter sent by Barlow Lyde & Gilbert on 17 November
7 this year, and in particular address the effect of the
8 judgment of the Administrative Court in the Da Silva
9 case and the differences between the evidence given in
10 these proceedings and in the criminal trial, the
11 difference in the state of the evidence.

12 Third, make some observations on the exceptional
13 circumstances confronting the police on 21 and 22 July.

14 Fourth, to deal with certain observations which, if
15 we may, sir, pick up on a point you made when you
16 observed to some of the officers, "You are damned if you
17 do, you are damned if you don't", to see what the
18 alternative courses of action open to the police might
19 have left them exposed to.

20 Fifth, our response to the criticisms made yesterday
21 in the course of Mr Mansfield's submissions.

22 Sixth, the significance of concessions made by
23 Mr Mansfield in the course of his oral submissions.

24 Finally, we will make some observations on the
25 narrative verdict and some concluding comment.

1 Sir, may I say, having heard Mr Gibbs this morning,
2 we would entirely support his observations on the
3 question of narrative verdict. They seem to us to be
4 full of very good sense inasmuch as that they would
5 provide a very simple framework within which we could
6 all operate, particularly the jury, and also --

7 SIR MICHAEL WRIGHT: You mean avoiding so far as possible
8 pejorative language?

9 MR PERRY: Yes, and also that it has another advantage,
10 because one of the difficulties about a six-page or
11 five-page questionnaire is of course if that route were
12 to be followed, we would have to make submissions as to
13 the detailed factual directions that would have to be
14 given to the jury on each point because you would
15 inevitably have to have a very balanced and detailed
16 direction on each point to ensure that the jury was
17 properly directed in relation to each point.

18 So, sir, very shortly, our general observations,
19 just to deal with our first topic, and I can take this
20 very shortly indeed, first of all we adopt our written
21 submissions, and I don't intend to repeat them.

22 Secondly, we adopt the legal submissions advanced on
23 behalf of the Commissioner by Mr Horwell.

24 SIR MICHAEL WRIGHT: As to duty of care.

25 MR PERRY: The duty of care. I am going to say something

1 about that in a little moment, if I may, sir. Our
2 primary position is we adopt the legal submissions
3 advanced on behalf of the Commissioner by Mr Horwell.

4 The third general observation at the outset is we
5 support the submissions advanced on behalf of C2 and C12
6 by Mr Stern, those advanced by Ms Leek on behalf of her
7 clients and those advanced on behalf of the surveillance
8 officers by Mr Gibbs.

9 Sir, may I just make these short observations in
10 relation to our position on the duty of care issue, lest
11 it be misunderstood: our primary case supporting
12 Mr Horwell is that no duty of care arises in this case
13 because the facts fall within the core principle
14 established by the House of Lords in the Hill case.
15 That's the primary submission.

16 However, our fallback position was made clear in our
17 written submissions at paragraph 2.5, and if, contrary
18 to the arguments advanced on behalf of the Commissioner,
19 the facts of this case are capable of giving rise to
20 a duty of care, then we submit that two key issues fall
21 to be considered.

22 The first key issue is at what point does the duty
23 of care crystallise; and the second key issue is what is
24 the content of the duty. Sir, for my purposes, may
25 I just say a few words about the first question, namely

1 at what point does the duty of care crystallise.

2 We have in the arguments advanced thus far two
3 polarities: at one extreme there is the Commissioner, at
4 the other extreme is the family.

5 If the conclusion is reached that at some point,
6 a duty of care could crystallise, then between those two
7 extremes the exact point would need to be located
8 because that would have an obvious and crucial impact on
9 who was captured by the duty of care.

10 We submit that Mr Mansfield's extreme position,
11 namely that there was a duty of care and that it
12 crystallised at 4.55 am, and it applied to each of the
13 officers presently under consideration --

14 SIR MICHAEL WRIGHT: Effectively from the very beginning of
15 the story.

16 MR PERRY: Yes. We submit that that would be exorbitant and
17 erroneous, and if it be the case that there is at some
18 point the crystallisation of a duty of care, we have
19 made our position clear, it would be at the point at
20 which an intervention against a specific individual was
21 decided upon; and in those circumstances we submit
22 Mr McDowall no duty of care for the reasons we have set
23 out in our document; DAC Dick, possible duty of care;
24 and Chief Inspector Esposito, no duty of care, for the
25 reasons we have set out.

1 So that is the position as we see it, sir, and I do
2 not want to take up time unnecessarily on that.

3 SIR MICHAEL WRIGHT: What is the point that you pick, or do
4 you not want to do so?

5 MR PERRY: Well, we have made it clear in our document.

6 I can say the point that we definitely say it doesn't
7 arise, if we are forced back to our fallback position,
8 and that's when you simply set in train a strategy.
9 Because no-one --

10 SIR MICHAEL WRIGHT: I have gone past your first point,
11 really on the basis that there is a possibility.

12 MR PERRY: Yes, well, we make it clear in our document, sir,
13 that what we say in relation to that, it would be at the
14 point at which it is decided to embark on
15 an intervention.

16 SIR MICHAEL WRIGHT: Yes, in other words, following Hill and
17 Van Colle, the point if there is one at which the police
18 activity changes from the investigatory to the
19 operational.

20 MR PERRY: Yes, yes.

21 SIR MICHAEL WRIGHT: The question is where.

22 MR PERRY: Yes, but that's where we would locate it. If we
23 are right on that, as a fallback position, without
24 seeking to undermine in any way the principal
25 submission, but if we are right about that, then

1 Mr McDowall is excluded and we would submit that

2 Mr Esposito for separate reasons is --

3 SIR MICHAEL WRIGHT: Mr Esposito, according to you, is not
4 in it for an entirely different reason.

5 MR PERRY: Yes. So that's the way we put it, sir.

6 On the breach of duty issue, assuming a duty of care
7 is found to exist, our primary submission is no breach.

8 On the causation issue, we say no identifiable act
9 or omission that was causative of death. Just for
10 cross-reference, see our written submissions at
11 paragraph 2.7.

12 On the gross negligence issue, quite apart from the
13 difficulties in establishing the existence of a duty,
14 breach of the duty and causation, we submit there is no
15 tenable basis for suggesting that the conduct of the
16 officers or any of the officers was so bad in all the
17 circumstances as to amount to a criminal act or
18 omission.

19 On the gross negligence issue, sir, may we
20 respectfully endorse the tentative assessment -- and we
21 recognise it's a tentative assessment -- made by your
22 own counsel to the effect that it may be thought
23 impossible to say that the failures against the three
24 officers we represent amounted to a gross breach of
25 duty.

1 So we invite you overall to conclude that a verdict
2 of unlawful killing is not available on the facts of
3 this case.

4 Accordingly, it would follow if we are right in
5 relation to that or if you accept that, sir, having
6 heard all the submissions, the only permissible short
7 form verdict would be either one of lawful killing or
8 an open verdict, and the verdict of lawful killing if
9 returned would reflect on the actions of C12 and C2 as
10 the officers directly involved in the shooting.

11 Sir, may I just make our submission on a question
12 you put to Ms Leek just a short time ago, whether
13 a verdict of lawful killing could be returned by way of
14 judicial direction. We submit that it would certainly
15 be possible to give a firm direction to the effect that
16 the only safe verdict supported by the thrust of the
17 evidence was one of lawful killing, leaving it to the
18 jury to make their own conclusion following a firm
19 direction; and of course it would require detailed
20 directions on self-defence, the ordinary detailed
21 directions --

22 SIR MICHAEL WRIGHT: Exactly the same as I would have to
23 give if I was leaving an unlawful killing verdict to the
24 jury.

25 MR PERRY: Or a narrative. Because whichever way you do it,

1 but it seems to us, sir, because it impacts principally
2 upon C2 and C12, we support the submissions made on
3 behalf of those officers because, although you put it in
4 debate this morning, it may be thought to be a high risk
5 strategy, it must be if those officers seek it, they
6 must know and appreciate, and it might be thought as
7 a matter of fairness to them, given the public interest
8 in this matter and what we have seen when they gave
9 evidence in these proceedings, that if the two officers
10 principally involved in this incident seek a direction
11 in that form, then as a matter of fairness to them it
12 ought properly to be left.

13 If the thrust of the evidence is to the effect that
14 that would be the only safe conclusion for the tribunal
15 of fact to reach, then we would submit that a very firm
16 direction could be given to the jury to ensure that to
17 the extent it is a high risk strategy, that the risk is
18 reduced to the bare possible minimum in these
19 circumstances.

20 Sir, we do support the submissions made by those
21 officers, and we do say as a matter of fairness to them,
22 if they wish it to be left, great weight should be
23 afforded to their views.

24 So that concludes the introductory topics. May
25 I turn to the letter from Messrs Barlow Lyde & Gilbert

1 on 17 November 2008. Sir, you will recall that we were
2 invited to address three issues, first of all the test
3 which was being applied by the High Court in the
4 Da Silva case, and how it differed from the modified
5 Galbraith test, which you, sir, are required to apply.

6 Secondly, the weight to be given to the remarks made
7 by the court that the view taken by the Director of
8 Public Prosecutions on certain matters when reaching his
9 decision not to prosecute any of the officers was
10 obviously right.

11 And thirdly, what new evidence has come to light
12 since the Da Silva judgment which may bear upon some of
13 the issues considered by the High Court in that case.

14 Sir, may I just deal with the first point, the test
15 being applied by the court in Da Silva and how it
16 differs from the modified Galbraith test. May I preface
17 our remarks by acknowledging at the outset that the test
18 being applied by the High Court in Da Silva was
19 concerned with a public law and human rights challenge
20 to a decision to prosecute, and therefore we are not
21 suggesting in any way --

22 SIR MICHAEL WRIGHT: 51 per cent.

23 MR PERRY: Yes. Well, it depends how you formulate it,
24 because the bookies' odds test, I am not sure whether it
25 is a 51 per cent test --

1 SIR MICHAEL WRIGHT: The basic question is whether it
2 is Wednesbury unreasonable.

3 MR PERRY: It was whether it was Wednesbury unreasonable and
4 then you had in addition a proportionality argument that
5 was being advanced because it was suggested that the
6 procedural right under Article 2 of the Convention was
7 engaged and that meant that the scrutiny that the court
8 was to apply was to be more intense.

9 SIR MICHAEL WRIGHT: And that was rejected.

10 MR PERRY: That was rejected. However, sir, may we just
11 make this point at the outset: we were not seeking, when
12 we made in our written submissions reference to the
13 Da Silva judgment, we were not seeking to say that the
14 Da Silva judgment had determined any specific factual
15 issue in these proceedings, and we couldn't make that
16 submission, and nor were we.

17 However, we were being confronted, and we were very
18 grateful to Mr Mansfield and Ms Hill for providing in
19 advance the copy of their written submission, which was
20 extremely useful and helpful to us in preparation of
21 ours. But we were confronted in the written submissions
22 prepared by counsel criticising the officers we
23 represent, with a suggestion that it would be perverse
24 to conclude that no jury properly directed could find
25 that Deputy Assistant Commissioner Dick's breaches of

1 duty were so serious as to be classified as criminal.

2 So, sir, what was being suggested was that it would
3 in fact be *Wednesbury* unreasonable not to leave the
4 allegation of unlawful killing, assuming a duty of care
5 exists, on the basis of gross negligence.

6 So given that the assessment of gross negligence
7 requires an evaluation, and there is a threshold test
8 with the judicial safeguard to ensure that, before the
9 threshold is reached, a case could be withdrawn from
10 a jury -- that was another point that the High Court
11 dealt with in the *Da Silva* case in answer to the
12 supremely a jury question using the language of the
13 Lord Chancellor in *Adomako*.

14 Sir, the point that we were making was that if it
15 were to be suggested it would be perverse to leave gross
16 negligence manslaughter, and that in public law terms
17 such a finding would be perverse or *Wednesbury*
18 unreasonable, that was the very argument rejected by the
19 High Court in *Da Silva*. We simply rely upon it for that
20 reason.

21 The second matter, the weight to be given --

22 SIR MICHAEL WRIGHT: Sorry, it would be perverse not to
23 leave gross negligence --

24 MR PERRY: Yes, thank you. The second point is the weight
25 to be given to remarks made by the court, that the view

1 taken by the Director on certain matters was obviously
2 right.

3 What we say in relation to that is while the remarks
4 made by Lord Justice Richards speaking for the court in
5 Da Silva are clearly not binding, they, we would submit,
6 are of some assistance on the question of the gross
7 negligence threshold, assuming that there is no material
8 change in the evidence adverse to the police and the
9 officers concerned in this case. For reasons for which
10 we will submit in a moment, we say that the evidence
11 adduced in these proceedings, and it appears to be the
12 case that this is accepted on all hands, is now more
13 favourable to the police than it was at the time that
14 this case was considered by the Director, and when it
15 was considered at the Central Criminal Court.

16 Sir, so far as the position of the Director is
17 concerned, you will recall that the decision not to
18 prosecute was taken by Mr O'Docherty following
19 consultation with the Attorney General and having taken
20 the advice of leading counsel.

21 The High Court, if I may just give the reference,
22 stated that although it was not necessary to go this
23 far, saw no reason to disagree with Mr O'Docherty's
24 conclusion on the question of gross negligence. That's
25 paragraph 58 of the --

1 SIR MICHAEL WRIGHT: Of the main judgment?

2 MR PERRY: -- of the main judgment. Sir, may I just leave
3 that by way of general observation for your note without
4 turning up the authority.

5 SIR MICHAEL WRIGHT: I have got it.

6 MR PERRY: Thank you very much, sir.

7 Sir, may I just add by way of a footnote on the
8 Da Silva decision, and it follows on something that
9 Ms Leek said this morning, and Mr Mansfield said
10 yesterday, Ms Leek expressed her gratitude that
11 Mr Mansfield had given Trojan 84 a commendation --

12 SIR MICHAEL WRIGHT: I think she did it with her tongue in
13 her cheek.

14 MR PERRY: Yes. It's even of more interest to note that in
15 the judicial review proceedings, it was suggested by
16 Mr Mansfield that Trojan 84 was an officer who should
17 have been prosecuted for gross negligence manslaughter;
18 see 839 to 840 of the High Court transcript.

19 It may be that the change of tack here represents
20 a more realistic assessment of the evidence, and we
21 would submit that that is a fair way of viewing the
22 change of position rather than suggesting that it's to
23 take forensic advantage of a point that could be made
24 through using Trojan 84's evidence.

25 But, sir, what we say is if you go to the High Court

1 saying Trojan 84 should be prosecuted for gross
2 negligence manslaughter and then in an inquest say there
3 is absolutely no criticism of him to be made at all, it
4 does mean that if allegations are going to be made, they
5 should be scrutinised with some degree of care; and we
6 welcome the acknowledgment that Trojan 84 is
7 an impressive officer whose conduct is beyond criticism;
8 and it's significant that his conduct is beyond
9 criticism because, of course, on one view of the
10 evidence, the non-identification of Mr de Menezes as
11 Nettle Tip was communicated via Trojan 84 on one view of
12 the evidence.

13 Sir, the next point that we make on what new
14 evidence has come to light since the Da Silva judgment:
15 your counsel submit that the reasoning in Da Silva on
16 a particular point may well hold good if there is no new
17 evidence on that point. We respectfully agree, but we
18 go further and submit that the new evidence, rather than
19 weakening the position of the police officers, has
20 improved their position, and we seek to identify now the
21 new evidence which has come to light.

22 If I may do it in this way: first, in paragraph 90
23 of the Da Silva judgment -- and that I think must be
24 a reference to the --

25 SIR MICHAEL WRIGHT: Appendix.

1 MR PERRY: -- it must be to the police review report.

2 SIR MICHAEL WRIGHT: Hang on. It must be the appendix. The
3 judgment only goes up to 67. Is it 19?

4 MR PERRY: No, sir, Ms Studd produced a report which had
5 paragraph numbers going up to ... it appears as though
6 the appendix was put together and run straight on once
7 the Contempt of Court Act order was no longer in force.
8 I hope I can find it, because it's in the section --

9 SIR MICHAEL WRIGHT: It would be round about 30 then in that
10 case.

11 MR PERRY: In the appendix, it was dealing with -- it's A23
12 in the appendix.

13 SIR MICHAEL WRIGHT: Thank you.

14 MR PERRY: Lord Justice Richards recorded the first specific
15 area of criticism relating to the senior officer -- who
16 we now know was Mr McDowall, although anonymised in the
17 judgment -- who set the strategy:

18 "That strategy, it appears, was never reduced to
19 writing, logged or otherwise noted."

20 So the first point to note, new evidence, this
21 criticism is wrong. The strategy was recorded in
22 Mr McDowall's red book. It has featured heavily in the
23 evidence at the inquest, and it's to be found in the
24 jury bundle, divider 38, documents page 1858.

25 Secondly, the second new matter in relation to

1 Mr McDowall, with regard to the implementation of the
2 strategy, Lord Justice Richards recorded the following
3 complaint, and it's in the tailpiece to A23:

4 "Manifestly it's argued by the claimant this policy
5 or strategy was never followed on the ground. The
6 claimant in terms accepts the review notes assessment
7 that if this strategy had been followed, it was highly
8 unlikely that events would have unfolded as they did."

9 Sir, we would submit that that now is shown to be
10 entirely erroneous as a fair analysis of this case. The
11 proposition that if the strategy had been followed it
12 was highly unlikely that events would have unfolded as
13 they did is based clearly upon the premise that
14 an intervention would have been ordered, had the
15 firearms cars been present at the TA Centre during the
16 period between 9.33 am, the leaving of the premises, and
17 9.41 am at the latest, giving the widest margin of
18 opportunity for Mr de Menezes to board the number 2.

19 However, the position now is that there was at least
20 one firearms car present at the TA Centre, the Alpha car
21 arriving there at 9.27 am, and there is unchallenged
22 endorsement that on the information available to the
23 operations room, there was in fact no basis to order
24 an armed intervention in the so-called prime window of
25 opportunity, because no intervention would have been

1 ordered on these facts.

2 SIR MICHAEL WRIGHT: You mean on the basis of the level of
3 identification that had then been achieved?

4 MR PERRY: Yes, "worth another look", and the other evidence
5 given by the surveillance officers as to the efforts
6 they made properly to carry out their duties in the
7 vicinity of Scotia Road.

8 I ought to say, sir, that we do not accept any
9 criticism of the surveillance officers at all in the way
10 they conducted their surveillance duties. This was
11 a difficult and arduous operation, and clearly, given
12 the nature of the covert investigation at this stage,
13 what they did in the period between 9.33 and 9.41 was
14 entirely reasonable.

15 So far as no intervention would have been ordered on
16 these facts, sir, may I just for your note
17 cross-reference to the evidence of Deputy Assistant
18 Commissioner Dick on 7 October 2008, page 98, lines 4 to
19 7, and page 112, line 15, to page 113, line 11.

20 Sir, those are the matters in relation to
21 Mr McDowall.

22 SIR MICHAEL WRIGHT: This is the same point, is it,
23 effectively, what Commander Dick was saying at that --

24 MR PERRY: Yes, wouldn't have ordered an intervention.

25 Just to put it in context, sir, it's because it did

1 not become known in the operations room that there was
2 a PIW-NT until James' telephone call at 0941 hours which
3 took place of course at or after the time Mr de Menezes
4 had boarded the bus.

5 So we would submit there is simply no causal
6 connection between the absence of the firearms cars at
7 the TA Centre, and the fact that no stop took place in
8 the vicinity of Scotia Road, and there was no
9 recognition of either of these important pieces of
10 evidence either at the time of the Da Silva case or at
11 the time of the Health and Safety trial. These points
12 fundamentally undermine the assertion that it is highly
13 unlikely that events would have unfolded as they did.

14 So far as Deputy Assistant Commissioner Dick is
15 concerned, Lord Justice Richards noted the assessment of
16 Mr O'Docherty that the boarding of the train, that's the
17 tube carriage, by the officers had an inevitable lethal
18 result. In the appendix, that must -- I have the --
19 thank you very much, in the composite judgment it's
20 paragraph 97, in the appendix it's A30.

21 It's the inevitable lethal result. It's at the end
22 of that. However, the current position in these
23 proceedings is that the evidence given by C2 and C12,
24 now tested on oath, has undermined the suggestion that
25 there was an inevitable lethal result, because both

1 officers explained that they entered the Underground
2 carriage with no preconceptions, and that that which
3 ultimately caused them to believe it was necessary to
4 discharge their firearms were the events as they
5 unfolded in the tube carriage.

6 So on the issue of the extent to which evidence is
7 developed, two of the principal criticisms at the Health
8 and Safety trial, firearms not in the vicinity of
9 Scotia Road, the first criticism; and that a stop should
10 have taken place near Scotia Road, are, we would submit,
11 now demonstrated to be without proper foundation.

12 Moreover, sir, in addition to those matters,
13 addressing the particulars of the indictment, you will
14 recall, sir, that the 19 particulars -- I don't know if
15 you have a copy in front of you. If not I could provide
16 one or it could go on the screens. It's documents
17 page 1599 for the screen.

18 There were 19 particulars of breach, and just taking
19 them very briefly, (a) was the failure adequately to
20 communicate Commander McDowall's strategy to the
21 officers who took over the running of the operation, the
22 surveillance officers and the firearms officers. May I,
23 sir, in relation to this, just adopt our written
24 submissions, 3.3.7 to 3.5.7.

25 The short point is that this matter had not been

1 investigated to the same extent by the IPCC in its
2 report. That's the Stockwell 1 report. That's not
3 a criticism in any way of the IPCC. It's simply
4 an observation that this area was not subjected to the
5 scrutiny which it's been given during the course of
6 these proceedings; for example Alan and Inspector ZAJ
7 were not asked to make statements until February or
8 March 2006 in relation to some of their involvement in
9 this case; and you will recall, sir, that so far as
10 Inspector ZAJ and Andrew were concerned, the evidence in
11 relation to their telephone calls wasn't in fact
12 clarified until these proceedings.

13 (b), a failure adequately to plan for or carry out
14 Commander McDowall's strategy for controlling the
15 premises; again, we rely on our submissions document,
16 see 3.3.1 for the Gold strategy, 3.4 for resourcing
17 issues, 3.5 for the meetings, 3.6 for the events between
18 7.30 and 8.30, and 3.7 for issues concerning the black
19 firearms team.

20 Sir, what we have tried to do in the narrative part
21 of our written submissions is to provide you with as
22 much assistance as possible as to the evidence; as much
23 as you are ever willing to accept this from an advocate,
24 it was intended to be as fair and as balanced as it
25 possibly could be. Certainly we sought to avoid any

1 tendentious comment or observations in that part of the
2 document in an effort to assist you when it comes to
3 formulating your directions on the facts in due course.

4 What we say is --

5 SIR MICHAEL WRIGHT: Just pause there a moment, Mr Perry,
6 I'm just taking you back one step. I know you weren't
7 there and I wasn't there, but I have read the summing-up
8 several times and I have read some of the evidence, not
9 all of it, I confess. My understanding is that it was
10 a given at the Old Bailey trial that
11 Commander McDowall's strategy, stopping there, was fit
12 for purpose.

13 MR PERRY: Yes, yes.

14 SIR MICHAEL WRIGHT: It was never suggested that it wasn't.
15 The arguments were it was never properly implemented.

16 MR PERRY: Exactly, sir, and of course the criticism that
17 the prosecution made at the Health and Safety trial,
18 which was to the effect that in fact DAC Dick had
19 perverted the strategy, is not one that has been pursued
20 in these proceedings. And again, that, we would submit,
21 is a fundamental distinction between these proceedings
22 and what took place at the Central Criminal Court, and
23 we also agree, sir, with your observation which echoes
24 the point made by Mr McDowall when he gave evidence in
25 these proceedings when he stated expressly in his

1 opinion it was fit for purpose.

2 Sir, may I just, while I am on this point, I was
3 going to come on to deal with this a little later but
4 perhaps it fits in quite well here. There is something
5 slightly unreal about a strategy that is set for
6 Scotia Road and Portnall being said by Mr Mansfield in
7 relation to Portnall: it was perfectly fit for purpose
8 and everything was sorted there, but when it comes to
9 Scotia Road it's completely unfit for purpose and it's
10 grossly negligent there; when the same strategy was
11 being overseen by the same officers and being
12 implemented in the same way, and the only material
13 distinction is that the door to the premises at Portnall
14 was visible to the officers which made it much less
15 challenging.

16 SIR MICHAEL WRIGHT: And single premises.

17 MR PERRY: Well, it's single premises with one means of
18 access, clearly visible to the surveillance teams.

19 SIR MICHAEL WRIGHT: Yes, but Alpha 1 said this was really
20 pretty easy, because of course in those circumstances
21 anybody who came out of that door was likely to be at
22 least an associate, if not a suspect himself or herself.
23 So to that extent the selection process didn't have to
24 be gone through.

25 MR PERRY: Yes.

1 SIR MICHAEL WRIGHT: At Scotia Road, unless -- I think
2 everybody is agreed about this -- the operation was at
3 risk of being blown at a very early stage, some form of
4 selection had to be implemented.

5 MR PERRY: Yes.

6 SIR MICHAEL WRIGHT: That I don't think anybody now
7 disagrees with.

8 MR PERRY: Yes, and we would submit, sir, that undermines in
9 a fundamental way the case as it was being put.

10 SIR MICHAEL WRIGHT: Against Mr McDowall.

11 MR PERRY: Against Mr McDowall. The other point we would
12 rely on in relation to this, sir, is really following on
13 from that: if it's suggested that Portnall Road was
14 sorted and it was less challenging, and if it's now
15 accepted that you have to modify the strategy to take
16 into account the more challenging circumstances at
17 Scotia, there is less scope for suggesting that the
18 events at Scotia demonstrate gross negligence, given the
19 greater difficulties confronting the officers and the
20 more difficult and complicated judgments that had to be
21 made in their professional expertise when dealing with
22 that address.

23 So we say that all of this supports the officers and
24 undermines any criticisms that might be made of them.

25 Then criticism 3 in the prosecution particulars

1 document, control room officers, firearms officers,
2 surveillance officers had a confused and inconsistent
3 understanding of what the strategy was for Scotia Road;
4 we submit that that's not -- that's the same point --
5 pursued. In any event, Deputy Assistant
6 Commissioner Dick, Detective Chief Inspector Purser, had
7 the same understanding of the strategy. They were
8 responsible for implementing it. Derek knew of the
9 strategy. See Derek's evidence, 17 October 2008,
10 page 127, lines 13 to 19; 20 October 2008, page 48,
11 line 19, and page 49, line 4; when he is dealing with
12 what Alan told him and he was asked about what Nick
13 said.

14 The fourth criticism, (d), there was a failure to
15 deploy officers to stop and question persons emerging
16 from Scotia Road premises, including Mr de Menezes.
17 That's again the same point, but we also submit it
18 displays a lack of understanding of the nature of the
19 operation, the dangers confronting the police, and the
20 potential risk of harm, not only to police officers but
21 also to members of the public; and it takes no account
22 of the overwhelming evidence from the senior officers
23 and the firearms tactical advisers regarding the danger
24 of jeopardising the covert nature of the operation and
25 the delicacy of operating in an area such as

1 Scotia Road.

2 SIR MICHAEL WRIGHT: You are going through this, you are
3 analysing this, Mr Perry, but we will never know which
4 particular one of these 19 criticisms the jury found
5 proved. For all I know, none of this was.

6 MR PERRY: Sir, the only purpose of going through it is not
7 to speculate as to what the jury's verdict was, but to
8 see to what extent the case has now changed from the way
9 it was being put.

10 (e), the failure to ensure a firearms team was in
11 attendance; we have already dealt with that and I need
12 not take up time with that.

13 (f), the failure to have a contingency plan. Well,
14 we now have more information about the TST option and
15 the ARVs.

16 SIR MICHAEL WRIGHT: And also that Derek and James had
17 between them, admittedly there was not an enormous
18 timescale, but had agreed between them that it would
19 have been possible to conduct their version of an armed
20 intervention if somebody had come out and they planned
21 it together.

22 MR PERRY: Yes.

23 (g), the failure to stop and question persons
24 emerging from Scotia Road. That's the same as (d)
25 above.

1 (h), there was a failure to identify a safe and
2 appropriate area where those leaving Scotia Road could
3 be stopped and questioned. We submit that that is
4 entirely unrealistic.

5 (i), the briefings given to the firearms officers,
6 inaccurate and unbalanced, and we submit that that's
7 demonstrably erroneous, and of course Mr Purser and
8 Trojan 84 were not called to give evidence at the Health
9 and Safety trial.

10 We have now had an opportunity and in particular the
11 jury have had an opportunity to assess their evidence;
12 and it is to be noted on this aspect, sir, may I just
13 add this, that the family's criticism has been modified
14 to a very great extent, it now being conceded that there
15 was a need for a full and comprehensive briefing and no
16 criticism is made of Mr Purser at all, so far as what he
17 said is concerned.

18 What now is being said against Mr Purser, see the
19 family's submission document, footnote 107, what is now
20 being said is that he should have provided a summary of
21 the detailed expertise in relation to the worldwide
22 experience of body-borne explosive devices, the
23 expertise which Superintendent Swain had built up over
24 many years. So there are two points to note in relation
25 to this.

1 First, this is a materially different criticism to
2 that which was advanced at the Health and Safety trial;
3 and secondly, there is perhaps a certain irony in it
4 being suggested that the briefing should in fact have
5 been longer than it was, because you will recall, sir,
6 that Trojan 84 gave evidence to the effect that
7 a detailed briefing on the topic of explosives might
8 have added up to 30 minutes to the briefing, see
9 Trojan 84, 16 October 2008, page 88, lines 9 to 16.

10 We say that, again, the submissions made by way of
11 critical analysis of the police officers do not bear
12 scrutiny and would impose unrealistic obligations on
13 police officers when confronted with the difficult
14 circumstances which clearly did confront them on this
15 particular day.

16 It's also on this aspect significant to note that
17 Mr Justice Henriques in his sentencing remarks, made the
18 point that the briefing of the firearms team was
19 inaccurate and unbalanced. But of course the learned
20 judge had heard no evidence from these two officers.

21 (1), the control room officers failed to satisfy
22 themselves a positive identification of Mr de Menezes as
23 the suspect had been made by the surveillance officers;
24 we submit that's not supported by the evidence adduced
25 at the inquest. See the evidence of Mr Boutcher, Deputy

1 Assistant Commissioner Dick and
2 Chief Inspector Esposito. In any event, the rider which
3 the jury added to their verdict suggests that the jury
4 at the Old Bailey did not regard this as a criticism
5 with any force insofar as it related to Deputy Assistant
6 Commissioner Dick.

7 (m), failure to deploy firearms officers at relevant
8 locations in time to prevent Mr de Menezes from getting
9 on to the bus and entering the tube station. Again,
10 that collapses into the earlier issues.

11 (n), the firearms officers failed to satisfy
12 themselves a positive identification of Mr de Menezes as
13 the suspect had been made by the surveillance officers;
14 and our simple response in relation to that is it's not
15 a matter for the firearms officers and in any event
16 a number of them have now given evidence that they heard
17 the subject described as "definitely our man".

18 (o), there was a failure to take effective steps to
19 stop tubes or buses or take other traffic management
20 steps to minimise the risk to the travelling public; our
21 short response, this was a judgment made by
22 Commander Dick, it was made for good reason in the
23 exercise of her professional judgment and it could not
24 be stigmatised as unreasonable, let alone as grossly
25 unreasonable, given the evidence that we have heard from

1 other senior experienced officers who agreed with the
2 decision and would have made the same decision, had they
3 been in her shoes.

4 (p), Mr de Menezes was twice permitted to get on to
5 a bus and to enter Stockwell Underground station,
6 despite being suspected of being a suicide bomber and
7 despite having emerged from an address linked to a
8 suspected suicide bomber; that links into the prime
9 window of opportunity. We have dealt with that, but
10 it's also relevant here, sir, to make this observation:
11 Mr Mansfield conceded yesterday, we would submit
12 realistically and fairly, no-one now suggests that he
13 should have been subjected to an intervention at
14 Brixton. So that point also now is to be resolved
15 fairly in favour of the officers.

16 (q), failure to give a clear or timely order that
17 Mr de Menezes be stopped or arrested before he entered
18 the tube station. The evidence is that Commander Dick
19 gave an evidence that he should be stopped as soon as it
20 became apparent that he was leaving the bus at Stockwell
21 and heading for the tube, and all the evidence has been
22 to the effect that her orders were clear, that she was
23 in command, and she has been praised by her senior and
24 experienced colleagues who were present with her on the
25 occasion of 22 July.

1 (r), failure to give accurate information to
2 Commander Dick as to the whereabouts of C019 when she
3 was deciding whether C019 or S012 should stop
4 Mr de Menezes. We submit this is not established by the
5 evidence. The evidence is that Trojan 84 informed
6 Chief Inspector Esposito that the firearms teams were
7 not in contention because he thought that at the time
8 they were behind the wrong bus. The information which
9 Chief Inspector Esposito relayed was therefore accurate,
10 and as soon as he and Detective Chief Inspector Purser,
11 that's Trojan 84 and Detective Chief Inspector became
12 aware that C019 officers were in a position to do the
13 stop, that was communicated forward to Commander Dick.

14 (s), there was a failure to minimise the risk
15 inherent in effecting the arrest of Mr de Menezes by
16 armed officers, whether in relation to the location,
17 timing or manner of the arrest. We have dealt with
18 those points.

19 The other criticisms, sir, related to the
20 surveillance officers and we don't deal with that, but
21 we don't accept that the surveillance officers failed to
22 operate a tight control of Scotia Road.

23 Sir, may I just come on to the next point, then, the
24 third of our sections, the unique nature of the
25 operation confronting the police. This is really the

1 battlefield conditions-point. Mr Mansfield puts his
2 case on the basis that this is a point against the
3 officers. We submit that, again, that's unrealistic
4 because the conditions confronting the police officers
5 clearly are matters to be weighed in their favour.

6 Sir, you will recall one of the cases that didn't go
7 to the House of Lords in Adomako was the Prentice case
8 which involved the two doctors in Birmingham who had
9 mixed up the drugs in the syringe. Syringe A had
10 an innocuous drug, syringe B had a lethal drug and they
11 gave the patient syringe B thinking that it was syringe
12 A, and the Court of Appeal quashed their convictions
13 because the trial judge had not properly explained to
14 the jury that it simply wasn't an objective test that
15 they had to apply disregarding the circumstances in
16 which the defendant was placed.

17 This is a point that Lord Mackay makes in Adomako in
18 that part of his opinion when he says "having regard to
19 the situation in which the defendant was placed".

20 That's not just a reference to the foreseeability of the
21 risk of death. It's also taking into account any
22 mitigating factors --

23 SIR MICHAEL WRIGHT: Pressure of circumstances.

24 MR PERRY: The pressure of circumstances, exactly. And yes,
25 it's right to say that if you are a surgeon, you perhaps

1 are expected to apply greater skill than a general
2 practitioner but there again even if you are a surgeon
3 and you are conducting a difficult brain operation,
4 account has to be taken for the difficulties confronting
5 you, and the novelty of the operation that you might be
6 performing. If you are the first surgeon to perform
7 a heart operation, and it goes wrong, it doesn't really
8 lie in anyone's mouth to say, well, because it was so
9 serious and dangerous you actually should have performed
10 at a higher level of skill than might otherwise have
11 been expected of you.

12 So, sir, the unique nature of the operation, see
13 Mr McDowall, 25 September 2008, page 163, lines 7 to 19,
14 "unique experience", "unique set of circumstances",
15 "pressures prevailing at the time", and "unprecedented
16 pressure on the Metropolitan Police", 25 September,
17 page 179, lines 19 to 22.

18 Mr White said, "Sadly it's impossible to recreate
19 the operating environment in London", see
20 26 September 2008, page 107, lines 5 to 9.

21 Also Mr White, page 124 on the same day, lines 3 to
22 10; and on the same day, page 136, line 22 to page 137,
23 page 1.

24 Mr Clarke, "London was gripped by fear",
25 29 September 2008, page 44, line 23 to page 45, line 8.

1 Mr Boutcher, "We didn't know the scale of this. We
2 had the attacks. My assessment was London was going
3 through a unique period. I was trying to make
4 contingency for further attacks potentially elsewhere",
5 see 1 October 2008, page 37, line 24 to page 38, line 7,
6 which includes the reference to military assets being on
7 standby.

8 Deputy Assistant Commissioner Dick, "a unique
9 challenge", see 7 October 2008, page 25, 17 to 20.

10 And Nick, "a unique operation", that's 9 October,
11 page 136.

12 Mr Rose, "I found this very difficult, a very
13 challenging day", 13 October 2008, pages 13 to 21.

14 Mr Esposito, "it was unique", and that's
15 15 October 2008.

16 If it's not considered too audacious on my part to
17 rely on Mr Paddick, he too said that the operation was
18 unique, see 5 November 2008, page 107, line 6.

19 Those are just a few of the many, many references,
20 and that concludes that part.

21 Then, sir, the "damned if you do, damned if you
22 don't" section.

23 SIR MICHAEL WRIGHT: I was just about to say, pick

24 a convenient moment. Is that a convenient moment?

25 MR PERRY: Yes, it is, sir, thank you.

1 SIR MICHAEL WRIGHT: That's helpful. Ten past.

2 (11.00 am)

3 (A short break)

4 (11.30 am)

5 SIR MICHAEL WRIGHT: I apologise for keeping you all

6 waiting. Yes, Mr Perry.

7 MR PERRY: Thank you very much, sir.

8 Sir, I have been asked to make it clear that the
9 criticism of Mr Purser's briefing is persisted in on the
10 basis that Mr McDowall and Mr Boutcher were
11 cross-examined on the point and if that is the case
12 I simply make this observation: Mr Purser did not have
13 the opportunity to deal with it.

14 On the "damned if you do, damned if you don't",
15 there are five situations, and we simply identify them
16 to demonstrate that whatever the police had done might
17 have left them open to criticism.

18 First of all, the deployment of orange team to
19 Scotia Road before 7 am that morning rather than holding
20 at a central location, and the obvious points arise
21 about something happening elsewhere.

22 Secondly, the deployment of firearms teams without
23 a comprehensive and realistic briefing, which could have
24 endangered the lives of firearms officers themselves as
25 well as members of the public and might have been the

1 subject of criticism.

2 Third, the deployment of firearms teams in such
3 a way as to blow the covert nature of the operation,
4 whether by conducting an intervention in the so-called
5 window of opportunity or elsewhere.

6 Fourth, the deployment of the firearms teams to
7 follow the subject before the events at Brixton took
8 place and the identification being made, which -- the
9 simple point there is pulling the firearms teams out of
10 position. Suppose they had been deployed earlier and
11 then someone had left the address who was in fact in
12 possession of a bomb.

13 The fifth point is, using unarmed officers to effect
14 the stop or persisting with S012 to effect the stop;
15 there was some evidence on this point about how people
16 might have been cross-examined if in fact a death had
17 resulted in those circumstances.

18 So we say that that's all in the category of "damned
19 if you do, damned if you don't", and it shows the
20 difficult situation that the police had to contend with
21 on this particular day.

22 So, sir, may I move on to address the points made
23 yesterday in the course of oral submissions and the
24 criticisms that have been made of the command team, the
25 three officers.

1 First of all, he should have been stopped before he
2 got on to the bus, the window of opportunity point, and
3 the safest place and time recognised by Mr McDowall and
4 Commander Dick was not put into practice, and we make
5 five points in response.

6 First, the highest level of identification
7 communicated to the operations room before Mr de Menezes
8 boarded the bus, worth somebody else having another
9 look.

10 The second observation in response, and this comes
11 from the evidence in cross-examination of Frank,
12 Mr Mansfield himself said, "Worth somebody else having
13 a look is neither here nor there in one sense, it's not
14 meaning he is a good possible, it's just meaning you
15 have not been able to get a good look, someone else
16 should", and although Frank disagreed with that, he did
17 agree he had not communicated any more than somebody
18 else should have a look. That's 20 October, page 119,
19 lines 16 to 21.

20 The third observation, Mr Boutcher and
21 Commander Dick agree they would not have sent a firearms
22 team on the basis of the information as it then stood.
23 The fourth observation, five surveillance officers had
24 sightings of Mr de Menezes before he turned into
25 Tulse Hill: Edward, Tango 2, Harry, Ken and James.

1 Ivor had a sighting before he got on to the bus and
2 there are only ten members in each team, three in the
3 red team and four in the greys, having sightings of him
4 before he gets on the bus as well as Frank.

5 The fifth observation, the theory of a tighter ring
6 of surveillance, we submit is a fallacy, merely to look
7 at the immediate area to realise that you could not have
8 tighter control before Mr de Menezes came onto
9 Upper Tulse Hill without compromising the operation, and
10 of course there is the problem of which other direction
11 he might travel in.

12 SIR MICHAEL WRIGHT: Hang on a minute. On that window of
13 opportunity point, I appreciate entirely what you are
14 saying, but it could hardly be described as not
15 a central factual issue in the sense that everybody
16 spent such a lot of time over it, over the course of the
17 last 36 days.

18 Are you submitting that I should or should not leave
19 a question to the jury on the existence or otherwise of
20 the window of opportunity?

21 MR PERRY: That you should not, sir, and I'll come on to
22 deal with the proposed questions in relation to the
23 narrative verdict --

24 SIR MICHAEL WRIGHT: That's a straightforward answer. You
25 say I shouldn't leave anything at all to the jury.

1 MR PERRY: In relation to that, because the weight of the
2 evidence simply doesn't --

3 SIR MICHAEL WRIGHT: I understand the point. That's what
4 I wanted to know.

5 MR PERRY: Yes. We have prepared a short document, sir,
6 which I'll come on to.

7 But, sir, in relation to that, we would submit the
8 evidence is all one way, so far as that's concerned.

9 Then the second criticism, the strategy was not
10 implemented effectively. Sir, as a result of our
11 exchange this morning, I'll just deal with this very
12 shortly, because that proceeds on a misapprehension as
13 to what the strategy was, and the revision to the
14 strategy made by Commander Dick when she knew it was
15 a door to the communal premises, fundamentally the
16 strategy remained the same, it was just the numbers of
17 people, the type of people to be stopped and challenged
18 that had changed.

19 On this point, see Mr McDowall, 25 September 2008,
20 page 111, line 12 to 113, line 5.

21 The next point of criticism, that the order to stop
22 him was given too late, we make three observations.
23 First, the starting point for this criticism seems to be
24 James' evidence that the order for S012 to do the stop
25 was never communicated. In fact there is a tension in

1 the evidence on this point. Pat says he did communicate
2 it to James and Mr Johnston said that he had heard the
3 communication. See our submissions document, paragraphs
4 3.9.40 at page 33.

5 Secondly, in any event, by the time the stop had not
6 been carried out by S012 for whatever reason,
7 Mr de Menezes was probably down the escalators and it
8 cannot be the case that he was simply not to be stopped
9 once he had gone that far. Accordingly, even at that
10 stage, decisions had to be made about how best to stop
11 him. And the evidence on this is all one way, that C019
12 were the instrument of choice.

13 The third and final observation on this point, on
14 whether it was not known in the operations room that he
15 was down the escalators, see our submission document,
16 paragraph 3.9.43, pages 34 to 36 of the document on our
17 analysis of the relevant evidence.

18 Sir, the next criticism relates to the fact that
19 Scotia Road was a priority address, and we submit that
20 that simply ignores the body of evidence given in these
21 proceedings; see Mr McDowall, 25 September, page 137,
22 line 24 to 138, line 9; Andrew, 29 September, page 205,
23 lines 22 to page 206, line 17; Mr Boutcher in
24 particular, 2 October, page 11, lines 13 to 25, and
25 page --

1 SIR MICHAEL WRIGHT: That's the point about the footprint
2 address, isn't it?

3 MR PERRY: Sir, that's exactly it.

4 The significance of this point is no criticism is
5 made of Mr Boutcher, but in fact it was Mr Boutcher who
6 said that he did not consider it necessary at that time
7 to dispatch a firearms team to Scotia Road. Firstly
8 because the intelligence did not say that there were
9 bombers at the addresses, and the way he put it was "far
10 from it", and because neither address had any priority,
11 there were two, so that's the significance of that.

12 There is also Mr Rose, 13 October 2008, page 90,
13 lines 19 to 20; Mr Esposito, 15 October, page 103,
14 lines 20 to 25. Both of those references, Mr Rose and
15 Mr Esposito, sir, in response to questions that you put
16 to them.

17 Sir, the next point concerns the risk to police
18 officers, and although this was not a criticism, the
19 significance of this point is that yesterday you
20 yourself, sir, made a point in debating the arguments
21 with Mr Mansfield: what about the risk to police
22 officers? We would submit that he had no satisfactory
23 answer to the weight to be attached to the risk to
24 police officers in conducting an operation of this kind.

25 So we rely on that point.

1 Then the next point, sir, the essential differences
2 between Portnall Road -- because it's suggested that at
3 Portnall Road, just to give you the reference, sir, what
4 Mr Mansfield had to say in relation to Portnall Road was
5 there everything was "absolutely sorted", to quote his
6 phrase, "absolutely sorted"; see 20 November, page 43,
7 line 12.

8 The significance of Portnall Road being "absolutely
9 sorted" is that of course there is no evidence to
10 suggest in relation to Portnall Road that Commander Dick
11 knew exactly where all the surveillance officers were,
12 where all the firearms officers were, where the pinch
13 point was, whether they had maps or plans, but no
14 criticism is made. Well, we say it just doesn't stand
15 scrutiny.

16 SIR MICHAEL WRIGHT: Just goes to show how much easier it is
17 when everything works properly.

18 MR PERRY: Yes, exactly, sir, and the other essential
19 differences, the single door point, fewer roads and
20 access points, and of course you have the police station
21 around the corner.

22 SIR MICHAEL WRIGHT: The first people to come out didn't
23 come out until 1 o'clock in the afternoon, so it was
24 an entirely different state of affairs.

25 MR PERRY: Yes. But if it's the same strategy, the same

1 people, and it's all sorted there, we submit it's
2 unrealistic to say it's not all sorted at Scotia Road.

3 The next criticism, surveillance officers not
4 focusing on the job, this was the tight surveillance
5 point, and we have already made the point in argument
6 that -- the difficulties that confronted the
7 surveillance team.

8 We have had no evidence about the location of
9 a number of the red team members. We have heard from
10 three. We would simply say that as a matter of ordinary
11 fairness, it's unacceptable to draw an inference about
12 others when no evidence in relation to their positions
13 has been heard.

14 So far as Mr McDowall is concerned, the criticism in
15 relation to him, the dismal failure point, we have dealt
16 with the events between 4.55 am and 7.15 am in some
17 detail in our submissions document, and may I just adopt
18 what's said there in relation to that, but we suggest
19 that there was no dismal failure on his part. In fact
20 a fair analysis of what took place that morning shows
21 him to be extremely busy, a person who put into place
22 a strategy, and was entitled to rely on others, other
23 senior officers, to implement it and in fact it was
24 implemented and a good deal of activity was undertaken
25 to ensure it was properly in place.

1 The next criticism in relation to the orange team
2 not being deployed, see our submissions document,
3 paragraph 4.35, which also deals with the suggestion
4 that the black team would have been available before
5 7 am. The short point there, sir, in relation to the
6 black team is you will recall the evidence that there
7 was no guarantee that even if rostered earlier than
8 their expected time of arrival, that they would
9 necessarily have arrived before 7 am at New Scotland
10 Yard.

11 The next point, sir, in charge, not in control. We
12 make two observations in relation to this. It was
13 suggested that this was something that could be relied
14 upon, it being a phrase that had been used before the
15 Administrative Court in the Da Silva case itself.

16 The two observations we make in response are, first,
17 we rely on the submissions document both in the
18 discussion of the position of Mr McDowall and
19 Commander Dick, for Mr McDowall see part 4, for
20 Commander Dick see part 5, and in particular see 5.15
21 where we summarise the evidence from her colleagues, and
22 in particular the evidence that she was extremely calm
23 and totally in control.

24 Second observation, when reliance is placed on the
25 evidence given, for example, by James that he was not

1 given direction, a close analysis of the contemporaneous
2 documentation and other evidence suggests that he was.
3 See, for example, Mr Cremin's log. We deal with this in
4 our submissions document at paragraphs 3.9.7 and 3.9.10.

5 But the short point, sir, is that the
6 contemporaneous documentation shows that there was
7 constant attention and care given to the situation.

8 The next point, Pat was aware at 9.33 am that
9 somebody was out of the premises and Pat was waving. We
10 make three points. First of all, Pat's entry in the log
11 is timed at 9.34, not 9.33.

12 Secondly, it's a composite entry, see our
13 submissions document, paragraph 3.8.10.

14 Finally, so far as Pat's evidence is concerned, in
15 fact he accepted that it may have been at some stage in
16 the morning that he raised his hand, not necessarily at
17 this time. See 10 October, page 19, line 20 onwards.

18 SIR MICHAEL WRIGHT: Derek's evidence was that he passed the
19 message on as soon as it happened.

20 MR PERRY: Yes.

21 SIR MICHAEL WRIGHT: So what you are really saying is that
22 if there is a failure it's at a different point.

23 MR PERRY: Yes, exactly, sir.

24 It was suggested that Mr Esposito was aware somebody
25 had left immediately. We make two points in response:

1 not clear that he did know, see 15 October, page 83,
2 lines 4 to 24. In any event, this is the second point,
3 whatever he said about that, there was no basis for
4 an intervention anyway.

5 Commander Dick and Esposito not focusing. Again we
6 rely on our written submissions, Commander Dick part 5,
7 in relation to Mr Esposito, part 6.

8 The suggested criticism that C12 was frustrated at
9 not being given an order, and we make no criticism of
10 C12 but it ought to be borne in mind that he did not in
11 fact communicate his position to anyone, and therefore
12 his frustration cannot be the result of any act or
13 omission on the part of any of the officers that we
14 represent.

15 State amber, the state amber point, generally please
16 see the command team submission at 5.22(ii), and there
17 is also evidence from Commander Dick, 8 October,
18 page 34, line 10 to page 35, line 1; and page 126,
19 lines 5 to 7.

20 Ralph, 29 October, page 102, lines 2 to 7; page 139,
21 lines 9 to 14.

22 The criticism that they didn't know where everybody
23 was, see our submission document, paragraph 6.17(xii).
24 The criticism that S012 should have been ordered to do
25 it and that that order should have been persisted in,

1 see our submissions document, paragraphs 5.22(iii) to
2 (v), and see also our analysis of the facts at
3 paragraphs 3.9.38 and 3.9.41.

4 Sir, may I in particular draw attention on this
5 aspect to the tension between the evidence of James on
6 the one hand, and the evidence of Pat and Mr Johnston on
7 the other. That's where they say James was in fact
8 told, he was not hanging on, and therefore it's unsafe
9 to proceed adversely to the officers.

10 So far as maps are concerned, we make four points.
11 The firearms team had maps, that's point one.

12 Second point, Commander Dick gave evidence that she
13 looked at a map.

14 The third point, what's the difference between this
15 and Portnall Road, rhetorically.

16 The fourth point is that Chief Inspector Esposito
17 did have maps, but that evidence appears to have been
18 overlooked in the criticism of him. See his evidence on
19 14 October, page 213, lines 15 to 19.

20 SIR MICHAEL WRIGHT: We know that the firearms team had maps
21 because we heard about -- I have forgotten who it was
22 now, the chap who missed most of the briefing because he
23 was busily working in the map room at Leman Street
24 producing maps, and we also know, because I asked him,
25 that the maps that he in fact produced were the same as

1 the largest scale maps that we have in our bundle.

2 MR PERRY: Yes, that's right, sir.

3 What we would submit, given that the case was put on
4 the basis that this was a demonstration of what was said
5 to be grandiose arrogance on the part of those in the
6 operations team, we would invite you to reject that
7 suggestion, and on a fair analysis on the basis of
8 Mr Esposito's evidence that he did in fact have a map,
9 that they were looking at maps, and there is also the
10 evidence given by Nick, who said he put a map up on to
11 the plasma screen, see 9 October, page 122, line 15.

12 Then, sir, the concessions that were made, there
13 were eight concessions during the course of the
14 submissions yesterday. First the acceptance that
15 nowhere in London is a perfect place to conduct an armed
16 intervention. We respectfully agree.

17 Second, the acknowledgment that an intervention on
18 the bus would have been dangerous and that no-one
19 expected there to have been an intervention at Brixton.
20 We respectfully agree.

21 Third, the acceptance that we are concerned with
22 split-second decision-making and a situation of some
23 pressure.

24 Fourth, that Mr Esposito was not responsible for
25 decision-making.

1 Five, that Pat was aware somebody of interest had
2 left, not that it was a possibly identical with.

3 Six, that the operations room was not conducting
4 a lifestyle surveillance exercise, and inferentially
5 that the conditions in the operations room were not to
6 be judged against such an operation.

7 Seven, that CO19 were the first choice to conduct
8 an armed intervention. That was the exchange with you,
9 sir, you will no doubt recall.

10 Finally, eight, that the non-identification was
11 possibly the result of what was described as
12 a malcommunication, to use the word used, and that the
13 information was that it was not Nettle Tip.

14 So, sir, we rely on those because we submit they
15 have a bearing on the analysis that should be conducted
16 in relation to the evidence generally.

17 Then, sir, may I come very briefly to narrative
18 verdicts, and I hope we circulated a document headed
19 "Narrative Verdict" this morning.

20 SIR MICHAEL WRIGHT: I do not have it yet.

21 MR PERRY: Sir, may I hand it in? It's just a short
22 document. (Handed). Sir, may I say that I will explain
23 as we go through this, but we have just prepared this
24 short document, and it is self-explanatory.

25 In the middle, we deal with not appropriate for

1 a narrative verdict to traverse matters which are not
2 causally relevant. We further submit that the form and
3 content of the questions proposed by the family are,
4 with respect, objectionable because they require the
5 determination of causally irrelevant matters and are
6 framed in pejorative and contentious terms.

7 Sir, may I just say, just as an observation, sir,
8 you can look through the proposed questions and search
9 in vain other than for the first few questions, for
10 a question that begins other than "do you consider ...
11 a failure".

12 So they all contain the suggestion that some failure
13 took place, and we submit that the principles which
14 should guide the drafting of the narrative questions are
15 two-fold.

16 First of all, they should above all else be simple
17 because otherwise there is a risk of confusion; and they
18 should provide a basis for the jury to express their
19 conclusions on the principal matters of relevance,
20 bearing in mind the need for simplicity; and although we
21 don't accept, sir, that the matters we have set out are
22 necessarily causally relevant, what we have attempted to
23 do is to simplify matters; and if the jury were asked
24 questions proposed by the family as opposed to a more
25 simple framework, as I made clear earlier, it would be

1 necessary to have a much more detailed summing-up.

2 So what we have done, sir, is just suggested
3 a number of questions, and we don't necessarily contend
4 for such a lengthy list, but we do say that the
5 phraseology of these questions is less objectionable
6 because you can see that, after questions 1 and 2, the
7 questions are generally neutral in their import and
8 directed to the fact that something happened rather than
9 whether there was a failure to act or omit to act in
10 a particular way.

11 We have just put those forward for consideration at
12 this stage because it may be, sir, that you want to have
13 further argument in relation to that in due course.

14 SIR MICHAEL WRIGHT: Yes, maybe.

15 MR PERRY: So, sir, may I then come to the final part of our
16 oral submissions, just to make these short concluding
17 comments. We would submit that the overall impression
18 of the police officers who have given evidence in these
19 proceedings is of a body of individuals dedicated to
20 public safety in the performance of their duties, and to
21 the extent that evidence was given on the point,
22 opinions were expressed and emotion was evident about
23 the tragic result of this particular operation, and the
24 fact that it resulted in such a tragic outcome should
25 not obscure the dedication exhibited by the officers and

1 in some cases their great courage in the face of extreme
2 personal danger.

3 We would submit that the three officers we represent
4 performed their duties in difficult circumstances and
5 acted reasonably and properly in an attempt to safeguard
6 the public of this city in circumstances which never
7 before had confronted officers in their position.

8 On that basis, sir, we would invite you not to leave
9 any unlawful killing verdicts in their cases. Thank you
10 very much.

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

12 Mr King.

13 Submissions by MR KING

14 MR KING: Sir, when I saw from the proposed timetable that
15 I was to be allotted 15 minutes, I assumed that those
16 responsible for the timetable simply couldn't bear to
17 deal in any lesser periods of time.

18 I do not intend to break my habit and stay on my
19 feet any longer than I have to.

20 I have produced a very short document which I trust
21 you will have had a chance to look at. The Independent
22 Police Complaints Commission remains now, as it always
23 has been, neutral on the issues which form the subject
24 matter of debate at this stage of these proceedings.

25 Unless there are specific issues with which you

1 require my help on behalf of the IPCC, there are no
2 separate submissions that I would wish to make beyond
3 that document.

4 SIR MICHAEL WRIGHT: Thank you very much. No, I have
5 problems about effectively the issues that I should
6 leave to the jury, but I don't think I could feasibly
7 ask you to deal with them.

8 MR KING: I don't think I could offer on behalf of the IPCC
9 any positive case, as it were, in respect of any such
10 matters.

11 SIR MICHAEL WRIGHT: I wasn't going to say that, but I do
12 not propose to trouble you about it.

13 MR KING: Thank you very much.

14 Additional submissions by MR STERN

15 SIR MICHAEL WRIGHT: Before I ask my counsel to address me
16 on this, Mr Stern, I think, first of all, there is
17 a problem that I want your help and Ms Leek's help to
18 grapple with.

19 You are both asking me effectively to leave --
20 Ms Leek seized upon the possibility that I might direct,
21 but leave that aside -- leave a lawful killing verdict.

22 MR STERN: Yes, sir.

23 SIR MICHAEL WRIGHT: If I do that, it has to be in the form
24 which gives the jury the alternative answers "yes" or
25 "no"; yes?

1 MR STERN: No, sir, with respect. That would be
2 a narrative.

3 SIR MICHAEL WRIGHT: All right. That was the alternative,
4 but Ms Leek again adopted as an alternative way of
5 approaching it.

6 In a narrative, as a question as part of a narrative
7 verdict would be the question: did C2 and C12 genuinely
8 and honestly believe that they were faced with
9 an immediate and mortal threat?

10 MR STERN: I think it would have to be phrased, obviously
11 one doesn't want to --

12 SIR MICHAEL WRIGHT: The phraseology doesn't much matter.
13 That's not what I am after.

14 MR STERN: It's more likely than not.

15 SIR MICHAEL WRIGHT: You are there. You are just about to
16 put your finger on the problem. If the answer is "yes"
17 or "no", as I understand it, the answer "no" would have
18 to be to the criminal standard of proof.

19 MR STERN: No.

20 SIR MICHAEL WRIGHT: Because it effectively is expressing
21 the view that this was an unlawful killing.

22 MR STERN: No, sir. With respect, the question has to be
23 left, whether it's in short form or in narrative, in
24 terms of the appropriate direction for lawful killing.
25 So the appropriate direction is effectively that the

1 definition of a lawful killing, which is:

2 "... one that occurs if the evidence shows that it's
3 probable that the deceased died by the deliberate
4 application of force against him and that the person
5 causing the injuries used reasonable force in
6 self-defence or defence of another, or to prevent
7 a crime or to assist in a lawful arrest, even if that
8 force was by its nature or the real manner of its
9 application likely to be fatal."

10 So it does require that direction in relation to
11 what lawful killing is, and therefore the first question
12 will essentially be whether or not the person who caused
13 the death, whoever that may be, whether that person --

14 SIR MICHAEL WRIGHT: They have to be treated together, don't
15 they?

16 MR STERN: They do, but can I come back to that point?

17 SIR MICHAEL WRIGHT: And leave that aside, that's not the
18 problem I'm after either.

19 MR STERN: That is a problem but it is not the problem that
20 we are dealing with at the moment.

21 SIR MICHAEL WRIGHT: No, I agree with that.

22 MR STERN: The position is that in terms of a direction, the
23 jury would have to be directed in precisely the same
24 way, so the question is: is it more likely -- sorry.

25 SIR MICHAEL WRIGHT: That will do. More probable.

1 MR STERN: Is it more likely than not that each of the shots
2 were fired in self-defence, let's paraphrase it for
3 a moment but obviously you understand the way I have set
4 it out from the direction of lawful killing.

5 The answer that the jury will be able to give is
6 "yes" or "no" in the narrative.

7 SIR MICHAEL WRIGHT: Pause there. If I were to leave that
8 to the jury, it would leave the jury with the option of
9 saying no.

10 That is tantamount, in fact it's more than
11 tantamount, it is in effect a finding by the jury that
12 this was an unlawful killing on the basis of the balance
13 of probabilities.

14 MR STERN: It's not, with respect, sir, because in order to
15 find unlawful killing, the jury would have to be
16 satisfied so that they are sure that there was no
17 self-defence at all.

18 SIR MICHAEL WRIGHT: No genuine belief.

19 MR STERN: The other end of the spectrum is the burden is
20 the other way, which is: is it more likely than not that
21 it was a lawful killing?

22 SIR MICHAEL WRIGHT: That I understand. If the answer is,
23 "Yes, it was a lawful killing", that I have no problems
24 about, as I understand the law. That is a verdict which
25 the jury can properly return on the balance of

1 probabilities.

2 MR STERN: Yes.

3 SIR MICHAEL WRIGHT: The other verdict, which is "no", I am
4 going back to what I have just said --

5 MR STERN: Going back to narrative, this is.

6 SIR MICHAEL WRIGHT: I am still on narrative, yes. If the
7 answer is to be no, I don't see how that answer can be
8 given on the balance of probabilities because what they
9 are actually saying is, "We believe that the officers
10 did not genuinely have this belief".

11 MR STERN: No, they are saying, "We believe that it is
12 not -- more likely than not that each of the shots fired
13 by both of the officers were fired in self-defence",
14 which is not the same as being satisfied so they are
15 sure that the killing was unlawful.

16 SIR MICHAEL WRIGHT: What is troubling me seriously is that
17 if I were to leave it on that basis, and the jury said
18 "no", that that would be seized upon as effectively
19 a finding by the jury that the officers had no genuine
20 belief that they were acting in self-defence.

21 MR STERN: Well, I respectfully agree, which is why I have
22 submitted --

23 SIR MICHAEL WRIGHT: Which is why it has to be done on the
24 basis of the criminal burden of proof.

25 MR STERN: That does not reflect the law, if I may say so

1 with respect. That is why in my submission it should be
2 left in a short form verdict.

3 SIR MICHAEL WRIGHT: I see.

4 MR STERN: Because then you are directing the jury in
5 relation to lawful killing, which is, as I say, on the
6 balance of probability: did the person who caused the
7 death honestly believe that it was necessary to defend
8 himself or another? So that is, in that direction, not
9 in the direction of self-defence in relation to unlawful
10 killing.

11 There is also an open --

12 SIR MICHAEL WRIGHT: I heard that. There may be a lacuna
13 between the two.

14 MR STERN: There may be in fact but not in law, if you see
15 what I mean. In other words there are two
16 possibilities: lawful killing or unlawful killing are
17 the extremes of either end, and in the middle there is
18 an open verdict as my learned friend Ms Leek has
19 indicated.

20 We would submit that that is a verdict that ought to
21 be left as well.

22 SIR MICHAEL WRIGHT: Very well.

23 MR STERN: Without doubt, if you are asking me at this
24 stage, it is without doubt that a more sensible approach
25 and an easier approach, and indeed one that is less

1 risk-ridden, to leave a short form verdict for the
2 reasons that you have identified this morning, and if
3 I may say so the reasons that you identified yesterday,
4 that is to say the possibility of getting an answer
5 which may be interpreted, rightly or wrongly, in either
6 way, either by the family or by officers or by the media
7 or anyone, in a way which is unsatisfactory, and may
8 cause difficulties thereafter. One wants to avoid that
9 when it may be that the jury had no intention of
10 creating such a problem.

11 SIR MICHAEL WRIGHT: That is what's worrying me.

12 MR STERN: That is precisely why I have submitted that the
13 appropriate course in relation to the central issue of
14 the shots is that there should be a direction of lawful
15 killing, indicating to the jury that that is the verdict
16 that is open to them, but also leaving -- I'm sorry,
17 lawful killing but also leaving open verdict as well.

18 SIR MICHAEL WRIGHT: If they are not satisfied about it or
19 if they are not prepared to come to that conclusion.

20 MR STERN: Yes, there is a direction in relation to that,
21 but it doesn't come quite to that, but there is
22 a direction in relation to open verdict.

23 SIR MICHAEL WRIGHT: Yes, very well. Thank you, Mr Stern.

24 Ms Leek.

25

1 Additional submissions by MS LEEK

2 MS LEEK: Sir, if one turns to paragraph 13 of the judgment
3 in Sharman, that's at tab 7.

4 SIR MICHAEL WRIGHT: Is that Lord Justice Leveson?

5 MS LEEK: It is, sir, yes.

6 SIR MICHAEL WRIGHT: Thought so. Bundle 3?

7 MS LEEK: Bundle 1.

8 SIR MICHAEL WRIGHT: Which tab?

9 MS LEEK: 7, sir.

10 That sets out assuming that there is sufficient
11 evidence for the jury --

12 SIR MICHAEL WRIGHT: Forgive me, paragraph?

13 MS LEEK: 13, middle of the page:

14 "... assuming that there was sufficient evidence for
15 the jury to consider, the proper way to articulate the
16 ingredients of the possible verdicts is ... " as
17 follows.

18 The first is unlawful killing. That is:

19 "A finding beyond reasonable doubt that the firearm
20 was not discharged in the belief that one of the
21 officers was under imminent threat of being shot with
22 a sawn-off shotgun."

23 If one is going to leave unlawful, lawful and open,
24 one would give the direction in relation to each of
25 these. Let's assume that you are not going to leave

1 unlawful, then you are simply left with the two
2 following directions or the ingredients as set out by
3 Lord Justice Leveson. Lawful killing: a finding, on the
4 balance of probabilities, that the officers albeit
5 mistakenly believed that they were under imminent threat
6 here of being blown up.

7 Three, open verdict. A rejection of the proposition
8 that they may have believed that they were under
9 imminent threat of being blown up. It goes on to say
10 that you wouldn't have to say that, because you wouldn't
11 be leaving unlawful killing, an inability to conclude
12 beyond reasonable doubt that such was not the case.

13 Now, the point here is that the jury would be being
14 asked to find: do you find on the balance of
15 probabilities, ie is it more likely than not, that they
16 honestly believed that there was an imminent danger of
17 detonation.

18 SIR MICHAEL WRIGHT: That would result in a lawful killing.

19 MS LEEK: In a lawful killing. An open verdict is not
20 tantamount to an unlawful killing. What it is is
21 a rejection of the finding that it is more likely than
22 not that they honestly believed, and so forth, but it is
23 not a finding beyond reasonable doubt that they did not
24 honestly believe.

25 SIR MICHAEL WRIGHT: I follow that.

1 MS LEEK: And that's the difference, and that's why it is
2 more convenient to leave lawful killing and open than to
3 deal with the factual circumstances --

4 SIR MICHAEL WRIGHT: As a question.

5 MS LEEK: -- or any other questions, because there can be no
6 doubt then of what returning a particular verdict means.
7 There is no confusion whatsoever. It is simply
8 a rejection of the proposition that the officers
9 honestly believed.

10 Now, if that were to be done by way of narrative,
11 the question would have to be asked, if one looks at
12 Middleton, paragraph 14, relating to McCann, the Death
13 on the Rock case, were the officers justified in using
14 such force.

15 Now, the direction would have to be the same,
16 exactly the same, because effectively what you would be
17 directing them on is lawful killing because the
18 ingredients of justified force are exactly the same as
19 the ingredients of lawful force. And that would be
20 lawful killing.

21 SIR MICHAEL WRIGHT: Yes, I see.

22 MS LEEK: A rejection of that proposition would effectively
23 amount to an open verdict. They simply wouldn't be
24 saying: no, we don't believe that; they would simply be
25 saying --

1 SIR MICHAEL WRIGHT: We don't know.

2 MS LEEK: We return an open verdict, we don't know, exactly.

3 SIR MICHAEL WRIGHT: Thank you. Yes.

4 Submissions by MR HILLIARD

5 SIR MICHAEL WRIGHT: Yes, Mr Hilliard.

6 MR HILLIARD: Sir, can I start by addressing the issue of
7 the existence of a duty of care or not. The starting
8 point for that, just so that it's been spelt out, is
9 a passage in the speech of Lord Bridge in Caparo Plc v
10 Dickman.

11 SIR MICHAEL WRIGHT: Three-fold test.

12 MR HILLIARD: Absolutely. Just for the reference, you have
13 the case in divider 18. That's volume 1. I don't think
14 there is any need to go to it. As I know you are very
15 familiar, he spelt out that:

16 "... the necessary ingredients giving rise to a duty
17 of care were foreseeability of damage, a relationship of
18 proximity, and finally it should be fair, just and
19 reasonable for the law to impose the duty."

20 With that by way of background, if we then go to
21 Hill, and I think we should look at this, decided two
22 years before Caparo, it's in divider 27, that's
23 volume 2. That, as you know, was what I will call the
24 Peter Sutcliffe case.

25 Sir, if you just go to a passage in the speech of

1 Lord Keith at page 59, it's quite helpful because we
2 will hear what others said about it later but he does
3 spell out in terms what the question of law is that's in
4 issue, and that may be important when we are looking to
5 see to what extent Hill governs or doesn't govern --

6 SIR MICHAEL WRIGHT: The single opinion.

7 MR HILLIARD: Page 59. If I can just finish the sentence.

8 It may be important to see how he put it because we will
9 consider later whether or not Hill is, for example,
10 an automatic bar to liability here.

11 If you have page 59, first full paragraph:

12 "The question of law which is opened up by the case
13 is whether the individual members of a police force, in
14 the course of carrying out their functions of
15 controlling and keeping down the incidence of crime, owe
16 a duty of care to individual members of the public who
17 may suffer injury to person or property through the
18 activities of criminals, such as to result in liability
19 in damages on the ground of negligence to anyone who
20 suffers such injury by reason of breach of that duty."

21 Then if we just look at the next paragraph:

22 "There is no question that a police officer, like
23 anyone else, may be liable in tort to a person who is
24 injured as a direct result of his acts or omissions."

25 So:

1 "He may be liable in damages for assault, unlawful
2 arrest, wrongful imprisonment and malicious prosecution
3 and also for negligence. Instances where liability for
4 negligence has been established ..."

5 Then there is reference to Knightley v Johns and the
6 Rigby case, both of which Mr Horwell took you to
7 yesterday.

8 If you turn, please, just to page 62, eight lines up
9 from the bottom of that page, there is a line that
10 begins "care similarly", but middle of the line:

11 "... Ms Hill cannot for this purpose be regarded as
12 a person at special risk simply because she was young
13 and female. Where the class of potential victims of
14 a particular habitual criminal is a large one, the
15 precise size of it cannot in principle affect the
16 issue."

17 Then last two lines:

18 "The circumstances of the case are, therefore, not
19 capable of establishing a duty of care owed towards
20 Ms Hill by the West Yorkshire police."

21 SIR MICHAEL WRIGHT: It was suggested that that authority
22 did no more than to create a duty of care in relation to
23 the activity of criminals.

24 MR HILLIARD: That certainly, we will see, is what
25 Lord Phillips was to say in the Van Colle case.

1 Absolutely right, that's the point.

2 Can I just say this, because this may also have
3 a bearing, just the last passage to look at here,
4 page 63, Lord Keith said that that, and obviously it
5 was, was sufficient for the disposal of the appeal, but
6 then went on:

7 "In my opinion there is another reason why an action
8 for damages in negligence should not lie against the
9 police in circumstances such as those of the present
10 case, and that's public policy."

11 Then if you go, it looks from here about ten lines
12 down but can you find there is a line that begins "be
13 said of police activities", and he says --

14 SIR MICHAEL WRIGHT: "The general sense of public duty"?

15 MR HILLIARD: Let me count them down. If we go seven lines
16 down, the last word of the line is "potential", perhaps
17 I should start there:

18 "Potential existence of such liability may, in many
19 instances, be in the general public interest as tending
20 towards the observance of a higher standard of care in
21 the carrying on of various different types of activity.
22 I do not, however, consider that this can be said of
23 police activities. The general sense of duty which
24 motivates police forces is unlikely to be appreciably
25 reinforced by the imposition of such liability so far as

1 concerns their function in the investigation and
2 suppression of crime. From time to time they make
3 mistakes in the exercise of that function, but it's not
4 to be doubted that they apply their best endeavours to
5 the performance of it. In some instances the imposition
6 of liability may lead to the exercise of a function
7 being carried on in a detrimentally defensive frame of
8 work. The possibility of this happening in relation to
9 the investigative operations of the police cannot be
10 excluded."

11 Then lastly, six lines up from the bottom of the
12 page:

13 "A great deal of police time, trouble and expense
14 might be expected to have to be put into the preparation
15 of the defence to, effectively, such an action and the
16 attendance of witnesses at the trial. The result would
17 be a significant diversion of police manpower and
18 attention from their most important function, that of
19 the suppression of crime."

20 I just pause to say this: that of course in a case
21 such as the present there is an IPCC investigation, of
22 necessity, which obviously takes up time and resources,
23 there is an inquest which does the same, and of course
24 nowadays there is always the possibility of an Article 2
25 claim. So it may be that we have moved on a little

1 since then.

2 SIR MICHAEL WRIGHT: It's also, I have a recollection
3 somewhere, I think it may be Van Colle, that the
4 sentence that reads "it's not to be doubted" and so
5 forth --

6 MR HILLIARD: I'm coming to that.

7 SIR MICHAEL WRIGHT: You are in a slightly more sceptical
8 approach to that.

9 MR HILLIARD: Absolutely. It's in the next case we are
10 going to look at, it's in Brooks in divider 32. You are
11 absolutely right.

12 If you just have the first page, essentially what
13 this was was a claim in negligence concerning how
14 a witness had been dealt with by the police, and you
15 have the holding there.

16 "... that as a matter of public policy the police
17 generally owed no duty of care to victims or witnesses
18 in respect of their activities when investigating
19 suspected crimes."

20 You will see Hill v Chief Constable of
21 West Yorkshire was applied. But the significance,
22 perhaps, of this case may be that there is a degree of
23 caution about the full width of Hill.

24 If I can just illustrate that: if you turn, please,
25 to page 1497, paragraph 3 in Lord Bingham's speech

1 there, halfway down, it's page 5 of 21 in the print,
2 fourth line down, said Lord Bingham:

3 "I would also be reluctant to endorse the full
4 breadth of what Hill v Chief Constable of West Yorkshire
5 has been thought to lay down, while readily accepting
6 the correctness of that decision on it's own facts."

7 Then over the page, please, the speech of
8 Lord Nicholls, paragraph 6:

9 "Like Lord Bingham and Lord Steyn, in reaching this
10 conclusion I am not to be taken as endorsing the full
11 width of all the observations in Hill."

12 Then this:

13 "There may be exceptional cases where the
14 circumstances compel the conclusion that the absence of
15 a remedy sounding in damages would be an affront to the
16 principles which underlie the common law. Then the
17 decision in Hill's case should not stand in the way of
18 granting an appropriate remedy."

19 Then finally the passage that you, sir, had in mind:
20 if we go, please, to page 1509 -- it's in the speech of
21 Lord Steyn -- paragraph 28. It's exactly as you
22 indicated, Lord Keith's observation that we looked at is
23 mentioned, and Lord Steyn observed:

24 "Nowadays a more sceptical approach to the carrying
25 out of all public functions is necessary."

1 SIR MICHAEL WRIGHT: Yes, there'd been a good deal of water
2 under the bridge since then.

3 MR HILLIARD: Yes.

4 Then lastly -- before I go to our skeleton -- if you
5 have the next case, it's Van Colle in divider 33, just
6 the point that you were making earlier on when we were
7 looking at Hill. If you go to Lord Phillips at
8 page 626, paragraph 97, talking about Hill and Brooks,
9 he deals with the core principle, and it's six lines
10 down. Says Lord Phillips:

11 "That principle is, so it seems to me, that in the
12 absence of special circumstances the police owe no
13 common law duty of care to protect individuals against
14 harm caused by criminals."

15 That I think was the point that you, sir, were
16 making earlier.

17 SIR MICHAEL WRIGHT: Yes.

18 MR HILLIARD: So the first submission that we make is really
19 this: that liability is not necessarily, we submit,
20 excluded by Hill, and the question really is whether it
21 is possible to carve out a principle of liability which
22 falls within the Caparo tests that we looked at.

23 As you know, we have endeavoured to do that; and can
24 I just take you to our written submissions beginning at
25 page 15. I have said what I have about Hill but, in

1 addition, as we point out at page 15, the courts have
2 always recognised that the principle in Hill does not
3 prevent the police owing a duty of care in various
4 operational actions. We have cited those examples that
5 we looked at yesterday of Knightley v Johns and the
6 Rigby case.

7 We have then made reference, and again Mr Horwell
8 helpfully took you to Hartwell's case, which is at the
9 bottom of this page.

10 Obviously if that is right, going to page 16, Hill
11 does not preclude liability relating to the distribution
12 of firearms.

13 So then, in our submission, if that is right -- and
14 in our submission it is -- it's difficult to see why
15 decisions concerning the immediate deployment of
16 firearms officers against an identified subject -- so
17 not the world at large, but against an identified
18 subject -- should not also engage a duty of care.

19 We go on to say that the best way, in our
20 submission, to reconcile the authorities is to say that
21 the police can owe a duty of care in negligence in
22 respect of various positive operational decisions,
23 particularly those which may foreseeably result in harm
24 to a defined class of persons. But, and this is common
25 ground, the police do not owe a more general duty to the

1 public at large in their general functions of
2 investigating crime.

3 Then, with Caparo in mind, in any event a duty will
4 only arise if the requirements of foreseeability and
5 proximity are met; and in many cases proximity will not
6 exist because, as I have already indicated, the duty
7 might be owed to an unacceptably wide class of persons,
8 and equally in many cases it will not be possible to say
9 that breach of a particular duty may foreseeably result
10 in harm.

11 Missing out the next paragraph, but save only to
12 note the reference to Heagren there -- which we looked
13 at, and I'll come back to that in a moment, Mr Horwell
14 took us to that yesterday -- but our submission is that
15 in the directing of firearms officers to stop or
16 challenge an identified individual, or to storm
17 an identified address, a senior officer can owe a duty
18 of care to that individual and to others in the
19 immediate vicinity.

20 We submit that that is analogous to the siege
21 situation in Rigby and, as we have put it, involves
22 a proximate relationship.

23 SIR MICHAEL WRIGHT: Also -- it just happens to be the one
24 case that I remember vividly -- the act of the police
25 officer in directing his motorcyclist to go back down

1 the tunnel exposed an identifiable class of people,
2 namely the people in the traffic coming the other way,
3 to unreasonable risk of injury, and that's what actually
4 happened. It's an operative decision.

5 MR HILLIARD: Absolutely. We have gone on to say, but
6 I hope its plain, that we think that this is more
7 difficult the further one moves back in time, and
8 Heagren obviously underlines the difficulty: that it may
9 also be arguable that in the planning and directing of
10 a MASTS operation against an identified address,
11 a senior officer owes a duty to those inside the address
12 who may be affected.

13 If I can just pull it together, in our submission
14 there is a good basis for saying that at the point where
15 the intervention was ordered -- so they are ordered to
16 get behind him, 9.55 or so -- that a duty of care could
17 properly be said to exist at that stage.

18 The operational deployment of the firearms team
19 against a named -- I say a named, but against
20 an identified individual, I will use "identified" --

21 SIR MICHAEL WRIGHT: Is it actually as soon as that? The
22 reason I ask is that, as I understand the evidence, the
23 function of the firearms teams in the initial stages is
24 simply to be in support of the surveillance officers,
25 behind them. There comes a later stage --

1 MR HILLIARD: When they are ordered to move through. I may
2 have put the time wrong. But as I say, when they are
3 ordered to get behind him, to move through and so on, at
4 that point.

5 SIR MICHAEL WRIGHT: Or I suppose, in any case, on any
6 basis, when they are ordered in to make the stop.

7 MR HILLIARD: Certainly, in our submission -- and I think
8 even Mr Perry probably agrees that, as it were, if there
9 were a duty, at that point that's when it would
10 crystallise.

11 But in our submission, it's much more difficult
12 before that stage, and the more so the further back one
13 goes; particularly, in our submission, for example at
14 4.55 in the morning when a firearms team had not in fact
15 been deployed at all. Very difficult, in our respectful
16 submission, to find a duty there.

17 SIR MICHAEL WRIGHT: Nor indeed had a surveillance team.

18 MR HILLIARD: Absolutely.

19 Sir, that, I think, it is one of the more difficult
20 questions but it was gone into in some detail yesterday,
21 and that's how we put the duty of care point.

22 That aside, I think so far as murder and
23 manslaughter are concerned, unsurprisingly there are no
24 differences, I think, between any of the interested
25 persons as to the legal elements in issue.

1 We have set out in our document what seem to us --
2 and, I have to say, having heard the arguments, still
3 seem to us to be the main issues for you to consider,
4 and we have attempted to put the points in each
5 direction. And unless you ask us to, we don't propose
6 to go beyond that analysis, and we leave the matter with
7 you in that way.

8 SIR MICHAEL WRIGHT: Yes.

9 MR HILLIARD: That leaves, I think, three topics. The
10 first -- and if he did and I missed it, then I apologise
11 to Mr Perry -- was the question of the effect of
12 section 16.7 of the Coroners Act. The Coroner --

13 SIR MICHAEL WRIGHT: Inconsistent verdicts.

14 MR HILLIARD: -- made some observations about that
15 yesterday, and I think said that unless anybody
16 disagreed there effectively, as in our document, that
17 unless anybody disagreed ... I am very grateful.

18 SIR MICHAEL WRIGHT: Fine, thank you.

19 MR HILLIARD: The next question, if I just deal with these
20 two together, perhaps, is the overall approach to
21 verdicts, which we have dealt with at page 31 of our
22 document, and the terms of any narrative enquiries.

23 Can I just add to what we have said in this way:
24 first of all, so far as narrative questions are
25 concerned, I'm sure everybody agrees that it's simply

1 not going to be possible to draft those in comity. The
2 principles are clear and you will obviously have to
3 decide what the proper questions are.

4 But we don't share the total aversion to the use of
5 the word "failure", and I do not want to mischaracterise
6 anybody's submissions, obviously a question of balance
7 is required, but it may of course be the --

8 SIR MICHAEL WRIGHT: There is no requirement for the
9 questions to be non-judgmental in (inaudible).

10 MR HILLIARD: No, I was really going to say two things.

11 Having said that it's obviously a question of balance,
12 but I suppose the first thing to say is that it may, of
13 course, be the obvious way to describe a particular
14 state of affairs as a failure, if it is established; and
15 secondly, as you have indicated, it's the case of Cash
16 which we have at divider 40, I don't think there is
17 a need to go to it, we have dealt with it at page 7 of
18 our written document, where Mr Justice Keith held that:

19 "Where the investigative obligation under Article 2
20 was engaged, it was not appropriate to direct the jury
21 that their narrative should be neutral and
22 non-judgmental."

23 So there is that clear statement of principle and,
24 as I say, it's perhaps more a question of deciding what
25 the apposite words are to describe a particular

1 situation that is referred to in the question.

2 Finally, the question of the overall approach to the
3 verdicts. Can I add something to what we have said in
4 our document?

5 SIR MICHAEL WRIGHT: Yes, please.

6 MR HILLIARD: I think this discussion that we have all been
7 having obviously proceeds upon the basis, and none of us
8 knows, that you were to withdraw unlawful killing in all
9 its forms. Obviously if you don't, everybody is agreed
10 as to what the position is. So I am not assuming
11 anything, but only for the purposes of the discussion.

12 The starting point is perhaps this: that you, I say
13 with respect, are obliged to act as a filter to avoid
14 injustice, and you would not leave a finding as open to
15 the jury which would be perverse if it was returned.

16 The question was raised at one stage, I think, of
17 whether or not it should be asked in a narrative: did
18 the officers honestly believe that Mr de Menezes
19 presented a threat? As you, sir, indicated, that if
20 that were asked in a narrative, the answer "yes" could
21 be given, on the balance of probabilities, the answer
22 "no" would have to be to the criminal standard.

23 SIR MICHAEL WRIGHT: Mr Stern doesn't accept that, as
24 I understand it.

25 MR HILLIARD: I think that is right if it's put in the

1 narrative form, or that's certainly our submission, and
2 that, we say, would be equivalent to leaving unlawful
3 killing by a different route.

4 SIR MICHAEL WRIGHT: On the balance of probabilities.

5 MR HILLIARD: Well, it would be leaving it open to the jury
6 to say: yes, they were sure that the officers didn't
7 have that belief; and so, if they said that in answer to
8 the question, that would be leaving unlawful killing
9 which you would by definition, for the purposes of this
10 argument, have withdrawn.

11 SIR MICHAEL WRIGHT: Yes, I follow.

12 MR HILLIARD: There is, of course, no difficulty, in our
13 submission, about you as the Coroner resolving one of
14 the central issues in a particular case by withdrawing
15 unlawful killing from the jury, were you to do that.
16 That appears, if we look at *Bubbins v United Kingdom*,
17 which is in file 3, right at the back of it, I think.
18 It's the very last authority.

19 If you go to page 24 of 28, those numbers in the top
20 right, paragraph 163, third line of that:

21 "Although the Coroner directed the jury to return
22 a verdict of lawful death, it does not consider that
23 this deprived the proceedings of their effectiveness.
24 If an independent judicial officer such as a Coroner
25 decides after an exhaustive public procedure that the

1 evidence heard on all relevant issues clearly points to
2 only one conclusion, and does so in the knowledge that
3 his decision may be subject to judicial review, it
4 cannot be maintained that this decision impairs the
5 effectiveness of the procedure."

6 This would be obviously rather a different situation
7 but, in our submission, the same principle is in play,
8 that there could be no objection to, as I say, you
9 yourself resolving one of the central issues in the case
10 by withdrawing unlawful killing from the jury.

11 Thereafter it really is, in our submission, a matter
12 for your discretion as to whether you leave no short
13 form verdicts at all, if you conclude that there is
14 a risk, as you were indicating, of misunderstanding, or
15 if you are satisfied that narrative questions will best
16 resolve any other central questions that arise in the
17 case.

18 If, in your discretion, you take the view that that
19 is the more appropriate course, then in our submission
20 there is nothing wrong with that.

21 Just finally, if I can take you to page 31, which is
22 our section on overall approach to verdicts.

23 SIR MICHAEL WRIGHT: In your submissions?

24 MR HILLIARD: Yes.

25 SIR MICHAEL WRIGHT: Just wait while I put Bubbins away, if

1 you will. (Pause). Yes.

2 MR HILLIARD: Just the point that we have made at the bottom
3 of the page there, that in this event that you had
4 withdrawn unlawful killing, that if you were to leave
5 lawful killing and open verdict you would have to take
6 the view that, on the evidence, the jury could properly
7 reject a lawful killing verdict, because there would
8 otherwise be no point in leaving the open verdict.

9 I only raise that because I am not entirely clear
10 from my learned friends' submissions as to whether they
11 both, or Mr Stern in particular, whether he accepts that
12 the jury could properly reject a lawful killing verdict
13 because it would be only be if that were the case, if he
14 is conceding that, that an open verdict could be left.

15 SIR MICHAEL WRIGHT: I would assume that they are both
16 thinking about Sharman, and the situation that was left
17 to the jury in Sharman. No, because that was all three
18 were left.

19 MR HILLIARD: That's right.

20 SIR MICHAEL WRIGHT: I beg your pardon, I am wrong.

21 The point here really is that if they have not got
22 unlawful killing to consider because I have withdrawn
23 it, it's theoretically possible at any rate -- and
24 Bennett is the case in point -- where the other two
25 verdicts can be left, but only, as you yourself say, the

1 circumstances are such -- and it's not altogether easy
2 to think what they might be -- that the jury could still
3 legitimately reject the lawful killing verdict
4 presumably on the balance of probabilities.

5 What I need to bear in mind, I think you are telling
6 me, is that in those circumstances I ought not, as it
7 were, to seek the same answer via another route by
8 including a question in the series that go to make up
9 the narrative verdict which includes the specific
10 question about genuine and honest belief in the
11 necessity for self-defence. And that simply doesn't get
12 in, doesn't have to be left at all.

13 MR HILLIARD: That would be our submission, that there are
14 great dangers about doing that, and principally the one
15 I have indicated.

16 SIR MICHAEL WRIGHT: In particular, as you say, the
17 differential burden of proof according to which answer
18 is intended to be given.

19 MR HILLIARD: Yes, and you are simply reintroducing what you
20 would by definition have withdrawn, so certainly not in
21 a narrative.

22 SIR MICHAEL WRIGHT: Thank you very much indeed.

23 MR HILLIARD: I don't know whether any of my learned friends
24 want to address you any further about it. I am not sure
25 whether everybody had their opportunity.

1 SIR MICHAEL WRIGHT: What I am going to suggest is this: if
2 we all break off now and have lunch, we may have come to
3 the end of this, but --

4 MR HILLIARD: It's really whether anybody had any further
5 submissions about narrative questions. If my learned
6 friends are ready to do that before lunch and we all
7 finish, then --

8 SIR MICHAEL WRIGHT: By all means, let's do it.

9 MR HILLIARD: It's a matter for them.

10 SIR MICHAEL WRIGHT: Nobody is actually leaping up.

11 MR MANSFIELD: Yes. May I just on this, because I didn't
12 address it yesterday --

13 SIR MICHAEL WRIGHT: I know you didn't.

14 MR MANSFIELD: -- on purpose, and we did a draft, we have
15 done a subsequent draft --

16 SIR MICHAEL WRIGHT: Which I now have.

17 MR MANSFIELD: -- and there may be yet more amendments. So
18 I would want to have some opportunity to say something.
19 It may be that it can be ironed out without addressing
20 you, it may not.

21 SIR MICHAEL WRIGHT: I am not averse to the idea of
22 listening to any more submissions on the format of the
23 questions. Do you want to do it now or at 2 o'clock?

24 MR MANSFIELD: I wonder if we could do it after lunch.

25 SIR MICHAEL WRIGHT: All right, well, if you're going to do

1 it at 2 o'clock then I am afraid everybody else will
2 have to follow on behind. I think that might be
3 sensible so you can all think about what was said this
4 morning.

5 Very well, 2 o'clock for that.

6 (12.50 pm)

7 (The short adjournment)

8 (2.00 pm)

9 (Proceedings delayed)

10 (2.15 pm)

11 SIR MICHAEL WRIGHT: Yes, Mr Hilliard.

12 MR HILLIARD: Just this, you may remember I, before
13 concluding, just asked a question of Mr Stern, if not
14 directly, certainly rhetorically, and I am very grateful
15 to him. I have had an opportunity to speak to him over
16 the short adjournment, and the position he has indicated
17 is that he will not be submitting that you should not
18 properly leave both an open verdict and a verdict of
19 lawful killing.

20 SIR MICHAEL WRIGHT: Right.

21 MR HILLIARD: We, that's Mr Hough and myself, have had
22 an opportunity obviously to hear the arguments that have
23 been advanced this morning, and to consider it between
24 ourselves, again over the break. It is our view that,
25 in the light of what Mr Stern has said, and as I say,

1 having considered the arguments, that there are
2 advantages, we think, were you to leave short form
3 verdicts of open verdict and lawful killing.

4 So that is, I think, a change from our position
5 before, as well as some narrative questions which we
6 will come to later.

7 SIR MICHAEL WRIGHT: I appreciate that the narrative
8 questions will always be there. Essentially analysing
9 it for a moment, the situation would be, then, that the
10 jury, if they were so persuaded, on the balance of
11 probabilities could leave lawful killing on the basis
12 that they had concluded that on the probabilities, C2
13 and C12 had a genuine belief in the immediate mortal
14 threat, but if they were not able to come to that
15 conclusion, they would give an open verdict on the basis
16 essentially that they couldn't make their mind up about
17 it.

18 MR HILLIARD: Or whatever, simply as --

19 SIR MICHAEL WRIGHT: Something short of the balance of
20 probabilities.

21 MR HILLIARD: That's really the simplest way to put it.

22 SIR MICHAEL WRIGHT: If I may say so, that's helpful, and
23 I understand the reason why you modified your views
24 about that, thank you.

25 Anything you want to add to that, Mr Stern?

1 Further submissions by MR STERN

2 MR STERN: First of all, can I say I am grateful for the
3 extra 10 minutes' time. I think we have saved a bit
4 longer by doing that.

5 Can I just add this: that of course you are the
6 person who is responsible for assessing the evidence and
7 the strength of the evidence at this stage, and in
8 determining which verdicts should be left to the jury as
9 a matter of law. If you came to the conclusion that no
10 jury properly directed could safely reject lawful
11 killing, then of course it would be your duty to
12 withdraw any other verdict and direct them accordingly.

13 So I do, as it were, rely on that, subject of course
14 to a proper analysis of the evidence and --

15 SIR MICHAEL WRIGHT: That I fully understand, of course.

16 MR STERN: Forgive me for saying something that is perhaps
17 obvious to you.

18 SIR MICHAEL WRIGHT: Thank you very much.

19 Ms Leek, I don't think this actually affects any of
20 your clients.

21 MS LEEK: I have nothing to add, sir.

22 SIR MICHAEL WRIGHT: Thank you very much.

23 Now, Mr Mansfield, questions.

24 Further submissions by MR MANSFIELD

25 MR MANSFIELD: Questions and verdicts, because I do have

1 something to say. I did not have time yesterday to deal
2 with this, so if I may be given the time now to deal
3 with it, because we say it's slightly more complicated
4 than has been set out.

5 First I am going to deal, if I may, with the short
6 form situation with regard to unlawful and lawful and
7 open first.

8 It goes without saying that in a sense this has only
9 arisen as a convention, you will recall the position
10 that has existed, certainly pre narrative verdicts, in
11 which --

12 SIR MICHAEL WRIGHT: They have no statutory basis.

13 MR MANSFIELD: Yes, no statutory basis and the jury are
14 entitled, provided they don't traverse any of the
15 coronial rules, and therefore, for example, give rise to
16 civil or criminal liability, they are entitled to use
17 words that they choose to use that reflect the
18 conclusions they have come to, subject to those matters
19 I have alluded to.

20 So that's the background to this. I put that in as
21 the background because it's leading, I suggest, to
22 a narrative rather than short form, and the next stage
23 is to consider this: it was something that was said this
24 morning when you were asking questions about the answers
25 and the level or standard of proof that may be applied

1 if a question was interposed into the narrative
2 questions that reflected the same thing.

3 I have drafted one, but it's no better and hopefully
4 no worse than the ones that have already been put
5 forward.

6 So for example, if this were the narrative question:
7 were the shots fired by the officers justified by
8 an honest and genuine belief that there was an imminent
9 threat posed by the detonation of a bomb?

10 SIR MICHAEL WRIGHT: Sorry, were shots fired justified?

11 MR MANSFIELD: Yes.

12 SIR MICHAEL WRIGHT: If I simply say by honest belief,
13 I know what follows.

14 MR MANSFIELD: That's it in a nutshell. Then they have the
15 answer yes or no. This then becomes the important area.
16 We say the yes/no would be and can be answered, and in
17 a sense would have exactly the same effect as the short
18 form and open. I will come to why it's preferable for
19 it to be in the narrative rather than the short form in
20 one moment. Because we say what is intended in the
21 narrative and all narrative verdicts is not a difference
22 in the standard of proof in relation to questions. So
23 therefore it would be perfectly open to the jury to say,
24 either: yes, on the balance of probabilities, we believe
25 it was in self-defence --

1 SIR MICHAEL WRIGHT: So we start off with common ground, yes
2 would be on the balance of probabilities.

3 MR MANSFIELD: Certainly that, but no also on the balance of
4 probabilities.

5 It's two sides of the same coin. In other words,
6 the jury may be saying to themselves, in fact it infers
7 a number of possibilities, just as the open does.

8 Now, if the concern is that, oh, well, the
9 conventional one is tried and tested, well, yes, as
10 a matter of convention it is, but it does not absolve
11 anyone from the difficulty, which I understand Mr Stern
12 and others are worried about, for the people that they
13 represent, that others -- I suspect they mean the media
14 and possibly ill-informed members of the public -- will
15 run away with the idea that it means the jury felt that
16 it was or may be murder.

17 Now, that is often the risk that is run by an open
18 verdict. In fact, commonly run by an open verdict.
19 It's why there has been discussion as a whole at a much
20 higher level about the desirability of verdicts at all
21 in this area. One appreciates that. But you don't get
22 round the problem by saying, well, we will have a short
23 form in terms of the normal, namely lawful or open.

24 So therefore, what one is contemplating here is
25 a perfectly legitimate evidential situation that could

1 be facing a juror, in other words they are not satisfied
2 on the balance of probability that it was in
3 self-defence. That is a perfectly legitimate position
4 to be in, and is often posited to juries that that might
5 be their situation. It's not that they are then to
6 speculate about what was in the mind or wasn't in the
7 mind; if they are not satisfied on the balance of
8 probabilities that this was in self-defence, then they
9 may be unable to reach the criminal standard for it to
10 be sure that it wasn't, in other words rebutting it; or
11 there is another area in between, before you get to
12 that. They just may not know. In other words they are
13 a don't know juror.

14 Those are all legitimate positions for a jury to be
15 in, and those other positions are legitimate and arise
16 whether it's contained within a narrative or whether you
17 have a short form and the open verdict. They all arise
18 in both cases. So we say the risks that are run by
19 a narrative form of finding is, from that point of view,
20 no worse than the short form.

21 However, there are drawbacks to having it as the
22 short form, and in fact at this stage I want to employ
23 in a sense the risk argument that is used in relation to
24 open. That if in fact -- and can I just, as it were,
25 countenance the several balls that are in the air at the

1 moment, and one can't catch them all at the same time
2 but, suppose, and I can't pre-empt and I don't wish to,
3 any decision that you may take, but just suppose that
4 you do not leave unlawful killing gross negligence.

5 SIR MICHAEL WRIGHT: They don't necessarily go hand in hand.

6 MR MANSFIELD: No, they don't, but for these purposes,
7 I just want to posit this situation, and I have to come
8 back to the inquisition in relation to this, because
9 I am not sure that the further position I want to deal
10 with has been fully thought through at the moment,
11 I include myself in this, so perhaps it's just me,
12 I don't know.

13 SIR MICHAEL WRIGHT: If you mean that what I'm sitting
14 through at the moment is a stream of consciousness ...

15 MR MANSFIELD: Yes, I am going to be perfectly honest about
16 that. To some extent it is addressing a situation
17 certainly I think very few of us have faced before,
18 certainly I haven't in inquests, and I'll come to it,
19 it's box 4 on the inquisition, in a moment.

20 But if you were to withdraw unlawful killing, gross
21 negligence and the only short form that is left is
22 lawful killing, whether or not they come to lawful or
23 open, that would be a serious, we say,
24 mischaracterisation of this whole inquest. That's the
25 risk, if it's not in the narrative, as opposed to being

1 in the narrative, because one can imagine straightaway
2 that in fact the other issues -- nobody has suggested
3 that there are not the other issues -- that bear upon
4 the death that did not occur in the five or ten seconds
5 of the carriage will be overshadowed, dramatically
6 overshadowed. I will come straight to the point.
7 Supposing it's a lawful killing verdict short form in
8 relation to the two officers effectively, that would be
9 a mischaracterisation of this whole inquest and the
10 purpose of satisfying Article 2, Middleton and all the
11 questions that have to be raised will be overborne by
12 that single verdict in that way.

13 That can be avoided at the same time as satisfying
14 Mr Stern in relation -- and we had a discussion this
15 morning, I accept entirely the need to have a resolution
16 of one of the issues in the inquest, and I understand
17 that, was the force justified, putting it shortly.
18 I understand. It would certainly run against common
19 sense from one point of view if that matter was not to
20 be resolved. So I understand that.

21 What I'm trying to do is, therefore, pose a way in
22 which it can be resolved without the detriment to
23 anyone, in other words that it's part of a narrative.
24 Whether it's put at the beginning of the narrative or
25 the end matters not. Chronologically it might perhaps

1 come at the end rather than at the beginning, so it's
2 seen very clearly where it fits into the narrative as
3 a whole, however many questions you decide to leave.

4 SIR MICHAEL WRIGHT: Why can't it be both?

5 MR MANSFIELD: You wouldn't want to have, I don't think,
6 a narrative question as well as a short form.

7 SIR MICHAEL WRIGHT: No, but it could fill in the gaps,
8 couldn't it?

9 MR MANSFIELD: The reason why you wouldn't want both, even
10 if -- it would only be filling in a very small gap. The
11 lawful killing aspect of the case has now boiled down
12 to -- I think on all sides are at least agreed on
13 this -- what happened after they left the escalators,
14 essentially, and went into the carriage. It's been said
15 on one side no preconceptions and so on. It's boiled
16 down to a very, very narrow area of time.

17 Although it could fill a gap at the end of
18 a narrative, in terms of well, what happened thereafter,
19 the problem I am posing is that, if it's a short form
20 verdict coming at the end like that, there is and since
21 there has to be transparency, allaying rumour and so on,
22 the other functions that the inquest performs on
23 a public front with regard to Article 2, the real risk
24 is lawful killing will be seen to be, if you like, the
25 synopsis of the whole seven weeks; and we are, on behalf

1 the family, seriously concerned that all the other
2 issues, and we are not suggesting that every single one
3 we have raised is one that you will want the jury to
4 consider, but there are a large number of them which we
5 imagine you will want the jury to consider. And they
6 will be as I say overshadowed and overborne in this
7 context.

8 If in fact the question that I have posed in the
9 narrative is precisely the same as the short form or
10 open, then we say there is no damage done to the
11 officers, they get a resolution of that but they get it
12 in the much wider context, and it's not going to lead
13 hopefully to any misjudgments, preconceptions or
14 misconceptions by others if it's in that context.

15 So we suggest that would be the strong argument for
16 making it part of a narrative rather than not.

17 May I just, while I am dealing with narrative before
18 a bit more on short forms, I would like just to address
19 a couple of other matters that were raised this morning.
20 First of all the nature of the language. I have spent
21 some of this morning redrafting --

22 SIR MICHAEL WRIGHT: Do you mean the point about failure?

23 MR MANSFIELD: Pejorative.

24 SIR MICHAEL WRIGHT: Yes.

25 MR MANSFIELD: It's perfectly possible to re-word it, the

1 fact that, no, the fact that no. If my learned friends
2 really want it put that way we can do it. It's not
3 difficult. In fact, from the point of view of those
4 most affected, it looks worse that way round, funnily
5 enough. But if they want that done, I can easily
6 re-word all of this in a factual way which reads far
7 more like an indictment than the present one does,
8 although they may not appreciate it, but I can certainly
9 do that.

10 In any event, our contention is I do not have to do
11 that.

12 SIR MICHAEL WRIGHT: You don't have to worry about their
13 sensitivities, Mr Mansfield.

14 MR MANSFIELD: No, I am certainly not worried about their
15 sensitivities, and therefore from that point of view,
16 the cases already cited make it very clear and the
17 history of verdicts make it very clear that the jury
18 can, and it should be indicated to them that they can
19 use language which is pejorative in relation to this if
20 they feel strongly about it.

21 So I do not spend more time on that.

22 One matter that Mr Gibbs raised this morning, and
23 I fear perhaps it's a misconception about inquests, and
24 I'm just going to deal with one factor because it
25 touches on the issue of Ivor.

1 The fact that Ivor wasn't challenged in the criminal
2 trial, for all sorts of reasons that are quite
3 different, is in a sense neither here nor there. There
4 were different issues there, at that stage, and
5 certainly he was called for the prosecution and the
6 defence had a different agenda at that trial.

7 When it comes to this, it's not a trial, and I did
8 make it clear at some stage much earlier on that I am
9 representing a party or person who actually wasn't in
10 the carriage, and therefore I am not really in
11 a position -- I said at an earlier stage it's not
12 splitting hairs -- to put a case.

13 All one was trying to do with Ivor in fact was to be
14 reasonable on the balance of what if he is saying he put
15 his arms -- the point you made this morning, if he put
16 his arms around, plainly one inference from that is that
17 he must have at least left the seat a bit for that to
18 have happened.

19 But in any event, whether I challenge or I don't
20 challenge has nothing to do with the verdict, and the
21 idea that somehow or another that becomes therefore,
22 one, a concession which is written in --

23 SIR MICHAEL WRIGHT: It doesn't define the issues in the
24 case.

25 MR MANSFIELD: Absolutely not. There is an issue. The jury

1 may say we don't care what Mr Mansfield's put -- they
2 may well be thinking that, I have no idea. We don't
3 care what he has put. There is a division of factual
4 evidence here about what a number of the passengers say
5 they saw, and of course it may be explained in all sorts
6 of different ways, but there is a division of evidential
7 material in relation to, in fact that very vital last
8 few seconds, whether he was shot while he was still
9 sitting in his seat or not.

10 From that point of view, may I say I do not agree
11 with Mr Gibbs' submissions in relation to that.

12 Sir, may I go on to a further difficulty. It may
13 not be, hopefully not, but it is one that we have been
14 discussing over lunch and that is this: if you look at
15 the form of inquisition I'm sure you are familiar with,
16 there is a box, number 4, for the verdict.

17 It may be that it's easily overcome if in fact in
18 this case there is more than one. This is back to the
19 short form situation. If you were to leave -- and it's
20 not an argument for not leaving -- unlawful in relation
21 to gross negligence but lawful in relation to shooting,
22 it's two different verdicts in relation to the same
23 case.

24 Now, that's not impossible, obviously from
25 a lawyer's point of view, to see how that could be

1 arrived at. But one immediately sees there could be
2 difficulties again when one gets to the short form
3 situation of having two verdicts that, on the face of
4 it, are inconsistent but of course they are not, legally
5 speaking, inconsistent at all. But it's a matter that
6 you may wish to, as it were, advert to because of the
7 way the box is framed, it would have to be re-framed for
8 the purpose of this --

9 SIR MICHAEL WRIGHT: You would have to split the two issues.

10 MR MANSFIELD: Yes, you would.

11 SIR MICHAEL WRIGHT: There should be no difficulty in doing
12 that, I wouldn't have thought.

13 MR MANSFIELD: No, we discussed it very briefly and you are
14 right, it's a stream of consciousness, as to how that
15 would happen. You could split box 4 and relate the
16 splits --

17 SIR MICHAEL WRIGHT: It was done in, as you remember, the
18 Princess of Wales case.

19 MR MANSFIELD: I mentioned that to your learned counsel. In
20 fact it was done, I brought the --

21 SIR MICHAEL WRIGHT: It was done in respect of two different
22 people or groups of people.

23 MR MANSFIELD: Well, it was the same verdict arrived at in
24 different ways.

25 SIR MICHAEL WRIGHT: That's right, in respect of two

1 different series of activities, driving the car on the
2 one hand and following the car on the other.

3 MR MANSFIELD: I have actually got it.

4 SIR MICHAEL WRIGHT: Well, you should know.

5 MR MANSFIELD: Yes, I have it here. It was obviously in
6 relation to two but they were in the same car, so
7 effectively, although it was possible that one had
8 intervening causes of a different kind, in the end they
9 were resolved. So the verdict --

10 SIR MICHAEL WRIGHT: Sorry, I was thinking of a slightly
11 different dichotomy. One was the drunkenness of the
12 driver.

13 MR MANSFIELD: Yes, as a route.

14 SIR MICHAEL WRIGHT: The other was the pursuit of the
15 paparazzi.

16 MR MANSFIELD: That's right, and another was the
17 combination. In each case, I think there were four
18 altogether, there were four routes to an unlawful
19 killing, so it was a single unlawful killing and they
20 had to specify which route they chose, and they chose --

21 SIR MICHAEL WRIGHT: To bring it closer to home here, it is,
22 as, if I may say so, my counsel and I think rightly, you
23 have confined C2 and C12 issues to murder, as we now
24 know; and that would be, as it were, the first half of
25 box 4, relating specifically to C2 and C12; the second

1 half of box 4 in relation to senior police officers,
2 unlawful killing, gross negligence.

3 They would not necessarily touch each other at all.

4 MR MANSFIELD: No, they don't, and we all understand the
5 distinction between the two groups, as it were, albeit
6 that the verdict would not attribute liability, so it
7 would not be able to name or specify in either of those
8 two. I am merely flagging up a potential risk of two
9 different types of verdict in relation to the same case,
10 although one would be dealing with causal factors in the
11 lead-up to the second. The second being --

12 SIR MICHAEL WRIGHT: I follow that, but as far as
13 identification is concerned, am I not right in thinking
14 that in the Princess of Wales case, you eventually did
15 get unlawful killing with reference to Henri Paul?

16 MR MANSFIELD: Yes, in combination.

17 SIR MICHAEL WRIGHT: Henri Paul was identified.

18 MR MANSFIELD: Unlawful killing in relation to the
19 drunkenness of the driver, the paparazzi and other
20 vehicles. There were three elements to that and that
21 was one of the four choices.

22 SIR MICHAEL WRIGHT: Your point is that -- the consequence
23 of that is although it did not spell it out in the
24 verdict, it was perfectly obvious it was being spoken
25 about.

1 MR MANSFIELD: Yes. The driver, yes.

2 SIR MICHAEL WRIGHT: And that happens from time to time.

3 MR MANSFIELD: That does happen from time to time. It may
4 be unavoidable. In one sense, of course, I go back to
5 the original position, which is, it may be on
6 reflection, if the lawful verdict is the only one that's
7 going to be left, that that would be a misnomer, and
8 that's our basic position as to why that should be in
9 the narrative with a question that specifically meets
10 Mr Stern's needs.

11 SIR MICHAEL WRIGHT: Right. Very well, thank you very much.

12 Now, does anybody else have submissions that they
13 wish to make? In any order that you like.

14 Further submissions by MR HORWELL

15 MR HORWELL: Shall I go first?

16 SIR MICHAEL WRIGHT: Yes, indeed.

17 MR HORWELL: I am going to very much keep my submissions to
18 the issue of verdict and questions, but could I simply
19 say this, on the issue that took so much time yesterday.

20 Duty of care, it will be less than a minute,
21 I promise you.

22 Today you have sought to grapple with, if there was
23 a duty of care, at what stage is it crystallised,
24 an issue of timing. We have asked in writing, we asked
25 orally yesterday, that if there is a duty of care could

1 somebody please define it. What is the duty of care
2 that the police owe to a suspected suicide bomber? You
3 only have, as we said yesterday, to pose the question to
4 realise that it's one that is not susceptible to
5 a sensible, logical, proper answer.

6 We accepted yesterday the Hartwell duty and there is
7 no breach here. I'll keep to my minute and move on.

8 For all of the reasons that have been expressed
9 today, we submit that if you decide on the evidence not
10 to leave unlawful killing in any form, we do submit that
11 a short form verdict should nonetheless be left to the
12 jury in respect of lawful killing and open.

13 SIR MICHAEL WRIGHT: There has to be an alternative.

14 MR HORWELL: We submit that the argument for those two
15 verdicts to be left is overwhelming. C2 and C12 must be
16 entitled to the opportunity of a verdict.

17 In relation to what was argued in your counsel's
18 written submissions, that leaving those two verdicts
19 could be confusing for a jury, we do not accept that
20 because the issue --

21 SIR MICHAEL WRIGHT: I think Mr Hilliard and Mr Hough have
22 been persuaded away from that.

23 MR HORWELL: I think so. The issue of self-defence has to
24 arise, whatever happens.

25 SIR MICHAEL WRIGHT: Yes. The argument is Mr Mansfield's

1 just given me something to chew over as to the form of
2 a question that could be left. Subject to that, the
3 risk is that you end up with a series of questions, none
4 of which actually deal with the crucial sentence(?).

5 MR HORWELL: Exactly.

6 SIR MICHAEL WRIGHT: That's really the point. As I say,
7 I have to think hard about the kind of format that
8 Mr Mansfield has given me.

9 MR HORWELL: You would only have to concentrate on the
10 shooting. You would not have to give any directions on
11 gross negligence manslaughter because that would be too
12 distant from the circumstances of death.

13 All that the jury would then be directed upon is
14 what they would have to be directed upon in any event,
15 so we see no scope for confusion.

16 SIR MICHAEL WRIGHT: In a murder trial?

17 MR HORWELL: Yes. Simply the issue of self-defence.

18 SIR MICHAEL WRIGHT: Yes.

19 MR HORWELL: Questions. The leading authority is Middleton,
20 and it's at tab 2 of the authorities bundle. It should
21 be read with some care, in our submission, because it
22 does provide assistance as to whether or not there
23 should be questions left at all to a jury in these
24 circumstances.

25 The facts in Middleton are not irrelevant. The

1 deceased was a long-term prisoner who hanged himself in
2 his prison cell. His family alleged that the Prison
3 Service knew that he was a suicide risk and should have
4 taken greater care of him.

5 So the inquest was therefore involved with the
6 prison system and the various rules and regulations
7 under which it was managed. The House of Lords
8 indicated that suicide by serving prisoners was not,
9 sadly, a rare event. Between 1990 and 2003, there were
10 nearly 1,000 suicides in prison, 177 of which were
11 detainees under the age of 21. Currently the House of
12 Lords stated that there were two suicides in prison each
13 week. So the problem was one of very real significance
14 to the public, and it involved a system that -- the
15 Prison Service system.

16 There are only a few paragraphs from the judgment of
17 Lord Bingham. Page 192, paragraph 5. That is the
18 paragraph in which the --

19 SIR MICHAEL WRIGHT: Those are your statistics.

20 MR HORWELL: -- various statistics have come from. Towards
21 the bottom of that page, four lines up:

22 "... they do highlight the need for an investigative
23 regime which will not only expose any past violation of
24 the State's substantive obligations already referred to
25 but also, within the bounds of what is practicable,

1 promote measures to prevent or minimise the risk of
2 future violations."

3 One can see how, in the case of a system, that
4 principle will apply to an inquest.

5 The House of Lords of course held in Middleton that
6 the then current inquest regime was not compatible with
7 Article 2, and it altered in a very slight way the
8 manner in which the "how" question would be asked in
9 future.

10 But the House of Lords in Middleton certainly
11 contemplated and accepted that even under the new regime
12 a short form verdict may suffice. Lord Bingham referred
13 to "the major issue in an inquest", and at times the
14 "central issue", and how "a short form verdict could,
15 without more, settle that major or central issue in
16 a satisfactory manner".

17 There are three paragraphs, if we go first to 14.
18 At 14 he deals with McCann, the Gibraltar SAS shooting:

19 "McCann ... arose from the fatal shooting by
20 soldiers of three people, believed to be terrorists, in
21 Gibraltar. A lengthy and detailed inquest was held,
22 also in Gibraltar, when much evidence was heard. It was
23 clear from the outset when and where the deceased had
24 died, and that they had been shot by the soldiers. The
25 central question was whether the soldiers had been

1 justified in shooting and killing the deceased."

2 Now, there are obvious similarities here, we would
3 suggest. At paragraph 18, Lord Bingham, on the second
4 line, refers to whether or not a verdict of an inquest
5 jury that an open verdict, sometimes unavoidable, which
6 does not express the jury's conclusion on a major issue.

7 It's this theme that runs throughout Middleton, that
8 a central or major issue must be resolved, and that
9 theme is again expressed at paragraph 31:

10 "In some other cases short verdicts in the
11 traditional form will enable the jury to express their
12 conclusion on the central issue canvassed at the
13 inquest. McCann has already been given as an example."

14 Now, there were similarities in McCann beyond the
15 fact that it was agents of the State that shot the
16 deceased. There were issues as to military rules of
17 engagement, there was information that the authorities
18 had that a terrorist attack would take place in
19 Gibraltar, and obviously there were issues as to
20 planning and preparation, there were issues as to
21 operational briefings, and of course the many
22 circumstances that surrounded the shooting itself.
23 A more complex case, it would seem, than even the one
24 that is before you now.

25 But in Middleton it was contemplated that the

1 central issue was whether or not the shooting was
2 justified, and that the short verdict resolved that
3 issue. Therefore we say that approach is one that can,
4 and we submit should, be taken here. The central issue
5 is whether the shooting of Mr de Menezes can be
6 justified. In our submission, whether that is resolved
7 by the jury or through a combination of a ruling from
8 the Coroner and the jury, it is to the same effect.

9 Going back to the prison cases, of which there are
10 so many, where there is a specific system under
11 investigation one can understand the need and the
12 benefit from a jury questionnaire, because it can and
13 could avoid such incidents in the future. Here there
14 was no system. The words "unique" and unprecedented"
15 have featured throughout the evidence.

16 SIR MICHAEL WRIGHT: Yes, but that's an historical aspect of
17 this particular case, as I have evidence, and indeed
18 common sense would lead to the conclusion that although
19 hopefully not this result, this situation might easily
20 arise again.

21 MR HORWELL: Yes.

22 SIR MICHAEL WRIGHT: When I say it's historical, it is
23 because it's only in recent years that terrorism in this
24 particularly difficult form has become, sadly, a feature
25 of our lives.

1 MR HORWELL: Yes.

2 SIR MICHAEL WRIGHT: Two of your major witnesses have said,
3 well, yes, it could happen again. To that extent it
4 seems to me that it is incumbent upon this inquest and
5 this jury to see if there are any aspects upon which the
6 system, even though it was evolved ad hoc, needs to be
7 looked at.

8 MR HORWELL: Can I develop my argument, and then I'll come
9 back to the point that you have just raised?

10 SIR MICHAEL WRIGHT: Yes.

11 MR HORWELL: You have foreseen the next point I was going to
12 make, namely the police having in July to create new
13 approaches, adapt old approaches, and use innovative
14 policing. It is a very different case to the structured
15 regimen of prison conditions and prison rules.

16 There is no system here, in our submission. The
17 case reflects a series of operational judgments made in
18 very difficult circumstances. There are in fact, when
19 one looks at the preparation and the operation itself,
20 there are very few disputes of fact. It's not a case
21 that is perhaps much more often the situation in
22 an inquest, where there are disputes of fact. Here in
23 relation to the central planning and deployment of
24 police officers, there is no dispute. The facts have
25 been established.

1 So there is an argument, we would submit, and I'll
2 come to your point any moment now, there is an argument
3 for saying that because the central issue here is the
4 shooting itself, once that has been resolved the central
5 purpose of this inquest has been fulfilled.

6 We would submit that there is an argument here for
7 saying that the verdict itself will resolve and
8 settle --

9 SIR MICHAEL WRIGHT: The verdict vis-a-vis C2 and C12?

10 MR HORWELL: Yes -- the purpose for this inquest.

11 If we are wrong or if you decide that there is scope
12 here for the jury making determinations that may prevent
13 such events happening again, then we would submit that
14 the actual questions that should be asked of the jury,
15 if there are to be questions, should be few -- I don't
16 think that there is much disagreement on that.

17 SIR MICHAEL WRIGHT: The fewer the better.

18 MR HORWELL: Certainly not the numbers that have been
19 suggested so far. They should be simple, they should
20 require findings of fact, not the expression of
21 opinions, and the jury should not be imbued with powers
22 and abilities beyond those which they can be expected to
23 have.

24 SIR MICHAEL WRIGHT: I am perfectly clear, Mr Horwell, that
25 the jury couldn't be asked by answers to questions, as

1 it were, to design a system for pursuing suspected
2 suicide bombers through London. They can only do it on
3 the basis of saying, well, the one that was actually
4 adopted on this occasion is flawed or may be flawed in
5 one of various aspects.

6 MR HORWELL: Yes.

7 SIR MICHAEL WRIGHT: The great advantage, of course,
8 although it may be irksome as far as your clients are
9 concerned, is that it does not depend upon the existence
10 of a duty of care that they give an answer in a
11 particular context.

12 Just to follow that up a moment, I am not sure what
13 you are going to say, what was in my mind was that if
14 this death had occurred in the context of what was
15 unequivocally a Kratos or a Clydesdale situation, as we
16 have had it defined for us by the witnesses, that,
17 I would have thought, was manifestly a situation where
18 there was a systemic question.

19 What I am now told, particularly by Mr Swain,
20 I think, and also Mr Macbrayne, is that effectively the
21 Metropolitan Police have now, arising out of this tragic
22 set of events, a third system. They say they have
23 improved it. They told us a bit about that.
24 Nevertheless there is now a third system in existence,
25 which is hopefully not -- will be called something which

1 hasn't got anything to do with Mr de Menezes, but that's
2 the point and that's what is, as it seems to me, my
3 present way of thinking leads me to think that questions
4 are germane and desirable in this particular inquest.

5 Now, if you challenge that, by all means, please do
6 so.

7 MR HORWELL: We can of course see the utility there, I am
8 not suggesting otherwise, but we do put as our primary
9 submission that the central issue, the central purpose
10 of this inquest will be determined by the verdict. In
11 that sense, there are similarities between this case and
12 McCann.

13 SIR MICHAEL WRIGHT: Yes.

14 MR HORWELL: The jury are fact finders, no more, no less.
15 They can only be permitted to find facts when they have
16 heard all of the available evidence, and they cannot
17 make findings on issues about which they have not heard
18 complete evidence. We adopt the submissions made this
19 morning in relation to the surveillance team. The
20 positioning of surveillance officers. The jury has not
21 heard evidence as to practice, methodology and training
22 of surveillance --

23 SIR MICHAEL WRIGHT: For reasons of security.

24 MR HORWELL: Yes, and also for reasons of relevance.

25 Criticism has been made of the fact that there were

1 surveillance officers to the right of Scotia Road.

2 Well, they were there, surprisingly enough, because
3 Mr de Menezes or whoever they were following may have
4 turned right rather than left.

5 Without detailed evidence on the topic of the
6 deployment and the use of surveillance officers, in our
7 submission, not only would it be wrong for the jury to
8 be asked to find as facts any issue relating to
9 surveillance, and I am only using them as an example for
10 the moment, any finding by them would be of little, if
11 any, value. That is why we make the submission that --

12 SIR MICHAEL WRIGHT: Because it is so fact specific?

13 MR HORWELL: Because they haven't heard the evidence.

14 SIR MICHAEL WRIGHT: That as well, but also because it
15 relates simply to an isolated and probably unrepeatable
16 set of facts.

17 MR HORWELL: Yes. They must have heard full and complete
18 evidence on an issue before they can be asked to express
19 a finding of fact upon it, and we have been here for
20 eight weeks, we would have been here for many, many
21 more weeks if every single part of this operation had
22 been explained and tested in detail.

23 So we do raise that as a caution as to the scope of
24 any questionnaire that is devised.

25 We also make this general submission, that whenever

1 a question is asked of the jury, the summing-up on that
2 issue must be extensive. We would submit the jury has
3 to be warned in the clearest possible terms that they
4 must not be influenced by hindsight, and that their
5 assessment of any act or decision must be made on
6 circumstances and knowledge which prevailed at the time
7 of the act or the decision.

8 They have got to put themselves in the position of
9 the police officers who at that time were conducting
10 themselves in a particular way or were making
11 a particular decision. There would be significant
12 unfairness here if there was any risk at all of the jury
13 looking backwards. They have, if they are going to be
14 asked to make findings of fact, to put themselves in the
15 position of the officers at the time that certain
16 decisions were made or acts conducted.

17 We also submit that questions must be asked in
18 an open and non-partisan fashion. The pejorative use of
19 the word "failure" in the family's document, it appears
20 20 times, is wholly unacceptable, in our view.
21 Questions such as: was it unreasonable for the police to
22 have done this or that? Open, unobjectionable questions
23 asked in that way is the correct manner, in our
24 submission.

25 As I have said, whatever questions are asked, the

1 summing-up must deal with that particular issue fully,
2 otherwise there is little purpose or value in asking the
3 question.

4 So to summarise those submissions, the questions
5 have to be designed at findings of facts, not
6 expressions of opinion. They should be few, they should
7 be simple, and they should be relevant to the
8 circumstances of the death. We do submit that the
9 verdicts will answer what happened in the carriage and
10 that questions in relation to those events should not be
11 permitted, because for all the reasons that have been
12 given, they may be thought to be going behind the
13 verdict on the central issue.

14 SIR MICHAEL WRIGHT: Yes, because I have to look to see, if
15 there are two alternative verdicts left, lawful killing
16 and open, I need to weigh up for myself what either
17 verdict will encompass by necessary logical conclusion.

18 What you are really submitting to me is that the
19 question should relate to the other aspects.

20 MR HORWELL: Yes.

21 SIR MICHAEL WRIGHT: I see the point. After all, the risk
22 always is that if you don't maintain that separation,
23 you may get answers to questions that are contradictory
24 to the verdict.

25 MR HORWELL: Exactly.

1 If the purpose of the questionnaire is to permit the
2 jury to make findings that may stop this happening
3 again, then it's in relation to what went before rather
4 than at the time of the shooting.

5 SIR MICHAEL WRIGHT: Yes.

6 MR HORWELL: Those are our submissions.

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

8 Mr Stern.

9 Further submissions by MR STERN

10 MR STERN: Sir, may I make two short points in response to

11 Mr Mansfield's submissions this afternoon.

12 SIR MICHAEL WRIGHT: Yes.

13 MR STERN: They are in relation to whether or not

14 a narrative rather than a short form verdict should be

15 left in relation to the shots.

16 The first is this, that he submitted that

17 a narrative question could be left in these terms: were

18 the shots fired justified by an honest and genuine

19 belief that there was an imminent threat, to which the

20 answer would be "yes" or "no", he said. And if it was

21 "yes", that would be on a balance of probabilities.

22 "no" would attach no burden at all or standard.

23 Therefore "no" would effectively be a rejection of that

24 very sentence which would be of course unlawful killing.

25 So what effectively would be happening is that,

1 without attaching any standard of proof, there would be
2 a verdict which would be tantamount to or an answer that
3 would be tantamount to unlawful killing which would of
4 course be clearly unlawful and wrong.

5 SIR MICHAEL WRIGHT: Mr Mansfield suggested that a burden of
6 proof was the same both ways. Balance of probabilities.

7 MR STERN: This is the difficulty with asking a narrative
8 question, of course, it will require very careful
9 execution, because the words will have to be set out
10 clearly, and we will have to consider the ramifications
11 of a positive or negative response. Which, as I say,
12 brings me back to my submission which I am grateful for
13 my learned friend Mr Hilliard now adopting, which is the
14 suggestion of short form verdicts.

15 The second matter raised by my learned friend
16 Mr Mansfield is that there should just be a narrative
17 verdict and it's, as I understand him to be saying,
18 would be a mischaracterisation of this inquest and/or
19 too complicated to make it just a short form.

20 Can I first of all just refer you to his submissions
21 that were set out and obviously we have not looked at
22 them for some time, but if you look at the first page,
23 you will see at paragraph 2 it says:

24 "For the reasons which follow it's the position of
25 the family that option 3 is to be preferred" --

1 SIR MICHAEL WRIGHT: These are his written submissions?

2 MR STERN: Yes. And option 3 reads, "inviting the jury to
3 return both a short form verdict and a narrative". So
4 the lack of complexity was not present in his mind when
5 this was drafted by him or whoever.

6 The suggestion at paragraph 2.1 was that "short form
7 verdicts of unlawful killing, lawful killing and an open
8 verdict should be left to the jury".

9 SIR MICHAEL WRIGHT: Yes. Everybody is entitled to modify
10 their --

11 MR STERN: They are, but all I am saying is clearly the
12 point is not a good one, that it's too complicated
13 because it is without any complication or difficulty.
14 There is no confusion at all. If a short form verdict
15 is good for unlawful killing or to include unlawful
16 killing, why is it not good if unlawful killing is not
17 to be left to the jury? That is without logic. So it
18 is only a mischaracterisation, it appears, if it's not
19 lawful killing.

20 SIR MICHAEL WRIGHT: It's just a great deal simpler.

21 MR STERN: Yes.

22 SIR MICHAEL WRIGHT: I have to go through an intellectual
23 exercise before I ever get there. If the situation here
24 was that the evidence, forget about the nuances, was
25 absolutely categorical, there was a swearing match going

1 on, it could be unlawful killing or lawful killing --
2 it's merely that my task in those circumstances would be
3 a great deal simpler than it will be if I am persuaded
4 into the position of saying no, this is not unlawful
5 killing and I have to leave the other two.

6 MR STERN: With respect, it's just as easy to leave a short
7 form verdict with just two rather than three, in fact,
8 it gives you less to say, so --

9 SIR MICHAEL WRIGHT: Somehow I don't think it does.

10 MR STERN: It makes it easier in many ways.

11 Can I also add as a serious point that the narrative
12 part of the inquest or the narrative part of the
13 questions that are to be left to the jury are in fact
14 part of the verdict, and so it is not just a question of
15 having a verdict which is lawful or whatever it is, or
16 open or unlawful; it is in addition the questions or the
17 answers to the questions that are left to the jury.

18 All of that can put in box 4, and so that I hope
19 meets Mr Mansfield's concern that there will just be one
20 item in the box.

21 SIR MICHAEL WRIGHT: Yes.

22 MR STERN: Those are my two points.

23 SIR MICHAEL WRIGHT: Thank you very much indeed.

24 MS LEEK: I have nothing to add, sir.

25 SIR MICHAEL WRIGHT: Thank you. Mr Gibbs.

1 Further submissions by MR GIBBS

2 MR GIBBS: Very little from me, sir. If the two short
3 forms, lawful and open, were to be left on the shooting,
4 that in my submission, and I am repeating to some extent
5 what others have said in a different way, would be
6 a further reason for avoiding any question about the
7 events in the carriage.

8 SIR MICHAEL WRIGHT: We have discussed this. I see the
9 force of that.

10 MR GIBBS: As to the specific question of stood up and moved
11 towards, you have our submissions about whether that
12 would be right or wrong with regard to Ivor. My learned
13 friend Mr Mansfield may, in retrospect, wish that he had
14 asked other or different questions of Ivor, but leaving
15 that entirely on one side, one might want to pause for
16 a second to consider it from Ivor's point of view,
17 having given evidence, even if the
18 Central Criminal Court is irrelevant here, and having
19 not had any contention put to him as to him having been
20 untruthful, and then later finding that he was on the
21 wrong end of a factual finding to that effect.

22 Having heard my learned friend Mr Horwell's most
23 recent submissions to you on the question of narrative,
24 and narrative elsewhere than in the carriage, and having
25 listened of course carefully to the exchange between you

1 and Mr Horwell, I think that we have from our
2 perspective nothing further to add to what's been said.

3 SIR MICHAEL WRIGHT: Very well.

4 MR GIBBS: On the discrete issue of the surveillance
5 deployment at Scotia Road, about which something has
6 been said and which has been picked up as an example of
7 the sort of area where one might avoid, for good
8 reasons, asking questions. It may be that if I could
9 just ask you to turn up again, amongst the welter of
10 paperwork on your desk, the excerpts from the evidence
11 which I gave you this morning.

12 If I could ask you to turn to page 4, in the middle
13 of the page, it's a short passage, on page 24, where you
14 see your question beginning:

15 "What more could you do ..."

16 SIR MICHAEL WRIGHT: Yes.

17 MR GIBBS: Then on page 5, the second half of the page,
18 picking up the transcript at page 92 where again you
19 say --

20 SIR MICHAEL WRIGHT: This is Derek, isn't it?

21 MR GIBBS: Yes, this is Derek again:

22 "The way in which you deployed your officers, were
23 you content that ..."

24 SIR MICHAEL WRIGHT: Sorry, where are you now?

25 MR GIBBS: I am on the fifth page of the excerpts, page 92

1 of the transcript for that day, which was the 21st day,
2 and it's the second half of that page. It's questioning
3 by you again, sir.

4 SIR MICHAEL WRIGHT: (Pause). Yes.

5 MR GIBBS: Of course by this stage, in an inquiry, one
6 sometimes forgets what had been established and what had
7 been established really without, beyond a peradventure
8 at an earlier stage, and it may be that just looking at
9 that exchange between yourself and Derek will help to
10 remind us all as to whether there really was an issue
11 left here at all when he left the witness box.

12 Those are my submissions.

13 SIR MICHAEL WRIGHT: Thank you very much, Mr Gibbs.

14 Mr Perry.

15 Further submissions by MR PERRY

16 MR PERRY: Sir, may I just make these short points: first of
17 all, the inconsistent findings or contrary verdicts
18 point.

19 You will remember, sir, that Mr Horwell addressed
20 you on the basis that if you have the lawful killing, or
21 if you have withdrawn unlawful killing and you have
22 questions that might cast doubt on a lawful killing
23 verdict, that's going to create a difficulty.

24 We would submit that the same applies equally to the
25 command team, because suppose for example you were to

1 conclude in due course, having considered all the
2 submissions that have been made, that unlawful killing
3 as a potential verdict based on gross negligence
4 manslaughter was not available in this case.

5 SIR MICHAEL WRIGHT: You mean if I came to the conclusion
6 that there was insufficient evidence to leave gross
7 negligence manslaughter unlawful killing in relation to
8 the command team, there is nothing else?

9 MR PERRY: There is nothing else, but then -- this is where
10 the danger arises, I am not saying this is why it's been
11 done but this is the difficulty that arises -- if you
12 then have narrative questions which touch upon that same
13 issue, it might later be suggested that the jury's
14 verdict suggests that they were some way suggesting that
15 there had been gross negligence, so it's the same
16 inconsistency. It's letting in gross negligence by the
17 tradesman's entrance, that's really the point; not being
18 able to return a verdict of that, you outflank your
19 ruling by withdrawing it and put it in the form of a
20 narrative. Well, clearly that would be wrong in
21 principle.

22 SIR MICHAEL WRIGHT: Depends on how you word the questions,
23 doesn't it?

24 MR PERRY: That was going to bring me to my next point,
25 because the way you have been addressed this afternoon

1 by Mr Mansfield is that the jury can use any language
2 they wish as long as they don't transgress the coronial
3 rules. Well, that's all very well, but the form of
4 these questions had not been formulated by the jury,
5 they are questions formulated and expressed in
6 a particular way and they can only be answered in
7 a particular way.

8 What we would invite, sir, just by way of example,
9 looking at the way the questions have been formulated --
10 and this is not done critically but just to illustrate
11 the difficulties -- page 2 of the family's document
12 where it's got contributory factors at 5(i) as
13 an example:

14 "A failure within the command team."

15 SIR MICHAEL WRIGHT: You are looking at the family's draft?

16 MR PERRY: The family's draft, sir, yes. Just focusing on
17 5(i) for the moment, forget that it begins with
18 "a failure", but then "within the command team". We
19 would submit that's meaningless; what does that mean?

20 Then it has "value judgments such as adequate",
21 which is an opinion, not a question, doesn't necessarily
22 answer a question of fact. "What is adequate and
23 continuous co-ordination?" How would you sum up on
24 those matters at all? And take (iii) "to obtain and
25 satisfactorily disseminate".

1 SIR MICHAEL WRIGHT: Can I interrupt you for one moment?

2 MR PERRY: Yes.

3 SIR MICHAEL WRIGHT: Depending on where you are in the
4 chronology, if the view I formed was that, for example,
5 at the very beginning there was no duty of care,
6 although that does not prevent the jury from answering
7 questions relating to this -- for want of a better
8 word -- system that has been developed, in answer to the
9 requirements in paragraph 5 of Middleton, that doesn't
10 run the risk of outflanking the verdict, does it,
11 because the verdict on that part of this history will
12 have been withdrawn from them, not on the basis that the
13 evidence isn't, doesn't have the capacity of grossness,
14 but simply because there isn't a duty of care.

15 MR PERRY: Sir, the answer to that may be it depends,
16 because it depends what use might be made of that later
17 to shed light on events that took place thereafter.

18 But there is another vice that arises. The other
19 vice is the expertise point and the opinion point.
20 Because what the jury are good at and what they should
21 be doing is finding facts. What they are not -- and we
22 all accept this -- good at is having an expertise to
23 make value judgments about what was continuous or
24 necessarily adequate when it's looking at a question of
25 fact.

1 Sir, the other point that we would make in relation
2 to this is that "yes" and "no" questions are simply too
3 stark, particularly when the questions are framed in
4 what might be thought to be a tendentious and weighted
5 way. If you go through this document and analyse each
6 of the questions and ask, as you go through, mentally:
7 is this a question of fact or is it actually inviting
8 an expression of opinion --

9 SIR MICHAEL WRIGHT: I suppose you might say they all
10 presume a hostile answer, and the only question is how
11 much do they contribute?

12 MR PERRY: Exactly. Then look at 5(iii) where, in the
13 middle passage, "As to this, you may wish to consider in
14 particular A, B, and C". Why in particular A, B and C?
15 Why not in particular other factors more favourable to
16 the police? And also why not put the question: "Would
17 it have been better not to have embarked on this
18 operation at all, pending the obtaining of a perfect
19 system and perfect photographs?"

20 SIR MICHAEL WRIGHT: This is something along the lines of
21 "when did you stop beating your wife?"

22 MR PERRY: Exactly. What we would submit, sir, is, as your
23 own counsel have submitted in their written document,
24 the questions should be much more limited. They should
25 be limited to fact, they should avoid overcomplicating

1 this case, and they should not provide any scope in
2 future for any legal ruling or verdict to be undermined,
3 either by way of legal process or outside the system
4 whereby a legal challenge might be brought.

5 So for those reasons, sir, we would submit that
6 a limited number of questions on facts which are not
7 tendentiously framed, there can be no objection to that,
8 but it must avoid calling into question the verdicts or
9 inviting opinions on expertise which the jury simply
10 does not have.

11 SIR MICHAEL WRIGHT: Give me an example, if you have thought
12 of one.

13 MR PERRY: An example of where the jury are being asked
14 to --

15 SIR MICHAEL WRIGHT: No. An example of a question on a fact
16 which is relevant to the causation of Mr de Menezes'
17 death and, once we have identified a question, how do we
18 frame it in a non-contentious way?

19 MR PERRY: We have done it in our little document, sir, that
20 we handed in this morning, we have just had under the
21 question: "Do you consider that any of the following
22 factual matters" --

23 SIR MICHAEL WRIGHT: Contributed.

24 MR PERRY: "Contributed to", and then we have listed them,
25 and to take 10 as an example, the information conveyed

1 to the control room on the topic of identification
2 during the various stages of the surveillance.

3 SIR MICHAEL WRIGHT: I follow.

4 MR PERRY: So, sir, that's what we say --

5 SIR MICHAEL WRIGHT: You adhere to this format?

6 MR PERRY: Yes. Sir, that's the way we put it.

7 SIR MICHAEL WRIGHT: Thank you very much, Mr Perry.

8 Mr King?

9 MR KING: No, thank you.

10 SIR MICHAEL WRIGHT: Thank you all very much indeed.

11 I suppose all there is left for me to say -- apart
12 from thanking everybody for the efforts that they have
13 put in; I have said it once and I repeat it, and I mean
14 it -- is see you all on Monday week, unless you get
15 a message saying not Monday, Tuesday.

16 The rulings will be distributed by email on the
17 basis of confidentiality that has already been spelt
18 out, and I do trust that everybody will observe it.

19 Monday week, 10 o'clock.

20 (3.25 pm)

21 (The court adjourned until 10.00 am on

22 Monday, 1 December 2008)

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