

IN THE SOUTHWARK CORONER'S COURT

INQUEST INTO THE DEATH OF:

JEAN CHARLES DE MENEZES (DECEASED)

**SUBMISSIONS ON BEHALF OF THE FAMILY
WITH REGARD TO 'VERDICTS'**

Introduction

1. By Barlow, Lyde and Gilbert's letter dated 17 October 2008 each Interested Party is invited to make submissions as to whether the learned Coroner could elicit the jury's conclusions on the central issues in the case by (i) inviting the jury to return one of a number of 'short-form' verdicts; (ii) eliciting a narrative verdict, for example through simple questions; or (iii) inviting the jury to return both a short-form verdict and a narrative.
2. For the reasons which follow, it is the position of the family that option (iii) is to be preferred, and that:
 - (i) Short-form verdicts of unlawful killing, lawful killing and an open verdict should be left to the jury;
 - (ii) The unlawful killing verdicts should relate to:

- (a) Allegations of murder with respect to C2 and C12; and
- (b) Allegations of gross negligence manslaughter with respect to (a) DAC McDowell; (b) DAC Dick; and (c) Chief Inspector Esposito; and
- (iii) The jury should also be invited to return a narrative verdict.

The relevant legal principles

3. It is hoped that the following legal principles are uncontroversial.

(i) **The requirements of Article 2**

4. The requirements of the Article 2 obligation, which applies to this inquest, mean that, as the House of Lords held in *R (on the application of Middleton) v HM Coroner for the Western District of Somerset & Anor* [2004] 2 AC 182,:

"[20]...an inquest ought ordinarily to culminate in an expression, however brief, of the jury's conclusion on the disputed factual issues at the heart of the case...."

[34]...a change of interpretation (authorised by section 3 of the Human Rights Act 1998) is required to honour the international obligations of the United Kingdom expressed in the Convention.

[35] Only one change is in our opinion needed: to interpret "how" in section 11(5)(b)(ii) of the Act and rule 36 (1)(b) of the Rules in the broader sense previously rejected, namely as meaning not simply "by what means" but "by what means and in what circumstances".

Accordingly the learned Coroner must ensure that the members of the jury do resolve the disputed factual issues at the heart of the case, and are able to

determine by what means and in what circumstances Mr de Menezes came by his death.

(ii) The test for leaving particular verdicts

5. In *R v HM Coroner for Exeter and East Devon, ex parte Palmer* [2000] Inquest LR 78 and in *R v Inner South London Coroner, ex parte Douglas-Williams* [1999] 1 All ER 344, at 348b-349c, Lord Woolf MR concluded that a coroner should apply a test similar to that developed by the courts for submissions of "no case to answer" in criminal trials. As is well known that is the test set out in *R v Galbraith* [1981] 1 WLR 1039, where Lord Lane CJ said:

"How then should the judge approach a submission of "no case"? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred. There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge".

6. In *Palmer*, Lord Woolf said that a similar approach should be followed by a coroner at the end of an inquest. In *Douglas-Williams*, Lord Woolf modified that test somewhat:

"The conclusion I have come to is that, so far as the evidence called before the jury is concerned, a coroner should adopt the *Galbraith* approach in deciding whether to leave a verdict. The strength of the evidence is not the only consideration and, in relation to wider issues, the coroner has a broader discretion. If it appears there are circumstances which, in a particular situation, mean in the judgment of the coroner, acting reasonably and fairly, it is not in the interest of justice that a particular verdict should be left to the jury, he need not leave that verdict. He, for example, need not leave all possible verdicts just because there is technically evidence to support them. It is sufficient if he leaves those verdicts which realistically reflect the thrust of the evidence as a whole. To leave all possible verdicts could in some situations merely confuse and overburden the jury and if that is the coroner's conclusion he cannot be criticised if he does not leave a particular verdict" (349a-c).

7. This approach was recently affirmed by Keith J in *R (Cash) v County of Northamptonshire Coroner* [2007] 4 All ER 903 at 913b-914a, where he concluded that, subject to the caveat explained by Lord Woolf in *Douglas Williams*, there was no difference between the approach of a judge in the Crown Court on a submission of no case and a coroner when considering leaving a verdict.
8. In *R (Bennett) v HM Coroner for Inner South London* [2007] EWCA Civ 617, Waller J concluded that the coroners are entitled to consider the question of whether a verdict, if returned, would be unsafe, although this had been the test rejected by the court in *Galbraith* for criminal cases:

"[The language] of Lord Woolf [in *Palmer*] and Leveson J [in *R (Sharman) v HM Coroner for Inner North London* [2005] EWHC 857 (Admin)], so far as coroners are concerned, would seem to be nearer the rejected school of thought, albeit Lord Woolf was saying that a coroner should not "decide matters which are the province of the jury". I would understand that the essence of what Lord Woolf was saying is that coroners should approach their decision as to what verdicts to leave on

the basis that facts are for the jury, but they are entitled to consider the question whether it is safe to leave a particular verdict on the evidence to the jury, i.e. to consider whether a verdict, if reached, would be perverse or unsafe and to refuse to leave such a verdict to the jury" (paragraph [30]).

(iii) Self-defence

9. The classic pronouncement of the relevant law is that of the Privy Council in *Palmer v R* [1971] AC 814, approved and followed by the Court of Appeal in *R v McInnes*, 55 Cr App R 551:

"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is so serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is over and no sort of peril remains, then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. Of all these matters the good sense of the jury will be the arbiter...."

10. The self-defence concept incorporates a two-stage test, the first part subjective (from the perspective of the suspect) and the second objective (the actions of the reasonable man).
11. The first issue is whether the suspect honestly and genuinely believed that force was necessary to protect himself or another. Although the reasonableness of the

belief is not a necessary ingredient in whether the belief is genuinely held, if there is insufficient basis for the belief then this may be a very strong indicator that the belief was not genuinely held (*Beckford v R* (1987) 3 All ER 425). In *R v Williams (Gladstone)* (1984) 78 Cr App R 276, Lord Lane said that:

"...the reasonableness or unreasonableness of the defendant's belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is neither here nor there....If however, the defendant's belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held".

12. In other words, the assertion of self-defence should not be accepted at face value, but the circumstances must be considered to see whether they support or undermine that assertion. If the circumstances disclose that there was no reasonable basis for the belief, then there would be material to challenge the genuineness of the alleged honest belief.
13. The second issue is whether, if the belief was genuinely held, even if irrationally, the degree of force used was reasonable to meet the threat as the defendant perceived them to be. This part of the test is objective and it is for the jury to determine whether the accused "overreacted" to the threat as he perceived it to be.

(iv) Unlawful killing by gross negligence manslaughter

14. The classic formulation of gross negligence manslaughter is that of Lord Hewart CJ in *R v Bateman* [1927] 19 Cr. App. R. 8, CCA:

"The prosecution must prove the matters necessary to establish civil liability [ie. for negligence]...and, in addition, must satisfy the jury that the negligence or incompetence of the accused went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to

amount to a crime against the State and conduct deserving punishment".

15. The elements of this form of the offence were set out by Lord Mackay of Clashfern, LC in *R v Adomako* [1995] 1 AC 171, HL at 187:

"...the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such a breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done, a risk of death to the patient, was such that it should be judged criminal".

Accordingly there are four elements: (i) the existence duty of care; (ii) a breach of that duty; (iii) a causative link between the breach of duty and the death; and (iv) a conclusion by the jury that the breach was so grave as to be judged as criminal.

16. Within the above framework it is for the judge to determine whether the facts are capable of giving rise to a duty of care (*R v Khan and Khan* [1988] Crim LR 830 CA), although in exceptional cases where a duty of care is obviously owed (as between doctor and patient, or where Parliament has imposed a statutory duty) the judge may properly direct the jury as to the existence of the duty (*R v Willoughby* [2005] 1 Cr App R 29). However it is for the jury to determine: (i) whether a duty of care was owed to the deceased; (ii) whether there was as breach of duty; (iii) whether the breach caused the death; and (iv) whether the defendant's conduct was so bad in all the circumstances to amount to a criminal act or omission.
17. As to element (iv), Lord Mackay in *Adomako* commented that this is "**supremely a jury question**". The grossness of the negligence is to be judged objectively;

- however the defendant who is subjectively reckless and exhibits a reckless disregard of health and welfare may well be more readily found to be grossly negligent to a criminal degree (*Attorney General's Reference (No. 2 of 1999)* [2000] QB 796, per Lord Justice Rose, VP).
18. An omission to act is sufficient. In such a context, the question is whether there was **"inattention or failure to advert to a serious risk that goes beyond mere inadvertence in respect of an obvious matter which the defendant's duty demanded he should address"** (*Prentice* (1993) 3 WLR 927, at 937).
19. The legal test for causation in homicide requires that the act or omission complained of **"more than minimally, negligibly or trivially contributed to death"** (*Douglas-Williams*, at 350).

The suggested short-form verdicts

(i) **Unlawful killing (murder)/lawful killing: C2 and C12**

20. Both C2 and C12 admit that when they fired their weapons at Mr de Menezes, they intended to kill him; and their actions plainly caused Mr de Menezes' death. Accordingly the only real issue with regard to this potential verdict is the assertion by C2 and C12 that they acted in self-defence (of themselves and others).
21. It is recognised that, in criminal cases¹, to invoke self-defence successfully, all a defendant need do is prove that s/he honestly held a belief in the need to act; s/he need not show that it was a reasonably held belief. However if the members of the jury conclude that it was unreasonable to hold the belief, they may be more likely to conclude that the belief was not in fact honestly held (see the summary of the relevant legal principles above).

¹ Albeit not in civil ones: see *Ashley and other v Chief Constable of Sussex Police* [2008] 3 All ER 573, HL.

22. It is submitted that there is evidence to the *Galbraith* test from which the jury could well conclude that C2 and C12 have not in fact been honest in their invocation of self-defence, namely:
- (i) C12's continued assertion, in the face of overwhelming evidence to the contrary (from the passengers²) or which does not support his account

² As to the evidence of the passengers, not one of them heard a shout of "Armed police" while in the carriage: Ralph Livock who was in a key position was asked "Did you hear him [C12] say anything to Mr de Menezes?" and replied "Absolutely not" and after the event still had no idea that they were police (30.10.08, pages 11 and 14); his partner Rachel Wilson similarly said in answer to the same question "If I had heard that, I would have thought they were police, so no" (30.10.08, page 55); Wesley Morrill did not hear any such shouts (30.10.08, page 90); Anna Dunwoodie, who was in the closest position to Mr de Menezes, gave very clear live evidence to this effect, concluding "I would like to say, though, that the thing about whether or not I heard "police", I am very, very clear on because I was -- I absolutely had no idea who they were and I was looking for a clue as to who they might be, and if anybody had said "police", I would have latched on that, I think" (3.11.08, pages 14-19); even after the incident she was not sure who were the "good guys" until she saw the news (3.11.08, pages 31-2); Simon Dixon did not hear anything shouted within the carriage before the shots and heard no-one identify themselves as police officers (3.11.08, pages 54, 56 and 61); Robert Preston did not hear anybody announce themselves as armed police (3.11.08, pages 74-75); Mark Whitby said that there was "not one mention of police" and no other instruction along the lines of "stand up, stand still" (3.11.08, pages 91 and 94); Ian Fitzgerald who was nearby noted that "almost immediately" after he heard the words "Get down", shots were fired (4.11.08, page 7); Thomas Neary "didn't hear the policemen say anything they just started firing" (4.11.08, page 10); Carol Harrison simply heard "get out" and then shots (4.11.08, pages 14-15); Kamila Wrobel does not recall hearing any shouts of "Armed police" (4.11.08, pages 16-21); James Turner said "I do not recall anyone identifying themselves as a police officer" (4.11.08, page 26); Robert Lowe said "I cannot recall what was said as it happened so quick. The shouting seemed urgent and as far as I recall the voices were male. Then I heard bangs, they sounded like bangers" (4.11.08, page 31); Holly Greenland simply heard "get off", "get down" and perhaps "stop" before the gunshots (4.11.08, pages 67-68); Martin Chisholm did not hear anything between the shouting of "get down" and the shot (4.11.08, page 73); Daniel Copeland heard "get down, get down", crouched in his seat and then heard gunshots (4.11.08, pages 77-78). The description several of the passengers give of the demeanour and sense of purpose of the firearms officers is also telling: Rachel Wilson said that they had "entered the train purposefully but then appeared to look around" (30.10.08, page 72); Wesley Morrill said that "...they moved towards him and held him down, pushed him over the seats. It looked like -- so they were totally restrained, his arms" (30.10.08, page 90); Anna Dunwoodie described Ivor as the "main threat" and the other officers as his "accomplices", and she thought they were "maybe...a gang" (3.11.08, pages 13-14); she also said that they appeared like "people...full of adrenaline and they move quickly and their movements are a bit jerky, and things just felt like they were a bit out of control" (3.11.08, page 23); Simon Dixon felt that "...they seemed to know what they were doing, I wasn't aware of any massive struggle or indecision, it seemed that they all knew exactly what their roles were and carried them out very

(from several of his fellow officers³) that on entering the carriage, he shouted "Armed police" and that Mr de Menezes failed to comply⁴ by moving towards him with his hands in an odd position⁵, and continued to do so despite C12 holding his gun to his face/head⁶, the evidence of the passengers being all the more compelling given the manner in which their

efficiently" (3.11.08, pages 55-6); Robert Preston said that "the officers went straight over to the Asian male who they obviously had in their line of sight without looking around. I just remember the officers then jumping on the Asian male and tackling him to the ground in some way" (3.11.08, page 76); Mark Whitby said the officer presumed to be C12 "sort of walked calmly on, he took about a pace forward and he leant forward" before firing (3.11.08, page 90); Carol Harrison described C12 as looking like a "gangster" such that she thought that she was going to get "steamed" (ie robbed) by him and the other officers; she also said that the officers had "a determined air and speed about them" (4.10.08, page 14); Mark Napier said that one of them "gave [him] a look that told me that they had acknowledged [him] but that they would not be swayed from what they were doing" (4.11.08, pages 81-2).

³ As to the accounts of the other officers in the carriage, it is notable that Ivor, Geoff, C7 and Ken do not corroborate the account of C12 regarding the shout of "armed police"; that Geoff said that three or four others in the carriage got up as Mr de Menezes did and agreed that he had not got very far out of his seat as Ivor as able to push him back into it (XXXX); that Ken showed that if Mr de Menezes had got out of his seat, he did so with his palms open (XXXX)(contrary to the evidence of C12 either in his witness statement or via his "reconstruction" in court, which was, in any event, a much more dramatic version than his original account, that Mr de Menezes' hands were down by his side). It is also submitted that Ken's account of Mr de Menezes's allegedly suspicious behaviour was particularly unpersuasive, in suggesting that it was unusual that he did not need to use his hands to push himself up out of the seat.

⁴ As to how Mr de Menezes was likely to react to any challenge by the police, the jury has heard evidence from his cousins Alex Pereira, Patricia Armani Da Silva and Vivien Menezes to the effect that (i) he did not seek to travel to the United States illegally when he was declined a visa (24.9.08, page 70, line 16 – page 71, line 4 and page 78, lines 20-25); (ii) he was "very ambitious and worked very hard" as an electrician in London, while also studying English, and sending money home to his family and girlfriend (24.9.08, page 71, line 6 – page 73, line 21 and page 80, lines 13-15); (iii) he was "very happy" in England and would have liked to settle here permanently (24.9.08, page 73, lines 22-5); (iv) he had no reason to fear the police as he had been stopped three or four times previously in London, and had reacted normally to this, and it was common for people to be stopped by armed police in Brazil (24.9.08, page 74, line 14 – page 75, line 21; page 84, lines 15-16 and 25 and page 91, line 25 – page 92, line 15); and (v) he had in fact specifically praised the British police for being polite and doing a good job compared to the Brazilian police (24.9.08, page 84, lines 16-24).

⁵ In assessing whether Mr de Menezes did in fact make any movements towards his waistband, the jury will no doubt have regard to David's evidence that was read to them, to the effect that on searching Mr de Menezes' body, all he found was a wallet and mobile telephone in his jacket, and some cards and papers in his jeans (10.11.08, page 86).

⁶ Transcript,

first accounts were recorded⁷ compared to the manner in which the officers recorded theirs⁸;

- (ii) C12's assertion that he did take time to assess the threat before him in the carriage, as TJ84 indicated that they would have to have done⁹, despite the overwhelming evidence that he did not;
- (iii) The assertion by C2 and C12 that they heard that Mr de Menezes was "Definitely our man"¹⁰ while he was on the bus at Stockwell station, when the only surveillance officer who was on the bus (Lawrence) has specifically denied saying this when questioned¹¹, and when all the other surveillance officers have denied that any positive identification of Mr de Menezes was made, let alone a definite identification of him; and when the only corroboration for this comes from their firearms colleagues, with whom they made their statements; and
- (iv) Their assertion that they believed Mr de Menezes was wearing a bulky denim jacket when this was plainly not correct, and in relation to which it

⁷ Together (both firearms and surveillance officers), on 23.7.05, after accepted discussion between themselves, and in the knowledge that an innocent man had been shot. On this issue the jury should also be directed to consider the differing "first accounts" that emerged from the scene before any of the firearms officers made their statements, and which are inconsistent with those statements, including (i) the account given to DCI Evans to the effect that the surveillance officer had been pushed out of the way before Mr de Menezes was shot (4.11.08, page 40); (ii) the account noted by DCI Evans' loggist, DI McDonald-Payne, that Mr de Menezes had "failed to stop" (Documents, page 3199.3); and (iii) the account given to Dr Shorrocks that Mr de Menezes had vaulted over the ticket barrier, run down to the train and stumbled on it, which he was clear he had received from officers at the scene rather than from the media (5.11.08, pages 4 and 33-35). On this issue, the jury may also recall the comment in Owen's notes (XXXX) to the effect that "Nothing until debrief later" which may suggest a direction that nothing was to be recorded by officers until they had been debriefed.

⁸ Individually, and in many cases in a noisy public house with news reports indicating that the police had shot and killed a suicide bomber.

⁹ Transcript, .

¹⁰ Transcript, .

¹¹ XXXX. He also could not be persuaded by Mr Stern QC that he might have said this (XXXX).

is hard to see how they could be mistaken, or at least how they both could be.

23. If the members of the jury conclude, as they well might do, that C2 and C12 have not been honest about these matters, then they could well conclude that the reason for this was that they did not honestly hold the belief they aver. As to this, the jury may also have regard to the evidence that in the immediate aftermath of the shooting there was some concern that C2 and C12 may have misunderstood the instruction from DAC Dick and thought that this was an instruction for a critical shot when it was not¹²; and implicitly, that they understood her instruction to mean that the first scenario in the Kratos People training - where a suspect carrying a bomb had been identified and immediate action was absolutely necessary, such that a critical headshot was justified - had been satisfied when it was not. The second scenario - where a person is suspected of carrying a bomb but that has not yet been confirmed - was the one that on any view applied here, and that required the officers to give a challenge¹³. This may well have afforded them a motive to lie.
24. Moreover it is submitted that there is evidence to challenge the honesty of C2 and C12's belief in the form of the material from which the jury could conclude that it would not have been reasonable for C2 and C2 to hold such a belief, namely:

¹² As to this, see the evidence of what Chief Inspector Esposito told D/Su Boucher: Chief Inspector Esposito stated that the SO19 officers were conducting an orthodox armed intervention and the officers' instructions were clear. The officers will have challenged the subject and his responses will have resulted in the officers' actions. This was not a Kratos incident" (1.10.08, page 104, lines 4-12); and what was similarly said to DAC Dick as referred to in her notes: "could there have been any confusion re: Kratos -- VE 'no'" which she explained was her noting that Chief Inspector Esposito had said "no" in answer to a question earlier on (7.10.08, page 4).

¹³ See the extracts from the training material at tab 62 the jury bundle; and the evidence of D/Su Swain, at the end of which he concluded that "...the two options that we came up with arising out of the Kratos policy was that if you are 100 per cent sure that this person is a suicide bomber, then deliver a critical shot. If you are not sure, then you challenge, then you challenge and however they react to that challenge is what you do. Now, 99.999 per cent of the time it's going to be a challenge, because I would suggest the times that you were 100 per cent sure would be very remote indeed" (6.11.08, pages 34-35).

- (i) The fact that he was sitting in his seat¹⁴ and completely restrained by Ivor at the time he was shot¹⁵, which D/Su Swain agreed would make a critical shot unreasonable¹⁶;
- (ii) The fact that on any view Mr de Menezes' jacket was not bulky, was open, and that he was of moderate build¹⁷;
- (iii) Assuming the jury accepts the evidence of the passengers, the fact that Mr de Menezes had not in fact failed to comply with any challenge given by the officers;
- (iv) Alternatively, any finding by the jury that even if the shout of "Armed police" was made, this did not constitute a proper challenge¹⁸, or a challenge in sufficient time for Mr de Menezes to comply with it and/or that his actions (even if he did get up out of his seat to any degree) did not constitute non-compliance with such a challenge.

25. Further or alternatively, it is submitted with regard to C2 that there is material from which the jury could conclude that he used excessive force. This arises from the admitted evidence that he paused while the stoppage in his weapon cleared and so had time to assess whether Mr de Menezes still posed a threat, which he

¹⁴ According to Franco Tomei, Mr de Menezes was "sitting upright, but then bent completely over to the left, such that his head was overhanging seat number three" and "almost horizontal" at the time he was shot (4.11.08, page 100-101).

¹⁵ As to which Wesley Morrill (who was on the same side of the carriage as Mr de Menezes) saw that Ivor had him "totally restrained, his arms" (30.10.08, page 90).

¹⁶ He said "You could argue, well, they did pose a threat, but, you know, as a professional police officer, I would say that if you have got this person pinioned on the floor and they can't actually physically detonate the device, it would be beyond what would be reasonable, I think, to actually just kill them then" (6.11.08, page 21).

¹⁷ Transcript,

¹⁸ As to this, Andrew confirmed that a challenge would conventionally be "Armed police, stop, stand still, show me your hands", "Armed police, stop", "Armed police, stand still", or words to that effect (29.9.08, pages 135-136) which was not even what C12 said he had done, as on his evidence he did not give Mr de Menezes any command to comply with.

plainly did not by that stage, but continued firing. If the evidence of Mark Whitby is correct, there was a not insignificant gap between the two groups of shots¹⁹. If the jury concludes that he acted with excessive force, this negates his assertion of self-defence.

26. Accordingly it is submitted that the *Galbraith* test with regard to an unlawful killing verdict (murder) is met with regard to C2 and C12 and should be left to the jury.

27. As there is clearly an issue for the jury to decide as to whether the officers acted in self-defence, the alternative verdicts of lawful killing should be left with regard to both.

(ii) Unlawful killing (gross negligence manslaughter): DAC McDowell

(a) The existence of a duty of care

28. To determine whether a duty of care is owed in negligence, there is a distinction to be drawn between (i) cases where it is well established by previous case-law that a duty of care is owed; and (ii) novel cases, where the Claimant must satisfy the three-fold test identified in *Caparo Industries plc v Dickman* [1990] 2 AC 605, HL. This test entails asking: (a) was the type of harm suffered by the claimant reasonably foreseeable; (b) was the relationship between the parties sufficiently proximate?; and (c) is it fair, just and equitable to impose a duty of care in the circumstances?.

29. Cases in which the police have directly caused physical harm to an individual, or have damaged property, fall squarely within category (i), as it is well established that in such cases a duty of care is owed; and the imposition of a duty of care in

¹⁹ He said that he heard the first group of shots while in the train and the second while he was about a third of the way up the (static) escalator assisting a female passenger, which the jury may well conclude was a dramatic and clear recollection (3.11.08, page 92).

such cases is uncontroversial even if the police were, at the time they inflicted the injury or damage, responding to an emergency or investigating a crime. As Lord Keith recognised in *Hill v Chief Constable of West Yorkshire* [1989] AC 53, HL, at 59B-D:

"There is no question that a police officer, like anyone else, may be liable in tort to a person who is injured as a direct result of his acts or omissions. So he may be liable in damages for assault, unlawful arrest, wrongful imprisonment and malicious prosecution, and also for negligence".

Lord Keith's comments were recently approved by Lord Bingham in *Van Colle and another v Chief Constable of Hertfordshire Police; Smith v Chief Constable of Sussex Police* [2008] 3 All ER 977, HL at 997 b-g²⁰.

30. This proposition is exemplified by several police driving cases²¹, as well as by a clear line of authority specifically involving the use of CS gas and firearms by the police and soldiers. This includes:

- (i) *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242, QBD - where Taylor J concluded that the "real and substantial" fire risk involved by the police firing a gas canister into the plaintiff's premises was only acceptable if sufficient precautions had been taken in the form of having fire equipment on hand to deal with the fire that resulted, such that a duty of care lay, and that the failure to have had fire equipment available was negligent;

²⁰ See further Booth and Squires, 'The Negligence Liability of Public Authorities', at paras. 10-15, 10-35 and 10-39 to 10-43.

²¹ See, for example, *Gaynor v Allen* [1959] 2 QB 403, CA, where a police officer's estate was held liable in negligence for the injuries he had caused to a member of the public while negligently riding his motorcycle in the course of his duties; and *Knightley v Johns* [1982] 1 WLR 349, CA, where a police inspector was held liable in negligence to a police motorcyclist whom he had instructed to ride the wrong way down a tunnel, and who had suffered injuries as a result

- (ii) *Crooks v Ebanks* [1999] 1 WLR 1287, PC – where the Privy Council permitted a claim to be brought arising out of the accidental discharge of a police officer's firearm;
 - (iii) *Schofield v Chief Constable of West Yorkshire* [1999] 43 BMLR 28, CA – where the Court of Appeal upheld a claim by a police officer for shock and psychiatric injury caused by his fellow officer's "unlawful and inexcusable" sudden discharge of his firearm;
 - (iv) *Bici v Ministry of Defence* [2004] EWHC 786 (QBD) – where Elias J held that soldiers taking part in United Nations peacekeeping operations in Kosovo owed a duty to prevent personal injury to the public and had breached that duty by deliberately firing on a car carrying Kosovar Albanians when they had no justification in law for doing so; and
 - (v) *Ashley and another v Chief Constable of Sussex Police* [2008] 3 All ER 573, HL, at 580 h-j, where, no doubt as a result of this well established line of authority, it was admitted by the Chief Constable that he owed a duty of care to the occupants of a flat in relation to which a firearms operation had been mounted. It was further admitted that there had been a breach of that duty in the period prior to the fatal shooting of Mr Ashley, which negligence had led to the shooting²².
31. In *Attorney-General v Hartwell* [2004] 1 WLR 1273, PC, the Privy Council concluded that a negligence claim could lie where a police officer had, in a fit of jealousy, deserted his post and used his firearm to shoot at his ex-partner in a bar without warning, seriously injuring the claimant. It is instructive that the Privy Council commented, at para. 36 that:

²² See also the Northern Irish and South African cases to similar effect cited in Booth and Squires at paras. 10-41 to 10-42.

".....where an article as dangerous as a loaded gun is handed over the class of persons to whom the duty of care is owed is wide and the standard of care required is high".

32. Accordingly, it is submitted that, as a matter of law, DAC McDowell and his colleagues owed a duty of care to ensure that the Scotia Road firearms operation was carried out in a safe manner. On that basis it would be appropriate for the learned Coroner to direct the jury that a duty of care was owed as a matter of law (see above). Alternatively, there is plainly material from which the jury, properly directed on the applicable legal principles, could reach its own conclusion that a duty was owed.

(b) *Breach of duty*

33. It is recognised, of course, that the jury has heard extensive evidence as to DAC McDowell's experience and qualifications, and the fact that he was operating in an atmosphere of extremely heightened tension. However, the jury is also entitled to conclude that in those circumstances, the public is entitled to expect the very highest levels of attention to detail, and recognition of urgency, from DAC McDowell and his police colleagues.

34. Against that background, it is submitted that there is material to the *Galbraith* test from which the jury could conclude that DAC McDowell was in breach of his duty of care, for the following reasons.

35. First, as to DAC McDowell's specific responsibilities:

- (i) It is very clear from Annexe 4A of the ACPO Manual on the Police Use of Firearms that as the Gold Commander of the operation, DAC McDowell had overall "responsibility and accountability for the operation"; was

required to "resource the operation", and had to "set, review and update the strategy, which may include some tactical parameters"²³;

- (ii) As he²⁴ and DAC Clarke²⁵ confirmed in evidence, it was his overall responsibility as Gold Commander to make sure the strategy was being implemented;
- (iii) Moreover, the accepted command means by which a Gold Commander does this is to appoint a Silver Commander: this much is clear from:
 - (a) The ACPO Manual which provides that the ultimate responsibility for the management of an incident and deployment of resources rests with the Silver Commander²⁶; and
 - (b) The evidence of DCS White²⁷, DAC Clarke²⁸ and Andrew²⁹, who all confirmed that effective delegation to Silver, in conjunction with input from tactical advisers, is the proper way to ensure that an operation is resourced (not least, as DAC Clarke said, because it is not possible for Gold to "run around all the time...making sure it's followed through"³⁰); and
- (iv) Indeed, DAC McDowell's own written strategy recognised the need to identify appropriate Silver Commanders³¹.

²³ Documents, page 289, paras. a, b and d; introduced through the further evidence of Stephen Reynolds (10.11.08, pages 106-7).

²⁴ 25.9.08, pages 92-3.

²⁵ 29.9.08, page 23.

²⁶ 25.9.08, pages 167-168.

²⁷ 26.9.08, page 102.

²⁸ 29.9.08, pages 22-23.

²⁹ 29.9.08, pages 69; 81 and page 182.

³⁰ 29.9.08, pages 22-24.

³¹ 25.9.08, page 12.

36. Second, there is plainly material from which the jury could conclude that DAC McDowell failed to comply with these responsibilities, which in turn led to a breach of his more general duty to ensure that the Scotia Road operation was carried out in a safe manner:
- (i) Contrary to the requirements set out above, he did fail to resource the operation properly in that he did not, as soon as his strategy was set, appoint a Silver Commander, nor ensure that someone else did this;
 - (ii) This meant that there was not, shortly after 4.55 am, one person responsible for bringing together the various aspects of the operation, and ensuring that the appropriate resources were promptly deployed;
 - (iii) The one person DAC McDowell did leave matters with was Alan, and it is clear that he did not appoint an immediately operational Silver, nor act as a sort of interim Silver himself and ensure that the firearms aspect of the operation was in fact promptly deployed³²;
 - (iv) The failure to have in place an immediately operational Silver effectively meant that there was a complete lack of command of the operation from 4.55 am until such time as DCI Purser and DAC Dick took up their roles, at around 7.15/7.30 am³³ and 8.15 am respectively³⁴;
 - (v) Moreover, there is no doubt that DAC McDowell had intended that all aspects of his strategy (surveillance teams, firearms teams, and the SO13

³² As to which issue, the jury is likely have to resolve the clear conflicts of evidence as between Alan, Inspector Zaj and Andrew as to whether or not Alan did communicate DAC McDowell's intentions for the firearms team or not; and whether Andrew was aware of either DAC McDowell's intentions or any decision to move the orange team to New Scotland Yard as a central holding location. The fact that there are conflicts of evidence as between Alan and Inspector Zaj, and Inspector Zaj and Andrew, on this issue make it all the more confusing.

³³ ~~XXX~~.

³⁴ When the meeting in the forward intelligence cell began, according to D/Su Boucher (1.10.08, pages 60-62).

arrest/intelligence team) were dispatched to Scotia Road as soon as possible, and the failure to appoint a Silver meant that this did not happen. In particular, the absence of the firearms teams was completely unjustified, and led to the surveillance teams being unreasonably and dangerously exposed, as their team leaders pointed out³⁵;

(vi) This failure to ensure that a Silver took control of the operation immediately was also completely unjustified, given that DCI Angela Scott had identified several individuals on night duty within New Scotland Yard who could have performed the role of Silver overnight if need be. These included DI Rose, DI Brian Tarpey, DCI Purser, herself, D/Su Macbrayne and DCI Mellody, as well other suitably qualified officers within SO13 and SO12³⁶. D/Su Boucher added Alan to that list³⁷. Moreover several of these were familiar with the operation and so would have needed less of a briefing before they were deployed³⁸;

(vii) Further, all the other elements necessary for DAC McDowell's strategy were available at 4.55 am and could have been immediately deployed under (or in the case of the DSO alongside) a Silver had one been appointed:

(a) There was an orange firearms team kitted up and ready to be deployed, stationed, it is said, at New Scotland Yard (see further below);

³⁵ **XXXX** DI Whiddett also expected that the firearms team would have arrived between 8.00 and 9.00 am (3.10.08, page 123-4). Central 2402 indicated that as far as Portnall Road was concerned, he felt that some delay in the arrival of the firearms team was understandable give the urgency of the deployment of the surveillance teams, but that "in ordinary circumstances, I would not have expected a gap" (7.11.08, page 170).

³⁶ 30.9.08, pages 70-73. DCS White also agreed that there were "a number of senior officers on duty at Scotland Yard throughout the night who were very capable of fulfilling [the role of firearms Silver] if required"; there were "absolutely" "plenty of...people" available for that role (26.9.08, pages 98-99).

³⁷ 1.10.08, pages 44-45 and 164.

³⁸ 30.9.08, pages 189-190.

- (b) CI Esposito was present and could have gone out with the orange team as their Tactical Adviser³⁹;
 - (c) As Andrew confirmed, it would have been possible to use Commander Andrew Baker for the DSO role prior to DAC Dick coming on duty⁴⁰ (although she herself, as it happened, was actually present in New Scotland Yard from around 5.30 am reading Kratos training material etc and so could presumably have been called in early if need be⁴¹);
 - (d) DS Dingemans and his team had been briefed by DCI Scott at an early stage, but had been directed to make contact with Silver and so were effectively delayed until s/he was appointed⁴².
- (viii) Contrary to the requirement that he "review and update the strategy" (see above) at no stage did DAC McDowell check that his strategy was being carried out, despite the almost continuous series of meetings he had thereafter, and despite the fact that the 6.50/7.00 meeting was specifically described on the attendance sheet as an "operational review"⁴³. DI Forteath accepted that his notes do not suggest any real review of what was happening at Scotia Road⁴⁴; DCI Scott had no recollection of there being any review of the implementation of the strategy during that meeting or sense of urgency⁴⁵; and no other witness present at those meetings has described any recognition by DAC McDowell that his strategy was not being implemented;

³⁹ **XXXX**

⁴⁰ 29.9.08, pages 64-65.

⁴¹ **XXXX**

⁴² 30.9.08, pages 79-80 and 125-126.

⁴³ Documents, page 61; 30.9.08, page 28.

⁴⁴ 30.9.08, pages 24-26.

⁴⁵ 30.9.08, pages 80 and 119.

- (ix) Even when, during the 6.50 am meeting, he must have realised that matters had been stalled because the Silver Commanders were actually appointed during that meeting, he still did not ensure that his strategy was fully implemented as a matter of extreme urgency;
- (x) At best, he indicated, as suggested by DI Forteath's notes, the need to "thro [sic] everything at it" and said something to the effect of "make sure resources available to support. May need to move this on quite quickly"⁴⁶. However even this may be too generous an attribution to DAC McDowell, as DI Forteath said in answer to Mr Perry QC that he felt that this comment in his notes related to the enquiry in general and not just to the firearms operation(s)⁴⁷; to Mr Horwell QC that he thought it related to obtaining as much intelligence as possible from the scenes⁴⁸; and to Mr Hough in re-examination that he thought it meant "...use all the resources we have to try to identify who these people are"⁴⁹;
- (xi) Further, DAC McDowell did not, in the alternative to ensuring that there was proper firearms support present at Scotia Road, ensure that a contingency strategy involving the use of the local ARV's on standby and/or SO12 doing the stop was adopted until such time as a full SFO team could get there⁵⁰;
- (xii) DAC McDowell ultimately accepted in evidence that his reliance on Alan may well have been what led to his strategy not being implemented as he had intended: he agreed that it was "entirely possible" that what happened

⁴⁶ Exhibits, page 862.

⁴⁷ 30.9.08, page 45.

⁴⁸ 30.9.08, page 54.

⁴⁹ 30.9.08, page 61.

⁵⁰ He accepted that had he known about the absence of firearms (as, it is submitted he should have done) he could have put the two Lambeth ARV's on standby and/or made arrangements for SO12 to do the stop (25.9.08, pages 99-104).

was that he "relied on Alan, who's really a SO12 co-ordinator, to do the job of a Silver, and it all got very confused because he didn't carry out what [DAC McDowell] wanted in the way that [he] wanted it"⁵¹.

37. As to the deployment of the orange team, it is submitted that there were a range of options that could have been used to ensure additional cover for Portnall Road/London generally, namely:

- (i) Calling in the black/green team before their rostered start time of 7.00 am on 22.7.05, in the knowledge that they would still be reasonably fresh, having been resting at Lemn Street since from just after lunchtime on 21.7.05 until going off duty that evening, and being called in early being a something that happens "all the time" according to C5⁵²; and in Alpha One seemed to assume that they could never really rely on their rostered start time: "they could be for argument's sake they could be brought in earlier depending on how long we had been on from the day before. It's not -- they're not set times"⁵³;
- (ii) Calling in the blue team from their training that week (as Andrew confirmed could have been done⁵⁴; and/or
- (iii) Using TST's and ARV's as back up at Portnall Road until a full SFO team could be deployed or as the emergency response for London generally (as indeed did happen from 7.00 am⁵⁵. As to this it is relevant that Andrew confirmed that the TST officers who were coming on duty at 7.00 am were

⁵¹ 25.9.08, page 98.

⁵² XXXX

⁵³ 10.11.08, page 6.

⁵⁴ 26.9.08, page 160.

⁵⁵ See the relevant entry to this effect in the SO19 Operational Policy Log at Documents, page 7684.

"very highly trained" if not quite as highly trained as the SFO's⁵⁶. Although it is now known from the evidence of Stephen Reynolds⁵⁷ that each of the local ARV's was in fact patrolling and occupied with other incidents at the material time on 22.7.05, there is no suggestion that any of these, or indeed any incident that the TST was involved in (as to which there is no information available) were of anything like the priority of this operation.

38. It is therefore not accepted that there was a need to choose between Scotia Road and Portnall Road for firearms deployment. However if a choice did have to be made:

- (i) On any view Scotia Road was the priority address given the links it had with two of the suspects and the identified presence of the black Primera;
- (ii) DI Whiddett accepted that this was the case: "I believe now...that Scotia Road was prioritised because the vehicle had been found nearby"⁵⁸; and
- (iii) The fact that Scotia Road was indeed the priority address is illustrated by the fact that, two surveillance teams (the red and grey) had been deployed there before Central 2402's blue team was sent to Portnall Road. D/Su Boucher also confirmed that firearms were not deemed necessary for the other addresses⁵⁹.

⁵⁶ 26.9.08, pages 157-158. Chief Superintendent Tillbrook also confirmed that they would have been available for deployment on Operation Theseus (6.11.08, pages 199-200).

⁵⁷ Tango Juliet 11 Delta was engaged on an incident between 9.48 and 9.52; Tango Juliet 151 was engaged on an incident between 9.38 and 9.43; and Tango Juliet 161 was called to an incident at Oval tube station at 9.43 (10.11.08, pages 103-4).

⁵⁸ 3.10.08, page 38.

⁵⁹ 2.10.08, page 82.

39. Related to this issue, the jury will need to determine whether there had in fact been a positive decision to hold the orange team centrally, and will no doubt be reminded by the learned Coroner that:
- (i) There is a complete lack of contemporaneous documentation suggesting that there was such a positive decision;
 - (ii) There is also no record of any discussion rejecting the need for urgent deployment at 7.00 am, as D/Su Boucher accepted⁶⁰;
 - (iii) Had there been such a decision, one would expect to see an entry to this effect in at least one officer's notebook (and there is none to this effect in Alpha One's), or its proper place, the SO19 Operational Policy Log. Indeed the granting of the firearms authorisation by DCS White appeared to have been on this specific basis⁶¹ and Inspector Zaj agreed that was where he would have expected Andrew to have recorded the decision⁶²;
 - (iv) It is to be assumed that there is no further documentation relating to this purported decision, leading counsel for the family having specifically invited the MPS to produce it⁶³, and no such document having since been provided;
 - (v) Inspector Zaj gave, what it is submitted was astonishing evidence, that he was "very, very clear in [his] mind" that the Scotia Road operation was

⁶⁰ 2.10.08, page 85.

⁶¹ DCS White's authorisation records that "Andrew....will record all firearms options within his tactical advice, that document to be the organic record of all firearms records and developments" (Documents, page 31). DCS White gave evidence that he understood that this meant that "...the firearms officer who was in the control room would make a record of all issues on the one log, so there was a firearms log from the senior tactical adviser being regularly updated in the control room" (26.9.08, pages 88-89). On any view this "log" was the rolling operational policy log rather than the tactical options document hinted at in the authorisation document.

⁶² 3.10.08, pages 137-8.

⁶³ 3.10.08, page 241.

"an intelligence-gathering operation" only, and that there was no need for a firearms team at all⁶⁴; and

- (vi) He himself accepted that if only one team was available, rather than send the team to neither address, "You certainly would have to prioritise"⁶⁵.

(c) *Causation*

40. In terms of causation, the jury would be fully entitled to conclude that had DAC McDowell appointed a Silver with immediate effect, and thereby ensured that the operation was properly resourced, all the necessary assets would have been in place at Scotia Road by the time the surveillance started at 6.04 am or shortly thereafter. The operation would therefore have been running for some 2½ hours before Mr de Menezes emerged from Scotia Road. If that had happened:

- (i) There would have been plenty of time for those in the control room, those in command on the ground (Silver and TJ84), and the surveillance and firearms teams themselves to carry out their roles as DAC McDowell had intended;
- (ii) In particular, the recce which his written strategy specifically required⁶⁶, would have been carried out;
- (iii) This would have meant that those on the ground and in the control room were properly familiar with the layout of the area, to better inform their management of the operation;
- (iv) Specifically, they would have known where the first bus stop was, and the proximity of the address to Stockwell tube station, where it was known

⁶⁴ 3.10.08, pages 134-6.

⁶⁵ 3.10.08, page 147.

⁶⁶ **XXXX**

that at least one if not all three of the attempted bombers had entered the tube system on the previous day⁶⁷,

- (v) They would have therefore been able to deduce the "window of opportunity" in which a stop should have been carried out, before the first access to public transport, namely within the three minutes or so it would take to walk to the first bus stop on Upper Tulse Hill⁶⁸. Although DAC McDowell accepted that to stop all those who were possible suspects, before they reached public transport, would have been a "perfectly proper strategic objective"⁶⁹, it is submitted that, given the unique risks to the transport system any even "possible" suicide bomber posed, this was in fact the only sensible strategic objective;
- (vi) Recognition of this window of opportunity would therefore have ensured that there was proper, tight control of the premises by surveillance, and that the teams realised the need to categorise people as of no interest, or "possible", within that window;
- (vii) This prompt categorisation of people leaving the premises by the surveillance teams would have meant that there was a proper, and clear, threshold for intervention by the firearms team, namely all those who were "possibles". Although DAC Dick felt that such a threshold may have led to unnecessary uses of force, and the drawing of firearms on innocent people⁷⁰, it is submitted that this was preferable to a possible suicide bomber being permitted to get on to public transport. Moreover, it is clear that the threshold for armed intervention applied at Portnall Road was even lower, as even those who were merely thought to be associates of the

⁶⁷ See the evidence of Stephen Reynolds (24.9.08, pages 63-64) and DAC McDowell (25.9.08, page 178) to this effect.

⁶⁸ See the evidence of Stephen Reynolds to this effect (24.9.08, page 59).

⁶⁹ 25.9.08, pages 111-112.

⁷⁰ **XXXX**

suspects, were subjected to an armed stop (see the evidence of Central 2402⁷¹ and Alpha One⁷², as to the armed stop of a group of women and a young male);

- (viii) Those running the operation on the ground would also have been able to give at least some consideration – albeit within a flexible framework – to where suitable stops could take place, a perfectly sensible and indeed necessary thing to have done: Alpha One, at least, sensibly accepted that if his (orange) team had been asked to intervene somebody coming out of Portnall Road as soon as possible, then "obviously we would look where we could potentially do that and would need to know the area pretty well to work out where a stop could be done"⁷³; the same was true of the surveillance team leader on that plot, Central 2402, who also accepted that it would be common sense to work out where to stop someone⁷⁴;
- (ix) Moreover, there were such places near Scotia Road where safe stops by a firearms team could be done: Andrew, a highly experienced tactical adviser, having visited the scene, agreed that they had the capability and the tactics to address a suicide bomber on foot leaving Scotia Road, before s/he got on to a bus⁷⁵;
- (x) Alternatively, if it was deemed appropriate to stop Mr de Menezes with an SO13 car, this could have been done safely on Upper Tulse Hill by DS Dingemans and his team;

⁷¹ XXXX

⁷² XXXX

⁷³ 10.11.08, pages 19-20.

⁷⁴ 7.11.08, pages 173-174.

⁷⁵ 29.9.08, page 96.

- (xi) Accordingly the strategy would have operated properly, and the prospects of a safe stop of Mr de Menezes being carried out, and his death thereby avoided, would have been massively increased.

The jury would therefore be entitled to conclude that the failure by DAC McDowell to resource his strategy properly and promptly more than minimally contributed to Mr de Menezes' death.

(d) *'So serious'*

41. As to the final limb of the *Adomako* test, this is, as set out above "supremely a jury question". There is evidence from which the jury could properly conclude that, despite the unique pressures on the Metropolitan Police posed by the events of 21.7.05, DAC McDowell's failure properly to resource and implement his strategy was indeed so serious as to be classified as criminal, bearing in mind that all he really had to do was ensure that proper Silver Commanders were appointed, and took up their positions, immediately. The jury's function on this issue should not be usurped at this stage.

(iii) **Unlawful killing (gross negligence manslaughter): DAC Dick**

(a) *Duty of care*

42. The submissions made above with regard to the duty of care owed by DAC McDowell are repeated with regard to DAC Dick.

(b) *Breach of duty*

43. As to DAC Dick, it is again recognised that the jury has heard extensive evidence as to her qualifications and experience. However, it is again the case that the

members of the jury still needs to make its own assessment of her acts and omissions on 21.7.05 in the context of all the evidence they have heard..

44. It is submitted that there is overwhelming evidence from which the jury could conclude that she breached her duty of care, in three chronological areas:
- (i) Her failure to ensure proper control of the Scotia Road property, meaning that she did not make effective decisions during the vital few minutes between Mr de Menezes leaving the property, and his getting on to a bus;
 - (ii) Her lack of knowledge of what was happening with the resources on the ground during the follow; and
 - (iii) Her failure to provide clear leadership in the last few minutes, between Mr de Menezes getting off the bus near Stockwell tube station and his descent into the station itself.
45. More specifically, it is said that the following acts or omissions by her would justify the jury in concluding that she was in breach of her duty of care.

The lack of immediate ground control at Scotia Road

- (i) On taking command of the operation, she failed to recognise and/or realise the gravity of the fact that the surveillance teams were unsupported by firearms officers at Scotia Road, and had been for some time, and she did not have an accurate idea of when they were likely to arrive;
- (ii) Had she realised that the full firearms team would not arrive at the Scotia Road area until gone 9.30 am, she should then, by proper liaison with Chief Inspector Esposito, have made alternative arrangements, such as the immediate deployment of the orange team, asking for the local ARV's to

be on standby, organising the strategy around SO12 officers doing the stops, or following whatever other tactical advice Chief Inspector Esposito gave her;

- (iii) She failed to ensure that an immediate recce of the Scotia Road area was carried out, so that the control room was aware of the window of opportunity described above with regard to DAC McDowell;
- (iv) She failed to ensure that there was a location Silver who could supervise and ensure that the red team kept Scotia Road under sufficiently "tight" surveillance so that proper categorisations of people leaving could be made, and appropriate interventions ordered, within the window of opportunity;
- (v) She failed to ensure in the absence of a location Silver (while DCI Purser was still briefing at Nightingale Lane) that the team leaders were properly aware of the locations of the surveillance officers to provide tight control of Scotia Road⁷⁶;
- (vi) She failed to respond properly to the specific concerns expressed by the surveillance team leaders as to the absence of the firearms teams, the fact that the buses were still running, and the lack of clarity as to what should happen if someone who was not a suspect emerged from the communal door⁷⁷;
- (vii) She failed, in particular, to ensure that there was a clear understanding of what was happening with regard to the buses. If indeed she did make a contemporaneous decision not to stop the buses (and her decision log in

⁷⁶ XXXXX

⁷⁷ XXXXX

this regard is retrospective⁷⁸), then D/Su Boucher did not recall any discussion over it⁷⁹, even when Mr Perry QC put the verbatim note from Dick's log to him⁸⁰, and there was considerable misunderstanding as to what she had decided as is evidenced by the efforts D/Su Johnston⁸¹ and Pat⁸² were going to in terms of contacting TfL and the bus company, the message that was given to Nick by Chief Inspector Esposito to the effect that they had indeed been stopped⁸³;

The thresholds for identification and intervention

- (viii) She failed to recognise that the photograph of Osman with which some of the surveillance officers had been provided was of such poor quality that, as several admitted⁸⁴, they would not have been able to make a positive identification of him;
- (ix) She failed to recognise that there was no clear and consistent system for identification, distinguishing between, for example, "positive", "probable", "possible" and "discounted", which was easily understood by all the officers involved in the operation⁸⁵;
- (x) Related to the above two failures, she failed to understand that to have an intervention strategy based around a positive identification was unworkable and unreliable from the outset⁸⁶;

⁷⁸ XXXXX

⁷⁹ 1.10.08, page 82, line 6.

⁸⁰ 1.10.08, page 204, line 2.

⁸¹ 2.10.08, pages 141-144.

⁸² XXXXX

⁸³ XXXXX. Moreover this clearly filtered down to the officers on the ground: C11, for example, was told by TJ84 that the buses had been stopped (3.11.08, page 104).

⁸⁴ XXXXX

⁸⁵ XXXXX

⁸⁶ XXXXX

- (xi) Even then, she failed to ensure that all the surveillance and firearms officers had a clear understanding of (a) what her strategy for identification and intervention was; (b) what the roles of each team were, and (c) what her role of DSO was or even that she was acting as a DSO at all⁸⁷;
- (xii) As a result, or in any event, she failed to communicate the sense of urgency to the surveillance officers⁸⁸;
- (xiii) She failed to decide that given the nature of the difficulties with the identification process, and the narrow window of opportunity, it would have been safer to adopt an intervention strategy based around "possible" identifications, as described above with regard to DAC McDowell;

Knowledge of what was happening on the ground

- (xiv) She did not ensure that she was informed as soon as someone potentially of interest left Scotia Road, and so did not become aware of Mr de Menezes until he got on to the bus, and was out of the window of opportunity;

⁸⁷ As to this, DI Whiddett's grey team did not know that she was in post as a DSO (3.10.08, page 92) and they were the second team to be briefed; he did not become aware that there was a DSO at all until he walked back into the operations room at 9.50 am, and did not shift from this view when it was suggested to him by Mr Perry QC that he might have known earlier (3.10.08, pages 115-6); and – astonishingly, it is submitted, the grey team officers were told that if a potential suicide bomber emerged from the premises, they were to call the telephone number which went straight into the 24-hour information room at New Scotland Yard and would presumably speak to the 24 hour DSO, not the DSO in charge of the operation on which they were working (3.10.08, page 48). James was therefore unaware that a DSO had been appointed let alone her identity; he did not know a Silver had been appointed or his identity; and had had no contact from Silver despite his role as commander for the firearms and surveillance teams (XXXX). The jury may also recall that when Central 2402 (the surveillance team leader from Portnall Road) gave his evidence he indicated that he sought direction from the control room on what to do in respect of someone who emerged from the address who was not a suspect, but received no immediate answer (7.11.08, pages 169-170), suggesting a similar lack of control by DAC Dick of the Portnall Road address.

⁸⁸ XXXXX

- (xv) Related to this, she (a) failed to listen to surveillance chatter once it became apparent someone of potential interest had emerged from the property; (b) failed to listen closely to what Pat was saying; (c) failed to look at his surveillance log on the screen⁸⁹; and (d) failed to respond properly to Pat's indication that someone had left the premises⁹⁰;
- (xvi) She failed to ensure that she had the facility within the control room to chart the locations of the various teams, which could easily have been done by projecting a map on to one of the screens⁹¹, and it is apparent from the evidence of Central 1614 which was read to the jury as uncontroversial, that proper maps were not called for until close to 10.00 am⁹²;
- (xvii) Accordingly she was unable to provide any real direction to the surveillance officers for the crucial first few minutes between Mr de Menezes leaving Scotia Road and getting on a bus⁹³;
- (xviii) She also did not have proper information as to the locations of the firearms cars and so was not able to make an informed decision as to how they might assist;

⁸⁹ D/Su Boucher similarly accepted that he was seeing the log for the first time during the inquest (1.10.08, page 143, lines 13-16).

⁹⁰ **XXXXX**

⁹¹ As to this, DAC McDowell thought it would have been possible to have a map projected on to the wall where the locations of the various teams could have been marked and that such information would have been "very helpful" (25.9.08, pages 77-79); DI Whiddett agreed there was a facility to put a map up on one of the plasma screens and that this was "quite easy" to do so (3.10.08, page 63); D/Su Johnston thought that she would even have been able to track the movements of the teams electronically (2.10.08, pages 158-159); and Inspector Zaj thought that there was an ability to add in cordons, RVPs etc to it: (3.10.08, page 174).

⁹² As to which he also stated that he was "surprised that [he] should have been asked to provide maps at such a time and that apparently no-one had obtained them prior to that time. The provision of maps was not a sensitive or difficult procedure, and would not normally have been a matter for [me in my role as] the collator" (10.11.08, pages 117-18).

⁹³ **XXXXX**

The decision to stop Mr de Menezes

- (xix) She failed to recognise that given the huge variation in the reports of the identification of Mr de Menezes over a very short period of time - from so clearly not a threat that it was acceptable for DS Dingemans to pursue him using his "blues and twos", up until around 9.58 am, because he was "absolutely" not the suspect at this stage according to D/Su Boucher⁹⁴, to such a threat that only SO19 could stop him, a matter of minutes later - that the comments by Pat and DCI Purser as to the views of the surveillance teams, even if correct, were an extraordinarily dubious basis on which to order an armed intervention;
- (xx) She failed to ensure via TJ80 to TJ84 and Silver that the firearms officers were placed on State Amber as soon as it became possible that they would become involved in an intervention⁹⁵;
- (xxi) As a result she did not order those firearms officers who were already at Stockwell station (on their evidence, the two cars in which both C12 and C2 were travelling⁹⁶) by the time Mr de Menezes got off the bus to carry out the stop in Binfield Road, or in the entrance hall of the station⁹⁷;

⁹⁴ 1.10.08, pages 84-85.

⁹⁵ **XXXXX**

⁹⁶ C2 having said that if he had been given State Red while they were at the lights before Mr de Menezes got off the bus "absolutely" he could have done the stop before he got into the tube station (XXXX).

⁹⁷ On this issue it is noted that during his opening remarks the learned Coroner told the jury that "...as Mr de Menezes was walking towards and into the station, the CO19 officers had not yet arrived. They certainly were not in a position to carry out the interception which ordinarily they would have been expected to carry out" (22.9.08, page 66, lines 4-8); and that "...[b]ecause CO19 hadn't actually got there, as Mr de Menezes got to the station, and were not going to be in a position to intercept him, Commander Dick....decided that armed SO12 surveillance officers could, would have to, carry this task" (22.9.08, page 67, lines 4-9). He is respectfully invited to correct these passages in light of the evidence the jury has heard that the cars in which C12 and

- (xxii) She unjustifiably delayed in assessing the request from Ivor to carry out the stop of Mr de Menezes in the entrance hall of the station, leaving James hanging on the telephone for the 86 seconds call, and as a result missed the perfect opportunity for Ivor to use conventional control and restraint techniques to stop Mr de Menezes⁹⁸;
- (xxiii) She failed to recognise that there was a very real risk of confusion, and blue on blue shootings, or injury to the public, caused by very rapid changes of decision of the sort she engaged in during the crucial last few minutes, and that the risk of confusion was all the greater, as here, when the communications had to be made via radios and mobile telephones;
- (xxiv) By the time she did order SO19 to do the stop it was too late as Mr de Menezes was on the escalator, and – contrary to her evidence – she must have known this as decision 18 in her log clearly shows this, and she agreed that it would not have been appropriate to have given such an instruction at this time, given the risks posed by sending a firearms team into a tube station without communications, and the real risk that someone was going to get shot;
- (xxv) She did not give clear and unambiguous instructions as to what the firearms officers should do. She would or should have been aware of the sort of briefings the firearms officers had been given as to the level of threat they faced; she knew that they would know that a DSO could give an authorisation for a critical shot, and that there were no codewords for this within a non-Clydesdale operation; and she would or should have been aware that the firearms officers had been told to trust the information that they received from the operations room as it might be sanitised.

C2 were travelling were indeed at Stockwell station and in a position to carry out the stop of Mr de Menezes had they been asked to do so.

⁹⁸ XXXXX

Accordingly it was essential that she gave completely clear instructions, and by not merely indicating that Mr de Menezes should be stopped, but by adding the gloss that he must not be allowed on to the tube, she gave it a level of urgency she says she did not mean to communicate. Given the factors mentioned earlier, there was a real risk that this would be misinterpreted by the firearms officers; and

(xxvi) If D/Su Lewindon's evidence is correct she used the words "at all costs" in her command⁹⁹.

(c) *Causation*

46. In terms of causation, the jury would be fully entitled to conclude that some or all of these acts or omissions of DAC Dick more than minimally contributed to Mr de Menezes' death because, put shortly:

- (i) For the reasons set out above with regard to causation and DAC McDowell, had the operation been running properly from the outset, the prospects of a safe stop of Mr de Menezes being carried out before he got on to the bus would have been massively increased; and/or
- (ii) Her failures of command during the follow of Mr de Menezes and at the time when he got off the bus at Stockwell, as set out above, meant that a safe stop was not carried out before he went through the barriers at the tube.

(d) *'So serious'*

⁹⁹ As to which it is relevant that he made a contemporaneous note of this comment, in speech marks, at around 5.00 pm that day (Documents, page 5055; 3.10.08, pages 12-17 and 23).

47. The submissions made above as to the jury's function on this issue are repeated with regard to DAC Dick. It is submitted that the evidence with regard to her acts and omissions is particularly compelling; and that in light of the utterly fundamental manner in which she failed properly to implement the strategy, her multiple errors, and the predictably devastating consequences of her actions, it would be perverse to conclude that no jury, properly directed, could find that her breaches of duty were so serious as to be classified as criminal.

(iv) Unlawful killing (gross negligence manslaughter): Chief Inspector Esposito

(a) Duty of care

48. The submissions made above with regard to the duty of care owed by DAC McDowell are repeated with regard to Chief Inspector Esposito.

(b) Breach of duty

49. There is evidence from which the jury could conclude that Chief Inspector Esposito breached that duty of care, in that:

- (i) He was clearly present at New Scotland Yard from around 6.00 am¹⁰⁰ and in discussion with Andrew, but failed to realise that an important element of DAC McDowell's strategy, namely the deployment of firearms team to Scotia Road as soon as was practicable, was not happening;
- (ii) To the extent that he was aware of the alleged decision to hold the orange team centrally at New Scotland Yard rather than deploy them to either Scotia Road or Portnall Road, he failed to revert to DAC McDowell and make him aware of this;

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- (iii) He failed to take appropriate steps to ensure that there was adequate firearms support at Scotia Road (by deployment of the orange team, the use of ARV's or TST's), even when the concerns as to the absence of this were expressed by the surveillance team leaders;
- (iv) In the absence of firearms support at Scotia Road, he failed to discuss with DAC Dick the prospect of SO12 officers carrying out any stop, so that she could, if appropriate, select that as an option at least until the SFO team arrived on the plot;
- (v) He did not provide any immediate tailored tactical advice to DAC Dick as to when and how safe firearms stops might be carried out near the Scotia Road property (if indeed firearms officers were in attendance);
- (vi) He did not ensure that a recce was carried out nor otherwise arm himself with information as to the locality so as to enable him to provide DAC Dick with proper tactical advice as to stops by either SO19 or SO12;
- (vii) There is very little evidence that he did in fact comply with his obligations under paragraph 5.5 of the ACPO Manual¹⁰¹ as DAC Dicks' Tactical Adviser to provide her with "valid and reliable tactical advice" throughout the operation;
- (viii) On Nick's evidence, he provided inaccurate information to the surveillance teams, principally with regard to the stopping of the buses, but also as to the location of the firearms teams, and he must have known that this was inaccurate¹⁰²;

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- (ix) Once the follow of Mr de Menezes had commenced, and in particular once it became apparent that DS Dingemans was not going to be deployed, he failed to ensure he had accurate information as to where the firearms officers were;
- (x) He failed to recognise the importance of his knowing where the firearms officers were, as he suggested in evidence in chief that their location would have been only of limited relevance to any decisions he made about advising DAC to order them to do the stop¹⁰³, when clearly knowledge of the location of the officers was vital if a suitable decision could be made about their involvement, potentially on a "split second" basis;
- (xi) He gave inaccurate information to the control room as to the location of the firearms officers, saying that they were not in a position to do the stop, when it is now known that at least some of them were¹⁰⁴;
- (xii) As he was unaware of their true locations, he failed to advise DAC Dick to order those firearms officers who were already at Stockwell station by the time Mr de Menezes got off the bus to carry out the stop in Binfield Road, or in the entrance hall of the station¹⁰⁵;

¹⁰³

¹⁰⁴ As to this, there is overwhelming evidence that he informed the control room that the firearms officers were not in a position to stop Mr de Menezes once he got off the bus at Stockwell tube: for example, D/Su Lewindon said that "Mr Esposito was on the telephone talking to what I believed were firearms teams on the other end....Clearly there was an issue, the fact that they weren't on the scene, and he was trying to get them on the scene" (3.10.08, pages 8-9); D/Su Boucher said that he indicated that the firearms officers were not in position (1.10.08, pages 96-97); DCI Scott also understood that there came a time when he said that the firearms team were not in a position to do the stop (30.9.08, pages 95-96); as did D/Su Johnston heard (2.10.08, page 136). It is now known that this is not correct and that at least some of the officers, including C2 and C12, were in a position to do the stop at Stockwell station.

¹⁰⁵

- (xiii) He unjustifiably delayed in assessing the request from Ivor to carry out the stop of Mr de Menezes in the entrance hall of the station, and as a result did not advise DAC Dick to accept his request; and
- (xiv) Alternatively, he did not ensure that DAC Dick gave a prompt order to the firearms officers to carry out the stop¹⁰⁶.

(c) *Causation*

(d) *'So serious'*

50. The submissions made above as to causation and the 'so serious' limb of the *Adomako* test with regard to DAC Dick are repeated with regard to Chief Inspector Esposito.

A narrative verdict

51. It is submitted that in order to ensure that Article 2 is properly complied with – and so that the members of the jury can transparently declare their conclusions on the disputed factual issues at the heart of the case – they should be permitted to return an additional narrative verdict whatever their conclusions on the short-form verdicts. There are three broad areas which such a narrative should address.

(i) Key factual disputes

52. There are certain key factual disputes on the evidence in this case which the jury will need to resolve, and the conclusions of which they should be permitted to express. The following are examples within this category:

- (i) If the jury concludes that the delay in deployment of the firearms team caused or contributed to Mr de Menezes death:

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- (a) The conflicts in the evidence of Alan, Andrew and Inspector Zaj around the deployment of the firearms teams; and
 - (b) Whether or not there had in fact been a decision to deploy the orange team to New Scotland Yard so as to hold them centrally.
- (ii) The precise nature of the instructions given by DAC Dick; and
- (iii) The events within the carriage, in particular the actions of C12 and Mr de Menezes, including:
- (a) Whether "Armed police" was shouted;
 - (b) If so, whether this constituted a challenge to Mr de Menezes;
 - (c) If so, whether it was said in sufficient time for him to do anything to respond;
 - (d) Whether Mr de Menezes got up out of his seat¹⁰⁷;
 - (e) Whether he advanced towards the officers;
 - (f) Whether C12 held his weapon to Mr de Menezes' face/head area; and
 - (g) Whether Mr de Menezes continued advancing towards the officers despite this.

¹⁰⁷ It is noted that in his opening remarks, the learned Coroner told the jury that "Mr de Menezes got up and walked towards the police officers" (22.9.08, page 70, lines 5-6). In light of the conflicting evidence on this issue which the jury has now heard, the learned Coroner is respectfully invited to correct this part of his opening in is summing up to the jury.

(ii) Key matters of causation

53. Second, the members of the jury should be asked to indicate the main issues that they consider caused or contributed to Mr de Menezes' death, applying the "more than minimal" test for causation, to the balance of probabilities test, within the confines of Rule 42.
54. The jury should be directed that they may describe any act or omission as "inappropriate", "inadequate", "unsuitable", "insufficient", "lacking", a "failure" or a "gross failure", but that they must not use words that imply a civil or criminal judgement, such as "carelessly", "negligently", "recklessly", "guilt", "tortious", "breach of duty" or "breach of a duty of care".
55. They can be guided in this exercise by a list of the key potentially causative issues in the case, under headings such as:

Policy issues

- (i) Any failure by the MPS to develop clear and consistent rules of engagement and/or to provide proper training for dealing with a person who is suspected of being a suicide bomber, but where there is no specific intelligence that s/he is actually carrying a device at the time¹⁰⁸;

¹⁰⁸ This is a proper question not least because, despite the evidence of extensive planning within the MPS for how to respond to a suicide bomber, involving tabletop and practical exercises, it is apparent from the Tactical Options document that officers had not been trained in six out of the nine tactics for dealing with a foot borne suicide bomber (see the questioning of DAC McDowell, 25.9.08, pages 109 and 128-130). Moreover it is apparent that despite the views of D/Su Swain that other countries were inappropriately applying a threshold for armed intervention of "I think" the person is a suicide bomber (6.11.08, pages 20-21), something close to this criteria was in practice being taught to SO19 officers, who were essentially trained to rely on their own judgment absent an authorisation for a critical shot from a DSO (6.11.08, pages 61-2). The fact that there had not, as 21.7.05, yet been time to develop rules of engagement within the MPS had been recognised by Commissioner Ian Blair in his letter to the Home Office of that day (Documents, page 3228).

- (ii) Any failure to develop unambiguous command language for use in non-Clydesdale operations involving potential suicide bombers¹⁰⁹;

Intelligence and photographs¹¹⁰

- (iii) Any failure by the MPS properly to develop intelligence held with regard to (it is now known) Osman, principally, the Ragstone photographs¹¹¹;

¹⁰⁹ Whatever view the jury form of Mr Paddick's evidence as to the role of the DSO, the family adopts his argument (5.11.08, pages 61-63) that the failure to develop a clear codeword or instruction within the Kratos framework was a significant weakness of the policy. Although much was made of his public order experience, in an attempt to damage his credibility, the jury will no doubt also be reminded that when he retired he had reached Deputy Assistant Commissioner (DAC) rank, the same as DAC McDowell and DAC Dick, and of which DAC McDowell confirmed there are only around ten within the Metropolitan Police (24.9.08, page 98, line 23 – page 99, line 3).

¹¹⁰ There is an issue fit for the jury here because both D/Su Boucher and DCI Southworth were at pains to express to the jury that their function was to act a central point within the operations room for intelligence from SO12, SO13, the Serious Crime Directorate and partner agencies because, as D/Su Boucher explained, "the important thing is that they all channel that information into one place, and that it's prioritised in the right way so that the ops room receives it as quickly as possible" (1.10.08, page 59); and as DCI Southworth said, they had to "make sure that all the intelligence and information that were relevant to the decision-maker were brought together into one place" (10.11.08, page 38). The jury should be asked to comment on whether, if they consider the lack of these photographs caused or contributed to Mr de Menezes' death, these standards set by D/Su Boucher and DCI Southworth were in fact met on 22.7.05, given the three different types of photograph of Osman so far identified which were not obtained sufficiently quickly to have been used by the surveillance officers. On this, it is relevant that DAC McDowell fully understood the importance of having good quality photographs for the surveillance teams: he accepted that the surveillance officers would want "as much photographic assistance as [they] can get if [they] are going to attempt a positive identification" (25.9.08, page 58); and he "would have wanted the best photographs available for whatever briefing was to follow" (25.9.08, page 66). Similarly D/Su Boucher also wanted to reassure himself that the officers "had the appropriate photographs, the most up-to-date ones, and if they were any emerging ones that obviously something was in place for them to receive those" (1.10.08, page 54). It is also relevant that DAC Dick specifically called for "comprehensive profiles of each of the premises and subjects to be provided as soon as possible" as this was "fundamental for planning and intervention" and making safe/clearing the premises" and had cause to go back some three hours later and make the point that she had not received what she needed (see DC Cremin's log at Documents, page 166 to the effect that "Request from DCI Mellody, written profiles of occupants and subjects premises originally requested three hours ago"; and the evidence of DAC Dick on 6.10.08, pages 111-115).

¹¹¹ As to this issue, the jury would be entitled to conclude that more should have been done with the Ragstone material prior to 21.7.05 than simply noting car registration details etc (as confirmed by DCI Southworth).

- (iv) The failure to ensure that all surveillance officers had a copy of the gymn card photograph¹¹²;
- (v) The failure to provide the surveillance officers with (a) the wedding photographs of Osman from the rucksack¹¹³; (b) the photographs of

¹¹² As to this issue, the jury will no doubt recall that DAC McDowell thought that it was "not best practice", given the acknowledged difficulties over identification, not to ensure that all the surveillance officers had a copy of the photograph (25.9.08, page 57); and that DI Whiddett did not think that in this case, operational security precluded them being given copies, albeit perhaps not with the wording on (3.10.08, pages 78-81). Moreover, if the members of the jury conclude that the lack of photographs in the possession of the surveillance officers caused or contributed to Mr de Menezes' death, they may wish to indicate whether this is a systemic issue, in light of DI Whiddett's evidence that as a matter of course surveillance officers are not issued with a photograph in case they drop it in the street or leave it visible in a vehicle, and thereby breach the security of the operation (3.10.08, page 43). D/Su Cummings also said that he would have expected the surveillance officers to have the images with them "to refer to when making identifications" (8.10.08, page 195).

¹¹³ As to this issue, the jury would be fully entitled to conclude that the explanation offered by D/Su Macbrayne (7.11.08, pages 78-79) for not passing on the wedding photographs (namely that he did not consider them of sufficient forensic value) was unacceptable; particularly given he later recognised that he was aware that a surveillance operation was being mounted, for which the officers would need "the best possible assistance" (in terms of photographs) (7.11.08, page 95); given that D/Su Boucher rightly said that he would have wanted to have known about their existence (1.10.08, page 156); and given that on any view they are better quality pictures of Osman than the gymn card photograph. The jury will also note that D/Su Macbrayne would not accept that the gymn card photograph is in reality poor in quality (7.11.08, pages 95-6).

Osman from Operation Ragstone¹¹⁴; and/or (c) the DVLA photograph of him (specify as appropriate)¹¹⁵;

Events during the operation

- (vi) Any delay in the deployment of the firearms officers;
- (vii) Whether the briefing of the firearms officers by DCI Purser was unbalanced, and focused on the dangers posed by the failed bombers, without providing officers with appropriate emphasis as to the legal parameters within which they were working, and giving them clear guidance as to the circumstances in which a critical shot might be fired¹¹⁶;

¹¹⁴ In addition to the more general question above around the failure to develop the Ragstone intelligence prior to 21.7.05, it is submitted that what is particularly telling here is the delay in accessing this material after the attempted bombings on 21.7.05. DAC McDowell accepted that the exercise of comparing the photographs from the CCTV and Ragstone could have been done; and said that he would have expected [DCI] Mellody or someone on his staff to be taking this forward (25.9.08, pages 54-55). However it is clear that this did not achieve any results until after the shooting of Mr de Menezes as it is clear that the Ragstone photos had not been accessed and researched between the end of the operation in May 2004 and later on the morning of 22.7.05 (10.11.08, pages 43-44). The jury would be fully entitled to conclude that given the significance of the Ragstone training camp, those photographs should have been accessed and compared with the CCTV footage and gymn card photographs as soon as the latter were available. The Ragstone material was, quite simply, a wealth of information as to suspected suicide bombers, and so the failure to examine in promptly in a "pro-active" search for alleged suicide bombers, is inexplicable. Moreover, had it been examined, there is a realistic prospect that Osman and the blue Golf would have been identified, and the surveillance officers thereby provided with the better quality Ragstone photographs.

¹¹⁵ As to this issue, the jury will need to determine whether it was acceptable that, as DCI Southworth confirmed, it was not possible for the MPS to contact the DVLA out of hours in 2005 (10.11.08, page 51) and/or that in the context of an operation as high profile as this one, no efforts were made to vary the normal practice in this regard (as had been done by asking the gymn to open up out of hours).

¹¹⁶ As to this issue the jury has heard evidence from many firearms officers, TJ84 and DCI Purser as to the content of their briefings. There is no doubt that words such as "deadly and determined" were used to describe the failed bombers, and although DCI Purser denied using the phrase "up for it", it is submitted that there is overwhelming evidence that he did say this. There is also little doubt that DCI Purser provided the firearms officers with a thorough history of the information known with regard to the failed bombers, the Luton devices, potential bomb damage and the ease with which bombs might be concealed. However it is submitted that what he failed to do was appropriately balance this by stressing the legal framework within which the officers were operating (other than repeating the standard warning regarding the use of force printed on all the

- (viii) Any failings in the identification process;
- (ix) Any mis-communication of the identifications of Mr de Menezes;
- (x) Any confusion over the locations of the various teams on the ground; and
- (xi) Any lack of effective command by the control room.

Communications

- (xii) The failure to have an efficient radio communications system between all the teams involved in the operation and the control room and/or the undue reliance on communication by mobile telephone;
- (xiii) The inability of the firearms teams to use their motorcycle resources due to problems with the communication equipment¹¹⁷;
- (xiv) Any undue noise in the control room¹¹⁸.

officers' authorisation cards [XXXX], with which they would be fully familiar); and in particular that there was no clear guidance to the officers as to when a critical shot might be fired, other than an indication that the authorisation for this might come from the DSO, or as a result of their own assessment. Moreover although it is recognised that devices could have been easily concealed, it was crucial that the firearms officers be given an accurate assessment of the information on this issue – and it is clear from the evidence of D/Su Swain that the means of detonation which would require the bomber to use is hands, namely a switch, a rocker and a pressure pad, were much more common than those which did not, namely those detonated by a timer or a remote control, and that around 3.5 kilograms of explosives would have to be concealed on the body (6.11.08, pages 9-13 and 68-69). It is submitted that this level of detail should have been communicated to the firearms officers, given that life or death decisions were potentially going to be made by them based on risk assessments which required this sort of information.

¹¹⁷ Had this equipment been working, the motorcycles would have permitted additional flexibility to the firearms teams as the tactics could involve either a rider and a pillion officer or just a rider on his/her own, as Andrew confirmed (29.9.08, page 59).

¹¹⁸ On this issue, the jury has heard the evidence of several witnesses as to the noise within the room (EXAMPLES). There is also evidence, adduced through D/Su Boucher, that during the Operation Catto training exercise which had been conducted in the 16th floor operations room on 15.7.07, Pat had previously raised concerns that "...the increased number of personnel coupled

56. Those representing the family would wish to make further submissions on the content of any narrative direction once the learned Coroner has given his ruling on the submissions relating to short-form verdicts.

Conclusion

57. Accordingly, it is submitted on behalf of the family of Jean Charles de Menezes that:

- (i) Short-form verdicts of unlawful killing, lawful killing and an open verdict should be left to the jury;
- (ii) The unlawful killing verdicts should relate to allegations of gross negligence manslaughter with regard to the acts or omissions of (a) DAC McDowell; (b) DAC Dick; (c) Chief Inspector Esposito; and (d) C2 and C12; and
- (iii) The jury should also be invited to return a narrative verdict.

MICHAEL MANSFIELD QC

HENRIETTA HILL

13 November 2008

with the numerous visitors/observers added to the already chaotic initial environment. The increased sound level generated by this and the radio traffic, see comms, also contributed to the sometimes confusing picture...." (Documents, page 7797-8; 1.10.08, pages 16-17).

**IN THE SOUTHWARK CORONER'S
COURT**

INQUEST INTO THE DEATH OF:

**JEAN CHARLES DE MENEZES
(DECEASED)**

**SUBMISSIONS ON BEHALF OF THE
FAMILY WITH REGARD
TO 'VERDICTS'**

Birnberg Peirce & Partners
14 Inverness Street
London NW1 7JH
DX 57059 Camden Town
Tel: (020) 7911-0166
Fax: (020) 7911-0170
Ref: Harriet Wistrich
Solicitors for the de Menezes family