

Thursday, 20 November 2008

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(9.30 am)

(Proceedings delayed)

(9.45 am)

SIR MICHAEL WRIGHT: Good morning, everybody. I would hope you have had a nice break but it might be thought to be in bad taste.

One or two things before we start. I hope everybody received and has taken on board the letter of 17 November, this Monday's letter from Barlows about the way in which I intend to deal with these sessions. May I also ask you all to take on board the fact that I am about to make and in fact will make now an order under the Contempt of Court Act in relation to the reporting of these oral submissions and also of any ruling that I may make hereafter. Those matters are not to be reported until after verdicts are in.

Mr Hilliard?

MR HILLIARD: Sir, the only other thing is that, following on from that, the transcript of the arguments that we are about to have shouldn't go on the website and won't, of course, also go in the transcript bundles which are in fact being prepared for the jury. We may have to come back to that and mention that again, but that's just for completeness' sake.

1 SIR MICHAEL WRIGHT: Thank you. Yes, Mr Mansfield.

2 MR MANSFIELD: Sir, good morning.

3 SIR MICHAEL WRIGHT: Good morning. First of all, can I also  
4 thank everybody, including you, Mr Mansfield, and  
5 Ms Hill for the very helpful, very full submissions that  
6 I have received. I am very grateful to you all for the  
7 work you have put in.

8 Yes.

9 Submissions by MR MANSFIELD

10 MR MANSFIELD: Sir, yes, I am indebted to those who sit  
11 beside and behind me for the preparation that has been  
12 done on paper.

13 May I start with a few preparatory matters. Again,  
14 bearing in mind the timetable that you have set, what we  
15 have prepared for this morning, although I am not going  
16 to go through it in detail but in order to save time, is  
17 really two documents. I think you have been handed one,  
18 and everybody else has just received one. Can I just  
19 indicate what it is? (Handed). The top document which  
20 is unpaginated but has paragraph numbers -- well,  
21 perhaps it is paginated.

22 SIR MICHAEL WRIGHT: Is this the smaller one?

23 MR MANSFIELD: Yes, four pages.

24 SIR MICHAEL WRIGHT: Yes.

25 MR MANSFIELD: That is directed towards part of the letter

1           that was sent asking for us to consider the narrative  
2           aspect of this inquest. I appreciate that some time has  
3           been set aside tomorrow, but bearing in mind there may  
4           be pressure on that time, we thought it advisable, at  
5           least on paper, to put down the questions, both factual  
6           and contributory factors. You will see it's in two  
7           parts.

8   SIR MICHAEL WRIGHT: Yes.

9   MR MANSFIELD: Which we suggest for your consideration and  
10           for the jury's consideration, whether or no specific  
11           short-form verdicts are left. In other words, they are  
12           questions which we say --

13   SIR MICHAEL WRIGHT: That is how I wish to approach these  
14           submissions, that is to say to cover both these aspects.

15   MR MANSFIELD: I had anticipated you might, and what I have  
16           to say which follows, which is hopefully a distillation  
17           and an interweaving of the law and the facts as we  
18           submit, has this narrative as a back cloth; in other  
19           words, many of the points that I will be making not only  
20           relate to specific verdicts but also relate to this  
21           narrative.

22           Sir, the factual questions, if you will excuse me,  
23           I am not going to read it all out --

24   SIR MICHAEL WRIGHT: They seem to me to follow very closely  
25           the submissions my counsel have made.

1 MR MANSFIELD: Yes, the answer to that is they do, except  
2 they are more extensive.

3 SIR MICHAEL WRIGHT: Yes.

4 MR MANSFIELD: Paragraph 4 are fairly obvious questions that  
5 relate to what happened in the carriage, and the  
6 contributory factors obviously are wider in the sense  
7 that they start before that point in time, and the  
8 failures are set out as questions right through three  
9 pages, but by glancing down, you will see the nature of  
10 those questions, failures in many cases by the command  
11 team in relation to their responsibilities.

12 May I just pick out one because it will come back in  
13 the submissions I am about to make. For example, 5.5:

14 "Failure by the command team to ensure effective and  
15 immediate control and containment of Scotia Road."

16 We say that's a particularly important question and  
17 is one which I will allude to shortly. But I will not  
18 read out the others because they are easy to read.

19 They do follow, we have tried to do it in  
20 a chronological fashion from before the decision on the  
21 day through to the decision on the day.

22 Then a final paragraph indicating the kind of  
23 phraseology --

24 SIR MICHAEL WRIGHT: I only point out that the Court of  
25 Appeal -- not the Court of Appeal, the admin court has,

1 I think on one occasion, said that a three-page  
2 questionnaire is not necessarily a good idea.

3 MR MANSFIELD: Yes. I think there are differing views about  
4 obviously --

5 SIR MICHAEL WRIGHT: I see a wry grin on Ms Hill's face.

6 MR MANSFIELD: I think there is no, obviously no bar, and  
7 this could all be contained, if I may say so, probably  
8 if typed on a different way, on two pages.

9 SIR MICHAEL WRIGHT: That's not an invitation.

10 MR MANSFIELD: So we will endeavour -- we really have tried  
11 to limit the questions, which actually are on two pages,  
12 the contributory factors, to the barest minimum, and we  
13 have not picked out all the --

14 SIR MICHAEL WRIGHT: It would be your submission, I suppose,  
15 that these are relevant questions or relevant factors  
16 for the jury to consider, whatever the limit and extent  
17 of the duty of care may be.

18 MR MANSFIELD: Yes, that's right.

19 SIR MICHAEL WRIGHT: Yes, all right.

20 MR MANSFIELD: In other words these are to satisfy, if you  
21 like, the Article 2 Middleton approach which there are  
22 questions to which the family and others are entitled to  
23 have answers, that bear upon the death. So we have been  
24 very careful to ensure that these are questions that  
25 relate to the causes of death.

1 SIR MICHAEL WRIGHT: So long as they are relevant and  
2 causative.

3 MR MANSFIELD: Yes.

4 SIR MICHAEL WRIGHT: Yes, certainly.

5 MR MANSFIELD: So that's the framework of how that's been  
6 revised and hopefully that will shorten matters in terms  
7 of the time available tomorrow.

8 I am certainly, and I think certainly I have been  
9 approached by one other counsel this morning, if it's  
10 necessary for counsel, as it were, to sit round a table  
11 and see if these questions or some of them can be  
12 agreed, obviously that would shorten it even more.

13 SIR MICHAEL WRIGHT: That would be extraordinarily helpful,  
14 yes.

15 MR MANSFIELD: I made it clear I'm very happy to do that.

16 The second part of this document, I am afraid is  
17 a bit longer, but it's intended in fact conversely to  
18 save time. Because rather than asking you constantly to  
19 get out a transcript bundle in order to demonstrate  
20 certain points, what we have done here is to put  
21 extracts that I would have wanted you to look at all in  
22 one bundle. It's paginated. So everybody is clear, I'm  
23 sorry it's only been available this morning but  
24 everybody has had the transcripts before. They relate  
25 to C12, C2, Ralph, TJ84, Purser, and Ivor.

1           One of the reasons for wanting to do that at this  
2           stage is because, looking at the way submissions have  
3           been put, clearly in some cases our position has been  
4           seriously misrepresented as to what we are actually  
5           saying, and so that it's clear that our position has  
6           been put throughout and exactly what we are saying,  
7           I have had the sections, particularly TJ84, which is  
8           lengthy, but it does spell out precisely what we are  
9           saying and not the position as described in part in  
10          the Commissioner's submissions as to what our position  
11          is.

12           I am sorry to have to do that, but I'll come back to  
13          that if I may.

14   SIR MICHAEL WRIGHT:   Probably the most convenient way of  
15          doing it.

16   MR MANSFIELD:   So those are the transcripts.

17           One other introductory matter, just so that it's  
18          clear at this stage: you will have been provided,  
19          I think everyone has been provided yesterday or the day  
20          before, with a bundle of statements from Mr Edwards and  
21          DCI Southworth.

22   SIR MICHAEL WRIGHT:   About the time that they can get at the  
23          DVLA.

24   MR MANSFIELD:   Yes. We would ask that this is read into the  
25          evidence in front of the jury because --

1 SIR MICHAEL WRIGHT: Is it not sufficient for Mr Hilliard  
2 simply to tell the jury that further investigations have  
3 elicited this fact? As long as it's in front of the  
4 jury in some form.

5 MR MANSFIELD: Yes, I think because it is a correction, and  
6 we submit it's a very important correction because --

7 SIR MICHAEL WRIGHT: Well, it's your point about  
8 availability of photographs(?).

9 MR MANSFIELD: Yes. So the simple point is that --

10 SIR MICHAEL WRIGHT: Does anybody have any problems about  
11 this?

12 MR HORWELL: No, sir.

13 SIR MICHAEL WRIGHT: I didn't think there would be. One too  
14 many questions from me as usual.

15 MR MANSFIELD: Well, I think it took us all by surprise --  
16 it certainly took me by surprise, I can't speak for  
17 others, that there was no method with the authorities,  
18 despite the fact that they are notoriously slow with  
19 private individuals.

20 But on an emergency of this kind, there was no way  
21 of obtaining that information much more quickly. The  
22 short point is that of course the DVLA photograph would  
23 have been available before 9.30 --

24 SIR MICHAEL WRIGHT: About an hour and a half, according to  
25 the evidence, it takes to get it. Yes.

1 MR MANSFIELD: So if somebody between 5 and 6 had asked for  
2 it, it would have been there between 7 and 8 in the  
3 morning, so a good, probably, two hours before, and it  
4 could have been distributed to teams that had not yet  
5 left, never mind the one in position.

6 It bears upon of course the narrative questions that  
7 we ask which are set out there about obtaining better  
8 images but it doesn't have very great bearing on what  
9 I want to develop this morning. So I won't return to  
10 that at this stage.

11 May I just introduce it by indicating that what I am  
12 seeking to do, given again the time framework, is to  
13 marry up an evidential framework with the legal  
14 principles which we say apply, so that it's hopefully  
15 a little easier to understand why we say certain  
16 principles do apply, because one has to look and see  
17 what the matrix of fact is that lies behind it.

18 SIR MICHAEL WRIGHT: Can I interrupt you a moment, something  
19 you said is slightly nagging at me. You are talking  
20 about submissions tomorrow. Are you intending to break  
21 yours up?

22 MR MANSFIELD: No, I am doing it all in one. But I notice  
23 that there was an hour and a half reserved tomorrow.

24 SIR MICHAEL WRIGHT: I see, for discussions, yes, that's  
25 really what I was thinking about, to give everybody the

1           opportunity to consider the forms of questions, yes.  
2 MR MANSFIELD: I thought it was sensible to put out the  
3           forms of questions first so everybody could see where we  
4           are coming from as a precursor to the discussions  
5           tomorrow. No, I am dealing with it all in one. But  
6           I think it will be clear as I go through how the factual  
7           questions and the legal principles also link up with the  
8           narrative because they are obvious stages, so it will be  
9           clear.

10           In a sense, I want to start, if I may, at the end  
11           and I want to start with, I would submit, a very strong  
12           factual obvious situation, but it can get in a sense  
13           side-stepped and marginalised because it is so obvious.  
14           Once it's stated, I think it has a great bearing on  
15           perhaps one of the biggest issues that we all face and  
16           you face in terms of the law, and that is the question  
17           about a duty of care being owed.

18           There are many other questions, but plainly a lot of  
19           time has been consumed on that issue.

20           The factual point at which I want to start is really  
21           what happened in the carriage just for one second, in  
22           fact 10 seconds, in fact less than the time I have just  
23           spoken over the last few sentences. In other words, we  
24           are dealing with an innocent member of the public who is  
25           deliberately killed; and I leave aside how much warning.

1 On anybody's view it's hardly any warning. We say no  
2 warning of course. But even on anybody's view, within 5  
3 to 10 seconds having been targeted by the police, it's  
4 not an accidental shooting, between 9.33 and 10.04, it's  
5 roughly half an hour that he has been targeted, and then  
6 effectively deliberately shot in those circumstances.

7 I think for -- it's as serious as of course the  
8 bombs themselves, and members of the public plainly, we  
9 say, not only are right to be concerned about the bombs  
10 themselves. There is also the other side -- and I have  
11 put it to a number of witnesses -- that they are  
12 entitled to be reassured about their right to life, and  
13 therefore the question we pose on the facts is: is it  
14 really to be argued, as I appreciate it is being argued,  
15 with some qualifications by your own team but certainly  
16 by all the others, that effectively there is no duty of  
17 care to that innocent citizen by the forces of the  
18 State; and we say put in that rather stark relief, that  
19 that is an utterly untenable situation, that there is no  
20 duty of care where the police are entrusted with fatal  
21 force and weapons of the kind which they had.

22 Not only is it utterly untenable, the law doesn't  
23 turn its face against this situation at all, and in one  
24 sense the cases that we have cited on paper, and that's  
25 in the original submissions we were making, make clear

1 a number of points.

2 Now, there are plainly two categories within this:  
3 namely the category of case where the courts have said  
4 that there is an inherently dangerous situation once you  
5 have entrusted someone with a firearm or other dangerous  
6 article. But in fact I do not, as you will see in one  
7 moment, I am not just relying on that rather obvious  
8 statement; in other words that the use, the deployment  
9 and the use of dangerous articles by the police -- and  
10 I concentrate on them at the moment -- in a sense  
11 dictates a duty of care. Because it is at the highest  
12 level of risk, there is -- and nobody I think is arguing  
13 the converse -- an obvious foreseeability of death once  
14 you have loaded weapons placed on the streets of London  
15 or anywhere else for that matter.

16 However, we can go further than that in this  
17 particular case. We say in fact there ought to be, and  
18 we say that's why these cases which we have cited  
19 indicate it, essentially a strong public policy in  
20 favour of a duty where you are having armed police on  
21 the streets. And of course one knows historically the  
22 British police customarily haven't been armed. So where  
23 you are going to go and provide this facility, we say it  
24 quite obviously does raise a duty.

25 Now, I do not list the cases for the moment. If

1 I may just go on, that's proposition number 1,  
2 inherently dangerous, and the courts have recognised the  
3 inherent danger of that situation.

4 But then one moves to a further situation here, and  
5 may I distill the second category that even without that  
6 obvious initial proposition, if you turn to the second  
7 category, if you like, the Caparo principles, then you  
8 have a situation here which we say fits well within the  
9 principles in any event.

10 May I distill the, so it fits the facts of this  
11 case, how we would submit it, is this: that where  
12 a positive operational decision -- and so it's clear,  
13 can I interweave what I am suggesting, it may be  
14 obvious, the operational decision is the one at 4.55.  
15 Where there is a positive operational decision taken at  
16 4.55 to mount an inherently dangerous firearms  
17 operation, because that is what a MASTS situation is,  
18 mobile armed support for surveillance, on an identified  
19 address. In fact, it's addresses, but again not meaning  
20 to exclude any, but at that stage we have submitted all  
21 along that Scotia Road was prioritised, but it doesn't  
22 for these purposes matter.

23 So where there is an identified address, so it's  
24 21 Scotia Road -- I appreciate of course the communal  
25 door point and all the rest of it, but that was

1 an identified address -- then that is an operation that  
2 is confined. In other words, it's not dealing with  
3 a wide class of people, which has been one of the main  
4 concerns in a large number of the authorities, that the  
5 police would be hampered in their investigation if they  
6 were going to owe a wide duty of care because, of  
7 course, they might end up with defensive policing, their  
8 investigations may be curtailed and so on because they  
9 are diverting resources, that public policy position.

10 Here we say if there is an identified address, it  
11 automatically limits the category of people to whom the  
12 duty is owed, and it's not going to provide the police  
13 with an overwhelming public policy problem because they  
14 are only being -- they are only targeting in fact, and  
15 I come to the last part of this, the people, a small  
16 defined class of people who are in the address,  
17 obviously after 4.55 because that's when the positive  
18 operational decision is taken; and the further factual  
19 adjunct to this is that small defined class of people  
20 inside the premises who then leave the premises.

21 So you will see hopefully straightaway that this is  
22 inherently dangerous, it's a very limited class of  
23 people, and we are dealing with the risk of death to any  
24 one of those who leaves.

25 But of course we say that -- and if it's necessary

1 to employ concepts like the assumption of  
2 responsibility, then we would argue that the assumption  
3 of responsibility by the police begins at 4.55 when the  
4 operational decision is taken against the identified  
5 address. It's a responsibility towards those people,  
6 and we submit that the public and public policy would  
7 demand when there is weapons of this kind being  
8 deployed, that it should be in that fashion.

9 But the duty, we say, continues from 4.55 all the  
10 way through, and may I just at this point indicate the  
11 stages I want to develop evidentially, the first one  
12 being the 4.55 to 9.33 stage. The second stage at which  
13 the duty is still continuing is from 9.33 to 9.39, when  
14 he -- that is Jean Charles de Menezes -- is one of those  
15 who actually leaves the premises and is targeted in the  
16 way that you are very familiar with, and then gets on  
17 a bus at about 9.39. That's stage number two.

18 So the duty continues through that, and then a third  
19 stage arises where the duty, we say, is particular, and  
20 that is -- I am using these times specifically -- 10.02.  
21 10.02 roughly, within a few seconds, is the time at  
22 which he's got off the bus and is walking past the bank,  
23 before or at the time he reaches the tube station. So  
24 it's either going across Binfield Road which is just by  
25 the tube station, or entering the concourse, but before

1           he goes down the escalator. Then of course there is the  
2           last stage when -- and I'll have to come to this -- the  
3           order is given, the decision is finally taken to  
4           intervene, and we say that's --

5   SIR MICHAEL WRIGHT: The "stop him" order.

6   MR MANSFIELD: Yes, which we say actually was taken too  
7           late, he was on the escalators at that time, and should  
8           have been taken in a different way.

9           So that's the continuum, the four stages which we  
10          say are important, through which this duty adheres, and  
11          it would adhere to any other address that is eventually  
12          covered in this way, for example Portnall Road where in  
13          fact, as you have heard, a group of four were subjected  
14          to a different kind but nevertheless an armed stop when  
15          they left. In other words, the duty is owed to them as  
16          well in the same way, because they are having lethal  
17          force deployed, although maybe the tactic is different  
18          because they were not regarded as suspects, but  
19          associates. But nevertheless, the duty obviously  
20          pervades there.

21          And any other address, and I do not need to go into  
22          all the other ones, that may or may not have attracted  
23          this kind of operation. We say this is extremely  
24          important because we have, and I don't think anybody has  
25          any doubt, that unfortunately this kind of operation may

1           have to be employed in the future, and therefore  
2           certainly the citizens of London or any other city or  
3           anywhere need to be reassured that there is a duty here  
4           rather than an abrogation of duty, because we say the  
5           law provides for it.

6           So what I am going to do in relation to this, if  
7           I may, in order to hopefully not spend too long going  
8           through authorities which have been very ably put  
9           together for all of us in a number of volumes -- which  
10          have disappeared, they were there, they have evaporated,  
11          they were just behind me.

12          Can I indicate just the cases for the moment that we  
13          say support the proposition concerning inherently  
14          dangerous activities. I'll give the tab references but  
15          I am not asking you to look at them for the moment  
16          because I am anticipating that most people have either  
17          read them or have them or know of them.

18          Plainly Rigby is an important authority. I know  
19          people have tried to distinguish it on the basis it was  
20          a siege condition but we say it has a lot of parallel  
21          similarities to this. That's at tab 28.

22          Now, Rigby in fact has been preserved, if I can put  
23          it that way, beyond the dicta in Hill.

24   SIR MICHAEL WRIGHT: It was approved in Van Colle.

25   MR MANSFIELD: I'll just do the references for the moment.

1           In the Hill case it was preserved in two -- well,  
2           certainly a main speech, Lord Keith at page 59, that's  
3           tab 27.

4   SIR MICHAEL WRIGHT: That's in Hill, is it?

5   MR MANSFIELD: Yes. Tab 27, it's the second volume, tab 27,  
6           Lord Keith at page 59, letters B to D. Impliedly  
7           preserved it. And in Van Colle, the matter you have  
8           just mentioned, that's also in the second volume,  
9           tab 33. In the two speeches there, Lord Bingham at  
10          paragraph 53 and Lord Hope at paragraph 79, who  
11          specifically indicated that in this sort of case, namely  
12          the Rigby type of case, would not compromise the public  
13          interest in police investigating and suppressing crime.  
14          I have already indicated that's how we put it in  
15          relation to this case.

16                 There are a series of other cases which we say are  
17                 illustrative of the inherent principle concerned with  
18                 firearms. They are Crooks in volume 3, tab 49, and in  
19                 fact I can, if I may, rattle through them because they  
20                 are one tab after another. Crooks at tab 49; Schofield  
21                 at tab 50; Bici -- which is the Kosovan case -- at  
22                 tab 51; Hartwell at tab 55, particularly where there are  
23                 dicta concerning the highly dangerous nature of  
24                 potentially lethal weapons which are easy to carry.

25                 The paragraphs there that relate to it -- that is

1 Hartwell, at tab 53 -- are paragraphs 32 --

2 SIR MICHAEL WRIGHT: Hartwell is tab 53, is it?

3 MR MANSFIELD: Yes, it is. If anyone sees I have made  
4 a mistake, please say, but I think that's correct.

5 SIR MICHAEL WRIGHT: At the moment I have 49, 50, 51 and 53.

6 MR MANSFIELD: That's right. That's a paragraph, sorry, in  
7 Hartwell, paragraphs 32 and 33 to 35.

8 So we say that there is an established line of  
9 respectable authority which indicates that that is  
10 a category which applies. But even if --

11 SIR MICHAEL WRIGHT: They are all firearms cases?

12 MR MANSFIELD: Yes, they are to do with firearms, connected  
13 with firearms and observations on firearms.

14 There is in fact, if I may, the only -- it may seem  
15 a little strange to go to a textbook. There is O'Dwyer.  
16 It's been added this morning. Tab 60 is another one.

17 It is a strikeout case, I appreciate it's probably  
18 of lower authority but in fact the principle is there as  
19 well. So if you add O'Dwyer, tab 60.

20 SIR MICHAEL WRIGHT: Yes.

21 MR MANSFIELD: There is a rather convenient summary. It's  
22 in volume 3, tab 54. It's the only one I ask you to  
23 look at at this stage.

24 SIR MICHAEL WRIGHT: Somebody had better give me my  
25 bundle 3. (Pause). Yes, volume 3. Tab?

1 MR MANSFIELD: 54. The negligence liability of public  
2 authorities. I appreciate it's only a persuasive  
3 authority --

4 SIR MICHAEL WRIGHT: Happily the authors are still alive.

5 MR MANSFIELD: Yes. Most certainly.

6 The reason we cite this one is that, of all the  
7 textbooks, this is on the face of it the one that deals  
8 with these issues in more detail than any other. So we  
9 would say it's a leading academic as well as  
10 practitioners' -- I do not put it higher than a guide,  
11 but it does in fact in a number of paragraphs  
12 conveniently, and somewhat succinctly summarise the  
13 position as I have been putting it.

14 The paragraphs are 10.15, which comes at page 546,  
15 cases in which the Caparo test is not applied.

16 SIR MICHAEL WRIGHT: Just a moment, I haven't quite got  
17 there. 10.15, yes.

18 MR MANSFIELD: 10.15:

19 "In many claims against the police, the courts have  
20 not considered the Caparo test and thus claimants have  
21 not been required to establish a prior relationship of  
22 proximity with the police and nor have the courts  
23 considered whether, as a matter of public policy, a duty  
24 ought to be imposed. These will, as we have noted, be  
25 cases in which the imposition of a duty of care cannot

1 be regarded as novel, and in which it is well  
2 established that a duty is owed. The principal category  
3 of case to which this applies as far as the police are  
4 concerned is claims that the police directly inflicted  
5 physical harm on the claimant. This occurs, for  
6 example, in cases in which injuries are caused directly  
7 by careless driving or the discharge of firearms."

8 You will note there that Rigby is the footnote.

9 "Imposition of a duty of care is uncontroversial in  
10 such cases even if the police were, at the time they  
11 inflicted the injury, responding to an emergency or  
12 investigating crime."

13 In a sense we say implicit in responding to  
14 an emergency is almost certainly going to be battle  
15 conditions; that's another factor that is taken into  
16 account in terms of the standard of care. And we say  
17 that is what the officers are trained for, and everybody  
18 agreed, and this is what they would have to face in this  
19 situation in any event. That doesn't somehow or other  
20 abrogate the duty of care or the level of care.

21 Another paragraph that again alludes to this  
22 position is 10.35 at page 558:

23 "Specific instances of police negligence."

24 The first heading is "Harm Caused Directly by the  
25 Police":

1            "This section considers the potential liability of  
2            the police when they cause physical harm directly  
3            through their negligence. It examines liability where  
4            the police cause accidents while driving, while  
5            discharging firearms and where they cause physical  
6            damage during a search of premises. As we suggested at  
7            paragraph 10.15 above, in such cases it's not necessary  
8            to consider whether there is a prior relationship of  
9            proximity between the police and the claimant, or  
10           whether the Hill policy grounds ought to preclude  
11           imposition of a duty. It is widely recognised that the  
12           police, like anyone else, have a duty to take care not  
13           to perform acts that directly and physically injure  
14           other people and this duty will be imposed even if the  
15           police were involved in the investigation or prevention  
16           of crime at the material time."

17           Then two more rather shorter paragraphs --

18        SIR MICHAEL WRIGHT: That of course applies to the case,  
19           I can't remember what it's called now, where the  
20           complaint was that the police had entrusted a weapon to  
21           an entirely unsuitable officer. You know the one I am  
22           talking about.

23        MR MANSFIELD: Yes.

24        SIR MICHAEL WRIGHT: That relates to the actual discharge of  
25           the weapon, as this paragraph appears to, where here of

1 course there is no question of negligence about the  
2 discharge of a weapon. It was done deliberately.

3 MR MANSFIELD: I do want to come to the circumstances in  
4 which --

5 SIR MICHAEL WRIGHT: The only distinction I am drawing,  
6 Mr Mansfield, is that the arguments here about the duty  
7 of care are, as I understand it, focused as to whether  
8 it ever engages at all and if so, at what point in the  
9 story.

10 MR MANSFIELD: It's dealing with -- it's certainly dealing  
11 with the deployment of firearms, if you are going to  
12 entrust a firearm, certainly whether it's a drunken  
13 police officer, which I think is O'Dwyer, or -- because  
14 some of them happen to be police officers on police  
15 officers, and one is a police officer in a fit of  
16 jealousy --

17 SIR MICHAEL WRIGHT: Yes.

18 MR MANSFIELD: -- sent to, I think, a public house, that's  
19 the Hartwell one, and shoots somebody.

20 So the duty of care is not only in the question of  
21 the discharge, but also the, as it were, handing of the  
22 weapon to somebody. In other words, there is an overall  
23 duty, and of course the Northern Irish cases look at  
24 this and have reserved their position in relation to  
25 this in the planning of an operation in which there is

1 a deployment.

2 So it goes from, as it were, the conveying of the  
3 weapon to somebody's possession, so the police have to  
4 ensure, for example, that the person to whom they give  
5 the weapon is not mentally unstable, that's one of the  
6 criterion, because otherwise they would be failing in  
7 their duty of care because that person is likely, in  
8 a moment of instability, to cause harm. So it's not  
9 just at the point at which it's fired, because otherwise  
10 it would absolve those who provide the arms in the first  
11 place.

12 So we would say it's slightly more extensive than  
13 just the discharge.

14 The next paragraph in fact, the final two  
15 paragraphs, there is one at 10.39, page 560, "Discharge  
16 of Firearms and Similar Devices", I appreciate it says  
17 "discharge":

18 "The police owe a duty to ensure they do not harm  
19 others by acting carelessly while engaged in dangerous  
20 activities. This includes a duty not to harm persons or  
21 property by negligently taking decisions regarding the  
22 use of firearms ..."

23 Again, we say there were decisions taken here from  
24 4.55 onwards which were negligent regarding the use of  
25 firearms in this case or similar devices during the

1 course of an operation.

2 SIR MICHAEL WRIGHT: Just read the next sentence, if you  
3 would.

4 MR MANSFIELD: Yes:

5 "The police will not, however, be held liable for  
6 errors of policy, for example in determining the kinds  
7 of firearm ..."

8 So for example here hollow tip or other equipment  
9 the police force should fire.

10 SIR MICHAEL WRIGHT: The footnote draws the distinction  
11 between policy and operational decisions.

12 MR MANSFIELD: Yes, and I have avoided -- and Marshall is  
13 cited as well -- including in this obviously any errors  
14 of policy and that applies to the narrative questions.  
15 We have excluded policy and included essentially  
16 operational decisions.

17 SIR MICHAEL WRIGHT: Yes, I understand.

18 MR MANSFIELD: Finally paragraph 10.41:

19 "Where police fire guns during the course of  
20 an operation [this is page 561], they owe a duty of care  
21 to those who might be harmed."

22 Then the Northern Irish case, Farrell, is in the  
23 footnote:

24 "The Court of Appeal in Northern Ireland has held  
25 that soldiers seeking to prevent a crime occurring, owed

1 a duty of care to individuals, including suspects, who  
2 might be harmed by their use of firearms, and it is also  
3 apparent that the police and army owe a duty of care  
4 when using firearms to control public disorder."

5 Then in fact the sentence which bears on something  
6 I have just said:

7 "The police may also be held to be in breach of  
8 a duty of care if they permit an individual" --

9 SIR MICHAEL WRIGHT: That's Hartwell.

10 MR MANSFIELD: Yes.

11 "... who is known to be unstable or otherwise  
12 potentially dangerous ..."

13 SIR MICHAEL WRIGHT: O'Dwyer is cited.

14 MR MANSFIELD: Sir, I have read those paragraphs, albeit  
15 from a textbook, but they do summarise our position. We  
16 say we are not limited by that, those series of  
17 principles, because we are making it clear here, their  
18 being a small and defined class and a target --  
19 a positive decision to target an address, that this  
20 falls within the parameters of namely, if you like,  
21 a proximity, a relationship has been struck at the  
22 moment the operational decision is taken all the way  
23 through to the actual decision to intervene on the  
24 particular individual concerned.

25 We say that the public policy is not going to be

1           undermined in any way in terms of the investigation and  
2           suppression of crime if, in a case such as this, which  
3           involves such important issues as life and death, the  
4           police have to take care, we say.

5           So may I, on the back of that, I have done it fairly  
6           briefly, but the idea is in fact to obviously relate it,  
7           those principles, to -- maybe before I do, I think there  
8           is a measure of, I hesitate to say agreement but in any  
9           event in your counsels' submissions certainly, they  
10          concede or appear to concede that there is a way of --  
11          they use the word reconciling, I suggest there isn't  
12          a need to reconcile, but in fact they do on page 16 of  
13          their submissions onwards, they do appear to echo what  
14          I have just been saying about the way to reconcile.

15          Perhaps if I can just deal with the paragraphs that  
16          deal with this. Because we say in a situation in which  
17          there is, we say a clear duty, you can direct the jury  
18          there is a clear duty, but even if you find there isn't  
19          a clear duty but there is a clearly arguable duty, and  
20          there is evidence capable of supporting the arguable  
21          duty, then it becomes a matter for the jury to decide in  
22          those circumstances. That's the Willoughby case.

23          So the position here is -- can I just read the  
24          relevant paragraphs? I am on page 16, the penultimate  
25          bullet point on that page:

1           "The best way to reconcile all the above authorities  
2 is to say that the police can owe a duty of care in  
3 negligence in respect of various positive operational  
4 decisions, particularly those which may foreseeably  
5 result in harm to a defined class of persons."

6           Well, that, of course, is what I have been  
7 developing.

8           "But the police do not owe a more general duty to  
9 the public at large in their general functions of  
10 investigating crime.

11           "In any event, a duty will only arise if the  
12 requirements of foreseeability and proximity are met.  
13 In many cases, the requisite relationship of proximity  
14 will not exist, because the duty would be owed to  
15 an unacceptably wide class of persons. In many cases,  
16 it will not be possible to say that breach of  
17 a particular duty may foreseeably result in harm."

18           Well, we say we meet the requirements of  
19 foreseeability and proximity because of the targeting of  
20 an address and eventually of a person.

21           We are not suggesting -- in the next bullet point:

22           "Therefore, in orchestrating a manhunt to find  
23 a suspected suicide bomber, a senior officer does not  
24 owe a duty to the whole of London to protect it against  
25 an attack. Nor does he or she owe a general duty of

1 care in the investigation to all persons who might  
2 foreseeably be affected by the results of the  
3 investigation."

4 Then there is reference to Heagren, where the Court  
5 of Appeal applied the principle in Hill to hold that:

6 "... a police force does not owe a duty of care to  
7 make reasonable enquiries to check that information from  
8 an informant is reliable before initiating an armed  
9 search of premises."

10 Then these last two bullet points we say are of  
11 particular relevance to the synopsis I have just  
12 outlined:

13 "In the directing of firearms officers to  
14 stop/challenge [or challenge] an identified individual  
15 (or to storm an identified address), a senior officer  
16 can owe a duty of care to that individual and others in  
17 the immediate vicinity. This is analogous to the siege  
18 situation in Rigby and involves a proximate  
19 relationship."

20 Clearly that is the stage at which Commander Dick  
21 takes the decision. I anticipate that's what it's  
22 intended to refer to. Then the final one:

23 "It may also be arguable that, in the planning and  
24 directing of a MASTS operation against an identified  
25 address, a senior officer owes a duty to those inside

1 the address who may be affected (although that duty  
2 might not apply to criminals or to those who are  
3 actually suspects)."

4 So we say in this case the last bullet point applies  
5 to Commander Dick and the command team in the control  
6 room, but we have obviously specified individuals.

7 Then the last bullet point, we say, relates to the  
8 4.55 decision onwards: it's an operational decision  
9 against an identified address, and of course it owes  
10 a duty to those inside the address, particularly who may  
11 be affected -- may I put a hyphen there -- when they  
12 leave, because it was intended to target them as and  
13 when they leave.

14 We say, of course, the bit in parentheses doesn't  
15 apply here, it is not suggested he is a criminal or he  
16 was an actual suspect in the sense that that is  
17 conventionally understood.

18 So we say there is a measure there to which there is  
19 support for our propositions, and it's in that context,  
20 if I may, I would like to, as it were, return to  
21 a continued interweaving of the principles with the  
22 various stages which have been outlined in our  
23 submissions.

24 I do not intend to go through the written  
25 submissions at all. I would like to, as it were, stand

1           back and try and distill what the position is and was.

2   SIR MICHAEL WRIGHT:  Would you agree that the ambit of the

3           duty of care, or the extent of the duty of care may, to

4           some extent, be limited by the gravity of the peril that

5           is perceived?  I'll give you the example.  I am afraid

6           I have a pragmatic mind.  I'll give you the example that

7           has crossed my mind.  Suppose you have a police officer

8           who is confronted with an armed criminal who is quite

9           obviously a major threat, and the police officer

10          correctly decides, or justifiably decides that he will

11          have to fire not necessarily a critical shot, it doesn't

12          really matter, just a shot to disable the gunman and he

13          misses, and the bullet, in fact -- if you would like to

14          make it more difficult -- ricochets off a wall.

15   MR MANSFIELD:  Well, it's the case ... yes.

16   SIR MICHAEL WRIGHT:  Where does the duty of care end?  Duty

17          of care doesn't apply to the man who has been shot at.

18   MR MANSFIELD:  Not if he is a criminal.

19   SIR MICHAEL WRIGHT:  I'm postulating that.

20   MR MANSFIELD:  We say, and the word -- I think it's in one

21          of the passages I have just read -- "anyone in the

22          vicinity".

23   SIR MICHAEL WRIGHT:  I know.  So you do have a duty of care,

24          do you, in respect of somebody who may foreseeably be

25          affected by the discharge of the gun?

1 MR MANSFIELD: Yes, in the vicinity.

2 SIR MICHAEL WRIGHT: Yes, that's why I asked you: does the  
3 immediacy and gravity of the peril perceived have any  
4 impact on the ambit or the extent of the duty of care?  
5 I think your submission would be no.

6 MR MANSFIELD: Well, no, it doesn't. It's the discharge of  
7 a firearm. It's the use of -- the deployment and use of  
8 a weapon that is capable of -- that is loaded and can  
9 kill.

10 SIR MICHAEL WRIGHT: Yes, all right. Very well. Thank you.

11 MR MANSFIELD: May I, just so that again you can see the  
12 stages through which I am going, I have already mapped  
13 them out, but can I just return to them in a little more  
14 detail, because I think what I have been proposing and  
15 putting, not that that, unless it's accepted, is of  
16 great importance, but where it is accepted, I want to  
17 submit it is of importance what has been developed  
18 throughout the inquest on behalf of the family; and it  
19 does go back, I'm afraid, to stage 1 and the strategy  
20 that was set by the Gold Commander, Mr McDowall, at  
21 4.55., because we say it has a direct link in fact to  
22 what happened in the carriage at the end of the day.

23 Because the link is this, working back from the  
24 carriage to this strategic decision: what happened in  
25 the carriage should not have occurred and would not have

1           occurred if, of course, at the much earlier stage, and  
2           we make it very clear, that Jean Charles de Menezes had  
3           been stopped before he got on a bus.

4           Because without question, we submit, and have  
5           submitted, that the safest time for this to have taken  
6           place, and we have not been submitting that it's  
7           underneath a certain tree if you turn left because you  
8           don't know whether the person is going to turn left. We  
9           have never ever submitted that. We are submitting that  
10          the safest time for a controlled stop, to minimise the  
11          risk of foreseeable death, was in that initial time, and  
12          we say this was recognised by McDowall and by Dick, but  
13          just not put into practice. I'm putting it in a very  
14          short form.

15          The moment that opportunity is missed and past, the  
16          risks are not minimised, they are maximised. Can  
17          I just, before I deal with it, try and look at this with  
18          feet on the ground realistically, as a police officer in  
19          charge, as a Londoner. There isn't anywhere in London  
20          where you are going to get conditions which allow you to  
21          do exactly how you want to perform a controlled stop.  
22          There is nowhere that's perfect.

23          But clearly, I think as the police themselves  
24          accepted, the further someone engages with public  
25          transport, in other words actually gets on a bus, which

1           actually can't be surrounded and hijacked by the police  
2           without serious risk, or, worse, gets into the tube  
3           system and on to a train, that that is a spectre that  
4           cannot possibly be contemplated. Therefore, deploying  
5           firearms have to be deployed at a time when they can be  
6           safely or at least minimising the risk, as one  
7           appreciates there is always a risk, but minimising the  
8           risk of death by using them at the safest opportunity.

9           We say the safest opportunity was at the start and  
10          increasingly it got more dangerous the closer it got to  
11          a tube station. Now, it may be said, well, they never  
12          knew he was going to get off at a tube station, but the  
13          problem was that once he is on the bus, he could end up  
14          much closer to central London and much closer to places  
15          where it would be almost impossible, if not impossible,  
16          to do a controlled stop under proper conditions,  
17          particularly when you are dealing with -- come back to  
18          this -- somebody who is fundamentally innocent.

19          We say that's the factual situation that was facing  
20          the police, and one has to say what was the object,  
21          stage one, before the strategy is set, what was the  
22          object; and again, I hope it's not being naive, I hope  
23          it's not being simplistic to say that once the gym card  
24          is found, what is anybody going to say, whether they are  
25          a Gold Commander, Silver, Bronze or a local PC; you have

1 a gym card, you have a photograph -- the photograph,  
2 I do not make any comment about that for the moment --  
3 you have a photograph, you have an address, you have two  
4 individuals linked to the address, and eventually by  
5 6.20 you have a car linked to that address.

6 What's going to be in the context of this case which  
7 has been hammered home time and time again of what  
8 happened on the day before and what happened on 7 July  
9 was that the threat to London at that point -- one was  
10 the highest threat probably since the wars, and higher  
11 than the IRA threat, so it's the highest threat. This  
12 dictates in a sense the highest duty of care where there  
13 is the highest threat.

14 There is the highest threat and what is the threat  
15 to? As far as the police were concerned, and the rest  
16 of London, because again it's been emphasised how  
17 everybody was afraid to even get on the public transport  
18 system, it appeared to be not exclusively but  
19 predominantly a threat to the public transport system,  
20 either bus or tube, both of which had been hit on the  
21 21st and the 7th.

22 So therefore it's not too sophisticated to, as it  
23 were, determine that the decision that has to be taken  
24 at 4.55 is the decision that was half taken, as it turns  
25 out. You have to contain and control the address. Why?

1           Because there are two objectives. As some of the cases  
2           indicate, you have to look at what is the objective of  
3           the operation that is being carried out? The objective  
4           is two-fold. The main one is just in case, and one  
5           can't assume that they are not going to be there,  
6           although we say in fact some of the senior management  
7           did assume that the individuals concerned wouldn't  
8           return to a footprint address.

9           However, you can't assume that. You can't allow  
10          that to affect your thinking at that point at all,  
11          4 o'clock in the morning. You have got a lead which is,  
12          if I may put it, a hot lead. It may turn out,  
13          fortunately for those perhaps in the block, that it  
14          wasn't a bomb factory and that in fact no-one was there,  
15          or at least the people they were looking for weren't  
16          there. However at 4.00 in the morning you don't know  
17          that.

18          So therefore the policy that has to be, we say,  
19          pursued at that point is controlling and containing and  
20          stopping anyone coming from the address that you have  
21          got -- I know about the communal door which is in the  
22          wings, as it were -- reaching public transport. And  
23          yes, they don't know which bus stop they are going to,  
24          they don't know whether they are going to turn left or  
25          right, they don't know whether they are going to walk

1 all the way, they don't know whether they are going to  
2 use a car. I have in fact contemplated all of those  
3 possibilities when cross-examining various officers.

4 One of the key witnesses which I will have to come  
5 to in a moment was TJ84, where I am afraid in some  
6 detail all of this was put. Whether it was appreciated  
7 by others who were listening, I don't know, but I have  
8 canvassed all of this very carefully as to the real  
9 objective here which could have been achieved without  
10 a death was that first, I have called it a window or  
11 parameter, and not a specific place, but a specific time  
12 before engaging with public transport.

13 SIR MICHAEL WRIGHT: You have never challenged the  
14 proposition that the beginning of the window, as it  
15 were, has to be far enough away from the building to  
16 avoid compromising the operation.

17 MR MANSFIELD: That's right, yes. Because I have accepted  
18 that you don't want to do it outside the front door and  
19 you don't want to do it probably in Scotia Road itself  
20 and you may feel that Marnfield Crescent even is too  
21 close in case somebody in Marnfield Crescent happens to  
22 know somebody in Scotia Road.

23 So I have accepted that. But what I have not  
24 accepted and what I haven't been saying is that it has  
25 to be point A, B or C in Upper Tulse Hill because in

1 fact the window is 9.33 when he actually leaves and Pat  
2 picks it up at 9.33, 9.33 and the estimate is that he  
3 gets on the bus at about 9.39. That's six minutes.

4 Now, if one takes off the time between the front door  
5 and Upper Tulse Hill, two, three minutes perhaps, you  
6 have a three, four-minute window.

7 SIR MICHAEL WRIGHT: In geographical terms, that's turning  
8 into Upper Tulse Hill from Marnfield Crescent and  
9 closing, what, at the bus stop?

10 MR MANSFIELD: Well, I am not going to be seduced into  
11 saying a particular position because then everyone is  
12 throwing back: oh, Mr Mansfield is picking out a  
13 position, and how can it be ...

14 My position has been, or the family's position has  
15 been, I'm sorry, that -- and certainly I do speak for  
16 the family on this -- that if he had been stopped, and  
17 of course it's not as it turned out, he could have been  
18 stopped; and I'm going forward a little bit, since we  
19 are on Upper Tulse Hill. What one has to remember in  
20 that stretch between Marnfield and Tulse Hill, that  
21 stretch of Upper Tulse Hill, now I know three minutes  
22 doesn't sound very long but in fact in the end they were  
23 taking decisions on somebody's life within seconds  
24 inside the carriage, and within seconds, slightly longer  
25 period, from the top of the escalator down to the train,

1 and of course leaving the bus. They are taking  
2 decisions in a much narrower window in a more much  
3 dangerous situation than Upper Tulse Hill.

4 Of course my window gets far larger if he had in  
5 fact chosen to walk the other way, and for example  
6 walked in the direction of either Roupell Road where  
7 there was another bus stop, or even just continued on  
8 Upper Tulse Hill to a bus stop off the map, as it were.

9 So that's the minimum, and if I may say so, it's not  
10 rocket science for a police officer or anyone else to  
11 have worked out, given the high level of threat, what is  
12 the high level of response which is: we really do have  
13 to stop him if he is there or anyone who might be him,  
14 in other words we can't take the risk. That's been  
15 appreciated in fact by Mr Horwell when he was putting  
16 questions at a later stage. You can't allow anybody who  
17 might be to get on to public transport, because of the  
18 risk and the threat level and so on.

19 Therefore it behoves the police to take a positive  
20 operational decision which maximises safety for the  
21 innocent persons who might be within the address and who  
22 might leave and who do leave, and in fact the category  
23 of people is narrowed even further because it was in one  
24 sense, because it was a communal door, and because they  
25 didn't know where people were coming from, they could

1           only deal with those people who appeared to look like  
2           one of the subjects, one of the two subjects.

3           May I say this, just in parentheses, there is  
4           an interesting factual example here: I think I put it to  
5           Commander Dick or certainly somebody, that had Omar, the  
6           other person linked to the gym card, who was thought to  
7           live there, come out of number 21, where there was a far  
8           better image in fact of him than there is of Osman, he  
9           was in the same position. He's totally innocent, as is  
10          now conceded. But it's a very good example of yet  
11          somebody else who would also have been seriously at risk  
12          if he had not, for example, or rather putting it the  
13          other way around, if he had got on to a bus, done the  
14          same route and so on, maybe got off at a different stop,  
15          but in any event, the risks are immediately seen for  
16          somebody who was thought without question by the  
17          Gold Commander, Mr McDowall, he thought Osman was a good  
18          likeness for Warren Street. In fact they all thought  
19          that.

20        SIR MICHAEL WRIGHT: Omar.

21        MR MANSFIELD: Yes, I am sorry, Omar, Omar was a good  
22          likeness. They all thought that.

23                Therefore Omar was in a very high risk category if  
24          he had have come out that morning.

25                So again it just demonstrates why there is

1 an extraordinary need for care here, we say, and  
2 obviously a duty that is imposed because of these risks  
3 of death, foreseeable risks of death, in terms of, as it  
4 turns out, shooting the wrong person.

5 So that walking along that stretch of  
6 Upper Tulse Hill, if one has it in mind, and I think we  
7 have all been there now. The irony of it all is there  
8 were sufficient resources to conduct a safe stop. Now,  
9 this, I know a question that has been floating not in  
10 the ether but on paper that has been posed is, you know,  
11 what is the difference between the inquest and the  
12 Health and Safety trial?

13 One of the big differences, and I think Mr Perry  
14 himself -- I see he is not here today but anyway -- has  
15 pointed out and I accept this that there is now  
16 a different factual situation, at least an appreciation,  
17 and I include myself in it, a different appreciation,  
18 although the material may have been there to put it  
19 together, nobody, without access to necessarily all the  
20 phone calls and putting it carefully together, it was  
21 not appreciated at the Health and Safety trial, I was  
22 not involved in that, but that in fact, for example, as  
23 de Menezes walked along Upper Tulse Hill past the  
24 TA Centre at 9.35-ish, 36 even perhaps but somewhere in  
25 that region, what was right across the road? The Alpha

1 car, armed C019, had already got there. And probably  
2 that's the minimum -- probably the second car, 805C, had  
3 got there. The third car which was the control car,  
4 probably hadn't got there because you will remember TJ84  
5 and others saying that --

6 SIR MICHAEL WRIGHT: Just as they turned in.

7 MR MANSFIELD: Yes.

8 SIR MICHAEL WRIGHT: Yes, I remember.

9 MR MANSFIELD: So therefore the probability, I think I can  
10 put it as high as that, the probability is there were  
11 two cars there. That is four armed police officers,  
12 highly trained to do a stop. We know from TJ84 and in  
13 fact no-one's said that it couldn't be done, that it  
14 could have been done if they were ordered to do it.  
15 Even though he -- that is the control car -- may not  
16 have reached there, that's not an uncommon situation, it  
17 could have been done. It could have been ordered at  
18 that point.

19 But it's more, as it were, amplified than that.  
20 It's not just that there were two cars right there.  
21 There were a number of other police officers in the  
22 vicinity. In other words, this isn't a case where the  
23 resources weren't actually available. The real question  
24 is: why wasn't it all pulled together to happen? I am  
25 coming to that.

1           Also, you now know that Jean Charles has walked past  
2           Frank. Now, he can't leap out of his van, I appreciate  
3           that. And in fact that's the trigger. He is really  
4           saying, because he is incommoded, he doesn't actually  
5           see precisely so he is saying worth a second or worth  
6           another look. So that's how it starts, and I'm going  
7           into the facts a bit of this, this is the second stage,  
8           but it bears upon actually stage one and the setting of  
9           the strategy.

10           What should have happened, and we say could have  
11           happened, it happened with the blue team, they had it  
12           absolutely sorted, if I may say so, up at Portnall Road,  
13           is that you don't rely on one person, if you have only  
14           got a small timeframe, same with Portnall Road, same all  
15           over London; the timeframe between leaving an address  
16           and hitting a bus stop or tube station is limited, even  
17           the walk from here, the Oval up to either the Oval  
18           Underground station that way or the overground station  
19           that way, we are talking minutes only, in fact not  
20           dissimilar timeframes. It doesn't matter where you are  
21           in London, it's that kind of timeframe. We are  
22           absolutely having to deal with that kind of timeframe.  
23           Portnall Road exactly the same.

24           So what the blue team, and you have had Alpha 1 and  
25           so forth give evidence here, is that if somebody had

1           been missed coming out of 61A, they had back-up, they  
2           had someone else -- I didn't want to know where they  
3           were -- ready to be able to achieve an identification or  
4           not of the persons who had come out.

5           Now, there were other people, but what we don't  
6           know, we don't know where they were. For the bulk of  
7           the red team who were red or not red as the case may be,  
8           we haven't got a clue where they were, and in fact  
9           no-one else seems to know where they were except one or  
10          two.

11          What is very clear is there wasn't a tight circle  
12          with officers able to, as it were, do an intervention on  
13          a surveillance basis because here we are dealing with  
14          high risk. There is no -- you have to balance the risk  
15          of a surveillance officer getting, as it were, seen  
16          against allowing somebody who might be a bomber getting  
17          on a bus. I think the risk of a surveillance officer  
18          exposing himself is much less in terms of the damage to  
19          his future use and all the rest of it, than the damage  
20          to London if he is a suicide bomber getting on to a bus.

21          But what didn't happen here was no other member of  
22          the red team appears to have been in a position to do  
23          anything about the missed opportunity by Frank because  
24          what happens is Edward is sitting in a car park right  
25          opposite Marnfield Crescent, and for reasons which he

1           gave which at the time I didn't accept and still don't,  
2           because he was not armed he didn't get out, so what, we  
3           allow a risk to get further closer to a bus stop? He  
4           doesn't get out of the car, and therefore he is not able  
5           to help.

6           That's Edward.

7           Now, from somewhere, I think it's a road further  
8           back up Upper Tulse Hill, comes Tango 2.

9           SIR MICHAEL WRIGHT: Too far away to interfere, he says.

10          MR MANSFIELD: Too far away to interfere. Now, that's  
11          another piece of evidence that has not surfaced before.  
12          He has never been asked about this. At least he never  
13          made a statement, although reference had been made to  
14          him by others. He is too far away. Why is he too far  
15          away? It's no use being 100 metres behind so he only  
16          sees the back. So that's pretty useless. He is in  
17          Upper Tulse Hill, Edward's in Upper Tulse Hill. Then we  
18          have Harry in a car following behind in  
19          Upper Tulse Hill, so that's a third officer. Then we  
20          have James and Ken in a car, driving alongside and Ken  
21          gets out.

22          So between five officers, effectively, there has not  
23          been -- what there should have been was tight control in  
24          order effectively to say, and I'm going to put it  
25          clearly, with this level of threat unless you can

1 discount this individual and say he's not one of the  
2 bombers, suspected, in other words he's not comparable  
3 to the image, because all they had to go on, this very  
4 poor image in one case and a better image in the other  
5 one, he doesn't appear to be either of the two we have  
6 got. Then in our submission a stop has to take place  
7 because of the risks involved, and could have taken  
8 place there.

9 Because in fact as it turned out, James, as you  
10 know, claimed that he got a fleeting glance. That's in  
11 fact another of the extraordinary bases almost upon  
12 which this whole case has emanated.

13 Frank missing an opportunity, have another look,  
14 someone has another extraordinarily brief look across  
15 a car as he is driving along and that becomes,  
16 eventually for him, sufficient for him to say he  
17 believes it is effectively. At the beginning he drives  
18 right into Tulse Hill, turns round in a block of flats,  
19 comes back down having looked at the image and is then  
20 conveying "possibly", possibly identical with on the  
21 basis of a poor image and a fleeting glance.

22 This really is totally unsatisfactory, and we say  
23 that what should have been happening at this period,  
24 tight surveillance control because they all should have  
25 realised that the -- it's rather like the line in the

1 sand that Ivor rather graphically drew. There is a line  
2 in the sand, not at the escalators, that's what he was  
3 forced to do because by then it was so late in the day,  
4 the line in the sand had been pushed back, pushed back,  
5 pushed back, top of the escalators.

6 The line in the sand actually for a safe controlled  
7 stop, and we know from Jean Charles's background that  
8 whenever he has been approached by the police, there has  
9 never been any problem, utter respect for them --

10 SIR MICHAEL WRIGHT: Yes, that means that had they done,  
11 that's what would have happened. I appreciate that  
12 entirely. But what do you say -- I fully understand the  
13 points you are making about effectively intervening at  
14 a time which will produce the minimum risk to people on  
15 public transport.

16 MR MANSFIELD: That's right.

17 SIR MICHAEL WRIGHT: What do you say about the risk to the  
18 officers themselves?

19 MR MANSFIELD: Oh, I say it's reduced substantially, because  
20 we have not been allowed to go into the tactics, I am  
21 not complaining but one is imagining, I hope, reasonably  
22 inferentially that what would happen on a controlled  
23 stop, a challenge and a controlled stop, which is in the  
24 Kratos document, the tactical options document that was  
25 provided by Andrew and Esposito to, at 11.45 that night,

1           and then 6.15 in the morning, was on the challenge and  
2           control as opposed to a stop, which is apparently at  
3           very close quarters, a challenge from a distance would  
4           enable plainly -- let's suppose there were at least two  
5           cars there, two cars, either the cars themselves to be  
6           deployed; in other words the officers wouldn't run out  
7           of the TA Centre outside their cars, that's what  
8           I understand would be the situation, they would drive  
9           out in cars, and within seconds they could drive  
10          alongside and clearly --

11       SIR MICHAEL WRIGHT: As they did at Portnall Road.

12       MR MANSFIELD: Yes. Exactly as they did at Portnall Road,  
13          although I appreciate that at Portnall Road the actual  
14          intervention was of a different kind because they were  
15          associates. I appreciate that.

16       SIR MICHAEL WRIGHT: That's the other point, of course, that  
17          the distinction at Portnall Road is that anybody who  
18          came out of those single premises was either a suspect  
19          himself or an associate.

20       MR MANSFIELD: Yes. Here it had to be narrower, so it's  
21          a narrower group of people to whom the duty is owed.  
22          It's anybody who appears to look like --

23       SIR MICHAEL WRIGHT: Yes.

24       MR MANSFIELD: So it's a really narrow group.

25       SIR MICHAEL WRIGHT: The reason I asked you the question,

1 Mr Mansfield, is the rather striking evidence that Neil  
2 gave when he was asked: how do you approach a suicide  
3 bomber? One could have thought of the old music hall  
4 joke answer, but what he actually said was only when he  
5 is stripped naked and lying flat on the floor. I don't  
6 think one ought to lose sight of the fact that the  
7 officers themselves must be conscious of the fact that  
8 any approach to somebody who is feared to be a suicide  
9 bomber may involve appalling risks to the officers  
10 themselves.

11 MR MANSFIELD: Or may not, it depends how it's -- of course  
12 there is a risk. There is an even bigger risk, we say,  
13 in the way that it actually was carried out. Obviously  
14 I am going to come to that.

15 SIR MICHAEL WRIGHT: We have not got there yet. I'm talking  
16 about your postulated intervention in Upper Tulse Hill.

17 MR MANSFIELD: And I am saying that would have constituted  
18 the minimal risk, it doesn't exclude it, the minimal  
19 risk to all concerned, that is the person being stopped,  
20 people who live in adjoining premises; at that time of  
21 day nobody has suggested the pavements were crowded in  
22 Upper Tulse Hill. They would probably have been  
23 sparsely populated and they would have done what Ralph  
24 indicated he would have done in Binfield Road where  
25 there were people. In other words you form a ring.

1           It's not difficult to get people to, as it were,  
2           understand they are armed police because if they are  
3           shouting "armed police" as they should do properly in  
4           a controlled situation above ground, and they come in  
5           and form a circle because they are obviously disciplined  
6           and know how to do it. Because I haven't been able to  
7           ask them exactly what the tactic is, I understand that  
8           they would form a ring and they would challenge,  
9           shouting "armed police" and they would make  
10          a instruction, because "armed police" isn't enough, you  
11          would have to say, as Andrew actually spelt it out,  
12          which would be "stand still, show me your hands". It  
13          can be said in a matter of seconds.

14                 There is a risk of course in that situation, and the  
15          risk is in the split second if there is what is called  
16          non-compliance or perceived to be non-compliance in  
17          relation to that kind of challenge, then of course the  
18          guidance has been that you made of your own volition.

19       SIR MICHAEL WRIGHT: The risk is, and on the evidence this  
20          is what would happen if he is a bomber, is they are  
21          dead.

22       MR MANSFIELD: Yes.

23       SIR MICHAEL WRIGHT: Because he will detonate.

24       MR MANSFIELD: Yes.

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

1 MR MANSFIELD: Yes. I accept all of that. It's because we  
2 are dealing with knife-edge split-second situations.  
3 This doesn't mean to say that, oh well we can't expect  
4 police officers or anybody else for that matter, but  
5 police officers to have a standard of care that is  
6 really impossible. We are saying quite the reverse.  
7 It's why I have said to many of the officers, and they  
8 have accepted, they are highly trained to deal with, on  
9 their firing ranges and elsewhere, precisely a situation  
10 which happens in the blinking of an eye, somebody coming  
11 through a door which they do in conventional situations  
12 where certainly in the case of Bennett, which I was  
13 involved in, where they had to go very quickly in an  
14 armed response vehicle in that case, very quickly indeed  
15 on a report that somebody had been seen with a gun. It  
16 turned out to be an imitation gun. It was a lighter.

17 SIR MICHAEL WRIGHT: Cigarette lighter.

18 MR MANSFIELD: And he ended up on a balcony, and the  
19 officers had to run up a pathway on to the balcony and  
20 he took -- within seconds he had taken or appeared to  
21 take a hostage. They had moments to decide what to do.  
22 This is not something, as it were, unpredictable, they  
23 are having to take difficult decisions.

24 So that plainly, the situation of pressure,  
25 fast-moving dynamic situations are regular, but my

1 position is that in Upper Tulse Hill, or if he turned  
2 right a longer period in Upper Tulse Hill or  
3 Roupell Road or whichever way he had turned, if he had  
4 left by car, clearly they had provision for that,  
5 because that's in the tactical options. There was  
6 a Nissan, they would have known, and of course that  
7 would have made it possibly an even stronger connection,  
8 because the car had the connections that they had  
9 already written down in their notebooks.

10 Therefore if they had gone in a car, that would have  
11 been possible to stop. They had vehicles to do that as  
12 well. So I have not limited it to leaving on foot,  
13 haven't limited it to leaving in a car either. And of  
14 course he could have gone in any direction. But the  
15 point is, if you are going to prevent this person  
16 wreaking havoc in London, whether via the use of a car  
17 or public transport, it has to be done as near to the  
18 address as possible without compromising the address.

19 After that, you have an unplanned, unpredictable  
20 situation. The one predictable situation they had was  
21 the one they were planning for, the one that surrounds  
22 the address, and that's why we say because they have  
23 better control, because they are there without the  
24 knowledge of the people inside, they are there with the  
25 resources without the knowledge of the people inside,

1 and this was the concern of surveillance officers and  
2 others, that once the person is allowed to run, you  
3 could lose them.

4 That's all right if they are not actually somebody  
5 who might be regarded, even might be regarded, as  
6 a suicide bomber. In other words if you can be sure  
7 they are a suspect -- I'm so sorry, an associate or  
8 somebody who might give you intelligence, maybe you do  
9 let them run.

10 But even then there is an unhappiness about letting  
11 them run too far because you spread your resources very  
12 thin. So we say the emphasis has to be on what I have  
13 called the window at the beginning. And that the answer  
14 to why things didn't happen there is not just that those  
15 on the ground, the CO19 weren't alerted, which we say  
16 they should have been, the surveillance were not  
17 focusing on a job they absolutely had to do before the  
18 bus stop, knowing -- well they didn't know that he was  
19 going to a bus stop but the possibility that he might be  
20 going to a bus stop round the corner and that that was  
21 one of the risks, that that tight surveillance and  
22 control should have been, as it were, their top  
23 priority, in order to enable the command team to take  
24 a decision whether to intercept because they were taking  
25 the decisions.

1           If you are not going to have, as it were, a command  
2           team on the ground for all the reasons that have been  
3           examined on the policy basis as to why it has to be at  
4           New Scotland Yard, then you just absolutely have to have  
5           reliable information communicated efficiently so that  
6           that decision can be taken.

7           Now, this goes back, and if I can step back for  
8           a moment, I am watching, sir, the clock slightly, to  
9           what happened at 4.55. Can I just, before perhaps the  
10          first break, take you to the strategy decision. I know  
11          it's been gone over many times but in fact it's a very  
12          important decision for a number of reasons. It's  
13          because this decision was not implemented effectively  
14          that the resources that were available in the end at  
15          Scotia Road didn't swing into action in the way that  
16          they should have done. In other words there is a duty  
17          of care and it was not, as it were, implemented. The  
18          duty of care wasn't implemented.

19          I have it at documents page 1858.

20       SIR MICHAEL WRIGHT: Is this in the bundle you have just  
21          given me?

22       MR MANSFIELD: No, it isn't, actually, I'm sorry. It's the  
23          handwritten version of his notes. I have used that  
24          because it's perhaps a more -- it's on screen, thank you  
25          very much, the command team have reproduced it. It

1           should have been on the screen.

2   SIR MICHAEL WRIGHT: Thank you.

3   MR MANSFIELD: It's one of the few documents, I'm trying to  
4           avoid using too many documents.

5   SIR MICHAEL WRIGHT: Yes, I remember this.

6   MR MANSFIELD: This one is so important because we say, if  
7           one looks at it as a whole, the seeds of its own  
8           destruction are here. It's a very well-intended  
9           decision, but it's not thought through. And it's  
10          certainly not implemented. Had it been, once again,  
11          what happened at the beginning, the best opportunity  
12          stage at 9.33, we say was utterly avoidable if somebody  
13          had considered, and we say Gold Commander, had  
14          considered it.

15                His strategy in respect of premises, plural,  
16          I appreciate there is two in mind and I am not going to,  
17          for these purposes, go into exactly when Portnall Road  
18          came onstream and so on, a short time afterwards, it  
19          did. In fact for the purposes of this submission it  
20          doesn't really matter and I'll explain why it doesn't.

21                What he has put here is extremely important in the  
22          first place:

23                "Control, challenge, stopped."

24                Now, control, challenge and stop, utterly  
25          commonsensical things to do. You have got the gym card.

1           You know the address. It's linked to two people. You  
2           have got July 7th where rucksacks have got the  
3           identities of the people who had carried out the  
4           bombings, and here we are again with more rucksacks with  
5           identities. There is a very strong premise that the  
6           identification materials relate to the person who  
7           committed the bombing, and there is a link to this  
8           address.

9           So all of that makes sense. So he is wanting  
10          a control, a challenge and a stop. Now, of course it  
11          doesn't say precisely where there, but he has made  
12          clear, and it is made clear later by Commander Dick,  
13          that these were not people who were going to be allowed  
14          to run. It had to be at or near the premises so that  
15          the operation isn't compromised, but so that you don't  
16          get a situation where the public are endangered, either  
17          on public transport or elsewhere.

18          So they are having to be stopped, that's the rider.  
19          Now, it plainly, although not written here, was intended  
20          that the stops involved an armed element, component, and  
21          the W is "with" S019. So from that moment onwards, that  
22          is the element, even though they may not arrive  
23          immediately because of the difficulties I am coming to  
24          in a moment.

25          But that's plainly what was in mind.

1           So if you are taking a decision to deploy, by which  
2           I mean send out into the field, an armed resource with  
3           loaded weapons, with the possibility they will actually  
4           be used and could actually have been discharged in  
5           relation to a stop, because of the prime concern is one  
6           of the two people who they think may be concerned with  
7           the devices the day before may be inside the premises.

8           So far, so good. And of course the little word that  
9           is added there "recce", reconnaissance, absolutely  
10          vital, we say, and he obviously thought so too, that  
11          there should be a reconnaissance. I am not going to go  
12          through the niceties of whether it happens just before  
13          the firearms arrive or after they have got there.  
14          Somebody's got to look at the layout of the ground.  
15          They have to look at the premises. You are certainly  
16          going to do that if the Metropolitan Police aren't  
17          actually going to bother with maps -- I know I have been  
18          on about this in terms of the command team. It seems  
19          fortunately that the firearms teams are slightly more  
20          organised and they have maps and they go done and they  
21          obviously do want to know, unlike the command team,  
22          exactly where everything is.

23          So that asking for a reconnaissance, asking for the  
24          involvement of S019, all of that line, if that had been  
25          put into practice, we say immediately. Now, by that

1 I do not mean at 4.55 and it's all there by 5.15.

2 Impossible.

3 But what we do know is possible, and I am coming to  
4 this, is that there should have been a structure in  
5 place either at the moment he took this strategic  
6 decision or very shortly afterwards, which was ensuring  
7 the implementation on the ground in Scotia Road, by  
8 which I mean the vicinity, with all the elements that  
9 were going to be necessary, as soon as practicable,  
10 which would be surveillance, firearms back-up, S013, all  
11 within the vicinity.

12 Now, is that asking too much when London is facing  
13 the highest threat ever? Are we going to sit on our  
14 seats and say: well, we are not quite sure whether this  
15 is the right address. There may be another one coming  
16 up. No. We say it was appreciated, it was the top  
17 priority, this address and perhaps another one, but they  
18 had resources that could cope with both.

19 The problem here is in the next sentence, because  
20 what perhaps unconsciously or consciously has gone wrong  
21 here is that Mr McDowall is locked into a framework  
22 which has been set the previous night, and the framework  
23 that was the contingency the previous night was in fact  
24 for there to be a standby team and a DSO standby as  
25 well, but that 7 o'clock was the customary rostered time

1 for the black team to come on, 7 o'clock in the morning.

2 So in almost an unconscious way, the problem is  
3 everybody was working to 7 o'clock, save -- I am coming  
4 to Alan -- obviously what Alan attempted to do, but he  
5 wasn't the right person to do it. Because the second  
6 part of the sentence:

7 "Silver to be identified each plot."

8 I am going to call that the location Silver.

9 Now, the location Silver, can I just pause for  
10 a moment, if I may call it that, I now understand they  
11 have been renamed and the location Silver is called  
12 a Bronze. But really I am not concerned in the title,  
13 but the role that he is performing.

14 Location Silver is important because as Mr Purser  
15 accepted when I asked him these questions, he is not  
16 there just as a firearms Silver in a MASTS operation,  
17 and this seems to have been forgotten. A location  
18 Silver is there to co-ordinate -- which didn't happen --  
19 all the resources required for a particular location.  
20 Co-ordinate in the sense of on the ground.

21 So he has an overview of what the red team, as it  
22 turned out and the grey team, are doing. He doesn't  
23 need to know where every individual officer is. He  
24 needs to know where the premises are. He needs to know  
25 there is a communal door. He needs to know the

1 possibilities of exit from that area. He needs to know  
2 that the red team are in a position to deal with it. He  
3 needs to know the grey team are in a position to have  
4 tight control, and -- and this all comes through  
5 a briefing which didn't actually happen like this,  
6 because it was all done piecemeal. So the location  
7 Silver has to have an overview of surveillance, firearms  
8 and SO13 because it should be a co-ordinated, control,  
9 challenge and stop.

10 You will see what he says here:

11 "To identify each plot, to liaise with Silver,  
12 DSO..."

13 That's Cressida Dick.

14 You begin to see the problem here. What is  
15 happening is, and we will see it in practice, that it's  
16 all delayed to the 7 o'clock timing save for the efforts  
17 of Alan which become bogged down, if I may say, in  
18 malcommunication inside New Scotland Yard is that if --  
19 they have to be identified for each plot and liaise with  
20 Dick. Well, what's happening to Cressida Dick at this  
21 time? Cressida Dick has been notified at 1.30 she is  
22 going to be needed. What was interesting in the phone  
23 call, if you recall, she said, "I was asked to come in  
24 at 5".

25 SIR MICHAEL WRIGHT: A voice in the background --

1 MR MANSFIELD: A voice in the background said 7. In fact  
2 she did get in early, between 5 and 6, well before 6.  
3 So what was happening then at 1.30 people were still  
4 locked into -- that's not a criticism -- 7 o'clock  
5 because the black rostered team was coming on then.

6 If in fact he is contemplating a liaison with the  
7 DSO, Cressida Dick, well, she is not going to actually  
8 be taking over until 7 because that is when she has been  
9 asked to come in. As it happened, as I have said, she  
10 was in New Scotland Yard shortly after 5 and certainly  
11 before 6. So you can begin to see how this is not  
12 taking off as it should have done. Then it's got:

13 "Consult Commander Carter."

14 Who is on the next floor down, DSO dealing with  
15 spontaneous Kratos. Then:

16 "Update according to developing intelligence."

17 That's obviously sensible, and "update" is  
18 an important word because we say also that's  
19 a responsibility he has.

20 Now, perhaps just before the break, if I can deal  
21 with what actually happened here. What actually  
22 happened was that Alan was present at some point, and  
23 the time doesn't matter much except that at an early  
24 stage, and he made a contemporaneous note, he did  
25 understand that Scotia Road had been prioritised. It

1           may be unnecessary for these purposes to try to, and we  
2           have not put it in the narrative because we accept that  
3           perhaps trying to discern exactly what went wrong here  
4           and who said what to whom may not be at the end of the  
5           day the most important causative factor. The most  
6           important causative factor was that the structures were  
7           not put in place at Scotia Road such that, from, we say,  
8           6 o'clock, surveillance, 7 o'clock latest, firearms, and  
9           location Silver was not in place.

10           If it had been in place, then by the time  
11           Jean Charles de Menezes left at 9.33, there would have  
12           been a very -- well, I put it no higher, the best  
13           opportunity and possibility for tight control of  
14           surveillance and command in order to stop, as it's set  
15           out in the strategy, somebody who's left and who then  
16           becomes of interest to the resources that are deployed  
17           and in particular the command team.

18           Now, that could have happened. That could have  
19           happened if Commander McDowall had done his job. We say  
20           his job wasn't just to set the strategy. Now, the  
21           command team have made a very interesting point about  
22           McDowall. They are saying he can't be, as it were,  
23           roped into the duty of care because he didn't implement  
24           it. That is precisely the point we are making. He  
25           didn't implement it and he should have done. Not

1           himself. He doesn't run round doing it.

2           His obligation is to make sure that somebody does  
3           implement it, and, since he is on the job and remains on  
4           the job and he has accepted this, I put it to McDowall  
5           in the very early stages, he accepted unequivocally that  
6           it was his responsibility to ensure that his policy was  
7           implemented. Otherwise it makes no sense.

8           You can't just, as it were, as a commander, in any  
9           business, sit, you know, on the roof of the building and  
10          issue instructions like confetti and then hope that they  
11          land in the right place and the right people are doing  
12          them, because we all know that's not actually how it  
13          works on the ground. That is why commanders or  
14          executives or whoever they happen to be have to follow  
15          it through, and it's the common question: have you done  
16          what I asked you to do? That's a very simple question.

17       SIR MICHAEL WRIGHT: That's the way you put it.

18       MR MANSFIELD: That's the way I put it and he has accepted  
19          that.

20       SIR MICHAEL WRIGHT: In fact a direct involvement in the  
21          execution of his instructions by his delegates.

22       MR MANSFIELD: Yes, and he was present through, he had come  
23          back from a rest, no-one is denying that, so by the time  
24          he has issued the strategy at 4.55 he is almost in  
25          continuous contact with different people between 5 and

1 the crucial meeting at 7, and one at 20 to 7.

2 So there he is meeting all the people, and I have  
3 obviously put it to him so I am not saying anything that  
4 I have not put to him: why on earth didn't you say,  
5 how's it going or have you got there yet? This is not  
6 hindsight. This is absolutely not hindsight, given the  
7 level of threat you might think that somebody would want  
8 to know, because how do you know when they are going to  
9 leave, once you have set the strategy. They could be  
10 leaving 5.30, 6.30, 7.30, 8.30.

11 The idea that people sit back and don't ask that  
12 question is, we say, astonishing, and if the word has to  
13 be used, gross, I use the word gross; it is a gross  
14 omission by those at the top not to ensure that this is  
15 being followed through. Would that be a useful time for  
16 a break?

17 SIR MICHAEL WRIGHT: Thank you very much. Shall we say 25  
18 to.

19 (11.25 am)

20 (A short break)

21 (11.40 am)

22 SIR MICHAEL WRIGHT: Yes.

23 MR MANSFIELD: So what would have happened or could have  
24 happened, I'm so sorry, here, after 4.55 and we say  
25 should have happened and it wasn't difficult to arrange

1 is first of all you have to have in place in New  
2 Scotland Yard to implement it a central Silver,  
3 an operations room Silver.

4 Now this post is accepted as being necessary.  
5 No-one is contesting that that is necessary. He has not  
6 put it in his strategy but it is necessary. The person  
7 who would fit that category had gone off, Mr Boutcher.  
8 When the jury were given, at the very beginning of the  
9 inquest, a diagram of posts and roles, he was down as  
10 the control room Silver. Anyway, he was not there, and  
11 Mr McDowall knew that he was not there.

12 Unfortunately neither was his deputy, Angela Scott.  
13 She was not there. They had both gone off. So there  
14 was no-one at that point, 4.55, actually in the premises  
15 and to expect them to get in there quickly would have  
16 been perhaps asking too much. So what was needed was  
17 an interim control room Silver who performed that role  
18 and was appointed to do that. Alan accepted that he  
19 really wasn't that person, although he was trying to  
20 fulfil it.

21 There were plenty of others, because he is S012,  
22 there were plenty of Silvers available. They had  
23 already been identified one way or another by  
24 Angela Scott before she left at 2 am. So it's not as  
25 though there was a shortage of resources. The

1 importance of a central Silver which has an effect on  
2 what happened at 9.33 onwards, is that the central  
3 Silver does what Alan didn't manage to do.

4 He makes sure not only that the strategy to get to  
5 Scotia Road as soon as practicable is carried out, and  
6 he also, as it were, makes sure by checking that when  
7 you say "please go there" that they have gone there.  
8 Now, you might delegate that responsibility in turn to  
9 another Silver, like the location Silver. However,  
10 there isn't a central Silver. Boutcher doesn't get back  
11 to New Scotland Yard until 10 minutes past 7.

12 But, as I say, there were other officers available  
13 to perform and see through this policy of  
14 implementation. If Alan was the locum Silver, which  
15 I suggest and he accepts he really wasn't that, but he  
16 was trying to do his best, he would have been at the  
17 7 o'clock meeting as the central Silver, but he wasn't.  
18 Neither was his superior, Noel Baker, wasn't at the  
19 7 o'clock meeting.

20 SIR MICHAEL WRIGHT: Yes, but I mean, I take your point  
21 about his rank. He is another inspector, in fact. As  
22 far as he was concerned, he thought he had done what  
23 (inaudible) ordered.

24 MR MANSFIELD: Yes, but the problem is if he had been  
25 properly undertaking his Silver task, he would have

1 followed it through, just like McDowall should have  
2 followed his strategy through with the central Silver  
3 just to check it was being done; the central Silver  
4 would have checked with the location Silver to make sure  
5 these resources were getting there. So it's a quick  
6 pass-down, I think the word being used, police speak, is  
7 cascade of authority down, so there would be a cascade  
8 of authority in that way.

9 As I say, I am not, as it were, going to get bogged  
10 down with what actually happened. What is plain is the  
11 strategy didn't reach ZAJ. He didn't know it had  
12 switched from overt to covert. Neither did Andrew.

13 Whether they are inaccurate or accurate or whatever --

14 SIR MICHAEL WRIGHT: It does seem that's where the breakdown  
15 in communication took place.

16 MR MANSFIELD: Yes.

17 SIR MICHAEL WRIGHT: Precisely why is possibly something we  
18 will never truly discover.

19 Why is it not, as it were, effectively  
20 an independent failure of a delegate to carry out  
21 instructions?

22 MR MANSFIELD: It is an independent failure but the failure,  
23 the overarching failure is for the person who set the  
24 strategy, because his obligation is to ensure that it is  
25 implemented by others.

1 SIR MICHAEL WRIGHT: Why can't he assume it's going to be  
2 done?

3 MR MANSFIELD: No, that's the one thing even -- I appreciate  
4 the ACPO guidance is only guidance, but it's very  
5 sensible guidance. He has to update. The word he has  
6 got -- he has to update according to intelligence. He  
7 has to update himself and, even if he doesn't think of  
8 it before 7 o'clock, he obviously would be asking. He  
9 meets two tactical advisers. He has not got a note of  
10 who they are. He says it's Andrew and in evidence he  
11 thinks it's Rush, but we may never know exactly who they  
12 were.

13 In any event, even if it doesn't happen at 5.15, by  
14 6.40 when he is again meeting people of certain  
15 importance in terms of their roles, he would be then  
16 just checking: how's it going, have you got there, are  
17 you making sure they are there, and has anybody left, is  
18 the question everybody I think would want to know. Has  
19 anybody left?

20 You might not want to know that if you are on some  
21 sort of, as it were, operation dealing with shoplifters.  
22 The person on top might not need to know whether they've  
23 spotted the usual target, but this is so very different  
24 in terms of deploying lethal weaponry, you would want to  
25 know whether somebody has left if they are going to pose

1 a threat to the whole of London. If I may say so, the  
2 police at this time must have been extraordinarily  
3 sensitive to the fact that, as far as they were  
4 concerned, these were bombings, and attempted bombings,  
5 of which they had no prior notice. So they must have  
6 been, having got a little prior notice, very concerned  
7 to ensure if they could that there wasn't a third  
8 explosion that very day by regrouping.

9 So we say it gets bogged down after Alan, but if  
10 there had been a central Silver, what would have  
11 happened is, plainly, there is an orange team on  
12 standby. It's a complete, if I may say so, as it turns  
13 out, waste of a resource, because they sit in the  
14 canteen and I am not interested in whether they are  
15 brought centrally because it's sensible to do so. They  
16 were available for deployment at that point, and they,  
17 if somebody had just managed to turn their minds to it,  
18 it's about co-ordination, it's about management, it's  
19 about ensure that what you want done is done.

20 There is the orange team. They have got ZAJ as  
21 their tactical adviser. He's also doing work for the  
22 24-hour DSO as a Kratos adviser essentially or  
23 a tactical adviser then, but he's also the team --  
24 a team adviser and the team inspector for the orange  
25 team, he's sitting with them in the canteen from about

1 5.30 onwards. They are kitted up, they are ready to go.

2 Therefore, if a central Silver had been appointed  
3 and recognised because they would have to have made  
4 themselves aware, so where are the armed teams? They  
5 haven't got an unlimited number. Where are they, and if  
6 you don't know yourself, you ask the tac adviser: where  
7 is he? ZAJ would have said they are with me downstairs.

8 So by 5.30, in New Scotland Yard, and this is why if  
9 you just stand back from New Scotland Yard you think on  
10 the different floors it's all there again, they have got  
11 a Silver who could have been the central Silver; they  
12 have a firearms team that could have been sent out; they  
13 have got ZAJ on hand who could have been sent out; they  
14 have a location Silver by now, because at 4.57 a message  
15 is sent to Rose. In he comes as fast as he can, he is  
16 there by 5.30. What does he do?

17 Rather like the orange team, I am not saying he sits  
18 around idly but he is left there. Nothing happens until  
19 gone 7 when McDowall has a meeting with Purser and Rose,  
20 and this is not a question of identifying the Silver for  
21 each plot. What happens according to Purser is at the  
22 end of the meeting there is an embarrassing moment in  
23 which --

24 SIR MICHAEL WRIGHT: They sort it out between themselves.

25 MR MANSFIELD: Yes, and he volunteers, I am not sure he is

1 too keen to do it for all sorts of reasons but anyway he  
2 feels he has to do it so he puts himself forward and  
3 it's at that point he is identified. It's all too late.  
4 It's coming too late. It's not Purser's fault. I am  
5 afraid it goes back to the higher echelons of not really  
6 putting this into effect.

7 But Rose was there at 5.30, so it would have been  
8 possible to have a central Silver, a location Silver  
9 goes out with the orange team. They could have arrived  
10 after a briefing with the location Silver at a holding  
11 point such as the TA Centre which had been identified in  
12 fact by the red team. I am going to be generous. They  
13 could have been there by 7 o'clock. As Andrew said, he  
14 could have kept them on beyond 8 o'clock if it was  
15 necessary to wait for the black team if they were going  
16 to take over, for example, and hadn't gone somewhere  
17 else. And if it was necessary to bring another team in  
18 like the blue team off training, that was possible. The  
19 grey team were going to come back on at 10, so there  
20 were resources.

21 So in a sense, it didn't have to be a choice between  
22 addresses, because the final point here is that the  
23 black team, and this is another misapprehension in the  
24 Health and Safety trial, and possibly to begin with  
25 here, which I include myself in, it was not appreciated

1           because the theme at the Health and Safety trial was  
2           that: well, they were very tired and we couldn't bring  
3           them in. That was the way it was put.

4           It's now perfectly clear that the black team had  
5           been resting since midday the day before. So they could  
6           have been brought in early and they ought, some of them  
7           agreed, Ralph I think was one of them, said could have  
8           been brought in an hour earlier, which would have been  
9           enough.

10          So if the orange team had already gone to  
11          Scotia Road, you get the black team up to Portnall Road  
12          if that's the problem, and it would have taken slightly  
13          longer, but if they had come in at 6, been briefed at  
14          Leman Street, then gone to a holding place near  
15          Portnall Road, they would probably have been there --  
16          one allows two hours for the briefings and getting there  
17          and kitting up -- they could have been to Portnall Road  
18          by 8 o'clock.

19         SIR MICHAEL WRIGHT: You are really saying that there were  
20          adequate SO19 or CO19 resources there without having to  
21          have resource to an ARV or a TST?

22         MR MANSFIELD: Absolutely. Just on that point, all we say  
23          about ARVs is, we certainly now know where they were all  
24          occupied or should I say preoccupied; in order to get  
25          one into the safest window, that overall 6 minute but

1 probably half that time, you can't rely on ringing up  
2 and finding out, can we have an ARV. They should have  
3 been on standby as a last resort being lesser trained  
4 and so on, but they didn't even do that.

5 So again we say that the safest opportunity was  
6 missed. May I just give you the reference, because it's  
7 an important reference. I have not included it in the  
8 transcripts but McDowall, in answer to the question  
9 I have posed today, whose responsibility for ensuring  
10 all this is implemented, he accepted on 25 September in  
11 cross-examination, pages 92 to 93, that it was his  
12 responsibility.

13 So I do not have to rely on ACPO, vicarious  
14 liability or anything. It's nothing to do with that.  
15 It's his responsibility, not somebody else's, his  
16 responsibility to ensure that this was carried through.  
17 We say, I am afraid, he dismally failed to do that. One  
18 appreciates all the difficulties but this is the job of  
19 a Gold Commander, I fear. He has to do that.

20 So given, again, the time constraints, what I may do  
21 is just this: if in relation to these first two stages,  
22 to indicate that what I have been putting is not pie in  
23 the sky, it isn't some clever academic argument with, as  
24 it were, feet off the ground. All of this was traversed  
25 with two extremely important witnesses. Can I just give

1           you the page numbers in there, rather than -- can I just  
2           go to the absolutely appropriate pages.

3           TJ84 starts at page 13. May I just check. These  
4           are taken straight off -- the transcript references are  
5           in fact included as well. He starts at page 13 of this  
6           bundle, but in fact I start asking him questions on  
7           page 15 where I say:

8           "Good morning. I want to turn to the scene itself  
9           and ask for your help ..."

10          Then on the following pages I go through actually  
11          all the points I have been putting this morning about  
12          the necessity for reconnaissance; in fact that's covered  
13          on page 16:

14          "... needs to have a reconnaissance of the area  
15          covertly?"

16          "Answer: Right ...", and so forth.

17          In fact, if I may say so, what he does is agree with  
18          all the propositions I am putting, including agreeing  
19          that it sounds sensible, page 17.

20   SIR MICHAEL WRIGHT: Yes.

21   MR MANSFIELD: So hopefully all I have done is to put  
22          extraordinarily commonsensical points to him, and you  
23          don't need to be a police officer to work them out. He  
24          goes all the way through, in fact, to the end, and I'm  
25          afraid it's a very long passage and I will not take up

1           time reading it, but I would ask you to read those pages  
2           because all the points I have just made in argument are  
3           set out and he agrees essentially that a stop could have  
4           been done if they had been obviously ordered to do one.

5           In fact, it's a question from you, sir, page 28,  
6           line 11, where:

7           "Do you think you would have been able to do, carry  
8           out" --

9   SIR MICHAEL WRIGHT: Yes, I remember that. What was the  
10          minimum number you needed to do it.

11   MR MANSFIELD: That's right.

12   SIR MICHAEL WRIGHT: I think he said two cars.

13   MR MANSFIELD: Yes.

14           It's interesting, his initial answer to you, which  
15          we say is absolutely spot on, and if I may say, possibly  
16          as far as our submissions are concerned, TJ84 was one of  
17          the most impressive witnesses to have appeared at this.  
18          There are others, but if I may be allowed to pick him  
19          out in the way -- it's not just because he agrees with  
20          my propositions.

21   SIR MICHAEL WRIGHT: It's not a bad start.

22   MR MANSFIELD: I think it was -- well, I do not speak just  
23          for myself. It was the way in which he gave his  
24          evidence as well as what he said that impressed a large  
25          number of people.

1           But it's his first response to your question:

2           "With these types of stakes ..."

3           In other words he is exactly assessing that because  
4           of the risks involved of the public transport, even  
5           though it's a tight window, you would have to do it, and  
6           he could have done it.

7           So that's TJ84. I am afraid --

8   SIR MICHAEL WRIGHT: Half the team, he actually said, which  
9           would be three cars' worth.

10   MR MANSFIELD: Yes.

11   SIR MICHAEL WRIGHT: Because he has three officers in each  
12           car.

13   MR MANSFIELD: Yes.

14           So it could have been done. Then page 30 onwards is  
15           the Silver himself, Mr Purser. I did exactly the same  
16           exercise in some detail, none of which involved picking  
17           out a spot, none of which involved only looking at  
18           people foot-borne with cars as well. 32 onwards are the  
19           particular pages I would ask you to look at. May I just  
20           pick out, on page 33, line 15, the need for a Silver at  
21           New Scotland Yard, line 16.

22   SIR MICHAEL WRIGHT: Page?

23   MR MANSFIELD: 33:

24           "... if you are going to deploy [page 33, line 16]  
25           to a location like Scotia Road, you are going to need to

1           have another Silver, which is of course where you come  
2           in [that's Purser] eventually, another Silver and I'm  
3           going to call them a location Silver, who's going to  
4           take charge of the location; correct?

5           "Answer: Yes, I think they have now re-badged it  
6           Bronze ..."

7           Then I avoid the terms and then I go on building the  
8           picture of what is necessary to do, and in fact on  
9           page 36, just one other example, at line 4 -- it's  
10          a rather long question but in fact it leads to what we  
11          say is a commonsensical answer:

12          "... please understand, I'll get to what actually  
13          happened. This is not leading into some massive  
14          critique of yourself, do you understand, I'm really not  
15          doing that; I just want to build up a picture through  
16          you, because you actually ended up having to go there as  
17          it happened rather late in the day.

18          "So, now, it's been suggested every time I do this  
19          by others who come after me that this is all hindsight.  
20          It's not hindsight, do you follow me? This is all very  
21          commonsensical foresight. Somebody has to work out what  
22          is the window of opportunity, not because we know he's  
23          going to number 2 bus stop on Tulse Hill, because you  
24          don't know that. What you don't know is which of the  
25          bus stops he may go to, so you need to know, if he is

1 going to go to a bus and is on foot, and not in a car,  
2 not on a bicycle, all right, on foot; because of what  
3 happened the day before, let's find out where the  
4 nearest bus stops are. That's pretty commonsensical and  
5 reasonable exercise, isn't it?

6 "Answer: I wanted to know where the bus stops were,  
7 yes.

8 "Question: You did, thank you very much. That's  
9 foresight ...", and so on.

10 SIR MICHAEL WRIGHT: A question that was perilously  
11 trembling on the edge of a speech.

12 MR MANSFIELD: It was. I accept that criticism and I'm  
13 sorry it was a rather long one.

14 One thing that I hope can't be said, that nobody has  
15 not been aware of the points that I am now putting,  
16 because they have been put extensively to witnesses, and  
17 the only point eventually I was ending up saying to  
18 Mr Purser was he couldn't do any of this because he  
19 didn't actually get down there, not his fault, he wasn't  
20 appointed and volunteered until 7.15. He then stuck  
21 with the firearms team, gave a briefing separately from  
22 surveillance and ended up at Nightingale Lane really and  
23 leaving rather later in the day and certainly probably  
24 not getting to the TA Centre before Jean Charles has got  
25 on to the bus.

1           So it's a race against time. That's what the  
2           problem has become. It's a race against time because  
3           the strategy, as set out, had not been put into place.  
4           That's why we say it's not too remote, the setting of  
5           the strategy, from what actually happened. It is very,  
6           as it were, close to what actually happened.

7           May I just move to the next stage, which is the 9.33  
8           position in fact in the absence of the orange team and  
9           so on and the set-up that should have been in place  
10          before.

11          Again, the situation here --

12   SIR MICHAEL WRIGHT: Stage three, really, I suppose.

13   MR MANSFIELD: Yes, stage three, 9.33. McDowall still has  
14          responsibility overall for the implementation of  
15          strategy, but Cressida Dick has now an intervening role  
16          as the DSO.

17          I am not going to spend a lot of time dealing with  
18          the points that have been made about who knew you were  
19          and who knew what your role was and so on. I am going  
20          to come straight to the kernel of it all. She set in  
21          her decision log decision number 3, in fact it's the  
22          second document that perhaps I ought just to ask you to  
23          look at. It's the one which she ...

24   SIR MICHAEL WRIGHT: Yes, that's up.

25   MR MANSFIELD: Decision number 3. It's an extremely

1 important decision. I am not going to lock her into  
2 a particular time, but she says when she writes it up  
3 later it's 8 am, so I'll go on that for the moment.

4 Again, there is an appreciation of what should be  
5 happening, namely:

6 "Safety of all, seek to arrest any of the subjects,  
7 [meaning suspects] near or at the address."

8 I am going to leave out "at"; no-one is suggesting,  
9 because of compromise, that actually is right. So I am  
10 just concentrating on "near":

11 "Premises made safe possible before the release of  
12 photographs."

13 So it's a covert operation. Then there is the  
14 important paragraph below after they have dealt with  
15 "the risks they pose to Londoners is very considerable",  
16 so this is the context again. In capital letters:

17 "We cannot therefore allow them to travel far even  
18 under surveillance if sighted, as I cannot guarantee we  
19 will not have a surveillance loss which could be  
20 catastrophic. However, the decision is to attempt to  
21 arrest some distance away should that be possible in  
22 order not to alert any person remaining in the address."

23 Then booby traps and so on.

24 SIR MICHAEL WRIGHT: She talked to McDowall starting from  
25 about 7.15.

1 MR MANSFIELD: Yes.

2 SIR MICHAEL WRIGHT: As I read it, this reflects effectively  
3 what she and McDowall agreed at about that time.

4 MR MANSFIELD: Yes.

5 SIR MICHAEL WRIGHT: She may have read (inaudible)  
6 8 o'clock, I understand that.

7 MR MANSFIELD: That's right.

8 SIR MICHAEL WRIGHT: Yes. But really she and Mr McDowall  
9 re-visited the strategy at this point, it would seem to  
10 me.

11 MR MANSFIELD: That's right, and therefore I say, as I have  
12 been, that they should not have been revisiting  
13 a strategy in a vacuum. What should have been  
14 happening, given the demands, given the context, given  
15 the threat level, is, well, how are things at  
16 Scotia Road? A red team has been there since 6 o'clock.  
17 A black team, everybody appreciates, isn't conceivably  
18 going to get there by 8 am, and as we know, from the  
19 visit -- from the list of people leaving, that in fact  
20 people have been starting to leave and are leaving  
21 during this period of time. As it happens, not people  
22 who could readily be regarded as worth stopping.

23 It would appear, it's only by accident that  
24 Commander Dick happens to look up at a screen, this is  
25 how it comes about, and notice that people have already

1 left. Now, it may be she doesn't need to be alerted  
2 about people that don't matter, and I am not going to  
3 take up time but it does appear an extraordinary way to  
4 go about things. However, people have already started  
5 leaving. You might think that that would prompt  
6 a question in somebody's mind: supposing they had been  
7 a bomber, do we have anybody down there to stop them?

8 Again, is this hindsight or is this just simple,  
9 straightforward planning of a high risk situation facing  
10 London, which hopefully any senior Commander would  
11 recognise is important? We suggest that in fact  
12 Commander Dick has become obsessed with bureaucracy at  
13 New Scotland Yard rather than what is going on on the  
14 ground. Therefore not allowing them to run is all very  
15 well, provided you have got the resources in place to do  
16 that, and it cannot be said ARVs are going to fulfil  
17 that role.

18 We get, therefore, into the frame, as it were, this  
19 period, if I can -- so I can relate it to what we say  
20 are specific charges as well as the narrative. There is  
21 another individual who we say has a responsibility here  
22 for a duty that is owed and that is the senior tactical  
23 adviser in New Scotland Yard. Because he has come on at  
24 6 o'clock, that's Mr Esposito. If anybody should know  
25 the disposition of firearms teams, it's him.

1           If anybody -- to give advice, I accept he is not  
2           responsible for the decisions, but he is responsible for  
3           providing the person who does take the decisions with  
4           reliable information such that it is a decision that is  
5           not negligently taken. So he must be in a position,  
6           after 6 o'clock, and after 7 o'clock because he attends  
7           the 7 o'clock meeting, he must be asking the question,  
8           these are questions that have been put to him, well,  
9           where are the firearms? Everybody seems to be relaxed,  
10          oh well they are en route, they are on way.

11          This is not the Health and Safety question, so if  
12          I may say again, this is a distinction from the Health  
13          and Safety trial, this is not the Health and Safety  
14          question; the question here, never mind the risk to the  
15          public, what about the risk to an innocent individual in  
16          this limited category, if you are not in position to do  
17          a safe stop in the safest place as I have already  
18          delineated.

19          In fact when I asked Esposito about this very  
20          decision that's on the screen at the moment,  
21          October 14th, page 210, I have not copied this one, but  
22          when I asked him whether he was aware, even, of this  
23          strategy at or near the premises, he said he was  
24          unaware. Again, extraordinary that he was unaware.  
25          Even if Cressida Dick didn't tell him, you would think

1 he would want to know what the strategy was, otherwise  
2 how's he going to give advice.

3 So he isn't even aware of this strategy, he says.  
4 And he goes on to say, on October 14th, page 166, that  
5 he can't remember it even crossing his mind when I was  
6 asking him, did you even know where the bus stops were.  
7 Again, is this asking too much of the people determining  
8 strategy that if you are going to do the safest stop,  
9 and he is the one advising the Commander who's going to  
10 decide on an interception, he has to be able to say to  
11 her it's possible or it's not possible, not the precise  
12 tree under which it's going to happen, but he can say --  
13 he could have said and he didn't say, that it's  
14 impossible.

15 He has to be giving accurate advice about that, and  
16 what he should have been saying is, if we are going to  
17 do a safe stop and we are going to do it at the safest  
18 place, we have to have the resources prepared to do it  
19 because any one of these people who are now coming out  
20 from 8 o'clock onwards could be a potential bomber.

21 But no, nothing like that. There is no sense of  
22 urgency about any of this. And that has been reflected  
23 by the CO19 officers, the black team in particular, who  
24 have been asked by Mr Hilliard and Mr Hough repeatedly,  
25 was there any sense of urgency communicated? No.

1           I doubt they could have acted much more quickly, but  
2           there was no sense of urgency being communicated here at  
3           all, because they had all relaxed into the frame of mind  
4           -- one of the frame of minds was this, I submit, and we  
5           have put it in our written submissions, but I just  
6           reflect on it for a moment, that actually what was  
7           affecting subconsciously the whole decision-making  
8           process was the footprint approach.

9   SIR MICHAEL WRIGHT: You mean the thought that there was not  
10           going to be anybody there anyway?

11   MR MANSFIELD: That's right. Dick said that very clearly at  
12           the trial, and I asked her about what she said; very  
13           clearly at the trial asked by Mr Thwaites on behalf of  
14           the Commissioner, called on behalf of the Office of the  
15           Commissioner, she said very clearly that that really  
16           wasn't, I will be generous to her, it really wasn't a  
17           high possibility. It was a possibility but it certainly  
18           wasn't a high possibility.

19           So they were relaxing, and then there was this other  
20           train of thought: oh well, this time they will do it  
21           later in the day to have maximum effect. These are  
22           extraordinary assumptions that the command team  
23           effectively were taking, and we suggest it's beginning  
24           to influence the fact there's no sense of urgency. Oh  
25           well, the black team are en route, that will do. We say

1           they just got there and if somebody had been on the  
2           ball, which they weren't, then they could have been sent  
3           into action. It's not the fault of the black team at  
4           all.

5   SIR MICHAEL WRIGHT: I understand what you are saying. If  
6           you like, the mindset that all this was actually going  
7           to turn out to be a waste of time because there was  
8           nobody there anyway, doesn't actually seem to have  
9           figured in any of the memoranda that came into  
10          existence, starting from 4.55 onwards, 6.50 over to  
11          7.15, or any of the strategy documents that we have  
12          seen. It doesn't appear anywhere.

13   MR MANSFIELD: No, and it's of interest that it doesn't  
14          because we say it's a psychological factor which they  
15          might not want to write down, but it has certainly come  
16          out in the evidence they have said that.

17                 McDowall in relation to it will happen later in the  
18          day was the thinking of Boutcher as well, and in Dick's  
19          case, just didn't think there would be -- the way it was  
20          put at the trial was: did you expect, words to this  
21          expect, a bomber or potential suicide bomber with  
22          a rucksack would come out of the front door of  
23          Scotia Road, and she was saying effectively she was not  
24          expecting that.

25                 That's only one small brick in the wall of what was

1 going on, but it builds for each individual, because  
2 I appreciate I can't aggregate all of this and put it at  
3 the door of one person, I'm trying to deal with the  
4 individuals concerned. You can incrementally see in  
5 an individual's case what has been going, we say,  
6 seriously wrong in relation to what we say is a duty  
7 that they had here.

8 This cannot be better illustrated than by what  
9 happened at 9.33. If one needs any clearer indicator  
10 that the reason things weren't pulled together is  
11 because the command team actually ... I think the phrase  
12 that was used -- I mean I used it but I wasn't the first  
13 one to use it -- in the Divisional Court, where  
14 different issues were at stake: they were in charge but  
15 not in control. That was a phrase used, in fact,  
16 I think in the first place by Mr Doherty, but I employed  
17 it in the Divisional Court because it aptly described  
18 what then happened.

19 At 9.33, because that's the time in the log, that's  
20 the agreed time he leaves, Pat notices someone leaving  
21 in the sense that he gets the message one way or  
22 another, because it seems the way it works is that Frank  
23 can't use the Cougar, another of the failings but I am  
24 not putting that down to Dick or any of the others. He  
25 has to go over the Airwave but another officer puts it

1 out over the Cougar. So within a fairly short space of  
2 time, Pat is aware in the central location that somebody  
3 of interest has left. It may not be higher than that.

4 We say at that point, given the stakes, as TJ84 put  
5 it, in this case, given the level of threat, is this  
6 unreasonable to suppose that Cressida Dick should have  
7 been on the ball? Yes, one appreciates there is so much  
8 going on, but --

9 SIR MICHAEL WRIGHT: Well, should have been told.

10 MR MANSFIELD: I am coming to that. We say was told but  
11 didn't register. Effectively I'm not going to go  
12 through, if one actually, I think I put it in an earlier  
13 hearing there were more chiefs than Indians. Just look  
14 at that control room. How many senior officers were in  
15 there? Boutcher, Scott, you have co-ordinators,  
16 managers, plenty of people. Perhaps too many cooks  
17 spoiling the broth on this occasion. Just too many  
18 people. I have not put noise other than in the  
19 narrative.

20 SIR MICHAEL WRIGHT: Pat says he waved his arms to attract  
21 her attention. She says, "I didn't appreciate anybody  
22 had come out until he was already on the bus". That's  
23 the gap.

24 MR MANSFIELD: That's the gap, yes, and it's a very  
25 important gap because you can't afford to have that gap

1 if you have already identified that they can't run and  
2 you have only got, because you can work it out,  
3 a six-minute, five-minute, four-minute gap of walking,  
4 even less if they are in a car. What was Cressida Dick  
5 going to do about that, if they got in a car? "I didn't  
6 notice that, I didn't know until they got to  
7 Trafalgar Square"?

8 I am sorry, it won't do. It is gross omission not  
9 to be absolutely alive, she is in that room, standing  
10 with a group of officers, and Pat's account of  
11 attracting attention by waving, he says because of the  
12 noise but it doesn't really matter, attracting attention  
13 at 9.33, and that is supported by, I think it's Brian,  
14 who is sitting two rows behind or a row behind. He  
15 confirms that he sees exactly the same. So she is  
16 actually notified.

17 What about Esposito? Very interesting what he says.  
18 He says in his statement that was put to him,  
19 October 14th, page 69:

20 "Yes, I did know, 9.34.

21 "Question: Oh, well, did you tell Cressida Dick?

22 "Answer: I thought she was aware."

23 Again, this won't do from the two top people. I say  
24 Esposito is the top person because he has the  
25 responsibility of advising her very, very quickly

1           whether this should be an intervention, and we are  
2           submitting there should have been a safe intervention,  
3           stop, of anyone who had not been excluded. Anyone who  
4           could not be discounted should have been stopped safely  
5           and in a controlled fashion without compromising the  
6           address.

7           So Esposito and Dick are just not really focusing.  
8           Esposito says: oh, well, I am on the phone. Again, we  
9           have this remarkable situation whereby, I am not going  
10          into communications under this heading but it's in the  
11          narrative, is totally ludicrous. They are having to use  
12          mobiles so they can't get through if somebody is  
13          engaged. They are not listening to the surveillance  
14          chatter that should have been, we say, put up at  
15          an audible level so that what -- is this so outrageous  
16          that what Cressida Dick at that time, there is nothing  
17          at 9.33 going on at Portnall Road. This is the highest  
18          priority. Somebody has come out of interest. For that  
19          next half an hour she should have been riveted to what  
20          was going on, riveted. No, in the middle of all this,  
21          probably at Brixton, that's where Jean Charles has got  
22          to, she's briefing a loggist who has not turned up,  
23          Mr Cremin, almost precisely at the time he is getting on  
24          and off buses.

25          So the earliest -- she actually is not able to say

1           when she first learnt. It certainly wasn't at 9.33. It  
2           certainly wasn't until he got on the bus, and we say it  
3           certainly wasn't until later than that even. In her  
4           taped record that she made after these events, she had  
5           put down a time which I put to her, it's in the tape.  
6           She says 9.45. Hopeless. Hopeless situation. She is  
7           not aware until after or about 9.45 about what is going  
8           on in relation to this individual.

9           That leaves her, as it turns out, and nobody could  
10          predict it, it could have been even less. It leaves her  
11          with 15 minutes maximum to decide what to do, and it  
12          should not have been like that, and it need not have  
13          been like that, if both these two, Commander Dick and  
14          Esposito, had really been focusing on the job in hand  
15          that they had to do.

16          I do not go through what -- then vacillated in  
17          between. We know at 9.48, I just mention it, is the  
18          Dingemans call, and we have a situation in which it is  
19          thought, possibly through malcommunication, one knows  
20          not, that it's not Nettle Tip, and Dingemans, this is  
21          the most remarkable part, if I may put it. It's not  
22          causative. It's illustrative of a lack of real focus  
23          here, of real proper communication and ensuring that  
24          there was proper communication of getting, as it were,  
25          the words from the horse's mouth rather than through

1           somebody else, through somebody else, whether it's  
2           Silver or TJ84.

3           The fact is that at 9.48, Dingemans with blues and  
4           twos races along this other route up to Stockwell, turns  
5           right, sees the bus. If he had been a bomber, Dick and  
6           her order effectively for S012 to follow, or certainly  
7           allowing that to happen, because she may not have known  
8           that it had already happened by the time she knew about  
9           it, would have compromised the whole situation. The  
10          bomber would have seen the blues and twos coming round,  
11          turning round behind the bus. Again, it's not quite  
12          keystone level but we are getting close to it, with them  
13          coming up behind.

14          May I pass through to the next stage.

15        SIR MICHAEL WRIGHT: Before you do that, can you remind me  
16          what time was Dingemans detailed off? 9.48?

17        MR MANSFIELD: 9.59.

18        MR HORWELL: 9.55. It's 48 to 55 are the two times.

19        MR MANSFIELD: Sorry, my mistake.

20        SIR MICHAEL WRIGHT: There are some corrections for Lambeth  
21          time, but subject to that, it's somewhere around 9.55.

22        MR MANSFIELD: Yes. So 48 to 55. Which, just in passing,  
23          had there been motorcycles, would have been an even  
24          faster time, but there we are. He manages to get there  
25          in that time using that route.

1           Passing to two minutes past 10, so it's seven  
2 minutes later, again in relation to the duty owed by  
3 both Esposito, we say, and Commander Dick at this point,  
4 firstly by two minutes past 10 we have this  
5 extraordinary identification position because that's,  
6 it's all hinging effectively on the Frank, "he's worth  
7 another look", a fleeting glance by James.

8           One has to stand back at this point because we say  
9 they have allowed it to get into a situation now,  
10 because they have missed the main opportunity, and I am  
11 not suggesting anything should have happened on the bus.  
12 I am not suggesting anything should have happened at  
13 Brixton in the crowds. Although there may be techniques  
14 that are developed, it may have been just too difficult.  
15 He is off the bus for a minute or so.

16           But once we are getting to Stockwell, they have  
17 a remarkable opportunity which they might not have had  
18 in the normal fast-moving situation. They had somebody  
19 on the bus. They had somebody on the bus almost waving  
20 a flag, look he is getting off now, so they knew  
21 perfectly well he was getting off. They did get that  
22 message.

23           If one thinks about it, the time between knowing  
24 that he's about to get off, and I'm sorry, this is where  
25 I got the time from, the time when they were aware that

1 he was getting off was 9.59, I had mixed the times up.  
2 9.59 is when they knew he was getting off. That's  
3 Lawrence on the bus.

4 If one thinks about it, there is another window of  
5 opportunity. They are not going to get very common  
6 opportunities the closer one gets to central London, and  
7 maybe this is the best it's going to get, and it's no  
8 use saying, "These are battle conditions, you can't  
9 expect decent decisions", or, "You can't expect an  
10 unreasonable duty of care". I'm not asking for  
11 unreasonable duty of care. I'm asking for a reasonable  
12 duty of care that once you know he is getting off at  
13 Stockwell, of course he might not be going to the tube,  
14 he might be going to one of the other addresses,  
15 Blair House, he might be walking, but you have to, if  
16 I can put it in the colloquial, you are going to have to  
17 do a hit right there before he moves too far away from  
18 the bus stop.

19 SIR MICHAEL WRIGHT: Pausing there a moment, if he turned  
20 the other way so as to go to Blair House, which is just  
21 up the road, in one sense the urgency decreases, because  
22 he is not going to detonate a bomb if he is going to one  
23 of his own bases.

24 MR MANSFIELD: True.

25 SIR MICHAEL WRIGHT: Indeed, it may be an absolutely golden

1 intelligence opportunity, they don't know. The crisis  
2 begins to develop when it is realised that he is heading  
3 for the tube.

4 MR MANSFIELD: Yes, which is the 10.02 time.

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

6 MR MANSFIELD: One, they know he's getting off the bus. May  
7 I pause at the time when he is getting off the bus  
8 because this is a factor we say bears very strongly on  
9 the decisions that had to be taken, and they must have,  
10 including Esposito, known this.

11 The identification position was extraordinarily  
12 tenuous. Although the stakes are very high, they are  
13 very high both ways. In other words the risk of  
14 stopping the wrong person in dangerous circumstances and  
15 death becomes that much higher at this point. Because  
16 I have tried to put Dick's evidence together on this.  
17 It appears that, because she says something different in  
18 the log from what she says in a note, it appears that  
19 this is what's happened. She was aware that to begin  
20 with for a brief time he was a possible, then he wasn't  
21 Nettle Tip, then he became a possible again, and then he  
22 became pretty sure. That's the sequence. That's all  
23 within roughly the 15 minutes of her awareness that she  
24 has had from 9.45 onwards.

25 You have to set that against a background at which

1           this was quite unlike another operation where they have  
2           had a lifestyle exercise, they follow the person, they  
3           know it's the same person, they know the name, they know  
4           the background. They knew none of that in this case.  
5           They just had not properly appreciated in the first  
6           place by the command team a very poor image of the  
7           person, that's the surveillance team evidence, almost to  
8           a man. Very poor image was being compared with  
9           a fleeting glance and a vacillation that goes from  
10          "certainly not" to "certainly is". In other words if  
11          they had waited another five minutes another officer  
12          might have said, "That's not my view", probably Lawrence  
13          because he is coming off the bus. Whereas of course you  
14          have Ken on foot ahead and Ivor for that matter but Ken  
15          saying "possibly is".

16                 Now, in that situation where you have, it's merely  
17          background but it's informative background, where you  
18          have a situation where actually you can't really say  
19          whether he is or he isn't; that should inform what you  
20          are going to do given the timeframe that if he is  
21          heading to the station, then you have got to act quickly  
22          in at least the safest conditions you can have, in those  
23          circumstances.

24                 So the next stage at which there is a safe  
25          opportunity again missed is Binfield Road. Now, in the

1 clip of transcripts, again I do not read it out, Ralph  
2 was asked by me about a safe stop. That's page 6  
3 onwards. He is the team leader of black, he was in one  
4 of the vehicles queuing up, not the lead vehicle, the  
5 third one.

6 If I may just go to the passage that perhaps is most  
7 important. He is asked questions by Mr Hough in  
8 re-examination, if I can call it that, on page 11,  
9 because I have been careful not to trespass upon exactly  
10 what tactics, because what he is saying is: we could  
11 have done it above ground. And when asked by Mr Hough,  
12 at page 11 onwards, exactly how would it have been done,  
13 he says, and you asked "middle of what road", and he  
14 says on page 12, Binfield Road. He describes how he  
15 would have done it: "in the street, with a bit of  
16 distance for firearms officer, so a bit of safety for  
17 them".

18 SIR MICHAEL WRIGHT: Sorry, which page is this?

19 MR MANSFIELD: It should be page 12.

20 SIR MICHAEL WRIGHT: Sorry, I was looking at page 11.

21 MR MANSFIELD: It starts on page 11. There is a long answer  
22 in answer to yourself about how he would have done it,  
23 minimising the risks. We say he was not the only one  
24 sitting at the lights. I say sitting at the lights,  
25 they are approaching the lights, they have had a race to

1 get there but they have got there. But more importantly  
2 than even him being there and then eventually ordering  
3 state red at a time which is, we say, too late, he is  
4 down the escalators, and somebody who it cannot be  
5 reliably said is him, and leaving out what firearms  
6 officers thought they heard, just dealing with the  
7 command team's responsibility here, in fact the position  
8 was that the Alpha car was two cars ahead. We have seen  
9 the Mercedes pulling out on the compilation, and plainly  
10 if state red had been called, at least officers which  
11 included C2 in the Alpha car could have got out of that  
12 car and been across to the entrance of the tube station  
13 at the very least to perform an interception.

14 But there is an even better candidate, as we now all  
15 know. Another difference with the Health and Safety  
16 trial is in fact the understanding that is now much,  
17 much clearer as a result of officers who were not called  
18 in the Health and Safety trial that C12 had used  
19 a different route and he had already reached, and we  
20 have put his evidence in the clip as well on this, C12  
21 we have put, it's the first part of the clip, there are  
22 a number of reasons why he is there, but page 3.

23 SIR MICHAEL WRIGHT: Hang on one minute.

24 MR MANSFIELD: Page 3 of the clip. (Pause). This is C12,  
25 page 3. He has arrived -- I am going to call it the

1 hatching, you may remember the hatching on the  
2 photograph.

3 SIR MICHAEL WRIGHT: Yes, I remember. Yes.

4 MR MANSFIELD: "So we were at this stage" -- he is moving  
5 slowly, that's what he is describing, he is moving  
6 slowly towards it because he realises where Stockwell  
7 station is, he realises it's an area of threat or could  
8 be, and therefore he is preparing himself.

9 He says at line 11:

10 "So we were at this stage, certainly when the  
11 suspect had entered the tube, very, very close to the  
12 tube ... I remember there being a radio silence and  
13 I was very frustrated by this.

14 "Question: Did you hear this: 'towards platforms 1  
15 and 2'?

16 "Answer: Yes, I did.

17 "Question: As you understood it, who was that  
18 talking about?

19 "Answer: The identified suspect, who I believed at  
20 that time was a failed suicide bomber.

21 "Question: Yes?

22 "Answer: Again, if I can add that my sense of  
23 frustration at this point was great, to say the least.  
24 I couldn't understand, if we were at state amber, why we  
25 weren't given state red at this time."

1 SIR MICHAEL WRIGHT: By that time he was down the  
2 escalators.

3 MR MANSFIELD: By the time of state red being called, he  
4 was.

5 SIR MICHAEL WRIGHT: No, by the time this sense of  
6 frustration ...

7 MR MANSFIELD: Yes, yes.

8 SIR MICHAEL WRIGHT: He had heard "platforms 1 to 2", ergo  
9 he must be down the escalators.

10 MR MANSFIELD: That's right.

11 SIR MICHAEL WRIGHT: So we are looking actually at  
12 a slightly earlier time than this where Charlie 12 and  
13 his Mercedes were -- no, not the Mercedes -- they were  
14 the last car -- was within 100 yards anyway.

15 MR MANSFIELD: 100 metres, he said he approaches slowly. So  
16 during the time he is approaching slowly, the man is  
17 getting off the bus and walking, so he has not actually  
18 quite got there but he is moving slowly.

19 SIR MICHAEL WRIGHT: It isn't quite as neat a coordination  
20 as you are putting here.

21 MR MANSFIELD: No, no.

22 SIR MICHAEL WRIGHT: Looking at the transcript, because by  
23 the time they actually get to their hatch marks and  
24 stop, then he is getting frustrated, so it's a little  
25 bit before that, that's all.

1 MR MANSFIELD: That's true, I accept that. In fact it bears  
2 on a point that arises out of what he says here. He  
3 thought he was at state amber. In fact another problem  
4 here, back to Esposito, back to Dick, back to ensuring  
5 that Silver, Mr Purser, actually got state amber issued,  
6 it never was.

7 SIR MICHAEL WRIGHT: Some officers interpreted, those who  
8 heard it, interpreted it as coming from CO19 moving  
9 through.

10 MR MANSFIELD: Well, that's this officer thought that.

11 SIR MICHAEL WRIGHT: Yes.

12 MR MANSFIELD: But in fact of course it had not been  
13 ordered. What should have happened, again it's not  
14 hindsight, is the moment that TJ84 -- which is much  
15 earlier -- is basically instructed to do the follow and  
16 perhaps even if to be generous not at that precise  
17 moment but certainly at the moment at which it is being  
18 said one way or another that CO19 then believe that  
19 either it's a possible or they are following somebody,  
20 they may have to intervene on, so some time after  
21 Brixton, if not before, they should have been on state  
22 amber. Not so they are right behind the bus because  
23 that might compromise the surveillance but so they are  
24 much closer, in a position so that when he's off the bus  
25 before he enters the tube station they can do

1 a Binfield Road type stop, and obviously if he walks  
2 further north as you say there is a bigger opportunity.

3 The problem was again, it's the race against time  
4 because the initial best opportunity has been dismally  
5 missed.

6 SIR MICHAEL WRIGHT: I follow that entirely. I am just  
7 questioning a little bit your proposition there. Get  
8 behind the bus or get behind the follow.

9 MR MANSFIELD: Follow, yes.

10 SIR MICHAEL WRIGHT: Which is the first order, that's their  
11 first deployment, really. State amber I was told or the  
12 jury were told is the order that is effectively saying:  
13 you have got to get yourselves into position so that  
14 when state red is ordered you can immediately deploy.

15 MR MANSFIELD: Yes.

16 SIR MICHAEL WRIGHT: So it's the moving through the  
17 following surveillance teams and getting up as close as  
18 you can to the subject of a follow is the effect of  
19 state amber.

20 MR MANSFIELD: Yes.

21 SIR MICHAEL WRIGHT: That's really why I was saying to you  
22 a moment ago it's the "get up there" and "C19 units  
23 moving through" is the indication that the equivalent of  
24 state amber has been ordered.

25 MR MANSFIELD: Only one officer interpreted it that way.

1 SIR MICHAEL WRIGHT: That's true.

2 MR MANSFIELD: That's this one, in fact, this particular  
3 officer.

4 So that this possible opportunity, because we can  
5 only deal with things obviously, and we say they are  
6 predictable situations --

7 SIR MICHAEL WRIGHT: But what he needed was state red.

8 MR MANSFIELD: Yes, he needed state red, and it should have  
9 been called as he was 100 metres away. It should have  
10 been called then. Now he might not have been able to --  
11 he in fact did get out of the car before it was ordered  
12 because --

13 SIR MICHAEL WRIGHT: He never heard state red.

14 MR MANSFIELD: He never heard it. In a sense that's saying  
15 how bad it gets, but that's what's happened here because  
16 again the command team, basically Dick and Esposito are  
17 really not in control, and one of the reasons they are  
18 not in control is they haven't got the necessary  
19 information, why haven't they got the necessary  
20 information, and I can put the point shortly, that is  
21 TJ80, Esposito, had really not got a clear picture of  
22 where everybody was.

23 SIR MICHAEL WRIGHT: Of where they were.

24 MR MANSFIELD: The idea that he says maps don't make any  
25 difference, I do not need to know where they are, is

1           such grandiose arrogance by somebody in a central  
2           control room when you would think they would absolutely  
3           -- perhaps he doesn't need to know exactly where  
4           everybody is sitting in every car, but he certainly  
5           needs to know, and I would submit they do need to know,  
6           where the individual units of a team are. It's no use  
7           knowing, especially if they get split up and relying on,  
8           as it were, second-hand information and certainly  
9           relying on a situation in which I do not need to know,  
10          and you will have heard the interchanges about where are  
11          you and so on.

12                 TJ84 said in his evidence very clearly he did keep  
13          Esposito informed with landmarks on a map that he, TJ84,  
14          was using. Why they have not bothered in the control  
15          room to work out this out I don't know, but they  
16          obviously were not working on that basis.

17                 And the interchange that is supposed to have taken  
18          place, particularly, "We can do it, we can do it", no  
19          single firearms officer ever claimed that they were  
20          saying that, "We can do it, we can do it". So there is  
21          something seriously amiss in relation to knowing where  
22          your resources are. You have to know where they are in  
23          order to take the decision.

24                 So therefore state red should have been called much  
25          earlier, leaving out amber for the moment, state red

1           should have been called much earlier. It's not a margin  
2           of error, it's not just a minor judgmental indiscretion  
3           when you are dealing with innocent members of the public  
4           or, for that matter, potential suicide bombers. These  
5           decisions have to be taken fast and carefully at the  
6           same time. That's the training.

7           Now, TJ84, in fact he was the one, during the  
8           cross-examination at --

9       SIR MICHAEL WRIGHT: No firearms officer has told us that he  
10          called out, "We can do it, we can do it". There is  
11          evidence that people were heard saying that, and indeed  
12          as far as Charlie 12 was concerned, that was his state  
13          of mind, "We can do it", and Charlie 2 for that matter.

14       MR MANSFIELD: Yes. That's why he got out of the car before  
15          state red. He could do it.

16          So that so far as TJ84 is concerned, he had some, if  
17          I may say so, other interesting observations. What he  
18          was really saying was we don't have a DSO in order to  
19          have to take the responsibility ourselves; we thought  
20          the DSO would take the responsibility. That's how he  
21          introduced what he was going on to say. What he was  
22          really saying was it was outrageous, that's the word he  
23          used, "the position we were placed in at Stockwell". He  
24          didn't place them there. Who placed them there? The  
25          command team put them in a outrageous situation that

1           they were having to race from behind the starting line  
2           in order to catch up when it was already too late.

3   SIR MICHAEL WRIGHT: Forgive me, what do you say he was  
4           referring to?

5   MR MANSFIELD: The position that they were in --

6   SIR MICHAEL WRIGHT: Forgive me, it's the outrageousness of  
7           it. Do you follow? It's a strong word. I am bound to  
8           say that my impression was that what he was really  
9           talking about was that his officers were likely to be  
10          put in mortal danger because of the way they were having  
11          to approach.

12   MR MANSFIELD: Yes, absolutely, yes, it is that, and to be  
13          expected to carry out, in a situation where -- these are  
14          the other factors which the command team must have known  
15          and did know, they were going to enter and he didn't  
16          know, nobody seems to know what the left and right hand  
17          are doing, very few of them, certainly the firearms team  
18          that I asked knew about the Dingemans situation, very  
19          few of them knew about that. Even fewer of them knew  
20          exactly where the surveillance team was, which I'm  
21          coming to in a moment.

22                 So to send them down into the Underground with no  
23          communications where there can be no control in fact  
24          exercised by the command team and we say the whole point  
25          of the DSO is going to be lost. So they have to

1 exercise, whether or not they like it, and I'm sorry  
2 about the exigencies into which they are placed, but I'm  
3 afraid that is the job they have undertaken to do and  
4 Cressida Dick particularly came on duty fresh, early,  
5 read through her regulations and manuals and so on. So  
6 she's not complaining that she is too tired. She is not  
7 complaining that it was all too difficult or she was  
8 panic stricken.

9 Quite the reverse. So if it is quite the reverse,  
10 I'm sorry to say that this situation is completely out  
11 of control at this point because having got  
12 an extraordinarily tenuous identification procedure  
13 which everybody accepts you can't expect, Ivor was  
14 saying which I am just coming to now, we could have gone  
15 on for another day with this image that we had, we would  
16 never have been able to confirm an identification on the  
17 back of that, we would have had to have it from another  
18 way, another source, cash machine, possibly a mobile  
19 phone, something else would have to have been able to  
20 confirm, not this photograph.

21 So we have a situation here at this critical moment  
22 with gross indecision taking place, the decision is: oh,  
23 CO19 to do it when they don't really know where they  
24 are. They then learn actually erroneously that they are  
25 not in a position to do it.

1           Then S012, if I may come to Ivor, makes an offer.  
2           Because Ivor very sensibly has taken the view that in  
3           surveillance it's useful to get ahead of the subject,  
4           which is, if you think about it, a very commonsensical  
5           they think to do. Because if somebody is alive to the  
6           fact they are going to be followed, they are not  
7           necessarily going to be looking for someone ahead of  
8           them. So he is ahead of this individual. He is waiting  
9           by the chemist door just inside the concourse and sees  
10          Jean Charles come in. Now, the command team don't have  
11          the luxury of shall we, shan't we, shall we, shan't we,  
12          they have to take a decision. He is offering to do it.

13                 We say, given the paucity of identification and the  
14          lack of other intelligence, in fact none, that relates  
15          to Osman particularly, although there was in relation to  
16          Omar, not in relation to this individual, that the  
17          proper decision was the one that was actually  
18          recommended by Boutcher. He gave evidence in which he  
19          said "I weighed up" -- here is somebody who is able to  
20          do the weighing up, despite the battle conditions, was  
21          it proportionate to use S012 who were not so highly  
22          trained? Answer: yes. We say yes. What does  
23          Cressida Dick do? Well, yes then. So she says she  
24          orders S012 to do it and others say they hear her saying  
25          that. But it doesn't seem to get communicated to anyone

1           on the ground. Again another difficulty. In one sense  
2           it would have been a happier result but in fact it  
3           didn't get communicated. So S012, that is Ivor, loses  
4           the really best opportunity at this end of the journey.

5   SIR MICHAEL WRIGHT: He was told to wait.

6   MR MANSFIELD: He was told to wait. We say can't afford to  
7           wait. He who hesitates is lost. It's a pretty easy  
8           thing to say. I am not in that situation, I don't want  
9           to be unrealistic, I don't want to put an unreasonable  
10          burden on the shoulders of those who have to take very  
11          difficult decisions, but one of the things you are,  
12          I hope, taught in conditions like this, you cannot  
13          afford, with weapons of destruction at your disposal, to  
14          hesitate in this way.

15                 So what happens is, according to James, he waits for  
16          a minute and a half. 1 minute 26 seconds, when you have  
17          only got a timeframe of maybe a couple of minutes. This  
18          is ridiculous. Ivor should have been given the advised  
19          instruction, "do it", and we now know that in fact there  
20          is a very straightforward, conventional method of  
21          approach and restraint. It is so commonsensical, it's  
22          even more so than any of the propositions relating to  
23          Scotia Road.

24   SIR MICHAEL WRIGHT: I think Neil has doubts about it.

25   MR MANSFIELD: Short of just letting them go or shooting

1           them --

2   SIR MICHAEL WRIGHT:  If you are going to put him down to the  
3           ground, you have to do it very gently.

4   MR MANSFIELD:  That may well be, and one appreciates that it  
5           has to be done, but Ivor had a very clear view of how he  
6           would do it, and of course you don't go up, sort of say,  
7           "Can I take your left arm, can I take your right arm,  
8           would you mind holding them out".  If one thinks about  
9           it, one doesn't have to think too hard and too long to  
10          work this out, even from boyhood scout days, you go up  
11          covertly behind somebody -- don't worry, I haven't been  
12          practising this at home -- you take one arm each, as he  
13          described he would.  While he was preoccupied -- he had  
14          thought it through -- while he was preoccupied, in one  
15          hand he has his Oyster card and in the other hand he has  
16          his Metro, he is not carrying a rucksack, arms out, you  
17          don't put him on the ground because that will be the end  
18          of all of them if he is.  It's an unarmed stop.

19                 What we also go on to say, this is policy so I do  
20                 not include it, but it's just as a matter of reference,  
21                 that does involve tactics.  I hope I have this right.  
22                 It appears that CO19, maybe they are now but at that  
23                 time were not practised in the art of a conventional,  
24                 almost unarmed stop.

25   SIR MICHAEL WRIGHT:  Are you thinking about the evidence of

1 the six of the nine strategies?

2 MR MANSFIELD: Yes. It's in parentheses. It's not in the  
3 tactical options document. If you remember, I wanted to  
4 know what tactics had been developed by CO19. I think  
5 the eventual answer that came back from one of the  
6 recent witnesses was that this tactic that we were  
7 suggesting, namely covert from behind is not something  
8 at that time that was being developed.

9 SIR MICHAEL WRIGHT: But do you question, leaving aside  
10 delay and indecision, do you challenge the proposition  
11 that other things being equal if you like, the  
12 preference should be to use the most highly trained  
13 officers, namely CO19?

14 MR MANSFIELD: Well, if they are there to do it, yes.

15 SIR MICHAEL WRIGHT: Yes, I say leaving all else on one  
16 side, that they would be the first choice?

17 MR MANSFIELD: Well, it depends where it's happening. They  
18 would be the first choice outside the tube station.

19 SIR MICHAEL WRIGHT: Don't make it unnecessarily  
20 complicated. All I am really saying is as between CO19  
21 and SO12, other things being equal, SO19 are the people  
22 to use. Forget about whether it was properly handled or  
23 badly handled. It's only that, given when Cressida Dick  
24 was given a choice, her first choice subject to what she  
25 was being told by everybody's availability, would be,

1           one would expect to be, C019.

2   MR MANSFIELD: Yes, and she was saying, although I am coming  
3           to what the decision log says, she was anticipating that  
4           that would be happening above ground.

5   SIR MICHAEL WRIGHT: Yes, of course. It's only the  
6           respective qualifications I am getting at.

7   MR MANSFIELD: Yes, on that basis alone obviously S019, but  
8           there are circumstances where, and we say obviously once  
9           the escalator comes into play, it's not S019. So yes,  
10          you are absolutely right, as a general principle.

11           So that we are now in a situation whereby Ivor has  
12          been denied the opportunity to allow this man to stay  
13          alive, effectively, and a stop which he had worked out  
14          in some detail and was able to describe, and that's why  
15          we have -- the Ivor transcript is, so you may note where  
16          it is, page 40 onwards, and his description is at a page  
17          after 40.

18   SIR MICHAEL WRIGHT: Is this Ivor?

19   MR MANSFIELD: Yes. Ivor. I think it's 52, 52 onwards is  
20          where he describes -- and he described it here so  
21          graphically I probably don't need to read out exactly  
22          how he put it. He was the one who also described being  
23          frustrated, he used exactly the same word, because he  
24          was not getting any answer, and the Health and Safety  
25          trial, he had been uncomfortable about the whole

1 situation, that is described on page 43. This is Ivor.  
2 Page 43. I am going back to the description:

3 "... when answering questions from Mr Thwaites [who  
4 was defending the Office of the Commissioner], as you  
5 feeling frustrated and uncomfortable with the situation  
6 you were in."

7 So that's two officers, different units.

8 "This is dealing with the situation you were in at  
9 Stockwell tube station, isn't it?

10 "Answer: Yes, sir.

11 "Question: I am going to go slowly because of what  
12 you have contained in these answers?

13 "Answer: Indeed.

14 "Question: ... 'can you just explain to the jury  
15 why you were frustrated? ... In view of the nature of  
16 the operation we were deployed upon, and the nature of  
17 the attacks...'"

18 Same point as TJ84, the stakes were high:

19 "'... the previous day, I felt that it was prudent  
20 to detain the man prior to entering the tube station.'"

21 Then he goes on to go back over the ground we have  
22 covered. Again we say everybody on the ground has the  
23 picture. The persons who haven't got the picture and  
24 should have got the picture and should have taken the  
25 decisions, I am afraid, were the command team.

1           One comes -- I see the time, may I just do this  
2           briefly. I am going to stick to the time because  
3           I appreciate others have things to say.

4   SIR MICHAEL WRIGHT: Yes, please, Mr Mansfield.

5   MR MANSFIELD: May I just say one thing, that what I do not  
6           finish and there isn't going to be much, if I can commit  
7           it to paper so that others are not compromised.

8   SIR MICHAEL WRIGHT: I hope we may just have an hour or so  
9           tomorrow afternoon. What I do want from you, as indeed  
10          I want from everybody else, is now we have been through  
11          it, you have had a chance to consider it, is your  
12          proposals as to what questions should be left for the  
13          purposes of a narrative verdict.

14   MR MANSFIELD: Yes.

15   SIR MICHAEL WRIGHT: You have been going through it, through  
16          most of this submission. I would just like to have them  
17          set out.

18   MR MANSFIELD: They are set out in our document.

19   SIR MICHAEL WRIGHT: All right. Let me see if I have this  
20          other thing right. I have been keeping score of the  
21          number of aspects of the evidence which were not  
22          available to the Divisional Court in Da Silva and of  
23          course therefore were not available to the Health and  
24          Safety trial either, and I think I have really got  
25          three. The first was that it was not appreciated then

1           that there were probably two cars at least at  
2           Tulse Hill, Upper Tulse Hill, by the time de Menezes  
3           walked past.

4   MR MANSFIELD:   Yes.

5   SIR MICHAEL WRIGHT:   Secondly that the black team was  
6           available to be called in earlier if anybody had wanted  
7           it.

8   MR MANSFIELD:   Yes.

9   SIR MICHAEL WRIGHT:   And the third one is that Charlie 12  
10          was already at the station while Mr de Menezes, or  
11          approaching the station at any rate, by a different  
12          route when Mr de Menezes was walking from the bus.

13   MR MANSFIELD:   Yes.

14   SIR MICHAEL WRIGHT:   Right?

15   MR MANSFIELD:   So far, yes.

16   SIR MICHAEL WRIGHT:   Thank you.   Now, please continue.   We  
17          have still got a bit longer.   You can have another ten  
18          minutes.   We started a bit late.

19   MR MANSFIELD:   The position here again relates to  
20          Cressida Dick's decision log because it's the one, the  
21          decision which we say completely demonstrates the fact  
22          that the decision which she took to send in S019 was  
23          entirely misconceived.   It's decision 18, please.  
24          Because what has happened is C019 to do it, then S012 to  
25          do it, then a countermand to S012.   None of that gets

1 through. Ivor continues on his way thinking he is on  
2 a surveillance operation. Then she says:

3 "CO19 to arrest."

4 I leave out whether the time is accurate that she  
5 has put, 10.05.

6 "If possible in Underground station before enters  
7 tube train".

8 Of course the reason:

9 "Am informed CO19 are up with S012, subject has gone  
10 down the escalator".

11 There is overwhelming evidence we say from other  
12 sources that she knew he had gone down the escalator and  
13 absolutely should not have been pursued out of hearing  
14 no communications by S019. Esposito's answer was: just  
15 got to carry on, have to do it wherever. We say this is  
16 an entirely irresponsible approach to this, given all  
17 the factors we have said so far, so that in relation to  
18 the situation she faced, once he was on the escalators,  
19 knowing that S012 had offered basically to do a covert,  
20 they should have continued, in fact they would not have  
21 needed to because they would in fact have done it before  
22 the line in the sand had been drawn.

23 So therefore we have reached a situation in which  
24 officers are going down an escalator having been given  
25 a command by her, and we have something to say about the

1           command, I will be very quick, namely, "Stop him before  
2           he gets on the tube" or words to that effect, reiterated  
3           twice to Ralph because he wants to be clear about it.  
4           And therefore we get to a situation in which the lead  
5           firearms officers have in their minds, that is C12 and  
6           C2, that he has to be stopped before, although they may  
7           be thinking he has already got on to a train and  
8           possibly departed because of what they had heard before  
9           going down a escalator.

10                 Now, C2 and C12, if I can move to them because it's  
11           in the last few minutes, that stage of the operation in  
12           which the command team play no part because they are out  
13           of communications.

14                 May I just point out it is of some interest to note  
15           that both the Commissioner's submissions and the command  
16           team's submissions both say essentially they are not  
17           involved, the decision to shoot -- we say not in  
18           self-defence -- was taken by the two when they and after  
19           they enter the carriage.

20                 So they both say, their submissions, the officers  
21           had no preconceptions. Now, Mr Stern on behalf of these  
22           two has emphasised concessions. In fact, what I did  
23           with both C2 and C12 which is why their extracts are in  
24           the bundle as well, was to ask them whether there was  
25           a possibility, and in fact suggest the possibility that

1 as they went down and I actually demonstrated, as you go  
2 down the escalator, that was it, he was a dead man, you  
3 were going to shoot him.

4 Interestingly, Mr Stern's clients both categorically  
5 rejected that, and the command team and  
6 the Commissioner's team both say neither officer had any  
7 preconception. That is really very, very important.  
8 It's not what I put to a witness, it's what the witness  
9 says that becomes important.

10 The officers are saying, "We go down, we approach  
11 covertly", and of course I am not leaving out the fact  
12 that they have information that they think it's him and  
13 that the him is a failed suicide bomber from the day  
14 before. But of course none of that is enough to  
15 literally trigger self-defence, because they have this  
16 vital exercise which they have been put in by the  
17 command team to assess whether in fact, even if they  
18 thought he was a bomber that day, they still had to  
19 assess, but they are saying they didn't think he was  
20 a bomber that day, before they got to the carriage.

21 They had to assess then, in five to ten seconds,  
22 whether this man presented an immediate threat. I do  
23 not need to go through what they are claiming, because  
24 I think the division in factual dispute which is part of  
25 the factual questions we suggest should be put in any

1 event, are very stark between -- and this is quite  
2 unlike a lot of the other cases dealing with officers  
3 pleading self-defence -- where there is a plethora of  
4 civilian witnesses who are sitting there, none of whom  
5 describe the approach described by these two officers.

6 The most important of which is, I have called it the  
7 cameo described by C12, namely it's the most critical  
8 part of his assessment. It has to be. He then wonders  
9 later why he ever asked this, and we wonder whether in  
10 fact he did say this, but his evidence is that he shouts  
11 "armed police". He's doing it, directing it towards  
12 de Menezes, with a gun held up towards or in the face.  
13 That's the cameo.

14 If it's going to be fudged and say well, maybe there  
15 was a shout of "armed police" from the platform, we  
16 heard "armed police" there, no, that's the key  
17 assessment that he is making: I shout "armed police", I  
18 lift my gun up and much to my amazement he continues.

19 On that, I understand the argument that an officer  
20 may lie because he doesn't think the truth will be  
21 believed, but this is a long way from that. This is  
22 a situation in which an officer has described something  
23 first of all that no other police officer who was in  
24 a position to see, I am not counting those who had not  
25 got there, the ones who were in a position to see, and

1 I can indicate who they are if necessary, none of those  
2 support that version, none. Of course they may not have  
3 seen it. Let's allow for that. They don't support that  
4 cameo approach, "armed police", gun up.

5 Secondly, for these two police officers it's worse  
6 than that, because the passengers describe something  
7 quite different. So this jury plainly have material on  
8 which they could reject the argument of self-defence.  
9 We say there is sufficient evidence here on, whether  
10 it's the modified Galbraith test or any form of  
11 Galbraith test, capable of giving rise to, using the  
12 modified test, a safe verdict that a jury may conclude  
13 these officers, because C2 is in a worse position. He  
14 doesn't issue any command or warning. He goes straight  
15 in behind, he doesn't see C12 do what he's just  
16 indicated. He goes straight over, puts the gun to the  
17 head and then shouts "armed police", useless at that  
18 point.

19 So therefore this huge division between what the  
20 officers claim or at least one of them claims happened  
21 as they entered the carriage, and what certainly the  
22 civilians say happened and the lack of support for C12  
23 in relation to the critical moment at which he makes the  
24 assessment, there can't have been much more time in five  
25 to ten seconds other than what he claims, will have to

1 be a matter for this jury in relation to the threshold  
2 which we say has been crossed.

3 So it's not, as in some cases, I am not relying on  
4 the bulky jacket argument at all. That was  
5 a Divisional Court argument which at that stage without  
6 benefit of all the materials that are now -- these  
7 officers didn't give evidence at the Health and Safety  
8 trial. These officers refused to be interviewed in  
9 detail. I am not saying that's a criticism. They were  
10 not interviewed by the IPCC in the sense they answered  
11 any questions. This is the first time these officers  
12 have been taxed. Just on C2, very interesting what he  
13 now claims. He now claims that he was going to do the  
14 same as C12, "raise my gun and shout, 'armed police'"  
15 but he didn't have time.

16 Interesting, he has never claimed that before.

17 So effectively these two officers' version of what  
18 happened, it's not just a question of assessing whether  
19 they themselves, in perceiving a bulky jacket, happened  
20 to be, as the director thought, telling a lie to cover  
21 the truth which may not be believed. One has to do a  
22 strict assessment, is there an evidential threshold  
23 which suggests that what they did on the train was what  
24 one of the passengers indicated was a controlled  
25 approach, they knew what they were doing, they had

1 an objective, he was dead, five to ten seconds. That is  
2 something we say has well passed this evidential  
3 threshold that has to be passed at this stage.

4 Sir, I see it's 1 o'clock. I will stop.

5 SIR MICHAEL WRIGHT: Thank you very much indeed.

6 MR MANSFIELD: There are other matters but I will only put  
7 them in writing if they are of consequence.

8 SIR MICHAEL WRIGHT: In the light of what we subsequently  
9 hear, all right.

10 MR MANSFIELD: Yes. Also, I have not addressed fully but by  
11 implication I have addressed it, is the Divisional Court  
12 and how they approached the whole matter and the Health  
13 and Safety trial. I have tried to interleave them  
14 a bit.

15 SIR MICHAEL WRIGHT: I do not need to trouble you about --  
16 I understand the difference between the Divisional Court  
17 approach and the approach that I have to take, which is  
18 the modified Galbraith approach.

19 MR MANSFIELD: Yes. The other matter, of course, is 16.7,  
20 inconsistency. I can put it in writing but I can put it  
21 very shortly. I don't think there is a problem.

22 SIR MICHAEL WRIGHT: Nor do I, actually, but anybody else  
23 who thinks there is, we can't identify from the jury's  
24 verdict which of the 19 complaints made in the Health  
25 and Safety trial the jury found proved, any one or more.



1           the moment that C2 and C12 pulled their respective  
2           triggers, fired their respective shots, what do you say  
3           their state of mind was?

4   MR MANSFIELD: Well, I have to put it the other way around,  
5           in other words that these were shots not fired in  
6           self-defence.

7   SIR MICHAEL WRIGHT: Doesn't quite answer the question.

8   MR MANSFIELD: No. I can't go further than that. Their  
9           intention was to kill, and it wasn't --

10   SIR MICHAEL WRIGHT: Yes, I accept that.

11   MR MANSFIELD: I'm putting clearly --

12   SIR MICHAEL WRIGHT: What do you say they perceived they  
13           were facing?

14   MR MANSFIELD: This is a difficult one to answer, because  
15           their evidence is they perceived an imminent threat,  
16           there and then, that this man was going to blow up the  
17           train. I am saying that he was an imminent threat then,  
18           he was going to blow up the train, he was going to  
19           detonate; that's their case.

20   SIR MICHAEL WRIGHT: Yes, but what do you say they actually  
21           perceived?

22   MR MANSFIELD: Well, all I can say is what they should have  
23           perceived was somebody who needed to be detained and not  
24           shot --

25   SIR MICHAEL WRIGHT: But if that is what they perceived, why

1           did they kill him?

2   MR MANSFIELD:  Because in fact they were on a mission at  
3           that point.  They went in on a mission.  The mission was  
4           to stop him before he got on the tube, too late.  He is  
5           on the tube and they go covert and it's almost  
6           an automatic response.  They are in and they kill.  And  
7           I can't go beyond that because I really don't -- I can't  
8           go inside the mind, I can't suggest --

9   SIR MICHAEL WRIGHT:  Forgive me, we have to.  I have to get  
10          inside their minds, don't I?  Or the jury --

11  MR MANSFIELD:  The jury have to determine -- no, we don't to  
12          this extent:  in other words, for example, I do not have  
13          to get inside the mind in order to establish a motive.  
14          So for example the fact that they went in and shot,  
15          I haven't got into the business of:  were you motivated  
16          by the fact that you wanted to get rid of somebody who  
17          you thought was a terrorist.  I do not have to go that  
18          far obviously in relation to this case.  All I have to  
19          show if I were, for example, a prosecutor in this case  
20          is to negative self-defence.  What motive they may have  
21          had to actually kill is a separate matter.  The  
22          prosecution never have to prove motive.  They often do  
23          put forward motive but that's not the point.  That's  
24          different from intention.  If there was an intention to  
25          kill and it wasn't in the context of self-defence, which

1           is what we say, then that's an end to the matter. What  
2           motives they may have had is another matter.

3   SIR MICHAEL WRIGHT: To bring it into the context of  
4           self-defence, the jury would have to be sure that they  
5           did not genuinely believe that the people, the man in  
6           front of them, presented an immediate mortal threat.

7   MR MANSFIELD: Correct.

8   SIR MICHAEL WRIGHT: What do you say they did perceive?

9   MR MANSFIELD: I am not sure -- I understand your question.  
10          I don't know that I can answer it, because beyond saying  
11          their perception was wrong, he was not an imminent  
12          threat, they say he was, so therefore I can't replace  
13          what they claim in their mind, other than to say you  
14          can't have thought he was an immediate threat.

15   SIR MICHAEL WRIGHT: Are you not forced into saying they did  
16          not perceive him to be an immediate mortal threat?

17   MR MANSFIELD: Yes, that is what I am saying.

18   SIR MICHAEL WRIGHT: If that is their state of mind, they  
19          did not perceive him to be an immediate mortal threat,  
20          why did they kill him?

21   MR MANSFIELD: I do not have to answer that. That is the  
22          motive question: why did they kill him. In any murder  
23          case, you will often -- I don't say often. There have  
24          been a number of murder cases in which the prosecution  
25          say: we don't know why this happened but we are saying

1           this man killed. There may be all sorts of reasons or  
2           motives why somebody kills, and the prosecution may not  
3           be able to prove that. In other words they may not be  
4           able to say why did you do it, and there will be  
5           a dispute of fact as there is here.

6           All we are having to say and all we do say is  
7           Jean Charles de Menezes was not a threat and was not  
8           perceived to be a threat and these two individual  
9           officers -- this is why the preconception is so  
10          important, why it is being said they did not have any  
11          preconceptions. And we are saying they went in and they  
12          killed. Why they did that is difficult. There may be  
13          a combination of motives as to why they did it. Whether  
14          they were on auto response at that point having been  
15          given an order, got to be stopped before he enters the  
16          train and there he is, covert approach, he is on the  
17          train and then Ivor gets in the way and so on, and they  
18          see their job --

19       SIR MICHAEL WRIGHT: The auto response is a neat way of  
20          putting it, would have to be on the basis: we have been  
21          given an instruction which to us means that he is  
22          an immediate mortal threat.

23       MR MANSFIELD: Well, they deny that.

24       SIR MICHAEL WRIGHT: I know they do, but that's -- I am  
25          asking you, I am interpreting what you are putting as

1           being their state of mind.

2   MR MANSFIELD:  As I say, I am not able to supplant a state  
3           of mind they deny.  They deny it.  We say they are not  
4           right.  They are not telling the truth about that.  
5           There wasn't a genuine belief he was an imminent threat,  
6           and it's a five and ten-second thing.  I can't go beyond  
7           that, and I don't think it would be fair to anybody if I  
8           were to start speculating what was in their mind.

9   SIR MICHAEL WRIGHT:  You can't do that, I appreciate that.  
10          Very well, thank you very much indeed.

11  MR MANSFIELD:  I am sorry not to be able to take it further.

12           The other matter, I'm sorry, that was pointed out  
13          over the lunch break, I may have been misunderstood.  
14          You posed a scenario to me of a robber.

15  SIR MICHAEL WRIGHT:  Oh, the bullet that goes astray, yes.

16  MR MANSFIELD:  Yes, and how far does it go and I may have  
17          made an answer which could be misinterpreted.  
18          I indicated, I think, it's at page 31, that I wasn't  
19          meaning to intend that there was no duty to the armed  
20          robber who the police officer or whatever correctly felt  
21          justified in shooting.  What I was saying was there was  
22          no breach of that duty if he correctly --

23  SIR MICHAEL WRIGHT:  No, I didn't misunderstand you.  What  
24          you are saying, you accept that there is no breach as  
25          far as the robber is concerned, but there is still

1 a duty of care to the casual bystander who gets a bullet  
2 through him.

3 MR MANSFIELD: I am saying there is a duty of care in fact  
4 to both.

5 SIR MICHAEL WRIGHT: Yes, there is no breach in relation to  
6 the robber.

7 MR MANSFIELD: That's right.

8 SIR MICHAEL WRIGHT: There may be a breach in relation to  
9 the bystander.

10 MR MANSFIELD: Yes, that's it.

11 SIR MICHAEL WRIGHT: That's what I understood you to mean.

12 MR MANSFIELD: That's what I meant to say. Thank you very  
13 much.

14 SIR MICHAEL WRIGHT: Thank you. Yes. Mr Horwell, I think.  
15 You have just lost 10 minutes so I will give it to you  
16 at the other end.

17 MR HORWELL: I won't be needing them, sir.

18 SIR MICHAEL WRIGHT: All right. Yes, Mr Horwell.

19 Submissions by MR HORWELL

20 MR HORWELL: Before I start with the submissions I had  
21 intended to make, can I just make a few observations on  
22 what Mr Mansfield has said this morning, and they will  
23 be short.

24 Mr Mansfield has reintroduced us this morning to  
25 a few old friends from this inquest, one of them the

1           predetermined stop point, a point which in our  
2           submission has gone.

3           The evidence against the viability and practicality  
4           of a predetermined stop in respect of a multiple  
5           dwelling building has been illustrated and emphasised by  
6           numerous witnesses throughout the inquest, and  
7           Mr Mansfield sought to take advantage from the fact that  
8           Trojan 84 answered many of his questions in a favourable  
9           manner. What Mr Mansfield did not then go on to mention  
10          in his submissions, that unfortunately for him,  
11          Trojan 84 answered many of the questions from Mr Perry  
12          and myself in a favourable manner to us.

13       SIR MICHAEL WRIGHT: It's what you call keeping out of  
14          harm's way.

15       MR HORWELL: It is.

16          Mr Mansfield's suggestion is based on the premise  
17          that an identification can be made within this short  
18          window of time, and, as you have heard from many  
19          a witness, that simply is not possible.

20          Today, I believe for the first time in this inquest,  
21          it is suggested that in fact the police should have  
22          stopped anyone not excluded by the time they reached  
23          a bus stop. How many men would that have been, during  
24          the course of this morning? Men who could not  
25          positively be excluded as being one of the two suicide

1           bombers.

2       SIR MICHAEL WRIGHT:  If you extend it to associates, it  
3           wouldn't be women either.

4       MR HORWELL:  Exactly, and the point that has repeatedly been  
5           made that armed interventions are dangerous in the best  
6           of circumstances, therefore they are not conducted  
7           unless necessary, and the covert, the vital importance  
8           of this operation remaining covert.

9           How many stops in and around Scotia Road would it  
10          have taken for this operation to have lost that  
11          essential element?  And what we suggest is that each and  
12          every time criticism is made, and each and every time  
13          a different tactic has been suggested, we believe that  
14          one of the most reasonable and practical ways of dealing  
15          with such criticism and suggested tactic is to do what  
16          DAC Dick suggested in the course of her evidence, when  
17          she said to Mr Mansfield, when Mr Mansfield was putting  
18          to her what she should have done, and I think it was in  
19          relation to SO12 conducting the arrest, when DAC Dick  
20          said:

21                 "If I had done that, what on earth do you think you  
22                 would have been asking me now?"

23          That approach of hers is one that we commend to the  
24          court, because every single time criticism is made:  why  
25          didn't you stop in this window of opportunity, stop any

1 male who could not be excluded from being a suicide  
2 bomber, and that male might have acted in  
3 a non-compliant way, and been shot; we can easily  
4 imagine the criticism that then would have been made;  
5 your threshold of identification was far too low, you  
6 were stopping anyone who could not be excluded as being  
7 a bomber, why didn't you wait? That would have been the  
8 suggestion, and so on.

9 What the last seven weeks have demonstrated beyond  
10 doubt is the enormous complexity and difficulty of this  
11 police operation. At every single stage, almost,  
12 a dilemma was faced and on more than one occasion we  
13 have heard the comment "damned if you do and damned if  
14 you don't". That is why we have suggested that many of  
15 the criticisms and suggestions are made with the  
16 glorious benefit of hindsight in this case, because  
17 DAC Dick was absolutely right: "Look at these  
18 suggestions, look at these recommendations, and then ask  
19 yourself what would have happened had I taken that  
20 different course, and the operation would have had  
21 an equally tragic effect".

22 We believe that that approach highlights the  
23 difficulties that the police faced with failed suicide  
24 bombers, the answer to which even to this day is not  
25 known.

1           Can I mention the other matters raised by  
2           Mr Mansfield this morning. Criticism is made of the  
3           lack of communication in the operations room and at the  
4           same time it is suggested there were in fact too many  
5           police officers in the operations room. The two cannot  
6           stand together.

7   SIR MICHAEL WRIGHT: Well, I don't know, too many police  
8           officers can get into the way of lines of communication  
9           if they have nothing useful to do.

10   MR HORWELL: Yes, but they all had a function and whatever  
11           the level of noise that may have been in that room, it  
12           is a nonsense to suggest that no-one could have  
13           communicated to Dick that which was necessary.

14           Comment was made as to Trojan 84's evidence that his  
15           officers were placed in an outrageous position and, sir,  
16           you understood, we suggest correctly, the manner in  
17           which Trojan 84 gave that evidence. If one were to read  
18           on a few lines in the course of his evidence, he said  
19           this:

20           "We can't do it any other way."

21           That is the spirit in which that evidence was given.

22           Again, it is suggested, notwithstanding all of the  
23           evidence that we have heard on this topic, that S012  
24           should have been ordered to do the stop. Well,  
25           I needn't repeat all of the arguments that have been set

1 out, but we have recently reminded ourselves of  
2 something that Dick said in evidence, which was that in  
3 the last eight years -- whether that's eight years from  
4 now or eight years from 2005, I cannot remember -- S012  
5 only intervened once.

6 It may be something that boy scouts can play at  
7 around the campfire, but it's really not a sensible  
8 suggestion when the stakes were as high as these, in our  
9 submission.

10 Mr Mansfield has referred to the very short time  
11 that C2 and C12 had in the carriage. He put it at five  
12 to ten seconds. It must have been less. And that  
13 limited time would have been the case wherever the stop  
14 would have taken place. So the carriage is not  
15 exceptional in that regard. You have heard on a number  
16 of occasions that a stop of this nature is only safe to  
17 the firearms officers if conducted at a distance of  
18 50 yards or so behind cover. That was never going to be  
19 possible that morning, and therefore wherever the stop  
20 took place, time was going to be very limited.

21 Now can I turn to our summary of the law, and fact.  
22 There are plainly two quite distinct stages to this part  
23 of the process. The first is for you to decide which of  
24 the proposed verdicts should be left, and the only issue  
25 here is whether or not there is sufficient evidence to

1           leave any one of the routes to unlawful killing. That  
2           is the only issue.

3   SIR MICHAEL WRIGHT: Well, in the context -- yes.

4   MR HORWELL: At this stage.

5   SIR MICHAEL WRIGHT: I mean, you have taken -- you have  
6           an overall responsibility for both C2 and C12 and the  
7           control officers, yes.

8   MR HORWELL: That's right.

9           And the second, quite distinct stage is, consequent  
10          upon that decision, in what form the inquisition should  
11          then take. For our part, and we believe for others, it  
12          would be extremely helpful if there was any possibility  
13          of having a ruling from you -- not the reasons,  
14          obviously -- before going to the second stage. We say  
15          that for this reason: making submissions on the form of  
16          the inquisition in a vacuum is not only difficult, it's  
17          somewhat artificial. We believe that we could be of  
18          most assistance to the court if the two stages could be  
19          divided by an intimation of your ruling on the first.

20          If it's not possible, then of course it's not  
21          something for which we can press.

22   SIR MICHAEL WRIGHT: What are you suggesting? Well, I know  
23          what you are suggesting.

24   MR HORWELL: By the time we have finished, and I believe  
25          that there is an extremely good chance that the time

1           that you have allocated to the remaining interested  
2           persons will not only not be exceeded, it will in fact  
3           be significantly less than you have anticipated, and the  
4           reason for that is obvious: everyone has spent  
5           a considerable amount of time reducing their submissions  
6           to writing, and it is a waste of everyone's time to  
7           repeat those submissions this afternoon.

8   SIR MICHAEL WRIGHT: I do not want anybody to do that. Are  
9           you really asking me -- I would have to hear everybody  
10          --

11   MR HORWELL: Yes, of course.

12   SIR MICHAEL WRIGHT: -- on the specific verdicts. Then  
13          what? Do you want to go away again and produce  
14          submissions in relation to the potential questions that  
15          would be left on a narrative verdict?

16   MR HORWELL: We would certainly find it much more  
17          constructive and helpful to the court if we could do it  
18          in that way.

19   SIR MICHAEL WRIGHT: I understand that. I can't do that,  
20          Mr Horwell. We are constrained overall as to our time.  
21          This is the difficulty. I had hoped, and I suspect that  
22          whatever I say, you are, in the light of the letter of  
23          the 17th, that everybody is ready, even possibly with  
24          less leisure than they would have liked, but everybody  
25          is ready to make broadbrush submissions about the kind

1 of questions that you think should be left.

2 But actually more to the point, I do not really  
3 think I am in a position to make my mind up.

4 MR HORWELL: Then, sir, I won't press the matter. We will  
5 make our submissions.

6 SIR MICHAEL WRIGHT: I would want, in some calm opportunity,  
7 to think very hard about the submissions that  
8 Mr Mansfield has made, and the ones that you are all  
9 going to make to me.

10 MR HORWELL: Of course, we understand that.

11 SIR MICHAEL WRIGHT: I don't think I can do that.

12 MR HILLIARD: We will be in a position to make our  
13 submissions on the inquisition tomorrow afternoon.

14 SIR MICHAEL WRIGHT: Thank you very much.

15 MR HORWELL: Can I start, then, with a very short summary in  
16 respect of the evidence in relation to C2 and C12. You  
17 have, this afternoon, in our submission, identified and  
18 crystallised the true problem in respect of the evidence  
19 in relation to them when looking at the issue of  
20 unlawful killing, namely that which you have raised with  
21 Mr Mansfield, why did they kill him?

22 Mr Mansfield says that motive is irrelevant. Well,  
23 in some cases it may be, where there is an imbalance of  
24 mind suggested; but in a case of this nature, where the  
25 balance of the mind of these two men is not an issue, it

1 is an extremely penetrating way of looking at this part  
2 of the case, because what Mr Mansfield has in fact said  
3 is that they went down the escalators to shoot him.  
4 There was no discretion, there was no decision-making  
5 process, this was an execution.

6 He has to put the case in that way, because in any  
7 other way it does not make any conceivable sense, and  
8 the matter, the moment that approach is identified, it  
9 is obvious how flawed an approach it is, because there  
10 is no evidence whatsoever that those two men went down  
11 the escalators to shoot the man that would be identified  
12 to them. For a jury to come to that conclusion, it  
13 would be perverse, in our submission.

14 In respect of C2 and C12, there is quite simply no  
15 evidence, or at least insufficient, to rebut the obvious  
16 defence of self-defence. In respect of the first limb  
17 of the defence, honest but mistaken belief --

18 SIR MICHAEL WRIGHT: It's conceded.

19 MR HORWELL: Overwhelming in their favour, and it's  
20 conceded.

21 The only logical interpretation is that not only did  
22 they believe that it was Osman but that he was about to  
23 detonate a bomb. No jury could reasonably determine to  
24 the criminal standard that such belief was not honestly  
25 held. Any finding to the contrary would be perverse,

1           and as to the second limb, as we said in our written  
2           submissions, on this evidence it is but a very short  
3           step to show that the evidence adduced has also failed  
4           to disprove this second limb of the defence.

5           The evidence of C2 and C12 is strongly supported by  
6           that of Ivor and D9, who did hear the words "armed  
7           police".

8   SIR MICHAEL WRIGHT: A rather different place.

9   MR HORWELL: Yes, he said he couldn't say where they were  
10          said.

11   SIR MICHAEL WRIGHT: He was up on the concourse at the time.

12   MR HORWELL: This is in the carriage.

13   SIR MICHAEL WRIGHT: Oh, I beg your pardon. Yes.

14   MR HORWELL: This is in the carriage. He said he couldn't  
15          specify where the words were spoken but that they were  
16          spoken.

17          The only argument that the family has to present is  
18          that the evidence of the civilian eyewitnesses is not in  
19          accordance with that of the police officers. The  
20          problem with that approach is that the evidence of the  
21          eyewitnesses is not in accordance --

22   SIR MICHAEL WRIGHT: Forgive me. I thought it was. My  
23          screen has suddenly stopped moving. Could we have  
24          a five minute break to sort it out?

25   MR HORWELL: Of course.

1 (2.25 pm)

2 (A short break)

3 (2.28 pm)

4 SIR MICHAEL WRIGHT: Yes.

5 MR HORWELL: The only approach that the family can offer is  
6 to suggest that the evidence of the eyewitnesses is  
7 different to that of the police officers and, as I was  
8 saying, the principal flaw in that approach is that of  
9 course the eyewitness evidence itself contradicts the  
10 eyewitness evidence.

11 SIR MICHAEL WRIGHT: Internally.

12 MR HORWELL: Yes. You cannot use the eyewitness evidence to  
13 construct what happened, because if you did, you would  
14 have people firing into the carriage from outside, you  
15 would have Arabs firing into the roof of the carriage,  
16 and many other actions and words spoken that cannot have  
17 happened or cannot have been said at the time before the  
18 shooting.

19 As we have set out in our written submissions, the  
20 eyewitness evidence neither proves nor disproves the  
21 evidence from the police officers as to what was said or  
22 what happened. Although it is of itself interesting, as  
23 again we have set out, in that it does, in our  
24 submission, offer support for the fact that  
25 Mr de Menezes stood up and advanced, which we submit is

1           the most important part of the description of what  
2           occurred inside. We refer, of course, to the evidence  
3           of Preston and Whitby, and the Asian man.

4   SIR MICHAEL WRIGHT: Ivor.

5   MR HORWELL: Ivor, and the rugby huddle or scrum which took  
6           place outside of the seat. That is only consistent, in  
7           our submission, with Mr de Menezes having got out of his  
8           seat, and having got out of his seat he was obviously  
9           going to move, he wasn't going to stay there, and move  
10          forwards. That is significant corroboration of a vital  
11          part of the evidence of those police officers.

12                 Again, it is interesting, bearing in mind the  
13                 criticism of C2 and C12 as to their recollection of  
14                 a bulky jacket. It is interesting again, as we set out  
15                 in our submissions, that Whitby referred to the bulky  
16                 jacket of Ivor when we know that he did not have a bulky  
17                 jacket.

18                 It simply goes to demonstrate the difficulty that  
19                 witnesses have in this situation, and C2 and C12 have  
20                 set out in their written submissions part of the  
21                 judgment of --

22   SIR MICHAEL WRIGHT: The bulky jacket's today somewhat  
23           diminished into the background.

24   MR HORWELL: It seems that it's gone, which -- it was  
25           a point that was at the forefront of the application

1 before the Administrative Court, and it has now gone.

2 It's also important to bear in mind that the  
3 eyewitness evidence hasn't changed. The evidence that  
4 we heard in this courtroom was that which appeared in  
5 the witness statements, and those witness statements  
6 have been available for a very long time.

7 Nothing, in our submission, is achieved by further  
8 elaboration. Our submission is a very straightforward  
9 one: there is simply not enough evidence in relation to  
10 C2 and C12 to rebut self-defence. That must bring  
11 an end --

12 SIR MICHAEL WRIGHT: On the criminal burden of proof?

13 MR HORWELL: On the criminal burden of proof. And that must  
14 bring an end to murder.

15 SIR MICHAEL WRIGHT: Very well.

16 MR HORWELL: We then move to gross negligence, manslaughter.  
17 And the family has identified McDowall, Dick, and  
18 Esposito as three officers against whom the family says  
19 there is evidence of such an offence. That claim is not  
20 accepted in any form on behalf of the Commissioner.

21 The House of Lords in Adomako set the threshold for  
22 this offence at a very high level, and that level is  
23 justified because this is a grave offence, it carries  
24 life imprisonment as a maximum sentence, and it does not  
25 require mens rea. And therefore the suggestion and

1 allegation is a very difficult one to make, and  
2 difficult to substantiate, in our submission.

3 There are four ingredients to the offence, each of  
4 them must be proved, and we submit that there is  
5 insufficient evidence to establish any one of the four  
6 ingredients. We only need succeed in relation to one of  
7 the four, and this offence must go at this stage. But  
8 we submit there is in fact insufficient or no evidence  
9 in respect of each of the four ingredients.

10 We start, of course, with duty of care. We make it  
11 clear, in case there is any misunderstanding, these  
12 submissions have nothing to do with the issue of  
13 compensation. As you may be aware, interim ex gratia  
14 payments have been made --

15 SIR MICHAEL WRIGHT: I wasn't, but I am not surprised.

16 MR HORWELL: And will continue to be made as appropriate.

17 We do not want anyone to think that these submissions  
18 are being advanced with that in mind.

19 The issue as to whether or not the police owe a duty  
20 of care in situations such as this is one of great  
21 importance to the police force in general, as you can  
22 well imagine. And there are certain circumstances or  
23 relationships in which the courts have held that a duty  
24 of care is owed. An obvious example is road traffic  
25 incidents. In respect --

- 1 SIR MICHAEL WRIGHT: Are you thinking of Knightley?
- 2 MR HORWELL: Yes.
- 3 SIR MICHAEL WRIGHT: A case for which I have a particular  
4 affection. If you ever read the whole report, you will  
5 see why.
- 6 MR HORWELL: I will look at it afresh. In our submission,  
7 the courts have taken a policy decision, and it's not  
8 difficult to see why, police officers are treated as  
9 drivers like anyone else. To that extent a duty of care  
10 is owed to other road users.
- 11 SIR MICHAEL WRIGHT: Even in cases of emergency.
- 12 MR HORWELL: Yes, and so it is a situation very different  
13 indeed from that which faces this court. Some of the  
14 authorities have sought to support the view by saying  
15 this is the civil duty of a police officer, not  
16 a criminal duty. If that approach is correct, it  
17 explains the reason for why there is a duty of care.
- 18 Relationships, special relationships such as police  
19 and informant. Again, it is very easy to understand why  
20 a duty of care would be owed.
- 21 SIR MICHAEL WRIGHT: You take on a special relationship with  
22 him.
- 23 MR HORWELL: Exactly.
- 24 SIR MICHAEL WRIGHT: You have to look after him.
- 25 MR HORWELL: Exactly.

1           The cases that have been cited, both for and against  
2           the proposition, I will only look now at a few of them  
3           because of course we have set out in detail in our  
4           written submissions what our case is. I am not even  
5           going to refer to Hill itself. The principle in Hill is  
6           very clear. But how is that principle applied? The  
7           case that is referred to by academic writers, because  
8           not many of these cases actually exist, which is cases  
9           in which a duty of care has been imposed, which is  
10          a very good starting point for looking at this  
11          principle. The courts are reluctant to impose a duty of  
12          care. One of them, of course, is Rigby.

13                 One of the problems with Rigby is that it was before  
14          Hill.

15         SIR MICHAEL WRIGHT: But it's been approved since.

16         MR HORWELL: It certainly has, at a very high level. But  
17                 that is a fact that, in our submission, must be borne in  
18          mind.

19         SIR MICHAEL WRIGHT: Well, what are you saying about it?

20         MR HORWELL: Well, the odd --

21         SIR MICHAEL WRIGHT: Are you limiting it to its peculiar  
22          facts?

23         MR HORWELL: The odd part about Rigby when looked at from  
24                 this particular perspective is that the principle of  
25          duty of care does not arise in the judgment at all, and

1           therefore either one assumes it must have been conceded,  
2           and if conceded, that is not a concession that in any  
3           sense --

4   SIR MICHAEL WRIGHT:  The report doesn't say so.  Lord Taylor  
5           might have thought it was self-evident.

6   MR HORWELL:  I do not know.

7   SIR MICHAEL WRIGHT:  You mustn't mind me pulling your leg.

8   MR HORWELL:  No, it's pulled frequently from those behind  
9           me.  We do submit that there are certain weaknesses to  
10          Rigby, to use Rigby in support of this proposition, when  
11          it doesn't even deal with the issue of duty of care,  
12          shows the weakness of that use.

13                 That's how we put our case on Rigby.  But there are  
14          other features that can be taken from it that assist in  
15          our submission.

16                 First of all, the action was of course against the  
17          Chief Constable who was vicariously liable for those  
18          officers on the ground.  Vicarious liability does not  
19          apply in the circumstances before you.

20   SIR MICHAEL WRIGHT:  They took a positive step by firing CS  
21          gas canisters into the building which effectively, as it  
22          turns out in the circumstances that existed, there were  
23          some unavoidable consequences, the house caught fire.  
24          Now, speaking entirely for myself, trying to put myself  
25          in the position that I would have been in if I had been

1           trying that case, I would have thought I would have come  
2           to the conclusion that that was a direct operational  
3           act.

4           Now, you may say that the distinction between  
5           operational and investigatory is a false one, I don't  
6           know. But that is the basis upon which it's been put  
7           forward in some very highly authoritative cases.

8           I would have thought that was the short answer to Rigby.

9           But you may tell me I am wrong.

10       MR HORWELL: It's important to bear in mind the duty that  
11           was said to have been breached. I'll read from  
12           page 1256 of the judgment. It's only a few words:

13           "I conclude that the defendant, by his officers, was  
14           negligent in failing to react to the departure of the  
15           Green Goddess by seeking other help and in using the  
16           canister without any fire-fighting equipment."

17       SIR MICHAEL WRIGHT: I see, it's two things, it's using the  
18           gas canisters, and (b) as you say not ensuring that  
19           there was an adequate fire-fighting capacity there.

20       MR HORWELL: We interpret the judgment as meaning that the  
21           breach here was not having fire-fighting equipment on  
22           standby, notwithstanding the fact that this was a fire  
23           service strike and notwithstanding the fact that  
24           Green Goddesses were very rare.

25       SIR MICHAEL WRIGHT: It is two-fold, isn't it, if you have

1 not got a fire engine standing by, even an  
2 unsatisfactory one, you mustn't fire canisters into the  
3 house.

4 MR HORWELL: I have interpreted this in a more limited way,  
5 simply because the psychopath inside the building was  
6 firing shots, and so there was an emergency, and it's  
7 not so much the decision to fire the canisters --

8 SIR MICHAEL WRIGHT: As to do so without the fire brigade  
9 present.

10 MR HORWELL: That's how we have interpreted it. So  
11 an analogy here, if it's of any use at all, is if the  
12 police know in advance that somebody is going to be  
13 harmed, not having an ambulance there, for example. So  
14 that is why we say it is of limited value.

15 But the other case to which significant reference  
16 has been made, Hartwell --

17 SIR MICHAEL WRIGHT: That's the firearms one, isn't it?

18 MR HORWELL: Yes. It is a case which we pray in aid. It's  
19 not one which is contrary to our argument. It's for  
20 that reason that I would like to spend a few moments,  
21 it's in file 3 of the authorities at tab 53.

22 Because it's important to note what the duty of care  
23 was, and what the Privy Council had to say about it.

24 The facts are fairly memorable, and can be taken quickly  
25 from the headnote at page 1273.

1           This is in the Royal Virgin Islands, a police  
2           officer had been given a sidearm, and he was a most  
3           inappropriate character to have that weapon. In his  
4           past were two incidents, one in which he had threatened  
5           another man with a knife in a confrontation over his  
6           girlfriend, and the second was when he had been seen  
7           walking about with a gun which he had taken from the  
8           police station without permission and in circumstances  
9           for which he had no adequate explanation.

10       SIR MICHAEL WRIGHT: One of the great pleasures of sitting  
11           in the Privy Council is that you get the opportunity to  
12           hear cases like this.

13       MR HORWELL: Thankfully we don't have them here. So those  
14           are the very unusual circumstances. If we look at the  
15           reasons for the judgment and the specific duty of care  
16           that was imposed by the court, if we go to page 1281 and  
17           to paragraph 31, this is after reference to the --

18       SIR MICHAEL WRIGHT: Paragraph?

19       MR HORWELL: Paragraph 31. The paragraph numbers are  
20           a little difficult to see on this report.

21       SIR MICHAEL WRIGHT: Got it.

22       MR HORWELL: Having dealt with the relevant authorities, the  
23           present case:

24           "When applying these principles in the present case  
25           two factual features of cardinal importance stand out.

1 This case does not fall on the 'omissions' side of the  
2 somewhat imprecise boundary line separating liability  
3 for acts from liability for admissions. In a police  
4 case this distinction is important. Here the police are  
5 not sought to be made liable for failure to carry out  
6 their police duties properly. This is not a case such  
7 as Hill ... where liability was sought to be imposed on  
8 the police in respect of an alleged failure to  
9 investigate the Sutcliffe murders properly. In the  
10 present case the police authorities were in possession  
11 of a gun and ammunition. They took the positive step of  
12 providing [the PC] with access to that gun. [He] did  
13 not break into the strongbox and steal [it]. The police  
14 authorities gave him the key. True, [he] disobeyed  
15 orders in taking the gun as he did. But the fact  
16 remains that the police authorities chose to entrust  
17 [him], who was on the island by himself, with ready  
18 access to a weapon and the ammunition needed for its  
19 use. The question is whether in taking that positive  
20 step the ... police ... owed [the victim] a relevant  
21 duty."

22 SIR MICHAEL WRIGHT: Yes, it's another example of a positive  
23 step.

24 MR HORWELL: Yes, and if we go to the bottom of that page,  
25 paragraph 37:

1            "In the present case the police authorities plainly  
2            owed a duty to take reasonable care to see that police  
3            officers to whom they entrusted firearms were competent  
4            and suitable. But to whom was that duty owed ..."

5        SIR MICHAEL WRIGHT: By parity of reasoning, if they took  
6            the step to fire canisters into a house, they owed a  
7            positive duty to ensure that such precautions as could  
8            be taken were taken to ensure the house didn't catch  
9            fire.

10       MR HORWELL: Yes, that's from Rigby, of course.

11            So the duty of care that was owed to the victim  
12            wasn't a duty owed to the victim himself. It was a duty  
13            owed to the public. All that Hartwell is an authority  
14            for is that the police owe the public a duty to  
15            ensure --

16        SIR MICHAEL WRIGHT: To those who were within the reasonable  
17            contemplation of the people taking the decision. So  
18            it's not necessarily the public at large, it's the  
19            people into whose contact that particular officer could  
20            be expected to come.

21        MR HORWELL: Yes, which in this case was in fact the public  
22            at large.

23        SIR MICHAEL WRIGHT: Well, it was the customers in the bar,  
24            anyway, if nothing else. Yes. I am not saying that you  
25            would necessarily have had a different result if he had

1           gone off around the other side of the island and shot  
2           somebody else. He would have had the same result. It's  
3           a question of what's foreseeable.

4 MR HORWELL: Yes. In fact, I am reminded, if we carry on,  
5           at paragraph 39 we do have articulated by the court the  
6           actual duty.

7 SIR MICHAEL WRIGHT: Yes.

8 MR HORWELL: "When entrusting a police officer with a gun,  
9           the police authorities owe to the public at large a duty  
10          to take reasonable care to see the officer is a suitable  
11          person."

12                 So it is as wide as I had suggested.

13 SIR MICHAEL WRIGHT: Because they have taken a positive step  
14          and put a dangerous article into the hands of  
15          a dangerous person, yes.

16 MR HORWELL: Yes, so by analogy if C2 and C12 had been  
17          incompetent, dangerous police officers, of which not  
18          only is there no evidence but all of the evidence is to  
19          the contrary, there would have been a duty in those  
20          circumstances owed to the public at large and therefore  
21          of course Mr de Menezes.

22 SIR MICHAEL WRIGHT: Yes.

23 MR HORWELL: Before we leave this particular line of  
24          authority, it again may be instructive to note that the  
25          duty in Rigby was to the owner of the premises, not to

1 the psychopath inside. So it's to the owner of the  
2 property, not to the suspect, if that's the right word,  
3 the criminal in the building.

4 If we now turn to the numerically greater  
5 authorities that support our proposition, we can see  
6 exactly how wide-ranging they are. If I could, for ease  
7 of reference, refer you to our written document.

8 SIR MICHAEL WRIGHT: Yes, I have it out.

9 MR HORWELL: If we start at page 44 it will be a lot  
10 quicker. As I have said, I am only going to refer to  
11 six or seven cases, and I'll do so briefly. They  
12 illustrate the significant reluctance of the courts to  
13 impose a duty of care upon the police in relation to  
14 suspects.

15 If we start at page 44 with L and P, L was the  
16 father of a daughter, and the mother falsely accused P  
17 of abusing the daughter. It's not only the mother that  
18 behaved improperly. There were serious and supported  
19 allegations made against the police in that case, they  
20 tried to trick P into making a confession.

21 The relevant part of the judgment, if we go to  
22 page 45 of our written argument, paragraph 19 of the  
23 judgment:

24 "Mr Faulks contended that the learned judge was  
25 correct to hold that no duty of care was owed to the

1 father in negligence as there was an insufficient  
2 relationship of proximity with him. The second  
3 appellant was a suspect in a potential crime. He was  
4 being interviewed as such. It cannot objectively be  
5 said that there was any assumption of responsibility to  
6 him when judged against that context. The relationship  
7 between police officer and victim is one of conflict or  
8 potential conflict. The class which the second  
9 appellant belonged, namely potential suspects of crime,  
10 is too wide for a relationship of proximity to exist."

11 Now, it is again worth bearing in mind that, at the  
12 time of this impropriety, P was in custody at the police  
13 station, being interviewed, and notwithstanding the fact  
14 that the police had arrested him, placed him in custody,  
15 and were interviewing him, notwithstanding that  
16 relationship and that assumption -- one could argue --  
17 of some responsibility, the court held that the  
18 relationship was not sufficiently proximate for there to  
19 be a duty of care.

20 SIR MICHAEL WRIGHT: That part of the judgment

21 Sir Philip Otton upheld.

22 MR HORWELL: Yes.

23 SIR MICHAEL WRIGHT: He went on to say, however, that there  
24 was another aspect which effectively meant that the  
25 appeal was allowed.

1 MR HORWELL: Yes, but it's a different duty of care. It  
2 arose, I believe, once P was no longer a suspect. It  
3 was the relationship they owed to him when considering  
4 what to do in relation to the daughter.

5 I appreciate of course there is no firearms element,  
6 but to have a man arrested and in your custody --

7 SIR MICHAEL WRIGHT: While he was a suspect they owed him no  
8 duty. Thereafter, what the police were really -- once  
9 they have eliminated that, they had gone on to consider  
10 what you might call the family relationship aspect of  
11 the case and at that stage a duty of care arose.

12 MR HORWELL: Yes.

13 SIR MICHAEL WRIGHT: I see.

14 MR HORWELL: The point is repeated, and I can deal with this  
15 very quickly, over the page to 46, the authority of  
16 Vellino is referred to over towards the bottom of the  
17 page. Lord Justice Schiemann dealt with a very similar  
18 principle, namely the relationship that the police owe  
19 to a person arrested.

20 This is the specific duty of care that is owed to  
21 somebody in detention. If one goes over the page to 47,  
22 middle of the page, paragraph 15 of the judgment:

23 "For my part I am content to assume without so  
24 deciding that when a police officer arrests a citizen,  
25 the police officer puts himself in a relationship with

1           that prisoner which can involve the police officer in  
2           having some duties for the breach of which the prisoner  
3           can sue. But in every case, one has to identify the  
4           particular duty which it is that has allegedly been  
5           broken."

6           To the bottom of the page, four lines up from the  
7           bottom:

8           "It is not the arrest which gives rise to the duty  
9           of care to the man. It is his detention."

10       SIR MICHAEL WRIGHT: The two things may be coincidental of  
11       course.

12       MR HORWELL: Yes, but the duty of care referred to here is  
13       the duty to look after the prisoner properly at the  
14       police station: which cells you put him in, how do you  
15       care for him.

16       SIR MICHAEL WRIGHT: Yes, it's the element of detention that  
17       gives rise to the duty of care.

18       MR HORWELL: Yes.

19       SIR MICHAEL WRIGHT: If you are arrested and then bailed,  
20       there is no special duty.

21       MR HORWELL: No.

22       SIR MICHAEL WRIGHT: It's, as you say, keeping him in proper  
23       accommodation.

24       MR HORWELL: Yes, but it's not even the arrest that creates  
25       the duty. It's the detention. One follows the other

1           ordinarily, but it's an important distinction that was  
2           made in Vellino, in our submission.

3   SIR MICHAEL WRIGHT:   Yes.

4   MR HORWELL:   So not even a duty owed up until the time of  
5           arrest, and not only the arrest creates the duty,  
6           an inevitable consequence of an arrest is detention, of  
7           course, but --

8   SIR MICHAEL WRIGHT:   What about helping the police with  
9           their enquiries?

10   MR HORWELL:   It would depend on the circumstances.

11   SIR MICHAEL WRIGHT:   Police officers are usually careful to  
12           say, "You are free to go if you want to".

13   MR HORWELL:   Yes, but in this particular circumstance not  
14           even the arrest creates a duty of care --

15   SIR MICHAEL WRIGHT:   It's the consequential detention.

16   MR HORWELL:   Yes, and that's an important distinction.

17           Page 48, reference has been made to Farrell this  
18           morning. This is the Irish case in which the Court of  
19           Appeal held that the Ministry of Defence and soldiers  
20           for whose actions it is responsible owed a duty to take  
21           reasonable care in the conduct of security operations to  
22           every person, including actual and suspected offenders.

23           That is the part that was referred to this morning.  
24           We need, in our submission, to see what Lord Dilhorne  
25           had to say about that decision of the Court of Appeal in

1 Ireland, because over the page to 49, that quotation at  
2 the top of the page, last three lines:

3 "I do not propose to comment on the views expressed  
4 on this question by the Court of Appeal, but it is not  
5 to be assumed that I agree with them."

6 I hope it is not being fanciful or overoptimistic to  
7 suggest that it is clear what Lord Dilhorne meant by  
8 that comment.

9 SIR MICHAEL WRIGHT: It depends what submissions were  
10 addressed to their Lordships' House. It may be that the  
11 parties had come to the conclusion that the other aspect  
12 of the appeal was all they needed to argue.

13 MR HORWELL: I am sure that was certainly the reasoning  
14 behind the decision, but it is a clear indication from  
15 that level that the decision from the Irish Court of  
16 Appeal --

17 SIR MICHAEL WRIGHT: He was not to be taken to be approving.  
18 That's about as far as it goes.

19 MR HORWELL: Yes, but it is worth bearing in mind when the  
20 case itself is referred to.

21 Another Irish case, page 57 of our document,  
22 Fitzsimmons. This was a bank robbery, and the police  
23 were waiting in the bank, or the Post Office as it was,  
24 for the robbers.

25 This was a decision of Lord Justice Carswell, as he

1           then was, and he dealt with the decision which did not  
2           involve a duty of care.

3   SIR MICHAEL WRIGHT:   Self-defence succeeded in this case.

4   MR HORWELL:   Yes.   He then went on to deal, even though he  
5           didn't have to, it's one of those occasions of a judge  
6           not having to deal with a point, but deciding --

7   SIR MICHAEL WRIGHT:   Which means it's obiter.

8   MR HORWELL:   Yes, but from that source, I think we can use  
9           it with some effect, I would like to think.

10           What he had to say, if one starts at the bottom of  
11           page 58, five lines up from the bottom:

12           "The mere foreseeability of likely harm in the  
13           circumstances was not by itself enough to give rise to  
14           the duty [an obvious point but one that should not be  
15           lost sight of].   Some further ingredient must be present  
16           to establish the requisite proximity of relationship  
17           between the plaintiff and the defendant."

18           Over the page, he referred to *Alexandrou v Oxford*,  
19           that's the shop premises and the burglar alarm, no duty  
20           of care owed there.

21           Having referred to this, he then in his speech went  
22           on to, in his judgment, the part that is underlined on  
23           that page:

24           "If the deceased in the present case had been  
25           a member of the public accidentally hit by a bullet

1           fired by the police at the robbers, it would appear  
2           arguable whether on the proper application of this  
3           principle, he could have recovered against the police in  
4           an action for negligence. If a member of the public  
5           could not so succeed, it is difficult to see how  
6           a higher duty could be owed to a fleeing criminal."

7   SIR MICHAEL WRIGHT: Lord Carswell didn't actually have the  
8           hardihood to decide the point then and there.

9   MR HORWELL: No. Well, he couldn't because --

10   SIR MICHAEL WRIGHT: It wasn't in front of him.

11   MR HORWELL: For the decision, but it is an instructive  
12           comment by him as to the principle that we advance.

13           Two cases then follow at pages 60 and 61 of our  
14           written submissions, Elguzouli and Kumar. Elguzouli was  
15           not a police case, it's a CPS case. But it's  
16           instructive again, we submit, to bear in mind that the  
17           Court of Appeal decided in Elguzouli for public policy  
18           reasons that the Crown Prosecution Service did not owe  
19           a duty of care to those it was considering as to whether  
20           or not they should be prosecuted.

21           It's helpful, we submit, to bear in mind again the  
22           extreme nature of the facts in Elguzouli. The Crown  
23           Prosecution Service acted in a poor way to that  
24           individual, as they did in Kumar. But no duty of care.

25           The recent case in the House of Lords, Van Colle and

1 Smith, we set out the facts and the judgments from  
2 page 67 in our written argument. One can, on occasions,  
3 spend too much time on the principles and the law and  
4 forget the facts. The facts in Smith, as we have  
5 suggested, are extreme, and Lord Brown, at the top of  
6 our page 68, described them as being "really very  
7 strong".

8 This was a man who had been assaulted because he  
9 wished to end his relationship with another man, had  
10 been assaulted, reported that assault to the police. He  
11 had moved away to Brighton. He received extremely  
12 threatening messages by telephone, text and internet,  
13 "You are dead", "Look out for yourself, psycho is  
14 coming", "I am looking to kill you, no compromises",  
15 "I was in the pub last night with a carving knife, it's  
16 a shame I missed you".

17 He reported those messages and the history to the  
18 Brighton police. They said it would take four weeks to  
19 trace the calls. He then goes to London. The messages  
20 continued. He reports the matter to the London police.  
21 They say, "Contact the Brighton police". He contacts  
22 the Brighton police. Not a lot of interest is shown by  
23 the inspector, who doesn't even bother to look at his  
24 phone to see the actual text messages. He's simply  
25 told: well, phone 999 if there is a problem. And he is

1           then assaulted with a hammer, receiving significant  
2           brain damage.

3           Now, those are, as we suggest, extreme  
4           circumstances, and the House of Lords held that no duty  
5           of care arose. Such is the importance of this  
6           principle.

7           Can I finally -- we did not deal with this in our  
8           written submissions. It's a case which has only just  
9           been added. If your authorities file has been added to  
10          last night or this morning, do you have a tab 59?

11       SIR MICHAEL WRIGHT: Heagren?

12       MR HORWELL: Yes, thank you, that's the case. The facts are  
13          very simple. If we go to the first page of the judgment  
14          of Lord Justice Kennedy. The police had information, it  
15          only takes a few moments to read:

16               "... 'a named person, and up to four other men,  
17          would be knee-capped by shooters ... shooting was to be  
18          carried out by Peter [who] had a sawn-off shotgun in  
19          a garage. He would be assisted by a man called Jim of  
20          Canons Walk in Thetford'."

21          Well, the police went armed to Canons Walk in  
22          Thetford to arrest Jim, who was Jim Heagren. The  
23          arrest, as one would expect, was somewhat dramatic in  
24          the circumstances. The information was false, and  
25          Mr Heagren wanted to sue. Unfortunately the pages

1 aren't numbered.

2 If the start of the judgment we call page 1, two  
3 pages on to page 3, the ground of appeal which Mr Money  
4 put in the forefront. Do you have that? We don't have  
5 paragraphs either. (Pause). Page 4 of the actual  
6 report, the third page of the written judgment.

7 SIR MICHAEL WRIGHT: Thank you, wait a minute. I have  
8 execution of warrant.

9 MR HORWELL: That's it.

10 SIR MICHAEL WRIGHT: Thank you. Yes, I see. Yes, yes.

11 MR HORWELL: Now, obviously the point was taken that there  
12 was no duty of care, and one can see how  
13 Lord Justice Kennedy dismissed any argument to suggest  
14 that there was a duty of care:

15 "In my judgment the judge was right to withdraw that  
16 issue, as can be seen from the decision of the House of  
17 Lords in Hill ... In that case Lord Keith, with whom  
18 three other members of the House expressly agreed, made  
19 it clear beyond argument that an action for damages in  
20 negligence against the police simply cannot be sustained  
21 in circumstances of the kind with which we are concerned  
22 in the present case."

23 The circumstances in the present case were false  
24 information upon which the police acted, and they  
25 arrested Mr Heagren as a suspect, and no duty of care

1           was owed. That was an arrest in relation to --

2   SIR MICHAEL WRIGHT: There was a claim in trespass, wasn't  
3           there?

4   MR HORWELL: As inevitably is the case in these actions,  
5           there were claims under every heading conceivable, but  
6           that part of the judgment dealt with negligence.

7           We have sought to identify the difficulty in the  
8           argument that must be advanced by the family by seeking  
9           to turn it round and ask: what is the duty of care that  
10          the police owe to a suspected suicide bomber? We  
11          haven't been able to articulate a sensible duty of care.

12          From the argument that has been advanced at times,  
13          indeed it's an observation that your own counsel made in  
14          their written document, can it be the case that a duty  
15          of care is owed to an innocent person but not to  
16          a guilty person? Well, that's re-writing the law of  
17          negligence, in our submission. The existence of a duty  
18          of care cannot depend on the actual status of  
19          an individual. If there is a duty of care, it is owed  
20          to the class of suspect. It cannot depend upon whether  
21          that suspect is ultimately acquitted or convicted.  
22          There cannot be a post facto assessment as to whether or  
23          not there is a duty of care.

24          That is why this principle has to be examined from  
25          the perspective that Mr de Menezes was a suspected

1 suicide bomber. That is why we submit not only on all  
2 of the principles that we have identified in the  
3 authorities, but when one looks at the facts in this  
4 case, it isn't possible to articulate what such a duty  
5 of care would be.

6 That is as good a reason as any as we have  
7 identified so far as to suggesting why there was not  
8 a duty of care in this case.

9 Now, it's a topic that takes a lot of time because  
10 it is such a complex topic, but we do submit that both  
11 on legal principle and on the facts of this case, there  
12 was not a duty of care owed to Mr de Menezes.

13 SIR MICHAEL WRIGHT: At any stage?

14 MR HORWELL: At any stage.

15 SIR MICHAEL WRIGHT: What did it mean, then, when DAC Dick  
16 said, "Stop him"?

17 MR HORWELL: When she said, "Stop him" --

18 SIR MICHAEL WRIGHT: What she said and what a lot of other  
19 officers said is: detain or arrest, arrest or detain.

20 MR HORWELL: As we have understood the evidence, there has  
21 been no misunderstanding whatsoever, the words "stop  
22 him" meant armed intervention.

23 SIR MICHAEL WRIGHT: Not worried about that for this  
24 purpose, but what I think you may be saying is that on  
25 your -- on the principles upon which you approach, and

1           indeed probably not even then, but the earliest point at  
2           which a duty of care could have arisen is when they  
3           actually detained him.

4   MR HORWELL:   Yes.

5   SIR MICHAEL WRIGHT:   And not right up to that moment.

6   MR HORWELL:   Yes, and that is based on authority.

7   SIR MICHAEL WRIGHT:   Indeed on your argument, in this  
8           context, not even then.

9   MR HORWELL:   Not even the arrest would have introduced  
10           a duty of care.   The moment he was detained ...

11   SIR MICHAEL WRIGHT:   We never got to that in this case,  
12           I appreciate that.

13   MR HORWELL:   That's right.

14   SIR MICHAEL WRIGHT:   What you are putting to me is if they  
15           had not fired, the duty of care only arises, never mind  
16           the formalities of arrest, it's when they actually  
17           physically detain him, when they get hold of him.

18   MR HORWELL:   Yes, and that is firmly based on authority.

19   SIR MICHAEL WRIGHT:   Arguably, Ivor had done it.   This may  
20           be a problem of the variety of angels dancing on the  
21           head of a pin, but nevertheless, on the evidence Ivor  
22           had done it.

23   MR HORWELL:   An arrest is a continuing process.   One cannot  
24           divide arrest and detention in a matter of a moment.  
25           The arrest of this man was what took place in that

1 carriage and detention hadn't even started.

2 SIR MICHAEL WRIGHT: Yes, all right. I understand what you  
3 say.

4 MR HORWELL: If one refers back to the authorities that we  
5 have looked at, at some speed, it is a duty of care that  
6 has been identified and defined as a duty to care for  
7 the prisoner's welfare once in detention. And therefore  
8 what cell do you put him in, what facilities do you give  
9 him, suicide risk and so forth. That is the duty of  
10 care that the police owe to a detainee.

11 SIR MICHAEL WRIGHT: But on the analogy of the cases you  
12 have already cited to me, and going right away from the  
13 circumstances of this case, if an officer had been  
14 ordered to pursue -- if an officer of the category of  
15 Constable Laurent in the British Virgin Islands case,  
16 had been sent off to detain Mr de Menezes, if you like,  
17 on the suspicion that he is a suicide bomber, because of  
18 Mr Laurent's unhappy tendencies to misuse firearms, the  
19 act of negligence is dispatching him.

20 MR HORWELL: Yes, it's a completely different duty of care.

21 SIR MICHAEL WRIGHT: That's the point.

22 MR HORWELL: If the operations room had knowingly and  
23 deliberately used the most incompetent officers that  
24 they could find, then that case and the duty identified  
25 in that case would be manifest.

1 SIR MICHAEL WRIGHT: I'm troubled by the concept of  
2 a different duty of care. The duty of care is  
3 universal. It's the question of how it's applied in any  
4 given circumstances, isn't it?

5 MR HORWELL: The duty of care identified in that authority  
6 is a duty to ensure that only proper and competent  
7 police officers are given access to firearms. That is  
8 a duty owed to the public at large. This is  
9 a completely different circumstance.

10 SIR MICHAEL WRIGHT: Duty owed to an individual.

11 MR HORWELL: Yes.

12 SIR MICHAEL WRIGHT: All right, yes.

13 MR HORWELL: It may even be earlier than that, that in that  
14 Privy Council case, the duty identified by the  
15 Privy Council was giving the firearm to the individual  
16 in the first place, and so dispatching doesn't even come  
17 into it. That is the duty that the police owe to the  
18 public at large. These are wholly different  
19 circumstances.

20 SIR MICHAEL WRIGHT: I follow the distinction you are  
21 drawing. Yes, very well.

22 MR HORWELL: Having spent so much time on the first part of  
23 Adomako --

24 SIR MICHAEL WRIGHT: As you rightly say, it is the most  
25 complex part.

1 MR HORWELL: I am going to deal with ingredients two to four  
2 very quickly because of course Mr Perry will deal with  
3 the detail tomorrow. I hope I don't do any injustice by  
4 dealing with it so quickly --

5 SIR MICHAEL WRIGHT: You will hear no complaints from me if  
6 you and Mr Perry are sharing the burden.

7 MR HORWELL: We are, but I do believe I can deal with it  
8 quickly because of the paucity of evidence that there is  
9 in relation to ingredients 2, 3 and 4.

10 If there was a duty of care, Mr Mansfield has sought  
11 to suggest that it arose at 4.55 in the morning when the  
12 strategy was set. Well, that on any analysis is far too  
13 early and far too remote, in our submission. The  
14 strategy that Mr McDowall set was a fit and proper  
15 strategy for these circumstances.

16 We would submit, starting with and looking at  
17 McDowall, thereafter he remained too remote. The  
18 criticisms continue. They appear to ignore the fact  
19 that, on the evidence, Mr McDowall kept in touch with  
20 what was happening, notwithstanding all of his other  
21 responsibilities and duties that day, he kept in touch,  
22 he had meetings, and he was kept informed.

23 We submit there is no evidence, and certainly  
24 insufficient, that if there was a duty Mr McDowall  
25 breached it. It simply isn't there.

1           Mr Esposito: too remote and far from such a duty, we  
2           submit. His responsibility that day was to give advice.  
3           There is no evidence whatsoever that the advice he gave  
4           was defective. There is no evidence that he was not  
5           keeping in contact with the firearms team, and when one  
6           examines the critical moments as to whether or not C019  
7           could make the intervention, there is no evidence to  
8           suggest that Mr Esposito was doing anything other than  
9           passing on the information that he was receiving.

10           Again, no breach.

11           And in respect of Dick, who was leading the team in  
12           the operations room, there is no evidence that she was  
13           negligent in failing to be kept informed. She was in  
14           the operations room and available for anyone to approach  
15           and inform and, if there is fault, and I am not  
16           suggesting that there was, in not informing her of  
17           a development, it's not her responsibility. This idea  
18           that senior police officers can be responsible  
19           personally for every single part of a complex operation  
20           such as this is not based on common sense.

21           Again, if we examine the critical moments, Dick's  
22           reluctance to use S012 is sound. The court has heard so  
23           much evidence as to why C019 were eminently to be  
24           preferred. Again, I remind you, as we reminded  
25           ourselves earlier today, as far as Dick was concerned,

1 once in eight years S012 had been used to intervene.

2 That's a judgment call. That's not negligence. And  
3 when she was told that C019 could not make the  
4 intervention, she was flexible enough to order S012 to  
5 intervene, and as we know, within moments she was told  
6 C019 were available and she countermanded her order.

7 It is quite wrong to approach the issue of fault  
8 looking backwards. Each of these decisions has to be  
9 examined at the time they were made, and in our  
10 submission there is no evidence that Dick was at fault  
11 and therefore breached any duty of care that she might  
12 have owed. All of the authorities that we have cited --  
13 on this occasion I am not obviously going to refer to  
14 them -- all of those authorities about police officers  
15 having to make split-second decisions and the sensible  
16 manner in which the courts have to examine those  
17 circumstances, there is no evidence here that she was at  
18 fault.

19 Others might have done differently. That's not  
20 negligence, never has been. These are the decisions  
21 that an extremely experienced and competent police  
22 officer made. Whatever one may say about them, they are  
23 not negligent.

24 So we submit Adomako ground number two. There is no  
25 breach even if there is a duty. We have set out in our

1 argument our submissions on causation, and perhaps the  
2 most obvious criticism that has been made: why didn't  
3 you get the firearms teams to the TA Centre at  
4 an earlier stage? When you look at the evidence, that  
5 was not causative of death.

6 SIR MICHAEL WRIGHT: What, because they all got there by  
7 half past nine?

8 MR HORWELL: Yes, they were there, and the evidence as we  
9 have set out in our written submissions, the evidence of  
10 Dick and Boutcher that the location of C019 made no  
11 difference to the decisions that were made. There is  
12 an expectation that firearms officers will be where they  
13 are told to be --

14 SIR MICHAEL WRIGHT: If you have to narrow it down,  
15 I suppose, to the closest point at which something went  
16 wrong, it would be, I suppose, the fact that for  
17 whatever reason DAC Dick was not aware that -- was not  
18 made aware that Mr de Menezes had left the house until  
19 he had passed the potential pinch point, if you like, at  
20 the TA Centre, by which time of course it was too late.

21 MR HORWELL: If that was a fault, it is not the fault of  
22 Dick.

23 SIR MICHAEL WRIGHT: That's what I mean, it's a failure of  
24 execution or a failure of -- yes, failure of execution  
25 of McDowall's instructions, in the sense that the person

1           who was in a position to order the intervention wasn't  
2           given the necessary information until it was too late.

3           Yes?

4   MR HORWELL:   Yes.  If an fault --

5   SIR MICHAEL WRIGHT:  That may well be something from  
6           a narrative verdict, it may well be, I don't know,  
7           I want to ask you about that in a moment, but not on any  
8           view a matter within DAC Dick's --

9   MR HORWELL:   Certainly not --

10  SIR MICHAEL WRIGHT:  -- or Esposito or McDowall.

11  MR HORWELL:   We agree, but as you have raised that point on  
12           the evidence, it comes back to where we started these  
13           submissions this afternoon, namely you cannot order  
14           an armed intervention until a certain threshold of  
15           identification has been reached.

16  SIR MICHAEL WRIGHT:  But I am not actually trying to be  
17           contentious.

18  MR HORWELL:   I know you are not.

19  SIR MICHAEL WRIGHT:  From the point of view of gross  
20           negligence, manslaughter, in one sense it's a complete  
21           answer on this particular narrow aspect of the case.

22  MR HORWELL:   Yes.

23  SIR MICHAEL WRIGHT:  On the other hand, from the point of  
24           view of the questions left to the jury for a narrative  
25           verdict, the existence or otherwise of a duty of care

1           and the degree of negligence, if any, that may have led  
2           -- it doesn't much matter. It's a question of the jury  
3           disposing of or dealing with the central factual issues  
4           in the case. Was it an error, was it a mistake,  
5           whatever you like to call it, was it a lost opportunity,  
6           which is the most appropriate phrase to be used in  
7           a narrative verdict of this kind. That is still open to  
8           them.

9   MR HORWELL: Potentially, yes. I would prefer to deal with  
10           that as a separate point tomorrow afternoon.

11   SIR MICHAEL WRIGHT: You can. I am only simply illustrating  
12           that there are other questions to be asked about that.

13   MR HORWELL: Certainly as a principle that is right, of  
14           course it is. If we simply look at the issue of gross  
15           negligence/manslaughter as set out by the family --

16   SIR MICHAEL WRIGHT: Then I have your point on that.

17   MR HORWELL: -- then it does not arise, and that's what for  
18           the moment we have an interest in. I really can be  
19           brief on ground number four. Even if we were to fail on  
20           everything else, how on earth, your having seen, the  
21           jury having seen the quality and the dedication and the  
22           experience and the competence of these police officers,  
23           how on earth can their decisions, their judgment calls,  
24           be said to be "criminal", "wicked", "heinous", and so  
25           forth.

1 SIR MICHAEL WRIGHT: Well, you have embarked on an exercise  
2 I was about to ask you to take on, to give me  
3 an anthology of the epithets that have been applied in  
4 order to justify the finding of gross. I know atrocious  
5 is one of them. Repeat what you have just said.

6 MR HORWELL: We have set them out at some length. But  
7 "criminal", "wicked", "truly exceptionally bad",  
8 "heinous", "properly condemned as criminal".  
9 We get nowhere near, on the evidence.

10 SIR MICHAEL WRIGHT: What do you say about the fact that it  
11 is said in Adomako that it is a matter supremely for the  
12 jury?

13 MR HORWELL: Everything in a criminal case is supremely  
14 a matter for the jury. That does not absolve the judge  
15 of the responsibility of deciding whether there is  
16 sufficient evidence for the jury to consider that point.

17 SIR MICHAEL WRIGHT: Am I not taking a subjective judgment  
18 as to what I think it is?

19 MR HORWELL: No. You are taking an objective look at the  
20 evidence, as every judge does in a criminal case at the  
21 close of the prosecution case.

22 SIR MICHAEL WRIGHT: Yes, this isn't Galbraith, is it?  
23 Not in that sense. This is an assessment of the --  
24 well, I suppose it is Galbraith in a sense, it's  
25 a question of looking at the evidence to say even if all

1           that is true, does it objectively viewed amount to what  
2           the case law says has to be shown?

3   MR HORWELL:   Yes.

4   SIR MICHAEL WRIGHT:   It's not quite Galbraith because  
5           Galbraith hugely depends on the belief or disbelief in  
6           the evidence.

7   MR HORWELL:   Yes, but you perform the function that any  
8           criminal judge would perform at this stage of deciding  
9           whether there is sufficient evidence on an ingredient of  
10          an offence, to go before a jury for a jury to decide so  
11          that they are sure that that ingredient has been proved.  
12          And all that is meant, we would submit, in Adomako, that  
13          of course it's supremely a matter for the jury.  
14          Dishonesty in a shoplifting case is supremely a matter  
15          for the jury, but if the judge doesn't find enough  
16          evidence, he withdraws it.

17   SIR MICHAEL WRIGHT:   I know.   I'm just perceiving  
18          a distinction.   So often Galbraith is a question of  
19          the tenuousness or otherwise of the evidence.   Here we  
20          are not worried about the tenuousness of the evidence.  
21          We are looking at the evidence square on and saying what  
22          does it come to.   Yes?

23   MR HORWELL:   Yes.

24   SIR MICHAEL WRIGHT:   If you like, as a matter of policy,  
25          I am exercising a filter, as a matter of the proper use

1 of words.

2 MR HORWELL: Yes, and again to quote some of the authorities  
3 that have been cited, if a Coroner were to decide that,  
4 if a jury were to return a finding to the criminal  
5 standard on a particular ingredient of an offence, if  
6 a Coroner were to find that such a finding would be  
7 perverse, we submit that, as he would have to under  
8 Galbraith, whatever the test he was applying, the  
9 Coroner would be under a positive duty to ensure that  
10 that matter was not left.

11 SIR MICHAEL WRIGHT: It should be the other way around. If  
12 the Coroner decided to leave such matters to a jury on  
13 the basis that they could give rise to a verdict of what  
14 in effect would be gross negligence/manslaughter, then  
15 it's capable of being reviewed. The decision to leave  
16 it.

17 MR HORWELL: Yes. It would be, because it doesn't matter  
18 what the ingredient is, it has to pass the test, the  
19 evidential test, and the element of grossness is  
20 an ingredient of the offence, like any other ingredient  
21 of any other offence, and the judge or the Coroner has  
22 to decide is there sufficient evidence for that  
23 ingredient to be left to a jury. So in that sense there  
24 is nothing unusual about the element of grossness, it's  
25 simply another ingredient of another offence, and in our

1 submission when you look at it objectively, the evidence  
2 comes nowhere near.

3 And those are our submissions.

4 SIR MICHAEL WRIGHT: Thank you very much, Mr Horwell, your  
5 timing is impeccable. We will have another ten minutes.  
6 We will go to quarter to. Mr Stern, you are a very long  
7 way back. Would you find it easier and more convenient  
8 if I asked you to move up?

9 MR STERN: Not at all, if it would be more convenient for  
10 you, sir.

11 SIR MICHAEL WRIGHT: I am thinking of you.

12 MR STERN: I am fine where I am.

13 SIR MICHAEL WRIGHT: What I am going to suggest, if  
14 Mr Horwell and others don't mind, if anybody wants to  
15 come up from the back row for the purpose of making  
16 submissions, I would be more than happy. You have ten  
17 minutes to do a bit of moving around if you would like  
18 to. If you prefer to do it from the front row, please  
19 do.

20 MR STERN: I am perfectly okay here.

21 SIR MICHAEL WRIGHT: Up to you. All right, ten to.

22 (3.40 pm)

23 (A short break)

24 (3.50 pm)

25

1 Submissions by MR STERN

2 SIR MICHAEL WRIGHT: Yes, Mr Stern.

3 MR STERN: Sir, we make three submissions on behalf of C2  
4 and C12.

5 The first is that there is no evidence or no  
6 sufficient evidence to leave unlawful killing to the  
7 jury. The second is that there is sufficient evidence  
8 and the jury ought to be left with the two potential  
9 verdicts, lawful killing and open verdict, in short form  
10 in relation to the firearms officers and the shots that  
11 were fired.

12 SIR MICHAEL WRIGHT: For lawful and open? The second of  
13 those sounds like a contradiction in terms.

14 MR STERN: Well --

15 SIR MICHAEL WRIGHT: If you have sufficient evidence for  
16 an open verdict.

17 MR STERN: I understand that, but it's one that ought to be  
18 left.

19 SIR MICHAEL WRIGHT: Yes, all right.

20 MR STERN: The third submission is that, dependent on the  
21 above, obviously, there are no narrative questions that  
22 are required for the actions on the carriage as they are  
23 subsumed within the short-form verdict.

24 SIR MICHAEL WRIGHT: I see that, yes. No basis for  
25 a narrative question?

1 MR STERN: No basis, yes. I make no submissions about  
2 narratives in relation to the command team and other  
3 aspects.

4 SIR MICHAEL WRIGHT: I understand that.

5 MR STERN: In relation to unlawful killing, there is  
6 a single issue. That is the issue of honest belief.  
7 I think, sir, you said that it was conceded.

8 SIR MICHAEL WRIGHT: Honest belief about his identity.

9 MR STERN: Exactly, I just wanted to clarify that.

10 SIR MICHAEL WRIGHT: That's what I meant, about his identity  
11 as being one of the previous day's attempted suicide  
12 bombers.

13 MR STERN: Exactly. Can I just stand back, as it were, from  
14 the detail of the evidence, because obviously we have  
15 heard a lot of it, and you have, I hope, had  
16 an opportunity of looking at the submissions that we  
17 have made, and indeed the fairly detailed references.

18 What you are concerned with in relation to these two  
19 firearms officers is a five to ten-second fast-moving  
20 and dynamic incident on the carriage of  
21 a London Underground train.

22 They were put as Trojan 84 described it or assessed  
23 it, as being an outrageous position.

24 SIR MICHAEL WRIGHT: Do you also agree with Mr Horwell that  
25 what he was talking about was the danger into which

1           these officers were put?

2   MR STERN:   I do.

3   SIR MICHAEL WRIGHT:  Or perceived danger, I should say.

4   MR STERN:  All of this is obviously on the basis of  
5           perceived danger.  He had said:

6           "It was a crying shame in all of this, you know.  We  
7           released 2 and 12 into an impossible situation where  
8           they had to make sense, because of the individual  
9           officer responsibility, they were given the judgment  
10          call and that is unbelievably outrageous that they  
11          should be left with that responsibility."

12          They had to stop what is accepted that they believed  
13          to be a suicide bomber who, the very day before, had  
14          sought to commit mass murder in the very same type of  
15          location.  As Lord Justice Richards said in Da Silva,  
16          paragraph 46:

17          "Once it's accepted that they honestly and genuinely  
18          believed that they were confronted by a real suicide  
19          bomber, then the only realistic judgment of their  
20          actions could be that they acted in the highest degree  
21          of courage in advancing towards him and doing what they  
22          did."

23          Clearly that may be that that included not just him  
24          being identified as a suicide bomber, but obviously  
25          believing that he --

1 SIR MICHAEL WRIGHT: The second limb.

2 MR STERN: The second limb. I come back in this overview to  
3 the very point that you made, sir, during the course of  
4 the final moments of my learned friend's submissions  
5 that if they did not honestly believe that their lives  
6 and the lives of the public were in imminent peril, then  
7 why did they shoot this man? It does not make sense.  
8 There is no basis for suggesting any alternative course  
9 that was in their minds.

10 Now, of course its right that motive is only part  
11 and parcel, but where you have here an express decision  
12 by the officers as to the reason why it is that they  
13 fired shots, then there must be some basis for  
14 undermining that and some alternative explanation put  
15 forward. In my submission, there doesn't even begin to  
16 be one here.

17 The points relied on by my learned friend today and  
18 obviously I take into account his written submissions,  
19 but we submit that these points, individually and  
20 cumulatively, could not begin to satisfy the Galbraith  
21 test of sufficiency for murder. They are essentially  
22 several isolated factors that do not rebut honest  
23 belief, and in any event, they ignore the cumulative  
24 weight of the evidence that C2 and C12 had every reason  
25 to form the honest belief that they did form.

1           The two aspects that were relied on in the Court of  
2           Appeal, the bulky jacket and the "armed police", I hope  
3           I can just paraphrase them in that way, neither of  
4           those, in our submission, constituted even prima facie  
5           evidence that the officers had lied --

6   SIR MICHAEL WRIGHT: Well, the bulky jacket does seem to  
7           have taken a bit of a back seat lately.

8   MR STERN: I was just going to say I am not going to address  
9           you any further on that because of the submissions that  
10          have, in my submission appropriately, been adopted by my  
11          learned friend Mr Mansfield today unless you wish me to.  
12          They are in our documents, they are in our submissions  
13          but I was not going to say any more about them.

14   SIR MICHAEL WRIGHT: You have the additional factor that one  
15          of the civilian witnesses whose name has now escaped me,  
16          Preston, thought that Ivor's similar denim jacket had  
17          a bulky appearance.

18   MR STERN: That's Whitby. Whitby and Preston, there are two  
19          of them in fact, and they are both set out in our  
20          submissions document.

21   SIR MICHAEL WRIGHT: Now of course we have the evidence of  
22          the officers themselves as to how it appeared to them --

23   MR STERN: Exactly, and in any event they were split second  
24          or snapshot views by them.

25                 Hopefully I can put that to one side, which leaves

1           really the issue of the "armed police", as Mr Mansfield  
2           calls it, the cameo or scenario, and the issue of  
3           confrontation which he has not enlarged upon today but  
4           is within his document.

5   SIR MICHAEL WRIGHT:   Yes.

6   MR STERN:   One of the ways in which Mr Mansfield put the  
7           matter to C12, and this is -- I'll just give you the  
8           reference and read it because it's a very short part,  
9           27 October, page 133, line 15:

10           "Question:   Do you think there is a possibility  
11           that, as you quite rightly say and I accept this, and  
12           I have given you the opportunity, as a human being you  
13           allowed fear to take over that day?

14           "Answer:   Fear was certainly present, but as regards  
15           controlling my actions, it possibly had some effect,  
16           yes.  I can't deny that.  You are asking me to recall  
17           exactly what I felt.  I felt I was going to die,  
18           certainly, and I took action in order to stop that.

19           "Question:   In other words, is there a possibility  
20           that because of the fear you felt, even that, that  
21           actually you weren't in control of assessment and your  
22           actions, the two things?

23           "Answer:   No.

24           "Question:   No?

25           "Answer:   Not at all, sir."

1           Fear does not negate honest belief. It is a --

2       SIR MICHAEL WRIGHT: It may be an explanation for it.

3       MR STERN: It may be a consequence of it.

4       SIR MICHAEL WRIGHT: No, it may be an explanation for it.

5       MR STERN: Whichever way you analyse the actions as set down  
6           by these officers, on whichever basis, there is no  
7           evidence to rebut honest belief. Even if there was  
8           a Kratos order, which there wasn't in this case and  
9           no-one suggests there was, that would still be an honest  
10          belief. Even if there was no challenge, there would  
11          still be an honest belief.

12           Sir, I want to look at the submissions document that  
13          we have prepared, beginning at page 9. I am not going  
14          to go through it all, but if I may I will just go  
15          through various parts of it, and highlights, as it were,  
16          in relation to the points that have been made in the  
17          document indeed by Mr Mansfield today.

18           Looking at the point that Mr Mansfield relies upon,  
19          the highest that this matter can be put forward is this:  
20          that even if the officers have lied, which is not  
21          accepted, that, as Mr Hilliard put in his submissions at  
22          paragraph 33(iii), that would not logically prove that  
23          there was no genuine belief in a threat any lie might  
24          have been to bolster lethal action taken in the genuine  
25          belief that there was a threat, and there is a reference

1           there to Sharman, paragraph 42, which is set out in our  
2           document.

3           If you want to look at the full context of that --

4   SIR MICHAEL WRIGHT: Of course the Divisional Court had it  
5           in mind that there are a lot of other explanations for  
6           lies.

7   MR STERN: Exactly.

8   SIR MICHAEL WRIGHT: Of which the most obvious one might be  
9           that in the awful consciousness that a man had been  
10          killed, that both of them might be aware that they had  
11          not actually followed black letter requirements of the  
12          ACPO guidance. If they had not.

13   MR STERN: Yes. Exactly. And the quote is set out more  
14          fully at page 26 in our skeleton argument for your  
15          reference.

16   SIR MICHAEL WRIGHT: Yes.

17   MR STERN: In the middle, paragraph 42 is quoted:

18           "Making every assumption against the officers that  
19          Mr Owen seeks and discounting (whether correctly or not)  
20          the problems of perceptual distortion suggested by  
21          Mr Bentley, it is equally plausible that, having  
22          honestly believed that they were under imminent threat  
23          of being shot, when they discovered that [he] had no  
24          more than a table leg, they then panicked and felt that  
25          their true recollections would not be believed."

1           That's the point you, sir, were just making.

2           "The finding (even if correct) of subsequent  
3 dishonest fabrication does not exclude it and, given all  
4 the circumstances, it does not appear to me that there  
5 is any basis for being able to rebut that possibility  
6 beyond reasonable doubt."

7           Mr Hilliard considered that there were three issues  
8 emerging from Mr Mansfield's skeleton argument that  
9 merited detailed consideration. There are only two that  
10 remain. The first he has set out at paragraph 33,  
11 page 21, and I adopt the arguments and the submissions  
12 that he has set out there in their entirety, numbers 1  
13 to 4.

14 SIR MICHAEL WRIGHT: Yes. Well, this is a reflection of the  
15 appendix of Da Silva to a very large extent.

16 MR STERN: Yes, but they are the points that he makes and  
17 I rely on them.

18           Insofar as this aspect is concerned, that first  
19 argument, the "armed police" cameo scenario, we have  
20 dealt with it at paragraph 11, which is page 21. The  
21 first point in relation to this is that there is  
22 evidence, safe evidence, that each of the constituent  
23 elements of that cameo are in fact supported by other  
24 evidence in the case.

25           The "armed police" or "police" is heard by a number

1 of witnesses and we have set them out at paragraph 12.  
2 Ivor heard shouting throughout the incident. Most  
3 importantly, Ivor hears the word "police" after the  
4 shouts of "he's here" but before he grabs Mr de Menezes.  
5 So in our submission that is entirely consistent with  
6 C12's account.

7 You have the references there, and I can take you to  
8 them if you wish, but again I was not proposing to take  
9 you to each of these references.

10 Geoff. He said that there was a noise within which  
11 he heard the word "police". It was audible to him. He  
12 said it was outside the carriage but very, very quickly  
13 outside became inside, which is why I have started with  
14 you are talking about an incident that is seconds, and  
15 therefore when you look at what Ivor said and when you  
16 look at what Geoff said, they are both, in our  
17 submission, consistent with what C12 said.

18 Sir, I'll just refer to you Terry, if I may. I have  
19 got the reference there, as you can see, and it begins  
20 in this way:

21 "So the order in which you put it in your statement  
22 is that there are shouts of 'Police' and 'Armed police'  
23 prior to you shouting 'Armed police'?"

24 "Answer: Yes.

25 "Question: Is that the order in which you recall it

1 now?

2 "Answer: Yes.

3 "Question: Familiar voices shouting those  
4 instructions, I presume you didn't know anybody on the  
5 tube?

6 "Answer: That's correct, sir.

7 "Question: So when you say 'familiar voices', do  
8 you mean the voices of those police officers who were on  
9 your team?

10 "Answer: Yes.

11 So that certainly narrows that down as to who it was  
12 who was shouting it. Over the page, page 174:

13 "Obviously at the time and you have put it in your  
14 statement, you were only really aware of C2's presence  
15 as I understand it?

16 "Answer: No, I was aware of other officers being  
17 present, but I was focused on C2, because he was so  
18 close to me."

19 Then at line 19:

20 "I see. Those shouts that you heard, or challenges  
21 of 'Police' and 'Armed police', were before you got on  
22 to the carriage?

23 "Answer: Yes.

24 Then he says:

25 "If you follow the next sentence, you will see,

1 because your call was as you came on to the carriage?

2 "Answer: Yes.

3 "Question: That's correct, is it?

4 "Answer: Yes, sir.

5 Then over the page at 176, line 8, having put it in  
6 its background context:

7 "Just while we are on that point of time, the way  
8 your statement is set out, Mr Stern's taken the first  
9 two steps, it's the third step I want to look at, you  
10 heard the familiar voices shouting various things such  
11 as 'Police' or 'Armed police'.

12 "Answer: Yes, sir.

13 "Sir Michael Wright: You have told Mr Stern that  
14 your call came after that.

15 "Answer: Yes.

16 "Sir Michael Wright: As you stepped into the  
17 carriage. The next thing that you set out in your  
18 statement is hearing the cracking noises. Do you see  
19 that?

20 "Answer: Yes.

21 "Sir Michael Wright: Which I take it you are  
22 referring to the shots?

23 "Answer: Yes, sir.

24 "Sir Michael Wright: Again, I fully understand that  
25 all this happened at top speed, very, very, very quick,

1 but to the best of your ability, is that the order in  
2 which those three things happened?

3 "Answer: It is the -- to the best of my ability,  
4 the order."

5 So again there is, in our submission, a consistency  
6 of the evidence.

7 So far as Terri Godley is concerned, she heard  
8 "armed police" on the platform before the shots.

9 Then Robert Lowe, on 4 November at page 30, line 19.

10 SIR MICHAEL WRIGHT: Everybody heard shouting of some kind.

11 MR STERN: Quite.

12 SIR MICHAEL WRIGHT: Or pretty well everybody.

13 MR STERN: Yes.

14 SIR MICHAEL WRIGHT: The civilian witnesses I think are as  
15 one in saying they didn't hear "armed police".

16 Terri Godley said "police".

17 MR STERN: I think she said "armed police".

18 SIR MICHAEL WRIGHT: We can look it up.

19 MR STERN: Yes. That is correct. That is the position.

20 But there doesn't have to be a distinction between  
21 police officers and civilians. One can't work on the  
22 basis that all police officers are lying and all  
23 civilians are telling the truth.

24 SIR MICHAEL WRIGHT: Depends how cynical you are being,

25 Mr Stern.

1 MR STERN: Well, I am not cynical as those who know me know.

2 But the position in relation to police officers is  
3 that it's inevitable that police officers are going to  
4 be more finely tuned to the sounds of "armed police",  
5 because clearly they are -- that is the sound that will  
6 obviously attract their attention to some incident being  
7 taken to another level, whereas civilians may  
8 concentrate on a variety of things.

9 If it were that all the civilians spoke with one  
10 voice about all matters, then that may be something that  
11 one could rely on, but that isn't the position.

12 SIR MICHAEL WRIGHT: That would be an all-time first.

13 MR STERN: Quite, because not all the police officers hear  
14 "armed police". Even C2 does not hear C12's shout of  
15 "armed police".

16 SIR MICHAEL WRIGHT: You are getting perilously close to the  
17 concept of collaborative notebooks, which I don't think  
18 we want to go into at this stage.

19 MR STERN: Precisely, that's exactly it, they don't have the  
20 same note.

21 Anna Dunwoodie described shouting as well. So  
22 that's the police or the --

23 SIR MICHAEL WRIGHT: Almost to a man or woman they say there  
24 was shouting.

25 MR STERN: Exactly.

1 SIR MICHAEL WRIGHT: The only issues -- the only point on  
2 which the police witnesses and civilian witnesses divide  
3 is the content of the shout. A lot of people say "get  
4 down" or "get out", but that's as far as it goes.

5 MR STERN: Yes, I think some say "get in".

6 SIR MICHAEL WRIGHT: One says "get in", yes.

7 MR STERN: But that aspect of the evidence of C12 is  
8 supported, in my submission, by numerous other witnesses  
9 and because witnesses can't say what those shouts were,  
10 that doesn't mean to say that you can reject it.

11 The second aspect, the gun up, there is in fact  
12 another witness who sees that, Ralph Livock, I have set  
13 it out at paragraph 13. He has the man entering the  
14 carriage carrying a pistol, levelled at the man sitting  
15 opposite Rachel Wilson. We know that's Mr de Menezes.

16 SIR MICHAEL WRIGHT: Yes, the distinction there is that he  
17 says it's up by the time he comes into the carriage,  
18 Charlie 12 said he had been holding it down by his leg  
19 until virtually the last moment when he brought it up.

20 MR STERN: Yes, he brought it up when he was on the  
21 carriage, yes.

22 SIR MICHAEL WRIGHT: Here again you have wide variations in  
23 the civilian recollection, including at one stage  
24 bullets in the ceiling, and I can't remember who it was,  
25 one of the ladies, I think, who said, "I actually

1           thought he was shot by two men with rifles".

2   MR STERN:   Yes, there is somebody who says that and somebody  
3           says he was shot on the floor by two men --

4   SIR MICHAEL WRIGHT:   Five shots on the floor.

5   MR STERN:   The point is not new to the courts, as I set out  
6           at paragraph 15.  Mr Justice Leveson in Sharman said:

7           "... it is commonplace that in sudden unexpected  
8           incidents, different people focus on different  
9           things..."

10           Indeed Lord Bingham, Lord Chief Justice, set it out  
11           in Bentley in more fulsome terms, and I know that you  
12           have looked at those.

13           So bearing in mind all of those comments and the  
14           evidence as we have looked at it there, the omission of  
15           a reference to a particular act or word spoken cannot  
16           amount to a safe evidence that the act did not take  
17           place or the word was not spoken.

18           Then the examples are set out there fully at  
19           paragraph 16, and I won't go through all of those.

20           At paragraph 17 there are witnesses who, as you say,  
21           positively assert various things, and again they are  
22           wrong about that.

23           So those are the matters in relation to the "armed  
24           police" point.  Even if it were not said, then, as  
25           I said at the outset, that would not amount to

1 a rebuttal of an honest belief for the reasons that  
2 I have already gone through.

3 SIR MICHAEL WRIGHT: Is it sufficient evidence to leave to  
4 a jury?

5 MR STERN: No.

6 SIR MICHAEL WRIGHT: Why not?

7 MR STERN: What, the "armed police"?

8 SIR MICHAEL WRIGHT: Yes. If there is room for  
9 a conclusion, however cynical it may sound, that the  
10 police officers are now, possibly with the support of  
11 their colleagues, claiming to have uttered the warning  
12 of "armed police", to use the old Lucas definition,  
13 because of a sense of guilt at what they had done, why  
14 isn't that something that a jury is entitled to  
15 consider?

16 MR STERN: There is no evidence to rebut honest belief. You  
17 cannot look and say: well, there may be a lie in  
18 relation to "armed police" and therefore that rebuts  
19 honest belief. You have to look at the evidence  
20 overall.

21 SIR MICHAEL WRIGHT: Mr Mansfield says it's indicative of  
22 the fact that they were in a mindset that they were  
23 going to shoot this chap before they ever got on the  
24 platform.

25 MR STERN: But that is not the evidence. That is not the

1 evidence at all. Not only is it not the evidence of C12  
2 and C2, it is not the evidence of the other firearms  
3 officers, and there is no evidence that these officers,  
4 that is to say those who say they heard "armed police",  
5 have conspired together and have decided to put in their  
6 statements this particular aspect of the evidence.  
7 There is no evidence of that.

8 So one has to look at the concrete evidence, not  
9 just at whether on one interpretation, for which there  
10 is no evidence of itself, they could come to the  
11 conclusion it is a lie. A lie about an immaterial  
12 aspect of the case might, might be supportive evidence  
13 if there were evidence, is I think the way Lord  
14 Justice Richards put it in Da Silva. It might be  
15 supportive of a charge if indeed there were sufficient  
16 evidence in the first place, but there isn't in this  
17 hearing or case at all.

18 SIR MICHAEL WRIGHT: Yes, very well.

19 MR STERN: The second aspect is set out at Mr Hilliard's  
20 skeleton argument at page 22. The bulky jacket, I will  
21 pass over that. The third argument, paragraph 35,  
22 page 22, the manner of the confrontation.  
23 Mr Mansfield's not dealt with any of this in further  
24 argument today, but he has set it out in his skeleton  
25 argument, and the points are summarised helpfully by

1 Mr Hilliard in his skeleton argument there at page 22.

2 I adopt all of the points that he makes, again,  
3 between paragraph 35(i) and 35(v).

4 Indeed, if one looks at paragraph 36 of his skeleton  
5 argument, he also makes it clear that the annex to the  
6 Da Silva judgment, 17 and A19, they tend to support the  
7 arguments of C2 and C12 on those points, although the  
8 full evidence of the civilian witnesses was not before  
9 the director and the court at the time.

10 Mr Horwell has addressed you in relation to the  
11 civilian witnesses, and indeed in relation to the fact  
12 that, although those witnesses had not been heard, the  
13 statements had been seen, and indeed their evidence has  
14 not differed to any marked extent.

15 Sir, we deal with this aspect in our submissions  
16 beginning at page 14.

17 At the top of the page, (g) and (h) deal with the  
18 movement by Mr de Menezes out of his seat. Now, when  
19 Ivor gave evidence of this, I don't believe there was  
20 any challenge to his evidence, and there is other  
21 evidence that supports that. You will remember the  
22 evidence of Mr Tomei that the distribution of blood and  
23 indeed the way in which the shots were fired were  
24 entirely consistent with Ivor having held Mr de Menezes.

25 The point about that is that it is obviously clear

1           that he must have got out of his seat in order for Ivor  
2           to have got him in a bear hug. So there is support for  
3           that. There is Ivor's evidence, there is D9's evidence,  
4           there is Ken's evidence, there is a range of evidence,  
5           and it's quite clear, as I say, that Ivor described him  
6           as agitated when he got up, and that he advanced towards  
7           the officers. This is an important piece of evidence  
8           for which there is no evidence to rebut it. But  
9           interestingly, none of the civilian witnesses see it,  
10          and it was not suggested, and has not been suggested as  
11          I understand it, that Ivor has lied or that D9 has lied  
12          or Ken has lied.

13                 So it is, again, an important illustration of the  
14          fact that, despite civilians being present and not  
15          seeing parts of the evidence, nevertheless it is  
16          unquestionably accurate.

17                 So we submit that in relation to that evidence, it  
18          is an obvious inference that the officers could draw,  
19          was that this identified suicide bomber was advancing  
20          towards a threat with a gun, forget about "armed police"  
21          for the moment, but even holding a gun in the way  
22          described by Mr Livock, and the obvious inference is  
23          that he was moving towards them because he had the  
24          means, the will and the ability to deal with or overcome  
25          that threat.

1           That is his action, which is described very fully by  
2           those witnesses, and again I won't take you to the  
3           transcript but I know you have it well in mind. But it  
4           doesn't end there because there is then this rather  
5           strange movement or unusual movement of his hands. That  
6           again is described at page 14, letter (j).

7   SIR MICHAEL WRIGHT: That's Mr Livock again, isn't it?

8   MR STERN: Well, it's Ivor, Mr Livock, D9, Ken.

9   SIR MICHAEL WRIGHT: I beg your pardon, forgive me, we were  
10          at cross-purposes. There is one specific movement of  
11          his hand which is spoken to by Mr Livock and nobody  
12          else.

13   MR STERN: Yes, that may well be: suspect's hands towards  
14          the left-hand side of his trouser waistband. Seconds  
15          before the -- hearing the shots were fired.

16          That is the position. But in any event, the  
17          perception of the hands is obviously difficult to be  
18          accurate about.

19          But one thing all of the witnesses are clear about  
20          is that there was something unusual about it. There was  
21          something not quite right. I think one of them  
22          described him as not using the armrest when he got out  
23          of his seat. But that was their interpretation,  
24          obviously, at the time. That was their perception.

25          So that of course is a very significant factor in

1 the minds of the officers, C2 and C12, and indeed all  
2 those others who were present.

3 Indeed, if you look, and we have set it out at  
4 page 15, letter (j), that there were a host of other  
5 officers who also interpreted the suspect's act as  
6 threatening. So we are not in a position here where C2  
7 and C12 are isolated in their perception of the threat.

8 There is practically no difference between the  
9 perception of Ivor and C2 and C12, and for Ivor's  
10 actions he was commended, as you know, and C2 and C12  
11 acted on the perception that they had with the same  
12 bravery.

13 Set out Ivor there at page 15. Over the page, D9.  
14 He believed that the suspect did have or might have  
15 a bomb on him and thought that he was going to detonate  
16 it. Incidentally, I should just mention this: D9 did  
17 not see Ivor move in the way described. Ken, he took  
18 the suspect's actions to mean that he was non-compliant,  
19 that he was a threat, and he feared for the suspect's  
20 safety. You will remember that Ken believed that the  
21 police had actually challenged, that was the way he put  
22 it, that there had been a challenge by the police to  
23 Mr de Menezes, and that is why he feared for his safety,  
24 because of his reaction in relation to that challenge.

25 SIR MICHAEL WRIGHT: It was D9, as I remember it, who was

1           actually coming down the carriage when all this  
2           happened.

3   MR STERN:   Yes.

4   SIR MICHAEL WRIGHT:  And he actually thought, when he heard  
5           the shots, a bomb was about to go off, if I remember.  
6           Am I right?

7   MR STERN:   Yes.  He was --

8   SIR MICHAEL WRIGHT:  He said he tensed up because he thought  
9           there was going to be an explosion.

10  MR STERN:   C5 -- I'm sorry -- I am told.  I thought it was  
11           D9 but it's C5.  Thank you very much.

12           There were a number of them who feared that they  
13           were not going to be going home that evening.  I think  
14           Ralph made that clear, he said as he was coming down the  
15           stairs.

16           Indeed, at letter (k), there are some extracts from  
17           some of the witnesses who were in that position and  
18           acutely aware of the significant potential threat.

19           Indeed, Ralph:

20           "... there was no doubt in my mind that this man was  
21           a suicide bomber and that there was a real possibility  
22           that he was in possession of a explosive device which he  
23           could detonate to the serious danger of the public and  
24           the officers from my team.  I firmly believed I may have  
25           to shoot him dead in order to prevent this."

1 C5:

2 "... I had this vision in my mind that if I don't  
3 get on that train, something terrible could happen and  
4 I will be left on the platform and there would be or  
5 possibly be an explosion in the tunnel further up. And  
6 I didn't want that to happen. I moved onto the train  
7 ..."

8 Which was remarkably brave, you may think, bearing  
9 in mind his state of mind.

10 "... onto that carriage via the small door to the  
11 left. You can't see it in the picture ..."

12 Terry. Terry deals with the position even after he  
13 can see that Mr de Menezes is clearly no longer a live  
14 threat. He said:

15 "I was very, very concerned at that point that there  
16 was still the possibility of this individual wearing  
17 a concealed explosive device and, despite what had  
18 happened and what I could see, I was still very  
19 concerned about the possibility of that device  
20 detonating."

21 Then Ken likewise, when you put to him, sir, the  
22 point that I had put to him about whether he was brave  
23 or not, and he said that he was, in his opinion:

24 "... a possible for the subject, and therefore I did  
25 believe he was a potential threat ..."

1           Of course so far as Ken is concerned one has to look  
2           at it in this way: that Ken was not of the view that he  
3           was positively identified as a suicide bomber from the  
4           day before, because he is a surveillance officer and  
5           therefore had a lower threshold of identification.

6           So all of those together, one has to look at the  
7           evidence as a whole, and look at the position in  
8           relation to these witnesses, and what it is that they  
9           thought.

10          Can I turn to page 18, please, in the submissions.  
11          18(m) and (n). It is a point that you may think is of  
12          some significance that both C12 and C2 separately and  
13          independently arrived at the same belief as to the level  
14          of threat posed and it was necessary to discharge their  
15          weapon in order to protect themselves and the public.

16          These are both, as you know, extremely experienced  
17          specialist firearms officers and both instructors, both  
18          having been with the specialist firearms officers for  
19          some years.

20          So each individually came to that conclusion, that  
21          it was necessary to do what they did.

22          At letter (n), I don't know if I need to deal with  
23          this, because the shots that were fired, the number of  
24          them, it's really I think an extension of the point that  
25          you were making, sir, perhaps earlier about what could

1 be the reason, that the shots in many ways are, both the  
2 location of the shots and indeed the number of the  
3 shots, is compelling evidence to suggest that both  
4 officers genuinely believed that they were facing  
5 an immediate threat.

6 Then again after the incident of the shooting, C12  
7 shouted, "Bomb, everyone get" out". C2, he pulled  
8 someone back and shouted, "Move back", and he went out  
9 of the doorway himself.

10 So it's quite clear, both before, during and after  
11 that they had a clear and honest belief that this man  
12 was about to detonate a bomb, and could still have  
13 a bomb detonated by a variety of means that we have  
14 heard about from Mr Swain, the switch method, underneath  
15 the clothing, without even noticing that somebody was  
16 doing that.

17 Indeed, if you have got even the toggle, I think in  
18 your hand, it's like a car switch, I think, as Mr Swain  
19 described it, you can brush that against your leg and  
20 that will move the switch in the direction that the  
21 suicide bomber would wish to.

22 Sir, the evidence at page 19, letter (p), and it's  
23 an extract, I won't read it out but you will remember it  
24 very well, I am sure. It's the point at which C12  
25 became emotionally upset.

1 SIR MICHAEL WRIGHT: Yes.

2 MR STERN: It's when they were in the passageway after the  
3 incident and they were looking at each other because  
4 they had heard gunshots, not being clear where they had  
5 come from, or they had heard bangs and they were not  
6 sure whether it was a detonated bomb, gunshots or what  
7 it was, and that they were actually concerned that they  
8 themselves had been actually injured or that the blood  
9 was coming from them.

10 Again, was that all a show or did they honestly  
11 believe that unfortunately this suspect was a suicide  
12 bomber?

13 Can I invite you, please, now to page 28, (d).  
14 There is the evidence of others, both Ivor, Ken and  
15 Terry, of what's described as the struggle that takes  
16 place during this extremely rapid movement, and that  
17 there was a feeling that the struggle continued even  
18 after shots were fire. Whether that was illusory or  
19 not, it was of course something that others noticed.

20 The shots, this is at letter (e), were all fired  
21 within seconds. I know in Mr Mansfield's submissions  
22 there is a reference to Mr Whitby, who stands alone  
23 I think in saying that one of the shots or some of the  
24 shots were 30 seconds later.

25 SIR MICHAEL WRIGHT: He was halfway up the escalator,

1 helping the lady.

2 MR STERN: Exactly. So the overwhelming body of evidence is  
3 that these shots were seconds, and I'll move on from  
4 that.

5 The clearing of the stovepipe stoppage, that's  
6 a point again made in Mr Mansfield's skeleton. Again  
7 there is clear evidence from C5 that that would have  
8 been done within a fraction of a second, so again we are  
9 not talking about long periods of time.

10 Page 29, please. And again I do not propose to go  
11 through this in any detail but what it sets out there is  
12 the restraint that was made of Mr de Menezes by Ivor and  
13 what D9's view was and where he thought the hands were  
14 and what it was that he was doing in relation to that.

15 Sir, those are the submissions on the facts. As  
16 I say, when you look at it, that is the only aspect that  
17 Mr Mansfield relies on, those two aspects now, "armed  
18 police" scenario, and there is both evidence that it's  
19 accurate and it is, and even if it's not, in my  
20 submission it doesn't rebut honest belief. The  
21 confrontation I have dealt with, and I rely, as I say,  
22 and adopt those arguments advanced on behalf of  
23 the Commissioner by my learned friend Mr Horwell and  
24 those points raised by Mr Hilliard in his submissions as  
25 well.

1           So those are my submissions, that there is clearly,  
2           and overwhelmingly clearly, no evidence or insufficient  
3           evidence to leave unlawful killing to the jury.

4           Would you wish me to deal with either any other  
5           aspect or --

6   SIR MICHAEL WRIGHT: I think I want you, rather than coming  
7           back to it later, have you had a chance to look at  
8           Mr Mansfield's four-page summary?

9   MR STERN: Very briefly this morning, yes.

10   SIR MICHAEL WRIGHT: There are, I think in relation to that  
11           which particularly impacts on your two clients, are the  
12           four factual questions.

13   MR STERN: That's it.

14   SIR MICHAEL WRIGHT: What you were saying to me earlier on,  
15           admittedly it's not really susceptible of enormously  
16           extended submission, but what you said, there is no  
17           basis for inviting the jury to leave narrative verdicts  
18           in relation to the events in the carriage.

19           There are the four suggestions that come from the  
20           family. What do you say about it?

21   MR STERN: Well, I think there are five, actually. First of  
22           all they are not contributory factors, they are factual  
23           questions.

24   SIR MICHAEL WRIGHT: That's right, they are direct factors.

25   MR STERN: Yes. Well, as I understand the basis upon which

1           you were going to leave any narrative questions, they  
2           must be relevant and causative.

3   SIR MICHAEL WRIGHT: Certainly.

4   MR STERN: That's the first point. The second is this: if  
5           they are --

6   SIR MICHAEL WRIGHT: Aren't these relevant and causative?

7   MR STERN: Well, they are subsumed, they could be, yes, some  
8           of them could be, but they are subsumed within the  
9           short-form verdict of lawful killing or open.

10   SIR MICHAEL WRIGHT: I do not want you to be under any  
11           misapprehension. I repeat what I said to Mr Horwell  
12           that I am certainly not going to make up my mind, as it  
13           were, on the hoof as to whether I think I should or  
14           should not. You are quite right in the sense that if  
15           I were to leave the short-form verdict of unlawful  
16           killing in relation to C2 and C12, a verdict on that  
17           would answer these questions.

18           But on the assumption that I do not, what do you say  
19           about the factual questions that are being suggested  
20           there?

21   MR STERN: No, what I am submitting is that if you left  
22           a verdict of lawful killing, then it would be subsumed  
23           within that. The reason I put it in that way is because  
24           of the way Mr Hilliard put it in his, because he has  
25           suggested at paragraph 54 that if you concluded that the

1 evidence supported leaving a short-form verdict of  
2 unlawful killing to the jury, then he was submitting  
3 that all three forms should be --

4 SIR MICHAEL WRIGHT: Yes, I know he did.

5 MR STERN: That's why I'm working on the basis that that's  
6 rejected.

7 SIR MICHAEL WRIGHT: Let's just take it in steps from there  
8 on. I fully understand, I think he is right if I were  
9 to do that, suppose I were to be in agreement with you  
10 that there is insufficient evidence safely to leave  
11 a verdict of unlawful killing in relation to C2 and C12  
12 which as we all understand for practical purposes here  
13 is murder.

14 MR STERN: Yes.

15 SIR MICHAEL WRIGHT: Are you saying -- well, you have said  
16 I should leave lawful killing as a verdict because there  
17 is sufficient evidence of that. Is that on the basis  
18 that, if it's not unlawful killing, then it must be  
19 lawful?

20 MR STERN: No, it's --

21 SIR MICHAEL WRIGHT: That there is no gap between the two.

22 MR STERN: There is clearly a gap between the two because it  
23 will be for the jury to determine whether or not the  
24 shots were justified in accordance with the standard of  
25 proof.

1 SIR MICHAEL WRIGHT: Do I not then, in that case, have  
2 effectively to rehearse to the jury again -- not again  
3 because I won't have done it if I have withdrawn  
4 unlawful killing -- I then have to rehearse to the jury  
5 all the questions of self-defence and reasonable belief,  
6 both limbs.

7 MR STERN: You do, that is correct, but that would be  
8 inevitable, in my submission, even if you left  
9 a narrative, because if you left a narrative you would  
10 have to leave a narrative on the central factual issue  
11 which is whether or not the shots were justified, and if  
12 you left a narrative issue on the shots were justified,  
13 then it would only be right to do so by obviously  
14 telling the jury what it is that it means, or -- or  
15 and -- about self-defence. Because if you were to leave  
16 a narrative question, for example, is it more likely  
17 than not that each of the shots were fired in  
18 self-defence? Something along those lines.

19 SIR MICHAEL WRIGHT: The justification for the shots is  
20 contained in the answers to questions 1, 2, 3, 4 and 5,  
21 is it not?

22 MR STERN: No, with respect they are not. Because the first  
23 issue is the honest belief of the officer.

24 These 3, 4, 5 questions do not contain any reference  
25 to the honest belief of the officer. That is

1 a fundamental issue in relation to the lawfulness --

2 SIR MICHAEL WRIGHT: Quite apart from these five questions

3 which may or may not be left, your submission is that

4 there should be a specific question saying: did the

5 officers genuinely believe that the person in front of

6 them presented an immediate mortal threat?

7 MR STERN: It will have to be phrased in accordance with

8 lawful killing direction, because if you, on this basis,

9 I am assuming that you have rejected unlawful killing on

10 the basis of the discussion we are having.

11 SIR MICHAEL WRIGHT: What I am bothered about, Mr Stern, and

12 what I need your help about, is how I leave such

13 direction without essentially creating the risk that

14 an unfavourable answer from the jury will effectively

15 inevitably produce by the back door a verdict of

16 unlawful killing.

17 MR STERN: That's precisely why I am submitting what I am

18 submitting, that you leave short-form verdicts --

19 SIR MICHAEL WRIGHT: I understand that.

20 MR STERN: -- and no narrative questions in relation to the

21 shots.

22 SIR MICHAEL WRIGHT: All right, I understand what you are

23 saying. That's really all.

24 MR STERN: That's all. Well, so far as the firearms

25 officers are concerned, yes.

1 SIR MICHAEL WRIGHT: You are not concerned with anybody  
2 else.

3 MR STERN: I am not concerned with anybody else.

4 SIR MICHAEL WRIGHT: As far as the firearms officers are  
5 concerned, no narrative questions at all?

6 MR STERN: Yes.

7 SIR MICHAEL WRIGHT: Very well. I understand the point.

8 MR STERN: If I may say so, the short-form verdicts are --  
9 I do not wish to recite cases that I have done, because  
10 there is nothing more tedious, but I have been in a few  
11 where -- and in each of them, that has been the course  
12 that's been adopted. Doesn't mean to say that's the  
13 right course, but short-form lawful and open.

14 SIR MICHAEL WRIGHT: And nothing else, and no alternative.

15 MR STERN: Fortunately in the ones I have been in, no.

16 SIR MICHAEL WRIGHT: You have been very successful.

17 MR STERN: Up to now, and hoping that -- yes. Anyway, that  
18 is it, and we -- I know Ms Leek has also been in  
19 a number of them, and she will be able to help you far  
20 better than I on the narrative and all of those issues.

21 There is, if you like, I have the directions that  
22 were given in the summing-up in the case of Bennett.

23 SIR MICHAEL WRIGHT: Yes. I know Mr Hough knows a good deal  
24 about that one.

25 MR STERN: Mr Hough joined us later on, yes, as did

1           Mr Mansfield, I think.

2   SIR MICHAEL WRIGHT: Very well.

3   MR STERN: Those are my submissions.

4   SIR MICHAEL WRIGHT: Mr Stern, thank you very much. Your  
5           timing as always is impeccable. Thank you very much  
6           indeed.

7           Very well. Ms Leek, 9.30 tomorrow morning.

8   (4.45 pm)

9                           (The court adjourned until 9.30 am on  
10                           Friday, 21 November 2008)

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