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2	*Osman v the United Kingdom* [1998] ECHR 101
3	*R (Middleton) v West Somerset Coroner* [2004] 2 AC 182.
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10	Submissions of Counsel for Interested Parties - A Rasheed, 8 October 2021

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COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

THIRD SECTION

CASE OF HUGH JORDAN v. THE UNITED KINGDOM

(*Application no. 24746/94*)

JUDGMENT

STRASBOURG

4 May 2001

FINAL

04/08/2001

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Hugh Jordan v. the United Kingdom,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr W. FUHRMANN,
Mr L. LOUCAIDES,
Mrs F. TULKENS,
Mr K. JUNGWIERT,
Sir Nicolas BRATZA,
Mr K. TRAJA, *judges*,
and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 4 April 2000 and on 11 April 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 24746/94) against the United Kingdom lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Irish and British national, Mr Hugh Jordan ("the applicant"), on 13 May 1994.

2. The applicant, who had been granted legal aid, was represented by Mr K. Winters and Mr S. Treacy, lawyers practising in Belfast. The United Kingdom Government ("the Government") were represented by their Agent, Mr C. Whomersley of the Foreign and Commonwealth Office.

3. The applicant alleged that his son Pearse Jordan had been unjustifiably shot and killed by a police officer and that there had been no effective investigation into, or redress for, his death. He invoked Articles 2, 6, 13 and 14 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. Having consulted the parties, the President of the Chamber decided that in the interests of the proper administration of justice, the proceedings in the present case should be conducted simultaneously with those in the cases of *McKerr v. the United Kingdom*, no. 28883/95, *Kelly and Others*

v. the United Kingdom, no. 30054/96 and *Shanaghan v. the United Kingdom*, no. 37715/97 (see judgments of the same date).

7. Third-party comments were received from the Northern Ireland Human Rights Commission on 23 March 2000, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 61 § 3).

8. A hearing took place in public in the Human Rights Building on 4 April 2000.

There appeared before the Court:

(a) *for the Government*

Mr C. WHOMERSLEY, *Agent*,
Mr R. WEATHERUP, QC,
Mr P. SALES,
Mr J. EADIE,
Mr N. LAVENDER, *Counsel,*
Mr O. PAULIN,
Ms S. MCCLELLAND,
Ms K. PEARSON,
Mr D. MCILROY,
Ms S. BRODERICK,
Ms L. MCALPINE,
Ms J. DONNELLY,
Mr T. TAYLOR, *Advisers*;

(b) *for the applicant*

Mr S. TREACY, QC,
Ms K. QUINLIVEN, *Counsel,*
Ms P. COYLE, *Solicitor*.

The Court heard addresses by Mr Weatherup and Mr Treacy.

9. By a decision of 4 April 2000, the Chamber declared the application admissible.

10. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. The facts of the case, in particular concerning what happened when Pearse Jordan was shot on 25 November 1992, are in dispute between the parties.

A. Events relating to the death of Pearse Jordan

12. On 25 November 1992, the applicant's son, Pearse Jordan, aged 22, was shot and killed in Belfast by an officer of the Royal Ulster Constabulary (the RUC), later identified as Sergeant A.

13. The official statement issued by the RUC to the media indicated that an RUC unit had pursued a car on the Falls Road and brought it to a halt. On stopping the car, the officers had fired several shots at the driver, fatally wounding him a short distance from where his car had been abandoned. No guns, ammunition, explosives, masks or gloves had been found in the car and the driver, Pearse Jordan, had been unarmed.

14. The *post mortem* report found two entry wounds in Pearse Jordan's back and one in the back of the left arm, and noted a bruise on the face and shin. It concluded that he had been struck by three bullets which had come from behind and to the left. There was nothing to indicate the range.

15. The shooting was witnessed by four civilians, who on 26 November 1992 made statements to the Committee for the Administration of Justice (CAJ), an independent non-governmental human rights organisation based in Belfast. The four witnesses gave the following account of the shooting, which is not accepted by the Government.

16. The four civilians were walking together along the Falls Road and passed Andersontown RUC station at 5 p.m. approximately. They noticed two unmarked police cars parked with their headlights dimmed, each containing three RUC officers: one car was red and the second dark blue/green.

As they proceeded along the road, they heard a crash behind them and turned to see on the opposite side of the road the red police car pulling alongside a car (Pearse Jordan's) and ramming it up onto the footpath. The red police car came to a halt in front of the car while the dark blue/green police car pulled up behind hitting it in the rear. The four civilians stopped and had an unobstructed view across the road. Pearse Jordan emerged from the immobilised car, and appeared shaken. He staggered across the road towards the four men followed by four police officers. As Pearse Jordan reached the white line in the centre of the road, an officer about 12 feet away fired a number of shots. The civilians heard no warning shout or

challenge given by any of the officers and saw nothing in Pearse Jordan's hands or anything threatening in his actions. Some of the shots struck Pearse Jordan. He staggered a little further then turned to face the police who, when they caught up with him, verbally abused him and pushed his face into the ground where he was kicked and searched. The police carried out a search of the car.

The four witnesses followed the ambulance which took Pearse Jordan to hospital where they stated that they were subjected to hostile and threatening remarks by members of the security forces.

17. According to the applicant, prior to the release of the official RUC statement (see paragraph 13 above), there were a number of unofficial reports widely circulated in the media to the effect that gloves, masks, guns and bombs had been found in the car, and one report to the effect that Pearse Jordan was a former Republican prisoner who had been charged in 1991 with possession of explosives. This information was not correct. Pearse Jordan did however receive an IRA funeral and, in the Republican News, he was described as a Volunteer of the Belfast Brigade of the IRA and it was said that he had died on active service.

18. An official RUC statement stated that a deputy superintendent of the RUC from outside Belfast would investigate the shooting. In a later statement, it was announced that the Independent Commission for Police Complaints (the ICPC) would supervise the RUC investigation.

19. On 26 November 1992, at 10.55 p.m., a detective chief inspector of the RUC criminal investigation department interviewed Sergeant A, in the presence of his solicitor and a representative of the ICPC. Sergeant A, member of an HMSU unit[1], stated as follows.

He had been at a briefing at 11 a.m. the day before concerning reports of a planned distribution of kit and munitions, including weapons, explosives and mortars, by the Provisional IRA in West Belfast. A surveillance operation was to be mounted and he was in charge of the teams on the ground which were going to intervene if possible to intercept the munitions. He was carrying a Smith and Wesson 59 pistol and a MP5 Heckler & Koch. At about 3.20-3.30 p.m., following reports of a car acting suspiciously at White Rock leisure centre, he and his teams left Woodbourne police station to wait at Andersontown police station. They heard reports there of a build up of activity at the back of two houses in Arizona street, which were under surveillance. The red car from the leisure centre arrived in Arizona street. Sergeant A thought that this was possibly the re-supply of terrorist equipment taking place. He was told by radio to gather his people together – car crews with call signs 8, 9, 3 and 12. When the red Orion left Arizona street, he and his crews left the police station but were called back almost

1. Royal Ulster Constabulary Headquarters Mobile Support Unit ("RUC HMSU"), the members of which were specially trained in counter-terrorism.

immediately to allow the red Orion to make its run. A red Cavalier left Arizona street and they were told to allow that to run. News arrived that the red Orion had come back to Arizona street. Sergeant A was told on the radio that the next time the red Orion came out they were to intercept it. He split his crews in two, his own team (call signs 8 and 12) to approach from the city side and the crews with call signs 3 and 9 to approach from the country side.

When the red Orion came past the two police cars, Sergeant A saw that there was one driver. They pulled out behind it. His driver flashed his lights at it. They switched on their police klaxon but had no blue flashing light on the car and none of them were wearing their police caps. Sergeant A's car drew level with the Orion and he signalled for it to pull over. The Orion slowed falling behind and then shot past on the passenger side, accelerating down the Falls Road in the direction of the city. Sergeant A told his driver to pursue him and force him off the road. The car possibly reached the speed of 60, maybe 70 miles per hour at the fastest. They were in a built up area, in traffic so it was difficult to judge. Their klaxon was going throughout. They drew parallel with the red Orion and nudged it once. The impact was hard enough to force the Orion partly up on the pavement and stop it. Sergeant A's own car stopped partly on the pavement in front of the Orion. The lock of his door had broken on the impact. He burst out of the door onto the pavement moving towards the Orion. He saw the driver running across the road from left to right at an angle away from him. He was looking over his right shoulder in Sergeant A's direction as he ran. Sergeant A said that he called out "Police. Halt." or "Halt. Police."

The driver of the Orion turned around towards him. He could not see the man's hands which were below his waist. His vision was either obscured by the roof of the police car in front of him or the arrival of the other black car (crew 12) on the scene. As he could not see the man's hands, he thought that his own life or the life of his own driver might be at risk. He feared the man was armed as he had spun round so quickly. He fired a short burst from his MP5 at the trunk of the man. When he made the split second decision to fire, the man was facing him but he could not say whether he had turned or moved in some other way. He was aware of other police officers shouting. He ran towards the driver who ran towards the footpath on the far side of the road. Constable F was shouting at him to get down on his knees. The driver fell flat, toppling over. It was realised at that stage that he was seriously injured.

Sergeant A quickly searched the car, while other security force personnel administered first aid to the driver. Either base, or he himself, suggested that the police officers move to Arizona street. The military took over the first aid. He had directed most of the police officers to leave the scene as soon as they had arrived, including crew 12 in their car. He did not know that car 12 had come into contact with the Orion or the deceased. He arrived back at the

station at about 5.30 to 6.00 p.m. There was a 20-30 minute debriefing in which he participated. He also discussed the matter casually with the others who were there. He was instructed to hand in his weapon at about that time.

20. On 30 March 1993, a detective inspector carried out a second interview of Sergeant A, in the presence of his solicitor. Further questions were put about his position and actions at the time of the shooting. He recalled that he had had a clear view of the deceased from the waist up. When the deceased turned to face him, he did not make any movements towards him. His arms remained down though. When asked to explain precisely why he had considered that his life was in danger, given that he could not confirm that the deceased was armed, Sergeant A replied that it had been a prolonged operation lasting several hours involving serious terrorist activity. The red Orion had reacted in a very aggressive manner in driving at excessive speed on a busy road. When the Orion was stopped, the driver ran away and when he was ordered to stop, he turned towards the Sergeant in what the Sergeant interpreted as an aggressive manner. His arms were down and his hands out of sight. In that short space of time, he formed the opinion that the deceased was a threat to his life. The man's actions had not been of someone about to surrender. He was certain that there were no viable alternatives to discharging his own weapon.

21. Forensic examinations of the cars involved in the incident were carried out. Interviews were conducted with the other police officers and army personnel involved in the incident.

According to the statements of police officers D, E and F in the car call sign 12, they had been pursuing the red Orion car close behind the red police Sierra in which Sergeant A was driving. When the Orion stopped, their car pulled up behind. As they were stopping, the driver was running from the car and either he ran into them or their car struck him, clipping him on the right thigh. The driver span round towards call sign 8. At that point, there was a short burst of gunfire. Their car had also at some point made contact with the red Orion in the rear. Only officer D heard shouting coming from the call sign 8 direction before the shooting. Shortly after moving their car to facilitate the flow of traffic, they had been directed to Arizona street.

In his statement of 6 December 1992, Sergeant H, from the car call sign 11, stated that on arrival at the scene he had instructed car 12 to be moved to facilitate the movement of a bus which had stopped very close to the injured man. He was not aware that car 12 might have struck the red Orion car or the deceased. The car was only moved back slightly and he was not involved in directing its complete removal from the scene.

Inspector M gave a statement on 7 December 1992 that, on being satisfied that the injured man was receiving first aid and that the red Orion had been secured, he gave directions for all the HMSU police teams to go to Arizona street for searches. Some sort of device has been located there.

22. During the investigation, appeals were made by the police in newspapers and broadcast media for potential eyewitnesses to come forward. A number of civilians made statements to the police and subsequently gave evidence at the inquest. In May 1993, the RUC concluded its inquiry. Its report on the investigation was submitted to the Director of Public Prosecutions (the DPP) on 25 May 1993.

23. On 3 June 1993, the ICPC wrote to the applicant's family expressing the view that the RUC report of 25 May 1993 concerning the criminal investigation into the shooting was satisfactory. On 15 June 1993, the RUC wrote to the applicant advising him that the papers had been sent to the DPP. The applicant and his family were not however provided with any indication as to the nature of the RUC's findings.

24. On 16 November 1993, the DPP's department issued to the Chief Constable of the RUC a direction of "no prosecution" in respect of the fatal shooting of Pearse Jordan. It had been concluded that the evidence was insufficient to warrant the prosecution of any person.

25. On 22 November 1993, having considered a submission by the CAJ, the DPP notified the CAJ that the direction of "no prosecution" should stand.

26. On 11 February 1994, the RUC Complaints and Discipline Department wrote to the applicant to inform him that the report on the shooting had been sent to the ICPC.

27. On 31 August 1994, the ICPC wrote to the applicant to inform him that after careful scrutiny of all the details it was of the opinion that the evidence was insufficient to warrant the preferment of disciplinary charges against the police officers concerned.

B. The inquest

28. On 29 November 1993, the RUC notified the Coroner that the DPP had directed "no prosecution". Following that decision, the Coroner decided to hold an inquest.

29. On 4 November 1994, the Coroner received the case papers from the RUC.

30. On or about 13 November 1994, the Coroner wrote to interested parties informing them that the inquest would begin on 4 January 1995.

31. Prior to the commencement of the inquest, the Secretary of State for Defence issued a certificate in which he identified information whose disclosure at the inquest he believed would be contrary to the public interest on grounds of national security, and made an application that the identities of certain military witnesses be withheld and that they should give their evidence from behind a screen.

32. On 20 December 1994, the Coroner held a preliminary hearing at which he decided to:

(a) protect certain categories of information from disclosure on the grounds of national security;
(b) protect the identity of three military witnesses, Soldiers V, W and X by withholding their names and screening them from all except the Coroner, the jury and the legal representatives of the interested parties; and
(c) protect the identity of certain RUC officers, including Sergeant A (the officer who fired the shots which killed Pearse Jordan) by withholding their names.

33. On 2 January 1995, the Secretary of State for Northern Ireland issued a certificate in which he identified information whose disclosure at the inquest he believed would be contrary to the public interest as compromising the integrity of RUC intelligence operations.

34. On 4 January 1995, the Coroner's inquest commenced. The applicant and his family were represented by a solicitor and counsel. The RUC were represented. The Coroner sat for three and a half days, hearing evidence from 19 witnesses, including the applicant, 8 civilians, Soldiers V, W and X, 7 police officers and a pathologist. These witnesses were subject to cross-examination. Sergeant A had informed the Coroner that he would not appear.

35. On or about 8 January 1995, the CAJ provided the Coroner with a statement which they had received from another civilian witness, a driver of a black taxi who had been at the scene.

36. On 10 January 1995, the Coroner rejected the request by the applicant's counsel to withdraw the protection of the identities of the RUC witnesses.

37. The proceedings were adjourned on 16 January 1995, at the request of Pearse Jordan's family, to enable the DPP, in the light of new evidence from the taxi driver, to reconsider the decision whether or not to bring a prosecution. The Coroner wrote to the DPP informing him that new evidence had come to light which should be considered.

38. On 10 February 1995, the DPP decided that the evidence remained insufficient to warrant the prosecution of any person in relation to Pearse Jordan's death. He requested that any further evidence adduced at the inquest relevant to his functions be reported to him.

39. On 14 February 1995, the applicant's legal representatives were informed by the DPP that his decision not to bring a prosecution still stood.

40. On 10 March 1995, the applicant's legal representatives made an application for the Coroner to discharge himself from the Inquest on the grounds that he was not conducting the inquest fairly. The Coroner refused the application.

41. On 11 April 1995, the Coroner wrote to the interested parties informing them that the inquest would resume on 12 June 1995.

42. On 26 May 1995, the applicant's legal representatives commenced judicial review proceedings seeking declarations that certain rulings given by the Coroner in the course of the inquest were wrong in law. Leave was granted on 2 June 1995. The applicant sought orders of certiorari to quash *inter alia* (a) the Coroner's refusal to give the next of kin access to the statements of the witnesses before they gave evidence at the inquest and (b) the decision of the Coroner to grant anonymity to RUC witnesses. Legal aid was granted to the applicant for this purpose. The Coroner adjourned the inquest pending these proceedings.

43. Leave was granted to bring judicial review proceedings against the Coroner on 2 June 1995.

44. The judicial review application was heard on 9 and 10 November 1995. By judgment of 11 December 1995, Lord Justice Carswell refused the applicant's claims. In doing so he had regard to the inquisitorial nature of inquest proceedings. He referred to the remarks of Griffiths J in *Ex parte Peach*:

> "A coroner's inquest is an inquisitorial procedure with a very limited objective indeed. The objective is set out in rule 26 of the Coroners Rules 1953. It is limited to ascertaining the following matters: who the deceased was; how, when and where the deceased came by his death. There is a further specific limitation provided by the Coroners (Amendment) Rules 1977. These provide by rule 7 that no verdict shall be framed in such a way as to appear to determine any question of criminal liability on the part of a named person or of civil liability.
>
> It is quite true that the coroner may allow interested parties to examine a witness called by the coroner. But that must be for the purpose of assisting in establishing the matters which the inquest is directed to determine. It is not intended by rule 16 to widen the coroner's inquest into adversarial fields of conflict."

45. Lord Justice Carswell also referred to the statutory background governing the procedure at inquest: Section 31(1) of the Coroners Act (Northern Ireland) 1959 providing that the jury shall give their verdict in the form prescribed by rules,

> "setting forth, so far as such particulars have been proved to them, who the deceased person was and how, when and where he came to his death."

and Rule 16 of the Coroners (Practice and Procedure) Rules 1963 providing:

> "neither the coroner nor the jury shall express any opinion on questions of criminal or civil liability ..."

46. On 8 January 1996, the applicant appealed against the decision of Lord Justice Carswell. The appeal was dismissed by the Court of Appeal of Northern Ireland on 28 June 1996. The applicant's application for leave to appeal to the House of Lords was refused on 4 October 1996. The House of Lords also refused leave on 20 March 1997.

47. The inquest was due to recommence on 1 December 1997. However, it was adjourned on 19 November 1997 by the Coroner, after consultation

with the parties, pending the outcome of a judicial review application in the High Court concerning the availability of legal aid for legal representation for the family of the deceased at inquests.

48. On 16 March 1999, final judgment was given in the case of *Sharon Lavery v. the Secretary of State and the Legal Aid Department*, in which a challenge concerning the unavailability of legal aid for inquests was dismissed.

49. On 1 July 1999, the Coroner informed the interested parties that he intended to resume the inquest on 1 November 1999.

50. On 13 October 1999, the Coroner adjourned the inquest pending the applicant's application for the disclosure of documents by the Chief Constable of the RUC in the wake of the Home Office Circular issued on 28 April 1999 on deaths in police custody which recommended, *inter alia*, that material supplied by the police to the Coroner should be made available to the families of deceased persons (see paragraphs 73 and 74 below).

51. On 2 February 2000, the applicant was informed that the Chief Constable would provide copies of the statements of the witnesses who were to appear at the inquest and copies of any statements which the Coroner proposed to read out.

52. On 3 March 2000, the applicant was granted leave to bring judicial review proceedings against the Chief Constable, challenging his decision not to provide further documents to the applicant.

53. When the inquest resumed, the Coroner proposed to call, in addition to the witnesses who gave evidence in January 1995, 12 police officers and Soldier Y involved in the anti-terrorist operation in which Pearse Jordan died, forensic experts and three police officers involved in the RUC investigation into the shooting.

54. On a date unspecified between 4 April and 2 October 2000, the applicant was provided with the witness statements of persons whom the Coroner has decided should be called to give evidence at the inquest.

C. Concerning the civil proceedings

55. The applicant was granted legal aid to pursue a civil action for compensation in the High Court. On 7 December 1992, the applicant instituted civil proceedings, alleging death by wrongful act.

56. On 5 October 1995, the applicant served a statement of claim in the civil proceedings. On 24 October 1995 the Ministry of Defence served their defence, together with a request for further and better particulars of the statement of claim. The applicant did not reply to this request until a date unspecified subsequent to 27 August 1998.

57. On 8 October 1999, the Crown Solicitor wrote to the applicant seeking consent to a remittal of the civil action to trial.

58. The applicant stated that the case is currently at the discovery stage but that this cannot be concluded until the inquest is terminated.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Use of lethal force

59. Section 3 of the Criminal Law Act (Northern Ireland) 1967 provides *inter alia*:

> "1. A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting the arrest or assisting in the lawful arrest of offenders or suspected offenders or persons unlawfully at large."

Self-defence or the defence of others is contained within the concept of the prevention of crime (see e.g. Smith and Hogan on Criminal Law).

B. Inquests

1. Statutory provisions and rules

60. The conduct of inquests in Northern Ireland is governed by the Coroners Act (Northern Ireland) 1959 and the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963. These provide the framework for a procedure within which deaths by violence or in suspicious circumstances are notified to the Coroner, who then has the power to hold an inquest, with or without a jury, for the purpose of ascertaining, with the assistance as appropriate of the evidence of witnesses and reports, *inter alia*, of *post mortem* and forensic examinations, who the deceased was and how, when and where he died.

61. Pursuant to the Coroners Act, every medical practitioner, registrar of deaths or funeral undertaker who has reason to believe a person died directly or indirectly by violence is under an obligation to inform the Coroner (section 7). Every medical practitioner who performs a *post mortem* examination has to notify the Coroner of the result in writing (section 29). Whenever a dead body is found, or an unexplained death or death in suspicious circumstances occurs, the police of that district are required to give notice to the Coroner (section 8).

62. Rules 12 and 13 of the Coroners Rules give power to the Coroner to adjourn an inquest where a person may be or has been charged with murder or other specified criminal offences in relation to the deceased.

63. Where the Coroner decides to hold an inquest with a jury, persons are called from the Jury List, compiled by random computer selection from the electoral register for the district on the same basis as in criminal trials.

64. The matters in issue at an inquest are governed by Rules 15 and 16 of the Coroners Rules:

> "15. The proceedings and evidence at an inquest shall be directed solely to ascertaining the following matters, namely: -
>
> (a) who the deceased was;
>
> (b) how, when and where the deceased came by his death;
>
> (c) the particulars for the time being required by the Births and Deaths Registration (Northern Ireland) Order 1976 to be registered concerning his death.
>
> 16. Neither the coroner nor the jury shall express any opinion on questions of criminal or civil liability or on any matters other than those referred to in the last foregoing Rule."

65. The forms of verdict used in Northern Ireland accord with this recommendation, recording the name and other particulars of the deceased, a statement of the cause of death (e.g. bullet wounds) and findings as to when and where the deceased met his death. In England and Wales, the form of verdict appended to the English Coroners Rules contains a section marked "conclusions of the jury/coroner as to the death" in which conclusions such as "lawfully killed" or "killed unlawfully" are inserted. These findings involve expressing an opinion on criminal liability in that they involve a finding as to whether the death resulted from a criminal act, but no finding is made that any identified person was criminally liable. The jury in England and Wales may also append recommendations to their verdict.

66. However, in Northern Ireland, the Coroner is under a duty (section 6(2) of the Prosecution of Offences Order (Northern Ireland) 1972) to furnish a written report to the DPP where the circumstances of any death appear to disclose that a criminal offence may have been committed.

67. Until recently, legal aid was not available for inquests as they did not involve the determination of civil liabilities or criminal charges. Legislation which would have provided for legal aid at the hearing of inquests (the Legal Aid, Advice and Assistance (Northern Ireland) Order 1981, Schedule 1 paragraph 5) has not been brought into force. However, on 25 July 2000, the Lord Chancellor announced the establishment of an Extra-Statutory Ex Gratia Scheme to make public funding available for representation for proceedings before Coroners in exceptional inquests in Northern Ireland. In March 2001, he published for consultation the criteria to be used in deciding whether applications for representation at inquests should receive public funding. This included *inter alia* consideration of financial eligibility, whether an effective investigation by the State was needed and whether the inquest was the only way to conduct it, whether the applicant required

representation to be able to participate effectively in the inquest and whether the applicant had a sufficiently close relationship to the deceased.

68. The Coroner enjoys the power to summon witnesses who he thinks it necessary to attend the inquest (section 17 of the Coroners Act) and he may allow any interested person to examine a witness (Rule 7). In both England and Wales and Northern Ireland, a witness is entitled to rely on the privilege against self-incrimination. In Northern Ireland, this privilege is reinforced by Rule 9(2) which provides that a person suspected of causing the death may not be compelled to give evidence at the inquest.

69. In relation to both documentary evidence and the oral evidence of witnesses, inquests, like criminal trials, are subject to the law of public interest immunity, which recognises and gives effect to the public interest, such as national security, in the non-disclosure of certain information or certain documents or classes of document. A claim of public interest immunity must be supported by a certificate.

2. The scope of inquests

70. Rules 15 and 16 (see above) follow from the recommendation of the Brodrick Committee on Death Certification and Coroners:

> "... the function of an inquest should be simply to seek out and record as many of the facts concerning the death as the public interest requires, without deducing from those facts any determination of blame... In many cases, perhaps the majority, the facts themselves will demonstrate quite clearly whether anyone bears any responsibility for the death; there is a difference between a form of proceeding which affords to others the opportunity to judge an issue and one which appears to judge the issue itself."

71. Domestic courts have made, *inter alia*, the following comments:

> "... It is noteworthy that the task is not to ascertain how the deceased died, which might raise general and far-reaching issues, but 'how...the deceased came by his death', a far more limited question directed to the means by which the deceased came by his death.
>
> ... [previous judgments] make it clear that when the Brodrick Committee stated that one of the purposes of an inquest is 'To allay rumours or suspicions' this purpose should be confined to allaying rumours and suspicions of how the deceased came by his death and not to allaying rumours or suspicions about the broad circumstances in which the deceased came by his death." (Sir Thomas Bingham, MR, Court of Appeal, *R. v the Coroner for North Humberside and Scunthorpe ex parte Roy Jamieson*, April 1994, unreported)
>
> "The cases establish that although the word 'how' is to be widely interpreted, it means 'by what means' rather than in what broad circumstances ... In short, the inquiry must focus on matters directly causative of death and must, indeed, be confined to those matters alone ..." (Simon Brown LJ, Court of Appeal, *R. v. Coroner for Western District of East Sussex, ex parte Homberg and others*, (1994) 158 JP 357)
>
> "... it should not be forgotten that an inquest is a fact finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable

> for one are unsuitable for the other. In an inquest it should never be forgotten that there are no parties, no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish the facts. It is an inquisitorial process, a process of investigation quite unlike a trial...
>
> It is well recognised that a purpose of an inquest is that rumour may be allayed. But that does not mean it is the duty of the Coroner to investigate at an inquest every rumour or allegation that may be brought to his attention. It is ... his duty to discharge his statutory role - the scope of his enquiry must not be allowed to drift into the uncharted seas of rumour and allegation. He will proceed safely and properly if he investigates the facts which it appears are relevant to the statutory issues before him." (Lord Lane, Court of Appeal, *R v. South London Coroner ex parte Thompson* (1982) 126 SJ 625)

3. Disclosure of documents

72. There was no requirement prior to 1999 for the families at inquests to receive copies of the written statements or documents submitted to the Coroner during the inquest. Coroners generally adopted the practice of disclosing the statements or documents during the inquest proceedings, as the relevant witness came forward to give evidence.

73. Following the recommendation of the Stephen Lawrence Inquiry, Home Office Circular No. 20/99 (concerning deaths in custody or deaths resulting from the actions of a police officer in purported execution of his duty) advised Chief Constables of police forces in England and Wales to make arrangements in such cases for the pre-inquest disclosure of documentary evidence to interested parties. This was to "help provide reassurance to the family of the deceased and other interested persons that a full and open police investigation has been conducted, and that they and their legal representatives will not be disadvantaged at the inquest". Such disclosure was recommended to take place 28 days before the inquest.

74. Paragraph 7 of the Circular stated:

> "The courts have established that statements taken by the police and other documentary material produced by the police during the investigation of a death in police custody are the property of the force commissioning the investigation. The Coroner has no power to order the pre-inquest disclosure of such material... Disclosure will therefore be on a voluntary basis."

Paragraph 9 listed some kinds of material which require particular consideration before being disclosed, for example:

– where disclosure of documents might have a prejudicial effect on possible subsequent proceedings (criminal, civil or disciplinary);

– where the material concerns sensitive or personal information about the deceased or unsubstantiated allegations which might cause distress to the family; and

– personal information about third parties not material to the inquest.

Paragraph 11 envisaged that there would be non-disclosure of the investigating officer's report although it might be possible to disclose it in those cases which the Chief Constable considered appropriate.

C. Police Complaints Procedures

75. The police complaints procedure was governed at the relevant time by the Police (Northern Ireland) Order 1987 (the 1987 Order). This replaced the Police Complaints Board, which had been set up in 1977, by the Independent Commission for Police Complaints (the ICPC). The ICPC has been replaced from 1 October 2000 with the Police Ombudsman for Northern Ireland appointed under the Police (Northern Ireland) Act 1998.

76. The ICPC was an independent body, consisting of a chairman, two deputy chairmen and at least four other members. Where a complaint against the police was being investigated by a police officer or where the Chief Constable or Secretary of State considered that a criminal offence might have been committed by a police officer, the case was referred to the ICPC.

77. The ICPC was required under Article 9(1)(a) of the 1987 Order to supervise the investigation of any complaint alleging that the conduct of a RUC officer had resulted in death or serious injury. Its approval was required of the appointment of the police officer to conduct the investigation and it could require the investigating officer to be replaced (Article 9(5)(b)). A report by the investigating officer was submitted to the ICPC concerning supervised investigations at the same time as to the Chief Constable. Pursuant to Article 9(8) of the 1987 Order, the ICPC issued a statement whether the investigation had been conducted to its satisfaction and, if not, specifying any respect in which it had not been so conducted.

78. The Chief Constable was required under Article 10 of the 1987 Order to determine whether the report indicated that a criminal offence had been committed by a member of the police force. If he so decided and considered that the officer ought to be charged, he was required to send a copy of the report to the DPP. If the DPP decided not to prefer criminal charges, the Chief Constable was required to send a memorandum to the ICPC indicating whether he intended to bring disciplinary proceedings against the officer (Article 10(5)) save where disciplinary proceedings had been brought and the police officer had admitted the charges (Article 11(1)). Where the Chief Constable considered that a criminal offence had been committed but that the offence was not such that the police officer should be charged or where he considered that no criminal offence had been committed, he was required to send a memorandum indicating whether he intended to bring disciplinary charges and, if not, his reasons for not proposing to do so (Article 11(6) and (7)).

79. If the ICPC considered that a police officer subject to investigation ought to be charged with a criminal offence, it could direct the Chief Constable to send the DPP a copy of the report on that investigation (Article 12(2)). It could also recommend or direct the Chief Constable to prefer such disciplinary charges as the ICPC specified (Article 13(1) and (3)).

D. The Director of Public Prosecutions

80. The Director of Public Prosecutions (the DPP), appointed pursuant to the Prosecution of Offences (Northern Ireland) 1972 (the 1972 Order) is an independent officer with at least 10 years' experience of the practice of law in Northern Ireland who is appointed by the Attorney General and who holds office until retirement, subject only to dismissal for misconduct. His duties under Article 5 of the 1972 Order are *inter alia*:

> "(a) to consider, or cause to be considered, with a view to his initiating or continuing in Northern Ireland any criminal proceedings or the bringing of any appeal or other proceedings in or in connection with any criminal cause or matter in Northern Ireland, any facts or information brought to his notice, whether by the Chief Constable acting in pursuance of Article 6(3) of this Order or by the Attorney General or by any other authority or person;
>
> (b) to examine or cause to be examined all documents that are required under Article 6 of this Order to be transmitted or furnished to him and where it appears to him to be necessary or appropriate to do so to cause any matter arising thereon to be further investigated;
>
> (c) where he thinks proper to initiate, undertake and carry on, on behalf of the Crown, proceedings for indictable offences and for such summary offences or classes of summary offences as he considers should be dealt with by him."

81. Article 6 of the 1972 Order requires *inter alia* Coroners and the Chief Constable of the RUC to provide information to the DPP as follows:

> "(2) Where the circumstances of any death investigated or being investigated by a coroner appear to him to disclose that a criminal offence may have been committed he shall as soon as practicable furnish to the [DPP] a written report of those circumstances.
>
> (3) It shall be the duty of the Chief Constable, from time to time, to furnish to the [DPP] facts and information with respect to -
>
> (a) indictable offences [such as murder] alleged to have been committed against the law of Northern Ireland; ...
>
> and at the request of the [DPP], to ascertain and furnish to the [DPP] information regarding any matter which may appear to the [DPP] to require investigation on the ground that it may involve an offence against the law of Northern Ireland or information which may appear to the [DPP] to be necessary for the discharge of his functions under this Order."

82. According to the Government's observations submitted on 18 June 1998, it had been the practice of successive DPPs to refrain from giving reasons for decisions not to institute or proceed with criminal prosecutions other than in the most general terms. This practice was based upon the consideration that

(1) if reason were given in one or more cases, they would be required to be given in all. Otherwise, erroneous conclusions might be drawn in relation to those cases where reasons were refused, involving either unjust implications regarding the guilt of some individuals or suspicions of malpractice;

(2) the reason not to prosecute might often be the unavailability of a particular item of evidence essential to establish the case (e.g. sudden death or flight of a witness or intimidation). To indicate such a factor as the sole reason for not prosecuting might lead to assumptions of guilt in the public estimation;

(3) the publication of the reasons might cause pain or damage to persons other than the suspect (e.g. the assessment of the credibility or mental condition of the victim or other witnesses);

(4) in a substantial category of cases decisions not to prosecute were based on the DPP's assessment of the public interest. Where the sole reason not to prosecute was the age, mental or physical health of the suspect, publication would not be appropriate and could lead to unjust implications;

(5) there might be considerations of national security which affected the safety of individuals (e.g. where no prosecution could safely or fairly be brought without disclosing information which would be of assistance to terrorist organisations, would impair the effectiveness of the counter-terrorist operations of the security forces or endanger the lives of such personnel and their families or informants).

83. Decisions of the DPP not to prosecute have been subject to applications for judicial review in the High Court.

In *R v. DPP ex parte C* (1995) 1 CAR, p. 141, Lord Justice Kennedy held, concerning a decision of the DPP not to prosecute in an alleged case of buggery:

> "From all of those decisions it seems to me that in the context of the present case this court can be persuaded to act if and only if it is demonstrated to us that the Director of Public Prosecutions acting through the Crown Prosecution Service arrived at the decision not to prosecute:
>
> (1) because of some unlawful policy (such as the hypothetical decision in Blackburn not to prosecute where the value of goods stolen was below £100);
>
> (2) because the Director of Public Prosecutions failed to act in accordance with his own settled policy as set out in the code; or

(3) because the decision was perverse. It was a decision at which no reasonable prosecutor could have arrived."

84. In the case of *R v. the DPP and Others ex parte Timothy Jones* the Divisional Court on 22 March 2000 quashed a decision not to prosecute for alleged gross negligence causing a death in dock unloading on the basis that the reasons given by the DPP – that the evidence was not sufficient to provide a realistic prospect of satisfying a jury – required further explanation.

85. *R v. DPP ex parte Patricia Manning and Elizabeth Manning* (decision of the Divisional Court of 17 May 2000) concerned the DPP's decision not to prosecute any prison officer for manslaughter in respect of the death of a prisoner, although the inquest jury had reached a verdict of unlawful death - there was evidence that prison officers had used a neck lock which was forbidden and dangerous. The DPP reviewing the case still concluded that the Crown would be unable to establish manslaughter from gross negligence. The Lord Chief Justice noted:

"Authority makes clear that a decision by the Director not to prosecute is susceptible to judicial review: see, for example, R. v. Director of Public Prosecutions, ex parte C [1995] 1 Cr. App. R. 136. But, as the decided cases also make clear, the power of review is one to be sparingly exercised. The reasons for this are clear. The primary decision to prosecute or not to prosecute is entrusted by Parliament to the Director as head of an independent, professional prosecuting service, answerable to the Attorney General in his role as guardian of the public interest, and to no-one else. It makes no difference that in practice the decision will ordinarily be taken by a senior member of the CPS, as it was here, and not by the Director personally. In any borderline case the decision may be one of acute difficulty, since while a defendant whom a jury would be likely to convict should properly be brought to justice and tried, a defendant whom a jury would be likely to acquit should not be subjected to the trauma inherent in a criminal trial. If, in a case such as the present, the Director's provisional decision is not to prosecute, that decision will be subject to review by Senior Treasury Counsel who will exercise an independent professional judgment. The Director and his officials (and Senior Treasury Counsel when consulted) will bring to their task of deciding whether to prosecute an experience and expertise which most courts called upon to review their decisions could not match. In most cases the decision will turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before (in a serious case such as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied."

As regards whether the DPP had a duty to give reasons, the Lord Chief Justice said:

"It is not contended that the Director is subject to an obligation to give reasons in every case in which he decides not to prosecute. Even in the small and very narrowly defined cases which meet Mr Blake's conditions set out above, we do not understand domestic law or the jurisprudence of the European Court of Human Rights to impose an absolute and unqualified obligation to give reasons for a decision not to prosecute. But the right to life is the most fundamental of all human rights. It is put at the forefront of the Convention. The power to derogate from it is very limited. The death of a person in the custody of the State must always arouse concern, as recognised by section 8(1)(c), (3)(b) and (6) of the Coroner's Act 1988, and if the death resulted from violence inflicted by agents of the State that concern must be profound. The holding of an inquest in public by an independent judicial official, the coroner, in which interested parties are able to participate must in our view be regarded as a full and effective inquiry (see McCann v. United Kingdom [1996] 21 EHRR 97, paragraphs 159 to 164). Where such an inquest following a proper direction to the jury culminates in a lawful verdict of unlawful killing implicating a person who, although not named in the verdict, is clearly identified, who is living and whose whereabouts are known, the ordinary expectation would naturally be that a prosecution would follow. In the absence of compelling grounds for not giving reasons, we would expect the Director to give reasons in such a case: to meet the reasonable expectation of interested parties that either a prosecution would follow or a reasonable explanation for not prosecuting be given, to vindicate the Director's decision by showing that solid grounds exist for what might otherwise appear to be a surprising or even inexplicable decision and to meet the European Court's expectation that if a prosecution is not to follow a plausible explanation will be given. We would be very surprised if such a general practice were not welcome to Members of Parliament whose constituents have died in such circumstances. We readily accept that such reasons would have to be drawn with care and skill so as to respect third party and public interests and avoid undue prejudice to those who would have no opportunity to defend themselves. We also accept that time and skill would be needed to prepare a summary which was reasonably brief but did not distort the true basis of the decision. But the number of cases which meet Mr Blake's conditions is very small (we were told that since 1981, including deaths in police custody, there have been seven such cases), and the time and expense involved could scarcely be greater than that involved in resisting an application for judicial review. In any event it would seem to be wrong in principle to require the citizen to make a complaint of unlawfulness against the Director in order to obtain a response which good administrative practice would in the ordinary course require."

On this basis, the court reviewed whether the reasons given by the DPP in that case were in accordance with the Code for Crown Prosecutors and capable of supporting a decision not to prosecute. It found that the decision had failed to take relevant matters into account and that this vitiated the decision not to prosecute. The decision was quashed and the DPP was required to reconsider his decision whether or not to prosecute.

86. *In the Matter of an Application by David Adams for Judicial Review*, the High Court in Northern Ireland on 7 June 2000 considered the applicant's claim that the DPP had failed to give adequate and intelligible reasons for his decision not to prosecute any police officer concerned in the arrest during which he had suffered serious injuries and for which in civil proceedings he had obtained an award of damages against the police. It noted that there was no statutory obligation on the DPP under the 1972

Order to give reasons and considered that no duty to give reasons could be implied. The fact that the DPP in England and Wales had in a number of cases furnished detailed reasons, whether from increasing concern for transparency or in the interests of the victim's families, was a matter for his discretion. It concluded on the basis of authorities that only in exceptional cases such as the Manning case (paragraph 85 above) would the DPP be required to furnish reasons to a victim for failing to prosecute and that review should be limited to where the principles identified by Lord Justice Kennedy (paragraph 83 above) were infringed. Notwithstanding the findings in the civil case, they were not persuaded that the DPP had acted in such an aberrant, inexplicable or irrational manner that the case cried out for reasons to be furnished as to why he had so acted.

III. RELEVANT INTERNATIONAL LAW AND PRACTICE

A. The United Nations

87. The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (UN Force and Firearms Principles) were adopted on 7 September 1990 by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.

88. Paragraph 9 of the UN Force and Firearms Principles provides, *inter alia*, that the "intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life".

89. Other relevant provisions read as follows:

Paragraph 10

> "... law enforcement officials shall identify themselves as such and shall give a clear warning of their intent to use firearms, with sufficient time for the warnings to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident."

Paragraph 22

> "... Governments and law enforcement agencies shall ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances. In cases of death and serious injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control."

Paragraph 23

> "Persons affected by the use of force and firearms or their legal representatives shall have access to an independent process, including a judicial process. In the event of the death of such persons, this provision shall apply to their dependants accordingly."

90. Paragraph 9 of the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, adopted on 24 May 1989 by the Economic and Social Council Resolution 1989/65, (UN Principles on Extra-Legal Executions) provides, *inter alia*, that:

> "There shall be a thorough, prompt and impartial investigation of all suspected cases of extra legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances ..."

91. Paragraphs 10 to 17 of the UN Principles on Extra-Legal Executions contain a series of detailed requirements that should be observed by investigative procedures into such deaths.

Paragraph 10 states, *inter alia*:

> "The investigative authority shall have the power to obtain all the information necessary to the inquiry. Those persons conducting the inquiry ... shall also have the authority to oblige officials allegedly involved in any such executions to appear and testify ..."

Paragraph 11 specifies:

> "In cases in which the established investigative procedures are inadequate because of a lack of expertise or impartiality, because of the importance of the matter or because of the apparent existence of a pattern of abuse, and in cases where there are complaints from the family of the victim about these inadequacies or other substantial reasons, Governments shall pursue investigations through an independent commission of inquiry or similar procedure. Members of such a commission shall be chosen for their recognised impartiality, competence and independence as individuals. In particular, they shall be independent of any institution, agency or person that may be the subject of the inquiry. The commission shall have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry as provided in these principles."

Paragraph 16 provides, *inter alia*:

> "Families of the deceased and their legal representatives shall be informed of, and have access to, any hearing as well as all information relevant to the investigation and shall be entitled to present other evidence ..."

Paragraph 17 provides, *inter alia*:

> "A written report shall be made within a reasonable time on the methods and findings of such investigations. The report shall be made public immediately and shall include the scope of the inquiry, procedures, methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and on applicable law ..."

92. The "Minnesota Protocol" (Model Protocol for a legal investigation of extra-legal, arbitrary and summary executions, contained in the UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions) provides, *inter alia,* in section B on the "Purposes of an inquiry":

"As set out in paragraph 9 of the Principles, the broad purpose of an inquiry is to discover the truth about the events leading to the suspicious death of a victim. To fulfil that purpose, those conducting the inquiry shall, at a minimum, seek:

(a) to identify the victim;

(b) to recover and preserve evidentiary material related to the death to aid in any potential prosecution of those responsible;

(c) to identify possible witnesses and obtain statements from them concerning the death;

(d) to determine the cause, manner, location and time of death, as well as any pattern or practice that may have brought about the death;

(e) to distinguish between natural death, accidental death, suicide and homicide;

(f) to identify and apprehend the person(s) involved in the death;

(g) to bring the suspected perpetrator(s) before a competent court established by law."

In section D, it is stated that "In cases where government involvement is suspected, an objective and impartial investigation may not be possible unless a special commission of inquiry is established ...".

B. The European Committee for the Prevention of Torture

93. In the report on its visit to the United Kingdom and the Isle of Man from 8 to 17 September 1999, published on 13 January 2000, the European Committee for the Prevention of Torture (the CPT) reviewed the system of preferring criminal and disciplinary charges against police officers accused of ill-treating persons. It commented, *inter alia*, on the statistically few criminal prosecutions and disciplinary proceedings which were brought, and identified certain aspects of the procedures which cast doubt on their effectiveness:

The chief officers appointed officers from the same force to conduct the investigations, save in exceptional cases where they appointed an officer from another force, and the majority of investigations were unsupervised by the Police Complaints Authority.

It stated at paragraph 55:

"As already indicated, the CPT itself entertains reservations about whether the PCA [the Police Complaints Authority], even equipped with the enhanced powers which have been proposed, will be capable of persuading public opinion that complaints against the police are vigorously investigated. **In the view of the CPT, the creation of a fully-fledged independent investigating agency would be a most welcome development. Such a body should certainly, like the PCA, have the power to direct that disciplinary proceedings be instigated against police officers. Further, in the interests of bolstering public confidence, it might also be thought**

appropriate that such a body be invested with the power to remit a case directly to the CPS for consideration of whether or not criminal proceedings should be brought.

In any event, **the CPT recommends that the role of the 'chief officer' within the existing system be reviewed.** To take the example of one Metropolitan Police officer to whom certain of the chief officer's functions have been delegated (the Director of the CIB [Criminal Investigations Bureau]), he is currently expected to: seek dispensations from the PCA; appoint investigating police officers and assume managerial responsibility for their work; determine whether an investigating officer's report indicates that a criminal offence may have been committed; decide whether to bring disciplinary proceedings against a police officer on the basis of an investigating officer's report, and liase with the PCA on this question; determine which disciplinary charges should be brought against an officer who is to face charges; in civil cases, negotiate settlement strategies and authorise payments into court. It is doubtful whether it is realistic to expect any single official to be able to perform all of these functions in an entirely independent and impartial way.

57. ...Reference should also be made to the high degree of public interest in CPS [Crown Prosecution Service] decisions regarding the prosecution of police officers (especially in cases involving allegations of serious misconduct). Confidence about the manner in which such decisions are reached would certainly be strengthened were the CPS to be obliged to give detailed reasons in cases where it was decided that no criminal proceedings should be brought. The CPT recommends that such a requirement be introduced."

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 2 OF THE CONVENTION

94. The applicant submitted that his son Pearse Jordan had been unjustifiably killed and that there had been no effective investigation into the circumstances of his death. He invoked Article 2 of the Convention which provides:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

A. The submissions made to the Court

1. The applicant

95. The applicant submitted that the death of his son was the result of the unnecessary and disproportionate use of force by an RUC officer and that his son was the victim of a shoot-to-kill policy operated by the United Kingdom Government in Northern Ireland. He referred, *inter alia*, to reports by Amnesty International and the Human Rights Watch, as well as the statements made by Mr John Stalker, a senior policeman, who carried out an investigation into allegations of such a policy. He argued that this case could not be looked at in isolation from the other cases in Northern Ireland involving the use of lethal force by State agents. In this context, it could be seen on analysis of the lethal force deaths between 1969 and 1994 that there was at the material time a practice whereby suspects were arbitrarily killed rather than arrested. He pointed to the common features of preplanning based on intelligence from informers, the deployment of specialist military or police units and the maximal use of force. In this case, Sergeant A had no evidence that Pearse Jordan was armed, and directed fire at the trunk of the body, making no attempt to wound or take evasive action in ducking behind his armoured car to protect himself. This could not be regarded as the use of minimum or proportionate force. The inadequate investigations into this and other cases were also evidence of official tolerance on the part of the State of the use of unlawful lethal force. Here, the police officer involved in the shooting was allowed to leave the scene with his weapons, a car involved in the incident had been moved from the scene and no adequate steps were taken to find independent eye witnesses, while witnesses who did come forward were subject to abuse and harassment.

96. The applicant submitted that while there were a few outstanding issues of fact, e.g. whether Sergeant A issued a warning, and whether and in what manner the deceased changed direction as he ran away, these elements were relevant only to issues of individual criminal responsibility and did not prevent the Court reaching its own conclusions under Article 2 of the Convention. To the extent that the Court felt there were any issues to resolve, it should of its own motion obtain the necessary material by an investigation under Article 38 § 1 a) of the Convention.

97. The applicant further submitted that there had been no effective official investigation carried out into the killing, relying on the international standards set out in the Minnesota Protocol. He argued that the RUC investigation was inadequate and flawed by its lack of independence and lack of publicity. The DPP's own role was limited by the RUC investigation

and he did not make public his reasons for not prosecuting. The inquest was flawed by the delays, the limited scope of the enquiry, a lack of legal aid for relatives, a lack of access to documents and witness statements, the non-compellability of security force or police witnesses and the use of public interest immunity certificates. The Government could not rely on civil proceedings either as this depended on the initiative of the deceased's family.

2. The Government

98. While the Government did not accept the applicant's claims under Article 2 that his son was killed by any excessive or unjustified use of force, they considered that it would be wholly inappropriate for the Court to seek itself to determine the issues of fact arising on the substantive issues of Article 2. This might involve the Court seeking to resolve issues, and perhaps examining witnesses and conducting hearings, at the same time as the High Court in Northern Ireland, with a real risk of inconsistent findings. It would also allow the applicant to forum-shop and would thus undermine the principle of exhaustion of domestic remedies. They submitted that there were in any event considerable practical difficulties for the Court to pursue an examination of the substantive aspects of Article 2 as the factual issues would be numerous and complex, involving live evidence with a substantial number of witnesses. This primary fact finding exercise should not be performed twice, in parallel, such an undertaking wasting court time and costs and giving rise to a real risk of prejudice in having to defend two sets of proceedings simultaneously.

99. Insofar as the applicant invited the Court to find a practice of killing rather than arresting terrorist suspects, this allegation was emphatically denied. The Government submitted that such a wide ranging allegation calling into question every anti-terrorist operation over the last thirty years went far beyond the scope of this application and referred to matters not before this Court. They denied that there had been any obstruction to the police investigation in this case, pointing out that the removal of the car from the scene was consistent with legitimate security concerns (i.e. the team being sent to Arizona Street where the presence of a bomb was suspected). They denied that there had been any intimidation or abuse of witnesses.

100. The Government further denied that domestic law in any way failed to comply with the requirements of this provision. They argued that the procedural aspect of Article 2 was satisfied by the combination of procedures available in Northern Ireland, namely, the police investigation, which was supervised by the ICPC and by the DPP, the inquest proceedings and civil proceedings. These secured the fundamental purpose of the procedural obligation, in that they provided for effective accountability for the use of lethal force by State agents. This did not require that a criminal

prosecution be brought but that the investigation was capable of leading to a prosecution, which was the case in this application. They also pointed out that each case had to be judged on its facts since the effectiveness of any procedural ingredient may vary with the circumstances. In the present case, they submitted that the available procedures together provided the necessary effectiveness, independence and transparency by way of safeguards against abuse.

3. The Northern Ireland Human Rights Commission

101. Referring to relevant international standards concerning the right to life (e.g. the Inter-American Court's case-law and the findings of the UN Human Rights Committee), the Commission submitted that the State had to carry out an effective official investigation when an agent of the State was involved or implicated in the use of lethal force. Internal accountability procedures had to satisfy the standards of effectiveness, independence, transparency and promptness, and facilitate punitive sanctions. It was however, in their view, not sufficient for a State to declare that while certain mechanisms were inadequate, a number of such mechanisms regarded cumulatively could provide the necessary protection. They submitted that the investigative mechanisms relied on in this case, singly or combined, failed to do so. They referred, *inter alia,* to the problematic role of the RUC in Northern Ireland, the allegedly serious deficiencies in the mechanisms of police accountability, the limited scope of and delays in inquests, and the lack of compellability of the members of the security forces who have used lethal force to appear at inquests. They drew the Court's attention to the form of enquiry carried out in Scotland under the Sheriff, a judge of criminal and civil jurisdiction, where the next-of-kin have a right to appear. They urged the Court to take the opportunity to give precise guidance as to the form which investigations into the use of lethal force by State agents should take.

B. The Court's assessment

1. General principles

102. Article 2, which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, to which in peacetime no derogation is permitted under Article 15. Together with Article 3, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings

also requires that Article 2 be interpreted and applied so as to make its safeguards practical and effective (see the McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, pp. 45-46, §§ 146-147).

103. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as for example in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death which occur. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC] no. 21986/93, ECHR 2000-VII, § 100, and also *Çakıcı v. Turkey*, [GC] ECHR 1999-IV, § 85, *Ertak v. Turkey* no. 20764/92 [Section 1] ECHR 2000-V, § 32 and *Timurtaş v. Turkey*, no. 23531/94 [Section 1] ECHR 2000-VI, § 82).

104. The text of Article 2, read as a whole, demonstrates that it covers not only intentional killing but also the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The deliberate or intended use of lethal force is only one factor however to be taken into account in assessing its necessity. Any use of force must be no more than "absolutely necessary" for the achievement of one or more of the purposes set out in sub-paragraphs (a) to (c). This term indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraphs 2 of Articles 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims (the McCann judgment, cited above, §§ 148-149).

105. The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (see, *mutatis mutandis*, the McCann judgment cited above, p. 49, § 161, and the Kaya v. Turkey judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, p. 324, § 86). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the

authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (see, for example, *mutatis mutandis*, *İlhan v. Turkey* [GC] no. 22277/93, ECHR 2000-VII, § 63).

106. For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (see e.g. the Güleç v. Turkey judgment of 27 July 1998, *Reports* 1998-IV, §§ 81-82; *Öğur v. Turkey*, [GC] no. 21954/93, ECHR 1999-III, §§ 91-92). This means not only a lack of hierarchical or institutional connection but also a practical independence (see for example the Ergı v. Turkey judgment of 28 July 1998, *Reports* 1998-IV, §§ 83-84, where the public prosecutor investigating the death of a girl during an alleged clash showed a lack of independence through his heavy reliance on the information provided by the gendarmes implicated in the incident).

107. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances (e.g. the Kaya v. Turkey judgment, cited above, p. 324, § 87) and to the identification and punishment of those responsible (*Öğur v. Turkey*, cited above, § 88). This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death (see concerning autopsies, e.g. *Salman v. Turkey* cited above, § 106; concerning witnesses e.g. *Tanrıkulu v. Turkey* [GC], no. 23763/94, ECHR 1999-IV, § 109; concerning forensic evidence e.g. *Gül v. Turkey*, 22676/93, [Section 4], § 89). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.

108. A requirement of promptness and reasonable expedition is implicit in this context (see the Yaşa v. Turkey judgment of 2 September 1998, *Reports* 1998-IV, pp. 2439-2440, §§ 102-104; *Cakıcı v. Turkey* cited above, §§ 80, 87 and 106; *Tanrikulu v. Turkey*, cited above, § 109; *Mahmut Kaya v. Turkey*, no. 22535/93, [Section I] ECHR 2000-III, §§ 106-107). It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

109. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see Güleç v. Turkey, cited above, p. 1733, § 82, where the father of the victim was not informed of the decisions not to prosecute; *Öğur v. Turkey*, cited above, § 92, where the family of the victim had no access to the investigation and court documents; *Gül v. Turkey* judgment, cited above, § 93).

2. Application in the present case

a. Concerning alleged responsibility of the State for the death of Pearse Jordan

110. It is undisputed that Pearse Jordan was shot and killed by a police officer while he was unarmed. This use of lethal force falls squarely within the ambit of Article 2, which requires any such action to pursue one of the purposes set out in second paragraph and to be no more than absolutely necessary for that purpose. A number of key factual issues arise in this case, in particular whether Sergeant A acted on the basis of an honest belief perceived for good reasons to be valid at the time but which turned out subsequently to be mistaken, namely, that he or any other police officer was at risk from Pearse Jordan in the circumstances of the case (see McCann and Others judgment, cited above, p. 58-59, § 200). Determining this issue would involve *inter alia* an assessment of whether Sergeant A's view was blocked by any vehicle as alleged, whether Sergeant A gave a warning shout, whether Pearse Jordan was facing him or whether in fact his back was already turned at the moment when Sergeant A decided to open fire. The evidence of the police officers at the scene are on a number of these points in direct conflict with statements given by civilian eye witnesses (see paragraphs 16 and 19-21 above). Assessment of the credibility and reliability of the various witnesses would play a crucial role.

111. These are all matters which are currently pending examination in two domestic procedures - the civil proceedings brought by the applicant alleging death by wrongful act and the inquest into the death. The Court considers that in the circumstances of this case it would be inappropriate and contrary to its subsidiary role under the Convention to attempt to establish the facts of this case by embarking on a fact finding exercise of its own by summoning witnesses. Such an exercise would duplicate the proceedings before the civil courts which are better placed and equipped as fact finding tribunals. While the European Commission of Human Rights has previously embarked on fact finding missions in cases from Turkey where there were pending proceedings against the alleged security force

perpetrators of unlawful killings, it may be noted that these proceedings were criminal and had terminated, at first instance at least, by the time the Court was examining the applications. In those cases, it was an essential part of the applicants' allegations that the defects in the investigation were such as to render those criminal proceedings ineffective (see e.g. *Salman v. Turkey*, cited above, § 107, where the police officers were acquitted of torture due to the lack of evidence resulting principally from a defective autopsy procedure; *Gül v. Turkey*, cited above, § 89, where *inter alia* the forensic investigation at the scene and autopsy procedures hampered any effective reconstruction of events).

112. In the present case, the Court does not consider that there are any elements established which would deprive the civil courts of their ability to establish the facts and determine the lawfulness or otherwise of Pearse Jordan's death (see further below concerning the applicant's allegations about the defects in the police investigation, paragraphs 118-121).

113. Nor is the Court persuaded that it is appropriate to rely on the documentary material provided by the parties to reach any conclusions as to responsibility for the death of the applicant's son. The written accounts provided have not been tested in examination or cross-examination and would provide an incomplete and potentially misleading basis for any such attempt. The situation cannot be equated to a death in custody where the burden may be regarded as resting on the State to provide a satisfactory and plausible explanation.

114. The Court is also not prepared to conduct, on the basis largely of statistical information and selective evidence, an analysis of incidents over the past thirty years with a view to establishing whether they disclose a practice by security forces of using disproportionate force. This would go far beyond the scope of the present application.

115. Conversely, as regards the Government's argument that the availability of civil proceedings provided the applicant with a remedy which he has yet to exhaust as regards Article 35 § 1 of the Convention and, therefore, that no further examination of the case is required under the Article 2, the Court recalls that the obligations of the State under Article 2 cannot be satisfied merely by awarding damages (see e.g. the Kaya v. Turkey judgment cited above, p. 329, § 105; the Yaşa v. Turkey judgment cited above, p. 2431, § 74). The investigations required under Articles 2 and 13 of the Convention must be able to lead to the identification and punishment of those responsible. The Court therefore examines below whether there has been compliance with this procedural aspect of Article 2 of the Convention.

b. Concerning the procedural obligation under Article 2 of the Convention

116. Following the death of Pearse Jordan, an investigation was commenced by the RUC. On the basis of that investigation, there was a

decision by the DPP not to prosecute any officer. An inquest was opened on 4 January 1995 and is still pending.

117. The applicant has made numerous complaints about these procedures, while the Government have contended that even if one part of the procedure failed to provide a particular safeguard, taken as a whole, the system ensured the requisite accountability of the police for any unlawful act.

(i) The police investigation

118. Firstly, concerning the police investigation, the Court finds little substance in the applicant's criticisms. It appears that the investigation started immediately after the death. While the scene of the incident was not maintained intact - it appears that cars involved in the collision were moved or sent away – this has not been shown either to have obstructed the investigation or to have been unjustified in the circumstances (see paragraphs 19-21 above). Nor was this measure of such a nature as to undermine any possibility of reconstructing events. There were numerous eyewitnesses who were able to give their version. Insofar as the applicant referred to a failure to seek out civilian witnesses, the Court does not consider it unreasonable of the police to concentrate on clearing the immediate scene of traffic and bystanders, where in a busy road there would be considerations of highway safety. It has not been shown that the RUC failed to look for or find civilian witnesses. Appeals were made to the public and it is apparent that in this case, as in others, for whatever reason, some witnesses were reluctant to come forward. Civilian witnesses have made statements and appeared at the inquest. There is no fundamental defect shown in this regard. Similarly, the Court does not consider that there is sufficient evidence to establish that there was intimidation of the witnesses who did come forward.

119. The investigation included the appropriate forensic examinations. While the gun of Sergeant A was not taken immediately, it appears that it was handed in when he returned to the police station at the conclusion of the operation and that satisfactory evidence is available concerning the number of bullets discharged. If therefore there were aspects of the investigation that could have been more efficiently performed, it cannot be said that these undermined its overall effectiveness.

120. It must be noted, however, that the investigation into the killing by a RUC police officer was headed and carried out by other RUC officers, who issued the investigation report on the file. The Government have pointed out that, as required by law, this investigation was supervised by the ICPC, an independent police monitoring authority. A member of the ICPC was present during the interviews of Sergeant A, for example. Their approval was required of the officer leading the investigation. There was nonetheless a hierarchical link between the officers in the investigation and

the officers subject to investigation, all of whom were under the responsibility of the RUC Chief Constable, who plays a role in the process of instituting any disciplinary or criminal proceedings (see paragraphs 77-79 above). The power of the ICPC to require the RUC Chief Constable to refer the investigating report to the DPP for a decision on prosecution or to require disciplinary proceedings to be brought is not, however, a sufficient safeguard where the investigation itself has been for all practical purposes conducted by police officers connected with those under investigation. The Court notes the recommendation of the CPT that a fully independent investigating agency would help to overcome the lack of confidence in the system which exists in England and Wales and is in some respects similar (see paragraph 93 above).

121. As regards the lack of public scrutiny of the police investigations, the Court considers that disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects to private individuals or other investigations and, therefore, cannot be regarded as an automatic requirement under Article 2. The requisite access of the public or the victim's relatives may be provided for in other stages of the available procedures.

(ii) The role of the DPP

122. The Court recalls that the DPP is an independent legal officer charged with the responsibility to decide whether to bring prosecutions in respect of any possible criminal offences committed by a police officer. He is not required to give reasons for any decision not to prosecute and in this case he did not do so. No challenge by way of judicial review exists to require him to give reasons in Northern Ireland, though it may be noted that in England and Wales, where the inquest jury may still reach verdicts of unlawful death, the courts have required the DPP to reconsider a decision not to prosecute in the light of such a verdict, and will review whether those reasons are sufficient. This possibility does not exist in Northern Ireland where the inquest jury is no longer permitted to issue verdicts concerning the lawfulness or otherwise of a death.

123. The Court does not doubt the independence of the DPP. However, where the police investigation procedure is itself open to doubts of a lack of independence and is not amenable to public scrutiny, it is of increased importance that the officer who decides whether or not to prosecute also gives an appearance of independence in his decision-making. Where no reasons are given in a controversial incident involving the use of lethal force, this may in itself not be conducive to public confidence. It also denies the family of the victim access to information about a matter of crucial importance to them and prevents any legal challenge of the decision.

124. In this case, Pearse Jordan was shot and killed while unarmed. It is a situation which, to borrow the words of the domestic courts, cries out for

an explanation. The applicant was however not informed of why the shooting was regarded as not disclosing a criminal offence or as not meriting a prosecution of the officer concerned. There was no reasoned decision available to reassure a concerned public that the rule of law had been respected. This cannot be regarded as compatible with the requirements of Article 2, unless that information was forthcoming in some other way. This however is not the case.

(iii) The inquest

125. In Northern Ireland, as in England and Wales, investigations into deaths may be conducted by inquests. Inquests are public hearings conducted by coroners, who are independent judicial officers, normally sitting with a jury, to determine the facts surrounding a suspicious death. Judicial review lies from procedural decisions by coroners and in respect of any mistaken directions given to the jury. There are thus strong safeguards as to the lawfulness and propriety of the proceedings. In the case of McCann and Others v. the United Kingdom (cited above, p. 49, § 162), the Court found that the inquest held into the deaths of the three IRA suspects shot by the SAS on Gibraltar satisfied the procedural obligation contained in Article 2, as it provided a detailed review of the events surrounding the killings and provided the relatives of the deceased with the opportunity to examine and cross-examine witnesses involved in the operation.

126. There are however a number of differences between the inquest as held in the McCann case and those in Northern Ireland.

127. In inquests in Northern Ireland, any person suspected of causing the death may not be compelled to give evidence (Rule 9(2) of the 1963 Coroners Rules, see paragraph 68 above). In practice, in inquests involving the use of lethal force by members of the security forces in Northern Ireland, the police officers or soldiers concerned do not attend. Instead, written statements or transcripts of interviews are admitted in evidence. At the inquest in this case, Sergeant A informed the Coroner that he would not appear. He has therefore not been subject to examination concerning his account of events. The records of his two interviews with investigating police officers were made available to the Coroner instead (see paragraphs 19 and 20 above). This does not enable any satisfactory assessment to be made of either his reliability or credibility on crucial factual issues. It detracts from the inquest's capacity to establish the facts immediately relevant to the death, in particular the lawfulness of the use of force and thereby to achieve one of the purposes required by Article 2 of the Convention (see also paragraph 10 of the United Nations Principles on Extra-Legal Executions cited at paragraph 90 above).

128. It is also alleged that the inquest in this case is restricted in the scope of its examination. According to the case-law of the national courts, the procedure is a fact finding exercise and not a method of apportioning

guilt. The Coroner is required to confine his investigation to the matters directly causative of the death and not to extend his inquiry into the broader circumstances. This was the standard applicable in the McCann inquest also and did not prevent examination of those aspects of the planning and conduct of the operation relevant to the killings of the three IRA suspects. The Court is not persuaded therefore that the approach taken by the domestic courts necessarily contradicts the requirements of Article 2. The domestic courts accept that an essential purpose of the inquest is to allay rumours and suspicions of how a death came about. The Court agrees that a detailed investigation into policy issues or alleged conspiracies may not be justifiable or necessary. Whether an inquest fails to address necessary factual issues will depend on the particular circumstances of the case. It has not been shown in the present application that the scope of the inquest as conducted so far has prevented any particular matters relevant to the death being examined.

129. Nonetheless, unlike the McCann inquest, the jury's verdict in this case may only give the identity of the deceased and the date, place and cause of death (see paragraph 64 above). In England and Wales, as in Gibraltar, the jury is able to reach a number of verdicts, including "unlawful death". As already noted, where an inquest jury gives such a verdict in England and Wales, the DPP is required to reconsider any decision not to prosecute and to give reasons which are amenable to challenge in the courts. In this case, the only relevance the inquest may have to a possible prosecution is that the Coroner may send a written report to the DPP if he considers that a criminal offence may have been committed (see paragraph 66 above). It is not apparent however that the DPP is required to take any decision in response to this notification or to provide detailed reasons for not taking any further action. In this case it appears that the DPP did reconsider his decision not to prosecute when the Coroner referred to him information about a new eye witness who had come forward. The DPP maintained his decision however and gave no explanation of his conclusion that there remained insufficient evidence to justify a prosecution.

130. Notwithstanding the useful fact finding function that an inquest may provide in some cases, the Court considers that in this case it could play no effective role in the identification or prosecution of any criminal offences which may have occurred and, in that respect, falls short of the requirements of Article 2.

131. The public nature of the inquest proceedings is not in dispute. Indeed the inquest appears perhaps for that reason to have become the most popular legal forum in Northern Ireland for attempts to challenge the conduct of the police and security forces in the use of lethal force. The applicant complained however that his ability to participate in the proceedings as the next of kin to the deceased was significantly prejudiced

as legal aid was not available in inquests and documents were not disclosed in advance of the proceedings.

132. The Court notes however that, as with the next of kin in the McCann case, the applicant has been represented by a solicitor and counsel throughout the inquest, even though legal aid only became available for inquests in Northern Ireland from 25 July 2000 (see paragraph 67 above). He has also been granted legal aid for the judicial review applications associated with the inquest. Nevertheless, it appears that the proceedings were adjourned effectively from 19 November 1997 to 1 November 1999, a period of almost two years, while developments were awaited in a pending case which concerned the availability of legal aid for families at inquests. While it cannot therefore be said that the applicant has been prevented, by the lack of legal aid, from obtaining any necessary legal assistance at the inquest, this has contributed significantly to prolongation of the proceedings. The Court considers this further below in the context of the delay (see paragraphs 136-140).

133. As regards access to documents, until recently the applicant was not able to obtain copies of any witness statements until the witness concerned was giving evidence. This was also the position in the McCann case, where the Court considered that this had not substantially hampered the ability of the families' lawyers to question the witnesses (cited above, p. 49, § 62). However it must be noted that the inquest in that case was to some extent exceptional when compared with the proceedings in a number of cases in Northern Ireland (see also the cases of *McKerr v. the United Kingdom*, no. 28883/95, *Kelly and Others v. the United Kingdom*, no. 30054/96, and *Shanaghan v. the United Kingdom*, no. 37715/97). The promptness and thoroughness of the inquest in the McCann case left the Court in no doubt that the important facts relating to the events had been examined with the active participation of the applicants' experienced legal representative. The non-access by the next-of-kin to the documents did not, in that context, contribute any significant handicap. However, since that case, the Court has laid more emphasis on the importance of involving the next of kin of a deceased in the procedure and providing them with information (see *Öğur v. Turkey*, cited above, § 92).

134. Further, the Court notes that the practice of non-disclosure has changed in the United Kingdom in the light of the Stephen Lawrence Inquiry and that it is now recommended that the police disclose witness statements 28 days in advance (see paragraph 73 above). Disclosure of the documents has now been made to the applicant in advance of the next stage of the inquest procedures (see paragraphs 50-54 above). This development must be regarded as a positive contribution to the openness and fairness of the inquest procedures. The Court is not prepared to reach any findings concerning the alleged incompleteness of the disclosure at this stage. There is nothing before it to suggest that materials necessary to the examination of

the facts have been withheld. It may be observed however that lack of access to the witness statements was the reason for several adjournments in the inquest (see further below, paragraph 136). The previous inability of the applicant to have access to witness statements before the appearance of the witness must also be regarded as having placed him at a disadvantage in terms of preparation and ability to participate in questioning. This contrasts strikingly with the position of the RUC who had the resources to provide for legal representation and full access to relevant documents. The Court considers that the right of the family of the deceased whose death is under investigation to participate in the proceedings requires that the procedures adopted ensure the requisite protection of their interests, which may be in direct conflict with those of the police or security forces implicated in the events. Prior to the recent development in disclosure of documents, the Court is not persuaded that the applicant's interests as next-of-kin were fairly or adequately protected in this respect.

135. Reference has also been made to the allegedly frequent use of public interest immunity certificates in inquests to prevent certain questions or disclosure of certain documents. In this case, the Secretary of State for Defence issued a certificate in or about September 1994, and the Secretary of State for Northern Ireland issued a second on 4 January 1995, to prevent disclosure of certain categories of information on the grounds of national security. As in the McCann case (*loc. cit.*), the Court finds no indication that these certificates have prevented examination of any circumstances relevant to the death of Pearse Jordan.

136. Finally, the Court has had regard to the delay in the proceedings. The inquest opened on 4 January 1995, more than 25 months after Pearse Jordan's death. The Coroner had been informed on 29 November 1993 that no prosecution would occur, but the RUC failed to pass on the case papers until almost a year later, on 4 November 1994. No explanation has been forthcoming for this delay.

The inquest has still not concluded at the date of this judgment, more than eight years and four months after the events in issue. There have been a series of adjournments:

– On 16 January 1995, the proceedings were adjourned on the application of the applicant to allow the DPP to reconsider the decision not to prosecute. That negative decision was communicated on 14 February 1995. However the inquest was not scheduled to resume until 12 June 1995.

– On 2 June 1995, there was a further adjournment on the application of the applicant who brought judicial review proceedings attempting *inter alia* to gain access to witness statements. The High Court rejected the application on 11 December 1995, while his applications for appeal and leave to appeal were dismissed by the Court of Appeal on 28 June 1996 and the House of Lords on 20 March 1997 respectively.

– Before the inquest was due to resume on 1 December 1997, there was another adjournment pending a case which might have affected the availability of legal aid in inquests. That decision did not issue until 16 March 1999, at which point the inquest was scheduled to resume on 1 November 1999.

– There was a fourth adjournment from 13 October 1999 as the applicant applied for the disclosure of witness statements in the light of the new policy introduced in England and Wales (see paragraphs 73-74 above). While partial disclosure was granted on in or about 2 February 2000, the applicant is currently pursuing a judicial review application to obtain full disclosure. The inquest has not yet resumed.

137. The Court observes that these adjournments were requested by, or consented to, by the applicant. They related principally to legal challenges to procedural aspects of the inquest which he considered essential to his ability to participate – in particular access to the documents. It may be noted that the judicial review proceedings which resulted in an adjournment from 2 June 1995 to 20 March 1997 (over one year and nine months) concerned access to witness statements which have now been disclosed voluntarily due to developments in what is perceived as desirable practice *vis-à-vis* a victim's relatives. Nor can it be regarded as unreasonable that the applicant consented to an adjournment to await a case which might have resulted in making legal aid available for his representatives. The Court notes that funding for legal representation at inquests in Northern Ireland has now become possible under an Extra-Statutory Scheme which recognises, under provisional criteria, that the family of the deceased may require legal assistance in order to participate effectively in inquest proceedings and that an effective investigation by the State into the death may be necessary in the circumstances of the case and the inquest may be the only way to conduct it (see paragraph 67 above).

138. While it is therefore the case that the applicant has contributed significantly to the delays, this has to some extent resulted from the difficulties facing relatives in participating in inquest procedures (see paragraphs 132 and 134 above, concerning a lack of legal aid and the non-disclosure of witness statements). It cannot be regarded as unreasonable that the applicant made use of the legal remedies available to him to challenge these aspects of the inquest procedure. The Court observes that the Coroner, who is responsible for the conduct of the proceedings, acceded to these adjournments. The fact that they were requested by the applicant does not dispense the authorities from ensuring compliance with the requirement for reasonable expedition (see *mutatis mutandis* concerning the speed requirements under Article 6 § 1 of the Convention, Scopelliti v. Italy judgment of 23 November 1993, Series A no. 278, p. 9, § 25). If long adjournments are regarded as justified in the interests of procedural fairness to the victim's family, it calls into question whether the inquest system was

at the relevant time structurally capable of providing for both speed and effective access for the deceased's family.

139. Nor has the inquest progressed with diligence in the periods outwith the adjournments. The Court refers to the delay in commencing the inquest and the delay (on two occasions of more than eight months), in scheduling the resumption of the inquest after the adjournments.

140. Having regard to these considerations, the time taken in this inquest cannot be regarded as compatible with the State's obligation under Article 2 of the Convention to ensure that investigations into suspicious deaths are carried out promptly and with reasonable expedition.

(iv) Civil proceedings

141. As found above (see paragraph 111), civil proceedings would provide a judicial fact finding forum, with the attendant safeguards and the ability to reach findings of unlawfulness, with the possibility of damages. It is however a procedure undertaken on the initiative of the applicant, not the authorities, and it does not involve the identification or punishment of any alleged perpetrator. As such, it cannot be taken into account in the assessment of the State's compliance with its procedural obligations under Article 2 of the Convention.

(v) Conclusion

142. The Court finds that the proceedings for investigating the use of lethal force by the police officer have been shown in this case to disclose the following shortcomings:

– a lack of independence of the police officers investigating the incident from the officers implicated in the incident;

– a lack of public scrutiny, and information to the victim's family, of the reasons for the decision of the DPP not to prosecute any police officer;

– the police officer who shot Pearse Jordan could not be required to attend the inquest as a witness;

– the inquest procedure did not allow any verdict or findings which could play an effective role in securing a prosecution in respect of any criminal offence which may have been disclosed;

– the absence of legal aid for the representation of the victim's family and non-disclosure of witness statements prior to their appearance at the inquest prejudiced the ability of the applicant to participate in the inquest and contributed to long adjournments in the proceedings;

– the inquest proceedings did not commence promptly and were not pursued with reasonable expedition.

143. It is not for this Court to specify in any detail which procedures the authorities should adopt in providing for the proper examination of the circumstances of a killing by State agents. While reference has been made for example to the Scottish model of enquiry conducted by a judge of

criminal jurisdiction, there is no reason to assume that this may be the only method available. Nor can it be said that there should be one unified procedure providing for all requirements. If the aims of fact finding, criminal investigation and prosecution are carried out or shared between several authorities, as in Northern Ireland, the Court considers that the requirements of Article 2 may nonetheless be satisfied if, while seeking to take into account other legitimate interests such as national security or the protection of material relevant to other investigations, they provide for the necessary safeguards in an accessible and effective manner. In the present case, the available procedures have not struck the right balance.

144. The Court would observe that the shortcomings in transparency and effectiveness identified above run counter to the purpose identified by the domestic courts of allaying suspicions and rumours. Proper procedures for ensuring the accountability of agents of the State are indispensable in maintaining public confidence and meeting the legitimate concerns that might arise from the use of lethal force. Lack of such procedures will only add fuel to fears of sinister motivations, as is illustrated *inter alia* by the submissions made by the applicant concerning the alleged shoot-to-kill policy.

145. The Court finds that there has been a failure to comply with the procedural obligation imposed by Article 2 of the Convention and that there has been, in this respect, a violation of that provision.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

146. The applicant invoked Article 6 § 1 which provides as relevant:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

147. The applicant claimed that his son was arbitrarily killed in circumstances where an arrest could have been effected by the RUC, and that Sergeant A deliberately killed him as an alternative to arresting him. He referred to concerns expressed, for example, by Amnesty International that killings by the security forces in Northern Ireland reflected a deliberate policy to eliminate individuals rather than arrest them.

148. The Government submitted that the shooting of Pearse Jordan could not be regarded as a summary punishment for a crime. Nor could the alleged failure to prosecute deprive the applicant of a fair hearing as this did not relate to any civil right which the applicant had.

149. The Court recalls that the lawfulness of the shooting of Pearse Jordan is pending consideration in the civil proceedings instituted by the

applicant. In these circumstances and in the light of the scope of the present application, the Court finds no basis for reaching any findings as to the alleged improper motivation behind the incident. Any issues concerning the effectiveness of criminal investigation procedures fall to be considered under Articles 2 and 13 of the Convention.

150. There has, accordingly, been no violation of Article 6 § 1 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

151. The applicant invoked Article 14 of the Convention, which provides:

> "The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

152. The applicant submitted that the circumstances of the killing of his son disclosed discrimination. He alleged that, between 1969 and March 1994, 357 people had been killed by members of the security forces, the overwhelming majority of whom were young men from the Catholic or nationalist community. When compared with the numbers of those killed from the Protestant community and having regard to the fact that there have been relatively few prosecutions (31) and only a few convictions (four, at the date of his application), this showed that there was a discriminatory use of lethal force and a lack of legal protection vis-à-vis a section of the community on grounds of national origin or association with a national minority.

153. The Government replied that there was no evidence that any of the deaths which occurred in Northern Ireland were analogous or that they disclosed any difference in treatment. Bald statistics (the accuracy of which was not accepted) were not enough to establish broad allegations of discrimination against Catholics or nationalists.

154. Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group. However, even though statistically it appears that the majority of people shot by the security forces were from the Catholic or nationalist community, the Court does not consider that statistics can in themselves disclose a practice which could be classified as discriminatory within the meaning of Article 14. There is no evidence before the Court which would entitle it to conclude that any of those killings, save the four which resulted in convictions, involved the unlawful or excessive use of force by members of the security forces.

155. The Court finds that there has been no violation of Article 14 of the Convention.

V. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

156. The applicant complained that he had no effective remedy in respect of his complaints, invoking Article 13 which provides:

> "Everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

157. The applicant referred to his submissions concerning the procedural aspects of Article 2 of the Convention, claiming that in addition to the payment of compensation where appropriate Article 13 required a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure.

158. The Government submitted that the complaints raised under Article 13 were either premature or ill-founded. They claimed that the combination of available procedures, which included the pending civil proceedings and the inquest, provided effective remedies.

159. The Court's case-law indicates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law (see the Aksoy v. Turkey judgment of 18 December 1996, *Reports* 1996-IV, p. 2286, § 95; the Aydın v. Turkey judgment of 25 September 1997, *Reports* 1997-VI, pp. 1895-96, § 103; the Kaya v. Turkey judgment cited above, pp. 329-30, § 106).

160. In cases of the use of lethal force or suspicious deaths, the Court has also stated that, given the fundamental importance of the right to the protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life, including effective access for the complainant to the investigation procedure (see the Kaya v. Turkey judgment cited above, pp. 330-31, § 107). In a number of cases it has found that there has been a

violation of Article 13 where no effective criminal investigation had been carried out, noting that the requirements of Article 13 were broader than the obligation to investigate imposed by Article 2 of the Convention (see also Ergı v. Turkey, cited above, p. 1782, § 98; *Salman v. Turkey* cited above, § 123).

161. It must be observed that these cases derived from the situation pertaining in south-east Turkey, where applicants were in a vulnerable position due to the ongoing conflict between the security forces and the PKK, and where the most accessible means of redress open to applicants was to complain to the public prosecutor, who was under a duty to investigate alleged crimes. In the Turkish system, the complainant was able to join any criminal proceedings as an intervenor and apply for damages at the conclusion of any successful prosecution. The public prosecutor's fact finding function was often essential in that context to any attempt to take civil proceedings. In those cases, therefore, it was sufficient for the purposes of former Article 26 (now Article 35 § 1) of the Convention that an applicant complaining of unlawful killing raised the matter with the public prosecutor. There was accordingly a close procedural and practical relationship between the criminal investigation and the remedies available to the applicant in the legal system as a whole.

162. The legal system pertaining in Northern Ireland is different and any application of Article 13 to the factual circumstances of any case from that jurisdiction must take this into account. An applicant who claims the unlawful use of force by soldiers or police officers in the United Kingdom must as a general rule exhaust the domestic remedies open to him or her by taking civil proceedings by which the courts will examine the facts, determine liability and if appropriate award compensation. These civil proceedings are wholly independent of any criminal investigation and their efficacy has not been shown to rely on the proper conduct of criminal investigations or prosecutions (see e.g. *Caraher v. the United Kingdom*, no. 24520/94, decision of inadmissibility [Section 3] 11.01.00).

163. In the present case, the applicant has lodged civil proceedings, which are pending. The Court has found no elements which would prevent those proceedings providing the redress identified above in respect of the alleged excessive use of force (see paragraph 112 above).

164. As regards the applicant's complaints concerning the investigation into the death carried out by the authorities, these have been examined above under the procedural aspect of Article 2 (see paragraphs 116-145 above). The Court finds that no separate issue arises in the present case.

165. The Court concludes that there has been no violation of Article 13 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

166. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

167. The applicant submitted that he was entitled to damages in respect of the unlawful deprivation of the life of his son Pearse Jordan.

168. The Government disputed that any award of damages would be appropriate in the present case.

169. The Court recalls that in the case of McCann and others (cited above, p. 63, § 219) it found a substantive breach of Article 2 of the Convention, concluding that it had not been shown that the killing of the three IRA suspects constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence. However, the Court considered it inappropriate to make any award to the applicants, as personal representatives of the deceased, in respect of pecuniary or non-pecuniary damage, "having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar".

170. In contrast to the McCann case, the Court in the present case has made no finding as to the lawfulness or proportionality of the use of lethal force which killed Pearse Jordan, or as to the factual circumstances, including the activities of the deceased which led up to the killing, which issues are pending in the civil proceedings. Accordingly, no award of compensation falls to be made in this respect. On the other hand, the Court has found that the national authorities failed in their obligation to carry out a prompt and effective investigation into the circumstances of the death. The applicant must thereby have suffered feelings of frustration, distress and anxiety. The Court considers that the applicant sustained some non-pecuniary damage which is not sufficiently compensated by the finding of a violation as a result of the Convention.

171. Making an assessment on an equitable basis, the Court awards the sum of 10,000 pounds sterling (GBP).

B. Costs and expenses

172. The applicant claimed a total of GBP 45,645.83. This included GBP 23,500 for senior counsel (inclusive of VAT), GBP 13,333.33 for junior counsel and solicitors' fees of GBP 8,812.50 (inclusive of VAT).

173. The Government submitted that these claims were excessive, noting that the issues in this case overlapped significantly with the other cases examined at the same time and proposed that a figure of GBP 15,000 was reasonable.

174. The Court recalls that this case has involved several rounds of written submissions and an oral hearing, and may be regarded as factually and legally complex. Nonetheless, it finds the fees claimed to be on the high side when compared with other cases from the United Kingdom and is not persuaded that they are reasonable as to quantum. Having regard to equitable considerations, it awards the sum of GBP 30,000, plus any value added tax which may be payable. It has taken into account the sums received by the applicant by way of legal aid from the Council of Europe.

C. Default interest

175. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7,5% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 2 of the Convention in respect of failings in the investigative procedures concerning the death of Pearse Jordan;

2. *Holds* that there has been no violation of Article 6 § 1 of the Convention;

3. *Holds* that there has been no violation of Article 14 of the Convention;

4. *Holds* that there has been no violation of Article 13 of the Convention;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three monthsfrom the date on which the judgment becomes final according to Article 44 § 2 of the Convention, the following amounts, plus any value-added tax that may be chargeable;
      (i) 10,000 (ten thousand) pounds sterling in respect of non-pecuniary damage;
      (ii) 30,000 (thirty thousand) pounds sterling in respect of costs and expenses;
   (b) that simple interest at an annual rate of 7,5% shall be payable from the expiry of the above-mentioned three months until settlement;

6. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Done in English, and notified in writing on 4 May 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P.COSTA
President

COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

CASE OF OSMAN v. THE UNITED KINGDOM

(87/1997/871/1083)

JUDGMENT

STRASBOURG

28 October 1998

In the case of Osman v. the United Kingdom[1],

The European Court of Human Rights, sitting, in accordance with Rule 51 of Rules of Court A[2], as a Grand Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,
Mr THÓR VILHJÁLMSSON,
Mr J. DE MEYER,
Mr I. FOIGHEL,
Mr R. PEKKANEN,
Mr J.M. MORENILLA,
Sir John FREELAND,
Mr A.B. BAKA,
Mr M.A. LOPES ROCHA,
Mr L. WILDHABER,
Mr G. MIFSUD BONNICI,
Mr J. MAKARCZYK,
Mr D. GOTCHEV,
Mr P. JAMBREK,
Mr K. JUNGWIERT,
Mr P. KŪRIS,
Mr U. LŌHMUS,
Mr J. CASADEVALL,
Mr T. PANTIRU,
Mr V. TOUMANOV,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 27 July and 24 September 1998,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 22 September 1997, within the three-

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Notes by the Registrar

1. The case is numbered 87/1997/871/1083. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

month period laid down by Article 32 § 1 and Article 47 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 23452/94) against the United Kingdom of Great Britain and Northern Ireland lodged with the Commission under Article 25 by two British nationals, Mrs Mulkiye Osman and her son, Ahmet Osman, on 10 November 1993.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby the United Kingdom recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 2, 6, 8 and 13 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30).

3. The Chamber to be constituted included *ex officio* Sir John Freeland, the elected judge of British nationality (Article 43 of the Convention), and Mr R. Ryssdal, the then President of the Court (Rule 21 § 4 (b)). On 25 September 1997, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr R. Macdonald, Mr A.B. Baka, Mr L. Wildhaber, Mr K. Jungwiert, Mr J. Casadevall and Mr V. Toumanov (Article 43 *in fine* of the Convention and Rule 21 § 5). Subsequently Mr R. Bernhardt, the Vice-President of the Court, replaced Mr Ryssdal as President of the Chamber following the latter's death (Rule 21 § 6, second sub-paragraph).

4. As President of the Chamber at the time (Rule 21 § 6), Mr Ryssdal, acting through the Registrar, had consulted the Agent of the United Kingdom Government ("the Government"), the applicants' lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's and the applicants' memorials on 5 and 24 March 1998 respectively, the applicants having been granted an extension by the President of the Chamber of the deadline for submission of their memorial. The applicants filed with the registry on 9 April and 8 June 1998 further details of their claims for just satisfaction under Article 50 of the Convention. The Government's observations in reply to these claims were filed with the registry on 18 June 1998.

5. In accordance with the decision of the new President of the Chamber, Mr Bernhardt, the hearing took place in public in the Human Rights Building, Strasbourg, on 22 June 1998. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr M. EATON, Deputy Legal Adviser,
Foreign and Commonwealth Office, *Agent*,
Mr J. EADIE, Barrister-at-Law,
Mr S. FREELAND, Barrister-at-Law, *Counsel*,
Ms R. DAVIES, Home Office,
Mr P. EDMUNDSON, Home Office, *Advisers*;

(b) *for the Commission*
Mr C.L. ROZAKIS, *Delegate*;

(c) *for the applicants*
Mr B. EMMERSON, Barrister-at-Law,
Mr N. AHLUWALIA, Barrister-at-Law,
Mr A.B. CLAPHAM, Barrister-at-Law, *Counsel*,
Mrs N. MOLE,
MS L. CHRISTIAN, Solicitor, *Advisers*.

The Court heard addresses by Mr Rozakis, Mr Emmerson and Mr Eadie.

6. Following deliberations on 26 June 1998 the Chamber decided to relinquish jurisdiction forthwith in favour of a Grand Chamber (Rule 51).

7. The Grand Chamber to be constituted included *ex officio* Mr Bernhardt, the President of the Court, who was elected to this office following the death of Mr Ryssdal, and Mr Thór Vilhjálmsson, the Vice-President, who was elected to this office in succession to Mr Bernhardt, together with the other members and the four substitutes of the original Chamber, the latter being Mr I. Foighel, Mr J. Makarczyk, Mr M.A. Lopes Rocha and Mr R. Pekkanen (Rule 51 § 2 (a) and (b)). On 28 June 1998 the President, in the presence of the Registrar, drew by lot the names of the eight additional judges needed to complete the Grand Chamber, namely Mr J. De Meyer, Mr J.M. Morenilla, Mr G. Mifsud Bonnici, Mr D. Gotchev, Mr P. Jambrek, Mr P. Kūris, Mr U. Lõhmus and Mr T. Pantiru (Rule 51 § 2 (c)). Subsequently Mr Macdonald, a member of the original Chamber, withdrew from the Grand Chamber, being unable to take part in the further consideration of the case.

8. On 26 June 1998, having consulted the Agent of the Government and the Delegate of the Commission, the President acceded to the applicants' request for legal aid (Rule 4 of the Addendum to Rules of Court A).

9. Having taken note of the opinions of the Agent of the Government, the Delegate of the Commission and the applicants, the Grand Chamber decided on 27 July 1998 that it was not necessary to hold a further hearing following the relinquishment of jurisdiction by the original Chamber (Rules 38 and 51 § 6).

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicants

10. The applicants are British citizens resident in London. The first applicant, Mrs Mulkiye Osman, was born in Cyprus in 1948. She is the widow of Mr Ali Osman who was shot dead by Mr Paul Paget-Lewis on 7 March 1988. The second applicant, Ahmet Osman, is her son, born in England in 1972. He was a former pupil of Paul Paget-Lewis at Homerton House School. Ahmet Osman was wounded in the shooting incident which led to the death of his father.

The applicants complaints are directed at the failure of the authorities to appreciate and act on what they claim was a series of clear warning signs that Paul Paget-Lewis represented a serious threat to the physical safety of Ahmet Osman and his family. There is disagreement between the applicants and the respondent State on essential aspects of the circumstances leading to the tragedy. The applicants have disputed in this respect the completeness of the facts as found by the Commission.

B. The events to the end of March 1987

1. The initial complaints against Paget-Lewis

11. In 1986 the headmaster of Homerton House School, Mr John Prince, noticed that one of his teaching staff, Paul Paget-Lewis, had developed an attachment to Ahmet Osman, a pupil at the school. According to a statement which he made to the police on 10 March 1988, Mr Prince indicated that he "made a point of personally keeping an eye on the situation". As a result of this attachment, Paget-Lewis informed Mr Prince that he intended to leave the school and become a supply teacher. Mr Kenneth Perkins, a deputy head teacher, spoke with Paget-Lewis and managed to persuade him to remain at the school.

12. In January 1987 Mrs Green, the mother of Leslie Green, another pupil at the school and the applicants' neighbour, telephoned Mr Fleming – another deputy head teacher – to complain that Paget-Lewis had been following her son home after school and harassing him. She alleged that Paget-Lewis had been spreading rumours that her son had engaged in deviant sexual practices and that he objected to her son's friendship with Ahmet Osman. Mrs Green made a formal complaint to this effect to Mr Prince on 2 March 1987.

2. The various interviews regarding the complaints

(a) Leslie Green

13. On 3 March 1987 Mr Perkins interviewed Leslie Green, who confirmed that Paget-Lewis had been following him and had been spreading rumours of a sexual nature about him because of his friendship with Ahmet Osman.

(b) Ahmet Osman

14. Also on 3 March 1987 Mr Fleming interviewed Ahmet Osman. In the typed record of this interview dated 6 March 1987, Ahmet confirmed that Paget-Lewis had warned him about Leslie Green, accusing Leslie of sexual misconduct with another boy at the school. Ahmet also reported to Mr Fleming during the interview that on one occasion Paget-Lewis had followed Leslie and himself home in his car. He also stated that Paget-Lewis had asked him to come and see him in his classroom at lunch times, apparently to learn Turkish, and that Paget-Lewis had taken photographs of him and given him money, a pen and a Turkish dictionary. However, he later took the pen and deliberately snapped it in half during a lesson.

(c) Paget-Lewis

15. On 6 March 1987 Mr Perkins interviewed Paget-Lewis. In the course of the interview Paget-Lewis stated that he had a special relationship with Ahmet Osman which had developed over a period of a year and which Leslie Green was trying to disrupt and that he was so upset on one occasion that he confronted Leslie and accused the boy of being a sexual deviant. He admitted that he had followed Leslie home on one occasion and had waited outside his parents' house for 45 minutes. Paget-Lewis mentioned to Mr Perkins that he had told Leslie Green that he would become "very angry" if anything happened to his relationship with Ahmet, although he indicated to Mr Perkins that this was not to be seen as a threat. He also acknowledged that he had given Ahmet money and presents, and had taken photographs of him for "sentimental reasons". In a later memorandum dated 5 May 1988, Mr Perkins described Paget-Lewis as having been in a highly

irrational state during this interview and unwilling to admit that his behaviour displayed a serious lack of wisdom and professionalism.

16. On 9 March 1987 Paget-Lewis submitted a written statement to Mr Perkins regarding the complaint made by Mrs Green. In his memorandum of 5 May 1988 (see paragraph 15 above) Mr Perkins stated that he found the statement "disturbing" since it showed clearly that Paget-Lewis was "overpoweringly jealous" of the friendship between Ahmet Osman and Leslie Green and provided clear evidence that he "was not in control of his emotions". Leslie was presented as devious, malicious and an evil influence.

Mr Perkins again interviewed Paget-Lewis on his written statement during which he pointed out his concerns about the content of the statement and suggested to Paget-Lewis that he seek psychiatric help. Mr Perkins informed Mr Prince of everything which had happened up until that date.

17. Prior to 13 March 1987 Mr Prince had an informal discussion with Paget-Lewis in which he admitted telling pupils at the school that Leslie Green had engaged in acts of oral sex with Ahmet Osman in revenge for rumours spread by Leslie concerning his relationship with Ahmet.

On 13 March 1987 Mr Prince formally interviewed Paget-Lewis on the basis of the notes of the interview between Paget-Lewis and Mr Perkins. The contemporaneous notes taken of the meeting reveal that Paget-Lewis admitted that he had become attached to Ahmet Osman; that he had accused Leslie Green of trying to turn Ahmet against him; and that he had parked outside Leslie's house to show that he was not to be scared away. Paget-Lewis denied that he had accused Leslie of deviant sexual practices. The notes of the meeting conclude with the sentence "the situation has now escalated and Mr Prince has no confidence in his own ability to contain it".

(d) Leslie Green and his mother

18. Mr Prince was informed on 16 March 1987 in an interview with Leslie Green and his mother that Paget-Lewis had been spying on Ahmet Osman and that Paget-Lewis had told Ahmet that "he knew where his mother worked and how much money she earned and that if Ahmet left school, he would find him".

(e) Ahmet Osman

19. During this period another deputy head teacher, Mr Youssouf, also interviewed Ahmet Osman on a number of occasions. These interviews revealed that Paget-Lewis had told Ahmet that he would be able to find him if he left the school. Paget-Lewis claimed to have discovered Ahmet's previous address and the name of his previous school and said he had visited the area and had spoken to his former neighbours.

(f) The Osman family

20. On 17 March 1987 Mr Prince met with the Osman family to explain his concerns about the interest Paget-Lewis had taken in Ahmet. He explained that the school was quite satisfied that nothing improper had taken place between Paget-Lewis and Ahmet. He told them that the school would monitor the situation closely to ensure that Ahmet would be safe. Ahmet was told never to be alone with Paget-Lewis. During this meeting Ahmet's mother expressed her wish that her son should be transferred to another school.

3. Contacts between the school and the police during this period

21. According to the diary of Mr Prince between 3 March 1987 and 17 March 1987 he met with PC Williams on four occasions. The applicants state that during these meetings information concerning Paget-Lewis' conduct towards Ahmet Osman was passed on to the police. The Government state that PC Williams had no recollection of being told about the presents which Paget-Lewis had given to Ahmet or that Paget-Lewis had followed Ahmet home. PC Williams did not keep any record of the meetings, nor did he make any report concerning the nature and extent of the information that was communicated to him, or if he did no such record now exists. The Government stress that all concerned were satisfied that there was no sexual element to Paget-Lewis' attachment to Ahmet and the matter could be dealt with internally by the school.

4. The graffiti incident

22. By 17 March 1987 graffiti had appeared at six locations around the school which read "Leslie, do not forget to wear a condom when you screw Ahmet or he will get Aids." The words had been written with spray paint and a stencil.

23. Following the discovery of the graffiti, Mr Perkins interviewed Paget-Lewis and asked him if he was responsible. He denied this. However, Mr Perkins noted in his report that Paget-Lewis knew the precise wording and the exact locations of all the graffiti.

5. The stolen files

24. On 19 March 1987 a further discussion took place between Mr Prince and the Osman family regarding Ahmet's transfer to another school. For his safety Mr Prince told Ahmet not to give his new school address to anyone from Homerton House. While attempting to arrange his transfer, Mr Youssouf discovered that the files relating to Ahmet and Leslie Green had been stolen from the school office. The file relating to staff disciplinary matters was also found to be missing.

Mr Perkins considered that the stolen files were the likely source of the information that Paget-Lewis had acquired about Ahmet Osman's previous address and school (see paragraph 19 above). He subsequently questioned Paget-Lewis, who denied any involvement in the theft and denied having made any comments about Ahmet's previous address and school or visiting the area in which Ahmet used to live.

25. On 23 March 1987 Ahmet Osman was transferred to a different school, but owing to curriculum difficulties he had to return to Homerton House fourteen days later.

C. The events between April 1987 and August 1987

1. Paget-Lewis changes name

26. On 14 April 1987, Paget-Lewis changed his name by deed poll to Paul Ahmet Yildirim Osman. On 1 May 1987, Mr Prince wrote to the Inner London Education Authority (ILEA) informing them that Paget-Lewis had changed his name and that he was worried that some psychological imbalance might pose a threat to the safety of Ahmet Osman. He also stated that he was of the opinion that Paget-Lewis should be removed from the school as soon as possible.

2. Further contacts between the school and the police

27. On 4 May 1987 Mr Prince spoke with two police officers, Detective Chief Inspector Newman and Detective Inspector Clarke. According to the applicants during this meeting the headmaster informed them of the missing files and the graffiti incident and discussed the fact that Paget-Lewis' real name was Ronald Stephen Potter. He had previously changed his name by deed poll to name himself after a pupil called Paget-Lewis whom he had taught at Highbury Grove School. The Government state that the two police officers have no recollection of having been informed of these matters.

3. The contacts with the ILEA

28. Following his letter of 1 May 1987 (see paragraph 26 above), Mr Prince wrote to the Head of Discipline at ILEA in a letter dated 8 May 1987 stating that while he believed Paget-Lewis needed medical help, his continued presence in the school jeopardised the welfare, safety and education of the pupils. An internal memorandum from the Head of Discipline at ILEA dated the same day makes reference to "a fear that [Paget-Lewis] might seek to take the boy out of the country" and that the police are investigating the complaint that "he has removed certain files about the matter from the school".

Undated notes written by the same official between 14 April and 8 May 1987 indicate that it was feared that Ahmet Osman may be harmed and that by changing his name Paget-Lewis may abscond with the boy. The notes refer to the fact that the police had stated that Mr Prince should contact them if Ahmet goes missing for more than an hour. In addition, the police would investigate the disappearance of the missing files, search Paget-Lewis' home and check up on his background.

The Government deny that the police said that they should be contacted if Ahmet went missing or that they intended to search Paget-Lewis' house.

4. The conclusions of the ILEA psychiatrist following the first meeting with Paget-Lewis

29. On 19 May 1987 Paget-Lewis was seen by Dr Ferguson, the ILEA psychiatrist. Dr Ferguson was provided with, *inter alia*, the documents showing Paget-Lewis' change of name; the records of the interviews conducted in March 1987; and the memorandum prepared by Mr Perkins on 5 May 1987 (see paragraph 15 above). Dr Ferguson reported:

> "This teacher must indeed give cause for concern. He does not present ill in formal terms, nor does he seem sexually deviant. He does have personality problems, and his judgment regarding his friendship with a pupil is reprehensibly suspect."

Dr Ferguson recommended that Paget-Lewis remain teaching at the school but that he should receive some form of counselling and psychotherapy.

5. The attacks on the applicants' property

30. On or about 21 May 1987, a brick was thrown through a window of the applicants' house. The police were informed and a police officer was sent to the house and completed a crime report. On two occasions in June 1987 the tyres of Ali Osman's car were deliberately burst. Both incidents were reported to the police, but no police records relating to the offences can be found.

6. Dr Ferguson's further interviews with Paget-Lewis

31. On 1 June 1987 Mr Prince requested Paget-Lewis to take sick-leave. On 2 June 1987 Paget-Lewis was examined again by Dr Ferguson. He described a continuing strong urge to speak with Ahmet Osman and said that he felt angry that Ahmet seemed content with the situation of non-contact. Dr Ferguson concluded that under the circumstances, Paget-Lewis should remain away from Homerton House and was designated temporarily unfit to work.

Paget-Lewis subsequently informed Mr Perkins that he would be taking medical leave for the remainder of the school term. He then left Homerton House and did not return again.

32. On 16 June 1987, following a further interview with Paget-Lewis, Dr Ferguson recommended that he should no longer teach at Homerton House and that transfer on medical grounds was strongly and urgently recommended.

7. Mrs Green's further complaints against Paget-Lewis

33. On 4 June 1987 Mrs Green telephoned Mr Perkins making further complaints about Paget-Lewis following her son. She also informed him that she had sent her son to stay with her sister.

8. Paget-Lewis' suspension from teaching duties and subsequent reinstatement

34. On 18 June 1987, Paget-Lewis was suspended pending an ILEA investigation for "unprofessional behaviour" towards Ahmet Osman. He submitted a statement dated 6 July 1987 in which, *inter alia*, he admitted taking photographs of Ahmet and giving him money but denied stealing files or painting graffiti. He accused Mr Perkins of lying about him and said that Mr Perkins has stated his intention of breaking him.

35. On 7 August 1987, ILEA sent a letter to Paget-Lewis officially reprimanding and severely warning him but lifting the suspension. The letter also stated that he was not to return to Homerton House. Shortly afterwards he began working as a supply teacher at two other local schools, Haggerston School and Skinners School.

D. The events between August 1987 and December 1987

1. The criminal damage to the Osmans' property

36. In August or September 1987, a mixture of engine oil and paraffin was poured on the area outside the Osman family home. On 18 October 1987, the windscreen of Ali Osman's car was smashed. During November 1987, in a series of incidents, the applicants' front door lock was jammed with superglue, dog excrement was smeared on their doorstep and on their car, and on more than one occasion the light bulb was stolen from the light in the outside porch. Around this time all the windows of their car were also broken. All these incidents were reported to the police and on two occasions Ali Osman visited Hackney police station to discuss the vandalism and criminal damage to his property.

37. At some point during November 1987, PC Adams visited the Osmans' home and then spoke to Paget-Lewis about the acts of vandalism. In a later statement to the police, Paget-Lewis alleged that he told PC Adams that the loss of his job was so distressing that he felt that he was in danger of doing something criminally insane. The Government deny that

this was said, and refer to the fact that during the interview with PC Adams Paget-Lewis denied any involvement in the acts of vandalism and criminal damage. No detailed records were made by PC Adams of his contacts with Paget-Lewis or the Osman family. Any entries in notebooks or duty registers (crime reports or parade books) could not later be traced by the Metropolitan Police Solicitor's Department.

2. The vehicle collision involving Paget-Lewis

38. On 7 December 1987 a car driven by Paget-Lewis collided with a van in which Leslie Green was a passenger. According to the driver of the van, Paget-Lewis claimed that his accelerator had jammed and that he could not help what happened. After the police arrived at the scene of the accident they cautioned Paget-Lewis, and provided him with a form requesting him to produce his driving documents.

39. On 10 December 1987 Paget-Lewis attended Hackney police station and produced his driving documents for inspection. Since he failed to produce a road worthiness (MOT) certificate for his car he was cautioned by the police.

40. In a statement taken by the police on 22 December 1987 from the driver of the van that had been allegedly rammed by Paget-Lewis, the driver recalled that after the accident Paget-Lewis had said: "I'm not worried because in a few months I'll be doing life."

3. Contacts between Detective Sergeant Boardman and ILEA

41. On 8 December 1987, following the collision incident, Detective Sergeant Boardman contacted ILEA stating that he wished to interview Paget-Lewis and the headmaster. The applicants state that Detective Sergeant Boardman assured ILEA that the Osman family would be protected. The Government deny that such an assurance was given.

An ILEA memorandum dated 8 December 1987 referred to the harassment of the Osman family and Paget-Lewis' alleged admission of responsibility for the van collision saying that Leslie Green had lured Ahmet Osman away from his affections. It noted that the police were pursuing enquiries but that if nothing was heard the matter should be "chased". It concluded with the note "Families getting police protection".

4. Detective Sergeant Boardman interviews the Green and the Osman families and visits the school

42. On 9 December 1987 Detective Sergeant Boardman took a detailed statement from Leslie Green and his mother concerning, *inter alia*, the fact that Paget-Lewis had followed Leslie home, the acts of harassment and the

graffiti which had appeared at the school. In his statement Leslie claimed that Paget-Lewis had threatened to "get him" whether it took "thirty days or thirty years". He also said that he had not been to school for two weeks as he was afraid to travel there and that he had moved in with his aunt, so as to be safe from Paget-Lewis.

43. On 14 December 1987 Detective Sergeant Boardman visited Homerton House and inspected the graffiti. A police photographer took photographs of the graffiti.

44. On or about 15 December 1987 Detective Sergeant Boardman visited the Osman family and discussed the criminal damage and Paget-Lewis' relationship with Ahmet. The applicants allege that Detective Sergeant Boardman told the family that he knew Paget-Lewis was responsible for the acts of vandalism, and gave them assurances that he would cause the incidents to stop. The Government deny that Detective Sergeant Boardman said that he knew Paget-Lewis was responsible, and that he gave assurances as to the family's safety.

5. Detective Sergeant Boardman's report on the case

45. In his report on the case which was completed on or about 15 December 1987, Detective Sergeant Boardman observed:

> "It should be pointed out at this stage that there is no evidence to implicate Paget-Lewis in either of these offences [the graffiti at the school] or the acts of vandalism against Osmans' address, although there is no doubt in everybody's mind that he was in fact responsible and this was just another example of his spite."

6. Paget-Lewis is interviewed by ILEA officers

46. On 15 December 1987 Paget-Lewis was interviewed by officers of ILEA at his own request. An ILEA memorandum dated the same day recorded that Paget-Lewis felt in a totally self-destructive mood, stating that it was all a symphony and the last chord had to be played. He admitted being deeply in debt and as a result was selling all his possessions. He blamed Mr Perkins for all his troubles but would not do a "Hungerford"[1] in a school but would see him at his home. The memorandum stated that the concerns of ILEA should be passed on to the police and noted that a call was made to Detective Sergeant Boardman, who was unavailable. Nevertheless, a detailed message was left with the receptionist.

One of the officers of ILEA recalled later in a statement dated 9 March 1988 that Paget-Lewis spoke in a manner which was very disturbing, said that he blamed Mr Perkins for the loss of his job, that he knew where he lived and that he was going to do something though not at the school. The

1. Hungerford was the scene of a 1987 massacre in which a gunman killed sixteen persons before committing suicide.

other officer recalled in her statement of 9 March 1988 that Paget-Lewis had stated that he was going to do something that would be "a sort of Hungerford". She recalled that as a result of this conversation she informed the police and the school that she considered that the head and deputy head were at risk of violence.

Although the applicants state that the content of the interview was passed on to the police, the Government deny that mention was made of the "Hungerford" reference or that there was any suggestion that the Osmans might be in danger.

7. Detective Sergeant Boardman's reaction to the ILEA message and the decision to arrest Paget-Lewis

47. On 15 December 1987 after receiving the message of the officer of ILEA (see paragraph 46 above), Detective Sergeant Boardman sent a telex to the local police station near Mr Perkins' home referring to the fact that vague threats had been made and that the school authorities were very concerned. He asked them to pay casual attention to the address, giving a brief description of Paget-Lewis and the registration number of his car.

48. On 16 December 1987 Detective Sergeant Boardman contacted ILEA with a view to tracing Paget-Lewis and was provided with his address. He requested the official at ILEA to ask Paget-Lewis to contact the police. On the same day, Detective Sergeant Boardman met with Mr Prince and Mr Perkins. The applicants state that he assured Mr Prince that the police would undertake the necessary measures to protect both Mr Perkins and the applicants. A diary entry of Mr Prince dated 16 December 1987 refers to Detective Sergeant Boardman and contains a heading "OSMAN/PERKINS/POLICE PRESENCE ARRANGED" and a note that ILEA had called "to finalise arrangements re protection for Perkins/Osman families". According to the Government no assurance of protection was given. Detective Sergeant Boardman received the impression from his meetings with Mr Prince and Mr Perkins that Paget-Lewis was angry at being removed from the school but that the anger was directed against the deputy head, who in any case did not feel in danger.

49. On 17 December 1987 Detective Sergeant Boardman and other police officers arrived at Paget-Lewis' house with the intention of arresting him on suspicion of criminal damage. Paget-Lewis was absent. The police were unaware that he was teaching at Haggerston School that day.

50. On 18 December 1987 pursuant to the request of the police, ILEA sent a letter to Paget-Lewis requesting him to contact Detective Sergeant Boardman. The same day ILEA informed the police that Paget-Lewis had not attended Haggerston School. He did not return to the school again.

E. The events between January 1988 and October 1988

1. Attempts to trace the whereabouts of Paget-Lewis

51. In early January 1988 the police commenced the procedure of laying an information before the Magistrates' Court with a view to prosecuting Paget-Lewis for driving without due care and attention. In addition, Paget-Lewis' name was put on the Police National Computer as being wanted in relation to the collision incident and on suspicion of having committed offences of criminal damage.

52. On 8 January an officer of ILEA rang Detective Sergeant Boardman for an update on the case but he was unavailable. Three days later he returned her call saying there had been no progress.

53. Between January and March 1988 Paget-Lewis travelled around England hiring cars in his adopted name of Osman and was involved in a number of accidents. He spent time at his home address during this period and continued to receive mail there.

54. On 17 January 1988 Paget-Lewis broke into a car parked near a clay-pigeon shoot near Leeds in Yorkshire and stole a shotgun. He sawed off both barrels. While the theft was reported to the local police, because there was nothing to connect the incident to Paget-Lewis the theft did not come to the attention of the Metropolitan police dealing with the case.

2. Paget-Lewis is sighted near the Osman home

55. On 1, 4 and 5 March 1988 Leslie Green saw Paget-Lewis wearing a black crash helmet near the applicants' home. According to the applicants, Mrs Green informed the police on each occasion, but her calls were not returned. The Government accept that, on 5 March 1988, Detective Sergeant Boardman received a message which stated "phone Mrs Green" but since there was no phone number on the note he did not connect the message with the mother of Leslie Green.

3. The fatal shootings and the arrest of Paget-Lewis

56. On 7 March 1988 Paget-Lewis was seen near the applicants' home by a number of people. At about 11 p.m. Paget-Lewis shot and killed Ali Osman and seriously wounded Ahmet. He then drove to the home of Mr Perkins where he shot and wounded him and killed his son.

57. Early the next morning Paget-Lewis was arrested. On being arrested he stated "why didn't you stop me before I did it, I gave you all the warning signs?"

58. Later that day Paget-Lewis was interviewed by the police. According to the record of the interview, Paget-Lewis said that he had been planning the attacks ever since he lost his job, and for the previous two weeks he had

been watching the Osmans' house. Although he considered Mr Perkins as his main target, he also regarded Ali and Ahmet Osman as being responsible for his losing his position at Homerton House. Paget-Lewis stated that he had been hoping in the back of his mind that the police would stop him. He admitted holding the family at gunpoint as they returned to the house, making Ali and Ahmet Osman kneel down in the kitchen, turning out the light and shooting at them. He denied that on earlier occasions he had damaged the windows of the Osmans' house but admitted that he had let down the tyres of their car as a prank. He also denied responsibility for the graffiti and taking the files from the school office.

4. Paget-Lewis is convicted of manslaughter

59. On 28 October 1988 Paget-Lewis was convicted of two charges of manslaughter having pleaded guilty on grounds of diminished responsibility (see paragraph 73 below). He was sentenced to be detained in a secure mental hospital without limit of time pursuant to section 41 of the Mental Health Act 1983.

F. Judicial proceedings against the police for negligence

60. An inquest was held into the death of Ali Osman after the conclusion of the criminal proceedings. Since a person had been convicted in connection with the death, the Coroner did not hold a full inquest (section 16 of the Coroner's Act 1988).

61. On 28 September 1989 the applicants commenced proceedings against, *inter alios*, the Commissioner of Police of the Metropolis alleging negligence in that although the police were aware of Paget-Lewis' activities since May 1987 they failed to apprehend or interview him, search his home or charge him with an offence before March 1988. Orders for discovery of documents were made on 24 April 1990.

62. On 19 August 1991 the Metropolitan Police Commissioner issued an application to strike out the statement of claim on the ground that it disclosed no reasonable cause of action. The High Court judge dismissed the application.

63. On 7 October 1992 the Court of Appeal upheld the appeal by the Commissioner (*Osman and another v. Ferguson and another* [1993] 4 All England Law Reports at p. 344). In its judgment, the court held that in light of previous authorities no action could lie against the police in negligence in the investigation and suppression of crime on the grounds that public policy required an immunity from suit.

64. Lord Justice McCowan found, *inter alia*:

> "In my judgment the plaintiffs [the applicants] have therefore an arguable cause that as between [the second applicant] and his family, on the one hand and the investigating officers, on the other, there existed a very close degree of proximity amounting to a special relationship."

65. However, having regard to the judgment of the House of Lords in the case of *Hill v. Chief Constable of West Yorkshire* (see paragraphs 90–92 below), from which he found no relevant distinction, he considered that the matters in issue were failures in investigation of crime and thus public policy doomed the action to failure. He rejected the argument that where the class of victim was sufficiently proximate and sufficiently small the public policy argument might not apply. He found that Lord Keith in the Hill case had treated public policy as a separate point that is not reached unless there is a duty of care.

The second judge in the Court of Appeal, Lord Justice Beldam, also held that on grounds of public policy the claims were not maintainable but refrained from expressing an opinion as to whether the facts, if proved, were sufficient to establish a relationship sufficiently proximate to found a duty of care. Lord Justice Simon Brown agreed with the judgment of Lord Justice McCowan. The applicants' claim was accordingly struck out.

66. The Court of Appeal refused leave to appeal to the House of Lords and the application to the House of Lords for leave to appeal was refused on 10 May 1993.

G. The Commission's findings of fact

67. The domestic courts had not established the full facts of the case since Paget-Lewis pleaded guilty to the charges against him and a full inquest was not conducted into the death of Ali Osman (see paragraph 60 above). Furthermore, the applicants' civil action against the police was struck out as showing no reasonable cause of action (see paragraph 65 above). Having examined the submissions and materials of the parties especially as regards the facts in dispute the Commission proceeded to the establishment of the facts of the case. Its findings may be summarised as follows.

68. As to the four meetings which took place between the police and the school between 3 March and 17 March 1987 (see paragraph 21 above), the Commission was satisfied that the police were made aware of the substance of the events and of the school's concerns about the disturbing attachment which Paget-Lewis was showing towards Ahmet Osman as well as Paget-Lewis' worrying reaction towards Leslie Green.

Furthermore, Mr Prince had in all probability informed Detective Inspectors Newman and Clarke on 4 May 1987 (see paragraph 27 above)

about the graffiti incident, the theft of the school files and Paget-Lewis' change of name, even if both officers had no recollection of having been told about the first two matters. Like the meetings between PC Williams and Mr Prince, no police notes appear to have been taken. However, the Commission did not find it established that at this stage the police had made any commitment to searching Paget-Lewis' home or were seriously concerned about the possibility of Paget-Lewis kidnapping Ahmet. These hypotheses emerge from the memoranda drawn up by ILEA officers around this time (see paragraph 28 above) and were probably based on the contacts which the officers had with Mr Prince and not on any direct contact between the officers and the police.

69. While all the vandalism on the Osmans' home and property between May and November 1987 had been reported to the police and the family had informed the police of its concern that Paget-Lewis was behind the attacks, the only step taken during that period was to invite Paget-Lewis to the police station for an interview (see paragraph 37 above). In the Commission's opinion, little reliance could be placed on Paget-Lewis' later assertions that he told PC Adams during the interview that he was in danger of doing something criminally insane. No police notes or records of this meeting which took place on an unspecified date could be traced.

70. Following the alleged ramming incident (see paragraph 38 above), the police immediately interviewed the Greens and the Osmans and photographed the graffiti at the school (see paragraphs 42 and 43 above). Although Detective Sergeant Boardman in his undated report (see paragraph 45 above) had stated that there was no evidence that Paget-Lewis was responsible for the graffiti and the attacks on the Osmans' home the police had nevertheless taken the view that he was presenting a sufficient threat that formal steps should be taken against him. Thus the decision was taken on 16 December 1987 to arrest Paget-Lewis on suspicion of criminal damage.

The Commission was also satisfied that there was no evidence that Paget-Lewis had made any direct or indirect threats against the Osmans during his meeting with ILEA officers on 15 December 1987 (see paragraph 46 above). It placed greater weight on the contemporaneous notes of the meeting rather than on the statement of one of the officers taken several months later that Paget-Lewis threatened at the meeting to commit a "Hungerford massacre". According to the notes of the meeting, Paget-Lewis is reported as having stated that he would not do a "Hungerford" at the school but would see the deputy at home. In the Commission's view, this would explain why the police requested that a casual watch should be kept on Mr Perkins' address. Furthermore, despite the wording of the ILEA memorandum of 8 December and of Mr Prince's rather cryptic diary entry on 16 December 1987 (see paragraphs 41 and 48 above) it seemed unlikely

that the police had referred to or promised police protection to the Osman family especially since none was in fact envisaged or provided. The school authorities had probably received this impression from the assurances given by the police that the necessary measures were being taken to deal with the situation including the vague threats made against Mr Perkins.

71. The Commission did not find it established that the letter sent by the ILEA to Paget-Lewis at the request of the police following the failed arrest attempt on 17 December 1987 caused Paget-Lewis to disappear (see paragraph 50 above). It was also satisfied that the police took no further active steps to trace the whereabouts of Paget-Lewis from 18 December 1987 to March 1988 apart from placing his name on the Police National Computer in January 1988. In addition, there were no contemporaneous records to support the assertion that Mrs Green had informed the police about Paget-Lewis being seen by her son around the Osman home in early March 1988 (see paragraph 55 above). It may have been the case that Mrs Green merely left a message with the police station that Detective Sergeant Boardman should ring her back. In that event, it was not surprising that Detective Sergeant Boardman had not been able to make a connection between a Mrs Green and the Paget-Lewis file since the case had been dormant for three months.

II. RELEVANT DOMESTIC LAW

A. The criminal law

1. Murder

72. The offence of murder is committed if a person of sound mind unlawfully kills any human being with malice aforethought. The mental element of murder, "malice aforethought", is established if it is proved that there was, on the part of the accused, an intention to kill, an intention to cause grievous bodily harm or an intention to do an act knowing it to be highly probable that the act will cause death or grievous bodily harm. The sentence for murder is life imprisonment.

2. Manslaughter

73. The offence of manslaughter is committed if the victim is unlawfully killed by a person who, by reason of abnormality of mind, suffered from diminished responsibility – i.e. who suffered from such abnormality of mind as substantially impaired his mental responsibility for his acts. The sentence of manslaughter is imprisonment for life or for any shorter term.

B. Criminal procedure

1. Search warrants

74. The power to obtain a warrant to search for items that have been used, or are intended for use, in committing criminal damage is governed by section 6(1) of the Criminal Damage Act 1971 which provides:

> "If it is made to appear by information on oath before a justice of the peace that there is reasonable cause to believe that any person has in his custody or under his control or on his premises anything which there is reasonable cause to believe has been used or is intended for use without lawful excuse –
>
> (a) to destroy or damage property belonging to another; or
>
> (b) to destroy or damage any property in a way likely to endanger the life of another,
>
> the Justice of the Peace may grant a warrant authorising any constable to search for and seize that thing."

2. Police powers of arrest and detention

75. In order for an arrest to be lawful it must first satisfy either section 24 or 25 of the Police and Criminal Evidence Act 1984 ("the 1984 Act").

76. Under section 24 a police officer may arrest any person whom he has reasonable grounds to believe is guilty of an arrestable offence. All offences which carry a maximum sentence of five years' imprisonment or more are considered arrestable offences (section 24(1)).

77. Under section 25 a police officer may arrest without warrant any person whom he has reasonable grounds to suspect is guilty of a non-arrestable offence provided that one of the general interest conditions apply. These include:

(a) that the constable has reasonable grounds for doubting whether a name furnished by the relevant person as a name is in fact his real name (section 25(3)(a));

(b) that the constable has reasonable grounds to believe that an arrest is necessary to prevent the relevant person causing physical injury to any person or causing loss or damage to property (section 25(3)(d)(i) and (ii));

(c) that the constable has reasonable grounds to believe that an arrest is necessary to protect a child or other vulnerable person from the relevant person (section 25(3)(e)).

78. In determining whether the available information is sufficient to give rise to a reasonable suspicion, the test to be applied is that laid down by the House of Lords in *Hussein v. Chang Fook Kam* [1970] Appeal Cases at p. 942:

> "Suspicion in its ordinary meaning is a state of conjuncture or surmise where proof is lacking: 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is at the end."

3. The decision to charge

79. Where a person is arrested for an offence without a warrant, or under a warrant not endorsed for bail, the custody officer at the police station where he is detained after his arrest must determine whether he has sufficient evidence to charge the person for the offence for which he has been arrested (section 37(1)(b) of the 1984 Act). In reaching this decision the custody officer must have "reasonable and probable" cause to prosecute. In *Hicks v. Faulkner* [1878] 8 Queen's Bench Division at p. 167, Judge Hawkins interpreted this requirement to mean:

> "… an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser to the conclusion that the person was probably guilty of the crime imputed."

80. The custody officer is not required to be sure that the accused person is guilty before charging him (*Tempest v. Snowden* [1952] 1 King's Bench Reports at p. 130). Nor is it necessary for a charging officer to believe that the prosecution will result in a conviction (*Dawson v. Vasandau* [1863] 11 Weekly Reporter at p. 516). The charging officer is simply required to make an assessment of whether there is sufficient evidence to withstand examination in the course of "a fair and impartial trial" (*Glinski v. McIver* [1962] Appeal Cases at p. 726).

81. If the custody officer does not have sufficient evidence to charge, the arrested person must be released either on bail or without bail. However, if the custody officer has reasonable grounds to believe that the suspect's detention is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him, the custody officer may authorise the suspect's further detention (section 37(2) of the 1984 Act).

4. Pattern of offending

82. In determining whether to bring criminal charges against a person, the custody officer may take into account evidence disclosing a pattern of

offending. However, in *D.P.P. v. P.* [1991] 2 Appeal Cases at p. 447 the House of Lords stated that admissibility of such evidence is to be determined by the degree of its probative worth. The Lord Chancellor, Lord Mackay of Clashfern, said:

> "… the essential feature of evidence which is to be admitted is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime… Once the principle is recognised that what has to be assessed is the probative force of the evidence in question, the infinite variety of circumstances in which the question arises demonstrates that there is no single manner in which this can be achieved. Whether the evidence has sufficient probative weight to outweigh its prejudicial effect must in each case be a question of fact and degree." (at p. 460)

He continued:

> "Where the identity of the perpetrator is in issue, and evidence of this kind is important in that connection, obviously something in the nature of what has been called in the course of argument a signature or other special feature will be necessary. To transpose this requirement to other situations where the question is whether a crime has been committed, rather than who did commit it, is to impose an unnecessary and improper restriction upon the application of the principle." (at p. 462)

5. Bail

83. Section 38 of the 1984 Act provides that where an arrested person is charged with an offence, the custody officer shall order his release from police detention, either on bail or without bail, unless, *inter alia*, his name or address cannot be ascertained; detention is necessary for the person's own protection or to prevent him causing physical injury to any other person or damage to property; or the person arrested will fail to appear in court to answer bail.

84. If the custody officer decides not to release the defendant, he must be produced before a Magistrates' Court within 24 hours after his arrest who shall either commit him in custody or release him on bail. Pursuant to section 13 of Schedule 1 Part 1 to the Bail Act 1976:

> "The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would –
>
> (a) fail to surrender to custody, or
>
> (b) commit an offence while on bail, or
>
> (c) interfere with witnesses or otherwise obstruct the course of justice, either in relation to himself or any other person."

In taking this decision the Magistrates' Court is required, pursuant to section 9 of Schedule 1 Part 1, to have regard to such of the following considerations as appear to it to be relevant, namely:

> "(a) the nature and seriousness of the offence…;
>
> (b) the character, antecedents, associations and community ties of the defendant;
>
> (c) the defendant's record as respects the fulfilment of his obligations under previous grants of bail in criminal proceedings;
>
> (d) except in the case of a defendant whose case is adjourned for inquiries or a report, the strength of the evidence of his having committed the offence or having defaulted."

C. Mental health

85. Section 136 of the Mental Health Act 1983 provides:

> "(1) If a constable finds in a place to which the public have access a person who appears to him to be suffering from mental disorder and to be in immediate need of care or control, the constable may, if he thinks it necessary to do so in the interests of that person, or for the protection of other persons, remove that person to a place of safety…
>
> (2) A person removed to a place of safety under this section may be detained there for a period not exceeding 72 hours for the purpose of enabling him to be examined by a registered medical practitioner and to be interviewed by an approved social worker and of making any necessary arrangements for his treatment or care."

86. Both the Magistrates' Court and the Crown Court have the power to remand an accused person to a specified hospital for the preparation of a report on his mental condition. Section 35(2) defines an accused person as follows:

> "(a) in relation to the Crown Court, any person who is awaiting trial before the court for an offence punishable with imprisonment or who has been arraigned before the court for such an offence and has not yet been sentenced or otherwise dealt with for the offence on which he has been arraigned;
>
> (b) in relation to a Magistrates' Court any person who has been convicted by the court of an offence punishable on summary conviction with imprisonment and any person charged with such an offence if the court is satisfied that he did the act or made the omission charged or he has consented to the exercise by the court of the powers conferred by this section."

If these requirements are met the court may, pursuant to section 35(3), remand the accused person to a hospital for a report if:

> "(a) the court is satisfied on the written or oral evidence of a registered medical practitioner, that there is reason to suspect that the accused person is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment; and
>
> (b) the court is of the opinion that it would be impracticable for a report on his mental condition to be made if he were remanded on bail…"

87. The Crown Court may remand an accused person to a specified hospital for treatment, if it is satisfied on the evidence of two medical practitioners that he is suffering from mental illness or severe mental impairment of a nature or degree which makes it appropriate for him to be so detained (section 36(1)).

88. Following conviction for an offence punishable with imprisonment, both the Magistrates' Court and the Crown Court have the power under section 38(1) to make an interim hospital order, where:

> "… the court before or by which he is convicted is satisfied, on the written or oral evidence of two registered medical practitioners
>
> (a) that the offender is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment; and
>
> (b) that there is reason to suppose that the mental disorder from which the offender is suffering is such that it may be appropriate for a hospital order to be made in his case…"

Pursuant to section 37(2) both the Magistrates' Court and the Crown Court may also admit an offender to a hospital if:

> "(a) the court is satisfied, on the written or oral evidence of two registered medical practitioners, that the offender is suffering from mental illness, psychopathic disorder, severe mental impairment or mental impairment and that…
>
> (i) the mental disorder from which the offender is suffering is of a nature or degree which makes it appropriate for him to be detained in a hospital for medical treatment and, in the case of psychopathic disorder or mental impairment, that such treatment is likely to alleviate or prevent a deterioration of his condition…
>
> (b) the court is of the opinion, having regard to all the circumstances including the nature of the offence and the character and antecedents of the offender, and to the other available methods of dealing with him, that the most suitable method of disposing of the case is by means of an order under this section."

D. Actions against the police for negligence

89. In the case of *Dorset Yacht Co. Ltd v. the Home Office* ([1970] Appeal Cases at p. 1004), the owners of a yacht damaged by borstal boys who had escaped from the supervision of prison officers sought to sue the

Home Office alleging negligence by the prison officers. The House of Lords held that in the particular case a duty of care could arise. Lord Diplock said:

> "I should therefore hold that any duty of a borstal officer to use reasonable care to prevent a borstal trainee from escaping from his custody was owed only to persons whom he could reasonably foresee had property situated in the vicinity of the place of detention of the detainee which the detainee was likely to steal or to appropriate and damage in the course of eluding immediate pursuit and capture."

90. In the case of *Hill v. Chief Constable of West Yorkshire* ([1989] Appeal Cases at p. 53), the mother of a victim of the Yorkshire Ripper instituted proceedings against the police alleging that they had failed properly to exercise their duty to exercise all reasonable care and skill to apprehend the perpetrator of the murders and to protect members of the public who might be his victims. Lord Keith in the House of Lords found:

> "The alleged negligence of the police consists in a failure to discover his identity. But if there is no general duty of care owed to individual members of the public by the responsible authorities to prevent the escape of a known criminal or to recapture him, there cannot reasonably be imposed upon any police force a duty of care similarly to identify and apprehend an unknown one. Miss Hill cannot for this purpose be regarded as a person at special risk simply because she was young and female. Where the class of potential victims of a particular habitual criminal is a large one the precise size of it cannot in principle affect the issue. All householders are potential victims of an habitual burglar and all females those of an habitual rapist. The conclusion must be that although there existed reasonable foreseeability of likely harm to Miss Hill if Sutcliffe were not identified and apprehended, there is absent from the case any such ingredient or characteristic as led to the liability of the Home Secretary in the Dorset Yacht case. Nor is there present any additional characteristic such as might make up a deficiency. The circumstances of the case are therefore not capable of establishing a duty of care owed towards Miss Hill by the West Yorkshire Police."

91. While he considered this sufficient to dispose of the appeal, Lord Keith went on to set out public-policy objections to the existence of an action in negligence against the police in the performance of their duties in the investigation and suppression of crime.

> "Potential existence of such liability may in many instances be in the general public interest, as tending towards the observance of a higher standard of care in the carrying on of various different types of activity. I do not, however, consider that this can be said of police activities. The general sense of public duty which motivates police forces is unlikely to be appreciably reinforced by the imposition of such liability so far as concerns their function in the investigation and suppression of crime. From time to time they make mistakes in the exercise of that function, but it is not to be doubted that they apply their best endeavours to the performance of it. In some instances the imposition of liability may lead to the exercise of a function being carried on in a detrimentally defensive frame of mind. The possibility of this happening in relation to the investigative operations of the police cannot be excluded. Further it would be reasonable to expect that if potential liability were to be imposed it would be not uncommon for actions to be raised against police forces on the ground that they had

failed to catch some criminal as soon as they might have done, with the result that he went on to commit further crimes. While some such actions might involve allegations of a simple and straightforward type of failure – for example that a police officer negligently tripped and fell while pursuing a burglar – others would be likely to enter deeply into the general nature of a police investigation, as indeed the present action would seek to do. The manner of conduct of such an investigation must necessarily involve a variety of decisions to be made on matters of policy and discretion, for example as to which particular line of inquiry is most advantageously to be pursued and what is the most advantageous way to deploy the available resources. Many such decisions would not be regarded by the courts as appropriate to be called in question, yet elaborate investigation of the facts might be necessary to ascertain whether or not this was so. A great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action and the attendance of witnesses at the trial. The result would be significant diversion of police manpower and attention from their most important function, that of the suppression of crime. Closed investigations would require to be reopened and retraversed, not with the object of bringing any criminal to justice but to ascertain whether or not they had been competently conducted."

92. Lord Templeman commented:

"... if this action lies, every citizen will be able to require the court to investigate the performance of every policeman. If the policeman concentrates on one crime, he may be accused of neglecting others. If the policeman does not arrest on suspicion a suspect with previous convictions, the police force may be held liable for subsequent crimes. The threat of litigation against a police force would not make a policeman more efficient. The necessity for defending proceedings, successfully or unsuccessfully, would distract the policeman from his duties.

This action is misconceived and will do more harm than good."

93. In *Swinney and another v. the Chief Constable of Northumbria* ([1997] Queen's Bench Reports at p. 464), the plaintiff had passed on information in confidence to the police about the identity of a person implicated in the killing of a police officer, expressing her concern that she did not want the source of the information to be traced back to her. The information was recorded, naming the plaintiff, in a document which was left in an unattended police vehicle, which was broken into with the result that the document was stolen, came into the possession of the person implicated and the plaintiff was threatened with violence and arson and suffered psychiatric damage. The plaintiff's claim in negligence against the police was struck out but allowed on appeal by the High Court judge. The Chief Constable appealed contending that the police owed no duty of care or alternatively that public policy precluded the prosecution of the claim since the police were immune for claims arising out of their activities in the investigation or suppression of crime. The Court of Appeal dismissed the appeal.

In his judgment Lord Justice Hirst referring to the cases of *Dorset Yacht* and *Hill* (see paragraphs 89–92 above) stated that he could not accept a claim of blanket immunity for the police in this case, but that there were

other considerations of public policy in this case, namely, the need to protect springs of information, to protect informers and to encourage them to come forward. On the facts of the case, it was arguable that the police had assumed a responsibility of confidentiality towards the plaintiff. The case should therefore proceed to trial.

94. Lord Justice Ward held that it was arguable that:

> "There is a special relationship between the plaintiffs and the defendant, which is sufficiently proximate. Proximity is shown by the police assuming responsibility, and the plaintiffs relying upon that assumption of responsibility, for preserving the confidentiality of the information which, if it fell into the wrong hands, was likely to expose the first plaintiff and members of her family to a special risk of damage from the criminal acts of others, greater than the general risk which ordinary members of the public must endure with phlegmatic fortitude.
>
> It is fair, just and reasonable that the law should impose a duty, there being no overwhelming dictate of public policy to exclude the prosecution of this claim. On the one hand there is, as more fully set out in *Hill v. the Chief Constable* ... an important public interest that the police should carry out their difficult duties to the best of their endeavours without being fettered by, or even influenced by, the spectre of litigation looming over every judgment they make, every discretion they exercise, every act they undertake or omit to perform, in their ceaseless battle to investigate and suppress crime. The greater good rightly outweighs any individual hardship. On the other hand it is incontrovertible that the fight against crime is daily dependent upon information fed to the police by members of the public, often at real risk of villainous retribution from the criminals and their associates. The public interest will not accept that good citizens should be expected to entrust information to the police without also expecting that they are entrusting their safety to the police. The public interest would be affronted were it to be the law that members of the public should be expected, in the execution of public service, to undertake the risk of harm to themselves without the police, in return, being expected to take no more than reasonable care to ensure that the confidential information imparted to them is protected..."

95. The police have been held liable in negligence or failure in their duties in other cases. In *Kirkham v. the Chief Constable of Manchester* ([1989] 2 Queen's Bench Reports at p. 283), the Court of Appeal upheld a finding of liability in negligence under the Fatal Accidents Act 1976 where the police had taken a man into custody, knew he was a suicide risk but did not communicate that information to the prison authorities. The man, diagnosed as suffering from clinical depression had committed suicide in remand prison. The police, which had assumed responsibility for the man, had owed a duty of care, which they had breached with the result that his death had ensued.

96. In *Rigby and another v. Chief Constable of Northamptonshire* ([1985] 2 All England Law Reports at p. 986), the High Court found the police liable to pay damages for negligence in that they had fired a gas canister into the plaintiffs' premises in order to flush out a dangerous psychopath. There had been a real and substantial fire risk in firing the canister into the building and that risk was only acceptable if there was

fire-fighting equipment available to put the fire out at an early stage. No equipment had been present at the time and the fire had broken out and spread very quickly. Negligence was also found in *Knightley v. Johns and others* ([1982] 1 All England Law Reports at p. 301) where a police inspector at the site of an accident failed to close a tunnel and ordered officers to go back through the tunnel in the face of traffic, thereby leading to a further accident.

97. In *R. v. Dytham* ([1979] 1 Queen's Bench Reports at p. 722), where a police officer stood by while a man died outside a club in a murderous assault, the Court of Appeal upheld the conviction of the officer for wilful neglect to perform a duty.

PROCEEDINGS BEFORE THE COMMISSION

98. The applicants applied to the Commission on 10 November 1993, complaining that there had been a failure to protect the lives of Ali and Ahmet Osman and to prevent the harassment of their family, and that they had no access to court or effective remedy in respect of that failure. The applicants relied on Articles 2, 6, 8 and 13 of the Convention.

99. The Commission declared the application (no. 23452/94) admissible on 17 May 1996. In its report of 1 July 1997 (Article 31), it expressed the opinion that there had been no violation of Article 2 of the Convention (ten votes to seven); that there had been no violation of Article 8 of the Convention (ten votes to seven); that there had been a violation of Article 6 § 1 of the Convention (twelve votes to five); and that no separate issue arose under Article 13 of the Convention (twelve votes to five). The full text of the Commission's opinion and of the three dissenting opinions contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

100. The applicants maintained in their memorial and at the hearing that the facts of the case disclosed breaches by the respondent State of its obligations under Articles 2, 6, 8 and 13 of the Convention. They requested

1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

the Court to find accordingly and to award them just satisfaction under Article 50.

The Government for their part requested the Court to find that there had been no breach of any of the Articles relied on by the applicants.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

101. The applicants asserted that by failing to take adequate and appropriate steps to protect the lives of the second applicant and his father, Ali Osman, from the real and known danger which Paget-Lewis posed, the authorities had failed to comply with their positive obligation under Article 2 of the Convention, which provides as relevant:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> …"

102. The Government maintained that the facts of the case did not bear out the applicants' allegation and for that reason there had been no breach of Article 2. The Commission agreed with the Government's arguments.

A. Arguments of those appearing before the Court

1. The applicants

103. The applicants contended that a most careful scrutiny of the events leading to the tragic shooting incident revealed that the police were several times put on notice that the lives of Ali and Ahmet Osman were at real risk from the threat posed by Paget-Lewis. Despite the clear warning signals given the police failed to take appropriate and adequate preventive measures to secure effective protection for their lives from that risk. While disagreeing with the standard of care formulated by the Government (see paragraph 107 below), they submitted that even on the basis of that overly-strict standard the obvious inadequacy of the police response over a period of fourteen months must be considered to amount to a grave dereliction of the authorities' duty to protect life and a substantial contributing factor to the death of Ali Osman and the wounding of the second applicant.

104. The applicants argued that by May 1987 the police, on the basis of their contacts with the headmaster of the school, Mr Prince (see paragraphs 21 and 27 above) must be taken to have been fully aware that Paget-Lewis was an unbalanced, obsessive and aggressive individual who had stalked Ahmet Osman, taken photographs of him, plied him with gifts and even assumed his name. Further, they were plainly made aware that Paget-Lewis was strongly suspected of being responsible for the graffiti incident and the theft of the school files. However, these warning signs were never taken seriously by the police even though they must have known of Mr Prince's assessment of the situation, in particular his view that Paget-Lewis was psychologically unbalanced (see paragraph 26 above). In spite of the existence of compelling circumstantial evidence linking Paget-Lewis with the theft of the school files and the spraying of graffiti close to the school (see paragraphs 22 and 24 above), the police did not investigate these matters further.

The applicants further submitted that this inertia on the part of the police in the face of clear indications that the life of a vulnerable child was at real risk from the danger posed by Paget-Lewis was compounded by their failure to apprehend the significance of the eight reported attacks on the home and property of the Osman family between May and November 1987 marking an escalation in an already life-threatening situation. In brief, nothing was done to establish that Paget-Lewis was the author of this campaign of harassment and intimidation threatening the security of the family. It was only on 17 December 1987, and ten days following the ramming incident (see paragraph 38 above), that a decision was finally taken to arrest Paget-Lewis. Even then the police seriously mishandled the situation by giving Paget-Lewis the opportunity to avoid arrest and abscond, and then failing to inform the Osman family of this occurrence and to keep a watch on their home.

105. The applicants emphasised that Paget-Lewis had on three separate occasions stated that he intended to commit a murder and each of his statements came to the attention of the police (see paragraphs 37, 40 and 46 above). However, the police once again failed to take seriously what was conclusive proof that the lives of the Osman family were at risk from an unstable, obsessive, disturbed and dangerous individual. The fact that no records were ever kept of the police visits to the school in March and May 1987 nor of the attacks on the home and property of the family confirmed in the applicants' view the casual and careless approach of the authorities to the investigation of a very grave threat to life and explained their failure to make use of their powers to prevent that threat from materialising by arresting Paget-Lewis on suspicion of being responsible for the graffiti incident, the theft of the school files or the attacks on the Osmans' home, or

searching his home for evidence of his involvement in these offences or by having him compulsorily admitted to a psychiatric hospital for assessment.

106. For the above reasons, the applicants concluded that the authorities had failed in the circumstances to comply with their positive obligation under Article 2 of the Convention. They further contended that there had never been any effective official investigation into the authorities' failure in this respect. Their civil action in negligence against the police founded on the successful invocation by the Metropolitan Police Commissioner of the rule of police immunity (see paragraph 63 above). In their view, this gave rise to a separate violation of Article 2.

2. The Government

107. The Government did not dispute that Article 2 of the Convention may imply a positive obligation on the authorities of a Contracting State to take preventive measures to protect the life of an individual from the danger posed by another individual. They emphasised however that this obligation could only arise in exceptional circumstances where there is a known risk of a real, direct and immediate threat to that individual's life and where the authorities have assumed responsibility for his or her safety. In addition, it had to be shown that their failure to take preventive action amounted to gross dereliction or wilful disregard of their duty to protect life. Finally, it must be established on sound and persuasive grounds that there is a causal link between the failure to take the preventive action of which the authorities are accused and that that action, judged fairly and realistically, would have been likely to have prevented the incident in question.

108. On that basis, and having regard to the facts of the instant case, the Government argued that the police could not be taken at any relevant time to have appreciated that Paget-Lewis represented a real and immediate threat to the lives of the Osman family. He had never threatened either Ali or Ahmet Osman in word or deed and both before and after his arrest he had consistently denied that he had been responsible for the theft of the school files, the graffiti in the area around the school and the acts of vandalism on the home and property of the family. Significantly, the Inner London Education Authority ("ILEA"), after investigating the complaints against Paget-Lewis, considered that a reprimand was sufficient action and he was allowed to assume teaching duties in another school. The fact that Dr Ferguson, the ILEA psychiatrist, had concluded on the basis of a complete case file that Paget-Lewis was fit to teach (see paragraph 29 above) confirmed that the latter manifested no clear signs of mental illness which would have suggested that he posed a real and immediate danger to the lives of the Osmans.

109. In the Government's submission, the police response at each stage of the events in the light of their knowledge and information at the relevant times was reasonable. At no time was there sufficient evidence on which to lay charges against Paget-Lewis on suspicion of having committed acts of criminal damage or to search his home to secure proof of such. Detective Sergeant Boardman conducted a complete review of the case file in December 1987 but was forced to concede that, in the absence of a confession statement, there was no evidence on which to lay charges against Paget-Lewis.

110. The Government averred that the weakness of the applicants' case before the Court lay not only in their assessment of the police action from the standpoint of hindsight but also in their erroneous interpretation of certain events in order to impute to the police knowledge of the danger posed by Paget-Lewis to the Osman family or to accuse them of gross negligence. In this latter respect they challenged, *inter alia*, the applicants' unfounded assertions that the police had promised protection to the family on the basis of the ILEA memorandum of 8 December 1987 (see paragraph 41 above) or that the ILEA letter of 17 December 1987 caused Paget-Lewis to abscond before he could be arrested (see paragraph 50 above) or that no police records had been kept of the incidents reported to them (see paragraph 105 above). As to the latter allegation, they pointed to the fact that Detective Sergeant Boardman was fully apprised of the entire case file in December 1987 (see paragraph 109 above).

3. The Commission

111. Having regard to its own findings in this case (see paragraphs 67-71 above), the Commission considered that there were no factors which, judged reasonably, rendered it foreseeable at the time with any degree of probability that Paget-Lewis would carry out an armed attack on the Osman family. While noting that it was to be regretted that the police did not keep or preserve records of their meetings with the school and ILEA officials and with Paget-Lewis himself, it did not consider that this failure prevented a proper assessment of the risk to the Osman family or posed an obstacle to effective steps being taken; nor did the failure to take any additional investigative steps suggest any seriously defective response to the threat posed by Paget-Lewis as perceived at the time. The Commission concluded that the circumstances of the case did not disclose any fundamental disregard by the police of the duties imposed by law in respect of the protection of life.

112. As to the applicants' argument that their inability to sue the police in negligence amounted to a breach of Article 2 (see paragraph 106 above), the Commission was not satisfied that the limited nature of the exclusion of

a duty of care in relation to negligence actions against the police (see paragraphs 90–97 above) demonstrated any lack of protection to the right to life in the domestic law of the respondent State.

B. The Court's assessment

1. As to the establishment of the facts

113. The Court notes that there was never any independent judicial determination at the domestic level of the facts of the instant case. The Commission on the basis of the pleadings of the parties and the hearing which it held in the case made its own findings on the course of events in the case up until the time of the armed attack by Paget-Lewis on Ali and Ahmet Osman on 7 March 1988 (see paragraphs 67–71 above). According to the applicants, the Commission overlooked in its findings of fact the importance of certain events which they claim have a bearing on the level of knowledge which can be imputed to the police in respect of the seriousness of the danger which Paget-Lewis represented for the lives of the Osman family (see paragraph 10 above).

114. The Court observes that it is called on to determine whether the facts of the instant case disclose a failure by the authorities of the respondent State to protect the right to life of Ali and Ahmet Osman, in breach of Article 2 of the Convention. In addressing that issue, and having due regard to the Commission's role under the Convention in the establishment and verification of the facts of a case, it will assess this issue in accordance with its usual practice in the light of all the material placed before it by the applicants and by the Government or, if necessary, material obtained of its own motion (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 64, § 160; and the McCann and Others v. the United Kingdom judgment of 27 September 1995, Series A no. 324, p. 51, § 173).

2. As to the alleged failure of the authorities to protect the rights to life of Ali and Ahmet Osman

115. The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the L.C.B. v. the United Kingdom judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, § 36). It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression

and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.

116. For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.

In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (see paragraph 115 above), it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The Court does not accept the Government's view that the failure to perceive the risk to life in the circumstances known at the time or to take preventive measures to avoid that risk must be tantamount to gross negligence or wilful disregard of the duty to protect life (see paragraph 107 above). Such a rigid standard must be considered to be incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2 (see, *mutatis mutandis*, the above-mentioned McCann and Others judgment, p. 45, § 146). For the Court, and having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case.

On the above understanding the Court will examine the particular circumstances of this case.

117. The Court observes, like the Commission, that the concerns of the school about Paget-Lewis' disturbing attachment to Ahmet Osman can be reasonably considered to have been communicated to the police over the course of the five meetings which took place between 3 March and 4 May 1987 (see paragraphs 21 and 27 above), having regard to the fact that Mr Prince's decision to call in the police in the first place was motivated by the allegations which Mrs Green had made against Paget-Lewis and the school's follow-up to those allegations. It may for the same reason be reasonably accepted that the police were informed of all relevant connected matters which had come to light by 4 May 1987 including the graffiti incident, the theft of the school files and Paget-Lewis' change of name.

It is the applicants' contention that by that stage the police should have been alert to the need to investigate further Paget-Lewis' alleged involvement in the graffiti incident and the theft of the school files or to keep a closer watch on him given their awareness of the obsessive nature of his behaviour towards Ahmet Osman and how that behaviour manifested itself. The Court for its part is not persuaded that the police's failure to do so at this stage can be impugned from the standpoint of Article 2 having regard to the state of their knowledge at that time. While Paget-Lewis' attachment to Ahmet Osman could be judged by the police officers who visited the school to be most reprehensible from a professional point of view, there was never any suggestion that Ahmet Osman was at risk sexually from him, less so that his life was in danger. Furthermore, Mr Perkins, the deputy headmaster, alone had reached the conclusion that Paget-Lewis had been responsible for the graffiti in the neighbourhood of the school and the theft of the files. However Paget-Lewis had denied all involvement when interviewed by Mr Perkins and there was nothing to link him with either incident. Accordingly, at that juncture, the police's appreciation of the situation and their decision to treat it as a matter internal to the school cannot be considered unreasonable.

Like the Commission (see paragraph 68 above), the Court is not persuaded either that the ILEA official's memorandum and internal notes written between 14 April and 8 May 1987 are an accurate reflection of how the discussions between Mr Prince and the police officers wound up (see paragraph 28 above).

118. The applicants have attached particular weight to Paget-Lewis' mental condition and in particular to his potential to turn violent and to direct that violence at Ahmet Osman. However, it is to be noted that Paget-Lewis continued to teach at the school up until June 1987. Dr Ferguson examined him on three occasions and was satisfied that he was not mentally ill. On 7 August 1987 he was allowed to resume teaching, although not at Homerton House (see paragraph 35 above). It is most improbable that the

decision to lift his suspension from teaching duties would have been made if it had been believed at the time that there was the slightest risk that he constituted a danger to the safety of young people in his charge. The applicants are especially critical of Dr Ferguson's psychiatric assessment of Paget-Lewis. However, that assessment was made on the basis of three separate interviews with Paget-Lewis and if it appeared to a professional psychiatrist that he did not at the time display any signs of mental illness or a propensity to violence it would be unreasonable to have expected the police to have construed the actions of Paget-Lewis as they were reported to them by the school as those of a mentally disturbed and highly dangerous individual.

119. In assessing the level of knowledge which can be imputed to the police at the relevant time, the Court has also had close regard to the series of acts of vandalism against the Osmans' home and property between May and November 1987 (see paragraphs 30, 36 and 37 above). It observes firstly that none of these incidents could be described as life-threatening and secondly that there was no evidence pointing to the involvement of Paget-Lewis. This was also the view of Detective Sergeant Boardman in his report on the case in mid-December 1987 having interviewed the Green and Osman families, visited the school and taken stock of the file (see paragraphs 42–45 above). The completeness of Detective Sergeant Boardman's report and the assessment he made in the knowledge of all the allegations made against Paget-Lewis would suggest that even if it were to be assumed that the applicants are correct in their assertions that the police did not keep records of the reported incidents of vandalism and of their meetings with the school and ILEA officials, this failing could not be said to have prevented them from apprehending at an earlier stage any real threat to the lives of the Osman family or that the irrationality of Paget-Lewis' behaviour concealed a deadly disposition. The Court notes in this regard that when the decision was finally taken to arrest Paget-Lewis it was not based on any perceived risk to the lives of the Osman family but on his suspected involvement in acts of minor criminal damage (see paragraph 49 above).

120. The Court has also examined carefully the strength of the applicants' arguments that Paget-Lewis on three occasions communicated to the police, either directly or indirectly, his murderous intentions (see paragraph 105 above). However, in its view these statements cannot be reasonably considered to imply that the Osman family were the target of his threats and to put the police on notice of such. The applicants rely in particular on Paget-Lewis' threat to "do a sort of Hungerford" which they allege he uttered at the meeting with ILEA officers on 15 December 1987 (see paragraph 46 above). The Government have disputed that these words were said on that occasion, but even taking them at their most favourable to the applicants' case, it would appear more likely that they were uttered with

respect to Mr Perkins whom he regarded as principally to blame for being forced to leave his teaching post at Homerton House. Furthermore, the fact that Paget-Lewis is reported to have intimated to the driver of the car with which he collided on 7 December 1987 that he was on the verge of committing some terrible deed (see paragraphs 38 and 40 above) could not reasonably be taken at the time to be a veiled reference to a planned attack on the lives of the Osman family. The Court must also attach weight in this respect to the fact that, even if Paget-Lewis had deliberately rammed the vehicle as alleged, that act of hostility was in all probability directed at Leslie Green, the passenger in the vehicle. Nor have the applicants adduced any further arguments which would enhance the weight to be given to Paget-Lewis' claim that he had told PC Adams that he was in danger of doing something criminally insane (see paragraph 37 above). In any event, as with his other cryptic threats, this statement could not reasonably be construed as a threat against the lives of the Osman family.

121. In the view of the Court the applicants have failed to point to any decisive stage in the sequence of the events leading up to the tragic shooting when it could be said that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk from Paget-Lewis. While the applicants have pointed to a series of missed opportunities which would have enabled the police to neutralise the threat posed by Paget-Lewis, for example by searching his home for evidence to link him with the graffiti incident or by having him detained under the Mental Health Act 1983 or by taking more active investigative steps following his disappearance, it cannot be said that these measures, judged reasonably, would in fact have produced that result or that a domestic court would have convicted him or ordered his detention in a psychiatric hospital on the basis of the evidence adduced before it. As noted earlier (see paragraph 116 above), the police must discharge their duties in a manner which is compatible with the rights and freedoms of individuals. In the circumstances of the present case, they cannot be criticised for attaching weight to the presumption of innocence or failing to use powers of arrest, search and seizure having regard to their reasonably held view that they lacked at relevant times the required standard of suspicion to use those powers or that any action taken would in fact have produced concrete results.

122. For the above reasons, the Court concludes that there has been no violation of Article 2 of the Convention in this case.

3. As to the alleged breach by the authorities of a procedural obligation under Article 2

123. The Court considers that the essence of the applicants' complaint under this head (see paragraph 106 above) concerns their inability to secure access to a court or other remedy to have an independent assessment of the police response to the threat posed by Paget-Lewis to the lives of the Osman family. The Court considers it appropriate therefore to consider this grievance in the context of the applicants' complaints under Articles 6 and 13 of the Convention (see, *mutatis mutandis,* the above-mentioned McCann and Others judgment, p. 48, § 160).

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

124. The applicants contended that the failure of the police firstly to bring an end to the campaign of harassment, vandalism and victimisation which Paget-Lewis waged against their property and family and secondly, and in particular, to avert the wounding of the second applicant constituted a breach of Article 8 of the Convention, which stipulates:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

125. The applicants maintained that they could not have been expected to obtain a civil injunction to prevent Paget-Lewis from intimidating their family and attacking their home and property since any such request would have been futile. They pleaded in this respect that they would have been unable to provide a court with any proof that Paget-Lewis was responsible for the acts of vandalism given that the police had never taken any steps to investigate the incidents which they had reported.

At the hearing the applicants informed the Court that their main complaint under Article 8 concerned the failure of the police to secure the second applicant's personal safety, an issue which the Commission had not addressed. In the applicants' submission, even if it were to be accepted that the police could not have foreseen that Paget-Lewis would have carried out a near-fatal attack on the life of Ahmet Osman, the risk of some harm being caused to him was nevertheless foreseeable. In their view that was in itself sufficient to engage the responsibility of the authorities under Article 8.

126. The Commission found that the applicants' complaints concerning the failure of the authorities to protect their home and property against the attacks allegedly perpetrated by Paget-Lewis did not give rise to a breach of Article 8 since in its view it would have been open to the applicants to seek an injunction against Paget-Lewis.

As to the complaint that the police failed to protect the second applicant's physical integrity, the Delegate of the Commission informed the Court at the hearing that the Commission had in fact addressed this grievance. For the reasons which led it to conclude that there had been no violation of Article 2, it found that the complaint under Article 8 could not be sustained either.

127. The Government agreed with the Commission on both points.

128. The Court recalls that it has not found it established that the police knew or ought to have known at the time that Paget-Lewis represented a real and immediate risk to the life of Ahmet Osman and that their response to the events as they unfolded was reasonable in the circumstances and not incompatible with the authorities' duty under Article 2 of the Convention to safeguard the right to life. In the Court's view, that conclusion equally supports a finding that there has been no breach of any positive obligation implied by Article 8 of the Convention to safeguard the second applicant's physical integrity.

129. As to the applicants' contention that the police failed to investigate the attacks on their home with a view to ending the campaign of harassment against the Osman family, the Court reiterates that the police had taken the view that there was no evidence to implicate Paget-Lewis and for that reason charges could not be laid against him. It is to be noted in this respect that Paget-Lewis was questioned by PC Adams sometime in November 1987, but he denied all responsibility. Detective Sergeant Boardman also confirmed in his report that there was no evidence on which to mount a prosecution case against Paget-Lewis (see paragraph 45 above). In the light of new developments in the case, an attempt was in fact made to arrest and question Paget-Lewis on 17 December 1987 on suspicion of criminal damage including with respect to the acts of vandalism directed at the applicants' home and property (see paragraph 49 above). However, that attempt failed.

130. The Court concludes accordingly that the facts of the case do not disclose the breach by the authorities of any positive obligation under Article 8 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTON

131. The applicants alleged that the dismissal by the Court of Appeal of their negligence action against the police on grounds of public policy

amounted to a restriction on their right of access to a court in breach of Article 6 § 1 of the Convention, which provides to the extent relevant:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing … by [a] ... tribunal..."

132. The Commission agreed with the applicants' arguments in this respect. The Government however contended that the applicants could not rely on Article 6 § 1, maintaining in the alternative that there had been no breach of that provision in the circumstances of the case.

A. Applicability of Article 6 § 1

133. The Government maintained that the applicants could not rely on any substantive right in domestic law to sue the police for their alleged failure to prevent Paget-Lewis from shooting dead Ali Osman and seriously wounding the second applicant. They explained that whether or not the police can be considered to owe a plaintiff a duty of care in a particular context depended not only on proof of proximity between the parties and the foreseeability of harm but also on the answer to the question whether it was fair, just and reasonable to impose a duty of care on the police. The Court of Appeal had answered the latter question in the negative, being satisfied that there were no other public-policy considerations which would have led it to reach a different conclusion. Accordingly, since the applicants had failed to establish an essential ingredient of the duty of care under domestic law they did not have any substantive right for the purposes of the applicability of Article 6 § 1. Any other conclusion would result in the impermissible creation by the Convention institutions of a substantive right where none in fact existed in the domestic law of the respondent State.

134. The applicants replied that the Court of Appeal had accepted their proposition that there was a special relationship of proximity between them and the police since the police knew that Paget-Lewis was conducting a campaign of victimisation against the Osman family and that the second applicant was especially at risk from the threat posed by Paget-Lewis to his life. The applicants maintained that although they had established all the constituent elements of the duty of care, the Court of Appeal was constrained by precedent to apply the doctrine of police immunity developed by the House of Lords in the Hill case (see paragraph 90 above) to strike out their statement of claim. In their view the doctrine of police immunity was not one of the essential elements of the duty of care as was claimed by the Government, but a separate and distinct ground for defeating a negligence action in order to ensure, *inter alia*, that police manpower was

not diverted from their ordinary functions or to avoid overly cautious or defensive policing.

135. The Commission agreed with the applicants that Article 6 § 1 was applicable. It considered that the applicants' claim against the police was arguably based on an existing right in domestic law, namely the general tort of negligence. The House of Lords in the Hill case modified that right for reasons of public policy in order to provide an immunity for the police from civil suit for their acts and omissions in the context of the investigation and suppression of crime. In the instant case, that immunity acted as a bar to the applicants' civil action by preventing them from having an adjudication by a court on the merits of their case against the police.

136. The Court recalls at the outset that Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters constitutes one aspect only (see the Golder v. the United Kingdom judgment of 21 February 1975, Series A no.18, p. 18, § 36).

137. The Court notes with reference to this fundamental principle that the respondent Government have disputed the applicability of Article 6 § 1 to the applicants' claim. They allege that the applicants did not have any substantive right under domestic law given that the Court of Appeal, in application of the exclusionary rule established by the House of Lords in the Hill case (see paragraph 65 above), dismissed their civil action against the police as showing no cause of action.

138. The Court would observe that the common law of the respondent State has long accorded a plaintiff the right to submit to a court a claim in negligence against a defendant and to request that court to find that the facts of the case disclose a breach of a duty of care owed by the defendant to the plaintiff which has caused harm to the latter. The domestic court's enquiry is directed at determining whether the constituent elements of a duty of care have been satisfied, namely: whether the damage is foreseeable; whether there exists a relationship of proximity between the parties; and whether it is fair, just and reasonable to impose a duty of care in the circumstances (see paragraphs 94 and 133 above).

It is to be noted that the latter criterion, which has been relied on by the Government in support of their contention that the applicants have no substantive right under domestic law, is not of sole application to civil actions taken against the police alleging negligence in the investigation and suppression of crime, but has been considered and applied in other spheres of activity. The House of Lords in the Hill case declared for the first time that this criterion could be invoked to shield the police from liability in the context of the investigation and suppression of crime (see paragraphs 90–92

above). Although the applicants have argued in terms which suggest that the exclusionary rule operates as an absolute immunity to negligence actions against the police in the context at issue, the Court accepts the Government's contention that the rule does not automatically doom to failure such a civil action from the outset but in principle allows a domestic court to make a considered assessment on the basis of the arguments before it as to whether a particular case is or is not suitable for the application of the rule. They have referred to relevant domestic case-law in this respect (see paragraph 94 above).

139. On that understanding the Court considers that the applicants must be taken to have had a right, derived from the law of negligence, to seek an adjudication on the admissibility and merits of an arguable claim that they were in a relationship of proximity to the police, that the harm caused was foreseeable and that in the circumstances it was fair, just and reasonable not to apply the exclusionary rule outlined in the Hill case. In the view of the Court the assertion of that right by the applicants is in itself sufficient to ensure the applicability of Article 6 § 1 of the Convention.

140. For the above reasons, the Court concludes that Article 6 § 1 is applicable. It remains to be determined whether the restriction which was imposed on the exercise of the applicants' right under that provision was lawful.

B. Compliance with Article 6 § 1

141. According to the applicants the public-interest considerations invoked by the House of Lords in the Hill case as justification for the police immunity rule and on which the Government have based their case could not be sustained. Thus, the argument that exposing the police to actions in negligence would result in a significant diversion of manpower from their crime-suppression function sits ill with the fact that the immunity is limited to negligence actions involving the investigation and suppression of crime and not to cases of assault or false imprisonment which could equally be said to give rise to a diversion of manpower.

As to the contention that the threat of liability for negligence would lead to defensive or over-cautious policing, they maintained that this consideration has never been invoked to protect other vital public services such as hospitals, ambulances and the fire brigade from negligence actions. They also disputed the validity of the argument that a negligence action against the police would have the undesirable effect of reopening closed investigations in order to ascertain whether they had been conducted competently. In their submission if a negligent investigation has resulted in

a wholly preventable death there are cogent reasons to re-examine the conduct of the police. The applicants further contended, *inter alia*, that the imposition of liability in negligence on the police in respect of the investigation and suppression of crime would serve to enhance standards among officers, especially where the activity in question concerned the protection of the right to life.

142. In their alternative submission the applicants asserted that even if it could be said that the immunity pursued a legitimate aim or aims, its operation offended against the principle of proportionality. They reasoned in this respect that the immunity was complete and as such did not distinguish between cases where the merits were strong and those where they were weak. In the instant case, involving the protection of a child and the right to life and where the damage caused was grave, the requirements of public policy could not dictate that the police should be immune from liability. Furthermore, the combined effect of the strict tests of proximity and foreseeability provided limitation enough to prevent untenable cases ever reaching a hearing and to confine liability to those cases where the police have caused serious loss through truly negligent actions.

143. The Government replied that the exclusionary rule which defeated the applicants' civil action pursued the legitimate aim or aims outlined by the House of Lords in the Hill case, in particular the avoidance of defensive policing and the diversion of police manpower (see paragraph 91 above). In the Government's view it was central to the reasoning of the House of Lords in the Hill case that the imposition of a duty of care in the context in question carried with it a real risk that effective policing for the benefit of the public at large would be undermined.

144. Further, the rule was a proportionate response to the attainment of those aims and fell well within the respondent State's margin of appreciation. They emphasised that the exclusion was not a blanket exclusion of liability but a carefully and narrowly focused limitation which applied only in respect of the investigation and suppression of crime, and even then not in every case (see paragraph 93 above). Thus, in the instant case, the Court of Appeal had considered that there were no competing public-policy considerations at stake which would have outweighed the general public-policy consideration that it would not be fair, just and reasonable to impose a duty of care on the police.

145. The Government further stressed in defence of the proportionality of the restriction on the applicants' right to sue the police that they could have taken civil proceedings against Paget-Lewis. Moreover, they had in fact sought to sue Dr Ferguson but subsequently abandoned their action against him. In either case they had full access to a court.

146. The Commission accepted that the impugned rule may be considered to pursue the legitimate aims suggested by the Government (see paragraph 143 above). However, it agreed with the essence of the applicants' arguments for countering the Government's justification for the application of the rule (see paragraphs 141 and 142 above). The Commission noted, in particular, that the applicants claimed to have satisfied the proximity component of the duty of care, which had not been satisfied by the plaintiff in the Hill case. However, they were denied the opportunity of establishing the factual basis of their claim in adversarial proceedings through the operation of an immunity rule which, moreover, did not distinguish between negligence having trivial effects and that, as in this case, with catastrophic results.

147. The Court recalls that Article 6 § 1 embodies the "right to a court", of which the right of access, that is, the right to institute proceedings before a court in civil matters, constitutes one aspect.

However, this right is not absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation, although the final decision as to the observance of the Convention's requirements rests with the Court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, most recently, the Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom judgment of 10 July 1998, *Reports* 1998-IV, p. 1660, § 72).

148. Against that background the Court notes that the applicants' claim never fully proceeded to trial in that there was never any determination on its merits or on the facts on which it was based. The decision of the Court of Appeal striking out their statement of claim was given in the context of interlocutory proceedings initiated by the Metropolitan Police Commissioner and that court assumed for the purposes of those proceedings that the facts as pleaded in the applicants' statement of claim were true. The applicants' claim was rejected since it was found to fall squarely within the scope of the exclusionary rule formulated by the House of Lords in the Hill case.

149. The reasons which led the House of Lords in the Hill case to lay down an exclusionary rule to protect the police from negligence actions in the context at issue are based on the view that the interests of the community as a whole are best served by a police service whose efficiency and effectiveness in the battle against crime are not jeopardised by the

constant risk of exposure to tortious liability for policy and operational decisions.

150. Although the aim of such a rule may be accepted as legitimate in terms of the Convention, as being directed to the maintenance of the effectiveness of the police service and hence to the prevention of disorder or crime, the Court must nevertheless, in turning to the issue of proportionality, have particular regard to its scope and especially its application in the case at issue. While the Government have contended that the exclusionary rule of liability is not of an absolute nature (see paragraph 144 above) and that its application may yield to other public-policy considerations, it would appear to the Court that in the instant case the Court of Appeal proceeded on the basis that the rule provided a watertight defence to the police and that it was impossible to prise open an immunity which the police enjoy from civil suit in respect of their acts and omissions in the investigation and suppression of crime.

151. The Court would observe that the application of the rule in this manner without further enquiry into the existence of competing public-interest considerations only serves to confer a blanket immunity on the police for their acts and omissions during the investigation and suppression of crime and amounts to an unjustifiable restriction on an applicant's right to have a determination on the merits of his or her claim against the police in deserving cases.

In its view, it must be open to a domestic court to have regard to the presence of other public-interest considerations which pull in the opposite direction to the application of the rule. Failing this, there will be no distinction made between degrees of negligence or of harm suffered or any consideration of the justice of a particular case. It is to be noted that in the instant case Lord Justice McCowan (see paragraph 64 above) appeared to be satisfied that the applicants, unlike the plaintiff Hill, had complied with the proximity test, a threshold requirement which is in itself sufficiently rigid to narrow considerably the number of negligence cases against the police which can proceed to trial. Furthermore, the applicants' case involved the alleged failure to protect the life of a child and their view that that failure was the result of a catalogue of acts and omissions which amounted to grave negligence as opposed to minor acts of incompetence. The applicants also claimed that the police had assumed responsibility for their safety. Finally, the harm sustained was of the most serious nature.

152. For the Court, these are considerations which must be examined on the merits and not automatically excluded by the application of a rule which amounts to the grant of an immunity to the police. In the instant case, the Court is not persuaded by the Government's argument that the rule as interpreted by the domestic court did not provide an automatic immunity to the police.

153. The Court is not persuaded either by the Government's plea that the applicants had available to them alternative routes for securing compensation (see paragraph 145 above). In its opinion the pursuit of these remedies could not be said to mitigate the loss of their right to take legal proceedings against the police in negligence and to argue the justice of their case. Neither an action against Paget-Lewis nor against Dr Ferguson, the ILEA psychiatrist, would have enabled them to secure answers to the basic question which underpinned their civil action, namely why did the police not take action sooner to prevent Paget-Lewis from exacting a deadly retribution against Ali and Ahmet Osman. They may or may not have failed to convince the domestic court that the police were negligent in the circumstances. However, they were entitled to have the police account for their actions and omissions in adversarial proceedings.

154. For the above reasons, the Court concludes that the application of the exclusionary rule in the instant case constituted a disproportionate restriction on the applicants' right of access to a court. There has accordingly been a violation of Article 6 § 1 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

155. The applicants complained that they had no effective remedy enabling them to have an adjudication on their claim that the authorities had not done all that was required of them under Article 2 to protect the lives of Ali and Ahmet Osman. They relied on Article 13 of the Convention, which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

156. The applicants submitted that the only effective mechanism in the circumstances for holding the authorities accountable for their failure in the instant case to comply with their positive obligation under Article 2 of the Convention would have been a civil action in negligence against the police. However the pursuit of that remedy was blocked when the Court of Appeal accepted the Metropolitan Police Commissioner's plea of police immunity and struck out their statement of claim.

157. The Commission considered that no separate issue arose under Article 13 in view of its finding of a violation of Article 6 § 1 of the Convention. The Government invited the Court to follow this view should it be minded to find a breach of Article 6 § 1.

158. The Court agrees with the Commission's opinion on this complaint having regard to its own conclusion that the applicants' rights under Article 6 § 1 have been violated. It recalls in this respect that the requirements of Article 13 are less strict than, and are here absorbed by, those of Article 6 (see, most recently, the above-mentioned Tinnelly and Others judgment, pp. 1662–63, § 77).

V. APPLICATION OF ARTICLE 50 OF THE CONVENTION

159. The applicants claimed just satisfaction under Article 50 of the Convention, which provides:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary and non-pecuniary damage

160. The applicants in their memorial requested the Court to award them compensation for pecuniary and non-pecuniary loss calculated by reference to the appropriate level of compensation which would have been payable in the domestic courts if their claim had been permitted to proceed and had succeeded in full.

161. In their supplementary submissions received at the registry on 9 June 1998 the applicants provided detailed estimates of what each of them might have been expected to receive from a domestic court by way of compensation. They indicated however that these were only to be seen as guidance for the benefit of the Court and that they were content for the Court to make its own assessment of the appropriate level of just satisfaction in accordance with its established principles.

162. The Government maintained in their primary submission that the applicants' detailed claims should be rejected since they were submitted out of time and were in any event unsubstantiated and inflated. In the alternative, they considered that a finding of a violation of any or all of the Articles of the Convention invoked by the applicants would in itself constitute sufficient just satisfaction.

163. The Delegate of the Commission did not comment on this branch of the Article 50 issue.

164. The Court notes that it conducts its assessment of what an applicant is entitled to by way of just satisfaction in accordance with the principles laid down in its own case-law under Article 50 and not by reference to the principles or scales of assessment used by domestic courts.

The applicants accept this to be the case (see paragraph 161 above). The Court does not consider it necessary therefore to answer the Government's objections to the admissibility of their supplementary submissions.

In any event, the Court cannot speculate as to the outcome of the domestic proceedings had the applicants' statement of claim not been struck out. It considers nevertheless that the applicants were denied the opportunity to obtain a ruling on the merits of their claim for damages against the police. Deciding on an equitable basis it awards each of the applicants the sum of 10,000 pounds sterling (GBP).

B. Costs and expenses

165. The applicants claimed a total amount of GBP 46,976.78 by way of costs and expenses incurred in bringing their case before the Convention institutions. They provided details of the number of lawyers who worked on the case, the hourly rates charged and the nature of the work involved as well as disbursements. The applicants were in receipt of legal aid from the Council of Europe.

166. The Government considered, *inter alia*, that the details supplied by the applicants showed a considerable overlap between the time spent by the solicitors and legal advisers on the case and the time spent by counsel. They contended that the claim should be reduced on that account. They suggested that a sum of GBP 27,216.43 would represent a more reasonable claim in the circumstances, this amount being subject to any award of legal aid by the Council of Europe and to apportionment to reflect anything other than a finding of violation of each of the Articles under which a complaint has been made.

167. The Delegate of the Commission did not comment on this limb of the Article 50 claim either.

168. Having regard to the specifications provided by the applicants, to the fact that their complaints under Articles 2 and 8 have not been substantiated and to equitable considerations, the Court awards the applicants the sum of GBP 30,000 together with any value-added tax that may be chargeable, less the 28,514 French francs already paid in legal aid by the Council of Europe.

C. Default interest

169. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7.5% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by seventeen votes to three that there has been no violation of Article 2 of the Convention;

2. *Holds* by seventeen votes to three that there has been no violation of Article 8 of the Convention;

3. *Holds* unanimously that Article 6 § 1 of the Convention is applicable in this case and has been violated;

4. *Holds* by nineteen votes to one that it is unnecessary to examine the applicants' complaints under Article 13 of the Convention;

5. *Holds* unanimously
   (a) that the respondent State is to pay the applicants, within three months, 10,000 (ten thousand) pounds sterling each by way of compensation for loss of opportunity;
   (b) that the respondent State is to pay the applicants, within three months, 30,000 (thirty thousand) pounds sterling in respect of costs and expenses together with any value-added tax that may be chargeable, less 28,514 (twenty-eight thousand five hundred and fourteen) French francs to be converted into pounds sterling at the rate applicable on the date of delivery of the present judgment;
   (c) that simple interest at an annual rate of 7.5% shall be payable from the expiry of the above-mentioned three months until settlement;

6. *Dismisses* by nineteen votes to one the remainder of the applicants' claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 October 1998.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the following separate opinions are annexed to the judgment:

1. The management of Homerton House School noticed since 1986 Mr Paget-Lewis' "attachment" to Ahmet Osman (Government's memorial, § 1.5) and they were informed in January 1987 that he was harassing Leslie Green (ibid., § 1.7). They viewed the events seriously (Commission's report, § 96 (b) and investigated the matter in March 1987. Mr Prince's letter of 1 May 1987 to Mrs May (Annex A to applicants' memorial, no. 4, p. 17) shows that the problem was known at the headquarters of ILEA before May 1987.

(a) concurring opinion of Mr Foighel;
(b) concurring opinion of Sir John Freeland;
(c) concurring opinion of Mr Jambrek;
(d) partly dissenting, partly concurring opinion of Mr De Meyer joined by Mr Lopes Rocha and Mr Casadevall;
(e) partly dissenting, partly concurring opinion of Mr Lopes Rocha.

Initialled: R. B.
Initialled: H. P.

CONCURRING OPINION OF JUDGE FOIGHEL

I agree with the conclusion of the majority that there has been no violation of Article 2 of the Convention in this case.

I also agree with that there has been a violation of Article 6 § 1 on account of the disproportionate impact of the restriction on the applicants' rights of access to a court guaranteed by that Convention provision (see paragraph 154 of the judgment). However, as regards the prior issue of the *applicability* of Article 6 § 1, I have based myself on a different line of reasoning to that used by the Court.

In the first place, and irrespective of whether the domestic rule which defeated the applicants' civil action in this case is framed in terms of a substantive or procedural bar, the applicants had first and foremost a Convention right under domestic law to submit their claim to a court and to have a determination on it. The fact that the applicants' claim failed to get off the ground does not displace the right guaranteed them by Article 6 § 1 of the Convention. In my view, what is decisive for the applicability of Article 6 § 1 in this case is that the applicants had a right to a determination on their claim that their rights to life should have been protected by the police, which claim could not be considered devoid of merit from the outset. In my opinion, the fact that they were adjudged by the Court of Appeal in application of the rule in the Hill case to have no cause of action, or as the Government have formulated it, no substantive right to sue the police, is irrelevant for the purposes of the applicability of Article 6 § 1. That decision is an issue which is independent of the question of the applicability of Article 6 § 1.

I am of course aware that the Court up until now has understood the expression "civil rights" in Article 6 § 1 as rights which exist under domestic law. For me, however, this does not exclude other rights whose existence cannot be a matter of doubt. The fundamental nature of an applicant's right to submit a civil claim to a court cannot be determined exclusively by domestic-law considerations on whether or not such a right exists in a particular set of circumstances. In this respect, I would recall that the Court has stressed on occasions that it is sufficient for an applicant to show that there are at least arguable grounds which point to the recognition of the right at issue under domestic law (see, *inter alia*, the Fayed v. the United Kingdom judgment of 21 September 1994, Series A no. 294-B, p. 49, § 65), and in the final analysis it is for the Court in the exercise of its supervisory jurisdiction and on the basis of Convention criteria to rule on whether the applicant has shown this to be the case. I would also note that

the requirement that there be a dispute (*contestation*) over a civil right in order to bring Article 6 § 1 into play has been construed by the Court in its case-law to cover not only disputes concerning the scope of a right but also its *very existence* under domestic law (see the Ashingdane v. the United Kingdom judgment of 28 May 1985, Series A no. 93, p. 24, § 55).

Furthermore, and of even greater importance, is the fact that the domestic law of the Contracting States must secure the enjoyment of the rights and freedoms laid down in the Convention and its Protocols (see Article 1 of the Convention). This includes the right to life. In the instant case, the applicants have relied on a civil action against the police to establish that their right to life was breached on account of the culpable failure of the police to prevent the tragedy which befell them. In my view that right, derived from the Convention, secures them in consequence their right to the protection of Article 6 § 1 of the Convention.

For the above reasons, I have been led to conclude that Article 6 § 1 is applicable in this case.

CONCURRING OPINION OF JUDGE Sir John FREELAND

1. To the reasons given in the judgment for the finding of a violation of Article 6 § 1, I would add only briefly in explanation of my own vote in that sense.

2. I so voted because of the way in which, in practice, the public-policy exception from liability enunciated by the House of Lords in *Hill v. Chief Constable of West Yorkshire* (see paragraphs 90–92 of the judgment) operated in this case to block the claims of the applicants in their actions against the police in negligence. I accept, as indeed does paragraph 150 of the judgment, that the aim of the exception is legitimate in terms of the Convention; and I also accept that the exception may in other cases be applied proportionately to that aim. The difficulty for me arises primarily from the fact that in the present case it appears to have been applied as if conferring on the police a blanket exemption from liability in negligence so far as concerns their function in the investigation and suppression of crime, to the exclusion of any examination by the court of considerations which might pull in another direction.

3. In this latter respect the present case stands in marked contrast to the later Court of Appeal case of *Swinney and another v. Chief Constable of Northumbria Police Force* (see paragraphs 93 and 94 of the judgment), where the court had regard to the possible existence of other, and countervailing, considerations of public policy – in particular, as relevant in the circumstances of that case, the need to preserve the springs of information, to protect informers, and to encourage them to come forward. The court also considered it arguable, on the facts pleaded in that case, that there had been a voluntary assumption of responsibility by the police (a similar argument has been advanced by the applicants in the present case).

4. I also note that in the Hill case the plaintiff lost her action on two grounds, either of which would have been enough to defeat it – first, the absence of the necessary proximity and, secondly, the public-policy exception. In the present case, however, McCowan LJ, with whom Simon Brown LJ agreed, expressed the view that the plaintiffs had an arguable case that there existed a very close degree of proximity amounting to a special relationship (the third member, Beldam LJ, preferred to express no opinion on the point at that stage); and the court proceeded to strike out the claim against the police on the sole ground of the public-policy exception.

5. The weight thus attached to the exception in this case, together with its broad reach and the exclusive application given to it, combined in my view to produce a disproportionate limitation on the applicants' right of access to court. I therefore concurred in the conclusion stated in

paragraph 154 of the judgment. For me the exception, operating in this way, is an inappropriately blunt instrument for the disposal of claims raising human rights issues such as those of the present case.

CONCURRING OPINION OF JUDGE JAMBREK

1. I agreed with the Court's unanimous conclusion that Article 6 § 1 of the Convention is applicable to the applicants' claim and with the reasons given in the judgment in support thereof.

2. However, in my opinion, a more extensive interpretation of the term "civil rights and obligations" than the one applied by the Court in this case and in its case-law in general, would only require the Court to be satisfied that a right existed under domestic law – in the instant case, a right derived from the general tort of negligence or the duty of care owed by the police to the plaintiff. The only condition for the Court's recognition of a right as a "civil" right, thereby guaranteeing an applicant the right of access to a domestic court as protected by Article 6 § 1, would be that the right at issue is recognised in the national legal system as an individual right within the sphere of general individual freedom. Seen in these terms, the right of everyone to a fair trial by a court of law would also protect the individual in his or her relations with the authorities of the State.

3. Had the Court taken this interpretation of the term "civil rights" as its starting-point, it would not have been necessary for it to examine in the instant case whether the exclusionary rule imposed on the exercise of the right operated in an absolute manner or whether it allowed the domestic courts to make a considered assessment as to whether a particular case should be allowed to proceed to a consideration on the merits before a domestic court and thus guaranteeing a plaintiff access to a court for this purpose (see paragraph 138 of the judgment). Nor would it have been necessary for the Court to establish whether the applicants could arguably claim that in the circumstances it was fair, just and reasonable not to apply the exclusionary rule in the Hill case (see paragraph 139 of the judgment).

4. My reasoning has been informed by the dissenting opinions of Mr Melchior and Mr Frowein in the decision of the European Commission of Human Rights in the Benthem case (Article 31 report of 8 October 1983) and by Judge van Dijk's chapter on "The interpretation of 'civil rights and obligations' by the European Court of Human Rights – one more step to take" in Franz Matscher and Herbert Petzold (eds.), *Protecting Human Rights: The European Dimension – Studies in Honour of Gerard J. Wiarda*, Köln, Carl Heymanns Verlag KG, 1988, pp. 131–43.

5. In the Sporrong and Lönnroth v. Sweden case (judgment of 23 September 1982, Series A no. 52), the Court ruled that, since the applicants' case could not be heard by a tribunal competent to determine all the aspects of the matter, there had for that reason been a violation of Article 6 § 1 of the Convention (p. 31, § 87). In its Golder v. the United Kingdom judgment (21 February 1975, Series A no. 18) the Court also

stressed (p. 17, § 35) that the guarantees embodied in Article 6 § 1 of the Convention could be frustrated by national legislators if the right to a court were not considered to be implied in that provision:

> "... a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government."

The situation as described in the facts of the present case comes close to the concerns expressed by the Court in this quotation.

6. I therefore also agree with Judge van Dijk's assessment that if the Court were to take this additional step, and thereby no longer restrict the meaning of "civil rights and obligations" to "private rights and obligations", the certainty and foreseeability of its case-law would be enhanced. Furthermore, if "civil rights and obligations" were to be understood as "all those rights which are individual rights under the national legal system and fall within the sphere of general individual freedom" (see, *supra*, the dissenting opinion of Mr Melchior and Mr Frowein in the Benthem case), the Court's case-law would conform better to the object and purpose of Article 6 and of the Convention as a whole, that is to say respect for the requirement of the rule of law as interpreted by the Court in, for example, the Klass and Others v. Germany case (judgment of 6 September 1978, Series A no. 28) wherein it held (pp. 25–26, § 55):

> "The rule of law implies, *inter alia*, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure."

PARTLY DISSENTING, PARTLY CONCURRING OPINION OF JUDGE DE MEYER JOINED BY JUDGES LOPES ROCHA AND CASADEVALL

In this sad case there was enough evidence that for several months before 7 March 1988 the authorities of the respondent State were well aware of the strange and worrying behaviour of Mr Paget-Lewis. Both ILEA[1] and the police[2] knew, at least since the spring of 1987[3], that he was obsessed with Ahmet Osman. They knew that he was harassing the Osman family and the Green family[4], and that he was increasingly threatening them as well as Mr Perkins[5]. They knew that some harm had already been caused[6]. From December 1987 they could have had hardly any doubts that further, more serious, harm was to be foreseen[7].

They took, however, almost no action to avert impending danger and to protect those concerned[8].

They should have taken Mr Paget-Lewis into custody before it was too late in order to have him cared for properly. Instead they let things go until he killed two persons and wounded two others.

Mr Paget-Lewis himself asked the police arresting him why they did not stop him before he acted as he did and reminded them that he had given all the warning signs[9]. He was right.

In my view, therefore, the authorities of the respondent State, by failing to do what they should have done[10], have violated the applicants' right to life and also their right to private and family life.

There was of course also a violation of the applicants' right to a court, since the Osmans were denied any possibility to have their claims concerning the failures of the police properly examined by a tribunal. Whether or not they could rely on any substantive right thereto in domestic law is irrelevant, since they were asserting that they were the victims of a violation of fundamental (and therefore also civil[11]) rights, which had to be secured to them under the Convention[12], notwithstanding anything to the contrary in domestic law or practice, and since their right to have their case heard in court was also such a right[13]. It was likewise irrelevant whether the immunity of the police was or was not absolute, since the very principle of such immunity is not acceptable under the rule of law. The refusal to consider the applicants' action was therefore an obvious denial of justice[14].

NOTES

2. Mr Prince met with PC Williams on 3, 9, 13 and 17 March 1987 (see the extracts of his diary, Annex A to applicants' memorial, no. 1, pp. 1–10). The Government admit that, on these occasions, "no doubt the substance of the concerns was made known to PC Williams" (Government's memorial, § 1.13).
3. Commission's report, § 96 (a)–(b).
4. Ibid., §§ 20–25.
5. The graffiti incident, the theft of the files and Mr Paget-Lewis' change of name occurred already in March-April 1987 (ibid., §§ 27, 28, 29 and 96 (c)). Then followed, in May-November 1987, the "vandalising attacks" on the home and car of the Osman family, for which "there was no doubt in everybody's mind he was in fact responsible" (ibid., §§ 32, 33, 37, 39 and 96 (d), Government's memorial, § 1.42, and Detective Sergeant Boardman's memo of 16 December 1987, Annex D to Government's memorial, p. 5, § 18), and also on the Green family (Annex A to applicants' memorial, no. 7, pp. 24–26, and Annex B to Government's memorial, pp. 37–38), on 7 December 1987 the ramming of the van in which Leslie Green was a passenger and Mr Paget-Lewis' statement to Mr Prince that "in a few months" he would "be doing life" (Commission's report, §§ 41 and 96 (e), Annex A to applicants' memorial, loc. cit., and Annex B to Government's memorial, pp. 41–42), on 15 December 1987, at the meeting with Mr David and Mrs May, Mr Paget-Lewis' saying that he would "not do a 'Hungerford' in a school", but "see Perkins at home" (Commission's report, §§ 47 and 96 (f), and Annex A to applicants' memorial, no. 8, pp. 27–29), on 18 December 1987 his disappearance from school (Commission's report, §§ 53 and 96 (g)), between January and March 1988 his roaming around and being involved in "a number of accidents" (ibid., § 58), and finally on 1, 4 and 5 March 1988 his presence in a crash helmet near the applicants' home (ibid., §§ 60 and 96 (j)). All these facts were known to the police before 7 March 1988.
6. Commission's report, §§ 32–33, 37, 39 and 41. See also Mrs Green's statement to Detective Sergeant Boardman on 9 December 1987 (Annex B to Government's memorial, pp. 37–38).
7. Commission's report, § 47. See the ILEA memorandum dated 15 December 1987 (Annex A to the applicants' memorial, no. 8, pp. 27–29) relating the meeting of Mr Paget-Lewis with Mrs May and Mr David. According to that document, Mr Paget-Lewis had "spoken in the following terms: He feels in a totally self-destructive mood … it is all a symphony and the last chord has to be played … he is deeply in debt and is selling all his possessions … Nick Perkins is the cause of all his troubles, has said he is sexually deviant … He wouldn't do a 'Hungerford' in a school, but will see Perkins at home". The memorandum adds that this information was passed on to the police. See also the statement of Mr Prince to Detective Sergeant Boardman on 22 December 1987 (Annex B to the Government's memorial, pp. 41–42). According to that statement, Mr Paget-Lewis had said, immediately after the collision of 9 December 1987: "I'm not worried about all this because in a few months I'll be doing life." After the shootings, he recalled, in one of his statements to Detective Sergeant Boardman on 8 March 1988, that he had earlier warned the police (PC Adams) that "there was a danger of me doing something criminally insane unless things were mended between me and the Osmans". (Annex B to Government's memorial p. 77). It is rather obvious that these utterances ought to have been taken more seriously.
8. In December 1987, after the van incident, the police decided to arrest Mr Paget-Lewis, but, having not found him at his home, they did not even try to find him at his school before he disappeared. They took no further steps to trace him, except for asking ILEA to request him to contact Detective Sergeant Boardman and putting him in January 1988 on their National Computer. It is most surprising that they could not get hold of him whilst he

was travelling around in hired cars and getting involved in several accidents (Commission's report, §§ 50, 52, 57, 58 and 96 (h)–(i)).

9. Commission's report, § 62. See also his statement to Detective Sergeant Boardman on 8 March 1988 (Annex B to Government's memorial, p. 98).

10. A few months ago, in another case (McLeod v. the United Kingdom judgment of 23 September 1998, *Reports of Judgments and Decisions* 1998-V, p. 1964), the representative of the Government of the United Kingdom observed that "there is a pressing social need to prevent disorder or crime" ant that more "particularly, in circumstances where there is a genuine and reasonable belief that there is a risk of disorder or crime, there is then a pressing social need to take steps to prevent it". He added that "it is much more desirable to prevent such disorder or crime than to await its development and only then take steps to contain it" (see the verbatim record of the hearing held on 18 May 1998, Doc. Cour/Misc(98) 355, at p. 20).

11. See, *mutatis mutandis*, the Aerts v. Belgium judgment of 30 July 1998, *Reports* 1998-V, p. 1964, § 59, and my separate opinion concerning the Pierre-Bloch v. France case, judgment of 21 October 1997, *Reports* 1997-VI, p. 2228.

12. Articles 1, 2 and 8 of the Convention.

13. Articles 1 and 6 of the Convention.

14. The dismissal of their civil action was also a violation of Article 13 of the Convention, as they were thereby denied what would have been "an effective remedy before a national authority" and it has not been shown, or even alleged, that any other remedy of that kind was available. Such a remedy had indeed to be ensured to them "notwithstanding that the violation ha[d] been committed by persons acting in an official capacity".

PARTLY DISSENTING, PARTLY CONCURRING OPINION OF JUDGE LOPES ROCHA

(*Translation*)

I regret that I am unable to share the majority's view that there has been no violation of Articles 2 and 8 of the Convention.

My interpretation of the facts – which is the same as Judge De Meyer's – leads me to conclude that the police underestimated the danger Mr Paget-Lewis presented for the life and physical integrity of Mr Ahmet Osman and, in all probability, of his close relatives.

In my opinion, it is not possible to say, as the Government did, that there was no causal link between the failure to take preventive action, of which the authorities are accused, and the events that occurred.

A quite different approach is required to determine liability for an omission from that required to determine liability for an act. The former must be determined according to generally accepted rules. It has to be decided whether the assault originated from the failure to take a particular measure or measures where the assailant's previous behaviour already pointed to a likelihood that he would act aggressively towards someone of whom he was particularly fond.

In the instant case, there was strong evidence of aggressive behaviour on the part of Mr Paget-Lewis suggesting that at the first opportunity he would act violently. It should not be forgotten that he displayed rather strange traits of personality and was known to the police, although there was some doubt over whether he was homosexual.

Given, too, the professional experience one is entitled to expect of them, the police could legitimately be required to exercise caution and to take measures to protect the people at risk. Failure to take such measures renders the police and the State concerned liable. There has therefore been a breach of the aforementioned Articles.

Judgments - Regina v. Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) ex parte Middleton (FC) (Respondent)

HOUSE OF LORDS

SESSION 2003-04
19th REPORT
[2004] UKHL 10
on appeal from: [2002] EWCA Civ 390

APPELLATE COMMITTEE

Regina v. Her Majesty's Coroner for the Western District of Somerset (Respondent) and other (Appellant) ex parte Middleton (FC) (Respondent)

REPORT

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(HL Paper 51)

19th REPORT
from the Appellate Committee

11 MARCH 2004

Regina v. Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) ex parte Middleton (FC) (Respondent)

ORDERED TO REPORT

The Committee (Lord Bingham of Cornhill, Lord Hope of Craighead, Lord Walker of Gestingthorpe, Baroness Hale of Richmond and Lord Carswell) have met and considered the cause Regina *v.* Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) *ex parte* Middleton (FC) (Respondent). We have heard counsel on behalf of the appellant and both respondents.

1. This is the considered opinion of the Committee.

2. The European Court of Human Rights has repeatedly interpreted article 2 of the European Convention as imposing on member states substantive obligations not to take life without justification and also to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life. See, for example, *LCB v United Kingdom* (1998) 27 EHRR 212, para 36; *Osman v United Kingdom* (1998) 29 EHRR 245; *Powell v United Kingdom* (App No 45305/99, unreported 4 May 2000), 16-17; *Keenan v United Kingdom* (2001) 33 EHRR 913, paras 88-90; *Edwards v United Kingdom* (2002) 35 EHRR 487, para 54; *Calvelli and Ciglio v Italy* (App No 32967/96, unreported, 17 January 2002); *Öneryildiz v Turkey* (App No 48939/99, unreported, 18 June 2002).

3. The European Court has also interpreted article 2 as imposing on member states a procedural obligation to initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that one or other of the foregoing substantive obligations has been, or may have been, violated and it appears that agents of the state are, or may be, in some way implicated. See, for example, *Taylor v United Kingdom* (1994) 79-A DR 127, 137; *McCann v United Kingdom* (1995) 21 EHRR 97, para 161; *Powell v United Kingdom, supra* p 17; *Salman v Turkey* (2000) 34 EHRR 425, para 104; *Sieminska v Poland* (App No 37602/97, unreported, 29 March 2001); *Jordan v United Kingdom* (2001) 37 EHRR 52, para 105; *Edwards v United Kingdom, supra,* para 69; Öneryildiz *v Turkey, supra,* paras 90-91; *Mastromatteo v Italy* (App No 37703/97, unreported, 24 October 2002).

4. The scope of the state's substantive obligations has been the subject of previous decisions such as *Osman* and *Keenan* but is not in issue in this appeal. Nor does any issue arise about participation in the official investigation by the family or next of kin of the deceased, as recently considered by the House in *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, [2003] 3 WLR 1169. The issue here concerns not the conduct of the investigation itself but its culmination. It is, or may be, necessary to consider three questions.

> (1)What, if anything, does the Convention require (by way of verdict, judgment, findings or recommendations) of a properly conducted official investigation into a death involving, or possibly involving, a violation of article 2?
>
> (2)Does the regime for holding inquests established by the Coroners Act 1988 and the Coroners Rules 1984 (SI 1984/552), as hitherto understood and followed in England and Wales, meet those requirements of the Convention?
>
> (3)If not, can the current regime governing the conduct of inquests in England and Wales be revised so as to do so, and if so how?

5. Before turning to consider these questions it should be observed that they are very important questions. Compliance with the substantive obligations referred to above must rank among the highest priorities of a modern democratic state governed by the rule of law. Any violation or potential violation must be treated with great seriousness. In the context of this appeal the questions have a particular importance

also. For, as the facts summarised in paragraphs 39-43 below make clear, the appeal concerns an inquest into the suicide, in prison, of a serving prisoner. Unhappily, this is not a rare event. The statistics given in recent publications, (notably "Suicide is Everyone's Concern, A Thematic Review by HM Chief Inspector of Prisons for England and Wales" (May 1999), the Annual Report of HM Chief Inspector of Prisons for England and Wales 2002-2003, and Evidence given to the House of Lords and House of Commons Joint Committee on Human Rights (HL Paper 12, HC 134, January 2004) make grim reading. While the suicide rate among the population as a whole is falling, the rate among prisoners is rising. In the 14 years 1990-2003 there were 947 self-inflicted deaths in prison, 177 of which were of detainees aged 21 or under. Currently, almost two people kill themselves in prison each week. Over a third have been convicted of no offence. One in five is a woman (a proportion far in excess of the female prison population). One in five deaths occurs in a prison hospital or segregation unit. 40% of self-inflicted deaths occur within the first month of custody. It must of course be remembered that many of those in prison are vulnerable, inadequate or mentally disturbed; many have drug problems; and imprisonment is inevitably, for some, a very traumatic experience. These statistics, grim though they are, do not of themselves point towards any dereliction of duty on the part of the authorities (which have given much attention to the problem) or any individual official. But they do highlight the need for an investigative regime which will not only expose any past violation of the state's substantive obligations already referred to but also, within the bounds of what is practicable, promote measures to prevent or minimise the risk of future violations. The death of any person involuntarily in the custody of the state, otherwise than from natural causes, can never be other than a ground for concern. This appeal is concerned with the death of a long-term convicted prisoner but the same principles must apply to the death of any person in the custody of the prison service or the police.

6. Question (1) What, if anything, does the Convention require (by way of verdict, judgment, findings or recommendations) of a properly conducted official investigation into a death involving, or possibly involving, a violation of article 2?

7. The European Court has never expressly ruled what the final product of an official investigation, to satisfy the procedural obligation imposed by article 2 of the Convention, should be. This is because the Court applies principles and does not lay down rules, because the Court pays close attention to the facts of the case before it and because it recognises that different member states seek to discharge their Convention obligations through differing institutions and procedures. In this appeal the Committee heard oral submissions on behalf of the Secretary of State, HM Coroner for the Western District of Somerset and Mrs Jean Middleton, and received written submissions on behalf of the Coroners' Society of England and Wales, the Northern Ireland Human Rights Commission and Inquest. It was not suggested that the express terms of the Convention or any ruling of the Court provide a clear answer to this first question before the House.

8. The Court has recognised (in *McCann v United Kingdom,* para 146) that its approach to the interpretation of article 2

> "must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective."

Thus if an official investigation is to meet the state's procedural obligation under article 2 the prescribed procedure must work in practice and must fulfil the purpose for which the investigation is established.

9. What is the purpose for which the official investigation is established? The decided cases assist in answering that question. In *Keenan v United Kingdom*, which concerned a prisoner who had committed suicide, the article 2 argument was directed to the state's performance of its substantive, not its procedural, obligation. The Court did, however, note the limited scope of an inquest in England and Wales (paragraphs 75-78), which was relevant to the applicant's complaint under article 13 that national law afforded her no effective remedy. In the context of that complaint the Government agreed (paragraph 121)

> "that the inquest, which did not permit the determination of issues of liability, did not furnish the applicant with the possibility of establishing the responsibility of the prison authorities or obtaining damages."

In paragraph 122 the Court, still with reference to this complaint, ruled:

> "Given the fundamental importance of the right to the protection of life, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life . . ."

On the facts, the Court held (paragraph 131) that a civil action in damages would not have afforded the applicant an effective remedy which would have established where responsibility lay for the death of the deceased.

10. *Jordan v United Kingdom* arose from the fatal shooting of a young man by a police officer in Northern Ireland. The Court found a violation of article 2 in respect of failings in the investigative procedures concerning the death. The Court held:

> "105The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures . . .
>
> 107The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard."

There was argument whether the inquest, which had been opened but not concluded, would satisfy the state's investigative obligation, but the Court concluded that, on the facts of this case, it would not:

> "128It is also alleged that the inquest in this case is restricted in the scope of its examination. According to the case law of the national courts, the procedure is a fact-finding exercise and not a method of apportioning guilt. The Coroner is required to confine his investigation to the matters directly causative of the death and not to extend his inquiry into the broader circumstances. This was the standard applicable in the *McCann* inquest also and did not prevent examination of those aspects of the planning and conduct of the operation relevant to the killings of the three IRA suspects. The Court

> is not persuaded therefore that the approach taken by the domestic courts necessarily contradicts the requirements of Art. 2. The domestic courts accept that an essential purpose of the inquest is to allay rumours and suspicions of how a death came about. The Court agrees that a detailed investigation into policy issues or alleged conspiracies may not be justifiable or necessary. Whether an inquest fails to address necessary factual issues will depend on the particular circumstances of the case. It has not been shown in the present application that the scope of the inquest as conducted so far has prevented any particular matters relevant to the death being examined.
>
> 129Nonetheless, unlike the *McCann* inquest, the jury's verdict in this case may only give the identity of the deceased and the date, place and cause of death. In England and Wales, as in Gibraltar, the jury is able to reach a number of verdicts, including 'unlawful death'. As already noted, where an inquest jury gives such a verdict in England and Wales, the DPP is required to reconsider any decision not to prosecute and to give reasons which are amenable to challenge in the courts. In this case, the only relevance the inquest may have to a possible prosecution is that the Coroner may send a written report to the DPP if he considers that a criminal offence may have been committed. It is not apparent however that the DPP is required to take any decision in response to this notification or to provide detailed reasons for not taking any further action. In this case it appears that the DPP did reconsider his decision not to prosecute when the Coroner referred to him information about a new eye witness who had come forward. The DPP maintained his decision however and gave no explanation of his conclusion that there remained insufficient evidence to justify a prosecution.
>
> 130Notwithstanding the useful fact-finding function that an inquest may provide in some cases, the Court considers that in this case it could play no effective role in the identification or prosecution of any criminal offences which may have occurred and, in that respect, falls short of the requirements of Art. 2."

The Court held (paragraph 142) that the Northern Irish inquest procedure fell short of what article 2 required because (among other shortcomings) it

> "did not allow any verdict or findings which could play an effective role in securing a prosecution in respect of any criminal offence which may have been disclosed."

11. The killing in *Edwards v United Kingdom* was of a prisoner by another prisoner with whom he shared a cell. The killer was charged with murder but his plea of guilty to manslaughter by reason of diminished responsibility was accepted, and there was accordingly no investigation in the criminal trial of how the two men came to be sharing a cell. This, not surprisingly, was a feature of the case which greatly concerned the family of the deceased. In paragraph 69 of its judgment, the Court described the purpose of the investigation required by article 2 in exactly the same terms as it had used in paragraph 105 of its judgment in *Jordan*, quoted above. A violation was found.

12. In *Mastromatteo v Italy* the deceased had been killed by a group of criminals, some of whom were on leave of absence from prison and one of whom had absconded from prison. A complaint that the state had violated its substantive obligation under article 2 was rejected (paragraph 79). So too was a complaint that the state's procedural obligation had been violated (paragraph 96). This complaint was primarily directed to the possibility of obtaining compensation (paragraphs 80-82), but the Court, while finding (paragraph 92) that there was a procedural obligation to determine the circumstances of the death, found the obligation to be met by the trial and conviction of two of the murderers and the making of a compensation order.

13. Basing themselves primarily on *Keenan, Jordan* and *Edwards*, the parties made competing submissions on what the procedural investigative obligation under article 2 requires. For the Secretary of State, it was argued that what is required, where the obligation arises, is a full, thorough, independent and public investigation of the facts surrounding and leading to the death but not necessarily culminating in any decision on whether the state or any individual is responsible. The duty is to investigate, no more. If the investigation yields evidence of delinquency on the part of the state or its agents, then the victim must have a remedy. But that is a requirement of article 13, not of the procedural obligation under article 2. Counsel for Mrs Middleton challenged this approach. If an investigation is to ensure the accountability of state agents or bodies for deaths occurring under their responsibility (*Jordan*, paragraph 105) and be capable of leading to a determination of whether the force used had been justified (*Jordan*, paragraph 107) and to establish the cause of death or the person or persons responsible (*Jordan*, paragraph 107), then it must culminate in a finding which, while it need not convict any person of crime nor constitute an enforceable civil judgment against any party, must express the fact-finding body's judgment on the cardinal issues concerning the death.

14. In choosing between these submissions assistance is gained by comparing the Court's decisions in *McCann* and *Jordan*. *McCann* arose from the fatal shooting by soldiers of three people, believed to be terrorists, in Gibraltar. A lengthy and detailed inquest was held, also in Gibraltar, when much evidence was heard. It was clear from the outset when and where the deceased had died, and that they had been shot by the soldiers. The central question was whether the soldiers had been justified in shooting and killing the deceased. On this issue the coroner directed the jury in some detail, giving illustrations of conduct which would amount to unlawful killing, and leaving to the jury three verdicts which he regarded as reasonably open to them (paragraph 120): these were unlawful killing (unlawful homicide), lawful killing (justifiable reasonable homicide) or an open verdict. The jury could thus indicate, by returning an open verdict, their inability to decide or, by choosing one or other of the remaining verdicts, express their judgment on the central, and very important, issue. Although criticism was made of the adequacy of the inquest proceedings as an investigative mechanism, the Court concluded that the alleged shortcomings in the proceedings had not substantially hampered the carrying out of a thorough, impartial and careful examination of the circumstances surrounding the killings (paragraph 163). The inquest could not, of course, have culminated in an award of compensation.

15. In *Jordan*, to which reference is made in paragraph 10 above, the central issue was very much the same but a different result was reached. One of the reasons for this was that the jury were only permitted in their verdict to give the identity of the deceased and the date, place and cause of death and not, as in England, Wales and Gibraltar, to return any one of several verdicts including "unlawful death". A verdict in the permitted form would not, the Court held, operate to trigger criminal prosecution. In a situation where the Director of Public Prosecutions of Northern Ireland had decided not to prosecute, with no reasons given, and with no effective means of requiring reasons to be given (paragraph 122), the Court regarded the inquest as inadequate to investigate the possible breach of the state's substantive obligation under article 2.

16. It seems safe to infer that the state's procedural obligation to investigate is unlikely to be met if it is plausibly alleged that agents of the state have used lethal force without justification, if an effectively unchallengeable decision has been taken not to prosecute and if the fact-finding body cannot express its conclusion on whether unjustifiable force has been used or not, so as to prompt reconsideration of the decision not to prosecute. Where, in such a case, an inquest is the instrument by which the state seeks to discharge its investigative obligation, it seems that an explicit statement, however brief, of the jury's conclusion on the central issue is required.

17. Does that requirement apply only to the very limited category of cases just defined, or does it apply to other cases as well? The decision in *Keenan* shows that it does apply to a broader category of cases, since although in that case no breach of the state's investigative obligation was alleged or found, the Court based its conclusion that article 13 had been violated in part on its opinion (paragraph 121) that the inquest, which did not permit any determination of liability, did not furnish the applicant with the possibility of establishing the responsibility of the prison authorities nor did it (paragraph 122) constitute an investigation capable of leading to the identification and punishment of those responsible

for the deprivation of life. A statement of the inquest jury's conclusions on the main facts leading to the suicide of Mark Keenan would have precluded that comment.

18. Two considerations fortify confidence in the correctness of this conclusion. First, a verdict of an inquest jury (other than an open verdict, sometimes unavoidable) which does not express the jury's conclusion on a major issue canvassed in the evidence at the inquest cannot satisfy or meet the expectations of the deceased's family or next-of-kin. Yet they, like the deceased, may be victims. They have been held to have legitimate interests in the conduct of the investigation (*Jordan*, paragraph 109), which is why they must be accorded an appropriate level of participation (see also *R (Amin) v Secretary of State for the Home Department, supra*). An uninformative jury verdict will be unlikely to meet what the House in *Amin*, paragraph 31, held to be one of the purposes of an article 2 investigation:

> "… that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others."

19. The second consideration is that while the use of lethal force by agents of the state must always be a matter of the greatest seriousness, a systemic failure to protect human life may call for an investigation which may be no less important and perhaps even more complex: see *Amin*, paragraphs 21, 41, 50 and 62. It would not promote the objects of the Convention if domestic law were to distinguish between cases where an agent of the state may have used lethal force without justification and cases in which a defective system operated by the state may have failed to afford adequate protection to human life.

20. The European Court has repeatedly recognised that there are many different ways in which a state may discharge its procedural obligation to investigate under article 2. In England and Wales an inquest is the means by which the state ordinarily discharges that obligation, save where a criminal prosecution intervenes or a public enquiry is ordered into a major accident, usually involving multiple fatalities. To meet the procedural requirement of article 2 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.

21. Question (2)Does the regime for holding inquests established by the Coroners Act 1988 and the Coroners Rules 1984 (SI 1984/552) as hitherto understood and followed in England and Wales, meet the requirements of the Convention?

22. The historical and statutory background to the Coroners Act 1988 and the Coroners Rules 1984 was accurately summarised by the Court of Appeal in *R v HM Coroner for North Humberside and Scunthorpe, Ex p Jamieson* [1995] QB 1. There has been little significant legislative change in England and Wales since then, and that account need not be repeated. It is enough to identify the main features of the regime so far as relevant to this appeal.

23. By section 8(1) of the Act an inquest must be held where there is reasonable cause to suspect that a deceased person

> "(a) has died a violent or an unnatural death;
>
> (b)has died a sudden death of which the cause is unknown; or
>
> (c)has died in prison or in such a place or in such circumstances as to require an inquest under any other Act."

If there is reason to suspect that the death occurred in prison or in police custody or resulted from an injury caused by a police officer in the purported execution of his duty, the inquest must be held with a jury (section 8(3)), and the independence of jurors dealing with prison deaths is specifically protected (section 8(6)). The requirement to summon a jury in such cases recognises the substantive and procedural obligations of the state which are now derived from article 2 as well as from domestic law. If a coroner fails to hold an inquest when he should, he may be ordered to do so, and if a coroner misconducts an inquest, another inquest may be ordered (section 13).

24. The task of the jury is to "inquire as jurors into the death of the deceased" (section 8(2)(a)) and they are sworn "diligently to inquire into the death of the deceased and to give a true verdict according to the evidence" (section 8(2)(b)). The coroner is to "examine on oath concerning the death all persons who tender evidence as to the facts of the death and all persons having knowledge of those facts whom he considers it expedient to examine" (section 11(2)). Thus the character of the proceedings is quite different from that of an ordinary trial, civil or criminal. The jury, where there is one, must hear the evidence and give their verdict (section 11(3)(a)). Section 11(5) requires that the inquisition, to be signed by the jury or a majority of them, must set out in writing, so far as such particulars have been proved, and in such form as the Lord Chancellor may by rule prescribe,

> "(i)who the deceased was; and
>
> (ii)how, when and where the deceased came by his death."

25. The 1988 Act recognises that a death which is the subject of an inquest may also be the subject of criminal proceedings, and also recognises the general undesirability of investigating publicly at an inquest evidence pertinent to a forthcoming criminal trial. In a departure from previous practice, section 11(6) of the Act provides:

> "At a coroner's inquest into the death of a person who came by his death by murder, manslaughter or infanticide, the purpose of the proceedings shall not include the finding of any person guilty of the murder, manslaughter or infanticide; and accordingly a coroner's inquisition shall in no case charge a person with any of those offences."

Thus the inquest jury may no longer perform its former role as a grand jury. Section 16 of the Act (and rules 27 and 28 of the Rules) make provision for the adjourning of an inquest when criminal proceedings are or may be pending on certain specified charges or in certain specified circumstances (but not solely because any criminal proceedings arising out of the death of the deceased have been instituted: rule 32 of the Rules). After the conclusion of criminal proceedings the coroner may resume the adjourned inquest "if in his opinion there is sufficient cause to do so" (section 16(3)). Section 17A makes provision for the adjourning of an inquest when a public inquiry into a death is to be conducted or chaired by a judge. A coroner may only resume an inquest so adjourned "if in his opinion there is exceptional reason for doing so", and then subject to conditions (section 17A (4)).

26. The Coroners Rules 1984 have effect as if made under section 32 of the 1988 Act, which gives the Lord Chancellor, with the concurrence of the Secretary of State, a wide power to make rules for regulating the practice and procedure at inquests and to prescribe forms for use in connection with inquests. The 1984 Rules prescribe a hybrid procedure, not purely inquisitorial or purely adversarial. On the one hand, notice of the inquest must be given to the next-of-kin of the deceased and a widely defined group of other interested parties (rule 19), who are entitled to examine witnesses either in person or by an authorised advocate (rule 20); witnesses are privileged against self-incrimination; notice must be given to, and attendance facilitated of, persons whose conduct is likely to be called into question (rules 24 and 25). On the other hand, the coroner calls and first examines all witnesses, the representative of a witness questioning him last (rule 21); no person is allowed to address the coroner or the jury as to the facts (rule 40); and there is no particularised charge or complaint as in criminal or civil proceedings. In addition to examining the witnesses the coroner (rule 41) sums up the evidence to the jury and directs them as to the law, drawing their attention to rules 36(2) and 42. Rule 43 provides:

> "A coroner who believes that action should be taken to prevent the recurrence of fatalities similar to that in respect of which the inquest is being held may announce at the inquest that he is reporting the matter in writing to the person or authority who may have power to take such action and he may report the matter accordingly."

Attention should be drawn to two important rules. The first of these, rule 36, provides:

> "(1)The proceedings and evidence at an inquest shall be directed solely to ascertaining the following matters, namely -

(a)who the deceased was;

(b)how, when and where the deceased came by his death;

(c)the particulars for the time being required by the Registration Acts to be registered concerning the death.

(2)Neither the coroner nor the jury shall express any opinion on any other matters."

The second, rule 42, provides:

"No verdict shall be framed in such a way as to appear to determine any question of -

(a)criminal liability on the part of a named person, or

(b)civil liability."

27. Rule 60 provides that the forms set out in Schedule 4 may be used for the purposes for which they are expressed to be applicable, with such modifications as circumstances may require. Schedule 4 includes, as form 22, a model form of inquisition. This suggests that, when recording the conclusion of the jury as to the death, one or other of certain forms should be adopted. The form provides that a finding that "the cause of death was aggravated by lack of care/self-neglect" should be added only where the finding is of a death caused by natural causes, industrial disease, dependence on or abuse of drugs, or want of attention at birth. In the case of murder, manslaughter or infanticide the suggested form of conclusion is that the deceased was "killed unlawfully".

28. Remarkably, as it now seems, the Court of Appeal made no reference to the European Convention in *Ex p Jamieson*, and the report does not suggest that counsel referred to it either. Counsel for Mrs Middleton criticised the reasoning of that decision, but it appears to the committee to have been an orthodox analysis of the Act and the Rules and an accurate, if uncritical, compilation of judicial authority as it then stood. Thus emphasis was laid on the function of an inquest as a fact-finding inquiry (page 23, conclusion (1)). Following *R v Walthamstow Coroner, Ex p Rubenstein* (19 February 1982, unreported), *R v HM Coroner for Birmingham, Ex p Secretary of State for the Home Department* (1990) 155 JP 107 and *R v HM Coroner for Western District of East Sussex, Ex p Homberg* (1994) 158 JP 357, the Court of Appeal interpreted "how" in section 11(5)(b)(ii) of the Act and rule 36(1)(b) of the Rules narrowly as meaning "by what means" and not "in what broad circumstances" (page 24, conclusion (2)). It was not the function of a coroner or an inquest jury to determine, or appear to determine, any question of criminal or civil liability, to apportion guilt or attribute blame (page 24, conclusion (3)). Attention was drawn to the potential unfairness if questions of criminal or civil liability were to be determined in proceedings lacking important procedural protections (page 24, conclusion (4)). A verdict could properly incorporate a brief, neutral, factual statement, but should express no judgment or opinion, and it was not for the jury to prepare detailed factual statements (page 24, conclusion (6)). It was acceptable for a jury to find, on appropriate facts, that self-neglect aggravated or contributed to the primary cause of death, but use of the expression "lack of care" was discouraged and a traditional definition of "neglect" was adopted (pages 24-25, conclusions (7), (8) and (9)). Where it was found that the deceased had taken his own life, that was the appropriate verdict, and only in the most extreme circumstances (going well beyond ordinary negligence) could neglect be properly found to have contributed to that cause of death (pages 25-26, conclusion (11)). Reference to neglect or self-neglect should not be made in a verdict unless there was a clear and direct causal connection between the conduct so described and the cause of death (page 26, conclusion (12)). It was for the coroner alone to make reports with a view to preventing the recurrence of a fatality (page 26, conclusion (13)). Emphasis was laid on the duty of the coroner to conduct a full, fair and fearless investigation, and on his authority as a judicial officer (page 26, conclusion (14)).

29. How far, then, does the current regime for conducting inquests in England and Wales match up to the investigative obligation imposed by article 2?

30. In some cases the state's procedural obligation may be discharged by criminal proceedings. This is most likely to be so where a defendant pleads not guilty and the trial involves a full exploration of the facts surrounding the death. It is unlikely to be so if the defendant's plea of guilty is accepted (as in *Edwards),* or the issue at trial is the mental state of the defendant (as in *Amin*), because in such cases the wider issues will probably not be explored.

31. In some other cases, short verdicts in the traditional form will enable the jury to express their conclusion on the central issue canvassed at the inquest. *McCann* has already been given as an example: see paragraph 14 above. The same would be true if the central issue at the inquest were whether the deceased had taken his own life or been killed by another: by choosing between verdicts of suicide and unlawful killing, the jury would make clear its factual conclusion. But it is plain that in other cases a strict *Ex p Jamieson* approach will not meet what has been identified above as the Convention requirement. In *Keenan* the inquest verdict of death by misadventure and the certification of asphyxiation by hanging as the cause of death did not express the jury's conclusion on the events leading up to the death. Similarly, verdicts of unlawful killing in *Edwards* and *Amin*, although plainly justified, would not have enabled the jury to express any conclusion on what would undoubtedly have been the major issue at any inquest, the procedures which led in each case to the deceased and his killer sharing a cell.

32. The conclusion is inescapable that there are some cases in which the current regime for conducting inquests in England and Wales, as hitherto understood and followed, does not meet the requirements of the Convention. This is a conclusion rightly reached by the judge in this case (see paragraph 44 below) and by the Court of Appeal both in the present case (see paragraph 44 below) and in cases such as *R (Davies) v HM Deputy Coroner for Birmingham* [2003] EWCA Civ 1739 (2 December 2003, unreported), paragraph 71.

33. Question (3) Can the current regime governing the conduct of inquests in England and Wales be revised so as to meet the requirements of the Convention, and if so, how?

34. Counsel for the Secretary of State rightly suggested that the House should propose no greater revision of the existing regime than is necessary to secure compliance with the Convention, even if it were (contrary to his main submission) to reach the conclusion just expressed. The warning is salutary. There has recently been published "Death Certification and Investigation in England, Wales and Northern Ireland: The Report of a Fundamental Review" (June 2003, Cm 5831). Decisions have yet to be made on whether, and how, to give effect to the recommendations. Those decisions, when made, will doubtless take account of policy, administrative and financial considerations which are not the concern of the House sitting judicially. It is correct that the scheme enacted by and under the authority of Parliament should be respected save to the extent that 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".

36. This will not require a change of approach in some cases, where a traditional short form verdict will be quite satisfactory, but it will call for a change of approach in others (paragraphs 30-31 above). In the latter class of case it must be for the coroner, in the exercise of his discretion, to decide how best, in the particular case, to elicit the jury's conclusion on the central issue or issues. This may be done by inviting a form of verdict expanded beyond those suggested in form 22 of Schedule 4 to the Rules. It may be done, and has (even if very rarely) been done, by inviting a narrative form of verdict in which the jury's factual conclusions are briefly summarised. It may be done by inviting the jury's answer to factual questions put by the coroner. If the coroner invites either a narrative verdict or answers to questions, he may find it helpful to direct the jury with reference to some of the matters to which a sheriff will have regard in making his determination under section 6 of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976: where and when the death took place; the cause or causes of such death; the defects in the system which contributed to the death; and any other factors which are relevant to the circumstances of the death. It would be open to parties appearing or represented at the

inquest to make submissions to the coroner on the means of eliciting the jury's factual conclusions and on any questions to be put, but the choice must be that of the coroner and his decision should not be disturbed by the courts unless strong grounds are shown.

37. The prohibition in rule 36(2) of the expression of opinion on matters not comprised within sub-rule (1) must continue to be respected. But it must be read with reference to the broader interpretation of "how" in section 11(5)(b)(ii) and rule 36(1) and does not preclude conclusions of fact as opposed to expressions of opinion. However the jury's factual conclusion is conveyed, rule 42 should not be infringed. Thus there must be no finding of criminal liability on the part of a named person. Nor must the verdict appear to determine any question of civil liability. Acts or omissions may be recorded, but expressions suggestive of civil liability, in particular "neglect" or "carelessness" and related expressions, should be avoided. Self-neglect and neglect should continue to be treated as terms of art. A verdict such as that suggested in paragraph 45 below ("The deceased took his own life, in part because the risk of his doing so was not recognised and appropriate precautions were not taken to prevent him doing so") embodies a judgmental conclusion of a factual nature, directly relating to the circumstances of the death. It does not identify any individual nor does it address any issue of criminal or civil liability. It does not therefore infringe either rule 36(2) or rule 42.

38. The power of juries to attach riders of censure or blame was abolished on the recommendation of the *Report of the Departmental Committee on Coroners* under the chairmanship of Lord Wright (Cmd 5070, 1936). It has not been reintroduced. Juries do not enjoy the power conferred on Scottish sheriffs by the 1976 Act to determine the reasonable precautions, if any, whereby the death might have been avoided (section 6(1)(c)). Under the 1984 Rules, the power is reserved to the coroner to make an appropriate report where he believes that action should be taken to prevent the recurrence of fatalities similar to that in respect of which the inquest is being held. Compliance with the Convention does not require that this power be exercisable by the jury, although a coroner's exercise of it may well be influenced by the factual conclusions of the jury. In England and Wales, as in Scotland, the making of recommendations is entrusted to an experienced professional, not a jury. In the ordinary way, the procedural obligation under article 2 will be most effectively discharged if the coroner announces publicly not only his intention to report any matter but also the substance of the report, neutrally expressed, which he intends to make.

The present case.

39. Colin Campbell Middleton took his own life by hanging himself in his cell at HMP Horfield on 14 January 1999. He had been in custody since, aged 14, he was convicted in April 1982 of murdering his eighteen-month old niece.

40. His career in prison was uneven, periods of progress being interrupted by setbacks, some of his own making, some attributable to the hostility of fellow-prisoners. After trial periods in open prisons in 1993, 1994 and 1996 he was transferred to Horfield where, in November 1998 he harmed himself seriously. A self-harm at risk form (F2052SH) was then opened, but closed a few days later. There was evidence that he was depressed, and he was receiving medication at the time of his death. On 11 January 1999 he wrote to the Wing Governor, unhappy about his status and referring to his mental illness. He spoke of suicide to another prisoner who may, or may not, have passed on this information to the authorities. Although he was aged only 30, he had spent more than half his life in custody.

41. The verdict reached at a first inquest was quashed for want of sufficient enquiry, and a second inquest was held over three days in October 2000, when oral evidence was received from eleven witnesses and written evidence from a further seven. It is accepted by Mrs Middleton and the family of the deceased that at this inquest the issues surrounding the death were thoroughly, effectively and sensitively explored.

42. At the end of the evidence the coroner ruled that the issue of "neglect" should not be left to the jury. But he told the jury that if they wished to do so they could give him a note regarding any specific areas of the evidence about which they were concerned, and he would consider the note, which would not be published, when considering exercise of his power under rule 43.

43. The jury found the cause of death to be hanging and returned a verdict that the deceased had taken his own life when the balance of his mind was disturbed. The jury also gave the coroner a note which communicated the jury's opinion that the Prison Service had failed in its duty of care for the deceased. The family asked that the note should be appended to the inquisition, but the coroner declined to do so. The contents of the note remained private until, in the course of these proceedings, two points made by the jury were revealed. As the judge put it, the jury

> "(a)expressed concern that a form F2052SH had been closed by two officers who had no prior knowledge of Mr Middleton; and
>
> (b)expressed their belief that a letter of 11 January 1999 written by him contained sufficient information to warrant an F2052SH being opened."

In exercise of his power under rule 43, the coroner wrote a full letter to the Chief Inspector of Prisons, drawing attention to the jury's point (a) and to the jury's noting of "a failure in the prison's responsibilities towards Middleton and a total lack of communication between all grades of prison staff". The coroner pointed out that on the day before his death the deceased had not left his cell, even for meals, and had placed a rug all day over the inspection port window into the cell.

44. In her judicial review application Mrs Middleton did not question the adequacy of the coroner's investigation nor seek an order that there be a further inquest. She sought an order that the jury's findings as set out in their note be publicly recorded, and that there should thus be a formal public determination of the responsibility of the Prison Service for the death of the deceased. The issue was thus raised whether the current regime for holding inquests in England and Wales meets the requirements of article 2 of the Convention. In his reserved judgment given on 14 December 2001 ([2001] EWHC Admin 1043), paragraph 54, Stanley Burnton J said:

> "However, where there has been neglect on the part of the State, and that neglect was a substantial contributory cause of the death, my view is that a formal and public finding of neglect on the part of the State is in general necessary in order to satisfy those requirements [of article 2]."

He therefore concluded (paragraph 56) that an inquest would not necessarily satisfy the procedural requirements of article 2 in a case such as the present. But the judge declined to order that the jury's note be incorporated in the inquisition, for a series of reasons but most importantly because he considered that the coroner had acted unlawfully in suggesting production of the note. The judge recorded (paragraph 60) that in the view of the jury and the coroner there had been significant deficiencies in the Prison Service's care of the deceased. He considered that no declaration was needed but, at the request of the Secretary of State, declared that:

> "by reason of the restrictions on the verdict at the inquest into the death of [the deceased] . . . that inquest was inadequate to meet [the] procedural obligation in Article 2 of the European Convention . . ."

The Secretary of State appealed to the Court of Appeal which delivered its reserved judgment on 27 March 2002: [2002] EWCA Civ 390, [2003] QB 581. It was found to be necessary, to comply with article 2, that a verdict of neglect be available, but the Court of Appeal distinguished between individual and systemic neglect:

> "87 A verdict of neglect can perform different functions. In particular, in the present context, it can identify a failure in the system adopted by the Prison Service to reduce the incidence of suicide by inmates. Alternatively it may do no more than identify a failure of an individual prison officer to perform his duties properly. We offer two illustrations, which demonstrate the distinction we have in mind. On the one hand, the system adopted by a prison may be unsatisfactory in that it allows a prisoner who is a known suicide risk to occupy a cell by himself or does not require that prisoner to be kept under observation. On the other hand, the system may be perfectly satisfactory but the prison officer responsible for keeping observation may fall asleep on duty.

> 88 For the purpose of vindicating the right protected by article 2 it is more important to identify defects in the system than individual acts of negligence. The identification of defects in the system can result in it being changed so that suicides in the future are avoided. A finding of individual negligence is unlikely to lead to that result. If the facts have been investigated at the inquest the evidence given for this purpose should usually enable the relatives to initiate civil proceedings against those responsible without the verdict identifying individuals by name. The shortcomings of civil proceedings in meeting the requirements of article 2 do not in general prevent actions in the domestic courts for damages from providing an effective remedy in cases of alleged unlawful conduct or negligence by public authorities.
>
> 89 In contrast with the position where there is individual negligence, not to allow a jury to return a verdict of neglect in relation to a defect in the system could detract substantially from the salutary effect of the verdict. A finding of neglect can bring home to the relevant authority the need for action to be taken to change the system, and thus contribute to the avoidance of suicides in the future. The inability to bring in a verdict of neglect (without identifying any individual as being involved) in our judgment significantly detracts, in some cases, from the capacity of the investigation to meet the obligations arising under article 2."

Later, the court continued:

> ". . . In a situation where a coroner knows that it is the inquest which is in practice the way the state is fulfilling the adjectival obligation under article 2, it is for the coroner to construe the Rules in the manner required by section 6(2)(b) [of the Human Rights Act 1998]. Rule 42 can and should, contrary to *R v Coroner for North Humberside and Scunthorpe, Ex p Jamieson* [1995] QB 1, when necessary be construed (in relation to both criminal and civil proceedings) only as preventing an individual being named, with the result that a finding of system neglect of the type we have indicated will not contravene that rule. If the coroner is acting in accordance with the rule for this purpose he will not be offending in this respect section 6(1).
>
> 92 For a coroner to take into account today the effect of the Human Rights Act 1998 on the interpretation of the Rules is not to overrule *Jamieson's* case by the back door. In general the decision continues to apply to inquests, but when it is necessary so as to vindicate article 2 to give in effect a verdict of neglect, it is permissible to do so. The requirements are in fact specific to the particular inquest being conducted and will only apply where in the judgment of the coroner a finding of the jury on neglect could serve to reduce the risk of repetition of the circumstances giving rise to the death being inquired into at the inquest. Subject to the coroner, in the appropriate cases, directing the jury when they can return what would in effect be a rider identifying the nature of the neglect they have found, the rules will continue to apply as at present. The proceedings should not be allowed to become adversarial. We appreciate there is no provision for such a rider in the model inquisition but this technicality should not be allowed to interfere with the need to comply with section 6 of the Human Rights Act 1998."

The Court of Appeal set aside the judge's declaration and instead declared:

> "In a case where
>
> (a)a coroner knows that it is the inquest which is in practice the way the State is to fulfil the adjectival obligation under Article 2 of the European Convention on Human Rights, and

(b)a finding of neglect by the jury at the inquest could serve to reduce the risk of repetition of the circumstances giving rise to the death being inquired into,

rule 42 of the Coroners Rules 1984 can and should be construed as allowing such a finding, providing no individual is named therein."

45. It follows from the reasoning earlier in this opinion that the judge's declaration was correctly made, although not for all the reasons he gave. There was no dispute at this inquest whether the deceased had taken his own life. He had left a suicide note, and it was plain that he had. The crux of the argument was whether he should have been recognised as a suicide risk and whether appropriate precautions should have been taken to prevent him taking his own life. The jury's verdict, although strictly in accordance with the guidance in *Ex p Jamieson,* did not express the jury's conclusion on these crucial facts. This might have been done by a short and simple verdict (eg "The deceased took his own life, in part because the risk of his doing so was not recognised and appropriate precautions were not taken to prevent him doing so"). Or it could have been done by a narrative verdict or a verdict given in answer to the coroner's questions. By one means or another the jury should, to meet the procedural obligation in article 2, have been permitted to express their conclusion on the central facts explored before them.

46. Had this been done (and the coroner cannot of course be criticised for applying the law as it stood) it would not have been necessary to invite the jury to submit a note. Their assessment of the facts and probabilities would have been clear, and the coroner (having also heard the evidence) could have judged what report he should make under rule 43. As it was, he was not constrained by the jury's note in what he reported. But the judge was right to view private communications between the jury and the coroner with disfavour, since such a practice must derogate from the public nature of the proceedings.

47. The declaration made by the Court of Appeal found no friend in argument before the House. In the absence of full criminal proceedings, and unless otherwise notified, a coroner should assume that his inquest is the means by which the state will discharge its procedural investigative obligation under article 2. There is force in the criticism made by all parties of the distinction drawn between individual and systemic neglect, since the borderline between the two is indistinct and there will often be some overlap between the two: there are some kinds of individual failing which a sound system may be expected to detect and remedy before harm is done. There will, moreover, be individual failings which need to be identified even though an individual is not to be named. "Self-neglect" and "neglect" are terms of art in the law of inquests, and there is no reason to alter their meaning. The recommending of precautions to prevent repetition is for the coroner, not the jury.

48. There has been in this case a full and satisfactory investigation. Mrs Middleton does not seek another inquest. The conclusions of the jury, which Mrs Middleton sought to publicise, have been published to the world. No purpose is served by a declaration.

49. The arguments of the Secretary of State and Mrs Middleton on the acceptability of the inquest regime to discharge the state's procedural investigative obligation under article 2 have, in each case, succeeded in part and failed in part. But the Secretary of State has succeeded in persuading the House that the Court of Appeal's declaration should be set aside. To that extent his appeal succeeds. We make no order for the payment of costs by any party.

50. In this appeal no question was raised on the retrospective application of the Human Rights Act and the Convention. They were assumed to be applicable. Nothing in this opinion should be understood to throw doubt on the conclusion of the House in *In re McKerr* [2004] UKHL 12.

APPENDIX I ORDERS OF REFERENCE, ETC.

WEDNESDAY 20 JUNE 2001

Appeal Committees—Two Appeal Committees were appointed pursuant to Standing Order.

Appellate Committees—Two Appellate Committees were appointed pursuant to Standing Order.

THURSDAY 4 JULY 2002

Regina *v.* H M Coroner for the Western District of Somerset (Respondent) and another (Petitioner) *ex parte* Middleton (Respondent)—The petition of the Secretary of State for the Home Department praying for leave to appeal was presented and referred to an Appeal Committee (lodged 25th April).

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TUESDAY 24 SEPTEMBER 2002

Regina *v*. H M Coroner for the Western District of Somerset (Respondent) and another (Petitioner) *ex parte* Middleton (FC) (Respondent)—The certificate of public funding of Jean Middleton was lodged.

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WEDNESDAY 13 NOVEMBER 2002

Appeal Committees—Two Appeal Committees were appointed pursuant to Standing Order.

Appellate Committees—Two Appellate Committees were appointed pursuant to Standing Order.

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THURSDAY 14 NOVEMBER 2002

Regina *v*. H M Coroner for the Western District of Somerset (Respondent) and another (Petitioner) *ex parte* Middleton (FC) (Respondent)—That leave to appeal be given, and that the petition of appeal be lodged by 28th November.

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MONDAY 2 DECEMBER 2002

Regina *v*. H M Coroner for the Western District of Somerset (Respondent) and another (Appellant) *ex parte* Middleton (FC) (Respondent) (England)—The appeal of the Secretary of State for the Home Department was presented and it was ordered that in accordance with Standing Order VI the statement and appendix thereto be lodged on or before 13th January next (lodged 28th November).

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MONDAY 13 JANUARY 2003

Regina *v.* Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) *ex parte* Middleton (FC) (Respondent)—The petition of the appellant praying that the time for lodging the statement and appendix and setting down the cause for hearing might be extended to 10th February next (the agents for the respondent consenting thereto) was presented; and it was ordered as prayed.

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MONDAY 10 FEBRUARY 2003

Regina *v.* Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) *ex parte* Middleton (FC) (Respondent)—The petition of the appellant praying that the time for lodging the statement and appendix and setting down the cause for hearing might be extended to 10th March next (the agents for the respondent consenting thereto) was presented; and it was ordered as prayed.

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MONDAY 10 MARCH 2003

Regina *v.* Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) *ex parte* Middleton (FC) (Respondent)—The petition of the appellant praying that the time for lodging the statement and appendix and setting down the cause for hearing might be extended to 31st March next (the agents for the respondent consenting thereto) was presented; and it was ordered as prayed.

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TUESDAY 1 APRIL 2003

Regina *v.* Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) *ex parte* Middleton (FC) (Respondent)—The appeal was set down for hearing and referred to an Appellate Committee.

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FRIDAY 18 JULY 2003

Regina *v.* Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) *ex parte* Middleton (FC) (Respondent)—The petition of Inquest and its associated charitable trust praying for leave to intervene in the said appeal was presented and referred to an Appeal Committee.

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THURSDAY 31 JULY 2003

Regina *v.* Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) *ex parte* Middleton (FC) (Respondent)—That the petition of Inquest and its associated charitable trust that they might be heard or otherwise intervene in the said appeal be allowed to the extent that they may lodge written submissions only.

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THURSDAY 2 OCTOBER 2003

Regina *v.* Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) *ex parte* Middleton (FC) (Respondent)—The petition of the Northern Ireland Human Rights Commission praying for leave to intervene in the said appeal was presented and referred to an Appeal Committee.

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THURSDAY 9 OCTOBER 2003

Regina *v*. Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) *ex parte* Middleton (FC) (Respondent)—That the petition of the Northern Ireland Human Rights Commission that they might be heard or otherwise intervene in the said appeal be allowed to the extent that they may lodge written submissions only.

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WEDNESDAY 26 NOVEMBER 2003

Appeal Committees—Two Appeal Committees were appointed pursuant to Standing Order.

Appellate Committees—Two Appellate Committees were appointed pursuant to Standing Order.

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MONDAY 26 JANUARY 2004

Regina *v.* Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) *ex parte* Middleton (FC) (Respondent)—The petition of the Coroners' Society of England and Wales praying for leave to intervene in the said appeal was presented and referred to an Appeal Committee.

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WEDNESDAY 28 JANUARY 2004

Regina *v.* Her Majesty's Coroner for the Western District of Somerset (Respondent) and another (Appellant) *ex parte* Middleton (FC) (Respondent)—That the petition of the Coroners' Society of England and Wales that they might be heard or otherwise intervene in the said appeal be allowed to the extent that they may lodge written submissions only.

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APPENDIX II MINUTES OF PROCEEDINGS

MONDAY 2 FEBRUARY 2004

Present:

L. Bingham of Cornhill

B. Hale of Richmond

L. Lord Hope of Craighead

L. Carswell

L. Walker of Gestinghorpe

The Lord Bingham of Cornhill in the Chair.

The Orders of Reference are read.

The Committee deliberate.

Counsel and Parties are called in.

Mr J. Crow and Mr R. Singh QC appear for the appellant.

Mr B. Emmerson QC, Mr P. Weatherby and Mr D. Friedman appear for the respondent Middleton.

Mr H. Mercer and Mr R. Eaton appear for the respondent Her Majesty's Coroner for the Western District of Somerset.

Mr Crow heard.

Mr Mercer heard.

In part heard and adjourned until tomorrow.

TUESDAY 3 FEBRUARY 2004

Present:

L. Bingham of Cornhill

B. Hale of Richmond

L. Lord Hope of Craighead

L. Carswell

L. Walker of Gestinghorpe

The Lord Bingham of Cornhill in the Chair.

The Order of Adjournment is read.

The proceedings of yesterday are read.

The Committee deliberate.

Counsel and Parties are again called in.

Mr Mercer further heard.

Mr Emmerson heard.

Further heard and adjourned until tomorrow.

WEDNESDAY 4 FEBRUARY 2004

Present:

L. Bingham of Cornhill

B. Hale of Richmond

L. Lord Hope of Craighead

L. Carswell

L. Walker of Gestinghorpe

The Lord Bingham of Cornhill in the Chair.

The Order of Adjournment is read.

The proceedings of yesterday are read.

The Committee deliberate.

Counsel and Parties are again called in.

Mr Emmerson further heard.

Mr Crow heard in reply.

Further and fully heard.

Bar cleared; and the Committee deliberate.

A draft Report is laid before the Committee by the Lord Bingham of Cornhill.

The Report is considered and agreed to unanimously.

Ordered, That the Lord Bingham of Cornhill do make the Report to the House.

Ordered, That the Committee be adjourned.

IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

CIV-2004-443-660

BETWEEN	WILLIAM KEITH ABBOTT Applicant
AND	CORONERS COURT OF NEW PLYMOUTH First Respondent
AND	COMMISSIONER OF POLICE Second Respondent
AND	JAMES WALLACE Third Respondent

Hearing: 17 February 2005
(Heard at Wellington)

Appearances: Ms S Hughes for Applicant
Ms W L Aldred for First Respondent
K P McDonald QC for Second Respondent
R Mansfield & J Cundy for Third Respondent

Judgment: 20 April 2005

RESERVED JUDGMENT OF RANDERSON J

This judgment was delivered by the Registrar
On 20 April 2005 at 3 pm pursuant to
Rule 540 of the High Court Rules

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Registrar

Solicitors: Govett Quilliam, Private Bag 2013, New Plymouth for Applicant
Crown Law Office, PO Box 2858, Wellington, for First Respondent
Dr A R Jack, PO Box 3017, Wellington for Second Respondent
Lee Salmon Long, PO Box 2026, Shortland Street, Auckland for Third Respondent

Introduction

[1] On 30 April 2000, Steven Wallace was shot by Senior Constable Abbott during an incident in the township of Waitara. Mr Wallace later died from his injuries. After an investigation conducted by the New Zealand Police and a review by the Deputy Solicitor General, a decision was made not to charge Constable Abbott. Later, James Wallace, representing the Wallace family swore an information charging Constable Abbott with murder. Constable Abbott was subsequently tried before Justice Chambers and a jury in this court in Wellington. Constable Abbott contended that he acted in self-defence and, after a trial occupying some 11 court sitting days, the jury acquitted him.

[2] Shortly after Steven Wallace's death an inquest was opened in the Coroner's Court at New Plymouth under the Coroners Act 1988. The Hamilton Coroner, Mr G Matenga, was asked to sit as Coroner due to a potential conflict of interest on the part of the New Plymouth Coroner. After opening the inquest, the Coroner adjourned it until the conclusion of the criminal trial. After hearing from counsel for the interested parties, the Coroner decided in a written decision dated 8 July 2003 to resume the inquiry but for limited purposes. These were:

a) To examine Police policy and procedure as it applies to general staff (excluding the Armed Offenders Squad - AOS) in dealing with violent offenders in circumstances such as those which applied in the case of Steven Wallace.

b) The provision of first-aid care including the actual care provided to Steven Wallace.

[3] As well, the Coroner ruled that it was unnecessary to hear oral evidence from any witnesses who had given evidence in the criminal trial. Rather, the Coroner decided he would receive the transcript of evidence and exhibits from the trial under s 26(5) of the Act. The Coroner also directed that the Wallace family provide a list

of witnesses they intended to call at the resumed inquest together with briefs of evidence if available.

[4] The Wallace family initially provided the names of three witnesses: Dr P S Johnston (a general surgeon), Dr I D S Civil (a vascular and trauma surgeon) and Mr B Rowe (a former police officer). Signed briefs were received from the two surgeons but Mr Rowe's brief was delayed.

[5] The Coroner issued a further decision on 10 September 2004 after hearing from counsel. He declined a request by counsel for Constable Abbott to review his earlier decision to resume the inquest. It had been submitted for Constable Abbott that no good purpose would be served by doing so. The Coroner also extended the time for filing Mr Rowe's brief and noted that the remaining issue was to determine the extent of the hearing by "directing which evidence, if any, will be heard viva voce at the resumed inquest hearing". A further telephone conference was to be arranged once Mr Rowe's brief was received.

[6] Mr Rowe's brief was later received as well as a fourth brief from a Mr P L Ward, another former police officer. The evidence of Messrs Rowe & Ward mainly addresses whether police policies and procedures were complied with at the time of the incident. Of the four witnesses whose briefs were tendered for the Wallace family, only Mr Rowe had given evidence at the criminal trial. He did so on behalf of the Wallace family.

[7] Prior to the Coroner's decision of 10 September 2004, both Constable Abbott and the Wallace family had given notice of their intention to bring proceedings to review the Coroner's decision as to the scope of the inquiry. This proceeding under the Judicature Amendment Act 1972 was filed by Constable Abbott on 9 December 2004. A statement of defence was filed by the Wallace family along with a cross-claim seeking alternative relief by way of judicial review.

[8] The two main issues are:

a) Whether there are any grounds to review the Coroner's decision to limit the scope of the inquiry to the two issues he identified.

b) Whether there are any grounds to review the Coroner's decision not to hear oral evidence from any of the witnesses who gave evidence in the High Court.

The relevant legislation

[9] The purpose of an inquest is set out in s 15(1) of the Act:

> **15 Purpose of inquests**
>
> (1) A coroner holds an inquest for the purpose of—
>
> (a) Establishing, so far as is possible,—
> (i) That a person has died; and
> (ii) The person's identity; and
> (iii) When and where the person died; and
> (iv) The causes of the death; and
> (v) The circumstances of the death; and
> (b) Making any recommendations or comments on the avoidance of circumstances similar to those in which the death occurred, or on the manner in which any persons should act in such circumstances, that, in the opinion of the coroner, may if drawn to public attention reduce the chances of the occurrence of other deaths in such circumstances.

[10] In the present case, it is common ground that the matters set out in s 15(1)(a)(i), (ii), (iii) and (iv) have been established. However, the parties are not in agreement as to whether the circumstances of the death under s 15(1)(a)(v) have been adequately established by the evidence at the criminal trial or otherwise. The issue is of some moment because, under s 26(6) of the Act, a Coroner is prohibited from admitting evidence at an inquest unless satisfied that its admission is necessary or desirable for the purpose of establishing any matters specified in s 15(1)(a) of the Act.

[11] As well, the Coroner may decide not to resume an inquest if satisfied that the s 15(1)(a) matters have been adequately established in a criminal trial. Section 28(6) provides:

> Notwithstanding section 17 of this Act, a coroner may decide not to open or resume an inquest postponed or adjourned under this section if satisfied that the matters specified in section 15(1)(a) of this Act have been adequately established in respect of the death concerned in the course of the criminal proceedings or inquiry concerned (whether finally concluded or not).

[12] The scope of the evidence which may be called at an inquest and some matters of procedure are covered by s 26 which provides:

> **26. Evidence**
>
> (1) Except as provided in this Act, at an inquest a coroner shall hear evidence from any person—
>
> (a) Who tenders, in respect of the death concerned, evidence relevant to any of the matters required by section 15(1)(a) of this Act to be established; or
>
> (b) Whom the coroner thinks it appropriate to examine.
>
> (2) Every person who gives evidence at an inquest shall do so on oath.
>
> (3) A coroner may cross-examine any person who gives evidence at an inquest.
>
> (4) Any person specified in section 23(2) of this Act, and any person with a sufficient interest in the subject or outcome of the inquest may, personally or by counsel, attend an inquest and cross-examine witnesses.
>
> (5) Subject to subsection (6) of this section, a coroner may admit at an inquest any evidence the coroner thinks fit, whether or not it would be admissible in a Court of law.
>
> (6) A coroner shall not admit any evidence at an inquest unless satisfied that its admission is necessary or desirable for the purpose of establishing any matter specified in section 15(1)(a) of this Act.
>
> (7) Notwithstanding subsection (1) of this section, a witness at an inquest may give any evidence by tendering a previously prepared written statement and confirming it on oath if—
>
> (a) The coroner is satisfied that there is no reason making it desirable for the witness to give the evidence orally; and
>
> (b) No person attending the inquest who is entitled to cross-examine the witness objects.
>
> (8) A witness who gives evidence at an inquest under subsection (7) of this section may be cross-examined as if it had been given orally; and the written statement concerned shall form part of the depositions of the inquest.

(9) The evidence given by each witness at an inquest and admitted by the coroner shall be put into writing by the coroner, read over by or to the witness, and signed by the witness and the coroner.

The Coroner's Decision of 8 July 2003

[13] After hearing from counsel for the affected parties, the Coroner issued a careful written decision. He accepted that the Court could be satisfied that there had been a death; that the deceased (Steven Wallace) was identified; and that the time and place of death as well as the cause of death, had been firmly established. Dealing with the issue of whether he should resume the inquest under s 28(6) of the Act, the Coroner relied particularly on the decision of Paterson J in *Hugel v Cooney* (HC TAU CP 17/98 9 April 1999) in which His Honour made the following observations about s 28(6):

> First, a coroner may only exercise the discretion not to resume the inquest "*if satisfied that the matters specified in s 15(1)(a) of this Act have been adequately established in respect of the death concerned in the course of the criminal proceedings ...*". Thus unless satisfied that the matters specified in s 15(1)(a) of the Act have been adequately established, the coroner is required, in my view, to continue with the inquest. In this case, unless the Coroner had satisfied himself that all the matters specified in s 15(1)(a) had been adequately established in the criminal proceedings, he was required to continue with the inquest. Secondly, the coroner "*may decide not to ... resume an inquest ...*". A coroner has a discretion whether or not to terminate the inquest. Even if a coroner were satisfied that the matters specified in s 15(1)(a) of the Act had been adequately established, he or she may still decide not to exercise the discretion not to resume as there may be other reasons which are relevant to a decision to continue with the inquest. One such reason may be to make recommendations to avoid similar circumstances arising in the future in accordance with the powers he has under s 15(1)(b) of the Act.

[14] The Coroner accepted that all the matters under s 20 of the Act (decision whether or not to hold an inquest) were relevant to a decision whether to resume the inquest under s 28(6). He then stated:

> [15] The Court however does not accept the submission that the trial of Constable Abbott was limited in its focus. Having read the entire transcript, the issues were thoroughly explored. There was certainly some emphasis on the time period when Constable Abbott left the Waitara Police Station to the time of the shooting but the actions of the other Police Officers involved including, Dombroski, Prestige, O'Keefe and Sandle were all fully explored. The use of OC spray and batons were examined. Training issues were examined as well as

> AOS training. Matters of Police policy such as the type of ammunition, the "double tap", shoot to incapacitate at centre body mass as opposed to shoot to wound, all these issues were closely scrutinised, and with good reason. All of this evidence was important for the jury to consider as they considered whether the force employed by Constable Abbott was justified.
>
> [16] The issue of Police training and instructions and whether other Police involved followed their training or instructions is certainly in the Courts view a live issue. It is a matter into which the Court is entitled to enquire as part of the circumstances surrounding the death of Mr Wallace. However, there is a limit to the matters that can truly be said to be part of the circumstances of the death. For example, the procedures followed by the Police in attendance fall for consideration. This would include any immediate first aid care or the lack of immediate first aid care provided to Mr Wallace. The administration of IV fluids if it can truly be shown is no longer considered best practice, is certainly something which fits squarely within the "circumstances which if brought to the public attention may avoid similar deaths in the future". I note Ms Hughes' submission that these issues would have made no difference in Mr Wallace's case. An inquest however is an opportunity to review current practices with a view to improvement so that death may be avoided. Therefore, the opportunity to look further at these issues should be taken.
>
> [17] In my view the question as to whether Constable Abbott should have continued in the AOS or be permitted to use firearms given psychological trauma, goes beyond the purview of this enquiry. As does the length of time that Police members should remain in AOS. This is not an AOS shooting. The Court accepts that Constable Abbott was AOS trained but to suggest that the opportunity can be taken to consider AOS procedures would be stretching s 15(1)(a)(v) and 15(1)(b) too far.

[15] The Coroner recognised that the High Court proceedings had involved great expense and placed substantial stress on all those involved. Nevertheless, the Coroner considered that issues of expense were subordinate to the public interest in the protection of life. He determined that it was necessary to resume the inquest but made it clear that it was not an opportunity to re-litigate the entire criminal proceedings. He stated that:

> The Court sees no reason to hear any further viva voce evidence from any of the witnesses called to give evidence in the High Court. The Court will receive the transcript and exhibits pursuant to s 26(5) of the Coroner's Act 1988.

[16] The Coroner then limited the scope of the resumed inquest to the two issues identified in [2] above. He rejected submissions that the matters at issue were within the province of the Police Complaints Authority (to whom a complaint has been

made which has been deferred until completion of the inquest). He also rejected a submission that the inquest should be adjourned pending the outcome of the complaint to the Authority.

Submissions

[17] The case for Constable Abbott as applicant was presented by Ms Hughes. In general terms, Constable Abbott's case was supported by the Commissioner of Police, represented by Ms McDonald QC. Ms Aldred, representing the Coroner, informed me that the Coroner would abide the decision of the Court.

[18] Ms Hughes did not dispute that the Coroner was entitled to direct the resumption of the inquest under s 28(6) of the Act. But she submitted that the Coroner had no jurisdiction to admit evidence beyond that which was necessary to establish the circumstances of the death for the purposes of s 15(1)(a)(v). She further submitted that the circumstances of the death were clearly established in the criminal trial and that the inquiry should therefore be limited to any recommendations or comments the Coroner might wish to make under s 15(1)(b). She submitted that any such recommendations could and should be made on the basis of the transcript of evidence from the criminal trial, considered in the light of any submissions counsel for the parties might make at the resumed inquest. By consent, the statement of claim was amended to reflect the submission that there was no authority for the Coroner to hear further evidence because all the matters under s 15(1)(a) were adequately established.

[19] To the contrary, Mr Mansfield, on behalf of the Wallace family, submitted that the circumstances of the death were not adequately established in the criminal trial and that issues remained at large under both s 15(1)(a)(v) and 15(1)(b). Mr Mansfield submitted that the Coroner was obliged to resume the inquiry to deal with issues under the first of those provisions and had a discretion to consider making recommendations under the second of them. It followed, Mr Mansfield submitted, that the Coroner had no jurisdiction to limit the scope of the inquest in the way he did and that he was obliged to conduct an inquest which considered all matters relevant to the circumstances of the death.

[20] It was also submitted for the Wallace family that the Coroner had no jurisdiction to admit the evidence from the criminal trial under s 26(5) nor to direct that there should be no further oral evidence from witnesses called at the criminal trial. Rather, it was submitted, the Coroner was obliged to call any witnesses who gave evidence at the trial relevant to the circumstances of the death and to permit cross-examination by the parties. Specifically, it was submitted that nine identified witnesses who gave evidence at the criminal trial should be called by the Coroner to give evidence and made available for cross-examination. As well, the Wallace family would seek to tender evidence from the four witnesses whose briefs were delivered to the Coroner.

Are there any grounds to review the Coroner's decision to limit the scope of the inquiry to the two issues he identified?

[21] A central point in Ms Hughes' submission was that the Coroner was satisfied, as a matter of fact, that all of the matters specified in s 15(1)(a) of the Act were adequately established during the criminal proceedings. She pointed to s 28(6) and to the prohibition in s 26(6) against the admission of any evidence at an inquest which does not address s 15(1)(a) matters. Ms Hughes relied on an affidavit sworn by the Coroner and filed in this proceeding in which he stated that the resumption of the inquest was necessary to allow further inquiry to be made in terms of s 15(1)(b) of the Act. The Coroner went on to state in his affidavit that he accepted that all the matters listed in s 15(1)(a) had been established during the criminal trial.

[22] During the hearing before me, I expressed some concerns about the Coroner's affidavit. It is well established that judicial review proceedings generally proceed on the basis of the evidence before the decision-maker at the time of the decision (*Roussel Uclaf Australia Pty Limited v Pharmaceutical Management Agency Limited* [1997] 1 NZLR 650, 658 CA). It is not appropriate for the decision-maker to file an affidavit after the event seeking to offer further explanations for the decision made. While I accept that the Coroner acted in good faith in an attempt to assist the Court, material of this kind should not have been filed. I intend to ignore it.

[23] My inquiry on judicial review must be limited to the terms of the Coroner's decisions. I accept the submission made on behalf of the Wallace family that the Coroner's decision of 8 July 2003 made it clear that, while he was satisfied that the matters in s 15(1)(a)(i) to (iv) were established, he was not satisfied that all the circumstances of the death in terms of s 15(1)(a)(v) were established. That is clear from his express finding that the matters in s 15(1)(a)(i) to (iv) were established and from his statement in [16] of his decision that police training and instructions remained a live issue into which the Court was entitled to inquire as part of the circumstances of the death of Mr Wallace. In reaching that conclusion however, the Coroner considered there was a limit to the matters which could properly be said to be part of the circumstances of the death and identified the two specific issues to which the resumed inquest was to be confined.

[24] In these circumstances, I agree with the view expressed by Paterson J in *Hugel* that the Coroner was obliged to resume the inquest under s 28(6) of the Act for the purpose of establishing any remaining issues about the circumstances of the death under s 15(1)(a)(v) and for the purpose of considering whether to make recommendations under s 15(1)(b). However, I do not accept the submission made on behalf of the Wallace family that the Coroner is obliged to hear all relevant evidence relating to the circumstances of the death on an open-ended basis. In my view, he has a discretion under s 28(6) to confine the inquest to those aspects of the circumstances of the death which he does not consider to have been adequately established in criminal proceedings.

[25] There is nothing in the language of s 28(6) or any other parts of the Act to suggest that the Coroner does not have a discretion to limit the scope of the inquest so long as he complies with the Act. It is not for the parties to an inquest to determine the scope of the inquiry. The nature of the inquiry is prescribed by the Act and it is well established that an inquest is a fact finding exercise, not a method of apportioning guilt: *R v West London Coroner, ex parte Gray & Others* [1987] 2 All ER 129, 133 citing a passage from the judgment of Lord Lane CJ in *R v South London Coroner, ex parte Ruddock* (8 July 1982, unreported). The essence of these observations is captured in the following passage from Laws of New Zealand, *Coroners* at 25:

25 **General.**

A Coroner's Court is a Court of record. A Coroner's inquest is a judicial hearing presided over by a warranted judicial officer, who has most of the ancillary powers of a District Court Judge. An inquest is a fact-finding exercise rather than a method of apportioning guilt. The procedures and rules of evidence that are suitable for one exercise are unsuitable for the other. In an inquest there are no parties, there is no indictment, and there is no trial. There is simply an attempt to establish facts. It is an inquisitorial process, a process of investigation quite unlike a trial. The fact that cross examination by counsel for permitted interested parties is allowed does not detract from the inquisitorial nature of the inquiry, nor from the fact that the findings are not conclusive as to the civil or criminal liability of any person.

[26] Where an inquest has been adjourned until the conclusion of criminal proceedings associated with the death, it is entirely within the discretion of a Coroner to determine whether, and to what extent, the matters in s 15(1)(a) of the Act have been established. The Coroner may decide they have been fully or only partly established by the evidence given at the criminal trial. In the latter case the Coroner may direct that the resumed inquest be limited to identified issues as the Coroner did here.

[27] It is for the Coroner to weigh the public interest considerations bearing upon the inquest. As Heron J pointed out in *Matthews v Hunter* [1993] 2 NZLR 683 at 687-688, while a Coroner is confined to the purposes set out in s 15, when making recommendations under s 15(1)(b), the Coroner has a "useful public voice" and that "the wider public interest involved in the prevention of further loss of life requires a not too limiting interpretation of s 15(1)(b)".

[28] However, there are other public interest considerations to weigh as well. Here, there has been a criminal jury trial which canvassed extensively the circumstances of the death, including police policies and procedures and whether or not they were complied with by Constable Abbott and other officers in the circumstances of the case. It is not in the public interest that issues already adequately canvassed at the criminal trial be re-litigated at the resumed inquest except to the extent that the Coroner determines that the circumstances of the death were not adequately established at the trial or that they might be helpful when considering recommendations under s 15(1)(b). It is entirely open for the Coroner to

determine, as he did, that he could assess that material at the inquest on the basis of the notes of evidence and the exhibits produced, assisted as necessary by the submissions of counsel for the parties.

[29] I do not accept the submission made on behalf of Constable Abbott that the resumed inquest must be confined to considering the making of recommendations under s 15(1)(b). But neither do I accept the submission made on behalf of the Wallace family that the Coroner was obliged to consider all matters relevant to the circumstances of the death without limitation.

[30] I reach these conclusions for the reasons already given. But it is also necessary to deal with a further argument advanced on behalf of the Wallace family to the effect that the criminal trial had a narrow focus on the issue of self-defence and that the Coroner's brief under s 15 is wider than the issues relevant to the criminal trial. That submission was coupled with the further point that conflicts of evidence were not publicly resolved in the criminal trial and that the presiding Judge was not called upon to deliver a judgment. The jury simply determined by verdict that Constable Abbott was not guilty of murder or manslaughter.

[31] While acknowledging these points, my own examination of the transcript shows there was extensive examination of police policies and procedures with evidence called by James Wallace as informant and the opportunity to cross-examine Constable Abbott and the witnesses he called. In that respect, the trial was unusual because the victim's family were directly involved as a party to the private prosecution. That may be compared with trials prosecuted by the state where the victim's family is not a party and is not entitled to lead evidence or cross-examine witnesses.

[32] The prosecution called some 19 witnesses while the defence called a further nine. The transcript of evidence runs to over 300 pages and, in addition, the evidence of some 20 witnesses was read by consent. There were three police officers directly involved in the incident. One of these (Detective Constable Dombroski) gave evidence for the prosecution, while the other two, (Constables Abbott and Herbert) were called for the defence and were cross-examined at length.

A number of other police officers with relevant evidence were called for the prosecution and the defence. Similarly with lay witnesses who were at or near the scene at the time.

[33] The prosecution called a forensic scientist and a forensic pathologist. The defence also called a forensic pathologist. The evidence of these witnesses covered the cause of death, the severity and survivability of the wound sustained by the deceased, as well as evidence about the sequence of the shots and the relative movements of Constable Abbott and the deceased at that time.

[34] A number of witnesses gave evidence for the prosecution and the defence in relation to police policies and procedures in confrontational situations and the use of firearms. There was also extensive evidence on other options which might have been available to the police officers on the night in question. These included the use of pepper spray, batons, police dogs, the option of retreating and waiting for further backup, and the techniques needed to "cordon and contain" a suspect. There was extensive questioning of the officers directly involved on these subjects as well as evidence from experienced serving or former police officers. For example, the prosecution called Mr Rowe and another former police officer a Mr Maubach. The defence called Superintendent Matthews and several other serving or former police officers with experience on issues such as the use of firearms and other options which might have been employed on the night in question. Again, these witnesses were extensively cross-examined on behalf of the Wallace family.

[35] Reference should also be made to the exhibits produced at the criminal trial. These included the police weapon involved in the shooting as well as a golf club which was in the possession of the deceased. Exhibits also included records of police communications during the incident. I also note that both the prosecution and the defence made extensive admissions of fact on a variety of issues to avoid the need to call evidence on those subjects.

[36] Finally on this issue, I do not accept Ms Hughes' submission that there was no evidential foundation for the Coroner's finding that some issues under s 15(1)(a) and (b) were still 'live' as he put it. It was within the Coroner's discretion to

determine that question which essentially came down to an evaluation of the large volume of evidence from the trial assessed in the light of the statutory purposes of an inquest as defined by s 15. No grounds were established which would enable this Court to interfere with the Coroner's decision.

Are there grounds to review the Coroner's decision not to hear any viva voce evidence from any of the witnesses who gave evidence in the High Court?

[37] The resolution of the second main issue depends substantially on the proper construction of s 26 of the Act. Except as provided elsewhere in the Act, s 26(1) obliges the Coroner to hear evidence from any person who tenders evidence relevant to any of the matters required to be established by s 15(1)(a) and obliges him to hear evidence from any other person whom the Coroner "thinks it appropriate to examine".

[38] Pausing at that point, it is clear that, subject to s 26(6), the Coroner is obliged by s 26(1)(a) to hear evidence from the witnesses tendered by the Wallace family so long as he considers the evidence to be relevant to any of the matters required by s 15(1)(a) to be established. As the Coroner has determined to limit the resumed inquiry to the two identified aspects, it follows that he is entitled to determine whether the evidence called by the Wallace family (or indeed any other party) is relevant to those identified issues.

[39] Apart from determining relevance, the Coroner must also observe s 26(6) and shall not admit any evidence at the inquest unless he is satisfied that its admission is necessary or desirable for the purpose of establishing any matter specified in s 15(1)(a).

[40] In combination, these provisions mean that it is for the Coroner to determine both the relevance of the evidence tendered under s 26(1)(a) and also to determine under s 26(6) whether it is necessary or desirable for that evidence to be admitted.

[41] In relation to s 26(1)(b), the Coroner has a discretion to determine whether it is appropriate to examine the evidence of any other person (i.e. any person other than

one whose evidence is tendered under s 26(1)(a)). This provision enables the Coroner to examine any other witness if he considers it appropriate to do so. Just as in the case of evidence tendered from any person under s 26(1)(a), the Coroner must not admit any evidence from any person under s 26(1)(b) unless satisfied that its admission is necessary or desirable for the purpose of establishing any of the s 15(1)(a) matters. Subject to that restriction, a Coroner may admit at the inquest any evidence the Coroner thinks fit, whether or not it would be admissible in a Court of law: s 26(5).

[42] A witness who gives evidence at an inquest must do so on oath and may be cross-examined by the Coroner: s 26(2) and (3). As well, any person specified in s 23(2) and any other person with a sufficient interest in the outcome of an inquest may, whether personally or by counsel, attend an inquest and cross-examine witnesses: s 26(3). There is no doubt that the Wallace family is entitled to be represented in this way under s 23(2)(a) as immediate family members.

[43] It was submitted on behalf of the Wallace family that the Coroner was not entitled to rely on s 26(5) in order to admit as evidence at the resumed inquest the transcript of evidence and exhibits from the criminal trial without calling the witnesses for examination at the inquest. Reliance was placed on s 26(7) to (9). Those subsections make relatively elaborate provision enabling a witness at an inquest to give evidence by tendering a previously prepared written statement and confirming it on oath. That course is only permissible if the Coroner is satisfied that there is no reason making it desirable for the witness to give the evidence orally and there is no objection to that course from any person attending the inquest who is entitled to cross-examine. If that course is followed, then the witness may still be cross-examined as if the material in the written statement had been given orally. The written statement then forms part of the depositions of the inquest. The evidence given by each witness at the inquest must be put into writing by the Coroner, read to the witness and signed both by the witness and the Coroner.

[44] I do not entertain any doubt that the Coroner has a discretion to decide whether it is appropriate to examine any of the witnesses from the criminal trial. That follows from the inquisitorial nature of the inquiry and the wording of the

statute: *McKerr v Armagh Coroner & Ors* (1990) 1 All ER 865, 868-870 (HL). But the more difficult question is whether the Coroner may rely on s 26(5) to admit evidence at the inquest from the criminal trial without the witness being called and the formal processes under ss 26(2), (3) and (7) to (9) being followed.

[45] It is evident that, where a witness is called, the process required to be followed under s 26 is a formal one. In the end however I accept the submission made on behalf of Constable Abbott and the Commissioner of Police that, read as a whole, s 26(5) does permit the Coroner to admit evidence from the criminal trial at the resumed inquest without calling the witnesses.

[46] Strictly speaking, the evidence from the criminal trial is hearsay so far as it is sought to rely on it as evidence at the resumed inquest. But it is for the Coroner to determine under s 26(1)(b) whether it is appropriate to examine the witness in question. If he determines that it is not appropriate to examine the witness, then the Coroner may admit the evidence from the criminal trial without calling the witness even though it would not be admissible in a Court of law. If it were otherwise, then, in the absence of consent from the parties, the Coroner could not admit as evidence, material such as medical, hospital or other records without calling the maker of those records or someone with sufficient knowledge of them to produce them and be questioned. Similarly with statements made to the police or evidence produced in the form of an affidavit.

[47] That would severely constrain the Coroner in carrying out his inquisitorial role. It would also be inconsistent with the plain and unqualified language of s 26(5) and the Coroner's discretion to decide under s 26(1)(b) whether it is appropriate to examine a witness. Under that provision a Coroner could decide, for example, that the maker of a statement to the police did not give evidence of sufficient importance to warrant examining the witness, or conversely, that for fairness or other reasons the witness should be called and made available for cross-examination.

[48] Here, of the nine witnesses identified by the Wallace family from the criminal trial, four of them were called by the Wallace family and five by the defence. The named witnesses included Constable Abbott and other senior police

officers called in his defence. The family has had the opportunity to participate fully in the criminal trial, to lead evidence, and to cross-examine Constable Abbott and his witnesses. It was within the Coroner's discretion in these unusual circumstances to determine that it was not appropriate to examine those witnesses at the inquest and to admit the evidence from the criminal trial under s 26(5).

[49] Mr Rowe is in a different category from the other witnesses from the trial identified by the Wallace family because his brief has been tendered as the Coroner directed. He was a witness at the criminal trial but I find that, subject to the issue of relevance to the identified issues and the application of s 26(6), the Coroner is obliged to hear his evidence if tendered by the Wallace family under s 26(1)(a).

Evidence of matters under s 15(1)(b)

[50] A subsidary submission made on behalf of Constable Abbott was that if the Coroner was already satisfied that all of the matters under s 15(1)(a) had been adequately established by evidence at the criminal trial, then s 26(6) prohibited the calling of any further evidence. It was submitted in particular, that s 26(6) meant that the Coroner was not permitted to hear evidence in relation to section 15(1)(b) but was limited to making any recommendations or comments under that provision designed to avoid deaths occurring from similar circumstances in the future.

[51] It is not strictly necessary for me to determine this issue because I am satisfied the Coroner is entitled to consider further evidence in relation to the identified issues under s 15(1)(a) and that the admission of evidence on those matters, coupled with the hearing of counsel's submissions, is likely to provide a sufficient evidential foundation for the Coroner to make comments or recommendations under s 15(1)(b) if he sees fit to do so.

[52] I am also satisfied that the phrase "the circumstances of the death" under s 15(1)(a)(v) is sufficiently wide to include evidence which bears upon s 15(1)(b) matters. If it were otherwise, one of the evident purposes of the Act would be frustrated. Coroners would be unnecessarily constrained from bringing matters to

public attention which could lead to the avoidance or reduction of deaths in similar circumstances in the future. That cannot have been the statutory intention.

[53] To put the matter beyond doubt, I endorse the recommendation of the Law Commission in its report *Coroners* (NZLC, R62, 2000) at [125] that s 26(6) be extended to cover s 15(1)(b) issues as well.

Scope of the evidence to be called by the Wallace family

[54] Ms Hughes submitted on behalf of Constable Abbott that the evidence of the four witnesses, whose briefs have been delivered to the Coroner by the Wallace family, was either outside the scope of the two issues under s 15(1)(a)(v) which the Coroner identified or would not assist the Coroner in view of evidence given at the criminal trial. In particular it was submitted that the injuries sustained as a result of the shooting were extremely serious and that it was unlikely Steven Wallace would have survived even if medical assistance had been received earlier. Secondly, she submitted that the evidence to be called from the two former police officers was outside the scope of the Coroner's direction because the witnesses accept the appropriateness of the police policy and procedures in cases such as this. She submitted that these witnesses simply challenged whether police policy and procedures were complied with in the present case.

[55] I do not intend to enter this debate. It is entirely a matter for the Coroner to determine the issue of relevance to the identified issues and it is a matter for him to rule on that issue in relation to the Wallace family briefs of evidence. In the absence of any such ruling, it is premature for this issue to be raised.

Summary

[56] I find in summary:

a) There are no grounds established to review the Coroner's decision to resume the inquest and to limit it to a consideration of the two issues he has identified.

b) Except in the case of the witness Mr Rowe, there are no grounds established to review the Coroner's decision not to hear oral evidence from any of the witnesses who gave evidence in the High Court and to admit that evidence under s 26(5) of the Act.

c) The Coroner is obliged to hear the evidence tendered by the Wallace family under s 26(1)(a) of the Act but only to the extent that the Coroner considers that the evidence is relevant to the two identified issues and that its admission in evidence is necessary or desirable for the purpose of establishing those issues.

d) It will be a matter for the Coroner to determine the issue of relevance and the necessity or desirability of the admission of the tendered evidence either at or prior to the inquest.

[57] I acknowledge the anguish and distress this tragic incident has occasioned to the Wallace family as well as to Constable Abbott and the other police officers involved. The Coroner must now be permitted to fulfil his statutory duty and to bring this matter to a conclusion as promptly as the circumstances will allow.

[58] I reserve for further consideration whether any formal orders are required.

[59] I also reserve the issue of costs. But the parties may consider this is a case where costs should lie where they fall given that, except in one limited respect, neither side has been successful on review. If there is no agreement I will receive submissions from the applicant within 14 days of this decision and from the respondents within 14 days after receipt of the applicant's submissions.

A P Randerson J
Chief High Court Judge

User Name: Safiya Alamin

Date and Time: Tuesday, 21 December 2021 10:10:00 AM NZDT

Job Number: 160330523

Document (1)

1. *Sarjantson v Humberside Police Chief Constable [2013] All ER (D) 205 (Oct)*

Client/Matter: -None-

Search Terms: state breach protective duties

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
NZ Cases	-None-

Overview | *[2013] EWCA Civ 1252*, | [2014] QB 411, | *[2014] 1 All ER 960*, | [2013] 3 WLR 1540, | **[2013] All ER (D) 205 (Oct)**

Sarjantson v Humberside Police Chief Constable [2013] All ER (D) 205 (Oct)

[2013] EWCA Civ 1252

Court of Appeal, Civil Division

EnglandandWales

Lord Dyson MR, McFarlane and Sharp LJJ

18 October 2013

Human rights – Infringement of human rights – Damages – Right to security of person – Protection from physical injury – Police being called to incident in which claimant being attacked – Claimant being victim of assault by group of males resulting in serious head injuries – Internal investigation concluding police delayed attending scene of incident by eleven minutes – Claimant bringing claim for damages on grounds that defendant police chief constable *breached* claimant's human rights – Judge striking claimant's claim out, holding claim having no prospects of success – Judge determining, inter alia, duty claimed by claimant upon defendant not being established in circumstances – Claimant appealing – Whether judge erring – Whether defendant in *breach* of duty to protect claimant from physical injury – Human Rights Act 1998, s 6 – European Convention on Human Rights, arts 2 and 3.

Abstract

*Human rights – Infringement of human rights. The claimant had issued proceedings alleging that the defendant Chief Constable had been in **breach** of his statutory under article 2 and/or 3 of the European Convention on Human Rights by failing, without justification, to take reasonable steps to protect him from physical violence at the hands of a group of young men. That claim was struck out by the judge as having no prospects of success because: (i) the positive duty as explained in Osman v United Kingdom(2000) 29 EHRR 245 could not have arisen because the claimant was only 'identified' at a time when it was too late; and (ii) even if the claimant did not have to be 'identified' before an Osman duty could have arisen, it could not have done so on the facts of the case. The claimant appealed to the Court of Appeal, who held, inter alia, that the judge had reached the wrong conclusion and there would be a direction for the case to go to trial.*

Digest

The judgment is available at: *[2013] EWCA Civ 1252*

At 01:11:43 on 9 September 2006, a log was created from a 999 call made by ID reporting that a number of names males (the assailants) were smashing the windows of a home in Grimsby with baseball bats and were after an individual whom they had already assaulted earlier that night. After 1.21 minutes of the call, ID requested that the police 'better get here quick'. After 5.59 minutes, ID ***stated*** that the assailants were beating up his nephew and later ***stated*** that the assailants had also beaten the claimant with baseball bats. In addition to another separate 999 call, LB called at 01:12. She reported that her boyfriend had been beaten up by the assailants and could the police 'send the riot van'. At 7.34 minutes of that call, LB mentioned the claimant by name. At 8.04 minutes into that call, she told the police that the claimant had been battered with a bat and at 8.24 minutes she told the police that he needed an ambulance. Accordingly, the first time that the police had been notified about a violent attack on the claimant had been at approximately 01:19, some seven minutes after the 999 calls had been made. The claimant sustained a serious head injury which had caused short and long-term memory loss. The assailants were convicted of causing grievous bodily harm and violent disorder and sentenced to substantial terms of imprisonment. An internal police investigation was made of the incident. The report was critical of the performance of the police. It concluded that there had been an eleven minute delay before police officers were deployed to the scene of the incident (see [9] of the judgment). The claimant issued proceedings alleging that the defendant Chief Constable had been in ***breach*** of his statutory duty under s 6 of the *Human Rights Act 1998* in that, in ***breach*** of arts 2 and/or 3 of the European Convention on Human Rights (the Convention), his police officers had failed, without justification, to take reasonable steps to protect them and their family from physical violence at the hands of the assailants. The case advanced before the judge had been that there had been a ***breach*** of the positive duty to take measures to avert a real and immediate risk to life and to avert a real and immediate risk of injury as required respectively by arts 2 and 3 of the Convention. The leading Strasbourg authority on the existence and scope of the positive duty under art 2 was *Osman v United Kingdom*(2000) 29 EHRR 245 (*Osman*) (the *Osman* duty). The judge struck out the claim as having no prospect of success, on two grounds. First, she said that the *Osman* duty could not have arisen until approximately eight minutes after the first call when the claimant was 'identified' for the first time. By that time, it was too late. Secondly, even if the claimant did not have to be 'identified' before an Osman duty could have arisen in his favour, it could not have arisen on the facts of the case because there had been insufficient time between the first call and the time of the assault for the police to attend the incident. Further, the judge held that it had taken the first police officer 13 minutes to arrive at the scene (the target time being 15 minutes) and had there been an immediate dispatch the officers would not have arrived until after the assault. The claimant appealed against that decision of the judge.

He contended that neither of the reasons given by the judge for holding that there was no *Osman* duty in the case had been sound. The judge's conclusions were inconsistent with clear Strasbourg jurisprudence and were wrong in principle. Further, the defendant's third reason, which had been advanced in the instant case and contended that once a risk to life or limb had materialise, there was no duty under arts 2 or 3 to take operational measures to avert that risk, was wrong in law. Accordingly, it fell to be determined: (i) whether it was a condition, under the *Osman* duty, that there was a real and immediate risk to an identified or identifiable person; (ii) whether there had been no

breach of the duty because there had been insufficient time for the police to attend the incident; and (iii) whether the duty could have arisen once the risk had materialised.

The appeal would be allowed.

(1) It was established law that art 2 of the Convention might imply, in certain well-defined circumstances, a positive obligation on the authorities to take preventive operational measures to protect an individual whose life was at risk from the criminal acts of another individual. The scope of that obligation was a matter of dispute between the parties. Such an obligation had to be interpreted in a way which did not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life could entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration was the need to ensure that the police exercised their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately placed restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in arts 5 and 8 of the Convention. In the opinion of a court, where there was an allegation that the authorities had violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it had to be established to its satisfaction that the authorities had known or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonable, might have been expected to avoid that risk (see [13] of the judgment).

In the present case, there was no reason in principle for limiting the scope of the defendant's duty. Neither the judge nor counsel for the defendant had suggested any reason for doing so. Such a limitation would be inconsistent with the idea that the provisions of the Convention should be interpreted and applied in such a way as to make its safeguards practical and effective. Taking the facts of the present case, the distinction drawn by the judge was arbitrary and unprincipled and was unsupported by the Strasbourg jurisprudence. The essential question in a case such as the instant one was whether the police had known or ought to have known that there was a real and immediate risk to the life of the victim of the violence and whether they had done all that could reasonably have been expected of them to prevent it from materialising. Where the police were informed about an incident of violent disorder, the *Osman* duty might arise regardless of whether they knew or ought to have known the names or identities of actual or potential victims of the criminal activity. It was sufficient that they knew or ought to have known that there were such victims (see [23]-[25] of the judgment).

Osman v United Kingdom (2000) 29 EHRR 245 applied; *Mastromatteo v Italy*[2002] ECHR 37703/97 considered; *Oneryildiz v Turkey*[2004] ECHR 48939/99 considered; *Makaratzis v Greece*[2004] ECHR 50385/99 considered; *Gorovenky and Bugara v Ukraine*[2012] ECHR 36146/05 considered.

(2) As the court had made clear in *Osman*, it had to be established that the police knew or ought to have known 'at the time' of the existence of a real risk and immediate risk to the life of the individual from the criminal acts of a third

party. That implied that compliance with art 2 should not be determined with the benefit of hindsight. The fact that a response would have made no difference was not relevant to liability (see [27], [28] of the judgment).

In the present case, the judge had erred on the second issue. The duty to provide protection had arisen at the time when the first emergency call had been made. At that time, it was impossible to know whether and, if so, how quickly an assault would take place. There had been therefore no reason at that time for the police to believe that immediate attendance was not required. Indeed, the time and contents of the 999 calls suggested that there had been every reason to think that there was an imminent likelihood that the assailants would injure or kill one or more persons who were in the vicinity. Although it was accepted that if it were established that a timeous response by the police in the instant case would have made no difference, it would be relevant to quantum. A finding that a response would have made no difference might mean that there was no right to damages. But it was not relevant to liability (see [26], [28] and [29] of the judgment).

(3) It went without saying that if the police were told that a person had been killed, it was too late to take measures to prevent the risk of death materialising in that case. However, if the police were told that there was a gang which was threatening and/or committing acts of violence and the incident was on-going, there was no basis for saying that there was no duty to take operational measures (if those were reasonably required) to avert the risk of further violence. There was no support for such a proposition in the Strasbourg jurisprudence and it was inconsistent with the idea which underpinned the *Osman* duty. If the police were or ought to have been aware that there was a real and immediate risk to a person's life, they were under a duty to take reasonable measures to prevent the risk from materialising; and it made no difference that the risk had arisen during an incident which had already commenced (see [31] of the judgment).

The issues raised in the instant case were of considerable importance for the police. For the reasons that had been given, the judge had reached the wrong conclusion on the first and second issues and the submissions in relation to the third issue would be rejected. It did not, however, follow that the claim for damages should succeed (see [32], [33] of the judgment).

The appeal would be allowed and there would be a direction that the case go to trial (see [33]-[36] of the judgment).

Per curiam: 'The facts strongly suggest that to have required the police to respond in accordance with the target of 15 minutes would not have imposed an unreasonable or disproportionate burden on them. It will, however, be a matter for the judge to decide whether the police failure in this case amounted to a ***breach*** of the duty bearing in mind all the circumstances of the case including, but not limited to (i) the length of the delay, (ii) the reasons for the delay, and (iii) the gravity of the risk of which they were made aware by the 999 callers. But hindsight should be ignored' (see [33] of the judgment).

Hugh Southey QC (instructed by Deighton Pierce Glynn) for the claimant.

Fiona Barton QC (instructed by Plexus Law) for the defendant.

Rasheed Sarpong Solicitor.

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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2014-443-066
[2021] NZHC 1963

IN THE MATTER	of the New Zealand Bill of Rights Act 1990
BETWEEN	RAEWYN WALLACE Plaintiff
AND	THE ATTORNEY-GENERAL Defendant

Hearing:	13–17 July 2020; further material received 20 and 29 October 2020, and 4 and 6 November 2020.
Counsel:	G E Minchin for Plaintiff P J Gunn, G M Taylor and N J Ellis for Defendant
Judgment: (released to parties)	30 July 2021
Reissued:	2 August 2021

JUDGMENT OF ELLIS J

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INTRODUCTION

[1] For reasons that are still not understood today, in the early hours of 30 April 2000 Steven Wallace became extremely angry. He vented his anger by breaking windows at the Waitara Police Station and then along the main street of the town using a set of golf clubs and a baseball bat. When Police arrived at the scene, he struck the windscreen of the patrol car with one of the clubs. Two officers then went to the nearby Police Station. They armed themselves with Police regulation Glock pistols and returned to the scene. Sixty-four seconds later, Steven Wallace had been shot four times and was lying in the middle of the road, mortally wounded. He died on the operating table at 9.05 am, that same morning.

[2] From the first to the last, Steven Wallace's encounter with Police lasted six minutes. He was 23 years old.

[3] In these proceedings, Steven's mother, Raewyn Wallace, makes a claim against the Crown relating to his death.[1] Mrs Wallace's principal claim is that the events of 30 April 2000 and their aftermath breached Steven's right to life under s 8 of the New Zealand Bill of Rights Act 1990 (the NZBORA). This follows a private prosecution brought by the Wallace family against the officer who fired the shots, Constable Keith Abbott,[2] that resulted in his acquittal for murder. Mrs Wallace says that despite the acquittal, Steven's death cannot be justified as a killing in self-defence. Mrs Wallace seeks declarations to these effects and compensation.[3]

[4] An earlier application by the Crown to strike out Mrs Wallace's claim did not succeed. Brown J noted that the claim raised difficult and novel issues, which it certainly does.[4] The principal of them are:

(a) whether the shooting was in self-defence, and thus a deprivation of life on grounds established by law and consistent with the principles of fundamental justice, in terms of s 8 of the NZBORA;

(b) whether s 8 imposes an obligation on the Crown to investigate Steven's death;

(c) if so, whether that obligation was met through the various inquiries that did occur into the circumstances of Steven's death;

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1 The proceedings were commenced on 18 September 2014 by Steven's father, James, acting as administrator of Steven's estate. After James's death, Steven's mother Raewyn took them over. Although the proceedings named both the Commissioner of Police and the Attorney-General as defendants, I agree with the Crown that the Commissioner is not vicariously liable for the acts of omissions of individual officers. The Attorney-General, on behalf of Police, is the only appropriate defendant.

2 Although Constable Abbott is often referred to as "Senior Constable" Abbott, the "Senior" signifies seniority not rank, and was not part of his official designation.

3 She seeks compensation of $200,000 for the right to life breach and $75,000 for the right to justice breach (which is the amount paid by the family to bring the private prosecution against Constable Abbott).

4 *Wallace v Commissioner of Police* [2016] NZHC 1338.

(d) whether s 8 imposes an obligation on state actors (including Police) to plan and control potentially life-threatening operations in a way that minimises the risk to the life of individuals;

(e) if so, whether that obligation was breached here and;

(f) whether the Solicitor-General's second decision not to prosecute the officer concerned constituted a breach of s 27 of the NZBORA or was otherwise unlawful.

PRELIMINARY MATTERS

[5] Steven was killed over 20 years ago. The passage of time, the wealth of relevant material and evidence, and the nature of the matters at issue have presented some unique challenges for the Court. As I said on a number of occasions to Mr Minchin (who appeared on behalf of Mrs Wallace) these proceedings are not and cannot be a de facto Commission of Inquiry. That said, aspects of this case seem to have come very close to one.

[6] For those reasons, it seems useful to begin by explaining how I have attempted to tackle those challenges. I explain why the question of self-defence can be revisited in this case. And I also explain why certain matters raised by Mrs Wallace's claim go beyond what I am prepared to consider in this judgment.

The evidence and my approach to it

[7] By dint of the long history of this matter, which includes a Police investigation, a depositions hearing, a criminal trial, an inquest, and an investigation by the Independent Police Conduct Authority (IPCA), the evidential picture is complex. The Court had before it the following material, all of which I have attempted to review and consider:

(a) the formal written statements made by witnesses soon after Steven's death;

(b) the notes of evidence from the depositions hearing and criminal trial of the police officer concerned;[5]

(c) notes of evidence from the Coroner's inquest;

(d) the various reports that have been written about the circumstances of Steven's death;

(e) further documentary evidence in the common bundle (some of which is admitted by consent);

(f) DVDs containing (among other things) television footage from both the time of the shooting and the criminal trial;

(g) the oral evidence of five witnesses given in this High Court proceeding; and

(h) a statement of agreed facts dated 20 September 2019.

Approach

[8] Strictly speaking, the record of the evidence given previously, in other forums, is hearsay. But the parties were agreed that—subject to any specific objections—I could accept it as admissible. I agree that such evidence passes the thresholds in s 18 of the Evidence Act 2006 (the EA) in that:

(a) the evidence was given under oath, which, provided the witnesses' answers under cross-examination are also included, provides a reasonable assurance of reliability; and

(b) undue expense and delay would be caused if the (former) witnesses were required to be witnesses in these proceedings.[6]

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5 The transcript from the depositions hearing is, itself, some 1,200 pages long. The transcript of the evidence at trial is 440 pages.

6 I also note that this was the approach adopted by the Coroner in the 2003 inquest into Steven's death and accepted by Randerson J in this Court on review in *Abbott v Coroners Court of New Plymouth* HC New Plymouth CIV-2004-443-660, 20 April 2005.

[9] More difficult, however, are questions of weight and questions of how conflicts in the evidence should be resolved. Although the Crown submitted that the (limited) evidence given in this Court should be given the most weight,[7] I am not sure I agree. For example, if something said by a witness in 2020 conflicts with evidence he or she gave at a time much closer to the shooting, there are good reasons for preferring the reliability of the earlier account.[8]

[10] Similarly, I am not sure why preference should be accorded sworn evidence given in the criminal trial as opposed to sworn evidence given during depositions. The Crown submission that the trial evidence should be preferred because it is later in time is not especially convincing. In a case such as this, it is just as logical that evidence given at a time *closer* to the events in question would be more reliable.

[11] All that being said, however, I have found in the course of writing this judgment that issues and difficulties of the sort just mentioned have proved more theoretical than real. I therefore do not need to express a concluded view on those issues.

[12] The documentary material that has never been produced through a witness at any of the previous hearings is arguably different. It, too, is hearsay. Some would be admissible by virtue of the business records exception contained in s 19 of the EA. For example, the report prepared by Detective Inspector (DI) Pearce at the conclusion of the Police homicide inquiry (the Pearce report), which is potentially central to both the "investigation" aspect of the s 8 claim arguably falls into this category. But statements made to Police in the course of the homicide inquiry (many of which are repeated verbatim in the Pearce report) are expressly excluded from the EA definition of "business records".[9] Nonetheless, in the circumstances of this case, I consider such formal statements also pass through the s 18 admissibility gateway. Where the makers of such statements went on to give sworn evidence either at depositions or at trial, however, I will (if necessary) afford primacy to that later sworn evidence.

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7 Again, subject to any specific relevance or admissibility issues.

8 I am referring to Sergeant Dombroski by way of example only. I am not saying that there were any material conflicts between his various statements.

9 This exception (which was inserted in 2016) seems intended primarily to catch statements made by witnesses to Police officers and written down by the officers in their notebooks.

[13] I do not propose to address specific admissibility challenges at the outset. Rather, I will simply deal with them individually if and when the need arises.

[14] And lastly, it is important to note as a preliminary matter that, as I understand it, Constable Abbott has long since left the Police force. He was not a party to this proceeding and was not called to give evidence at the hearing before me, although the other officer directly involved in the shooting (Constable Jason Dombroski[10]) was. While there is no claim now made against Constable Abbott personally, there might still have been a natural justice concern if Mrs Wallace had succeeded in her substantive s 8 claim. In light of my conclusion on the question of self-defence, however, the concern does not need to be addressed.

Why the question of self-defence can be revisited

[15] Despite Constable Abbott's acquittal at trial, the Crown accepts that the question whether he killed Steven in self-defence is at large in these proceedings. That is because the acquittal established only that the jury was *not* satisfied beyond reasonable doubt that he had *not* acted in self-defence. Moreover, and as I will explain later, the standard, and the burden, of proof is different (and more favourable to Mrs Wallace) in these proceedings.[11]

[16] As I will also discuss in more detail later, the post-trial investigations into the incident—by the Coroner and the IPCA—proceeded on the assumption that the jury's verdict represented a positive finding that the shooting *was* justified in self-defence. As just noted, that is not the case. The jury would have been bound to acquit Constable Abbott even if they had thought Constable Abbott had *probably not* acted in self-defence.

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10 Constable Dombroski has since become Sergeant Dombroski. But for the purposes of consistency with the other inquiries and reports, I will refer to him by his rank at the relevant time.

11 The Crown accepts that the civil standard of proof (the balance of probabilities) applies, but disputes that the burden of proof has shifted away from Mrs Wallace. That issue is discussed later in this judgment.

Issues that will not be further considered

[17] A number of the factual matters raised by Mr Minchin on Mrs Wallace's behalf have, in my view, been fully ventilated and unassailably determined in the past. As well, there are several other issues raised by Mr Minchin that, while relatively new, simply do not have an adequate evidential foundation. I think it is useful to address these at the beginning of this judgment so that no further time need be spent discussing them.

Whether someone other than Constable Abbott shot Steven (and Exhibit D05)

[18] Mrs Wallace now questions whether it really was Constable Abbott who shot Steven. The suggestion is that it may have been Constable Dombroski who (also or instead) did so.

[19] Mr Minchin submitted that this theory is supported by the location in which Police found a relatively undamaged bullet (in front of the pharmacy, behind and to the left of where Constable Abbott was standing at the time of the shooting). The bullet, labelled by police as Exhibit D05, had fragments on it that matched Steven Wallace's clothing, indicating that it had hit him. Evidence from Mr Wilson (a forensic scientist) at depositions confirmed that there was no reasonable explanation as to how it had ended up there, with him saying "it is highly unlikely that it has hit the post office and rebounded that far back across the road". His suggestion was that it must have been moved by a passer-by before it was found.

[20] I am unable to accept this submission. While there were admitted forensic omissions by Police at the beginning of their investigation (the failure to test the guns, or the hands of the officers for gunpowder residue, discussed later) the theory is inconsistent with the location and grouping of the spent cartridges. It is not supported by the ballistics evidence (discussed below), which confirmed that all bullets were fired from the same pistol. Moreover, the proposition that Constable Abbott would accept responsibility for shots he had not fired is deeply counter-intuitive.

Whether Constable Abbott had been drinking on the evening of 29 April

[21] Constable Abbott was awoken at around 3 am on 30 April to attend the incident involving the breaking of the windows. At various points it has been suggested that he might have consumed alcohol only a few hours before the shooting and that he was, accordingly, to some extent impaired.

[22] Inquiries were made as to Constable Abbott's activities before going to bed on the evening of 29 April during both the initial Police investigation and the later IPCA investigation. In particular, the inquiries focused on rumours that Constable Abbott had attended a private function at the Waitara Fire Station late that night, drinking alcohol while there.

[23] Police interviewed members of the public with whom Constable Abbott had interacted between 3 pm and 11 pm on 29 April (when he was on duty). Also interviewed were his wife and those who had attended the fire station function, who all said he had not been there. That was confirmed by a check of the Waitara Police Station communication devices, which included details of Constable Abbott's activities. The police investigation concluded that Constable Abbott had not attended a private function that evening.

[24] And in its much later report, the IPCA concluded the same, saying that there was no evidence Constable Abbott had attended the function:

> The evidence of both inquiries indicates that Senior Constable Abbott did not attend either function, and that these rumours have no foundation. Rather, the evidence establishes that Senior Constable Abbott worked his rostered shift from 3pm to 11pm on Saturday 29 April 2000 and arrived home at about 11.15pm. After eating a meal and consuming a non-alcoholic drink he watched television and went to bed at about midnight. The next event was his urgent recall to duty at 3.48am on the morning of Sunday 30 April 2000.

[25] Nor is it possible that Constable Abbott attended an Armed Offenders Squad (AOS) farewell function that evening. Although Constable Abbott was a member of the AOS, the function had been in New Plymouth. The evidence summarised above similarly establishes that he did not attend it.

[26] Mr Minchin nonetheless urged me to find otherwise, by drawing an inference from:

(a) the fact that the Fire Station (or the AOS) function was one that Constable Abbott might ordinarily have attended;

(b) Constable Abbott's mistaking of Steven for an acquaintance of his named David Toa (a point discussed separately later) which, Mr Minchin says is otherwise "inexplicable"; and

(c) the failure by Police to administer a breath or blood alcohol test to Constable Abbott immediately after the incident.

[27] It is simply not open to me to do as Mr Minchin asks. Even *without* the other, direct and conflicting evidence referred to by the IPCA, the points just mentioned would be an inadequate evidential basis for such an inference. I take the point no further.

Whether Constable Abbott was suffering from PTSD from a prior shoot-out

[28] Constable Abbott had been a member of the AOS from December 1986 and attended numerous callouts involving armed offenders. In 1991, along with other AOS officers, he was shot at during an attempted aggravated robbery by an armed gang at the TSB Bank in Moturoa near New Plymouth.

[29] Mr Minchin submitted that it is likely (and that the Court can be satisfied) that, as a result of this incident, Constable Abbott was suffering from post-traumatic stress disorder (PTSD) and that his judgement on the morning of 30 April 2000 was affected by it. I believe the basis for this contention was twofold. First, the shoot-out would, undoubtedly, have been extremely frightening. And secondly, it relies on material obtained by the Wallace family's lawyer (Mr Rowan QC) that was not led in evidence at Mr Abbott's trial. That material seems to have been derived from a supposedly anonymous interview (the interviewee later being said to be Constable Abbott) with *The Daily News* about a year after the shootout but republished after the end of Constable Abbott's 2002 trial, under the banner "Shootout haunted Abbott". It included the following:

> Mr Abbott suffered flashbacks, anxiety attacks, and tearful bouts of depression after the December 1991 shootout at New Plymouth's Moturoa PostBank. He also declared he would shoot to kill if caught in the same situation again.
>
> Fortunate not to be hit when an armed robber fired at him from close range, Mr Abbott described the ordeal as "the most horrendously mind-shattering experience I had ever encountered".
>
> He sought help from a psychologist, had trouble sleeping, and temporarily transferred to a desk job at the New Plymouth Police Station.
>
> …
>
> Mr Abbott struggled to cope in the aftermath of the PostBank showdown.
>
> "Coming to terms with how close to death I had come played havoc on [sic] my life," Mr Abbott said.
>
> "Repeated visits to a psychologist during the first few weeks has failed to clear the problem adequately.
>
> "It has resulted in sleepless nights and, sometimes with no apparent warning, periods of tearful depression have overcome me." He concluded: "I will be seeking to continue my professional therapy, but see the only cure as time."

[30] Even assuming that the originally unidentified interviewee was, indeed, Constable Abbott, such reports are not a sufficient evidential basis for concluding that he was suffering from PTSD either at the time of the interview or almost a decade later. Moreover, this issue too was dealt with as fully as possible by the IPCA in 2008, when it went so far as to seek expert advice on the issue. The Authority said in its report:[12]

> Based on the opinion of an expert in PTSD who was consulted by the Authority, given the passage of time it is not possible to conclusively establish whether or not Senior Constable Abbott was suffering from any form of trauma, including post-traumatic stress disorder, on 30 April 2000. However, there is no evidence to indicate that he was.

[31] No expert evidence to the contrary was identified or given before me. There is no possible basis on which I can take this matter further.

Whether Steven was approaching Constable Abbott in threatening manner

[32] Until the hearing before me, it had never been disputed that Steven was walking towards Constable Abbott in a threatening manner (armed with golf club and

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[12] The IPCA did, however, make a recommendation about how Police policy could be improved in this area, noting that it was already under review.

bat) as he (Constable Abbott) backed down the main street of Waitara. As I understood it, Mr Minchin's new contention was either that it was Constable Abbott who was pursuing Steven down the street and/or that Steven was not walking directly towards Constable Abbott in a threatening way at the time he was shot. He says that, rather, Steven had simply changed his course slightly in order to avoid the car containing Constable Herbert, which was parked a little further up the road.

[33] Putting to one side the impossibility of interrogating that new theory 20 years after the event, it really makes no difference. As discussed in more detail later, there simply can be no doubt that Constable Abbott perceived that Steven was approaching him menacingly with the bat raised (having already thrown the golf club at him) while threatening to hurt or kill him. The reasonableness of that belief is confirmed by the evidence of the other officers and of bystanders. By way of example only, I note that counsel for the Wallaces at the criminal trial formally accepted that bystanders had heard Steven say "I'm going to fuck you up" a few seconds before the gunshots.

WHO WAS STEVEN WALLACE?

[34] Because of the fraught circumstances of Steven's death and its aftermath, it is easy to forget that real people were involved, including most centrally, Steven himself. And because aspects of the Police homicide investigation did involve an element of victim blaming (a matter discussed later below), it is important to record that Steven was a young man with many positive attributes, who was much loved by his family. Their determined pursuit of this difficult claim is evidence of that.

[35] Steven James Wallace was the elder child of Mr James Wallace and Mrs Raewyn Wallace, although Raewyn had other children. He was born in New Plymouth and has whakapapa connections to Te Ātiawa. At the time of his death, he was living with his parents and sister at the Wallace family home in Waitara.

[36] At secondary school, Steven had showed real academic promise; he was awarded the Ngahina Okeroa prize for Senior Māori Scholar at Waitara High School in 1994. He received several other accolades including outstanding achievement in mathematics, science, and technical drawing. He had scored in the top five per cent for graphics in New Zealand, and this led him to take architecture papers at university.

His reluctance to take on student debt caused him to leave university to earn money, which he did by working with his father at Taranaki Farm Kill Services.

[37] Steven was also a talented sportsman; in particular, he attained awards for outstanding achievement in rugby. He played softball, a bit of tennis, ran, and lifted weights. I have no doubt that he had the ability and the capacity to make a positive contribution to the community in which he lived.

FACTUAL OVERVIEW

[38] Before turning to a narrative of the relevant events, it is necessary to set out certain matters of context.

Background matters

Policing in Waitara at the relevant time

[39] Waitara is a small town in North Taranaki. In 2000, it had a population of around 6,000. At that time, the Officer in Charge of the Waitara Police Station was an acting sergeant with responsibility for four small outlying stations and 17 staff. Two Police officers were rostered to be working at the station at any given time, but on most occasions only one officer was on duty due to annual leave and other commitments.

[40] The Waitara Police Station closed at 11 pm every night.

[41] The nearest available back-up for the Waitara Police were the officers stationed at New Plymouth, approximately 18 minutes away.

Relevant Police protocols and General Instructions (use of force, firearms)

[42] In 2000, the New Zealand Police Force was generally unarmed. But its Operations Manual recognised that firearms should be available when needed.

[43] The Police General Instructions (GIs) contained several sections dealing with the use by Police of firearms. The GIs refer to provisions of the Crimes Act 1961

(the CA) dealing with justification and the use of force. They emphasise that police are criminally liable for excess force and that "an overriding requirement in law is that minimum force must be applied to effect the purpose".

[44] GI F059 states that Police firearms are not to be issued except on the authority of a commissioned officer or a supervising non-commissioned officer, *unless* an emergency situation exists and neither aforementioned officer is available. Certain particulars regarding the issue of firearms and ammunition must be recorded in the Firearms Register, and each staff member is required to have a detailed knowledge of policy and the CA in relation to the use of firearms by Police.

[45] GI F060(6) authorises the issue of firearms to members in any of the circumstances prescribed in GI F061(2), which prohibits the use of firearms by Police except:

> (a) To defend themselves or others (Section 48 Crimes Act 1961) if they fear death or grievous bodily harm to themselves or others, and they cannot reasonably protect themselves, or others, in a less violent manner.
>
> (b) To ARREST an offender (Section 39 Crimes Act 1961) if they believe on reasonable grounds that the offender poses a threat of death or grievous bodily harm in resisting his arrest;
>
> AND
>
> the arrest cannot be carried out in a less violent manner;
>
> AND
>
> the arrest cannot be delayed without danger to others.
>
> (c) To PREVENT THE ESCAPE of an offender (Section 40 Crimes Act 1961) if it is believed on reasonable grounds that the offender poses a threat of death or grievous bodily harm to any person (whether an identifiable individual or the public at large);
>
> AND
>
> he takes flight to avoid arrest or escapes after arrest;
>
> AND
>
> such flight or escape cannot reasonably be prevented in a less violent manner.

[46] GI F061(3) directs that an offender is not to be shot:

> (a) until he or she has first been called upon to surrender, unless in the circumstances it is impracticable and unsafe to do so;
>
> AND
>
> (b) it is clear that he or she cannot be disarmed or arrested without first being shot;
>
> AND
>
> (c) in the circumstances further delay in apprehending him or her would be dangerous or impracticable.

[47] GI F064 discourages the firing of warning shots because of the difficulty in making it clear to an offender that "he is in fact receiving a warning and not being shot at". The instructions note:

> Any misconception in this regard may precipitate the offending action that a warning shot is trying to prevent.

[48] But warning shots are recognised as potentially appropriate in circumstances where there is no danger to bystanders and the offender has been called upon to surrender and has failed to do so.

[49] GI F066 authorises the deliberate discharging of a firearm in any of the circumstances in GI F061.

[50] As well, the Police Manual of Best Practice reinforces that a shooting must be both necessary and justified in law *at the time* of the shooting. The Manual reminds officers that there is no legal justification for shooting a person when he or she is no longer a threat to life, irrespective of his or her previous actions. It also reiterates that officers may be criminally liable if the force used is excessive.

[51] Officers are required to evaluate the prevailing circumstances before firing a shot. The onus of assessing the situation at the time of firing is on the Police officer pulling the trigger *unless* another officer giving the order can make the assessment at the time he or she orders the shot to be fired.

[52] The Manual emphasises in its "Basic Principles" section that Police procedures governing the use of firearms call for caution. When the actions of the suspect permit, the Manual counsels that time should be taken to cordon the area and that a "wait and appeal" role should be adopted in order to negotiate a surrender. But the Manual also stresses:

> … if the suspect is acting in a way that makes casualties likely, police must act immediately to prevent this.

[53] The New Zealand Police Firearms Instructors Manual contains a section on when multiple shots are appropriate. It notes that while the starting point may be a standard double tap, that is not always sufficient. Indeed, the training module on multiple shots notes:

> In general, multiple shot techniques (all of them, regardless of how many rounds are fired) best lend themselves to close confrontational situations where the immediate stoppage of any adversary is the primary concern.
>
> … the outermost bound for many of these drills should be limited to three or five metres. We also believe that the closer the adversary is, the more important his "immediate stoppage" is.
>
> …
>
> Two shots, while often better than one, might not create the "immediate stoppage" we require. If the shooter has become programmed to fire two rounds and to then move on to another target or reassess the hits on the first, the shooter might well die as a result.
>
> The shooter must be taught to judge the severity of each threat faced, based on a number of factors (we feel distance is the key) and to fire as many rounds as is necessary until the threat is negated. …

[54] Police training in the use of firearms is always to shoot for the greatest body mass and to shoot until the suspect is stopped. The training module produced in evidence at trial includes a multiple shot drill, which states the technique is "designed to be used against [an adversary] who poses an immediate life-threatening situation inside five metres". It emphasises that it must only be used when department policy and law justify the use of lethal force *and* immediate stoppage is necessary to prevent the adversary from gravely injuring or killing another.

[55] The module goes on to define "dangerous space", noting that it only takes 1.5 seconds for an adversary to cover five metres, leaving only one second (accounting

for reaction time) for an officer to incapacitate the threat. It states that once the decision is made to employ the multiple shot technique, the procedure is extremely fast. The first shots are to hit upper centre mass, with the pattern then tracking vertically upwards to increase chance of incapacitation. It notes that the "number of rounds fired depends on the shooter, but four to five seems to be the norm".

The events of 30 April 2000

[56] The narrative that follows is largely based on the evidence at the criminal trial. In terms of timings, the most reliable record is the transcript of the Communications (Comms) made over the Police radio at the time and, when possible, I refer to it.[13] Cell phones were, of course, much less commonplace at this time and data from them do not feature in the evidence.

[57] On the evening of 29 April 2000, after cooking for his family and eating dinner with them, Steven went to a night club in New Plymouth. He stayed there, drinking and socialising, into the early hours of the following morning. Witnesses from the night club, both those who knew Steven before and those who did not, described him as acting normally, albeit a little quiet. Witnesses who knew Steven said that he was there by himself but was mixing with others and did not appear angry or agitated—he seemed relaxed and in a good mood.

[58] By the time Steven arrived back at his family home in Waitara, at some time after 3 am, his mood had changed. Family members were awakened by the screeching of his tyres. His father and sister went outside to meet him. Steven was yelling and swearing. When asked why he was upset, Steven is reported to have told his sister, "You know what it's like". They told him to come inside, but after visiting the garage Steven got back into his car, taking off at speed.

[59] Raewyn Wallace was sufficiently concerned about Steven's behaviour to call 111, which she did at 3.37 am. She terminated the call before it was answered. She

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[13] The recollection of individual witnesses as to precise times is very variable and, when judged against the Comms recording, almost wholly unreliable. That is not a criticism of the witnesses themselves but largely (I would think) a function of the fact that the events occurred in the early hours of the morning, when a number of witnesses had been roused from their sleep.

and her daughter then walked with her three grandchildren to another daughter's house, nearby. James Wallace, Steven's father, stayed at home.

[60] At some point before 3.45 am, Steven started smashing the windows of the Waitara Police Station in Domett Street, which was—at that time of night—deserted. He yelled to Police to come outside. Neighbours eventually called 111.

[61] At 3:46:06, Comms notified Sergeant Fiona Prestidge (who was at that point at the New Plymouth Police Station) of the call, reporting that the neighbour had reported someone breaking windows at the Station. A police patrol car containing Constable Jason Dombroski and Constable Jillian Herbert[14] (who were in New Plymouth on duty) were directed to drive to Waitara. Constable Dombroski asked the Police controller to call out Constable Abbott to assist.

[62] Comms reported that there had been further calls from different informants about someone breaking windows and vandalising the phone at the Waitara station. The advice was:

> Description is a male 20 years, Māori, dark clothing, pants, jersey. Apparently he was on his own.

[63] It seems that at some point between around 3.45 am and 3.50 am, Steven returned briefly to the family home. The evidence was that he continued to curse and went into the shed, before jumping back in his car and speeding off. By this point it appears that he had blown the front tyre of his car, as a number of witnesses (including his father, James) commented on the flapping noise it was making.

[64] Next, at 3:56:54, there was a call reporting that the window detector alarm had gone off at the New World supermarket on Queen Street. That was caused by Steven breaking windows there.

[65] It seems Steven then drove to the main street of Waitara. He drove his car round the wrong side of the roundabout on Queen and McLean Streets (narrowly missing a

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[14] Constable Herbert was, at that time, known by her maiden name of "Curtin".

taxi) then up on to the footpath, at the intersection of McLean and Domett Streets. He began smashing the windows of a chemist shop.

[66] When the taxi passed on its return trip, Steven crossed the road swinging a baseball bat. He smashed the driver's window, although the driver had the impression that he was aiming for the windscreen. The driver went into a nearby petrol station and also rang Police.

[67] Steven twice moved aggressively towards a Holden driven by some young people who knew him and had attempted to intervene. The driver left in a hurry each time, afraid that Steven would damage his car.

[68] In the meantime, the patrol car containing the two officers from New Plymouth pull up beside Steven's car. Steven then hit the front windscreen with a golf club, causing it partially to shatter. He also smashed the driver's window. This caused Constable Dombroski to report to Comms (at 3:57:08):

> Oh someone's just attacked us with those, … has smashed our window of the car. Call Keith Abbott this guy's really fucked off. He's smashing all the windows in town. He's got a, ah, golf club. He's going nuts. Call Keith, let him know.

[69] Thirty seconds later Constable Dombroski told Comms to "Phone the Waitara Police Station and tell Keith to bring a gun out".

[70] As it transpired, Constable Abbott had by then left the empty Police station and gone up to McLean Street to see what was happening. It was from there that he saw Steven break the windows of the patrol car. He returned to the station of his own accord, having decided independently that a firearm would be required.

[71] The patrol car met up with Constable Abbott at the Police Station. Constable Dombroski remained with Constable Abbott and Constable Herbert was sent back to McLean Street in the damaged patrol car to observe. While there, the two officers armed themselves with Glock pistols, loading them with magazines containing 17 rounds. They took extra magazines with them. They agreed between themselves that the offender was a "nutcase". Neither put on helmets or body armour, the latter

of which was designed only to protect against bullets, not blunt weapons. Constable Dombroski had left his PR24 baton in the patrol car and did not take another one. Constable Abbott had his baton with him. Both officers had OC (pepper) spray. Neither Constable Dombroski nor Constable Abbott signed the Firearms Register at that time.

[72] At 3:58:44 Constable Herbert reported to Comms that:

> This guy is running all around Waitara smashing anything he can find including he's trying to get taxis.

[73] At 3:59:16 a decision was made by Sergeant Prestidge to call out the dog handler (Delta Unit) from New Plymouth, and at 4:00:00 there was confirmation that this had occurred. Constable Dombroski and Constable Herbert were aware of this, but Constable Abbott later said that he was not.

[74] At 4:00:38 there was a decision made that another local officer, Sergeant O'Keefe, should be called to the scene.

[75] At 4:01:07 Constable Herbert, watching from her car, advised that Steven had moved up the street and was smashing more windows there. She said that he was getting back in his car and then that he had driven to the Major Decorating shop, beyond the intersection of McLean and Grey Streets. Constable Herbert remained parked near the intersection of McLean and Domett Streets. Constable Dombroski told Constable Herbert to stay where she was.

The shooting

[76] The two armed officers drove past Constable Herbert and parked just before the intersection of McLean and Grey Street, on the (Northern) Waitara side. At that stage Steven Wallace was beside his car, which was parked outside the Major Decorating shop, on the New Plymouth (Southern) side of the intersection.

[77] Constable Abbott and Constable Dombroski got out of their car. Constable Dombroski drew his gun and shouted that they were armed police and that Steven should drop his weapons. Constable Abbott, mistakenly believing that he was dealing

with his former neighbour David Toa, attempted to talk to Steven, addressing him as "David" or "Dave".[15] This caused Steven to turn his attention away from Constable Dombroski and towards Constable Abbott. At that point Constable Abbott had his baton in his hand; his gun remained holstered. Constable Herbert reported at 4:02:48:

> [Dombroski] and Abbott are out there with firearms and this guy is just mouthing off at them at the moment. He's just walking along. He's got this big bar, but they're staying quite a way back.

[78] Eyewitnesses also gave evidence of shouting, and several heard Steven swearing and saying things like, "Fuck you I'm going to fuck you up" and, "You've pushed me too far" and "Who's gonna make me?".

[79] Steven advanced on Constable Abbott, who began backing away, moving northeast down the street. Constable Abbott continued to speak to Steven, saying things like, "David, David, what's going on, what are you doing, it's me, Keith Abbott". Steven threw a golf club in his direction; Constable Abbott ducked, and the club flew either over or past him.[16]

[80] Constable Abbott then holstered his baton and then drew and racked[17] his pistol, saying to Steven that he was armed. He said Steven was holding the baseball bat over his shoulder in an "axe grip". Constable Abbott said that he was convinced Steven would attempt to hit him with the bat and that he feared for his life. After retreating about half of the block, he fired a warning shot into the air at a 45-degree angle, when the gap between him and Steven was about half the width of the road.

[81] At 4:03:06 Constable Herbert reported:

> He's about 20 metres up towards New Plymouth from the Post Shop and he's, he's um, really amped up. He's heading down the road towards Keith. They might have to take him down. Here he comes.

[82] Constable Abbott's evidence at trial was that after the warning shot, Steven changed his angle slightly in what he thought was an attempt to block his escape

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15 The officers did not check the registration number of Steven's car before they approached.

16 That the golf club was thrown in the direction of Constable Abbott was also confirmed by an eyewitness, Mr Atkinson.

17 Evidence at the criminal trial confirmed that racking the pistol makes a distinctive noise.

(which would have been to turn west into Domett Street, about 20 metres to Constable Abbott's left).[18] Steven continued to advance in a determined manner. Constable Abbott says he warned Steven that he would shoot if he came any closer. His evidence was that he could not continue retreating backwards because he was running out of room: he knew he was getting close to the gutter but could not see it. He was concerned that accidentally backing into or onto the gutter might cause him to trip, leaving him vulnerable to an attack. The three officers' evidence was that Steven was yelling constantly words to the effect of: "I'm going to fucking kill you, you fucking arsehole".

[83] Once Steven was within four or five metres of him, Constable Abbott fired four shots (two double taps) in rapid succession. All four bullets hit Steven, who stumbled and then fell to the ground slowly, dropping the bat. The officers' evidence was that even after being shot, Steven tried to stand up and continued to yell abuse, an account supported by eyewitnesses. After Steven was on the ground, Constable Abbott said he stayed in place so that his position could be fixed. While waiting for Constable Dombroski to find some tape for that purpose, he rang two colleagues, including Detective Senior Sergeant Grant Coward, for support.

[84] At 4:03:33, Constable Herbert reported: "Yeah he's down. Can we get an ambulance out there?" At 4:03:59, Constable Dombroski confirmed, "Yeah we've got one down." And at 4:04:18, Constable Herbert advised, "Yeah, he's no longer a threat". Shortly after that, Constable Dombroski approached Steven and told him that an ambulance was on the way. The constable's assessment was that little first aid could be administered.

[85] At 4:07:35 the dog handler was advised that he was no longer needed.

[86] Upon her arrival at about this time, Sergeant Prestidge visually examined Steven and observed that there appeared to be minimal bleeding and that compression bandages were not required.

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[18] This is consistent with the eyewitness account of Mr Luxton.

[87] A bystander offered a blanket to Constable Dombroski to place over Steven. According to that bystander, this was initially refused but later accepted, and, at around 4.12 am, Constable Dombroski placed the blanket over Steven's legs. Shortly afterwards, Sergeant Prestidge examined Steven a little more closely and applied a sling bandage to his body, again after an examination that revealed minimal bleeding.

[88] Steven was still breathing at this point, but his condition appeared to be deteriorating. Sergeant Prestidge remained with him from 4.14 am until 4.20 am, when the ambulance arrived. She then assisted the ambulance crew with on-site treatment and with preparing Steven for transport to Taranaki Base Hospital. Constable Herbert travelled with Steven in the ambulance and arrived at the hospital at 5.07 am.

First contact between Police and the Wallace family

[89] Because of Constable Abbott's misidentification of Steven, his identity was not immediately known. But at 6.15 am Police arrived at the Wallace family home and told Mr Wallace that Steven had been shot and was in hospital. At around 6.30 am, Mr Wallace went with Police to tell the rest of the family, at his stepdaughter's place.

[90] Most of the family immediately headed to the intensive care unit (ICU) at Taranaki Base Hospital. Police officers were also there. An impartial narrative of what then transpired is difficult to discern, as the accounts from the family and Police are rather distinct in tone.

[91] While the Wallace family sat in the ICU waiting room, a detective sought to obtain a statement from Mrs Wallace as to how Steven had been behaving before he left home. Mrs Wallace began speaking but then told the detective that she would not be making a statement before knowing how her son was doing. She said that the detective replied something to the effect of, "If you don't make a statement now, you'll be making one later".

[92] Steven died at 9.05 am, while still in the operating theatre. The attending physicians were unable to stop the bleeding caused by a shot that had pierced his liver.

[93] The news was broken to the Wallace family. Mrs Wallace fell to the ground, distraught. Police say she then got to her feet and leapt at one of the attending detectives, swinging at her face, landing a glancing blow.

[94] It seems a number of members of the Wallace family made no efforts to conceal their feelings towards the officers present. According to Police statements, several of the family yelled at attending officers things like, "You fucken pig cunts shot him", and, "fucken murdering pigs". It is said they kicked doors and walls. One of Steven's sisters, in particular, went so far as to yell, "I'm going to get a gun and fucken kill you, then I'm going to fucken kill you, and you", pointing at each attending officer. Police took her threats seriously and, after she had left the hospital, they took steps to address the possibility of her obtaining a firearm. It is also said that two of the young children present, aged around 11 and seven, were encouraged to abuse the police present, with one walking up to an officer and saying, "I'll get a gun and shoot you, you didn't have to shoot him". Further officers were requested to attend at the hospital to assist.

[95] It seems Mr Wallace and one of Steven's sisters, Kelly, remained calm and tried to keep the peace. They were asked to identify Steven's body around midday.

[96] After calming down, Mrs Wallace also asked to see Steven, but she was told that only one person would be allowed to identify him. When Mr Wallace and Kelly returned, Mrs Wallace again asked to see him. She was told that to do so would delay the autopsy (and so his return to the family), so she did not insist. Despite this, the autopsy was not started for several hours, beginning at around 3 pm. Steven did not arrive home until shortly after midnight, according to Kelly Wallace's later statement.[19]

THE INQUIRIES INTO STEVEN'S DEATH

[97] Because the s 8 claim brought by Mrs Wallace encompasses an attack on the investigatory processes that followed Steven's death, it is necessary to set out those processes at some length here.

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[19] The IPCA report, however, records that Steven was returned home at 7.30 pm that night. The reason for this discrepancy is unclear.

Operation McLean

[98] Police began an investigation—styled *Operation McLean*—on the morning of the shooting. The investigation was initially led by DS Coward, who was stationed at New Plymouth. DS Coward had been a friend of Constable Abbott's for over 15 years. As noted earlier, DS Coward was one of the two men telephoned by Constable Abbott for support while he was still at the scene of the shooting.

[99] Neither Constable Abbott nor Constable Dombroski were breath tested or blood tested for the presence of alcohol or drugs after the shooting.[20] No residue testing was carried out on either Constable Abbott or Constable Dombroski, despite that being standard practice. Later, at the depositions hearing, DS Coward explained that because Steven was (at that point) still alive, it was not yet being treated as a homicide. He said he accepted Constable Abbott's word that it was he who had fired the shots.

[100] All three police officers made and signed narrative statements about what had occurred. Constable Dombroski's statement records that it was begun at 6.38 am and completed at 11.40 am. Constable Herbert began her statement on her return from the hospital at 7.31 am and completed it at 11.11 am.

[101] At around 8.50 am—after being taken home to change his clothes—Constable Abbott also began making a statement, in the presence of his lawyer, Ms Susan Hughes. His statement records that he had been read his rights by Detective Sergeant Bryan, the interviewing officer.

[102] As noted earlier, Steven Wallace died at 9.05 am that morning. Operation McLean then became a homicide investigation.

[103] From the outset, of course, Police proceeded on the basis that Constable Abbott had shot and killed Steven. So the principal inquiry was whether, based on the

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[20] The Police did not at the time have a policy requiring such testing after a critical incident, but this was later recommended by the Independent Police Conduct Authority (IPCA) in its report—see below at [259].

evidence, criminal liability might attach. In turn, that depended on whether there was evidence that the killing had been in self-defence and, so, justified in law.

[104] Statements from a number of key witnesses were taken during the course of Sunday, 30 April.

Detective Inspector Pearce takes over

[105] On 2 May, command of the investigation was formally transferred to Detective Inspector Pearce, who had been in Christchurch. The intention was that the investigation be led by someone with no connection to the New Plymouth policing area.[21] DI Pearce reported directly to the District Commander (Central Police District), Superintendent Mark Lammas, and to the Acting Deputy Commissioner (Operations) at Police National Headquarters. Inevitably, however, DI Pearce was assisted in his inquiry by local officers.

Inquiries related to Steven Wallace's character and the Wallace family

[106] It seems that from an early point in the investigation there was some focus on Steven Wallace himself and on the Wallace family.

[107] For example, in early May, a questionnaire was prepared and given to the owners of 77 local businesses. The questionnaire sought answers to the following questions:

> DO YOU KNOW STEVEN WALLACE?
>
> IF YES – HOW DO YOU KNOW HIM AND WHAT IS YOUR RELATIONSHIP WITH HIM
>
> HAS STEVEN WALLACE OR THE WALLACE FAMILY EVER HAD ANY REASONS TO HAVE ANY ANIMOSITY TOWARDS YOU OR YOUR BUSINESS?
>
> IF YES WHAT WERE THE CIRCUMSTANCES SURROUNDING ANY ANIMOSITY?
>
> HAS STEVEN WALLACE EVER CAUSED ANY DAMAGE TO YOUR PROPERTY OF BUSINESS?

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[21] DI Pearce confirmed in his report that, except for two members he had briefly met in 1986, the New Plymouth Police staff were strangers to him.

[108] On 10 May Detective Tunley reported on the results of the questionnaire to DI Pearce, noting that:

> No statements were taken and no businesses identified who had any problems with Steven WALLACE or any of the WALLACE family.

[109] Police also obtained warrants permitting them to access Steven's bank, school and university records. They visited the local golf club, which confirmed that Steven had not ever been a member. Households in the Wallace family's neighbourhood were spoken to by Police. So too were people known to be associates of Steven. Police also spoke to Steven's former high school PE teacher.

[110] Police attempts to interview members of the Wallace family were initially resisted, despite approaches made by Police Iwi Liaison Officers. This caused DI Pearce to say in his final report:

> In my experience I have never encountered a homicide investigation where the victim family has adopted such a position. I anticipated that a day or so after the tangi family members would make themselves available to be interviewed, but this was not the case.

[111] Eventually, however, some 20 days into the investigation, Mr Rowan QC—who was by then acting for the Wallaces—facilitated interviews with five family members. The subject matter of the interviews was expressly confined to the 30 minute period during which Steven Wallace was at home between 3.15 and 3.45 am on 30 April 2000.

[112] The family maintained they had no idea what had caused Steven to become so agitated. Some said they had concerns at the time that Steven had been drinking and ought not to drive, and at one point that was suggested as the reason for Mrs Wallace's 111 call. But as DI Pearce's report later noted, that was at odds with the fact that Steven's behaviour had been sufficiently threatening for Raewyn and Kelly to wake the children and walk them to Helen Collingwood's house at around 3.40 am.[22]

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[22] Helen Collingwood was Mrs Wallace's daughter and Steven's half-sister.

David Toa interview

[113] On 9 May, Police interviewed David Toa, the man Constable Abbott believed he was confronting that night. It was not disclosed to Mr Toa at the time of interview that Constable Abbott had mistaken Steven for him. Mr Toa said that there was no animosity between the two of them and that, before his recent move, he would see and wave to Constable Abbott daily.[23] This was consistent with Constable Abbott's statement.

[114] The inquiry team prepared a document that enabled a side by side photographic comparison of the two men. Despite the 14-year age difference between Mr Toa and Steven, the investigators noted physical similarities that—they believed—might explain the mistaken identity: both were of Māori descent and had similar heights and builds.[24] The inquiry concluded:

> Clearly this is a genuine case of mistaken identity on the part of Constable [Abbott]. There is no evidence that any animosity exists between Constable [Abbott] and [David Toa] and certainly nothing to support the view that Steven Wallace was shot because of any act of transferred malice by Constable [Abbott].

The cartridge cases

[115] The Police inquiry ascertained that the position of the five expended cartridge cases did not seem to accord with Constable Abbott's statement that he had remained where he had been standing when he shot Steven (until it was marked 10 minutes later by Constable Dombroski). The cases were found to the left of where they would be expected if he had remained in that spot. Ultimately, two possible explanations were given for this inconsistency:

(a) The cartridge cases were moved by the ambulance driving over them;[25] or

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23 Although Mr Toa read his statement and acknowledged its correctness, he ultimately refused to sign it.

24 The quality and age of the photos used, and the conclusion that there were meaningful similarities, are matters of some concern to Mrs Wallace. The suggestion is that the comparison was a partisan attempt by Police to justify Constable Abbott's mistake.

25 The ambulance did drive directly over the relevant area, and one of the cartridge cases had obviously been squashed by something or someone.

(b) Constable Abbott was mistaken as to his position and may have moved approximately two metres to his right, in order to cover Steven, while he was still moving after being shot.

[116] The inquiry concluded that it was unlikely that all of the cases would have been moved as a group by the ambulance; the latter explanation was preferred.

Ballistics

[117] Ballistics analysis confirmed that both firearms were fully functional and within appropriate specifications. One forensic scientist's report suggested that Constable Abbott had fired from a position to the left of where he ultimately marked (as discussed above). The forensic report concluded that all five of the cartridge cases were fired from the same pistol.

Autopsy and toxicology

[118] The autopsy report concluded that Steven died as a result of an un-survivable gunshot wound to his liver. The pathologist opined that neither first aid nor earlier surgical intervention could have prevented his death.

[119] The toxicology report recorded that Steven's blood alcohol level was approximately 2.5 times the legal driving limit. No evidence was found of other drugs such as amphetamines or hallucinogens.

The sequence of shots

[120] An ESR forensic scientist, Mr Peter Wilson, was involved in the investigation from day one. Among other things, he attended and reported on the post-mortem, the examination of vehicles, and the tests of the Glock pistol ejection patterns (discussed earlier).

[121] In June 2000, Mr Wilson made a formal statement addressing all these matters, and opining on Steven's position when each of the four shots were fired. He explained how Steven's position when shot was able to be discerned by the wound patterns:

> The damage to the shirt confirms the findings made at the post mortem with regard to the number and direction of shots that hit Mr Wallace. At the time the shots to the chest and left arm were fired, Mr Wallace would be standing at an angle to the shooter with his left side more forward than his right. The trajectory of the bullets that entered the left forearm and left upper arm, and the trajectory of fragments that resulted from the bullets breaking up, indicate that Mr Wallace's hands were in the area of his right shoulder at the time these shots were fired. The shot in the back is consistent with Mr Wallace turning and bending to the right and thereby presenting his back to the shooter.

The Pearce report

[122] DI Pearce's final report on the investigation is dated 23 June 2000. It is 185 pages long, although much of it comprises replicating the various witness statements taken by Police. Many of the matters discussed above were recorded in it. The other relevant matters canvassed are:

(a) the tenability of other tactical options available to the officers that night;

(b) compliance by the officers with the relevant GIs; and

(c) potential criminal liability.

[123] It is necessary to say a little about each, in turn.

Other tactical options

[124] The report notes the opinions of some observers that the three officers should have adopted a "wait and see" approach, pending further back-up from New Plymouth—in other words, cordon and contain.

[125] But the report expresses the view that, given the limited available resources, the officers would not have been able to contain Steven safely. It emphasises that Steven was mobile, with ready access to his car. It concludes that the officers were justified in uplifting firearms and confronting him; they had seen and experienced first-hand the damage that Steven was capable of causing.

[126] As to the need for a plan, the report said:

> There is no evidence that Constables A or B were intending to effect the arrest of WALLACE immediately prior to the shooting although that objective may well have been in their minds. They did not have time to formulate a plan in the short (140 metre) distance they travelled from the Police Station.

[127] The report then addresses in more detail whether a less violent option was available to Constable Abbott. Deployment of a Police dog—preferably two dogs, in a coordinated two-dog attack—was recorded as a viable tactical option in circumstances of this kind. But the report notes that on the night Steven was killed, only one Police dog and handler were available, and they were off-duty and not in the immediate area. The report notes that the events "very quickly overcame [the] Constables … and moved far too quickly for them to effectively utilise the dog patrol".

[128] Both OC spray and batons were considered unviable—and dangerous—tactical options in dealing with an offender armed with a blunt-edged weapon. The report noted that, the Police guidelines for the use of OC spray advise of its limited effectiveness:

> … Studies have shown that a goal-driven person can fight the effects of OC Spray in order to achieve their objective. There is nothing stronger than the human will to accomplish a specific goal.
>
> …
>
> *Extreme caution should be exercised where the subject is armed with a blunt edged weapon, or knife, as the distance required to deploy the spray effectively could expose members to unnecessary risk.*
>
> … The use of OC Spray in these situations may be an unnecessary risk as the member is required to get within 3.5 metres of the subject for the spray to work effectively.

[129] As for the use of a PR24 baton (bearing in mind that only Constable Abbott had one with him) DI Pearce had sought the opinion of a Police advanced baton instructor. His report records that using a PR24 to defend against a baseball bat would be highly dangerous:

> In summary, [the instructor] records that Police Officers would place themselves at high risk of serious or mortal injuries if they attempted to block a swinging baseball bat with a PR24 and that to successfully do so would "require a very high level of skill to execute".
>
> [The instructor] observes that the impact absorbed by the baton in blocking a baseball bat swung forcibl[y] could be sufficient to break the officer's arms or

> hands and that while he/she might successfully block the first blow, the officer has still not diminished the threat of further attack.

[130] DI Pearce also made further inquiries with Police officers who frequently used the PR24 baton during the 1981 Springbok Tour to determine whether the PR24 baton provided a realistic defence option against an offender wielding a baseball bat, noting:[26]

> The unanimous opinion being that a Police Officer would have to be extremely confident and proficient in his ability to contemplate using the PR24 defensively against a baseball bat and that *to reach the required level of confidence and skill, weeks of training and consistent use of the PR24 would be required.* Such levels of skill and confidence are unlikely to be found in the average frontline Police Officer …

[131] The report concludes that there was no tenable tactical alternative available to Constable Abbott when he decided to discharge his firearm.

Compliance with the relevant GIs

[132] The Pearce report also concludes that the officers followed the relevant GI guidelines and that Constable Abbott's decision to shoot Steven was made in the genuine and reasonable belief that failing to apprehend him by use of force was dangerous and impracticable. The report notes that the significant consistencies between the accounts of the three Constables and other key witnesses supported this version of events.

Criminal liability

[133] Finally, there was the question of Constable Abbott's criminal liability. The report emphasised that criminal liability must be assessed based on the circumstances that existed at the time Constable Abbott decided to shoot—it could not be assessed with speculation about what might have happened had different steps been taken earlier.

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[26] Emphasis added.

[134] The report found that Constables Abbott and Dombroski had chosen to uplift firearms in order to protect themselves, not to arrest or kill Steven Wallace.[27] And it notes that the decision to arm themselves with guns was made by each of the officers separately.

[135] The report then observes that Constable Abbott did not immediately draw his firearm; he instead tried to negotiate with Steven, mistakenly believing that he was dealing with someone whom he knew. It was only after Steven had thrown the golf club and advanced towards him that Constable Abbott drew his gun.

[136] DI Pearce concludes that, once Steven had begun advancing on Constable Abbott in this way, he was left with no viable choice but to shoot. Physically wrestling him, even with the assistance of Constable Dombroski, would have been extremely dangerous given Steven's weapon and given that both officers' firearms were loaded. Attempting to retreat was similarly unviable: even apart from the fact that it would have entailed abandoning Constable Dombroski, it "would take a 44-year-old of considerable physical agility and confidence to back himself against a fit athletic 23-year-old".[28]

[137] I set the report's conclusion on the question of self-defence in full:

> 23.13 That having drawn his firearm in self-defence, Constable A had no opportunity to adopt a less violent means even had he considered that to be an option.
>
> 23.14 That in the face of what appeared to be an imminent physical attack involving a baseball bat, Constable A had to take a positive action or risk losing control of his own weapon and serious injury to himself.
>
> 23.15 That Constable A genuinely feared for his own life and shot WALLACE in an act of self-defence.
>
> 23.16 That Constable B also genuinely feared for Constable A's life and seriously contemplated shooting WALLACE in self-defence of Constable A and himself.

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[27] It makes the point that if Constable Abbott believed in advance that he would likely have to shoot, then, as a highly trained sniper, he might well have chosen to uplift a rifle rather than a pistol.

[28] Of course, Constable Abbott believed at the time that he was dealing with Mr Toa, who was in his forties.

23.17 That in the circumstances they found themselves in, Constables A and B could not reasonably have adopted a less violent means in self-defence.

23.18 That Constables A and B conformed with Police General Instructions and relevant sections of the Crimes Act 1961 relating to the carriage and use of firearms. General Instructions F60, F61 and F64 and S48 (self-defence) Crimes Act 1961.

23.19 That on the facts Constable A is not culpable for the death of Steven WALLACE. Neither is Constable B as a party, ie Section 66 Crimes Act 1961.

23.20 That while issues of fact are more properly the domain of a jury, it is considered that no jury properly directed could, beyond reasonable doubt, find that Constable A shot Steven WALLACE other than in self-defence.

[138] The report also recorded the finding:

> Steven WALLACE died as a direct result of an unsurvivable gunshot wound to his liver and that no act or omission by any person to render first aid or other emergency treatment could have saved his life.

[139] And the report concluded with four recommendations:

24.1 That no criminal charges be preferred as a consequence of Steven WALLACE's death.

24.2 That this report and the investigation file be submitted for an independent legal opinion.

24.3 That if the above recommendation (24.1) is upheld, an early pragmatic response to the WALLACE family's request for full disclosure be acceded to.

24.4 That in the public interest the New Plymouth Coroner be encouraged to conduct a comprehensive hearing into the death of Steven WALLACE, so that the facts relating to this death are established in an open transparent manner.

The decision not to prosecute

Inspector Dunstan's review

[140] DI Pearce's report was referred to another senior police officer (Inspector Bruce Dunstan of Lower Hutt) to review its findings and, in particular, to assess whether Constable Abbott had made the right tactical choices. His careful review

(recorded in a letter to the Commissioner dated 8 August) was based solely on the information contained in the Pearce report. Of some note is the following observation:

> 4.12 On a strictly tactical point of view, the safest action would have been for Constable A to use his car as cover and call upon Wallace from a position of safety and concealment. This is standard AOS procedure, however I do not raise this as criticism only as the safest option. Obviously from the facts available to me, I do not know whether Constable A had the time or opportunity to take this action and had he done so it would have accelerated events.

[141] And in his conclusions, Inspector Dunstan explained why alternative options were unavailable and why the outcome was largely inevitable:[29]

> 5.2 The safest tactical option on the night would have been for Constables A, B and C to observe and contain until reinforcements arrived.
>
> 5.3 This option was never really a feasible achievable option due to the fact that there were only three of them, so they attempted to do the best they could. This had to be undertaken and no criticism should be levelled at their attempts to do so.
>
> 5.4 Having attempted this, events overtook them once Wallace observed them.
>
> 5.5 As mentioned in 4.12 the correct tactical option would have been to take cover behind their vehicles and challenge him. While this would have provided the greatest level of protection to Constables A and B, it would have accelerated events with the same outcome, just earlier. *It is unfortunate that dogs were not available, as the perfect solution would have been to take cover, challenge and then disarmed utilising dogs.* They were not available and ultimately led to Constable A's final option.
>
> 5.6 Constables A and B chose to withdraw maintaining a semi cordon and continuing to negotiate. Taking this action Constable A has allowed himself more time and provided Wallace with ample opportunity to surrender. In doing so though he has put himself at risk by being exposed from cover. As Constables A and B have withdrawn tactically they have maintained fire cover for each other and considered fire angles, being careful not to create a cross-fire situation.
>
> 5.7 Once faced with a situation whereby Constable A could not withdraw further in order to protect himself, he had no other option but to shoot. He had exhausted all other options. Ultimately in these types of situations it is the offender who dictates the tactics and the outcomes.

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[29] Emphasis added.

[142] Inspector Dunstan ultimately agreed with the views expressed by DI Pearce in his report on the tactical options question.

Police media statement

[143] On 16 August 2000, the Police released a media statement on the shooting. In it, the Police explained that the outcome of their investigation was that Constable Abbott (unnamed in the statement) had acted lawfully.

[144] The media statement also made clear that there were two other ongoing inquiries: the Coroner's Inquest and the PCA investigation. The former was to consider how Steven Wallace died and the circumstances surrounding his death. The latter would review the findings of the homicide investigation to consider the police procedures and policies involved, and to consider the actions of the police staff involved in the incident.

Acting Solicitor-General's press statement

[145] On that same day, the Acting Solicitor-General also released a press statement. It recorded that Police had received legal advice from the Wellington Crown Solicitor's office about laying criminal charges relating to Steven death. The Acting Solicitor-General's statement explained that the Police had then also asked Crown Law to review that advice.[30]

[146] The statement recorded that the review by Crown Law was conducted in accordance with the Solicitor-General's Prosecution Guidelines[31] and was aimed at objectively and independently examining both the Police investigation and the legal decision made. Its review considered DI Pearce's report, the Crown Solicitor's opinion, and additional materials provided by Mr Rowan on behalf of the family. It recorded that Crown Law agreed with the decision not to lay charges over the shooting, because:

> The available evidence led inevitably to a conclusion that the shooting was done in self-defence.

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30 Such a review is not uncommon; one would be requested in cases of medical or vehicular manslaughter, for example.

31 These are set out later in this judgment, at [592] below.

> Self-defence provides a complete legal justification for the shooting.
>
> As a result, in terms of the Prosecution Guidelines, there was not sufficient evidence to charge any person in relation to the shooting.

Police Complaints Authority investigation

[147] As required by law, the Commissioner of Police had reported the shooting to the Police Complaints Authority (PCA) under s 13 of the Police Complaints Authority Act 1988.[32] On 9 May 2000, Judge Jaine (who was the Authority) and Judge Borrin (the Deputy Authority) travelled to Waitara to be briefed by Police and to visit both the scene and the Wallace family.

[148] At this time, the PCA did not have its own investigators. Rather, it relied on Police resources. In this case Detective Inspector Brew (DI Brew) from Palmerston North was appointed to assist. The PCA's investigation nevertheless remained separate from the homicide investigation, focusing instead on Police policy, practice, and procedure (rather than on issues of criminal liability).

[149] DI Brew completed his tasks in August 2000 and provided a preliminary report to the PCA, which has since been lost.[33] But the Authority did not then prepare its full report, or release DI Brew's, because of its public commitment not to comment on the shooting until the end of any coronial hearing.

Opening the inquest

[150] Although the precise date is not clear from the material before me, at around the same time as these other investigations Steven's death was reported to Coroner Mori, who opened an inquest. On 9 May 2001, that inquest was transferred to Coroner Matenga.

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[32] That Act has since been renamed the Independent Police Conduct Authority Act 1988. The section imposes a duty on the Commissioner to notify the Authority where a Police employee appears to have, in the execution of their duties, caused death or serious bodily harm to any person.

[33] From a much later (2007) document authored by DI Brew, it appears his preliminary report may have made recommendations around the provision of first aid.

Adjournment

[151] Due to the prospect of the Wallace family bringing a private prosecution,[34] Ms Hughes (representing Constable Abbott) applied for an adjournment of the inquest. Coroner Matenga met with counsel on 21 May. Ms Hughes argued that the inquest should adjourn until the private prosecution was at an end. She made the orthodox (and legally correct argument) that the Police officers would be prejudiced by the inquest proceeding. That is because they would be compelled to give evidence at the inquest on oath but then face the possibility of having that evidence used against them at trial.

[152] On 11 June 2001, Coroner Matenga adjourned the inquest to await the outcome of the private prosecution.

Further Police inquiries: Mrs Dombroski's statement

[153] Objection is taken by the Crown to the admissibility of the matters discussed in the next few paragraphs. Although I agree that its relevance is fairly marginal, the matter to which it relates is of some significance to Mrs Wallace. And it cannot be said to be of no consequence at all. At the very least, it underscores the point that, in bringing the private prosecution, the Wallaces found themselves up against the power and resources of the State. It also represents a continuation of what the Wallaces (at least) might see as an over-anxiety by Police to attribute blame to Steven. As well as being relevant in terms of wider context, this is also a matter specifically relevant to a consideration of s 8 compliance, in terms of the various investigations into Steven's death.

[154] In 2000, Constable Dombroski's mother, Mrs Patricia Dombroski, had been working as a coordinator at the New Plymouth Family Court. The Police investigation into Steven's death prompted her to remember a phone call that she had received there about a fortnight before the shooting. She said that a woman named "Mrs Wallace" had called the Family Court to ask about getting a protection order for herself and her daughter. "Mrs Wallace" had said she wanted the protection order because she was

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[34] It seems that the family and Mr Rowan in their media statements had indicated that a private prosecution would be pursued.

fearful of her son, who had threatened to kill them. Mrs Dombroski took notes of all her work calls.

[155] In around May 2000, Mrs Dombroski raised the incident with her supervisor. Knowing that such conversations were confidential, she asked him whether she could give the information to Police. He told her to fill out a critical incident form outlining the details of the call, and said he would seek advice from National Office. He later told Mrs Dombroski that National Office had confirmed that the information should not be disclosed.

[156] A year later, however, Mrs Dombroski formed the view that she should tell Police about the conversation. No doubt that was because by then the private prosecution was, as I have said, becoming a reality.

[157] A Police job sheet dated 16 May 2001 records that Mrs Dombroski called to disclose the conversation she had had with "Mrs Wallace". In a later statement, Mrs Dombroski said that during this initial talk with Police she had been unable to find the notes of the conversation in her diary but had found the relevant entry later that night, when she was at home.

[158] On 17 May Mrs Dombroski made a signed statement, in which she gave the following account:

(a) She received a phone call from a woman on 14 April 2000. The woman asked for advice about how she could protect herself and her daughter from her son. The woman told Mrs Dombroski that her son was becoming increasingly violent and had threatened to kill them.

(b) The woman told her that her son was in his twenties, abused drugs and alcohol, and had a criminal history. The woman said her son's name was "Steven Wallace".

(c) She told the woman that no one of that name was on the Family Court database. After explaining the basics of protection orders and recommending that the caller talk to a solicitor, the conversation ended.

(d) She takes many phone calls daily at her work. She records their names in her diary. She looked through her diary and found an entry on 14 April 2000 with details about this call. (The diary was apparently taken by Police as an exhibit.)

(e) While she recognised that she was breaching privilege and her work's code of conduct, she believed that "if there was going to be a trial then the full facts needed to be known".

[159] That same day, Police applied for several search warrants, seeking the telephone records relating to calls made to the phone lines at the New Plymouth Family Court on the day in question, in order to ascertain whether any of them came from Mrs Wallace (or the Wallace family). Notably, the affidavits filed in support of the applications deposed that the offence under investigation was "threatening to kill" (by Steven Wallace):

> I believe evidence relevant to the crime of Threatening to Kill will be found in these records which are held by Telecom NZ. Execution of this warrant will enable the informed compliance by Telecom to reveal this data.

[160] It was also asserted that:

> Records of this conversation could corroborate the complainant's statement by their very existence.

[161] Steven was, of course, dead and could not be prosecuted for threatening to kill. Nor is it clear who the "complainant" was supposed to be—the maker of the phone call was unidentified and had made no complaint, and Mrs Dombroski was only a potential witness.

[162] The affidavits nonetheless made their real purpose clear:

> The conversation that took place on 14 April 2000, between a woman who stated her son was Steven WALLACE and a Family Court Co-ordinator could

> further indicate the unstable nature of WALLACE's behaviour at the time of this fatal shooting. I am unsure if the Steven WALLACE's [sic] concerned are one and the same. By virtue of this search and other enquiries, I am seeking to confirm or refute this.

[163] The applications were granted, but the telephone records revealed nothing of relevance—in particular, there was nothing to link the call to Mrs Wallace.

[164] When Police then attempted to speak to Raewyn Wallace about the phone call, she replied that there was no protection order and declined to talk to them further.

Depositions hearing

[165] In September 2001, James Wallace swore an information charging Constable Abbott with murder.

[166] The depositions hearing took place before two Justices of the Peace (JPs) at the New Plymouth District Court. Although the parties were agreed (albeit for very different reasons) that the matter should go to trial, the hearing lasted nearly a month; it began on 21 January 2002 and continued until 19 February. The evidence at the hearing was extensive: it resulted in a 1,200-page transcript.

[167] I do not propose to refer to much of that evidence here, although it does not hurt to note that several of the necessary prosecution witnesses were Police officers—including DS Coward and Constable Dombroski. As counsel for Mr Wallace (the prosecutor) Mr Rowan was not, of course, entitled to cross-examine those witnesses.

[168] By this time, it is clear that the prosecution theory focused principally on the question of excessive force.[35] Of particular relevance to that theory was:

(a) Expert evidence given by three retired Police officers: Mr Wayne Idour, Mr (formerly Superintendent) Bryan Rowe, and Mr Bernard Maubach, who had been a high-ranking Police officer in Germany. Their

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[35] Although the addresses of counsel have not survived (they do not form part of the record), that this was the theory is confirmed by the analysis of the prosecution case in the later judgment of the Chief Justice, discussed below at [183]–[186].

evidence related primarily to Police procedures and the tactical alternatives open to the officers on the night in question.

(b) The evidence of the forensic pathologist, Dr Kenneth Thomson, whose expert view was that it was the third shot that had been fatal (the first two being to Steven's arms/upper body and the last to his back).

[169] There are two further matters about the depositions evidence that need to be mentioned here.

[170] The first is that during her cross-examination of Mr Maubach, Constable Abbott's lawyer, Ms Hughes, raised the "Mrs Dombroski" issue (about which Mr Maubach had no knowledge). She followed it shortly with a question about the 111 call that had been made and then aborted from the Wallace family home on the night of the shooting. This revelation was then widely reported in the media, with headlines such as, "Mother feared son, court told".

[171] Mrs Dombroski was later called by the defence to give evidence at depositions about the call she had received in April 2000. She said that the caller had specifically identified her son as "Steven Wallace". And she produced her diary entry for 14 April 2000 which she read out as follows:

> "Mother, son VIO", which in my shorthand is violent. "A and D issues", in my shorthand is alcohol and drug issues. "Daughter involved. Criminal history. Steven Wallace".

[172] Under cross-examination, Mr Rowan made much of the fact that the name "Steven Wallace" had been written in different ink from the rest of the entry. He put it to Mrs Dombroski that she had written it much later, which she denied. Mr Rowan handed her a piece of paper with a name written on it and asked her if that was the name she had been told. Ms Dombroski denied it. Then, Mr Rowan put it to her that it had been a woman with a name similar to Mrs Wallace who had made the 14 April call. Mrs Dombroski said that the caller had not identified herself.

[173] Next, on 13 February 2002, the woman made a statement confirming that it had been she who had had the telephone call with Mrs Dombroski on 14 April 2000,

and it was she who had sought to take a protection order out against her son. She said the media reports of the cross-examination of Mr Maubach had prompted her to telephone Raewyn Wallace. This, in turn, led to her making that statement, which then became part of the evidence at the depositions hearing. Police inquiries later confirmed that the call had indeed come from her number.

[174] The second matter is tangentially related to this. There were aspects of the defence case at this time that, I suspect, fed into a feeling by the Wallace family that it was they who were under attack. Although it can be noted that there were admissibility issues around some of the material I am about to refer to,[36] I do not mention this by way of criticism but rather, for the reasons given by me at [153] above.

[175] As I have mentioned already, Ms Hughes' had raised Mrs Wallace's 111 call in the course of her cross-examination of the prosecution expert, Mr Maubach. During that exchange, she also suggested that things mighty have ended differently had Mrs Wallace not terminated her 111 call on the night of the shooting. She said:

> The defence case will be that, if Mrs Wallace hadn't aborted that call, but told the Police that Steven was in a rage, that he'd been drinking, that he'd smashed holes in the garage, that he had his golf clubs with him, that she and the kids were going to leave home, then the dogs would have been called out then.
>
> …
>
> … had that information been relayed and had the dogs been called at 3.37, the dogs would have been in Waitara by 4.00 o'clock in the morning, even on your timings, wouldn't they?

[176] In a similar vein was some of the questioning of James Wallace, who was called as a witness for the defence. In the context of asking him about Steven's temper (including, inferentially, his criminal history) and his behaviour on the night he was shot, Ms Hughes moved on to the wider question of violence in the family. There was the following exchange:

> Q. Now the question I put to you Mr Wallace is - have these rows [between Mr Wallace and Raewyn Wallace] become physical?
>
> A. I will say this that - I myself think that this is irrelevant, and I don't want to answer that question.

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[36] I note that this material did not form part of the evidence at the later trial.

[177] After an exchange between counsel and the JPs about whether Mr Wallace should get legal advice, the questions went on:

> Q. So you're not prepared to answer the question about whether the rows got physical, is that right?
>
> A. That's right.
>
> Q. And are you prepared to answer the question as who's broken Raewyn's jaw?
>
> A. I am not prepared to answer that either.
>
> Q. And how did Steven feel about the assaults by you on his mother?
>
> A. I'm not sure.
>
> Q. And you and Raewyn are not together now are you?
>
> A. Yes, we are.
>
> Q. You are still living -
>
> A. Over this trial, yes.
>
> Q. Over the trial? Apart from the period of the trial, when did you last live together as man and wife?
>
> A. We're still man and wife.

The JPs' decision

[178] As noted earlier, the parties had been agreed that Constable Abbott should be committed for trial. Despite this, the JPs declined to do so.[37] Rather, on 20 February 2002, they issued a brief decision, which simply said:

> Senior Constable Abbott you are charged with the murder of Steven Wallace at Waitara on 30 April 2000 under the Crimes Act 1961, Section 167b and 172.
>
> The preliminary hearing which has just been completed is unusual in a number of ways. Over 1200 pages of detailed evidence plus hand-up material has been heard over 22 days from both the prosecution and defence.
>
> There is no doubt that you shot Steven Wallace on McLean Street in Waitara on the Sunday morning.

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[37] Defence counsel wanted a committal so that the matter could finally be resolved by way of (what she anticipated would be) a successful application under s 347 of the Crimes Act 1961. Such an application would have constituted an acquittal and ensured that Constable Abbott was not exposed to the risk of further prosecution.

> The Court has decided that you shot Steven Wallace in self defence in line with the policy and operational procedures of the New Zealand Police.
>
> The defendant is discharged.

[179] After the discharge was granted, one of the JPs (Mr Moffat) spoke to the media, saying that the decision had not been "really hard to make".[38]

The Chief Justice consents to the filing of the indictment

[180] As a consequence of the discharge decision, on 9 May 2002, Mr Rowan wrote to the Attorney-General requesting that, pursuant to s 345(3) of the CA, she either file an indictment or consent to the filing of an indictment against Constable Abbott for murder.

[181] The request was referred to the Solicitor-General, who replied a few weeks later. He advised that a decision on an indictment was for the Court, noting that it was very rare for a Solicitor-General to exercise the s 345 power.

[182] So Mr Wallace applied to the High Court under s 345(3) for consent to indict Constable Abbott for murder. The hearing took place before Elias CJ on 4–5 June. Judgment was delivered about 10 days later.

[183] Elias CJ began by making clear that she was not expressing any view about Constable Abbott's guilt or innocence, the credibility or strength of the evidence, or the likely outcome of a trial.[39] She emphasised that those were all matters for the jury; the only question she was to address was whether, on a preliminary review, there was sufficient evidence to found a conviction.

[184] After noting the Law Commission's recent opinion that private prosecutions serve as an important safeguard against misuse of State power, Elias CJ held that the JPs' decision could only be read as a determination of a jury question, which was not the question they were required—or permitted—to answer.[40] And given that error, she

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38 *Wallace v Abbott* HC New Plymouth T9/02, 16 September 2002 at [16].

39 *Wallace v Abbott* [2003] NZAR 42 (HC).

40 But she did express her sympathies for the JPs, explaining that they were put in an unenviably difficult position, given the volume of evidence, media attention, and various required rulings. She said that, in hindsight, the hearing ought to have gone to a judge. She also noted that the

proposed to deal with the s 345(3) matter afresh, adopting an approach that was analogous to that taken on an application for discharge under (what was then) s 347 of the CA, by reference to the principles set out in *R v Flyger*.[41]

[185] After canvassing in some detail the evidence given at the depositions hearing and the submissions of counsel, Elias CJ concluded that there was "clearly [a] sufficient basis for jury determination of whether the prosecution has excluded self-defence".[42] She observed that a jury could properly decide that the force used by Constable Abbott was not reasonable by drawing on evidence of:

(a) the weapons used;

(b) the degree and immediacy of the danger that Steven Wallace posed to others;

(c) the options available to Constable Abbott;

(d) the manner of Constable Abbott's approach to Steven Wallace;

(e) the sequence of the shots, and which had proved fatal;

(f) Constable Abbott's knowledge (if accepted by the jury) of the first two shots to hit Steven Wallace and their effect or likely effect; and

(g) the opportunity available to Constable Abbott to reassess the threat (and move out of harm's way) after the first two shots were fired.

[186] The Chief Justice overturned the discharge decision and consented to the filing of the indictment.

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approaches taken by counsel at the depositions hearing had catalysed the error (for example, she noted that their submissions failed to identify the proper question that the Justices were to answer—their submissions were more akin to a jury address).

41 *R v Flyger* [2001] 2 NZLR 721 (CA).

42 *Wallace*, above n 39 at [103].

[187] After the release of the Chief Justice's decision, the other JP who had presided at the depositions hearing, Mr More, also spoke to the media, saying that he would nonetheless "make the same decision again".[43]

Further communications with Crown Law

[188] Shortly after the release of the Chief Justice's decision, Mr Rowan again sent a letter to the Solicitor-General, asking that the Crown either assume responsibility for the prosecution or cover the family's costs. The Deputy Solicitor-General replied to him the next month, declining both requests. She described the matter as "a classic private prosecution" and said further that:

> It is accepted that in New Zealand the right to take a private prosecution is a constitutional safeguard for the citizen. However, that does not mean any particular prosecution is of constitutional importance.
>
> The Solicitor-General is of the view that the public interest factors here should operate to leave the prosecution of Mr Abbott at trial as a private prosecution. It follows that costs of such prosecution should not be borne by the Crown.
>
> On the Solicitor-General's behalf I have reviewed the ruling of the Chief Justice in the light of the specific provisions you have referred to in your letter. It is considered that they are all matters that the Chief Justice thought should be left to the tribunal of fact; the jury. None of them operate to elevate the matter to such a degree that the Crown should intervene to take over the trial.

Section 322 application for venue change

[189] On 6 September 2002, Mr Wallace applied under s 322 of the CA to have the trial venue moved to Wellington, on the grounds that there could not be a fair trial in New Plymouth.

[190] Although not directly relevant to the matters now under consideration, Chambers J's 16 September decision (in which he grants the application) is notable for the snapshot it gives of the climate and context for the prosecution at that time. The following matters canvassed in the judgment deserve specific mention:

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[43] *Wallace*, above n 38, at [16].

(a) the prosecution was the first occasion in New Zealand that a serving police officer had been charged with murder while in the execution of his duty;

(b) the huge publicity the case had received, particularly in the Taranaki area;

(c) the public interest had been intensified, and the community polarised, by the racial overtones that the case had developed;

(d) there appeared to be considerable local support for Constable Abbott, which had been reported in the press;

(e) These matters caused Chambers J to conclude that:

> [12] … People in Taranaki have identified with the victim or the accused in an almost unprecedented way, and certainly the personal involvement of Taranaki people in the tragedy has been much more significant than has been the involvement of people elsewhere in New Zealand.

[191] Chambers J criticised the Police for their survey of local businesses (the questionnaire noted at [107] above) and the JPs for their comments on the Chief Justice's decision. As to the former, he said:[44]

> [18] … It is hard to see how such a survey was relevant to the sole issue in this case, whether Constable Abbott acted in self-defence. But the fact that such a widespread survey was carried out will have contributed to an impression that the Wallace family are on trial.

[192] And as to the latter, the Judge observed:[45]

> [16] … How [the JP] could possibly make such a statement in light of the Chief Justice's decision that he and his colleague had misinterpreted their function is, to say the least, surprising.

[193] The Judge noted that both JPs were well-known in Taranaki and that both had publicly aligned themselves with Constable Abbott.

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44 *Wallace v Abbott*, above n 38, at [18].
45 At [16].

[194] These matters, together with the small size of the jury pool in New Plymouth, made it likely that jurors drawn from that pool would have preconceived views about the case. The Judge held that the transfer was warranted.

The private prosecution continues

[195] After a trial date had been set, on 3 October Mr Rowan again wrote to the Solicitor-General. He asked the Solicitor-General to reconsider the previous decision about taking over, or funding, the prosecution. He referred to the Chief Justice's "sanctioning" of the prosecution, the Wallaces' very limited resources and fact that the Crown was effectively paying for, and supporting, Constable Abbott.[46]

[196] There was no response to Mr Rowan's letter. He wrote again to the Solicitor-General on 16 October, advising that further trial costs had arisen. Although an acknowledgement of receipt was sent the next day, his requests went substantively unanswered. Mr Rowan wrote again on 8 November, advising of additional trial costs. There was no reply.

The High Court trial

[197] The criminal trial began on 18 November 2002 in the Wellington High Court before Chambers J and a jury. Because Constable Abbott claimed he was defending himself when he shot Steven, Mr Wallace (as prosecutor) bore the burden of disproving self-defence beyond reasonable doubt.

[198] The opening and closing submissions and the Judge's summing up are not available. As the key evidence at trial forms the basis of the factual narrative that I have set out above there is no need to summarise it again here. I will, instead, refer to matters of evidentiary detail later, if and when the need arises. The prosecution case—and the witnesses—had not changed materially since depositions.

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[46] Mr Rowan referred to a contribution made by the Treasury to the Police Association (which was funding the defence) and to a public statement by the Commissioner of Police that the Police would continue to support Constable Abbott fully.

[199] On 3 December 2002, the jury found Constable Abbott not guilty. He was discharged, accordingly.

The Coroner's inquest resumes

[200] Before discussing the inquest in more depth, it is useful to say something about the statutory framework within which coroners were then operating.

The Coroners Act 1988

[201] At the time of the resumed inquest, the coronial process in New Zealand was governed by the Coroners Act 1988 (the 1988 Act).[47] The purpose of an inquest was set out in s 15(1) of the 1988 Act:

> **15 Purpose of inquests**
>
> (1) A coroner holds an inquest for the purpose of—
>
> (a) Establishing, so far as is possible,—
>
> (i) That a person has died; and
>
> (ii) The person's identity; and
>
> (iii) When and where the person died; and
>
> (iv) The causes of the death; and
>
> (v) The circumstances of the death; and
>
> (b) Making any recommendations or comments on the avoidance of circumstances similar to those in which the death occurred, or on the manner in which any persons should act in such circumstances, that, in the opinion of the coroner, may if drawn to public attention reduce the chances of the occurrence of other deaths in such circumstances.

[202] Under s 17, the default position was that a coroner was *required* to hold an inquest in certain cases, including (for example) where the death appeared to have been the result of suicide; or where a person had died while in the care or custody of agents of the State (including in the custody of the Police). Absent from that list, however, is any obligation to hold an inquest in a case where a person is killed by a Police officer in the course of his duty.

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[47] That Act was repealed and replaced by the Coroners Act 2006.

[203] In cases where an inquest was not obligatory, the coroner had a discretion, the exercise of which was to be governed by the matters set out in s 20, namely:

> (a) Whether or not the causes of the death concerned appear to have been natural; and
>
> (b) In the case of a death that appears to have been unnatural or violent, whether or not it appears to have been due to the actions or inaction of any other person; and
>
> (c) The existence and extent of any allegations, rumours, suspicions, or public concern, about the death; and
>
> (d) The extent to which the drawing of attention to the circumstances of the death may be likely to reduce the chances of the occurrence of other deaths in similar circumstances; and
>
> (e) The desire of any members of the immediate family of the person concerned that an inquest should be held; and
>
> (f) Any other matters the coroner thinks fit.

[204] Subject to certain specific exceptions, s 25 required inquests to be held in public. Section 26 dealt with evidence at inquests and related procedural matters. It provided that any person with a sufficient interest in the subject or outcome of the inquest may, personally or by counsel, attend an inquest and cross-examine witnesses.[48]

[205] Section 28 permitted a coroner to postpone or adjourn an inquest while criminal proceedings relating to the death were extant. By virtue of subs (4), a coroner was empowered to open or resume such an inquest upon the conclusion of such proceedings if satisfied that doing so would not prejudice the person charged with a criminal offence relating to the death or its circumstances. And by virtue of subs (6), a coroner was authorised *not* to open or resume such an inquest if satisfied that the matters specified in s 15(1)(a) had been adequately established in the course of the criminal proceedings.

[206] The 1988 Act did not expressly prohibit a coroner from determining matters of civil, criminal or disciplinary liability.[49] But it had long since been accepted that the

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[48] Such persons include the immediate relatives of the person who has died.

[49] This can be contrasted with s 57 of the 2006 Act, which does contain such an express prohibition.

coronial process must be focused on fact-finding, rather than on the attribution of blame. That said, the authorities also acknowledged that the implicit attribution of blame may nonetheless be a necessary byproduct of the process.[50]

The decision to resume

[207] Following the conclusion of the criminal trial, Coroner Matenga sought submissions about whether the inquest should be resumed and, if so, to what extent.[51] The submissions revealed disagreement about these issues.

[208] In February 2003, the Coroner was provided with a full transcript of the notes of evidence from the criminal trial, in accordance with the decision of this Court in *Hugel v Cooney*.[52] The Coroner read the transcript.

[209] On 8 July, the Coroner issued his decision. After referring to the relevant parts of s 15, the Coroner said he could be satisfied that there had been a death, that the deceased had been identified, and that the time, place, and cause of death had been determined. But counsel assisting had submitted that the matter referred to in s 15(1)(a)(v), the circumstances of the death, had not been determined. That is because it required "not only a determination of the procedures that are employed but also a determination as to whether the correct procedures were employed". If so, then s 28(6) required the resumption of the inquest.

[210] Mr Rowan, on behalf of the Wallace family, had referred to s 20 of the 1988 Act and argued that a number of relevant matters remained uninterrogated:

> (i) The trial of Constable Abbott was limited in its focus dealing particularly with a 64 second period from the time Constable Abbott left the Waitara Police Station to the time of the shooting.
>
> (ii) An inquest is necessary to consider the actions or inactions of other persons who were involved particularly Sergeant Prestidge and Constable Dombroski.

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50 *Re Hendrie* HC Christchurch CP445/87, 1 December 1988.

51 At this time, the Wallace family was represented by Mr Rowan, but he was later replaced by Mr Mansfield. Constable Abbott did not appear (although he had a right to do so) but was effectively represented by the Police Association, which, in turn, was represented by Constable Abbott's lawyer at trial, Ms Hughes. There were also appearances by counsel for the Police Commissioner (Ms McDonald QC) and counsel appointed to assist the Court (Mr Gudsell).

52 *Hugel v Cooney* HC Tauranga CP17/98, 9 April 1999.

(iii) It is submitted that no steps were taken by Constable Abbott or Constable Dombroski to provide immediate first aid care to Mr Wallace.

(iv) The Police relied on ambulance transport when other means were available to transport Mr Wallace quickly to Taranaki Base Hospital.

(v) The administration of intravenous fluids to Mr Wallace by ambulance staff.

(vi) Alleged psychological trauma suffered by Constable Abbott.

(vii) The length of time Police members should remain in the AOS and whether they should be subjected to regular psychological testing.

[211] The Coroner held that the inquest should continue, but in a limited capacity. It was to consider only the following issues:

(a) Police policy and procedure as it applies to general staff (excluding AOS) in dealing with violent offenders in circumstances such as these.

(b) The provision of first aid care, including the actual care provided to Steven Wallace.

Judicial review of the Coroner's decision

[212] There was dissatisfaction with this outcome. In 2004, Ms Hughes sought judicial review of the decision, saying that the inquest should not have been resumed at all. The Wallaces cross-claimed, challenging the Coroner's decision not to hear oral evidence from witnesses who had given evidence at the criminal trial.

[213] That review application was heard on 17 February 2005 at the Wellington High Court. Randerson J delivered his judgment on 20 April.[53] He agreed with the Wallace family that the Coroner was obliged to resume the inquest because the circumstances of Steven's death had not been fully determined. But he disagreed that the Coroner was obliged to rehear all evidence relating to the circumstances of the death; he had a discretion to confine the inquest to those circumstances relating to the death that had not been fully established at the criminal trial. It was also not in the public interest to relitigate issues that had been properly canvassed at trial. The inquest was therefore

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53 *Abbott v Coroners Court of New Plymouth*, above n 6.

properly restricted to the two issues identified by the Coroner: Police policies for violent offenders and first aid care.

[214] Randerson J also agreed with the Wallace family in a further limited capacity, finding that the Coroner should hear evidence tendered by the Wallace family to the extent that it was relevant to those two identified issues. But he held also that, apart from the expert Police witness Mr Rowe, the Coroner did not need to hear oral evidence from any of the witnesses who gave evidence in the High Court criminal trial.

The Coroner's report

[215] The inquest took place between 12–16 September 2005. The Coroner did not release his findings until 3 August 2007. For a narrative of relevant events, he relied on the evidence from the criminal trial. The Coroner focused in his report on the two issues he had earlier identified and so (unsurprisingly) declined to make findings on the key matters seen by the Wallace family as going to self-defence: the sequence of shots and the question of alternative tactical options.

[216] In addressing the issues around Police policy and procedure around dealing with violent offenders, the Coroner looked at six discrete aspects of those procedures and policies:

(a) supervision and command;

(b) appreciation technique;

(c) authority to draw firearms and fire orders;

(d) warning shot;

(e) double tap policy; and

(f) first aid.

Supervision and command

[217] The Coroner noted that reg 5 of the Police Regulations 1992 required there to be a responsible supervisor on the night in question. He said that this was Sergeant Prestidge, at least at the early stages.

[218] But once the two officers had been dispatched to Waitara, he said the responsibility arguably shifted to Constable Dombroski, who was senior to Constable Herbert. He noted that it was Constable Dombroski who directed Comms to contact Constable Abbott to draw a firearm, and that it was he who drew a firearm for his own protection. Both decisions were made without reference to Sergeant Prestidge. Then, once Constable Abbott had arrived, responsibility shifted to him—he was "clearly the most senior and most experienced police officer present at the scene", which, according to the Police Manual of Best Practice, required him to take charge.

[219] The Coroner identified several issues with the command structure that evening. He found:

(a) Sergeant Prestidge should have exhibited more leadership and control (for instance, by simply asking Constable Dombroski what he was planning to do).

(b) Constables Dombroski and Abbott did not discuss between themselves how they would handle the situation, and they did not seem to be on the same page, evidenced (in the Coroner's view) by:

(i) Constable Dombroski exiting the vehicle and drawing his firearm and Constable Abbott exiting the vehicle holding his baton;

(ii) Constable Dombroski being the first to speak and act, despite Constable Abbott telling him that he thought the offender was someone he knew; and

(iii) the absence of any decision about cordoning and containing, making a voice appeal, or both.

[220] The Coroner concluded that there was a lack of leadership shown at the scene. But he rejected the submission that these were due to faults in the relevant policies and procedures. He found that the line of command was always clear. The issue was therefore one of performance; he declined to make any recommendations about the matter.

Appreciation technique

[221] The Coroner noted that the Police "appreciation process" describes how officers are trained to make decisions in responding to any given situation. The four basic steps are:

(a) fixing a firm aim or objective;

(b) stating all the factors involved;

(c) considering the different courses open and selecting one that is best and most appropriate to the circumstances; and

(d) making a plan to implement the chosen course.

[222] He acknowledged that, in practice, this process would be a mental one. The report noted that both Constable Abbott and Constable Dombroski observed the situation—Steven Wallace smashing windows and attacking the patrol car—and then decided on a course of action to take. While the officers did not discuss their observations, aims, or plans, each of them came to separate conclusions that they would need to arm themselves for protection.

[223] The Coroner concluded that a proper application of the appreciation technique required the two constables to discuss matters such as resources, urgency, and available backup. He rejected the submission that the plan was "so obvious that it did

not need stating". He gave as an example the fact that Constable Dombroski knew that the Delta (dog) unit was en route, when Constable Abbott did not.

[224] The Coroner then considered whether Police policies and procedures should be more specific about when a dog unit should be call out, particularly in armed offender situations. He noted that the Police Dog Deployment guidelines discuss *how* dogs should be used but do not explain *when* dogs should be used. While accepting the strong element of common sense involved, the Coroner recommended that the guidelines be reviewed.

[225] The Coroner agreed with the submissions that the instructions for use of batons and OC spray were clear. He expressly declined to consider whether the officers should have used these tools, saying

> [67] Also under this heading of the appreciation technique fits the hotly debated issue of the use of batons and OC spray as a less violent option. I have taken the view that I cannot consider whether the officers in the circumstances of this case should have used or attempted to use the baton or the OC spray or a combination of the two. To do so would be to stray into the jurisdiction of the High Court. *The jury found that the level of force employed by Senior Constable Abbott was justified therefore to suggest that other less violent means should have been attempted is to endeavour to cast doubt on the jury's verdict. The focus of this court is on the adequacy of the Police policy and procedure and not a reconsideration of the actual force used.* …

Authority to draw firearms and fire orders

[226] The report briefly addresses the decision and authority of the constables to uplift firearms. The Coroner found a technical breach of GI F059 because Sergeant Prestidge had been available (over the radio) to authorise the uplift but did not (and was not asked to) do so. The Coroner nonetheless agreed that the decision to draw firearms was appropriate in the circumstances; he made no recommendation.

Warning shot

[227] Counsel for the Wallace family had submitted that Constable Abbott breached the GIs by firing the warning shot, arguing that the shot may have caused Steven to attack him. But after a brief analysis, the Coroner found that the policies on warning shots did not require amendment.

Double tap policy

[228] The Coroner declined to comment on whether (or which of) the shots fired were justified, on the basis that the jury had accepted that the force used was not unreasonable. Specifically, he said:[54]

> [42] … The doctors were all in agreement that this injury was quite simply not survivable. I cannot see what is to be gained by making Findings as to whether Dr Thompson's opinion as to the order of the shots, or Dr Sage's opinion as to the order of the shots is correct. *The High Court jury clearly accepted that the force used was not unreasonable in the circumstances as Senior Constable Abbott believed them to be.*

[229] The Coroner said there was no evidence that Constable Abbott's training, or police firearms training in general, was deficient. He found that the current training materials and policies were all appropriate.

[230] Although he acknowledged the extensive evidence about the merits of a "shoot to injure" rather than a "shoot to incapacitate" policy, he said:

> [72] … I have not been convinced that the police policy is out of line with other countries and should be reviewed. Rather, it is clear from the evidence that the current police policy of shoot for centre body mass, shoot to incapacitate, is the policy which is generally accepted and in use in many other countries.

First aid

[231] Finally, the Coroner noted the evidence of first aid care provided by Police at the scene:

(a) an ambulance was called immediately by Constable Herbert;

(b) Constable Dombroski approached Steven Wallace and told him that an ambulance was on its way; and

(c) Sergeant Prestidge briefly examined Steven Wallace and placed a triangle bandage under his shoulder or arm, 10–12 minutes after she arrived at the scene.

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[54] Emphasis added.

[232] He also recorded the evidence of all of the relevant medical witnesses that Steven's injuries were not survivable; nothing else that Police could have done would have made any difference to the outcome. That said, he referred to a comment made by Professor Ardagh at the inquest:

> However I would add that it would have been desirable had some attention to Mr Wallace been undertaken. I do believe it wouldn't have made any difference to survivability, but it would have demonstrated compassion.

[233] A submission was made by counsel assisting that the relevant policies were difficult to ascertain because they were contained in a number of different documents. The Coroner was advised by Police that a review of this issue more widely had been commenced in 2005. On that basis, the Coroner found that there was no deficiency in the relevant Police policy, saying:

> [78] … I am prepared to accept … that a review was commenced and that I think is a complete answer to Mr Gudsell's submission but does not answer the need for Police to provide first aid care as a show of compassion. In the circumstances of this case it is more a timing issue. The real complaint is that Steven Wallace could have been approached sooner than he was. There is no deficiency in the Police policy: the policy states that first aid is to be rendered when it is safe to do so.

Formal verdict

[234] The Coroner's verdict and formal recommendations were recorded in two concluding paragraphs:

> [79] In conclusion then, I find that Steven James Wallace, late of Waitara, died at New Plymouth Hospital on the 30th day of April 2000 following an incident on the streets of Waitara where he was shot by armed Police. Steven James Wallace died as a result of the gunshot wounds he received.
>
> [80] I recommend pursuant to s15(1)(b) of the Coroner's Act 1988 that the police review the Police Dog Deployment guidelines with a view to providing guidance to general duties staff as to when to call out a dog team to assist general duties staff in the execution of their duties.

Police response to the Coroner's report

[235] It is apparent that Police were displeased with the criticisms contained in the Coroner's report. On 3 August 2007, the same day the Coroner released his findings,

the Police Commissioner issued a media statement dismissing those criticisms and commending the three officers for their professionalism and dedication.

[236] And on 27 August, DI Pearce forwarded a lengthy report to Superintendent Lammas responding to the Coroner's criticisms, which he said failed to recognise the realities faced by the officers that night. He argued that any lack of leadership (the existence of which was disputed) could not be regarded as having contributed to Steven's death.

Police Complaints Authority review and reform

[237] As noted earlier, a parallel investigation by the PCA had begun at the same time as the Police homicide inquiry, but was deferred pending the inquest, which, itself, was much delayed by the trial.

Intervening review

[238] As it happened, Steven Wallace's death—and the initial investigations into it—coincided precisely with a review of the Police Complaints Authority undertaken by Sir Rodney Gallen. The review was occasioned by a rise in criticism of the Authority. The criticisms were directed not at the Authority as such, but rather on its reliance on Police officers to staff the investigations of complaints against the Police. In the summary of his report (published in October 2000), Sir Rodney noted:

> 1.16 In submissions, the point was made repeatedly that investigation of complaints against the police by members of that service, lacked independence.
>
> …
>
> 1.19 It is essential in the interests of both the community and the police that there should be confidence by the community in the police and by both the community and the police in any authority responsible for the investigation of complaints.
>
> 1.20 Whether justified or not, there is a perception in the community that investigation by the police of complaints against the police was neither independent nor appropriate.
>
> 1.21 Because of the necessity for confidence, the existence of such a perception whether or not it is correct justifies a reconsideration of the approach taken at the time the Act was passed.

[239] And in the body of the report itself (in a section headed "Disadvantages of current practice") Sir Rodney relevantly made the following observations:

(a) In small town contexts, it is likely that the parties will be known to witnesses who are questioned. Those witnesses may have sympathies towards the officers they know, and they may have biases against the complainants (particularly if they had bad records).

(b) There had been a suggestion that investigating officers were inevitably entangled in Police culture, resulting in a focus on justifying police actions rather than critically examining them. Put more positively, it was possible that some Police officers preferred to resolve failures behind closed doors.

(c) It had been suggested that Police officers over-relied on previous interactions between a complainant and Police, which could lead to a lower level of scrutiny of the particular complaint. A similar lack of scrutiny may manifest as a reluctance to involve expert witnesses, with different cost considerations being applied when investigating police complaints rather than criminal prosecutions.

(d) There was a risk that investigating officers would be subjected to both direct and indirect peer pressure from other officers.

[240] Although it took several years, eventually the Gallen report was reflected in the establishment of the Independent Police Conduct Authority (IPCA) in late 2007.[55] By then there had been a further in depth inquiry into the workings of the PCA in the wider context of the Commission of Inquiry into Police Conduct, headed by Dame Margaret Bazley, who reported in 2007. The Police Complaints Authority Act 1988 was renamed the Independent Police Conduct Authority Act 1988 (the IPCA Act) and provisions aimed at ensuring the Authority's independence were enacted.

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[55] The change to the law also directly followed the release in 2007 of the report of Commission of Inquiry into Police Conduct.

Independent Police Conduct Authority investigation and report

[241] The Coroner's report was released shortly before the start of the new IPCA regime. But as soon as it was up and running, the Wallace family asked the IPCA to conduct an independent investigation into Steven's death.[56] The family also advised of certain specific issues they wished to have investigated.

[242] On 11 February 2008, the first IPCA Chair, Justice Lowell Goddard notified the Commissioner of Police of her intention to conduct further independent inquiries under s 12(1)(c) of the IPCA Act 1988. She indicated her wish to interview serving and retired Police officers who had been involved in the case, as well as civilian witnesses.

[243] The investigation culminated in the release of a 44-page report in March 2009.

The scope of the investigation and the report

[244] The report makes its scope clear: it was not intended to address the 64 seconds during which Steven Wallace was confronted and shot. The focus of the investigation was, rather, on Police actions leading up to the encounter, immediately after the shooting, and later, when interacting with the Wallace family. As well as considering the evidence given at the criminal trial and at the inquest the Authority itself interviewed more than 50 witnesses.

[245] The report surveyed the various investigative steps that had previously been taken. As regards the issue of self-defence, the report noted what was determined at the criminal trial:[57]

> The trial took place before Justice Chambers and a jury in the Wellington High Court from 18 November to 3 December 2002. *The issue at trial was whether the prosecution could exclude beyond reasonable doubt the possibility that Senior Constable Abbott had acted in self-defence when he shot Steven Wallace*. During the trial, evidence of an expert nature relating to Police policy, practice and procedure in armed offender situations was given by witnesses for both the prosecution and defence. At the conclusion of the trial Senior Constable Abbott was acquitted by the jury.

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[56] Under s 12(1)(c) of the Independent Police Conduct Authority Act 1988.
[57] Emphasis added.

[246] But later, the report said that it could not review the reasonableness of the third and fourth shots because of the jury's verdict:[58]

> 113. As also established, after a warning shot, Senior Constable Abbott fired a total of four shots at Steven, in two double taps. The fatal of those shots pierced Steven's liver and was not survivable. The Coroner made no specific finding as to which of the four shots was fatal, in light of differing expert opinion given on the topic at trial.
>
> 114. The question of the distance between the two men at the time the shots were fired and the order of those shots were key issues for the jury to determine in assessing the reasonableness of Senior Constable Abbott's response to Steven's aggression, it being argued by the prosecution that the firing of the third and fourth shots was reckless and entailed excessive use of force. *As is clear from the verdict of acquittal, however, the jury did not find the Senior Constable's action in firing the four shots unreasonable, in the circumstances as he perceived them to be, and at the point he fired his pistol.*
>
> 115. *It is not open to the Authority to review the jury's verdict on those issues.* Rather, the Authority's focus must be on the Police actions up to the 64 second period during which Constable Abbott was confronted by Steven Wallace and the shooting occurred (the timeframe in which the issue of self-defence had to be determined by the jury) and on the Police actions immediately after the shooting and on subsequent interaction between Police and the Wallace family.

[247] The IPCA's findings were grouped under the following headings:

(a) Carriage and use of firearms;

(b) Tactical options other than the use of firearms;

(c) Constable Abbott's fitness for duty;

(d) Supervision and command;

(e) Police actions after the shooting;

(f) The Police homicide investigation;

(g) Police conduct at Senior Constable Abbott's trial;

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[58] Emphasis added.

(h) Family concerns; and

(i) Police policy and procedures.

[248] I attempt to summarise the Authority's findings under those headings, in turn.

Carriage and use of firearms

[249] The Authority's discussion under this heading begins with a review of the relevant GIs, (set out earlier in this judgment) together with the justification and self-defence provisions in the CA. The report then asks and answers three questions:

(a) Were Police justified in arming themselves in response to Steven's actions?

(b) Did Police follow proper procedures when issuing themselves with firearms?

(c) Was Senior Constable Abbott justified in firing a warning shot?

(d) Was the shooting justified in law?

[250] On the first question the Authority noted that the Coroner had agreed that the decision to uplift firearms was appropriate in the circumstances and that counsel representing the Wallace family at the Inquest had been recorded as not criticising that decision. The Authority found that the officers were justified in arming themselves:

> Both Senior Constable Abbott and Constable Dombroski had eye-witness evidence of Steven Wallace's extreme violence directed at persons as well as property. This can have left them in no doubt that they were dealing with an emergency situation, which required the uplifting of firearms from the Waitara Police Station in order to respond to a real threat of death or grievous bodily harm to themselves or to others in the vicinity. The officers were therefore justified in arming themselves.

[251] On the second question the IPCA found the officers had technically, but in the circumstances, reasonably, breached the GIs by failing to complete the Firearms Register.

[252] There were two issues about the warning shot: whether it complied with the relevant policy/GIs and whether it might have caused Steven to believe that he was under attack, and so provoked him to act offensively. The IPCA noted that, although GI F064 discourages the firing of warning shots:

> Senior Constable Abbott complied with required policy, having repeatedly called upon Steven Wallace to surrender his weapons without success and by firing a shot directly into the air without placing anyone at risk.
>
> By his actions Senior Constable Abbott made it clear to Steven Wallace that he was not being shot at, but was receiving a warning.

[253] On the fourth sub-issue—whether the shooting was justified in law—the IPCA's discussion begins by reiterating that "the issue of self-defence has been finally determined by due process in the courts". And then (after very briefly canvassing the relevant evidence) the Authority says:

> The jury accepted that at the critical time when Senior Constable Abbott fired his Glock, he genuinely feared for his life and for the life of Constable Dombroski, and had no less violent option immediately available to him to remove this threat.

[254] The Authority's formal findings were:

> In accordance with the jury's verdict, Senior Constable Abbott was lawfully justified in shooting Steven Wallace in self-defence and in the defence of others, within the meaning of section 48 of the Crimes Act 1961.
>
> It is appropriate to reinforce that Steven Wallace was shot, not because he had broken windows, or because he was resisting or escaping from arrest, but because Senior Constable Abbott had reasonable grounds to fear for his own life and for that of Constable Dombroski.

Tactical options other than the use of firearms

[255] On this issue the IPCA's overall finding was that:

> Given the limited nature of the available resources and the immediate threat presented by Steven Wallace, no option was available to the officers at the critical time other than use of force.

[256] Underlying that conclusion were the following sub-findings:

(a) Cordon and containment was not a viable option in terms of the guidance contained in the Police Manual of Best Practice, which

warned that it is better to take a matter too seriously than too lightly and that every effort must be made to prevent casualties, and that:

> … if the suspect is acting in a way that makes casualties likely, Police must act immediately to prevent this …

(b) On the basis of the expert evidence at trial, retreat would have exposed members of the public to danger and was not a viable option;

(c) OC spray was not viable in terms of the Manual, which noted that its use on an armed offender carried some risk and would likely have been ineffective against a "goal-oriented" attacker;

(d) The PR24 baton was primarily a blocking tool and the expert evidence was that it would have been of limited (if any) use in relation to an assailant with a baseball bat;

[257] In concluding that Constable Abbott's mistaken belief that Steven was David Toa did not materially affect his handling of the situation, the Authority found:

(a) the mistake was a genuine one, and had caused Constable Abbott to think he might be able to calm Steven by way of personal appeal; and

(b) it was improbable that either the officers' actions or the outcome wold have been different had they first checked the number plate of Steven's car and been able to ascertain his true identity.

Constable Abbott's fitness for duty

[258] In terms of Constable Abbott's fitness for duty, the IPCA noted that GI FO6O prohibits the consumption of alcohol within a reasonable time before commencing duty. Following investigation, the IPCA concluded that Constable Abbott had neither attended a wedding function at the Waitara Fire Station nor a farewell function for two AOS colleagues at the New Plymouth Police Station on the evening before the shooting. Rather—and as noted earlier—the IPCA made a positive finding on the evidence that Constable Abbott had finished work at 11 pm on Saturday 29 April 2000,

arrived home at about 11.15pm, consumed a meal and a non-alcoholic drink, watched television and gone to bed at about midnight.

[259] Under this heading the Authority also considered the absence of breath or blood testing of either Constable Abbott or Constable Dombroski immediately after the shooting. It noted that, despite previous comments by both the Authority and by Coroners, Police did not have a policy that requires testing following a critical incident, except breath testing when there is a vehicle crash involving the Police. It said:

> In the Authority's view, mandatory drug and alcohol testing following critical incidents would be of considerable benefit to Police and should be introduced. It would indicate a willingness on the part of Police to ensure accountability within its own ranks. And it would protect individual officers from false allegations that they were or may have been impaired by alcohol and/or drugs. The Authority's view is that Police should urgently develop policy and procedures for compulsory alcohol and drug testing …). The Police accept this and have advised the Authority that the policy is under review, and that the review is well advanced.

[260] As also discussed earlier, the Authority further found (after engaging its own expert in the field) that there was no evidence to support the Wallaces' theory that Constable Abbott had been suffering from PTSD at the time of the shooting.

Supervision and command

[261] On the command and control issue, the IPCA began by noting the Coroner's findings of poor planning and decision-making and lack of leadership. But the Authority's analysis was somewhat different. It observed that:

> Senior Constable Abbott and Constable Dombroski should have briefly discussed control of the situation while they were at the Waitara Police Station. Clearer communication may at least have acquainted Senior Constable Abbott with the fact that Constable Herbert was also in attendance. However, this reflects the reality that Constable Dombroski and Senior Constable Abbott were responding as quickly as they could to an immediate and serious threat.
>
> As she travelled to Waitara, Sergeant Prestidge was clearly aware of the seriousness of the incident and of the capabilities of the officers involved. She was also aware that firearms were being drawn and was comfortable with that course of action under the circumstances. Any input she might have had before arriving at the scene could only have been general in nature, and to have interjected at that time would have distracted the

> members from their primary task. Clearly, if Sergeant Prestidge had not been happy with the members arming themselves, she was under an obligation to give appropriate directions; the fact that she did not is not grounds for criticism of her command and control of the situation. Indeed, she made a perfectly reasonable decision to rely on the officers at the scene, including an experienced member of the AOS, to respond appropriately to a dangerous offender.

[262] The Authority concluded:

> The lack of communication between Constable Dombroski and Senior Constable Abbott reflected the urgency of the situation they faced. In the Authority's view, Sergeant Prestidge's leadership was reasonable and appropriate under the circumstances.

Police actions after the shooting

[263] On the question of first aid, the Authority essentially agreed with the Coroner. It found:

> Notwithstanding the traumatic effect of the incident on the officers concerned, more should have been done to show compassion and concern for Steven Wallace, once it was ascertained he was no longer a threat. However, even if first aid had been provided immediately, this would not have saved Steven Wallace's life.

[264] The IPCA report was the first occasion on which the question of the appropriateness of Police liaison and interactions with the Wallace family had been considered, albeit in a limited way.[59] Its review also covered events at the hospital immediately after the shooting and cultural issues, including in particular the actions of Police in washing Steven's blood off McLean Street before the area could be blessed. And in that respect the finding was:

> Police have recognised that their performance in terms of managing appropriate release of information to the public and news media could have been better in this case, and have taken steps to remedy the shortcomings apparent at Waitara.

[265] Consideration was also given to criticisms of public Police statements made after the shooting, but the finding was that the alleged statements had not been made.

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[59] The only finding was that "[a]lthough some time was taken to positively confirm Steven's identity, the proper process in terms of family liaison was followed as soon as it was confirmed."

Police homicide investigation

[266] In terms of the Police investigation, the IPCA noted that DI Pearce had taken over command from DS Coward as soon as practicable and that reporting lines were appropriate. It acknowledged that most of the investigating officers had come from either New Plymouth or the Central District and that a number were acquaintances of Constable Abbott. But taking into account the available Police resources at the time, the Authority concluded that the overall integrity of the investigation was properly maintained. It noted that it had "looked carefully for any suggestion of bias towards a preconceived outcome and found none".

[267] The Authority also noted, however, that in some respects that investigation had fallen short of best practice. It gave examples of a mistake made in recording the serial numbers of the pistols carried by Constable Abbott and Constable Dombroski, and the failure to conduct residue testing on either officer (both failings having been acknowledged by Police). The report also noted (without elaborating) that "interviewing standards at times fell short of best practice". Overall, the conclusion on this point was that:

> Operation Mclean was well-led and, in most respects, met high standards of professionalism and integrity. Some aspects of the investigation did not meet best practice.

Police conduct at Constable Abbott's trial

[268] The Wallace family had contended that members of the Police had deliberately worn their uniforms in Court during the criminal trial in an inappropriate attempt both to show solidarity with Constable Abbott and to intimidate jurors. The IPCA found:

> There is no evidence that the Police officers concerned wore their uniforms to court in a deliberate attempt to influence the jurors or to intimidate the Wallace family.
>
> However, the wearing of uniform to court when attending to support a colleague and while not on duty is a breach of the relevant policy. It also gives an impression of solidarity and thus risks creating the impression that the officers concerned hope to influence the jury.

Family concerns

[269] The Authority addressed—to the extent it had jurisdiction to do so—a list of specific questions raised by the Wallace family. I do not intend, or need, to detail those issues here.

Police policy and procedures

[270] Lastly, the Authority briefly noted that the Police had made several changes to policy and practice in response to issues arising from the shooting—including improvements to firearms training, first aid training for General Duties staff, and media liaison.

SECTION 8 NZBORA: THE RIGHT TO LIFE

[271] Section 8 of the NZBORA provides:[60]

> **8 Right not to be deprived of life**
>
> No one shall be deprived of life except on such grounds as are established by law and are consistent with the principles of fundamental justice.

[272] In his 2016 decision declining to strike out Mrs Wallace claim, Brown J noted that s 8 reflects the belief that the sanctity of human life is fundamental.[61] He referred to *Shortland v Northland Health Ltd* where the Court of Appeal emphasised that it is the one right on which all other rights depend:[62]

> ... as this Court has made clear the fundamental rights affirmed in the Bill of Rights are to be given full effect and a generous interpretation, … As well, we have recently stressed that when questions about the right to life are in issue the consideration of the lawfulness of official action must call for the most anxious scrutiny, …

[273] The Judge observed that s 8 has not generated a jurisprudence proportionate to its importance and was unlikely to do so in future. For that reason, a number of the

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60 As initially proposed in the 1988 White Paper, the right was (again) phrased slightly differently: "No one shall be deprived of life except on such grounds, and, where applicable, *in accordance with such procedures*, as are established by law and are consistent with the principles of fundamental justice."

61 *Wallace v Commissioner of Police*, above n 4, at [12].

62 At [12], citing *Shortland v Northland Health Ltd* [1998] 1 NZLR 433 (CA) (citations omitted).

questions of law raised by the present claim are novel, at least in a domestic context. And those questions must all be answered *before* any assessment of the facts, and any potential liability arising.

[274] While it is accepted, for example, that the "core" of s 8 (the right to life) is squarely engaged—because Steven was killed by an agent of the State, the following questions still arise in relation to that aspect of the claim:

(a) Is the justification of self-defence established by law and consistent with the principles of fundamental justice?

(b) In a s 8 claim where self-defence is raised, on whom does the burden of proof lie?

(c) Are the elements of self-defence raised in a s 8 claim the same as the elements of self-defence in a criminal proceeding?

[275] And in terms of the wider "procedural" aspects of the s 8 claim, it is also necessary to determine what the ambit of the right is and, more particularly:

(a) In a case involving the killing of an individual by a state actor, does s 8 impose an obligation on the state to investigate?

(b) If so, then what is the content of the obligation to investigate?

(c) Does s 8 require those in charge of state operations potentially involving lethal force to plan and control those operations in a way that minimises the risk of harm to individuals?

(d) If so, then what is the precise ambit of such an obligation?

[276] But before turning to consider how the s 8 right plays out in relation to the individual claims, it is necessary to look beyond s 8 itself. That is because the right to life needs to be understood—and s 8 interpreted—in its international context.

The international human rights context

[277] As the long title to the NZBORA makes clear, one of the Act's two purposes is to affirm New Zealand's commitment to the International Covenant on Civil and Political Rights (the ICCPR). It is therefore useful to start this contextual overview by reference to the ICCPR equivalent to s 8: Article 6. Article 6 expresses the right to life in the following way:

> Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

[278] Most art 6 cases to have come before the Human Rights Committee have involved either "disappearances" of persons in state custody or killings by security forces. But it can be noted in passing that the Committee has made it clear that the right incorporates both investigative and protective obligations.[63]

[279] It may, however, immediately be observed that the ICCPR right is expressed positively (the right to life), whereas s 8 is expressed negatively (the right *not* to be deprived of life …). The reason for this is not articulated in the White Paper that preceded the enactment of the NZBORA.[64]

[280] At a general level, however, I record my agreement with the authors of *The New Zealand Bill of Rights*, that:[65]

> Not too much should be made of that distinction, however. The 'right to life' is really only a succinct way of affirming a right not to be wrongly deprived of life. Indeed, since death is inevitable for all persons, that is all a 'right to life' can mean.

[281] Art 6 (and s 8) can be compared with art 2 of the European Convention on Human Rights (ECHR), which provides:

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63 See the discussion in R Clayton and H Tomlinson *The Law of Human Rights* (2nd ed, Oxford University Press, Oxford, 2009) at [7.159]–[7.162].

64 Geoffrey Palmer "A Bill of Rights for New Zealand: A White Paper" (1985) AJHR A6. The only comparison made in the commentary is with s 7 of the Canadian Charter, the point being that the New Zealand right was framed to make it clear that the reference to "fundamental justice" was not just a synonym for natural justice but had substantive heft. (At that point, the articulation of the right to life was slightly different: "No one shall be deprived of life except on such grounds, *and, where applicable, in accordance with such procedures*, as are established by law and are consistent with the principles of fundamental justice").

65 Paul Rishworth and others *The New Zealand Bill of Rights* (Oxford University Press, New York, 2003) at 220.

> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> a. in defence of any person from unlawful violence;
>
> b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> c. in action lawfully taken for the purpose of quelling a riot or insurrection.

[282] As commentators have noted, since both the ICCPR and the ECHR aim to give effect to the Universal Declaration of Human Rights[66] their effect ought generally to be the same, despite the differences in wording.[67]

[283] And lastly, there is s 7 of the Canadian Charter:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[284] Section 7 is noted only for comparative purposes; it will not be the subject of further discussion in this judgment. To my knowledge there have been no cases in Canada under s 7 brought by the family or estate of someone killed by a state actor. None was referred to me by counsel. So far as I can tell this is because Canada—subject only to limited statutory exceptions—adheres to the common law position that a personal right of action dies with the person who possesses it. Similarly, tortious claims for wrongful death do not seem to be a feature of the Canadian jurisprudence.[68]

[285] But in New Zealand the common law rule is more generally abrogated by the Deaths by Accident Compensation Act 1952. Section 4(1) of that Act provides that where the death of a person is caused by a wrongful act that would, if death had not

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66 Article 3 of which provides: "Everyone has the right to life, liberty and the security of person."

67 Kris Gledhill *Human Rights Acts: The Mechanisms Compared* (Hart Publishing, Oxford, 2015) at 213.

68 See for example the 2004 discussion of the rule by the Albertan Court of Appeal in *Ferraiuolo v Olson* (2004) 246 DLR (4d) 225 (CA). It seems that in the various Canadian provinces the common law rule has only partially been abrogated by statute.

occurred, have entitled the party to bring an action and recover damages, the person who would have been liable to the deceased is liable to an action in damages.[69]

[286] It is against this generalised overview that I turn to consider the specific s 8 claims in this case. I begin with the core claim: that killing Steven constituted a breach of his right to life. I then move on to the "systemic" claims: failure to investigate effectively, and failures of planning and control.

UNLAWUL KILLING

[287] There is, of course, no dispute that Steven was killed by Police on 30 April 2000. The central s 8 question is whether the killing was on grounds established by law and consistent with the principles of fundamental justice. The Crown says that self-defence is—both in law and in fact—such a ground here. As noted earlier, a determination whether that is so requires preliminary consideration of:

(a) whether the justification of self-defence established by law and consistent with the principles of fundamental justice;

(b) whether the elements of self-defence in a s 8 claim the same as the elements of self-defence in a criminal proceeding;

(c) on whom the burden of proof lies; and

(d) whether the elements of self-defence are established (to the requisite standard) here.

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69 Provide the accident compensation legislation does not apply (which it does not, in relation to a NZBORA claim).

Is the justification of self-defence established by law and consistent with the principles of fundamental justice?

[288] In *Seales v Attorney-General*,[70] Collins J held that a deprivation of life will not offend s 8 if the grounds for the killing are both "established by law" and "consistent with the principles of fundamental justice".[71] I proceed on that basis.

Self-defence: established by law?

[289] There can be no dispute that self-defence constitutes justification for an otherwise unlawful killing that is established by law. That is because "the law"—in the form of s 48 of the CA provides:

> Every one is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.

[290] And as the Chief Justice noted in the indictment decision, s 48 reflects one of the fundamental principles of the common law. She said:[72]

> The policy of the common law, encapsulated in s 48 was explained in the 1879 Report of the Royal Commission appointed to consider The Law Relating to Indictable Offences (C 2345):
>
> > We take one great principle of the common law to be, that though it sanctions the defence of a man's person, liberty, and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonably be anticipated from the force used is not disproportioned to the injury or mischief which it is intended to prevent. (p 11)

[291] That the justification of self-defence is not limited in its operation to the criminal law is confirmed by s 2 of the 1961 Act, which defines "justified", in relation to any person as "not guilty of an offence *and not liable to any civil proceeding*". And

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70 *Seales v Attorney-General* [2015] 3 NZLR 556 (HC).

71 At [167]. Following the Canadian case of *Carter v Canada (Attorney-General)* [2015] SCC 5, Collins J said that determining whether the law was consistent with the principles of fundamental justice required analysis of:

> *… whether the law was arbitrary and had no rational connection to its objective; whether the law went further than necessary or is overbroad; and whether the impact of the law is grossly disproportionate to the purpose of the law.*

72 *Wallace v Abbott,* above n 39, at [99].

that those italicised words mean what they say was confirmed in *Leason v Attorney-General*, where the Court of Appeal said:[73]

> [51] We accept that the s 48 defence may have application in the context of civil proceedings. This is because the word "justified" as used in s 48 is a defined term in the Crimes Act …

Self-defence: consistent with the principles of fundamental justice?

[292] It seems that the words "consistent with the principles of fundamental justice" were taken from s 7 of the Canadian Charter. In *Seales*, Collins J noted that their scope had not yet been determined in this country, making reference to the Canadian jurisprudence necessary. He explained:

> [170] Canadian cases identify three components to be considered when determining whether the principles of fundamental justice have been breached.
>
> [171] First, the principle of fundamental justice prohibits arbitrariness and targets situations where there is no rational connection between the objective and the law. This component is referred to as "arbitrariness".
>
> [172] Second, laws which go further than necessary breach the principle of fundamental justice when they deny the rights of individuals in a way that has no bearing on the objective of the law. In Canada, this component of the principle of fundamental justice is called "overbreadth". My preference is to address this component of the principles of fundamental justice under the heading of "overly broad".
>
> [173] Third, the principle of fundamental justice is breached if the impact of the restriction on an individual's life is grossly disproportionate to the purpose of the law in question. This is referred to as "gross disproportionality".

[293] In a sense, all three aspects require a comparison between the *purpose* of the specific restriction on the right and its *effect*.

[294] Here, the purpose of the justification of self-defence is as described by the 1879 Commissioners—to permit individuals to use force to prevent crimes, to preserve the public peace, and to bring offenders to justice.[74] Its effect is, of course, profound. It effectively permits (or justifies) the killing of one individual by another. The

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73 *Leason v Attorney-General* [2013] NZCA 509, [2014] 2 NZLR 224.

74 And at a theoretical level, the moral reasoning underlying the justification is complex: see for example the discussion by Shlomit Wallerstein in her article *Justifying the Right to Self-Defense: a Theory of Forced Consequences* (2005) 91 Va L Rev at 999.

justification, itself, constitutes a balancing exercise between competing—but equally fundamental—rights.

[295] Importantly, however, the application of the justification as a matter of law, and in practice, also requires an internal balancing between purpose and effect. It cannot be relied on unless the person claiming self-defence believes at the time that there is a real and immediate threat, either to his or her own person, to the person of another or to property. And the person's response to the threat—the force used must—itself, be reasonable and proportionate to the seriousness of the perceived threat. Those internal limits mean not only that the *theoretical* justification of self-defence is consistent with the principles of fundamental justice but ensure that the *operation* of the defence in practice will also be consistent with those principles. It is the elements of self-defence themselves that provide protection against arbitrariness, overbreadth and gross disproportionality.

Self-defence: an established exception to art 2

[296] Lastly, and by way of brief cross-check, I note that the common law justification of self-defence[75] has always been accepted in the Strasbourg and the English and Welsh cases as falling within the art 2(2) exception of "force which is no more than absolutely necessary … in defence of any person from unlawful violence".

[297] In particular, the Courts have held that there is no material difference between the requirement that the force be "absolutely necessary" in art 2 and the common law requirement that the force used must be reasonable, in the circumstances as the actor perceives them to be.[76] As Collins J said in *Bennett v HM Coroner for Inner London*:[77]

> It is … clear that the European Court of Human Rights has considered what English law requires for self-defence, and has not suggested that there is any incompatibility with Article 2. In truth, if any officer reasonably decides that he must use lethal force, it will inevitably be because it is absolutely necessary to do so. To kill when it is not absolutely necessary to do so is surely to act unreasonably. Thus, the reasonableness test does not in truth differ from the Article 2 test as applied in *McCann.*

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75 Which finds codified form in s 48 of the CA.

76 See for example the discussion in *Da Silva v United Kingdom* (2016) 63 EHRR 12 at 250–252.

77 *Bennett v HM Coroner for Inner South London* [2006] EWHC 196 (Admin) at [25].

Conclusion

[298] It follows that, in my view—and subject only to its proper application in the individual case—the justification of self-defence is both established by law and consistent with the principles of fundamental justice.

Are the elements of self-defence in a s 8 claim the same as the elements of self-defence in a criminal proceeding?

[299] In a criminal trial for murder, once the defence has established a tenable evidentiary basis for the defence, the Crown must prove beyond reasonable doubt that:

(a) the defendant was not acting in self-defence at the time he killed the victim; and

(b) the force the defendant used was not reasonable, having regard to the circumstances as he *honestly but subjectively* believed them to be.

[300] A defendant in criminal proceedings will not, therefore, be convicted even if he mistakenly and foolishly misapprehended the nature or seriousness of the threat that gave rise to his defensive response, provided his misapprehension was an honest one.

[301] But in a tortious claim, the test is weighted more towards the victim. In *Leason* the Court of Appeal explained that an unreasonable belief will not suffice for self-defence in a civil context:[78]

> … it is axiomatic that … under s 48, a person is justified in using force only if it is reasonable in the circumstances. In a civil law context, an objectively unreasonable belief, no matter how genuinely held, would not be sufficient to establish self-defence or defence of another.

[302] The authority cited for this proposition was the English case of *Ashley v Chief Constable of Sussex Police*.[79] There, as here, the claimants sought to bring an action for damages after a family member had been shot by police. The officer had been

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78 *Leason*, above n 73, at [64].

79 *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25, [2008] 1 AC 962.

acquitted by a criminal court of murder. The chief constable appealed a finding that the officer might nevertheless be liable in a civil court. The House of Lords noted that in a criminal context, self-defence had a subjective element: the reasonableness of the defensive act was to be assessed against the circumstances as the defendant honestly and genuine believed them to be. But in a tortious claim, the defendant's belief needed to be both honest *and* reasonable. As Lord Scott explained:[80]

> The function of the civil law of tort is … to identify and protect the rights that every person is entitled to assert against, and require to be respected by, others. The rights of one person, however, often run counter to the rights of others and the civil law, in particular the law of tort, must then strike a balance between the conflicting rights.
>
> …
>
> As to assault and battery and self-defence, every person has the right in principle not to be subjected to physical harm by the intentional actions of another person. But every person has the right also to protect himself by using reasonable force to repel an attack or to prevent an imminent attack. The rules and principles defining what does constitute legitimate self-defence must strike the balance between these conflicting rights. *The balance struck is serving a quite different purpose from that served by the criminal law when answering the question whether the infliction of physical injury on another in consequence of a mistaken belief by the assailant of a need for self-defence should be categorised as a criminal offence and attract penal sanctions. To hold, in a civil case, that a mistaken and unreasonably held belief by A that he was about to be attacked by B justified a pre-emptive attack in believed self-defence by A on B would, in my opinion, constitute a wholly unacceptable striking of the balance.* It is one thing to say that if A's mistaken belief was honestly held he should not be punished by the criminal law. It would be quite another to say that A's unreasonably held mistaken belief would be sufficient to justify the law in setting aside B's right not to be subjected to physical violence by A. I would have no hesitation whatever in holding that for civil law purposes an excuse of self-defence based on non-existent facts that are honestly but unreasonably believed to exist must fail. …

[303] Lord Scott also expressly left open the unargued point of whether a mistaken belief in non-existent facts (which, if true, might have justified the assault/battery complained of) should be capable, even if reasonably held, of constituting a complete defence to a claim in those torts.

[304] Although a claim under s 8 of the NZBORA is broadly regarded as "civil" in nature, it is not a tortious claim. And the Strasbourg and the English and Welsh authorities have applied a slightly modified reasonableness requirement, where self-

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80 At [18] (emphasis added).

defence is in issue. Sometimes the requirement is expressed baldly: that the relevant belief in the need for defensive force must be honestly *and* reasonably held. But other cases make it clear that not only is the existence of "good reasons" for the honest belief to be determined *subjectively* but also:[81]

> … in applying this test the Court has not treated reasonableness as a separate requirement but rather as a relevant factor in determining whether a belief was honestly and genuinely held.

[305] Similarly, in *E7 v Holland* the English and Welsh High Court said:[82]

> Section 76(4) of the Criminal Justice and Immigration Act 2008 requires a court to determine the genuinely held belief of the individual in question, as to the circumstances when considering whether the degree of force used was reasonable, whether or not the belief in question was mistaken, or (if it was mistaken) whether it was reasonable. *The reasonableness or otherwise of a belief is only relevant to the question whether it was genuinely held.* This inevitably requires consideration of the dynamic situation and militates against an analysis by fractions of a second.

[306] In the present case, however, the niceties just discussed do not much matter. As will become clear later in this judgment, my view is that Constable Abbott's subjective view about the threat to his life was also a reasonable one. But for what it is worth, I agree with Mr Minchin that—in line with *Leason*—an additional reasonableness requirement exists. The claim is founded upon Steven Wallace's *right* not to be deprived of life. Constable Abbott is not at risk of penal sanctions (or, indeed, of civil ones). So for the reasons given by the House of Lords in *Ashley* it would be wrong in principle—and arguably *in*consistent with the principles of fundamental justice—if Constable Abbott's genuinely mistaken but *unreasonable* belief as to the relevant circumstances at the time he killed Steven Wallace could render the killing justified.

In a s 8 claim where self-defence is raised, on whom does the burden of proof lie?

[307] In *Seales*, Collins J also noted that, in Canada, the onus on establishing a breach of the Canadian equivalent of s 8 of the NZBORA rests with the plaintiff. He referred

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81 *Da Silva*, above n 76, at 245. *Da Silva* was an unsuccessful art 2 claim brought by the family of the Brazilian national shot and killed by two special firearms officers at Stockwell station, following the terror attacks in London in July 2005.

82 *E7 v Holland* [2014] EWHC 452.

to the decision in *Carter v Canada (Attorney-General)* where the Supreme Court said:[83]

> A claimant under s 7 [of the Canadian Charter] must show that the state has deprived them of their life, liberty or security of the person and that the deprivation is not in accordance with the principles of fundamental justice.

[308] In the present case, Mr Gunn for the Crown relied on this statement to argue that the burden was on Mrs Wallace to *dis*prove, on the balance of probabilities, that Constable Abbott was acting in self-defence. That reflects the way the burden works in a criminal trial, where once a tenable claim of self-defence has been raised on the evidence, the prosecutor must disprove it beyond reasonable doubt.

[309] I am not persuaded by that argument. I accept that in a case such as *Carter*, which was concerned with whether a particular statutory provision infringed s 7 of the Charter, it makes sense for a plaintiff to bear the burden of proof. That is very different from a case such as the present, where the circumstances relied on to found the claim of self-defence are far more within the Crown's knowledge than within Mrs Wallace's. Mr Gunn's suggested approach would, in my view, operate unfairly.

[310] Support for my view can, I think, be found by analogy with tort law. In a tort claim for assault and battery the burden of proving self-defence (if raised) lies on the defendant.[84] And it seems that is the approach signalled in the international human rights context, too. The ECtHR said in *Jordan v United Kingdom*: [85]

> In the light of the importance of the protection afforded by Art.2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as for example in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death which occur. *Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation*.

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83 *Carter*, above n 71, at [80].

84 See for example *Ashley*, above n 79, at [14] and *R (Davis) v Commissioner of Police of the Metropolis* [2016] EWHC 38 (QB) at [29].

85 *Jordan v United Kingdom* [2001] ECHR 327 at [103] (emphases added).

[311] I can see no reason in principle why that should not be the case here and I proceed on the basis that the burden is on the Crown to prove self-defence on the balance of probabilities.

HAS THE CROWN ESTABLISHED SELF-DEFENCE HERE?

[312] Having addressed the preliminary matters above, I am now required to determine whether, on the balance of probabilities, Constable Abbott shot Steven in self-defence. That requires answers to the following questions:

(a) In shooting Steven, was Constable Abbott using force to defend himself or another?

(b) What were the circumstances Constable Abbott believed to exist at that time?

(c) Was that belief reasonable?

(d) Was the force used by Constable Abbott reasonable in the circumstances as he (reasonably) believed them to be?

[313] The first and second of those questions are intertwined, so I propose to deal with them together, first.

What were the circumstances as Constable Abbott believed them to be?

[314] The best evidence about what Constable Abbott believed the circumstances were when he shot Steven largely comprises his own statements and evidence. It has never been suggested to Constable Abbott that his evidence on the point was either not credible or not reliable, and there is no basis on which I could question it now.

[315] At the outset, I record that Constable Abbott genuinely believed that he was dealing with David Toa. Not only has that been the subject of formal findings in the past, the evidence to support it is overwhelming, and incontrovertible. It has been established beyond doubt that he addressed Steven as "David" or "Dave" on more than

one occasion. His doing so makes no sense whatsoever in the absence of a mistaken belief.

[316] There is, however, an issue raised on behalf of Mrs Wallace that requires further consideration. Mr Minchin says that there was an historical animus between Constable Abbott that influenced Constable Abbott's view of the relevant circumstances and, indeed, the interaction overall. He relies on the evidence of one eyewitness, Barbara George, who reported hearing someone say "'we've been after you for a long time Dave". He also relies on a later interview of David Toa by a private investigator, Mr Bass in which he detailed a number of matters that might suggest that Constable Abbott harboured a degree of ill feeling towards him.

[317] But on the evidence, I do not accept that any such animus is established. Constable Abbott's evidence, and the evidence of other bystanders, contradicts that of Ms George. It is, in my view, much more likely that Ms George conflated two parts of the fast-paced dialogue in her head: Constable Abbott referring to Steven as "Dave" on the one hand and, on the other, Steven saying to Constable Abbott something like, "You've been after me for too long, I'm sick of it, you've pushed me too far". That is what other bystanders reported hearing Steven say and it is also consistent with the evidence that suggests that Police were the first object of his rage that night. And it is also consistent, to some extent with the fact that in the two or so years before the killing, Steven had had a series of (relatively low level) encounters with Police.

[318] And even if Mr Bass' hearsay evidence of his conversation with Mr Toa was to be admitted in this proceeding, Mr Toa's statement is quite at odds with his original statement made to Police and, in my view, coloured by the fact that he had (by then) discovered that he was the man Constable Abbott believed he was shooting.

[319] For these reasons, the relevance of Constable Abbott's mistaken identification remains as described in the IPCA report. If anything, his belief that he knew Mr Toa (and was on not unfriendly terms) was a circumstance that made it *less* likely that he would shoot him unless he perceived it as absolutely necessary.

[320] The relevant circumstances as they were actually perceived by Constable Abbott immediately before the shooting were that his life was in immediate jeopardy. I have no doubt that that belief was genuinely held; there were a number of objective indicators of this (discussed shortly below) that were known to him and that would have informed his belief.

[321] As well, Constable Abbott believed that Constable Dombroski was farther away from him than Constable Dombroski himself said he was. I have little doubt that Constable Abbott's full attention remained fixed on Steven, and it is therefore unsurprising that he was unaware of the true distance between them. In any case, he believed that Constable Dombroski was not close enough to help him in any physical encounter, without himself resorting to shooting Steven.[86]

[322] Constable Abbott also believed he was running out of clear space behind him, having been backed up towards the pavement and shops. Between the gutter and other obstacles, he believed that he could run out of space or trip.

[323] After Constable Abbott fired the warning shot and Steven continued to advance towards him, but at an altered angle. Constable Abbott believed he had done this in order to cut off his escape.

Was his belief as to those circumstances reasonable?

[324] As noted earlier, the art 2 self-defence cases proceed on the basis that the question of reasonableness is viewed merely an indicator of whether the belief as to the relevant circumstances is honestly held. Reasonableness is, itself, to be judged subjectively (on the basis of the matters actually known to the person using force). But even applying a higher, objective, threshold I would find the following matters established on the evidence:

(a) Constable Abbott was awakened at around 3.48 am and instructed to assist Constable Dombroski to deal with a person who had been seen smashing windows.

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[86] I also discuss below the (un)viability of a physical confrontation with Steven at that point, even if the Constables were to have used their PR24 batons.

(b) When Constable Abbott arrived at the Police Station, he saw that the windows had been broken. This might logically suggest that the person was both targeting, and potentially seeking an encounter with, the Police.

(c) Constable Abbott then witnessed the Police patrol car pull up near Steven. He saw Steven attack the patrol car with force, smashing both the windscreen and the driver's side window. Again, this would logically reinforce any belief that the offender was targeting, and unafraid to encounter, the Police.

(d) When Constable Abbott went to the Police Station to arm himself he met Constable Dombroski, who had himself independently decided to do the same. This would reasonably have reinforced Constable Abbott's own assessment of Steven as a threat warranting an armed response.

(e) Constable Dombroski, who, at that point, had had a closer encounter with Steven, told Constable Abbott that Steven was a "nutcase".

(f) When the two constables confronted Steven, he was holding a golf club and a baseball bat. Either was a potentially lethal weapon.

(g) When Constable Dombroski drew his gun and yelled, "armed police, drop your weapons" Steven did not back down. Rather, he began to advance on Constable Abbott, who was forced to retreat, moving backwards. At that point, a reasonable person would assume that Steven was undeterred by either the Police presence or a loaded gun.

(h) Steven threw the golf club at Constable Abbott, which a reasonable person would take to be a specific act of targeted (and objectively dangerous) aggression. The evidence of eyewitnesses does not support Mr Minchin's submission that the golf club was not thrown at, or in the direction of, Constable Abbott.

(i) Steven did not positively respond to, or back down following, Constable Abbott's attempts to talk to him.

(j) Steven was yelling threats, saying things like, "you've pushed me too far" and, "I'm going to fucking kill you" as he advanced towards Constable Abbott.

(k) It was reasonable for Constable Abbott to keep his eyes trained on Steven and not to check Constable Dombroski's precise position.

(l) There was, in fact, little in the way of clear space behind Constable Abbott and—given that he was moving backwards—there was a real possibility that he might trip if he hit the gutter. The consequences of tripping in that situation were potentially life-threatening.

(m) Steven did not back down after Constable Abbott fired the warning shot but instead continued to advance, at a slightly altered angle. There was a reason for Constable Abbott to believe that Steven might be trying to cut off his escape.

(n) Steven continued to advance determinedly and angrily on Constable Abbott, yelling threats. The distance between them closed to between 4–5 metres. Steven continued to shout threats. He was holding the bat in an axe grip.

[325] And in terms of the objective immediacy of the lethal threat, there is:

(a) Constable Dombroski's evidence was that if Constable Abbott had not shot Steven, he would have done so himself.

(b) The play-by-play account given by Constable Herbert over Comms further reinforces such an assessment. She expressly reported moments before the shooting: "Here he comes. They might have to take him down".

[326] In light of the above I have no doubt that Constable Abbott reasonably believed that he was dealing with a person who would cause him immediate, grave, and potentially fatal, harm. It follows that on the balance of probabilities, I accept that Constable Abbott reasonably believed that his life was in danger and—so—that he was entitled to use *reasonable* (proportionate) force to defend himself.

Did the use of a firearm constitute reasonable force, given the circumstances?

[327] As to the officer's resort to a firearm, I have referred to relevant aspects of the Police firearms policy above. It reflects the legal position and confirms that Police cannot rely on the GIs to escape criminal responsibility. The instructions are relevant context within which Police conduct can be assessed for reasonableness.[87]

[328] The short point is that—either by reference to the GIs or to the general law relating to self-defence—Constable Abbott would only be justified in using his firearm if, at the moment he shot Steven, there was no other reasonable way of protecting his life. As Elias CJ said: "whether the force was reasonable cannot, as a matter of common sense, be considered in isolation from the options reasonably open to the constable".

[329] The other options available to the officers at the time of the shooting have been extensively scrutinised for over two decades now. Despite that, at the hearing before me, Mr Minchin put to Constable Dombroski that he could have tackled Steven from behind. That was rightly rejected by Constable Dombroski. It would not, in any event, have any bearing on whether Constable *Abbott* acted in self-defence: it could not sensibly be suggested that he should have waited for Constable Dombroski to act, in circumstances when he had no way of knowing whether or not Constable Dombroski would, in fact, do so.

[330] I can see no basis for revisiting in any depth or detail the tenability of the other possibilities that have, at various times, been suggested—they have been canvassed enough. So briefly, I consider:

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87 I note that both prosecution and defence relied on them for that reason at the depositions hearing and at trial, although the inferences they sought to draw were very different.

(a) Retreat was not a reasonable option. To turn and run would give rise to an extraordinary risk in such a situation. It would have required either that Constable Abbott holster his gun (rendering him momentarily vulnerable) or to have run with a loaded gun in his hand (also rendering him and any bystanders vulnerable). It would also have meant abandoning Constable Dombroski. It would have risked Steven catching up and attacking him with the bat from behind. So while a "tactical withdrawal" *might* have been possible at an earlier stage, I cannot accept that it was feasible at the relevant time.

(b) The use of the PR24 baton was not a reasonable available option. Evidence was given at trial that engaging an offender armed with a bat with only a PR24 baton would be highly dangerous, even for someone trained for such a confrontation (which Constable Abbott, and almost all of the police force, were not). Again, it would have required Constable Abbott to holster his gun and reach for his baton, making him momentarily very vulnerable.

(c) The use of or the OC (pepper) spray was similarly a dangerous and untenable option. The evidence was that it does not reliably stop a "goal driven" or amped-up offender. And this option, too, would have required Constable Abbott to put himself in harm's way by first holstering his pistol and then finding and activating the spray cannister.

[331] Lastly, it is important to note that the possibility of adopting a "cordon and contain" approach does not arise in the self-defence context. To the extent the possibility ever reasonably existed (discussed later), it could only have done so at an earlier point in time; by the time of the shooting, it was far too late for such an approach. Steven was, at that point, only around five metres away from Constable Abbott. And he was moving closer.

[332] The fact that he first fired a warning shot also confirms that the shooting was properly viewed by Constable Abbott as a step of last resort: he was reluctant to shoot Steven and, indeed, wanted to exhaust all other options reasonably available to him.

For the reasons given in the IPCA report, I do not consider that the warning shot would have further inflamed the situation in any relevant way.

[333] Constable Abbott's use of a firearm was, in my view, reasonable in all the circumstances in which he found himself.

Was firing four shots reasonable, given the circumstances?

[334] I turn now to the question of whether it can be said that all four shots fired[88] were in self-defence. I proceed on the basis that the reasonableness of the "double tap" policy (set out earlier) is not challenged. I also proceed in the basis that no issue is taken with the recommended Police practice of aiming for central mass (for reasons that are articulated), although I note that Constable Abbott's evidence was that there was no such precise "aiming" involved in this case.[89]

[335] Rather, as I understand it, the focus of this aspect of Mr Minchin's argument is that, by firing the second double tap (shots three and four) Constable Abbott did not conform to the relevant Police instructions and that firing those later shots was excessive and unreasonable. He contends that it was the third shot that pierced Steven's liver. And if that is so, he says, the fatal shot was not justified in law.

[336] There is, I think, some conceptual subtlety underlying this contention. Although the question of *excessive* force was one of the main focuses of the prosecution case at trial (and was also the issue that the Coroner and the IPCA expressly declined to consider) I am not sure that is the right analytical approach. In my view, there are two possible arguments here. Either:

(a) the fact that the second double tap followed immediately upon on the first (defensive) double tap by and of itself meant that the second constituted excessive force; or

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88 Excluding the warning shot.

89 Rather, it was said that Police are trained to shoot instinctively in such a situation, as the mind has become so fixated on a target by that point that the aim is effectively automatic.

(b) at the time of the second double tap there was no longer an imminent threat to Constable Abbott's life and so the later shots are either to be regarded as excessive or, more properly, *cannot reasonably be seen as defensive at all*.

[337] The first of these approaches fits better with a bare contention that the second double tap—and in particular the fact that it followed so quickly upon the first—was excessive because it was at odds with Police procedures. But I do not consider that is a helpful analysis. Whatever Police procedures were and regardless of whether they were strictly complied with, it begs the core self-defence question. It suggests an assessment that is devoid of context.

[338] It cannot be right that either a certain number of shots can, without more, be presumptively excessive.[90] Any self-defence assessment would require consideration of not only how many (if any) of the earlier shots hit their target, but also on whether the shooter knows how many (if any) have done so. As well, it depends on whether the earlier shots had, as a matter of fact, reduced or stopped the threat posed by the target and (again) the awareness by the shooter of any such diminished risk.

[339] For these reasons I consider it is the latter of the two approaches above that obviously admits inquiries of that kind and thus constitutes the better framework here. It involves focus on the core issue of self-defence, rather than the question of *excessive* force, strictly so-called.

[340] In adopting this approach, two sub-issues will require consideration:

(a) Which of the four shots was the fatal one?

(b) Was it reasonable for Constable Abbott to fire the second double tap?

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[90] By way of example only, in *Andronicou and Constantinou v Cyprus* [1997] ECHR 80 the ECtHR found that Police shooting Mr Andronicou 27 times with a machine gun was not excessive, in the circumstances.

Shot sequencing and the fatal shot

[341] This issue is relevant because, if one of the shots fired in the first double tap was the fatal one, the second double tap (whether legitimately defensive or not) is not causally linked to Steven's death and, therefore, to any breach of s 8.

[342] It is necessary to set out the relevant evidence on this issue in some detail.

[343] At trial, the forensic scientist, Mr Wilson (whose initial report I have referred to at [121] above) was questioned about the shot sequence. He proposed a possible sequence of shots:[91]

> … it is difficult to be definite about the sequence. It is highly likely that the last shot was the one that went up through the back, the body having turned. The two that have gone – one into the left upper arm one into the left wrist area which could well have been the first and 2nd shot, no way of saying whether the first shot went into the left upper arm or whether it went into the left wrist. At this point if the arms were raised or if they were dropped it could expose the sternum area, the chest to a third shot. *However, I must add that it is difficult to determine the actual sequence of shots*.

[344] When later asked whether he had any view as to whether those two shots were fired before the fatal shot,[92] he said:[93]

> The shot into the left arm and the shot into the wrist appear to follow a similar trajectory which indicate that they may have been fired from a similar position and may be at a similar time. … As to the one below the sternum, depending on the stance of Mr Wallace, the area below the sternum may have been protected in some way by the arms and if the arms were dropped or lifted it may expose the area if the body was turned it may expose the area below the sternum for a shot to have gone into it. *But I cannot be dogmatic about whether the two in the arm occurred before the one below the sternum though it does appear that the two through the arm may have occurred one after the other.*

[345] Under cross-examination, Ms Hughes put to Mr Wilson the defence evidence that would be called from the forensic pathologist, Dr Martin Sage. He agreed with Dr Sage that the first shot might have been the fatal one. He also agreed that the

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91 Emphasis added.

92 Described as the shot "that entered the central body mass just to the left of the sternum and just below the sternum".

93 Emphasis added.

"literature" recorded that it was possible for a person who had been shot several times to continue advancing "on people".

[346] The expert called by the prosecution was Dr Kenneth Thomson, an experienced and well-respected forensic pathologist. He had prepared a report that was tendered in evidence.

> Consideration of the direction of the shots suggested that the first three shots described above were fired while Mr Wallace was upright, with his left shoulder advanced towards the shooter and possibly his hands close together in front of the right shoulder. In my view there was a delay before the last shot. If the shots were fired in quick succession I do not believe Steven Wallace could have turned around fast enough to receive the final one in the back.

[347] When asked in his evidence-in-chief about the sequencing, he explained how the bullet trajectories (and suggested rotation of Steven's body) informed his belief as to the sequence of shots:

> … The issue is the order of shots that were fired entering the front of the body. From Dr Hunt's[94] description and from a reconstruction of the passage of the bullets through the body there are two shots which were very close together in terms of both their entry point and the direction in which they were travelling.
>
> … It's my belief that those two shots were fired in rapid succession with very little change in the position of Mr Wallace in relation to Constable Abbott. The third bullet wound entered there and laid under the skin in the middle of the back just to the right of the midline so the direction that it was coming towards the body was from just to the left of front rather than from the direction of the left shoulder. This suggests that there had been a change in position of either Mr Abbott or Mr Wallace prior to that shot being fired. I believe it is likely that that was due to Mr Wallace rotating had he been in a position of readiness to strike received two bullet wounds to his arms which would certainly have made it less comfortable for him to hold the weapon up. I believe he rotated more towards Constable Abbott at the time the third shot as I see it was fired. The fourth shot I believe occurred as Mr Wallace continued to rotate and presumably turned away from the direction of the gun fire.

[348] In other words, Dr Thomson's opinion was that the third shot was the fatal one.

[349] Later, under cross-examination by defence counsel, there was the following exchange about whether the first shot was the fatal shot:

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[94] Dr Hunt was the pathologist who had conducted the autopsy.

Q: You've said it's not possible for you to say with any certainty the order of the shots other than the back shot is certainly the last shot?

A: … I think that would be accepted but there is certainly no pathology test that would assist in determining the order of shots in this case. Sometimes there is but not in this case.

Q: So you cannot exclude the possibility that the first shot was the liver shot?

A: I cannot completely exclude it. In my view it is unlikely but I certainly can't exclude it.

[350] Dr Thomson confirmed in a response to further questioning by Ms Hughes that he had experience of cases where a person had continued to attack or behave aggressively even after receiving what were to be fatal injuries:

> …I can recall an individual who sustained a bullet wound to the head during a homicide and survived two hours after committing the homicide and certainly with severe and absolutely lethal knife injuries it's not uncommon for people to survive for several minutes rather than collapse as one would imagine immediately after the injury. I think every forensic pathologist has cases where people have survived surprisingly beyond the odds.

[351] Dr Thomson agreed that there was nothing in Steven's injuries that enabled him to say forensically that any one of them would immediately have stopped him in his tracks, although he said:

> I would suspect that the impact of a bullet into the abdominal wall and liver would certainly slow him down. The impact and the damage caused by the bullet wounds to the left upper arm left forearm and right upper arm would certainly make him lower the weapon fairly quickly but none of those injuries is going to make him collapse unconscious to the ground.

[352] As foreshadowed, the defence called evidence from the equally experienced and respected Dr Sage. His evidence was that the first shot was most logically the fatal shot:

> In my view, the most likely and logical sequence is as I've shown here with the first shot entered the left side of the upper chest, the one that's called wound No. 2 in Dr Hunt's report and from here it passed through the liver and this is the fatal shot.
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> …
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> You can't get a shot to pass in through here and backwards towards the liver when somebody is standing side on and for this shot to pass this way they have to be standing effectively side on. This is why it is my contention that this

> [the liver shot] is the first shot then there is a continuous rotation of the body resulting in the other three.

[353] Under cross-examination Dr Sage accepted that Dr Thomson's contrary view was logical and reasonable, but said he thought his sequencing was "less likely than the sequence I have illustrated".

[354] Based on this evidence I acknowledge that it is reasonably possible that the fatal shot was the third shot, and so part of the second double tap. But I am unable to make a firm finding that, on the balance of probabilities, it was. The evidence is just too evenly balanced. It is equally likely that the fatal shot was one of the first two shots (all are agreed that the liver shot could not have been the fourth).

[355] Strictly speaking, my inability to make the finding urged by Mr Minchin means that the other question posed at [340] above does not require answer. But for completeness, and in case my conclusion on that is proved wrong at some later point in time, I address that question now.

Was the second double tap fired in self-defence?

[356] I begin by observing that the micro-analysis required by this aspect of Mrs Wallace's claim is not one in which I happily engage. I doubt that such an analysis can ever bear much connection to reality and it sits uneasily with the warnings against the use of hindsight in cases like this. And I note that similar observations were made by the English and Welsh High Court in *E7 v Holland* where the Court had also been asked to determine the reasonableness of the fatal fifth, sixth, seventh and eighth shots fired by a Police officer at Mr Azelle Rodney, in 2005.[95] After noting that there had been, at most, a mere 0.24 of a second between each of the shots, the Court said:[96]

> [The first] six shots had been fired less than 1.5 seconds after the Bravo car stopped by the Golf. In our judgment, *there is considerable force in the expressed concern that minute dissection of fractions of a second with the benefit of hindsight will discourage an appropriate response, in real time, to threats thereby resulting in potentially increased danger to those involved in (or likely to be affected by) these exceedingly difficult operations*. … The

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95 *E7 v Holland*, above n 82. The Commission of Inquiry into the shooting conducted by Sir Patrick Holland (which followed a decision not to prosecute) had, in fact, concluded that none of the shots fired were in self-defence.

96 At [54] (emphasis added).

> reasonableness or otherwise of a belief is only relevant to the question whether it was genuinely held. *This inevitably requires consideration of the dynamic situation and militates against an analysis by fractions of a second.*

[357] Despite those observations, I accept that the "second double tap" forms an important part of Mrs Wallace's s 8 case. I therefore address it as best I can, below.

[358] The evidence establishes that Constable Abbott was not himself aware at the time of how many shots he had fired or, indeed, whether he had fired in double taps. That is most strikingly demonstrated by his exchange with Tim Fletcher (a bystander) immediately after the shooting. When Barbara George was asked at trial whether Constable Abbott said anything to her or her partner (Mr Fletcher) immediately after the shooting she said:

> Tim said to hm he didn't have to shoot the poor cunt 4 or 5 times and… he [Constable Abbott] said you want to go back to school and learn how to count.

[359] Mr Fletcher's evidence was to the same effect.

[360] As well, Constable Abbott said in his statement immediately after the shooting that he believed he had shot at Steven three times. Although he later accepted that there had been two double taps, he maintained that, at the time, he had thought there were three shots.[97]

[361] It seems clear, therefore, that in the heat of the moment, Constable Abbott was not thinking about the Police policy on double taps, and that he was not aware of how many shots (or taps) he had fired. In the circumstances, I do not consider any blame can fairly be attributed to Constable Abbott for that.

[362] That conclusion of fact makes any inquiry into whether it remained reasonable for Constable Abbott to believe that Steven still presented an imminent threat to his life after the first double-tap difficult. But again, I think the problem can be resolved by a slight reframing. Rather, I propose to ask whether the evidence establishes that

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[97] Rather oddly, both Constable Dombroski and Constable Herbert also said they had heard only three shots. All, or almost all, of the other bystanders heard four or five (counting the warning shot).

Constable Abbott continued firing after it had become clear that the immediate threat posed to him by Steven had been either averted or materially diminished.

[363] It seems to me that the evidence is clear enough that Steven did not fall to the ground until after the first double tap and, in fact, not until after the third shot. When Constable Abbott was asked at the trial why he had kept shooting he said:

> I continued to shoot until the threat was averted. Mr Wallace never stopped advancing on me until after the last shot was fired.

[364] Constable Abbott's evidence also was that he saw no reaction from Steven after the first double tap and did not know whether he had been hit.

[365] Similarly, Constable Dombroski said:

> After the final shot [Steven] dropped, he just stood still, dropped his bat, went down onto his knees and onto the ground.

[366] And this was confirmed by the experts—all of whom agreed that the fourth shot hit Steven in the back while he was twisting and falling, still semi-upright.

[367] That Steven may well have continued moving forward, despite having been shot twice was also confirmed by other expert evidence about the likely impact of the 9mm Hydrashok ammunition used by the officers and acknowledged to be very "effective" for law enforcement purposes. The jacket of the bullet is grooved so that it peels back on impact and expands, thus delivering, as one witness put it, "maximum shock energy with minimal penetration". Although prosecution witnesses opined that two of these bullets would have incapacitated any offender, the defence experts disagreed. They said that it was possible to have a delayed reaction and that a determined offender could continue to advance despite being shot.[98] On the basis of this evidence, it could not safely be concluded that the first two shots *must* obviously have incapacitated Steven or stopped his advance.

[368] The only remaining possibility that might be of avail to Mrs Wallace is that, despite remaining upright, Steven had dropped the bat at some earlier point. If Steven

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[98] A distance of 5 m in 1.5 seconds was suggested. Given a reaction time of around 0.5 seconds, it was said that the shooter would have only a second to reassess the threat.

had effectively been disarmed, then—theoretically at least—he was no longer a significant threat.

[369] I acknowledge that if the first two shots were to Steven's arms, there is some intuitive likelihood that he did then drop the bat. But Constable Dombroski's evidence (just noted above) suggests otherwise. And his evidence is supported, or at least not contradicted, by the other (admittedly limited) eyewitness accounts.

[370] Mr Luxton, who was watching from the window of his home across the street, initially said:

> The weapon, baseball bat, I remember flew out of his arms at about chest level as he was shot. This was still while he was standing.
>
> I couldn't tell you at which shot of the final shots that the baseball bat left his hands.

[371] At trial, he maintained that he did not know after which of the shots Steven dropped the bat.

[372] And Constable Herbert said in her statement, and then at the trial:

> When [Steven] was actually shot and I saw his body jerking he was definitely holding the bat with both hands around the bat, which was raised about his right shoulder. [Steven] did not drop the bat the instant he was shot, he dropped it before he fell to the ground.
>
> …
>
> I heard another two shots and at that stage when he'd been after the two shots I saw Steven fall forward and as he fell he dropped when he was just about at the ground the dropped the baseball bat and it dropped into the gutter.

[373] In the end, the evidence does not enable a safe conclusion that Steven had dropped the bat before the (assumed for present purposes) fatal third shot. It therefore follows that Constable Abbott had an objective basis to assume that Steven had not been incapacitated and, perhaps, not hit at all. Steven still presented as an imminent threat to Constable Abbott, even after the first double tap. So even disregarding the "heat of the moment" reality,[99] I find on the balance of probabilities that the second

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[99] For reasons of the kind given earlier, I suspect there was no real time to consider the number or spacing of shots until Steven was "down".

double tap was justified in self-defence. It therefore does not matter which of the four shots was the fatal one.

Conclusion

[374] On the balance of probabilities, I find that all the shots fired by Constable Abbott were fired in self-defence, Steven was not unlawfully deprived of life under s 8 of the NZBORA. This cause of action must fail accordingly.

DOES S 8 ENCOMPASS AN OBLIGATION TO INVESTIGATE?

[375] It is well-established that art 2 of the ICCPR incorporates an ancillary obligation to investigate deprivations of life for which the State is responsible. The duty to investigate is said to be implied not only in the right to life (art 2), but also in the right not to be subjected to torture or to inhuman or degrading treatment or punishment (art 3).[100] As Lord Bingham explained in *R v Secretary of State for the Home Department, ex parte Amin* (*Amin*), the purpose of this "gloss" on the substantive right is:[101]

> … to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.

[376] The obligation to investigate is not dependent on whether the relevant use of force itself is ultimately found to constitute a violation of art 2.[102]

[377] The Crown resisted the proposition that this line of art 2 jurisprudence should be followed in relation to s 8. Mr Gunn emphasised the drafting differences between s 8 and art 2 (set out earlier) and, in particular, the express reference in art 2 to the right being "protected" by law, which is missing from s 8. Mr Gunn said that it was the requirement to "protect" the right that has grounded the overseas' Courts' findings of positive duties. He also submitted that there is no need to read s 8 in this way

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100 See for example *Assenov v Bulgaria* [1998] ECHR 98.
101 *R v Secretary of State for the Home Department, ex parte Amin* [2004] 1 AC 653 (HL) at [31].
102 *Ramsahai v the Netherlands* [2007] ECHR 393 (Grand Chamber) at 322.

because, in New Zealand, there are a number of statutory mechanisms aimed at ensuring such investigations will occur. I do not agree with those submissions.

[378] First, the proposition that the necessary processes already exist begs the following questions:

(a) How would the right be vindicated if (for whatever reason) the statutory processes were repealed?

(b) How would the right be vindicated if the statutory processes were not followed?

(c) How would the right be vindicated if the statutory processes proved inadequate, by reference to the standards espoused in the art 2 cases?

[379] As for whether s 8 has a "protective" aspect, I acknowledge that many of the relevant cases expressly link the duty to investigate to the positive (protective) opening words of art 2. Other cases, however, expressly link the duty with both the obligation to protect *and* the obligation not to *take* life unlawfully.[103] Moreover the same protective obligation has been read into art 3, which—like s 8—is expressed negatively (the right *not* to be subjected to torture …).

[380] That a protective obligation arises regardless of the way in which the right to life is expressed also makes purposive sense. As Baroness Hale said in *Savage v South Essex NHS Trust*:[104]

> … The material part of article 2.1 reads as follows: "Everyone's right to life shall be protected by law. No-one shall be deprived of his life intentionally …" It is now well established that this imposes three different duties upon the state. The first is the negative duty to refrain from taking life, save in the exceptional circumstances catered for by article 2.2.
>
> The second is an implied positive duty properly and openly to investigate deaths for which the state might bear some responsibility. *There is not much point in prohibiting police and prison officers, for example, from taking life if*

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103 *Menson v United Kingdom* [1998] ECHR 107 at 13–14; and *Amin*, above n 101, at [31].

104 *Savage v South Essex NHS Trust* [2008] UKHL 74, [2009] 2 WLR 115 at [76] (emphasis added). Precisely the same point was made in the art 3 context by the ECtHR in *Assenov*, above n 100, at [102].

> *there is no independent investigation of how a person in their charge came by her death*. …

[381] Moreover, as the ECHR said in *McCann v United Kingdom*:[105]

> … It must often be the case where State agents have used lethal force against an individual that the factual circumstances and the motivation for the killing lie largely, if not wholly, within the knowledge of the State authorities and that the victim's families are unlikely to be in a position to assess whether the use of force was in fact justified. It is essential both for the relatives and for public confidence in the administration of justice and in the State's adherence to the principles of the rule of law that a killing by the State is subject to some form of open and objective oversight.

[382] This reasoning applies with equal force and logic to s 8. The prohibition on depriving others of life is toothless without a parallel obligation to interrogate and test the circumstances in which such a deprivation has occurred in the individual case. As with art 2, the interpretation of s 8 must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires its provisions to be interpreted and applied in a manner that makes its safeguards practical and effective.[106]

[383] Such an approach is also consistent with the Long Title to the NZBORA, which makes it clear that one of the Act's overarching purposes is to *protect* the rights it confirms. In light of that protective purpose, the Courts have repeatedly endorsed a generous interpretation of the NZBORA.[107] This purpose is "expressive of a positive commitment to" the rights contained in the NZBORA and so calls for an interpretation "in that spirit".[108]

[384] In my view, therefore, a purposive interpretive approach to s 8 not only permits but *requires* the inclusion of an obligation to investigate a death that has occurred at the hands of a state actor.

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105 *McCann v United Kingdom* [1995] ECHR 31 (Grand Chamber) at [192].

106 At [146]; *Salman v Turkey* [2000] ECHR 357 (Grand Chamber) at [97]; and *Jordan*, above n 85, at [102].

107 See for example *Mist v R* [2006] 3 NZLR 145 (SC) at [45].

108 *Ministry of Transport v Noort: Police v Curran* [1992] 3 NZLR 262 (CA) at 276–277 per Richardson J. See also the observations of Cooke P at 268 and Gault J at 292.

What is the content of the s 8 investigative obligation?

[385] Having reached that conclusion, the next question is what a s 8 "duty to investigate" entails. On this issue the parties were largely agreed, based on the overseas authorities.

[386] First, the answer is a matter of substance rather than form. The obligation does not require a particular *kind* of investigation.[109] As the House of Lords has said, a rights-compliant investigation can take different forms depending on the circumstances. In some cases it might be reduced to a mere formality—describing the circumstances of death, and where appropriate, identifying what went wrong and who was responsible.[110] Lord Phillips emphasised that "different circumstances will trigger the need for different types of investigation with different characteristics".[111]

[387] I also accept that the requirement for a rights-compliant investigation can be fulfilled through a combination of different inquiry processes. For example, in *R (Hambleton) v Coroner for the Birmingham Inquests (1974)*, the Court said:[112]

> A State may clearly discharge its procedural obligation under article 2 in different ways. The fact-finding and accountability components of the investigative obligation may be shared between authorities, including coronial and criminal authorities, provided they are procedurally effective in totality.

[388] But it is the decision of the ECtHR in *Jordan v United Kingdom* that remains the guiding authority as to the minimum features required of an art 2 compliant investigation.[113] Such an investigation must:

(a) be independent;[114]

(b) be effective;[115]

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109 *Jordan*, above n 85, at [105]; and *Da Silva*, above n 76, at [230].
110 *R (L(A Patient)) v Secretary of State for Home Department* [2008] UKHL 68, [2008] 3 WLR 1325 at [79].
111 At [31].
112 *R (Hambleton) v Coroner for the Birmingham Inquests (1974)* [2018] EWHC 56 (Admin) at [50].
113 *Jordan*, above n 85.
114 At [106].
115 At [107].

(c) be reasonably prompt;[116]

(d) have a sufficient element of public scrutiny;[117] and

(e) "in all cases" involve the next of kin "to the extent necessary to safeguard his or her legitimate interests".[118]

[389] Some of these features require a further unpacking.

Independence

[390] Independence requires that the person or body carrying out the investigation must be appropriately separate—independent—from those implicated in the events under investigation. While absolute independence is not required, the cases suggest that there must be practical independence and an absence of any hierarchical or institutional connection.

[391] The Crown referred me to a number of examples where the ECtHR had reached different conclusions about whether certain investigations of killings by Police (or equivalent agencies) were appropriately independent, depending on the circumstances. Thus:

(a) *Jordan* itself, which concerned the shooting of an unarmed man in Belfast by members of the Royal Ulster Constabulary (RUC). The Police investigation was headed by a deputy superintendent of the RUC from outside Belfast, supervised by the Independent Commission for Police Complaints. The investigation was found *not* to be independent.[119] The fact that the decision whether to prosecute was then made by the DPP (accepted by the Court to be an independent functionary) did not alter that conclusion, because the prosecution

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116 At [108].
117 At [109] and [121].
118 At [109]. For reasons that are not quite clear to me, the Crown omitted this last requirement from its list of necessary features.
119 At [120].

decision was based on (and so tainted by) the non-independent RUC report.

(b) *McKerr v United Kingdom*, where members of the RUC were again involved in the fatal shooting of three unarmed men. And again the Court similarly held that the RUC investigation was *not* independent.[120]

(c) *Giuliani and Gaggio v Italy* concerned the Police shooting of a protestor. Even though the investigation it involved Police officers from the same branch as those involved in the shooting the Court found it had been adequately independent. But that was because those officers had only been entrusted to investigate matters of a technical nature, such as seizing weapons and vehicles, compiling photographic evidence, and acquiring audio-visual materials.[121]

(d) And finally, *Al-Skeini v United Kingdom* related to the killing of Iraqi civilians by British soldiers. An inquiry by the Royal Military Police (RMP) investigators was found to be institutionally, but not operationally, independent of the armed forces.[122] Although the chains of command were different, it was up to the armed forces' chain of command whether the RMP should be involved at all (and whether its involvement should, at any point, cease). The Court noted that certain circumstances require that particular attention be paid to *perceptions* of independence:[123]

> … the fact that the United Kingdom was in occupation also entailed that, if any investigation into acts allegedly committed by British soldiers was to be effective, it was *particularly important* that the investigating authority was, and *was seen to be*, operationally independent of the military chain of command.

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120 *McKerr v United Kingdom* [2001] ECHR 329 at [140]. A later investigation into particular claims (of concealing evidence and of perverting the course of justice) led by Police officers in England was held by the Court to meet the independence requirement.

121 *Giuliani and Gaggio v Italy* [2011] ECHR 513 (Grand Chamber).

122 *Al-Skeini v United Kingdom* (2011) 53 EHRR 589 (GC) at [172].

123 At [169].

[392] To this list I add *Ramsahai v the Netherlands*.[124] That was also a case brought by the family of the victim of a police shooting, where—after an internal Police investigation into the killing—the public prosecutor had declined to prosecute on the ground that the killing had been in self-defence.

[393] Although rejecting the family's contention that Mr Ramsahai had wrongly been deprived of life (because self-defence was established on the facts), the Grand Chamber of the ECtHR found that art 2 had been breached due to both the ineffectiveness of the investigation (a point discussed later below) and its lack of relevant independence.

[394] On the question of independence, the Court noted that fifteen and a half hours had passed between the time of Mr Ramsahai's death and the involvement of the (independent) State Criminal Investigation Department. Until then, essential parts of the investigation had been carried out by officers in the same force as those involved in the shooting (the Amsterdam/Amstelland police force). Their inquiries had included the forensic examination of the scene of the shooting, the door-to-door search for witnesses, and the initial questioning of witnesses. The Court said:[125]

> 335 It has not been disputed that essential parts of the investigation were carried out by the same force to which Officers Brons and Bultstra belonged … namely, the forensic examination of the scene of the shooting, the door-to-door search for witnesses and the initial questioning of witnesses, including police officers who also belonged to the Amsterdam/Amstelland police force ….
>
> 336 After the State Criminal Investigation Department took over, further investigations were undertaken by the Amsterdam/Amstelland police force, although at the State Criminal Investigation Department's behest and under its responsibility ….
>
> 337 The Court has had occasion to find a violation of Article 2 in its procedural aspect in that an investigation into a death in circumstances engaging the responsibility of a public authority was carried out by direct colleagues of the persons allegedly involved …. Supervision by another authority, however independent, has been found not to be a sufficient safeguard for the independence of the investigation …
>
> 338 Whilst it is true that to oblige the local police to remain passive until independent investigators arrive may result in the loss or destruction

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124 *Ramsahai*, above n 102. The decision was referred to in the closing submissions of both parties, although not in relation to the matters I am dealing with here.

125 Citations omitted.

> of important evidence, the Government have not pointed to any special circumstances that necessitated immediate action by the local police force in the present case going beyond the securing of the area in question; there is no need for the Court to consider this question in the abstract.

[395] And even at the point where the State Criminal Investigation Department took over (although still assisted by local Police), there was a problem. The ECtHR noted:[126]

> 340 As to the investigations of the Amsterdam/Amstelland police force after the State Criminal Investigation Department took over, the Court finds that the Department's subsequent involvement cannot suffice to remove the taint of the force's lack of independence.
>
> 341 On these grounds alone the Court therefore finds that there has been a violation of Article 2 of the Convention in that the police investigation was not sufficiently independent.

Effectiveness

[396] The cases recognise that if an investigation is not independent in the required sense, then it will also not be regarded as effective. That is because what is at stake is "nothing less than public confidence in the state's monopoly on the use of force".[127]

[397] And in a case where there is a claim that the use of force by a State actor leading to a death is justified, effectiveness means:[128]

> … capable of leading to a determination of whether the force used was or was not justified in the circumstances … and to the identification and punishment of those responsible …. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy providing a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death …. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard ….

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126 At [337]–[341] (citations omitted).
127 *Ramsahai*, above n 102, at [325].
128 *Edwards v UK* (2002) 35 EHRR 487 at [71] (citations omitted; emphasis added).

[398] This passage makes it clear that it the effectiveness obligation does not require the State in all cases to *prosecute* those identified as being involved.[129] On the other hand, [t]he need for an effective investigation into a death goes well beyond facilitating a prosecution".[130] Nevertheless, in order to be effective, a firm conclusion as to responsibility or potential liability is required. Thus, in *R (Middleton) v West Somerset Coroner* (a case involving the suicide of an inmate), the House of Lords said:[131]

> It seems safe to infer that the state's procedural obligation to investigate is unlikely to be met if it is plausibly alleged that agents of the state have used lethal force without justification, if an effectively unchallengeable decision has been taken not to prosecute and if the fact-finding body cannot express its conclusion on whether unjustifiable force has been used or not, so as to prompt reconsideration of the decision not to prosecute. Where, in such a case, an inquest is the instrument by which the state seeks to discharge its investigative obligation, it seems that an explicit statement, however brief, of the jury's conclusion on the central issue is required.

[399] In support of its conclusion that some kind of a formal finding or verdict is always required, the House of Lords made two points. First, omitting to make a finding on a major issue would fail to meet the expectations of the next of kin. The family, who "like the deceased may be victims" have a legitimate interest in the conduct of the investigation and deserve to know that lessons learned from the death may save the lives of others.[132] And secondly, such an omission risks failing to identify systemic failures to protect human life (even where the case does not concern unjustified lethal force by agents of the State) and would be inconsistent with the objects of the Convention.[133]

[400] *Middleton* is an important case for other reasons, and I return to it later.

[401] And lastly, in order for an investigation to reach a conclusion that the use of force to *was* justified in terms of art 2:[134]

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129 In *R (da Silva) v Director of Public Prosecutions* [2006] EWHC 3204 (Admin), the High Court of England and Wales held that art 2 effectively added nothing to the ordinary grounds of review in a refusal to prosecute case.

130 *In re Finucane's Application for Judicial Review* [2019] UKSC 7, at [127].

131 *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182 at [16] (emphasis added).

132 At [18].

133 At [19].

134 *Nachova and Others v Bulgaria* [2005] ECHR 465 (Grand Chamber).

> 113. The investigation's conclusions must be based on thorough, objective and impartial analysis of all relevant elements and must apply a standard comparable to the 'no more than absolutely necessary' standard required by Article 2 § 2 of the Convention. Any deficiency in the investigation which undermines its capability of establishing the circumstances of the case or the person responsible is liable to fall foul of the required measure of effectiveness (…)."

Promptness

[402] The requirement for promptness largely speaks for itself. But as well as meaning that the inquiry should be undertaken with reasonable expedition and carried out with reasonable speed, it must also be initiated by the State. The State cannot, for example, leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigation.[135]

Accountability

[403] Accountability means that the investigation or its results should be subject to public scrutiny that is sufficient to secure accountability in practice as well as in theory.[136]

Involvement by next of kin

[404] The involvement of the next of kin (the feature of the obligation to investigate omitted from the Crown's submissions in this case) was an issue in both *Edwards v United Kingdom* and *Amin*.[137] Both cases involved the death of a prisoner while in custody.

[405] In *Edwards*, Christopher Edwards was killed by his mentally disordered cellmate. The cellmate subsequently pleaded guilty to manslaughter (by reason of diminished responsibility), so there was no substantive criminal trial. A coroner's inquest had been opened but adjourned pending the criminal proceedings. After the cellmate's conviction, the coroner closed the inquest, saying there was no obligation to continue in those circumstances. Mr Edwards' parents were later advised by Police that there was insufficient evidence to establish manslaughter by gross negligence on

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135 *Edwards*, above n 128, at [69].
136 At [73].
137 *Edwards*, above n 128; and *Amin*, above n 101.

the part of any State official or agency involved in the matter, but also that there was to be a further inquiry.

[406] That inquiry was chaired by a Queen's Counsel and had other expert panel members. It heard evidence on 56 days over a period of 10 months. It sat in private. It had no power to compel witnesses or production of documents; two prison officers refused to give evidence. About 150 witnesses attended the inquiry to give evidence, while a considerable number of others submitted written evidence.

[407] The inquiry report concluded that neither Mr Edwards nor his cellmate should have been in prison at all and, in any event, should not have been sharing the same cell. It found "a systemic collapse of the protective mechanisms that ought to have operated to protect this vulnerable prisoner". And the report identified a series of shortcomings, including poor record-keeping, inadequate communication and limited inter-agency cooperation, and several missed opportunities to prevent Mr Edwards' death.

[408] The Crown Prosecution Service then maintained its previous position that there was insufficient evidence to proceed with criminal charges. That view was confirmed by the Edwards' lawyer.

[409] The ECtHR found that, in terms of art 2, there had not been an effective or expeditious investigation. As well as the Inquiry not having the power to compel witnesses, the Court noted that Mr Edwards' parents were not sufficiently involved:

> 84. The applicants, parents of the deceased, were only able to attend three days of the inquiry when they themselves were giving evidence. They were not represented and were unable to put any questions to the witnesses, whether through their own counsel or, for example, through the inquiry panel. They had to wait until the publication of the final version of the inquiry report to discover the substance of the evidence about what had occurred. Given their close and personal concern with the subject matter of the inquiry, the Court finds that they cannot be regarded as having been involved in the procedure to the extent necessary to safeguard their interests.

[410] And in *Amin*, the Court accepted that the police investigation into criminal culpability for the death had properly been conducted in private and without

participation by the family.[138] But the investigation by the Prison Service and the resulting report (on which advice not to prosecute was based) was found *not* to discharge the State's investigative duty. As well as having problems with independence (because the report had been written by a serving official in the Prison Service) and accountability (because the investigation was conducted in private and the report was not published), the family had been unable to play any meaningful part.[139] And although a later inquiry had brought additional facts to light, it was confined to race-related issues and it, too, had been conducted in private and without effective involvement by the family. The Court concluded:

> 37. … Whether assessed singly or together, the investigations conducted in this case are much less satisfactory than the long and thorough investigation conducted by independent Queen's Counsel in *Edwards'* case, but even that was held inadequate to satisfy article 2(1) because it was held in private, with no opportunity for the family to attend save when giving evidence themselves and without the power to obtain all relevant evidence.

HAS THERE BEEN A RIGHTS-COMPLIANT INVESTIGATION INTO STEVEN'S DEATH?

[411] It is against the principles identified and discussed above that I will consider whether the various investigations into the circumstances of Steven's death—either individually or collectively—met the requirements of s 8. But there is a preliminary matter that requires discussion first.

What role can the criminal trial play in meeting the s 8 obligation?

[412] After noting the numerous investigations and inquiries into Steven's death that had already taken place, Brown J observed in his strike out decision:[140]

> [88] There can be no doubt that the circumstances of Steven Wallace's death have been the subject of thorough review as a consequence of the three different investigations which have been undertaken – the criminal trial, the Coroner's inquest and the IPCA inquiry. Short of a full commission of inquiry, it is difficult to envisage what further investigating steps could have been undertaken.

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138 Here, "properly" means appropriately for an investigation of that kind. It did not mean that the investigation was art 2 compliant.

139 At [36].

140 *Wallace*, above n 4.

[413] But then, the Judge observed:

> [92] … while it may well prove to be the case that the facts have been exhaustively reviewed in the course of the three different inquiries, the impression which I gained was that both the second and third inquiries proceeded on the basis that the conclusion inferred from the outcome of the criminal trial was in a sense "binding". Furthermore Mr Minchin has advocated strongly that there were in fact some matters which were not fully or adequately explored at the criminal trial, which was a private prosecution.

[414] There was, I think, real force in this point. Despite the sheer *number* of separate inquiries, the later of them are undoubtedly predicated on the assumed adequacy of the earlier. So if there proved to be some problem with the earlier inquiries—if the assumption of adequacy proved to be wrong—then it is possible that the later inquiries might then also be tainted, inadequate, or incomplete. In particular (and as Brown J noted), the inquiries that post-dated the criminal trial quite explicitly took the jury's verdict in the trial as their stepping-off point for what otherwise might have been a central issue.

[415] At this point, there are two observations that can usefully be made about that.

[416] The first is that, as noted earlier, the jury's not guilty verdict did not constitute a finding that Constable Abbott was acting in self-defence when he killed Steven. By virtue of the operation of the criminal burden of proof, the only thing that can properly be said to have been was established by the verdict was that the jury thought it reasonably *possible* that Constable Abbott had acted in self-defence.

[417] That is not, by and of itself, problematic. Were it not for the second point below, the verdict would qualify as a "finding" of the kind said by the House of Lords in *Middleton* to be required for the purposes of art 2 (and so, by analogy, s 8). The finding was that Constable Abbott was not criminally responsible for Steven's death.

[418] The second point is not one referred to by Brown J. It is that a *private* prosecution cannot, in my view, meet, or contribute to meeting, the s 8 obligation to investigate. That is because the s 8 obligation rests on the Crown, not the family of the person who has been killed. I accept Mr Gunn's submission that, in the normal course, an adversarial criminal trial can properly be regarded as constituting an

effective procedure for finding relevant facts and (if proven) attributing criminal responsibility.[141] But a private prosecution does not constitute such a "normal course".

[419] Nor could it be an answer to say that the fact that the private prosecution was *permitted* to go forward somehow meets the s 8 obligation. I do not think that reflects the realities here. The Wallaces' private prosecution was required to proceed off the back of a Police investigation that had concluded there was no case to answer. That conclusion was the subject of public statements made by the Police and then by the Deputy Solicitor-General that Constable Abbott had acted in self-defence. Nor, of course, was the prosecution backed by the resources of the Crown. Requests for financial assistance made to the Solicitor-General were unanswered. Indeed, the Crown (through the Police) actively supported Constable Abbott. The search warrants sought and obtained by Police to pursue the "Mrs Dombroski issue" is one example of continued Police assistance to Constable Abbott even after its investigation proper was complete. Moreover, Police officers demonstrated their active support for Constable Abbot during the trial by sitting in uniform in the public gallery.[142]

[420] And although, to my knowledge, there are no overseas cases where the courts have considered whether a private prosecution can fulfil the art 2 investigatory obligation, there are cases holding that *civil* proceedings relating to the death of someone killed by a State agent (and brought by the victim's family) do not assist in meeting that obligation. Thus, in *Jordan* the ECtHR said:[143]

> 141. … civil proceedings would provide a judicial fact-finding forum, with the attendant safeguards and the ability to reach findings of unlawfulness, with the possibility of damages. *It is however a procedure undertaken on the initiative of the applicant, not the authorities, and it does not involve the identification or punishment of any alleged perpetrator. As such, it cannot be taken into account in the assessment of the State's compliance with its procedural obligations under Art.2 of the Convention.*

[421] And so too said the English and Welsh High Court in *R (Wright) v Secretary of State for the Home Department*:[144]

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141 *McKerr*, above n 120, at [134].
142 This was a matter eventually considered by the IPCA.
143 *Jordan*, above n 85 (emphasis added).
144 *R (Wright) v Secretary of State for the Home Department* [2002] HRLR 1 at [61].

> The civil proceedings in this case are irrelevant to the defendant's procedural[145] obligations under articles 2 and 3 of the Convention.

[422] There are two points that can therefore be made. First, and for the reasons just given, no real weight can be placed on the private prosecution and the criminal trial in any assessment of s 8 compliance here. And secondly, if the criminal trial cannot, itself, be relied on to satisfy the Crown's obligations under s 8, then it is difficult to see how the outcome of that trial—the verdict—can be assumed to be a rights-compliant entry point for the later inquiries. I will return to this second matter later.

[423] With those preliminary observations in mind, I turn now to consider the various investigations that took place in this case. I propose to do so on an individual basis, before considering their collective heft. In the first instance, that will require consideration of each inquiry's:

(a) independence;

(b) effectiveness;

(c) accountability;

(d) timeliness; and

(e) family involvement.

The Police homicide inquiry

[424] Before considering the rights-compliance of the Police homicide inquiry, I begin with two wider matters of relevance. They are important mainly because it is otherwise difficult—over 20 years after the event—to get a real sense of how things were in the relevant place and at the relevant time. And although "how things were" does not assist directly in answering the questions that need to be answered here, they do assist with matters of nuance and context.

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145 The obligation to investigate is commonly referred to as a procedural obligation.

[425] The first contextual matter is that (as noted earlier) Steven's death—and the first investigations into it—coincided precisely with the review of the PCA undertaken by Sir Rodney Gallen. While that review focused on the perceived lack of independence of the PCA, the creation of the PCA itself, in 1988, had been founded on concerns about the ability of the Police to investigate allegations of wrongdoing by its own members.[146] So the concerns noted by Sir Rodney, about small town police investigating their own and so on, were writ large, so to speak, where internal Police investigations such as *Operation McLean* were concerned.

[426] Secondly, it seems clear that Steven's death brought underlying tensions between Police and the Taranaki community—particularly the Māori community—to a head. Indeed, the local reaction was such that it prompted the then Race Relations Conciliator, Dr Rajen Prasad, to visit Taranaki just a week after the killing, and again in July 2000. And in September 2000, he published a report entitled *Relationships in Taranaki*. Included in the Executive Summary of that report were the following observations:[147]

> The shooting of Steven Wallace by the Police in Waitara unleashed a storm of protest locally, and generated extensive national debate, about the shooting being an act of racism. A focus on racism in the New Zealand Police Force was given greater impetus by the publicity concerning two 1998 pieces of research into "Maori Perception of the Police" and "Police Perceptions of Maori". These reports had provided some evidence of racism in the New Zealand Police Force and confirmed that Maori perceived the Police as a racist organisation. A subsequent Police investigation recommended that no criminal charges be laid against the Officer responsible for the shooting.
>
> …
>
> The report, which is written from a race relations perspective, found that there was intense interest in the incident as well as in the historical and present day relationships between Maori and Pakeha in Taranaki. At every consultation on the matters surrounding the death of Steven Wallace, there was extensive discussion on Taranaki history, the historical experiences of Maori and their present day frustrations and aspirations.

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146 It is important to note—and I will attempt to keep noting throughout this section of the judgment—that the Police inquiry's lack of independence is not a criticism of the inquiry or the personnel involved in it. It is a function of the fundamental difficulty posed by *any* internal investigations of this kind and also of the inevitable *perceptions* of partiality (regardless of whether there is any basis in reality for those perceptions).

147 Rajen Prasad *Relationships in Taranaki* (Office of the Race Relations Conciliator, September 2000).

> Steven Wallace's death had propelled Waitara and other Taranaki communities to reflect on historical Maori/Pakeha relationships, on the level of Maori under achievement, unemployment, poor health, and disproportionate participation in negative social statistics.
>
> The death of Steven Wallace became a rallying point for Maori calls to hasten the resolution of historical issues, for opportunities to participate meaningfully in matters that affected their whanau, hapu and iwi, for urgent attention to be given to the development of their economic base, and for the mana of kaumatua to be effective once again in providing leadership of Maori.

[427] I would suggest that—given Steven's ethnicity—the matters referred to by Dr Prasad made the perceived independence of any inquiry into his death particularly important.[148] Although much was made from time to time of the fact that Constable Abbott was, himself, Māori, that does not diminish the force of the concerns underlying the Race Relations Conciliator's comments. As well, the matters to which he referred also, I suspect, go some considerable way to explaining the fractured nature of the interactions between Police and the Wallace family immediately following his death, to be discussed later.

[428] So it is against those background matters that I turn to consider the Police inquiry against the internationally accepted benchmarks.

Independence

[429] The international cases make it clear that a Police investigation into a killing by one of its own is unlikely to be sufficiently independent to satisfy s 8. As footnoted above, that is not a criticism of Police generally, or of any particular officers; it is simply a reflection of the reality noted in the decisions and (domestically) in the Gallen report.

[430] For that reason, it is much more likely to be an inquest—which is open, independent, transparent and takes place with family involvement—that is likely to be the appropriate vehicle for a rights-compliant inquiry into a death of this kind. Indeed, this was expressly recognised by DI Pearce at the end of his report:

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148 See *Al-Skeini*, above n 122, at [169].

> That in the public interest the New Plymouth Coroner be encouraged to conduct a comprehensive hearing into the death of Steven WALLACE, so that the facts relating to this death are established in an open transparent manner.

[431] That said, the Crown in this case does rely on the homicide investigation, in terms of meeting the s 8 investigative obligation. The Crown submitted that the investigation *was* in fact independent. Reference was made (for example) to the IPCA's finding that it had "looked carefully for any suggestion of bias towards a preconceived outcome and found none."

[432] It is therefore necessary to consider the question of independence a little more closely.

[433] It seems to me that the absence of obvious signs of bias (as noted by the IPCA) is not a complete answer in this context. That is because independence is, in part, about optics. Moreover, its absence will not necessarily be obvious on the face of the record. That is why there is an underlying requirement for institutional and hierarchical independence.

[434] My own view is that the Police investigation here could not be, and was not in fact, independent in the way required by the relevant case law.

[435] First, there is the point that a local officer (and old friend of Constable Abbott) oversaw the investigation for the first two—and arguably critical—days. Significantly, the three police officers involved and 10 other witnesses were interviewed within that time. Search warrants were sought and obtained for Steven's car and bank records. And the optics of all this would not have been assisted by the media release issued on 1 May by the Police Association[149] saying that it "fully supports the actions of the Taranaki Police Officers involved in the weekend shooting".

[436] Secondly, even after DI Pearce had taken over (on 2 May) it seems clear that at least some of the officers involved in the investigation knew and worked with

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[149] I acknowledge that the Police Association was, as a matter of fact, independent of the New Zealand Police as an organisation and played no part in the investigation. As noted, however, it is the optics that are important.

Constable Abbott. That is confirmed by the later account given by David Toa of the way in which he had been interviewed, on 9 May. In 2001, Mr Toa told both a Sunday Star Times journalist and the Wallace family's private investigator, Mr Paul Bass, that the Police officer who interviewed him constantly referred to Constable Abbott as "Abbo" and "talked to me like [Abbott] was her friend".[150]

[437] Thirdly, as the Strasbourg cases discussed earlier show, the assumption of command by someone more removed from the fray does not necessarily meet the independence requirement. Regardless of whether the investigating officers knew Constable Abbott personally, there remained a hierarchical link between them.

[438] Mr Minchin was also critical of the continued Police focus throughout the investigation on matters personal to Steven, including his prior conduct and character, financial position, educational background and sporting interests. He submitted that this focus on Steven, and on Steven's culpability for his own death, shows partiality from the outset.

[439] While I have some sympathy for Mr Minchin's position, it must also be acknowledged that in any criminal investigation where self-defence is the principal issue there will inevitably be *some* focus on the person who is said to have caused the need for defensive action. And because self-defence is, in law, a matter of "justification" it is difficult for any analysis not to contain overtones of "victim blaming". If a killing is found "justified" there will almost certainly have been some action on the part of the victim that provoked or caused it. An inquiry's focus on such matters will, of course, cause pain to the victim's family and loved ones. Nonetheless, it does seem to me unfortunate that the Pearce report often refers to Steven as the "offender".[151]

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150 The Crown says, and I accept, that this evidence is hearsay, but I am prepared to admit *this part* of Mr Toa's statements (recorded in the affidavit of Mr Bass) as truth of their contents under s 18 of the Evidence Act. I consider there is a reasonable assurance of reliability because Mr Toa said the same thing to both the press and Mr Bass (who recorded the statements at the time) within a year of Steven's death. I also consider that undue expense or delay would be caused if Mr Toa were to be called as a witness.

151 I acknowledge that the report was not written with a view to public dissemination, but DI Pearce's recommendation 24.3 (set out at [139] above) suggests that it was intended to provide the Wallace family with a copy, if a decision not to prosecute was made.

[440] That said, the principal focus of a self-defence inquiry is logically on the victim's acts and words in the time immediately before the killing. It will be those matters—and anything else that is known to the other party about the victim at the time—that are primarily relevant. But in this case, there was also a live and relevant question as to whether there was something that had caused Steven to become angry specifically with the Police.[152] If so, that would have potentially been material to the question of self-defence because it goes to whether Steven's anger might have been inflamed by, and focused on, the officers who confronted him. Steven's previous encounters with Police (and so, his criminal record) could well be material to that.

[441] Whether it was strictly necessary to access Steven's bank, educational and sporting records is a judgement call about which I am reluctant to comment. My inclination is that Steven's personal circumstances were relevant in a broad sense and, as such, were apt to form part of what Police term "General Inquiries". And if, for example, it had transpired that Steven had been in trouble financially, that might have assisted in explaining his distress. Information about his educational and sporting achievements may be rather more marginal, but I do not think it can fairly be said that, by seeking that information, Police were acting partially or improperly.

[442] But judicial criticism has previously and rightly been made of the decision to distribute the questionnaire about Steven and his family to local business owners immediately after Steven's death. I have noted earlier Chambers J's comments about it suggesting the family was on trial. I agree with him that it was unnecessary and inevitably inflammatory.

[443] Mr Minchin also submitted that the way in which Police dealt with matters concerning Mrs Dombroski was evidence of ongoing bias. It is therefore necessary to say a little more about those matters here.

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152 There was, from the outset, substantial evidence suggesting that Steven was motivated by anti-Police feelings: his first stop had been the Police Station, where he pounded on the door (and, according to neighbours, yelled things like "Where are you, fucking bastards, come out here" and "You Pigs") and broke the Station windows. Even if a specific animus could not be firmly established, there was hardly a dispute about what Steven was doing and saying in the moments before he was shot; the Police officers were not the only witnesses to describe just how amped up and angry he was. It was never going to be disputed that he had broken many windows or that he had just attacked the Police car.

[444] The first point is that the Police investigation had formally come to an end by the time Mrs Dombroski made her statement. DI Pearce had delivered his report and the decision not to prosecute had been made. It cannot be suggested, however, that Police should not have investigated further if new and material information came to light. Moreover, the private prosecution was, by then, plainly in prospect.

[445] That said, what Mrs Dombroski had to say was only marginally relevant. Although it suggested that Steven had been involved in family violence in the past, it said nothing about his actions on McLean Street on 30 April and it added little to what was already more generally known by Police about him.

[446] More significantly, there were aspects of the Police inquiries following her disclosure that did, in my view, demonstrate partiality. In particular, the warrant applications were made under s 198 of the Summary Proceedings Act 1957, which was predicated on there being grounds for believing that the object of the proposed search may be evidence of an imprisonable offence. While the offence specified ("threatening to kill") was and is an imprisonable offence, Police were *not* in fact—and could never have been—investigating that offence. There was no prospect whatsoever of a charge of threatening to kill being laid against Steven. And so there was no prospect of the fruits of the search being used in evidence in a prosecution for that offence.

[447] Overall, and particularly given the marginal relevance of Mrs Dombroski's statement, obtaining the warrants on this basis strikes me as an improper and unnecessary overreach. It does, in my view, give some credence to Mr Minchin's claim of partiality.

[448] For all the reasons I have given, I find that the Police homicide investigation was not—and really never could have been—independent in the sense required in the right to life cases.

Effectiveness

[449] The main aim of the Police investigation was to determine Constable Abbott's potential criminal liability and thus to decide whether a charge should be laid against

him. As a matter of criminal law, that required Police to ask whether, on the evidence gathered, the Crown would be able to *disprove* self-defence beyond reasonable doubt. That is made clear by DI Pearce's principal conclusion:[153]

> That while issues of fact are more properly the domain of a jury, it is considered that no jury properly directed could, beyond reasonable doubt, find that Constable A shot Steven WALLACE other than in self-defence.

[450] On its face, this conclusion would undoubtedly meet the *Middleton* requirement for a firm finding on the central issue of responsibility.

[451] The difficulty, however, is that the case law makes it clear that the investigation's lack of independence means that it could not be a relevantly effective one.[154]

[452] As well, Mr Minchin had other criticisms that he submitted went to (or demonstrated) the inquiry's ineffectiveness. In particular, he was critical of:

(a) the failure to test Constables Abbott and Dombroski for gunpowder residue;

(b) the failure to breath test them for alcohol consumption;

(c) the failure to keep the officers separated prior to interview; and

(d) in relation to Constable Abbott (as the "suspect") the mode of interview itself.

[453] As far as the failure to test the officers for gunpowder residue is concerned, this was later the subject of (relatively mild) adverse comment by the IPCA, which

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153 A reading of the preceding paragraphs in the report, however, makes it tolerably clear that this conclusion was based on DI Pearce's positive view that (on the evidence) Constable Abbott *did* shoot Steven in self-defence because (a) in the moments immediately prior to the shooting, and in the circumstances as Constable Abbott perceived them to be, he genuinely feared for his life; (b) Constable Abbott shot Steven to defend himself; and (c) shooting Steven was a reasonable and proportionate use of force in the circumstances as Constable Abbott believed them to be.

154 Looked at another way, the lack of independence simply means that the inquiry cannot be rights-compliant, making it unnecessary to consider the other requirements.

noted that it fell short of best practice. The failure to breath test was also the subject of a specific recommendation by the IPCA.

[454] As I understand it, Mr Minchin's third "process" criticism rests on a statement made by Constable Andrew Ross in November 2002, in which he says he was called in to work at the Waitara Police Station at around 4.15 am on 30 April 2000. On his arrival at the Station, he said:

> Constable Abbott, Constable Dombroski, Grant Coward, Vaughan Watson, Robbie O'Keefe, and Anne O'Keefe were all in the Station.
>
> Vaughan, Constable Abbott and Grant were in the meal room together. They were just milling around.
>
> Constable Dombroski and Anne O'Keefe were in the Watch House. I was briefed by Grant Coward as to what had happened. I think we then had a coffee in the meal room. Constable Dombroski came down as well.

[455] I am unable to read this statement (which has never been explored with Constable Ross in cross-examination) in the way Mr Minchin does. It does not obviously suggest that the two officers were together or (more importantly) able to talk at that time.

[456] Moreover, this reading is not consistent with other evidence. For example, Anne O'Keefe's account is that when she and her husband (Sergeant Robbie O'Keefe) arrived at the Station with Constable Abbott after the shooting that morning, Constable Dombroski was acting as the scene guard outside the Station. She describes later talking to Constable Dombroski in the main office, and it seems plain that no one else was present.

[457] Similarly, DS Coward's account records Vaughan Watson and Constable Abbott being in the tearoom and then, after deciding that Constable Abbott should be interviewed in New Plymouth, Constable Abbott leaving the Station (with Sergeant Watson). Sergeant Watson also records being in the tearoom with Constable Abbott and (later) DS Coward, taking Constable Abbott to his home to get more clothes, returning to the Station to speak with DS Coward, and then taking Constable Abbott to New Plymouth (driven by Constable Peoples).

[458] On the evidence, I am therefore unable to conclude that the two officers were not separated before making their respective first statements.

[459] Finally, on the fourth point, my understanding is that Mr Minchin's criticism of the way in which Constable Abbott was interviewed is based on the fact that Constable Abbott's initial statement suggests that the interviewing officer (DS Bryan) did not adopt the questioning technique that might be expected when interviewing a suspect involved in a shooting.[155] Constable Abbott's statement is in the same form as the statements taken from all the witnesses. The suggestion is that the statement was typed up as Constable Abbott made it orally, without intervention or interrogation from the "interviewer".[156] As well, Mr Minchin points out that there was no tape (audio or video) made of the interview.

[460] I begin by noting that, at the time Constable Abbott's first interview began, Steven had not died and so there was no *homicide* investigation.[157] Nonetheless the shooting was a serious matter and it seems plain that Constable Abbott was, quite rightly, treated at interview as a "suspect": he had his lawyer present and he was read his rights. But there was certainly no prospect of Constable Abbott being charged; nor was he in custody.

[461] I do not, however, think it can safely be concluded that the interviewing officer did not ask Constable Abbott *any* questions. On the contrary, there are aspects of the statement that suggest he *was* questioned, albeit only in the way that an officer interviewing any witness might. It also needs to be borne in mind that the Police investigation had barely begun; DS Bryan's knowledge of the details of the case would, at that point, have been minimal.

[462] As far as the omission to make a video or audio recording of either interview with Constable Abbott, I begin by noting that in April 2000 the interviewing of suspects was governed by the Judges' Rules. By contrast with the Chief Justice's 2007

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155 In fact, all of Constable Abbott's statements take this form.

156 It is clear that a typist (Ms Booker) was present and typed the statement as Constable Abbott went along.

157 Steven died before the end of the interview, but, at the request of his lawyer, Constable Abbott was not told of this until he had completed his statement.

Practice Note on Police Questioning, there is nothing in the Rules about the desirability of video (or audio) recording interviews—at least of those in custody or who have been charged.[158] Nonetheless, the Courts had been saying for some time that video or audio recording—where practicable—constituted best Police practice. In 1988, for example, McMullin J in the Court of Appeal had said:[159]

> A different but related issue is whether police interviews with suspects and arrested persons should be recorded on tape or video. The view which I believe to be widely held by Judges is that, while it has to be recognised that cost is a factor, this should be aimed at as a goal as soon as reasonably practicable. As well as being a safeguard for the person questioned, the taking of a reliable record cannot infrequently be advantageous to the police. The present case, where there is an incidental dispute about the editing of the constable's evidence, is a typical illustration of the desirability of recording. A balanced discussion of the issues of tape and video recording as at 1981 will be found in the English Royal Commission's Report, already cited, para 4.16 to 4.31.

[463] It may be observed in passing that while in 1988, video recording may well still have been in its relative infancy (thus costly and out of reach), audio recording was something that anyone could have done.

[464] In any event, by the time of Steven's death, video recording Police interviews with suspects had obviously become much more commonplace, even in provincial centres. For example, in *R v Dacombe*—which involved events in 1998—Whangārei Police officers had made video recordings of their interviews of a number of suspects in a murder inquiry, but they had also spoken to them "off camera" beforehand.[160] This prompted Fisher J to say:[161]

> The second burden was the decision to conduct certain interviews off-camera as a prelude to video-recording. Video-recording is both a disincentive against impropriety and a powerful protection to the police. Once a suspect lays an evidentiary foundation for an allegation of police misconduct the onus lies on the police to refute it. A video-tape usually puts the matter beyond doubt. There will be many situations in which it is not practicable to record on video - lack of facilities, pressure of events, the inconsequential nature of the discussion, or lack of warning that something significant might be said. But where a video facility is available, and a significant interview with a suspect is contemplated, it is folly not to use it. The proper practice was exemplified

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158 The Practice Note states that audio recording or recording the interview in writing is acceptable where video is impractical or where the person declined to be recorded in that way.

159 *R v Admore* [1989] 2 NZLR 210 (CA) at 553–554.

160 *R v Dacombe* HC Whangarei T990189, 1 April 1999.

161 At 12.

> by Constable Candy. As soon as it emerged that Mr Harris might be implicated he stopped the off-camera interview and continued on video.

[465] There is no evidence before me about the availability of video recording facilities at the New Plymouth Police Station (where Constable Abbott was interviewed) in April 2000. It might be speculated that if facilities were available in Whangārei at that time, they were likely available there. And it is hard to imagine that there were not audio recording facilities. Although with the benefit of hindsight it might have been preferable to use them, I would not put the matter any higher than that.

[466] The procedural omissions discussed above seem not to be—in light of the established facts—particularly important.[162] But the decision in *Ramsahai* (discussed in another context earlier) demonstrates that even quite minor matters of process can sometimes undermine the effectiveness of a right to life investigation, notwithstanding the absence of any substantive effect. In *Ramsahai*, the Court was critical of (among other things) Police failures to test the hands of the police officers for gunshot residue, to examine the relevant weapons, to keep the officers apart, to interview them until three days after the events, and to undertake a reconstruction of events and of the bullet trajectories.

[467] At first instance, no violation of art 2 (in these respects) had been found. That was because despite the expectation that such steps would normally feature in an investigation into a death by shooting, in that case there had never been any doubt about the identity of the suspect, and the relevant circumstances could be adequately established without those examinations. Accordingly, their omission was thought not to have impaired the effectiveness of the investigation as a whole.

[468] But the Grand Chamber disagreed. In finding that the investigation into the circumstances surrounding the death of Mr Ramsahai was inadequate and in breach of art 2, they said:

> The applicants correctly pointed out that several forensic examinations which one would normally expect in a case such as the present had not been carried

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[162] Because Constable Abbott always accepted, for example, that it was he who had fired the shots, and because there was no evidence that he had been drinking.

> out: thus, no attempt had been made to determine the precise trajectory of the bullet (which the applicants submitted would have been possible); the hands of Officers Brons and Bultstra had not been tested for gunshot residue; no report of any examination of Officer Brons's service weapon and ammunition or of the spent cartridge was contained in the investigation file; the autopsy report, as filed, did not comprise any drawings or photographs showing the entry and exit wounds caused by the fatal bullet; and there had been no reconstruction of the incident. Lastly, Officers Brons and Bultstra had not been questioned until several days after the fatal shooting, during which time they had had the opportunity to discuss the incident with others and with each other.
>
> It is true that no attempt was made to establish the trajectory of the bullet. It may be questioned whether this could have been determined on the basis of the information available, since after hitting Moravia Ramsahai, the bullet left no trace apart from a shattered pane of glass …
>
> However, the Court considers that the other failings pointed out by the applicants impaired the adequacy of the investigation. On this point its findings differ from those of the Chamber.
>
> The failure to test the hands of the two officers for gunshot residue and to stage a reconstruction of the incident, as well as the apparent absence of any examination of their weapons … or ammunition and the lack of an adequate pictorial record of the trauma caused to Moravia Ramsahai's body by the bullet … , have not been explained.
>
> What is more, Officers Brons and Bultstra were not kept separated after the incident and were not questioned until nearly three days later … Although, as already noted, there is no evidence that they colluded with each other or with their colleagues on the Amsterdam/Amstelland police force, the mere fact that appropriate steps were not taken to reduce the risk of such collusion amounts to a significant shortcoming in the adequacy of the investigation.
>
> These lacunae in the investigation are all the more regrettable in that there were no witnesses who saw the fatal shot fired from close by, except for Officers Brons and Bultstra themselves. The Court has already drawn attention to the inconsistency between their statements to the effect that the fatal shot was fired by Officer Brons and those of Officers Braam and Van Daal, who both stated that they had heard Officer Bultstra report that he had fired and call for an ambulance … .

[469] In my view, the Police omissions in the present case are not quite in the order of those in *Ramsahai*. By and of themselves, they would not justify a conclusion that the Police investigation here was not effective. But the absence of independence requires that conclusion in any event. The relatively minor technical investigative omissions simply serve to underscore that conclusion.

Accountability

[470] Of necessity, an internal Police investigation does not take place in—and its findings are not subsequently made—public, except insofar as they might be incidentally ventilated and tested by way of a Crown prosecution. So, as with independence, there is an inherent bar to such an investigation being appropriately accountable. No blame can be attributed for that.

[471] The Pearce report and its conclusions were, of course, subject to both an internal review (by Inspector Dunstan) and an external review (by the Wellington Crown Solicitors and by Crown Law). None of these reviews were made public at the time; the contents of the external legal reviews remain undisclosed. None can meet the need for "public scrutiny".

[472] There is, perhaps, a question whether the eventual review of the Police investigation conducted as part of the IPCA's inquiry makes a difference to that conclusion. As will be discussed later, the IPCA is itself relevantly independent and its findings are public.

[473] But regardless of whether the availability of the IPCA processes might mean that a Police investigation such as *Operation McLean* would be found relevantly accountable today, those processes were not available until seven years after Steven's death. So I do not consider they could "save" the inquiry in this case.

[474] I find that the homicide investigation was not and could not be sufficiently accountable to satisfy the requirements of s 8.

Timeliness

[475] There is no issue with the timeliness of the Police investigation. It began immediately after Steven's death, and was complete within approximately three months.

Family involvement

[476] A Police inquiry into the death of a person killed by a Police officer cannot accommodate family involvement in the sense that the term is used in the cases. Again, that is not a criticism of Police but a function of the purpose and focus of such an inquiry.

[477] Here, of course, the relationship between Police and Steven's family was particularly fractious. It seems clear that Police believed the family was being obstructive. For its part the family was angry with Police and deeply suspicious of their ability to investigate Steven's death properly. Certain specific failings to deal with the family appropriately were noted by the IPCA in its report. Those matters do not, however, add much to the s 8 analysis of Operation McLean. For the reasons just noted, it was never going to be the Police investigation that met the s 8 need for appropriate family involvement.

Conclusion

[478] For the reasons given above, I do not consider the Police inquiry met the requirements of s 8. It was not independent, and (for similar reasons) it could not meet the effectiveness, accountability or family involvement requirements either. But as I have been at some pains to emphasise, that is not a criticism of Police but rather a necessary function of the nature of Police investigations of this kind. As DI Pearce himself recognised, it is the coronial process that would ordinarily be expected to fulfil the s 8 function.

PCA Inquiry

[479] There is little that can be said about the PCA investigation in 2000; the investigation was not completed, and the interim report has been lost. As well, the Gallen report makes clear the concerns that then existed about the PCA's lack of meaningful independence. That is borne out by the (limited) facts in the present case.

Criminal Trial

[480] For the reasons I have already given, the private prosecution and criminal trial cannot be taken into account when considering whether the Crown has complied with its s 8 investigatory obligations. I do not propose to say more about that here.

The Inquest

[481] As mentioned earlier, it will often be the inquest that is the most apt, and rights compliant, investigative forum in a case of this kind. That is clear from the international case law, particularly the decision in *McCann*.[163] That said, the holding of an inquest will not in every case satisfy the obligation to investigate arising under art 2 or, as I have found, in s 8. Whether it does so will depend on the facts of the case and the course of events at the inquest itself.[164]

[482] In the present case, it was not suggested by any party that the coronial process was not appropriately (in s 8 terms) independent or accountable. Nor did Mr Minchin contend that there was an issue about the nature and extent of the Wallace family's involvement in the inquest. And while there might be thought to be an issue about promptness, the process was necessarily delayed by the criminal trial and then again by the application for judicial review. Moreover, it was not a point taken by Mr Minchin; I do not pursue it further.

[483] So the only issue relates to whether the inquest was a relevantly "effective" investigation into Steven's death.

[484] On that count, I can begin by rejecting Mr Minchin's submission that the inquest was not effective because the Coroner's criticisms of aspects of Police procedures and conduct were later "undone" by the IPCA. The IPCA report does not in any meaningful sense "trump" the Coroner's report. The Coroner's findings were made. They were not judicially reviewed. They remain a matter of record.

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163 *McCann*, above n 105.

164 *R v DPP, ex parte Manning* [2001] QB 330, [2001] HRLR 3; *Salman*, above n 106; *Jordan*, above n 85; and *R (Wright)*, above n 144.

[485] Rather, the central "effectiveness" issue relates to the relationship between the inquest and the criminal trial and, in particular, the question of self-defence. That raises difficult issues of the kind canvassed by David Boldt in a recent article published in the New Zealand Law Journal.[165]

[486] Boldt begins by making the point I have attempted to make earlier in this judgment: the operation of the criminal standard (and burden) of proof means that a defendant must be acquitted at trial even if the jury thinks he or she is "probably guilty". He contrasts this with both civil proceedings and inquests, where a conclusion that "it probably happened that way" is enough to make a finding of fact. Then, he says:[166]

> Coronial inquiries which overlap with criminal proceedings, or where the deceased may have died as a result of unlawful conduct, already present special challenges for coroners. If charges have been laid, or are likely, the first step is easy enough – under s 68 of the Coroners Act 2006 the coronial inquiry will be adjourned until after trial, by which time, with any luck, all the relevant issues will have taken care of themselves.
>
> But what if they do not? What if criminal charges, for one reason or another, never materialise? And what should a coroner do if a suspect is charged with murder or manslaughter, and acquitted?
>
> … Given that even those who are probably guilty are entitled to be acquitted, what should coroners make of a verdict of not guilty – when they re-open their inquiry under s 68 (5)? How can coroners respect the integrity of the criminal process while also acknowledging that – outside the walls of a criminal courtroom – an acquittal establishes nothing at all?

[487] Boldt rightly observes that a homicide trial can be an imperfect vehicle for determining the "circumstances of death". Then, he says:

> Often of course, and despite the fundamental differences between the two procedures, a criminal trial will tell a coroner everything he or she needs to know. Where the defendant is convicted there will usually be no difficulty in concluding that the circumstances of death have been well and truly established. That will sometimes be the case even where there is an acquittal; where the defence was self-defence, insanity or lack of intent, a trial may still provide enough information for coroners to proceed directly to their findings. The same may apply if there was clear evidence the death was not a homicide at all.

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165 David Boldt "The coroner as judge and jury" [2020] NZLJ 246.

166 Although Boldt is dealing with the position under Coroners Act 2006, many of the examples he discussed relate to the 1988 Act. For the purposes of the present discussion, there is no material difference between the two.

> On the other hand, given the narrow focus of a criminal trial, the unique rules under which it operates and the inconclusive nature of most acquittals, a not guilty verdict will sometimes be of little help to a coroner who returns to a file after trial. …

[488] In the present case, the Coroner proceeded on the basis that the jury's verdict effectively "proved" the matters required to establish that defence and, in particular, that the level of force used was justified. But, for the reasons I have already explained, the verdict established only that it was reasonably possible that Constable Abbott had acted in self-defence.

[489] Ordinarily, however, that point would be of no moment in terms of art 2 compliance.[167] That is because it would be the criminal trial itself that would be regarded as constituting the rights compliant "investigation". The wider circumstances of Steven's death would have been fully explored during the trial, and the not guilty verdict would constitute the necessary formal finding as to responsibility. The Coroner would not need to concern himself with it.

[490] But the question in this case is whether—in light of my finding that the criminal trial in this case was not adequate to meet the Crown's s 8 investigative obligation—the Coroner was required to do more than he did and to revisit the question of self-defence. A similar question arises later, in relation to the IPCA.

[491] It is here that the House of Lords decision in *Middleton* becomes particularly instructive.

[492] *Middleton* was centrally concerned with whether an inquest that had inquired into Mr Middleton's suicide in prison complied with the United Kingdom's "adjectival" obligation under art 2.[168] Consistent with the position I have outlined above, the House of Lords noted that in England and Wales an inquest is how that obligation is usually discharged. The only likely exceptions were noted to be "where a criminal prosecution intervenes or a public enquiry is ordered …".

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167 Although the wider issues with which Mr Boldt is concerned might still be at large.

168 The duty to investigate is sometimes referred to as an adjectival obligation.

[493] The House also went on to note that criminal proceedings will not always discharge the state's procedural obligation, saying:[169]

> This is most likely to be so where a defendant pleads not guilty and the trial involves a full exploration of the facts surrounding the death. It is unlikely to be so if the defendant's plea of guilty is accepted (as in *Edwards),* or the issue at trial is the mental state of the defendant (as in *Amin*), because in such cases the wider issues will probably not be explored.

[494] Added to those exceptions should, I think, be a case such as the present, where the criminal proceedings were not instigated by the State, and the prosecution was a private one.

[495] In *Middleton* itself, there had been no criminal prosecution, so art 2 compliance depended on the coronial process. No issue was taken with that process. Rather, the particular matter at issue was whether the Coroner had been right not to make a formal and public finding of neglect on the part of the Prison Service, despite that being supported by the evidence.[170] Instead, the verdict was simply that Mr Middleton had taken his own life when the balance of his mind was disturbed.

[496] The Coroner's refusal to make a finding of neglect was based on an earlier decision in which the English and Welsh Court of Appeal had held ("remarkably, it now seems"[171] without reference to art 2 or the European Convention) that the statutory requirement that an inquest should determine "how" a person had died was to be narrowly construed.[172] The Court of Appeal interpreted "how" to mean "by what means" rather than "in what broad circumstances", noting it was *not* the function of a coroner or an inquest jury to determine (or appear to determine) any question of criminal or civil liability, nor to attribute blame.

[497] The competing arguments as to what art 2 requires were summarised by the House of Lords as follows:

> For the Secretary of State, it was argued that what is required … is a full, thorough, independent and public investigation of the facts surrounding and leading to the death but not necessarily culminating in any decision on whether

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169 *Middleton,* above n 131, at [30].
170 The coroner had received a note from the inquest jury expressing that view.
171 At [28].
172 *R v HM Coroner for North Humberside and Scunthorpe, Ex p Jamieson* [1995] QB 1.

> the state or any individual is responsible. The duty is to investigate, no more. If the investigation yields evidence of delinquency on the part of the state or its agents, then the victim must have a remedy. But that is a requirement of article 13, not of the procedural obligation under article 2.

[498] By contrast, counsel for Mrs Middleton cited *Jordan* and submitted:

> If an investigation is to ensure the accountability of state agents or bodies for deaths occurring under their responsibility … and be capable of leading to a determination of whether the force used had been justified … and to establish the cause of death or the person or persons responsible …, then it must culminate in a finding which, while it need not convict any person of crime nor constitute an enforceable civil judgment against any party, must express the fact-finding body's judgment on the cardinal issues concerning the death.

[499] In considering the issue, the House of Lords noted that, in *McCann*, the inquest had been found by the ECtHR to be art 2 compliant because:[173]

> The central question was whether the soldiers had been justified in shooting and killing the deceased. On this issue the coroner directed the jury in some detail, giving illustrations of conduct which would amount to unlawful killing, and leaving to the jury three verdicts which he regarded as reasonably open to them …: these were unlawful killing (unlawful homicide), lawful killing (justifiable reasonable homicide) or an open verdict. The jury could thus indicate, by returning an open verdict, their inability to decide or, by choosing one or other of the remaining verdicts, express their judgment on the central, and very important, issue. …

[500] By contrast, in *Jordan* the inquest had *not* sufficed, because:[174]

> … the jury were only permitted in their verdict to give the identity of the deceased and the date, place and cause of death and not, as in England, Wales and Gibraltar, to return any one of several verdicts including "unlawful death". A verdict in the permitted form would not, the Court held, operate to trigger criminal prosecution. In a situation where the Director of Public Prosecutions of Northern Ireland had decided not to prosecute, with no reasons given, and with no effective means of requiring reasons to be given …, the Court regarded the inquest as inadequate to investigate the possible breach of the state's substantive obligation under article 2.

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173 At [14].

174 At [15]. The ECtHR in *Jordan* had held that the inquest procedure fell short of what art 2 required because (among other shortcomings) it "… did not allow any verdict or findings which could play an effective role in securing a prosecution in respect of any criminal offence which may have been disclosed." The Court also criticised the coronial process due to the lack of independence of the police officers investigating the incident from those implicated in it, the lack of public scrutiny, the failure to transmit information to the victim's family, and the absence of legal aid for the family in relation to the inquest.

[501] I have referred earlier to the conclusion in *Middleton* that an art 2 compliant investigation needs to be capable of furnishing an applicant with the "possibility of establishing the responsibility of … the authorities" and/or leading to the identification and punishment of those responsible for the deprivation of life. The Court noted the "inescapable" conclusion that there were "some cases in which the current regime for conducting inquests in England and Wales, as hitherto understood and followed, does not meet the requirements of the Convention".[175] And in terms of the case before it, the House said:

> … There was no dispute at this inquest whether the deceased had taken his own life. He had left a suicide note, and it was plain that he had. The crux of the argument was whether he should have been recognised as a suicide risk and whether appropriate precautions should have been taken to prevent him taking his own life. The jury's verdict, although strictly in accordance with the guidance in *Ex p Jamieson,* did not express the jury's conclusion on these crucial facts. This might have been done by a short and simple verdict (eg "The deceased took his own life, in part because the risk of his doing so was not recognised and appropriate precautions were not taken to prevent him doing so"). Or it could have been done by a narrative verdict or a verdict given in answer to the coroner's questions. By one means or another the jury should, to meet the procedural obligation in article 2, have been permitted to express their conclusion on the central facts explored before them.

[502] And more generally, the House concluded:

> In the absence of full criminal proceedings, and unless otherwise notified, a coroner should assume that his inquest is the means by which the state will discharge its procedural investigative obligation under article 2.

So was the (resumed) inquest in this case "effective" in terms of s 8?

[503] I begin by recording that the Coroners Act 1988 (UK) (the provisions of which are discussed in some detail in *Middleton*) differs from the (New Zealand) 1988 Act in a number of respects. In New Zealand there are no longer inquest juries. And nor did coroners' juries make findings of "lawful killing", "unlawful killing" or an open verdict. Coroners are, however, permitted (and sometimes required) to inquire into "the circumstances of death", which was the central concern in *Middleton*.

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[175] At [32] (citations omitted). The House noted that the problem could easily be rectified: by interpreting the word "how" in the Coroners Act 1988 (UK) to mean not just "by what means" but "by what means and in what circumstances".

[504] As I have said (on a number of occasions now), the difficulty in this case is my conclusion that the criminal trial did not suffice to meet the Crown's investigative obligation under s 8. As expressly noted in *Middleton*, it will not always be the case that the criminal process will constitute a rights-compliant investigation. So it seems to me that the s 8 burden of investigating whether Steven had been unjustifiably deprived of life then fell on the Coroner—despite no one turning their minds to it at the time.[176]

[505] Whether or not self-defence *was* a matter into which the Coroner could have legitimately inquired was not the subject of specific argument before me. But the fact that the Coroner himself took the trouble to explain why he was *not* looking at that issue suggests that he thought it was. And although the law is clear that a coroner's function is to find facts and not to attribute blame for a death (at least directly), the elements of self-defence *are* factual matters. That is why, in a criminal context, self-defence is a jury question. And, on the *Middleton* approach, whether a person's death was the result of another person using force in self-defence would be a matter that was within the scope of the broad s 15(1)(a)(v) power contained in the 1988 Act to inquire into "the circumstances of death".

[506] The short point is, however, that at the time the inquest took place, there had not been a rights-compliant inquiry into Steven's death and, in particular, whether his killing was justified in law. And the Coroner did not, himself, conduct such an inquiry, for the reasons I have explained.

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[176] For the simple reasons that this, the first case to have considered the nature and extent of the Crown's obligations under s 8, is not being decided until 13 years later. Moreover, at the time of the resumed inquest, the Wallace family did not contend that self-defence should be considered by the Coroner. Self-defence was not included in the matters included by Mr Rowan in his list of "circumstances" requiring coronial investigation (recorded in the Coroner's resumption decision and set out at [210] above). Similarly, Randerson J's judgment contains no suggestion that the Wallaces wished the question of self-defence to be considered as part of the "circumstances" of Steven's death.

The IPCA investigation

Independence

[507] As I understood it, Mr Minchin submitted that because (in his view) the IPCA report "undid" some of the findings made by the Coroner, it could be inferred that the IPCA was not independent. But there is a logical flaw in that proposition. To the extent the IPCA differed from the Coroner (particularly on the issues of command and control) it was entitled to do so. The fact that the IPCA's view might be seen as more favourable to Police does not meant that it was biased in that direction. Any such suggestion is akin to saying that a lack of impartiality can be inferred simply from the fact that a tribunal finds in "favour" of one party rather than another.

[508] As its title suggests, the IPCA was (unlike its predecessor) required as a matter of law to be independent. And, as a matter of fact, there is simply nothing to suggest that it was not. It was chaired by a High Court Judge. It had its own investigators. No basis for concluding that anyone involved had a "pro-Police" inclination has been advanced. The IPCA inquiry was a properly independent one.

Effectiveness

[509] Again, it is the question of effectiveness that is most problematic. The report expressly states that, because of the jury's verdict, the investigation could not consider the 64 seconds immediately before the shooting. It was those 64 seconds that was the critical time in terms of the self-defence analysis. And the Authority's "finding" that the shooting was justified—and that force used was reasonable—is explicitly based on the jury's verdict.

[510] It seems plain that the IPCA could, itself, have investigated the question of self-defence, had it chosen to do so. Its statutory powers of investigation are wide. And it has done so in other cases.[177]

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[177] See, for example, its 2017 report entitled *Fatal Police shooting of Shargin Stephens in Rotorua*, in which the IPCA makes a firm finding that Officer G was justified in shooting Mr Stephens in self-defence.

[511] For the same reasons that the inquest was not relevantly effective, I am also unable to conclude that this aspect of the Authority's inquiry was relevantly effective.

Accountability

[512] Although the IPCA investigation was conducted in private, its report—which contains a detailed record of the outcome of its investigation and the reasons for it—was made public, as is required by law. It meets the s 8 accountability requirement.

Promptness

[513] By the time of the IPCA inquiry, about eight years had elapsed since Steven's death. That would not ordinarily meet the s 8 requirement for timeliness. In the circumstances, however, it is difficult to see how the delay can be a significant s 8 problem. The IPCA only came into existence in late 2007, and completion of the inquiry begun by its predecessor was properly deferred pending the inquest, which was in turn delayed, in large part by the criminal trial.

Family involvement

[514] I did not understand issue to be taken about the nature and extent of family involvement. Although the IPCA process is different from the coronial one (and does not involve a hearing, family representation or the opportunity to cross-examine witnesses) the Authority was plainly concerned to address a large number of specific issues raised by the family, and it did so.

Conclusion

[515] I have found this a difficult issue. But the upshot, I think, is that none of the individual investigations into the circumstances of Steven's death was, by itself, compliant with s 8. By way of summary, that is because:

(a) The Police homicide investigation was not (and could not be) sufficiently independent and so, was not effective or accountable. Nor could it meet the requirement for appropriate family involvement.

(b) The private prosecution (and so the criminal trial) was not effective for s 8 purposes because it was not instigated or supported by the Crown.

(c) While the jury's verdict was a formal and lawful finding that Constable Abbott was not criminally liable for Steven's death, it was not a finding resulting from, or that was part of, an investigation that complied with s 8.

(d) Both the inquest and the IPCA investigation were, similarly, not effective because both had proceeded—on the question of self-defence—on the basis of the verdict returned at the criminal trial, which:

(i) was itself not relevantly effective; and

(ii) could not properly be seen as constituting a positive finding that Constable Abbott had killed Steven in self-defence.

[516] Nor do I think it assists to view the inquiries collectively. Although it is tempting to suggest that a rights-compliant investigation could be created by somehow cobbling them all together, I do not think that can be so. That is because while some important s 8 deficiencies in the Police investigation (such as independence, accountability and family involvement) are filled by the later investigations, none of them has been found to be relevantly effective.

DOES S 8 IMPOSE PLANNING AND CONTROL OBLIGATIONS?

[517] Mrs Wallace says that s 8 also incorporates an obligation on state actors (such as Police and the armed forces) to plan and control potentially dangerous operations in a way that minimises risk to life. This obligation is distinct from, although broadly connected to, the positive protective duties that the ECtHR has also found to be

encompassed by art 2.[178] It is not necessary, however, to consider those other protective duties in this judgment.

The ECtHR cases

[518] The planning and control obligation was first articulated by the ECtHR in *McCann v United Kingdom* (discussed above), which concerned an SAS operation against IRA suspects in Gibraltar and resulted in all the suspects being shot and killed.[179] The Court found that the shootings themselves were not in breach of art 2, because the four SAS soldiers concerned had an honest and reasonable (albeit mistaken) belief at the time that the suspects would otherwise activate a bomb, causing serious loss of life. But the Court also held that art 2 had been infringed because the operation could have been planned and controlled so as to achieve its objective without killing the suspects. It explained why the right to life incorporated a planning and control duty in this way:

> 146. The Court's approach to the interpretation of Article 2 must be guided by the fact that the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make its safeguards practical and effective.
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> 147. It must also be borne in mind that, as a provision which not only safeguards the right to life but sets out the circumstances when the deprivation of life may be justified, Article 2 ranks as one of the most fundamental provisions in the Convention – indeed one which, in peacetime, admits of no derogation under Article 15. Together with Article 3 of the Convention, it also enshrines one of the basic values of the democratic societies making up the Council of Europe. As such, its provisions must be strictly construed.
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> 148. The Court considers that the exceptions delineated in paragraph 2 indicate that this provision extends to, but is not concerned exclusively with, intentional killing. As the Commission has pointed out, the text of Article 2, read as a whole, demonstrates that paragraph 2 does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The use of force, however, must be no more than "absolutely necessary" for the achievement of one of the purposes set out in sub-paragraphs (a), (b) or (c).

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178 By which I mean either the positive obligation to have legal and administrative frameworks that are protective of life (see cases such as *Keenan v United Kingdom* [2001] ECHR 242; *Oneryildiz v Turkey* [2004] ECHR 657 (Grand Chamber); and *Makaratzis v Greece* [2004] ECHR 694 (Grand Chamber)) or positive obligations to take operational measures to protect an individual whose life is at risk from the criminal acts of a *third party* (such as *Osman v the United Kingdom* [1998] ECHR 101 (Grand Chamber)).

179 *McCann*, above n 105.

> 149. In this respect the use of the term "absolutely necessary" in Article 2(2) indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraph 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2(a), (b) and (c) of Article 2.
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> 150. In keeping with the importance of this provision in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances including such matters as the planning and control of the actions under examination.

[519] That "planning and control" forms part of an inquiry into whether the force used in a lethal operation was "absolutely necessary" was emphasised again, later in the decision, when the Court said:

> 194. Against this background, in determining whether the force used was compatible with Article 2, the Court must carefully scrutinise, as noted above, not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force.

[520] And so, on the facts before it, the ECtHR concluded:

> 213. In sum, having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2(2)(a) of the Convention.

[521] But the Court in *McCann* was split: there was a strong dissenting judgment.[180] While the minority accepted the existence of a planning and control obligation, they emphasised the seriousness of the allegations and warned against assessing operational matters with the benefit of hindsight. The minority concluded that there was no rights-breaching failing in the organisation of the SAS operation.

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[180] The majority comprised 10 judges and the minority, nine.

[522] Following *McCann*, breaches of art 2 as a result of operational failures have been found in some cases involving the actions taken by Turkish security forces against Kurdish activists. For example, in *Ergi v Turkey* the ECtHR concluded art 2 had been breached where Turkish security forces had set up an ambush in the vicinity of a village, purportedly to capture members of the PKK (the Workers' Party of Kurdistan), without taking sufficient care to plan it in a way that did not place civilian lives at risk.[181]

[523] But it is, I think, of some note that *McCann* and the Turkish cases involved operations that were the product of formal advance planning; relevant decisions were made by the state authorities and actors well before (hours, if not days) the relevant use of lethal force. Planning of that kind is qualitatively different from decisions made (or not made) under unforeseen conditions of urgency, within a very short period. And to my knowledge, there has been no ECtHR decision where a breach of the art 2 "planning and control" obligation has been found in these more urgent kinds of circumstances. On the contrary, in those circumstances, the ECtHR has consistently found no breach of the right to life in such cases.

[524] So, for example, although in *Andronicou and Constantinou v Cyprus* the Court was critical of some aspects of a Police operation that had resulted in officers shooting a young man and his female hostage numerous times (with a machine gun), it did not consider they warranted a finding of breach. The Court found that, in general, the operation had been conducted in a manner which was reasonable in the circumstances.[182]

[525] And *McCann* was also distinguished by the ECtHR in its admissibility decision in *Brady v United Kingdom*, a case brought by the father of a man who had been shot during a Police operation aimed at preventing what was believed to be an armed robbery.[183] The shooting occurred after the man had made what was perceived by Police to be a threatening movement. The Court accepted that the officer concerned

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181 *Ergi v Turkey* RJD 1998-IV 1751, 28 July 1998. A number of villagers had been killed.
182 *Andronicou*, above n 90, at [183].
183 *Brady v United Kingdom* App 55151/00, 3 April 2001 (ECHR).

honestly believed the shooting was necessary in self-defence. As to prior planning and control, the Court said:[184]

> Nor is the Court persuaded that the plan in itself rendered the use of lethal force either inevitable or highly probable. *In any circumstances, an arrest planned against robbers who are armed or suspected of being armed will involve some risk that shooting will take place or that police officers will find themselves in a position in which they believe that their lives are in danger.*
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> While it appears that the team leader called for the arrest at an earlier moment than planned and before the others were in position, the Court does not find that this rendered the execution of the operation incompatible with the requirements of the Convention. *Operations of this kind inevitably require a certain amount of flexibility of response to evolving circumstances. Errors of judgment or mistaken assessments, unfortunate in retrospect, will not per se entail responsibility under Article 2 of the Convention.*
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> …
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> Notwithstanding therefore that the operation could have been executed more efficiently at least in theory, the Court considers that *the main causative factor in lethal force being used against James Brady was Officer A's belief that the deceased was pointing a gun at him*. No element of planning or control has been identified as responsible for Officer A's actions in that respect. This case must be distinguished from the *McCann* case, where the soldiers had been given erroneous information which led them to believe that the three IRA suspects were about to detonate a bomb, where the soldiers' automatic recourse by training was to rapid, intense firing and where there had been a decision by the authorities to allow this apparently highly dangerous situation to develop by permitting the suspects to enter a densely populated area with a suspected explosive device …

[526] Similarly, in *Bubbins v United Kingdom*,[185] Police had been called to a flat after a man had been seen entering the rear window. Believing the man to be an armed intruder, Police warned him a number of times to put down his gun and come outside. When he did not do so, a Police officer shot him.

[527] In assessing the art 2 compliance of the operation the ECtHR again emphasised the context in which the incident had developed. And in determining whether Police had taken appropriate care to ensure that any risk to life had been minimised, the Court again cautioned against revisiting such events with the wisdom of hindsight:[186]

> 149. The Court cannot agree with the applicant's submission that the manner in which the operation was planned and conducted inevitably led to

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184 At 9 (emphasis added).
185 *Bubbins v United Kingdom* [2005] ECHR 159.
186 Emphasis added.

> the fatal shooting of Michael Fitzgerald. *It must be recalled that the incident was relatively brief in duration and was fraught with risk. During that time operational decisions had to be made as the situation evolved and more information became available. The incident ended abruptly and tragically.*
>
> 151. It would further observe, and no submissions have been made to the contrary, that the use of firearms by the police as well as the conduct of police operations of the kind at issue were regulated by domestic law and that a system of adequate and effective safeguards exists to prevent arbitrary use of lethal force. In the instant case, none of the key officers concerned operated in a vacuum. They were all trained in the use of firearms and their movements and actions were subject to the control and supervision of experienced senior officers.
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> 151. Having regard to the above considerations, the Court is of the view that it has not been shown that the operation at issue was not planned and organised in a way which minimised to the greatest extent possible any risk to the life of Michael Fitzgerald.

[528] And lastly, in *Giuliani v Italy*,[187] a protestor had been killed during a G8 protest in Genoa that had turned violent. As the *carabinieri*[188] officers were withdrawing, protestors surrounded their vehicle, shouting threats and smashing the jeep's side and rear windows. As Mr Giuliani lifted a fire extinguisher above his head, one of the officers inside the vehicle drew his pistol and shot him.

[529] A majority (10 votes to seven) in the ECtHR found no violation of the right to life in terms of the planning and control of the operation. It held that the authorities "did not fail in their obligation to do all that could reasonably be expected of them to provide the level of safeguards required during operations potentially involving the use of lethal force".

The English and Welsh cases

Davis

[530] The only decision I have found in which the art 2 "planning and control" obligation has been considered by the domestic courts in the United Kingdom is *R (Davis) v Commissioner of Police of the Metropolis*.[189] Police had received information that Mr Davis was planning a robbery and had been trying to acquire a

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187 *Giuliani*, above n 121.
188 The Italian military police.
189 *R (Davis)*, above n 84.

gun. A team of specialist firearms officers was told, wrongly, that he had fired at police during earlier offending, for which he had been imprisoned. Mr Davis was placed under surveillance by the team, during which one of the officers observed him in a car with three others, fiddling with what appeared (to the officer) to be a gun in his waistband. An armed officer approached the car and said that he saw Mr Davis holding a small black object with a square end. The officer believed that it was a gun pointing at him and that he would be shot. Instead, the officer shot Mr Davis, albeit not fatally. No gun was found in the car and it appeared that Mr Davis had, in fact, been fiddling with some jumper leads.

[531] Mr Davis brought proceedings against Police for battery, negligence and breach of his right to life under art 2, both for the shooting itself and for alleged failures in planning and control.

[532] None of the claims succeeded. The art 2 claim relating to the shooting itself failed because the English and Welsh High Court found, on the balance of probabilities, that the shooting had been in self-defence; the force used had been no more than was reasonably or absolutely necessary, in the circumstances as the officer honestly and reasonably believed them to be. The planning and control claim also failed because—despite the erroneous advice and other operational errors—there had been no *material* lack of care. I will return to that point, shortly.

DSD

[533] *Commissioner of Police for the Metropolis v DSD* was a case brought under art 3 (the right to be free from inhuman treatment) rather than art 2.[190] The parallelism between the arts 2 and 3—particularly in terms of the implied protective obligations they encompass—has been noted earlier.

[534] In *DSD*, Police were found liable for a breach of art 3's protective obligations as a result of significant failures over the course of their investigation into serious

[190] *Commissioner of Police for the Metropolis v DSD* [2018] UKSC 11.

allegations of sexual offending.[191] The Supreme Court's decision (unanimously upholding the findings in the lower Courts) is notable in two respects.

[535] First, by a 4:1 majority the Law Lords found that liability could be imposed for not only systemic failures, but operational failures by Police. If any further support were needed, that view tends to confirm the proposition that art 2 has a similar ambit.

[536] But it is the reasoning of the minority judgment that leads to the second relevant point. In dissent, Lord Hope's concern was that the benefits of an operational obligation were outweighed by its costs. He said that imposing liability for operational breaches would involve revisiting the "complex series of judgments and discretionary decisions" involved in law enforcement and the investigation of crime in a way that would inhibit the robust operation of Police work, divert resources from current inquiries, and would be detrimental, rather than a spur, to law enforcement.[192]

[537] In rejecting these concerns, Lord Kerr (with whom Lady Hale agreed) said:[193]

> 29. I cannot accept a suggestion that, to give rise to a breach of article 3, deficiencies in investigation had to be part and parcel of a flawed approach of the system generally. I accept, however, that simple errors or isolated omissions will not give rise to a violation of article 3 at the supra-national and the national levels. That is why, as I point out below, *only conspicuous or substantial errors in investigation would qualify*. The Strasbourg court disavowed any close examination of the errors in investigation because it was a supra-national court. It left that to national courts. But, my reference to ECtHR's disinclination to conduct such a close examination is not intended to suggest that minor errors in investigation will give rise to a breach of the Convention right on the national plane. To the contrary, as I make clear in paras 53 and 72 below, errors in investigation, *to give rise to a breach of article 3, must be egregious and significant*.

[538] And at [53] and [72], he said:[194]

> 53. … All of the cases in this area involve conspicuous and substantial shortcomings in the conduct of the police and prosecutorial investigation. And, as this case illustrates, frequently, operational failures will be accompanied by systemic defects. The recognition that *really serious operational failures* by police in the investigation of offences can give rise to

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191 The failings at issue were longstanding ones, encompassing almost the entirety of the Police investigation.

192 Ultimately, however, the divergence of view made no difference because Lord Hope found all the errors (categorised as operational by the majority) were properly viewed as systemic.

193 Emphases added.

194 Emphases added.

> a breach of article 3 cannot realistically be said to herald an avalanche of claims for every retrospectively detected error in police investigations of minor crime.
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> …
>
> 72. … Nothing in [the ECtHR's] case law supports the notion that charter has been created for the examination of every judgment or choice of strategy made. As I have said, only *obvious and significant shortcomings* in the conduct of the police and prosecutorial investigation will give rise to the possibility of a claim. There is no reason to suppose that courts will not be able to forestall challenges to police inquiries based on spurious or speculative claims.

[539] In other words, the standard against which Police operational decisions and actions are held is not high: to be actionable, breaches must be "egregious and significant", "conspicuous or substantial" or "obvious".

Causation?

[540] In the last of the quotations from *Brady* I have set out above, the ECtHR appears to have been influenced by the fact that the officer's belief that Mr Brady was pointing a gun at him—it was considered to be an "intervening cause" in the shooting that militated against a finding of breach for prior operational decisions.

[541] And in *Davis*, the English and Welsh High Court referred to the need to establish a *material* lack of care in order to ground operational liability under art 2. In making that finding, the Judge expressly rejected the argument made by counsel for Mr Davis that a causative link between the operational failings and the relevant death or injury was required. The Judge noted—but distinguished—the decision in *Sarjanston v Chief Constable of Humberside Police* (a case involving the art 2 duty to take reasonable steps to protect individuals from a real and immediate threat posed by third parties), where the English and Welsh Court of Appeal had found that a causative link was relevant to relief (quantum), but not to the question of breach.[195] He drew support from dicta in the ECtHR's decision in *Osman*[196] and observed that if the submission made by Mr Davis' counsel was right:

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195 *Sarjanston v Chief Constable of Humberside Police* [2014] QB 411 (CA).

196 *Osman v United Kingdom* [1998] ECHR 101 (Grand Chamber). Osman was about the duty of the state under art 2 to take reasonable steps to provide protection in response to a real and immediate threat to life. The English and Welsh Court of Appeal has held that liability in those cases is not

> 150. … it would have been unnecessary for the Court in *Bubbins* or *Andronicou and Constantinou* to consider whether the death in question would have occurred notwithstanding the flaws in the planning or conduct of the operations which it identified.

[542] To the extent that either *Brady* or *Davis* suggest that causation in the tortious sense is required in cases where breach of a protective duty arising under art 2 is alleged, I do not agree. Other decisions suggest that the approach to causation under art 2 is "looser" than in negligence and requires a risk-based approach: "it appears sufficient generally to establish merely that [the claimant] lost a substantial chance" of avoiding harm.[197]

[543] As an illuminating and recent article by Gemma Turton makes clear, this is an area of Convention jurisprudence that remains relatively unexplored.[198] But Turton notes that a divergence between tort and Convention law on this point is justified, because the relevant legal doctrines have different aims. She quotes Lord Brown's observation in *Van Colle* that:

> 138. Convention claims have very different objectives from civil actions. Where civil actions are designed essentially to compensate claimants for their losses. Convention claims are intended rather to uphold minimum human rights standards and to vindicate those rights.

[544] As well, Turton notes that a right to life claim under art 2 need not involve death at all,[199] a point that, by and of itself, militates against a but-for causation approach. And she points out that in *Osman* the ECtHR placed an emphasis on risk, rather than harm. She posits that, in an art 2 protective duty case, it must be shown that, knowing of a real and identifiable risk to the life of an individual, the authorities "failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid the risk".[200]

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judged by reference to what actually happened afterwards, although (for example if a timely response would have made no difference to the outcome) it is relevant to the quantum of damages: *Sarjanston*, above n 195.

197 *Chief Constable of Hertfordshire v Van Colle* [2008] UKHL 50, [2009] 1 AC 225 at [138]. But I acknowledge that some disquiet over the suggestion that an art 3 claim did not require satisfaction of the but-for test was expressed by Lady Hale in *Re E (A Child)* [2008] UKHL 66, [2009] 1 AC 536.

198 Gemma Turton *Causation and Risk in Negligence and Human Rights Law* [2020] Camb Law J 148.

199 As the *Davis* case itself demonstrates.

200 Turton, above n 198, quoting *Van Colle,* above n 197, at [66].

[545] Conceptually, Turton suggests that causation in tort law looks backwards, from the harm actually caused. So the relevant question is: what should reasonably have been done to avoid the harm that occurred? By contrast, a human rights law focus requires a forward-looking approach that does not involve a retrospective "causation" analysis. Rather, the appropriate approach (in line with *Osman*) is to ask: what would a reasonable state actor in the particular circumstances do to protect the relevant right?

[546] That analysis makes sense to me. I do not consider that a tortious approach to causation is apt in right to life cases. The causal link required is between the relevant act or omission and the *risk* to—but not the actual deprivation of—life.

So can planning and control failures constitute a breach of s 8?

[547] As I understand it, the Crown rejected the contention that s 8 should be interpreted as encompassing an art 2 "planning and control" obligation. Mr Gunn said that (in this case) liability cannot arise under s 8 in relation to operational acts or omissions by Police that preceded the shooting itself. Thus, the Crown's written submission was that:

> To hold Police liable under s 8 for a broader range of acts or omissions, such as the planning and conduct of the operation as a whole, and leadership and command issues, or systemic failings would be to broaden s 8 beyond its intended scope.
>
> Defendants submit s 8 should be construed so that it protects individuals from state action or omission which deprives them of life – such that the focus is on the actions of the individual(s) responsible for depriving a person of life.
>
> The defendants submit that this Court should not follow the jurisprudence of the European Court of Human Rights in its interpretation of the positively framed "right to life" in Article 2 of the European Convention …

[548] I confess that I find the thinking underlying this submission difficult to understand. For the reasons given earlier, the s 8 right is all but neutered if it implies no protective duties. And as the European cases make clear, the "planning and control" obligation is sourced as much in the constraints on the permitted use of force, as it is in the "positive" duty to protect.

[549] In any event, I am unable to see why, as a matter of wider principle and purpose, s 8 should not extend to include an obligation on (say) law enforcement agencies to plan and control major operations involving the use of force in a way that reasonably minimises the risk to life. I cannot see how a death resulting from high risk operational and planning decisions made, or actions taken by such agencies without due consideration of the potentially lethal consequences of those decisions, could properly be said to be a deprivation of life that has occurred on "grounds … established by law" or that is "consistent with the principles of fundamental justice".

[550] I therefore consider that s 8 encompasses an obligation on the state to plan and control potentially life-threatening operations reasonably. Consistent with the cases I have discussed, however, that is not an invitation to micro-analyse individual operational decisions made in the moment, in the course of responding to an immediate and dangerous incident. On the contrary, the closer the relevant decisions are to the moment where lethal force becomes justified, the more acute is the need to be wary of slow motion, frame by frame, retrospective vision and to afford the relevant actors a relatively generous margin of appreciation.

[551] In this case, the key question will be whether any of the impugned operational acts or omissions involved an egregious and significant failure to do something that the officers could, in the circumstances, reasonably have been expected to do to avoid the risk to Steven's life.

WAS THE PLANNING AND CONTROL OBLIGATION BREACHED HERE?

The pleadings, and my approach

[552] The amended statement of claim alleges a raft of specific failings or omissions by Sergeant Prestidge, Constable Abbott and Constable Dombroski that are said, individually or collectively, to amount to a failure of operational planning and control in breach of s 8. Many have been the subject of previous consideration by either the Coroner, the IPCA or both, albeit with different conclusions reached on some.

[553] To avoid this judgment being longer than it already is, it is necessary, I think, to begin by trying to marshal the various discrete allegations into groups. For the purposes of the necessary analysis, the allegations can, I think, usefully be categorised and dealt with as follows:

(a) the failure to adopt a cordon and contain approach (including issues around the possible use of the patrol car's public address system);

(b) the failure to wait for, or utilise, Delta Unit (including the issues around Constable Abbott's knowledge that Delta had been called out);

(c) the absence of overall planning and control; and

(d) the failure to attend to Steven after the shooting or to administer first aid.

[554] In fairness to Mrs Wallace, I will also address two unpleaded operational matters that were the subject of Mr Minchin's submissions: the alleged operational failures involved in the initial and "causative" encounter between Steven and the two officers (Dombroski and Herbert), and the alleged failure to call out the AOS.

[555] I have also grouped the allegations that I do *not* intend to consider further here. So, I do not propose to address:

(a) allegations for which I have found there is no evidential support, namely those predicated on:

(i) Constable Dombroski having fired all or any shots;

(ii) Constable Abbott's consumption of alcohol during the evening of 29 April;

(iii) the existence of any kind of animus between Constable Abbott and David Toa (which also renders it unnecessary to consider

the alleged failure of the officers to identify Steven by checking the registration of his car);

(b) those allegations involving technical breaches of relevant Police practice and procedure (for example, the failure to sign the firearms register), which could not, on any analysis, have increased the risk to Steven's life;

(c) those allegations relating to the alleged failures to:

(i) use OC spray and/or batons, which I consider were not tenable or reasonable options, for the reasons given by the Coroner and the IPCA;

(ii) use shields and helmets, which I similarly regard as untenable and unreasonable options.[201]

(d) those allegations that have been dealt with in the context of my finding that the shooting of Steven was in self-defence, namely that:

(i) there was no immediate danger posed by Steven to Constable Abbott; and

(ii) the second double tap was unnecessary.

Analysis

[556] I begin by reiterating my view that, in order to succeed on this cause of action, it is necessary for Mrs Wallace to show that one or more of the pleaded acts or omissions identified above involved an egregious and significant failure to do something that the officers could, in the circumstances, reasonably be expected to do to protect Steven's life.

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[201] Putting to one side the evidence at trial that suggested that protective equipment was not a viable option, they would have been little use had there been an attack not on the officers themselves, but on a member of the public.

The initial encounter

[557] In his submissions, Mr Minchin sought to attribute operational blame to Constables Dombroski and Herbert for stopping their patrol car on their way to the Police Station. He said it was contrary to an "order" from Constable Abbott to drive directly to the Station and meet him there. He said their consequent encounter with Steven (in which he smashed the windows of the car) was foreseeable (because of the prior reports that he had attacked the Police Station) and causative of everything that followed: including most relevantly, the decision to uplift firearms.

[558] This contention is an excellent example of why the question of causation—and the appropriate approach to it—is important and can make a real difference. It is readily apparent that Mr Minchin's submission is predicated on a retrospective, but-for negligence analysis: if the officers had not stopped, Steven would not have been shot. But for the reasons I have already given, that approach is inapt in s 8 cases. And when the issue is viewed through the lens of the key risk-based question (as I think it must be), it can immediately be seen that there is no merit in the argument. That is because, adopting a forward-looking approach, there was *no* risk to Steven's life (either immediately or down the track) that would or should have been obvious to the officers when they made their decision to stop.[202] The "planning and control" aspect of the art 2 right to life is simply not engaged by that decision, and I do not consider it further.

The decisions that put Steven's life at risk

[559] In direct contrast to the decision to stop, the officers' later decisions to uplift guns and then return immediately to where Steven was, *did* pose a relevant s 8 risk to Steven's life. It is these decisions that must, logically, be at the heart of this aspect of the claim. And it is those decisions that invite consideration—in terms of s 8—of the

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[202] To the extent it matters, I am also unable to see anything in the least unreasonable or improper in the decision made by the officers to stop their car near Steven's (which had been driven up onto the footpath) in order to ascertain both whether it was he who had been breaking windows and (more generally) what he was doing. I disagree with Mr Minchin that the advice received by Constable Dombroski through Comms that Constable Abbott would meet him at the Police Station can reasonably be interpreted as some kind of "order", and/or that it meant that the officers could not stop to investigate anything they saw of relevance on the way.

alternative and possibly less life-threatening alternatives that might have been open to the officers, namely:

(a) the possibility of a cordon and contain approach;

(b) the possibility of waiting for Delta Unit; and

(c) the possibility of calling and waiting for the AOS.

[560] It is therefore necessary to consider—from a risk to life perspective—the reasonableness of the decisions to uplift weapons and return to the scene against the reasonableness of "waiting", in order that those other three options might be pursued.

[561] I begin with the question of the reasonableness of the officers' decisions to uplift firearms and return to the scene, before considering the alleged alternatives. The reasonableness of those initial decisions is largely contingent on both the seriousness and the immediacy of the threat that they believed Steven posed. The following points can be made.

[562] First, the uplift of firearms was a matter regulated by relevant Police policies. No defect in those policies—and no significant failure to comply with them—was identified by either the Coroner or the IPCA. As in *Bubbins*, the mere existence of these policies (of an adequate and effective system of safeguards to prevent arbitrary use of lethal force) is a factor that counts *against* a finding of unreasonableness (and breach).

[563] Secondly (as is noted by both the Coroner and the IPCA), the decision that firearms were necessary was made independently by both Constable Abbott and Constable Dombroski, without discussion between them. By and of itself that operates as a cross-check on reasonableness.

[564] Thirdly, the officers knew that Steven had in his possession one or more potentially lethal weapons and had already shown willingness to use one against Police. They knew he was extremely angry and amped up. I have no doubt that the incident involving the patrol car would have been very frightening for the officers

inside, and the potential danger Steven appeared to pose to the lives of others would have been at the forefront of their minds.

[565] Relatedly, despite the fact that—as Mr Minchin emphasised—at 4 am the streets of Waitara were relatively deserted, there was a reasonable basis for the view that the life of any member of the public who did happen to cross Steven's path might be at risk. Although I acknowledge that, at the time the decision to arm was made, the officers did not know Steven had already attacked a cyclist and a taxi driver, the fact that he had done so provides retrospective support for the reasonableness of their view about the danger he posed, and its immediacy. Moreover, the officers knew that the sound of smashing windows had woken local residents and prompted more than one 111 call. It would not be unreasonable to be concerned that the noise might prompt people to come outside, placing themselves in harm's way.

[566] It follows that I am unable to accept Mr Minchin's submission that there was neither a serious risk to the safety of public nor urgency about addressing it.

[567] Fourthly, it cannot logically or fairly be assumed that, in uplifting the firearms, it was the officers' intention to shoot Steven. Rather, their object was logically to persuade him to stop what he was doing and to surrender his weapons. It was reasonable to hope and expect that, once Steven was faced with Police officers who were known by him to be armed with guns, he would do just that. That is what any reasonable person would do. As Inspector Dunstan said:

> The best non-lethal tactical option available once confronted with Wallace was negotiation. Challenge the offender and then attempt to negotiate with him. Constable A actually attempted to do this without success believing Wallace to be a David Toa whom he believed he could establish rapport with.

[568] I acknowledge that it might be posited that Steven's obvious and very high state of agitation made that outcome—and any kind of reasonable response by him—less likely. But that is where caution around hindsight is required. And the point made earlier remains: arming themselves with guns and returning to the scene was reasonably necessary in order to protect themselves, and members of the public.

[569] Having arrived at that point, the question then becomes whether the officers should, nonetheless, reasonably have entertained and pursued one or more of the other options put forward by Mr Minchin on the basis that they posed less risk to Steven's life. In considering that question, it must be borne in mind that I have already found that it was reasonable and necessary (for public safety) to return to the scene immediately. And given the immediacy of the perceived risk posed by Steven's behaviour, it would also have been necessary first to attempt to cordon and contain him, to minimise the risk while waiting for reinforcements (in the form of either Delta Unit or the AOS).

[570] The first difficulty with the cordon and contain option was that both officers knew that Steven had a car, and, for that reason, they did not know precisely where he would be once they returned to the scene. Just how "mobile" Steven in fact was is shown by the Comms record, which reveals Constable Herbert's running commentary on his movements:

04:00:11	He's heading down towards New Plymouth on, through the main street.
…	
04:01:06	Yeah, he's just gone up. He's smashing all the windows up at the next block now.

And then, immediately after Constable Dombroski responds "Roger we'll be there shortly", Constable Herbert reports:

04:01:24	He's now getting back in his car and I think he's going to head down this way.
…	
04:01:42	He's now going Post Office, ah nah the Major Decorating shop.

[571] As well, both Constable Abbott and Constable Dombroski were familiar with Waitara streets. The section of McLean Street where Steven was at the time of the initial encounter and—albeit parked at a different spot—on the officers' return, had two four-way intersections. Even with two Police cars, it is difficult to see that there

could be any effective cordoning or containment.[203] And for the reasons I have already given, I do not regard waiting for "reinforcements" (such that the area *could*, perhaps, be effectively cordoned and contained) was a viable option. As Inspector Dunstan said:

> The immediate and foremost tactical consideration would be to observe, cordon and contain. The limiting factor facing Constables A, B and C was that there was no immediate backup available, the area of operations was wide and the offender was mobile. The other consideration hand in hand with that was the officers' personal safety.

[572] And the IPCA formed the view that, by reference to the Police Manual of Best Practice,[204] and in the particular circumstances (involving a volatile, demonstrably dangerous and mobile offender—and the perceived and associated risk to members of the public), cordoning and containment was *not* a viable option.

[573] For these reasons, I consider the omission to consider or to implement cordoning and containment cannot be said to have been an egregious and significant failure to do something that the officers could, in the circumstances, reasonably be expected to do to protect Steven's life.

[574] Once that point is reached, the other options—waiting for Delta Unit or calling out the AOS—really fall away as reasonable operational possibilities. Both were predicated on their ability to first contain Steven effectively until their arrival (even if Delta Unit was only 10 minutes away) and their ability to stop him driving away.[205] Even the 10 minutes that it would have taken Delta Unit to arrive was too long.[206] As the IPCA said:[207]

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203 This issue was explored extensively at trial.

204 The Police Manual of Best Practice stated that, when responding to an armed offender, Police should, if possible, cordon the area and take a "wait and appeal" approach. But it went on to advise: "if the suspect is acting in a way that makes casualties likely, Police must act immediately to prevent this".

205 Permitting Steven to get behind the wheel in the state he was in does not strike me as a reasonable option for the officers.

206 For completeness, I record that I do not accept Mr Minchin's submission that the evidence suggests that Delta Unit had begun travelling to Waitara in the van at the time Constable Sandle was told to stand down and in fact arrived at the scene a little time after the shooting. And even if true, those matters would not affect my conclusion.

207 At [155].

> Given the limited nature of the available resources and the immediate threat presented by Steven Wallace, no option was available to the officers at the critical time other than use of force.

[575] As well, the proposition that these other options would, in fact, have presented less risk to Steven's life is, itself, contestable. Although counterfactuals are always difficult, it seems to me to be more likely than not that those options (Delta Unit or AOS) would *not* have posed less risk to Steven's life (or resulted in a better outcome for him). The evidence suggests that his state of agitation was so high that he would have been undeterred either by the presence of a dog (together with armed officers), or (in an AOS scenario) by the presence of even more armed officers.

Command and control

[576] I have found that the decisions made (and the decisions not made) did not involve any egregious and significant failure to have due regard to the risks posed to Steven's life. It follows that questions of command and control have no bearing on the s 8 matter now at hand. If the decisions-making process itself does not constitute a breach, then it does not matter who the decision-makers were (or should have been). The issues in that regard were properly matters for the IPCA.

[577] In any case, I do not consider that it would have been appropriate for Sergeant Prestidge to attempt to micromanage this fast-moving operation. In my view, it was reasonable for her to defer to the officers on the scene (including Constable Abbott, a senior officer with AOS experience) and their judgment until she arrived.

Failure to administer first aid

[578] Despite the fact that these allegations relate to events after the shooting, I accept that they can form part of the s 8 "planning and control" claim. Again, it provides a good example of the distinction between a claim involving tortious ideas of causation and a rights-based claim. A tortious claim would likely be met and answered by the proposition that first aid would have made no difference to the outcome: Steven's injuries were unsurvivable. But a rights-based approach means that it is potentially legitimate to ask whether, on the basis of what was known by the

officers at the time, the failure to render first aid did not take sufficient account of the (obvious) jeopardy his life was in.[208] The fact that first aid would not have made a difference becomes relevant only to remedy.

[579] That said, I do not think the officers can be faulted for their provision of first aid on the scene. The evidence of Constable Dombroski and Sergeant Prestidge was that Steven was not bleeding heavily and could not be attended to, which I accept would be the case when the fatal wound (and so the deadly bleeding) was internal. And as addressed by the Coroner in his report, medical evidence from Professor Ardagh (a specialist in emergency medicine) was that there was nothing else the officers could have properly done.[209]

THE REFUSAL TO PROSECUTE

[580] This cause of action pleads that after the Chief Justice determined there was sufficient evidence on which a jury could properly convict Constable Abbott, the Crown was required to assume responsibility for the prosecution (or at least to assist in funding it).

[581] Mrs Wallace says the failure to do one or other of those things amounts to a breach of s 8, a breach of the "principles of fundamental justice", or a breach of the "right to justice". Mr Minchin also submitted that this failure constituted a "breach of comity and an omission of the duty of the Attorney-General to apply prosecutorial guidelines uniformly and not at variance to the constitutional principle of 'equality before the law'", and that it constituted an effective overruling of the Chief Justice's decision.

[582] Although the authorities make it clear that the decision not to prosecute may be the subject of judicial review, I do not regard such decisions as engaging s 8. That view is supported by the decision in *R (on application of da Silva) v Director of Public Prosecutions* where the High Court of England and Wales held that art 2 of the Convention did not itself impose an obligation to prosecute and added nothing to the

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[208] I put the question of compassion, however, to one side. That does not engage directly with the relevant risk and has been adequately addressed elsewhere.

[209] Again, aside from showing more compassion to Steven.

ordinary grounds of review in such a case.[210] The Court accepted, however, that the requirement in an art 2 context to submit the case to "careful scrutiny" on review was entirely consistent with the general approach in cases involving fundamental human rights.

[583] But that is not the end of the matter. The Crown rightly accepts that the decision not to prosecute is reviewable, and it cannot sensibly be contemplated that Mrs Wallace should be required to bring some separate proceeding in order to advance her argument. I did not understand Mr Gunn for the Crown to suggest otherwise. I therefore deal with this issue by reference to ordinary judicial review principles.

Refusal to prosecute: the law

[584] *Osborne v Worksafe New Zealand* is the leading New Zealand authority dealing with review of a refusal to prosecute (or, in that case, a decision to discontinue a prosecution).[211] It contains a useful overview of the relevant law. The Court began by noting that there was a material difference between a review of a positive decision *to* prosecute and a decision *not to* prosecute (or to discontinue a prosecution) because:

> … a challenge of the latter kind involves no collateral challenge to an active criminal proceeding. Culpability for an alleged crime will not be established at all unless review is successful. The factors noted above at [34](c)–(e) are absent.[212] The costs and risks of private prosecution place that mechanism beyond the reach of most concerned citizens. There may be, as in this case, a statutory bar on private prosecution.

[585] The Court then discussed the relevant English authorities, saying:

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210 *R (da Silva)*, above n 129. The Court accepted that it might certainly be relevant to ask whether the prosecution guidelines themselves were compatible with the obligation under art 2 to "put in place effective criminal law provisions to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions," (the formulation in *Osman*, above n 196). But the Court found that the UK guidelines were compatible. No issue has been raised—in my view quite rightly—in the present case about whether the New Zealand Prosecution Guidelines comply with s 8.

211 *Osborne v Worksafe New Zealand* [2017] NZCA 11. The decision was overturned by the Supreme Court (*Osborne v Worksafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447) but on other grounds.

212 These were factors favouring restraint on review of a positive prosecution decision: the undesirability of collateral challenges to criminal proceedings which may disrupt due process; the High Court's inherent power to stay or dismiss a prosecution for abuse of process; the opportunity to challenge a prosecutor's opinion that an offence has been committed—either summarily, by applying for a discharge under s 147 of the Criminal Procedure Act 2011, or at trial.

> [38] … the Divisional Court (Richards LJ, Forbes and MacKay JJ) in *R (on the application of da Silva) v Director of Public Prosecutions* considered an application for judicial review of a decision not to prosecute a police officer for shooting a commuter who was mistaken for a suicide bomber. The Court said it was well established that a decision not to prosecute is susceptible to judicial review, and that different considerations apply in such a case than to decisions to prosecute. Further, in *Marshall v Director of Public Prosecutions* the Privy Council said the threshold for review may be "to some extent lower" for decisions not to prosecute than for decisions to prosecute.

[586] The Court agreed with *Marshall* "so far as it relates to intensity of review and remedial response" but noted that there could be no *jurisdictional* distinction between decisions to prosecute and decisions not to prosecute: if the decision is reviewable, then logically it must be so regardless of whether it was positive or negative.[213]

[587] A lengthy discussion of possible grounds on which prosecution decisions could be reviewed, by reference to a number of decided cases, then followed. The review essentially confirmed that, in appropriate circumstances, all the standard bases for review (abdication of discretion, failure to follow established guidelines, taking into account irrelevant considerations, failure to take into account relevant ones, unlawfulness and unreasonableness) might be available.

[588] Of particular relevance here, however, is the reference to the decision in *R v Director of Public Prosecutions, ex parte Manning*.[214] In that case a prisoner had died in custody while under restraint following an altercation with two prison officers. A coronial inquest found this was an unlawful killing caused by the application of excessive force to the prisoner's neck by a prison officer. But the prosecutor declined to lay charges. The prisoner's family was told there was insufficient evidence to justify a prosecution or establish a realistic prospect of conviction.

[589] On an application for review of that decision, the Divisional Court (Lord Bingham CJ and Morison J) held the while the power to review a decision not to prosecute was to be sparingly exercised: "the standard of review should not be too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy

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213 At [38].

214 *Manning*, above n 164.

would be denied". And in that case, the Court found there had been a duty to give reasons for the declinature: it was a death in custody case, there had been a verdict of unlawful killing by the coronial inquest, and there was credible evidence identifying the responsible prison officer. Because the reasons given to the family were inadequate (and because the Court identified a failure to consider important evidential matters) the prosecution decision was remitted for reconsideration.

[590] I will return to *Manning* shortly.

[591] In *Osborne* itself, the Court concluded that all the grounds of review pleaded by the appellants were justiciable. The justiciability of any particular ground depended on:

(a) the existence of some legal yardstick against which the impugned decision could be tested; and

(b) the absence of engagement with "an area it would be constitutionally inappropriate for the Court to go".

The Solicitor-General's 1992 Guidelines

[592] Both the original decision not to prosecute and the second decision (after the release of the Chief Justice's judgment) were made by reference to the Solicitor-General's 1992 Prosecution Guidelines (the 1992 Guidelines).[215] The 1992 Guidelines relevantly stated:

> **3. The Decision to Prosecute**
>
> In making the decision to initiate a prosecution there are two major factors to be considered; evidential sufficiency and the public interest.
>
> 3.1 Evidential Sufficiency
>
> The first question always to be considered under this head is whether the prosecutor is satisfied that there is admissible and reliable evidence that an offence has been committed by an identifiable person.

[215] These have since been replaced by the Solicitor-General's 2013 Prosecution Guidelines.

The second question is whether that evidence is sufficiently strong to establish a prima facie case; that is, if that evidence is accepted as credible by a properly directed jury it could find guilt proved beyond reasonable doubt.

…

3.3 The Public Interest

3.3.1 The second major consideration is whether, given that an evidential basis for the prosecution exists, the public interest requires the prosecution to proceed. Factors which can lead to a decision to prosecute or not, will vary infinitely and from case to case. *Generally, the more serious the charge and the stronger the evidence to support it, the less likely it will be that it can properly be disposed of other than by prosecution. A dominant factor is that ordinarily the public interest will not require a prosecution to proceed unless it is more likely than not that it will result in a conviction.* This assessment will often be a difficult one to make and in some cases it may not be possible to say with any confidence that either a conviction or an acquittal is the more likely result. In cases of such doubt it may be appropriate to proceed with the prosecution as, if the balance is so even, it could probably be said that the final arbiter should be a Court. It needs to be said also that the public interest may indicate that some classes of offending, eg driving with excess breath or blood alcohol levels, may require that prosecution will almost invariably follow if the necessary evidence is available.

3.3.2 Other factors which may arise for consideration in determining whether the public interest requires a prosecution include:

(a) the seriousness or, conversely, the triviality of the alleged offence; ie whether the conduct really warrants the intervention of the criminal law;

(b) all mitigating or aggravating circumstances;

(c) the youth, old age, physical or mental health of the alleged offender;

(d) the staleness of the alleged offence;

(e) the degree of culpability of the alleged offender;

(f) the effect of a decision not to prosecute on public opinion;

(g) the obsolescence or obscurity of the law;

(h) whether the prosecution might be counter-productive; for example by enabling an accused to be seen as a martyr;

(i) the availability of any proper alternatives to prosecution;

(j) the prevalence of the alleged offence and the need for deterrence;

(k) whether the consequences of any resulting conviction would be unduly harsh and oppressive;

(l) the entitlement of the Crown or any other person to compensation, reparation or forfeiture as a consequence of conviction;

(m) the attitude of the victim of the alleged offence to a prosecution;

(n) the likely length and expense of the trial;

(o) whether the accused is willing to co-operate in the investigation or prosecution of others or the extent to which the accused has already done so;

(p) the likely sentence imposed in the event of conviction having regard to the sentencing options available to the Court.

3.3.3 None of these factors, or indeed any others which may arise in particular cases, will necessarily be determinative in themselves; all relevant factors must be balanced.

3.3.4 A decision whether or not to prosecute must clearly not be influenced by:

(a) the colour, race, ethnic or national origins, sex, marital status or religious, ethical or political beliefs of the accused;

(b) the prosecutor's personal views concerning the accused or the victim;

(c) possible political advantage or disadvantage to the Government or any political organisation;

(d) the possible effect on the personal or professional reputation or prospects of those responsible for the prosecution decision.

[593] The 1992 Guidelines did not expressly address decisions to assume carriage of a private prosecution. But Mr Gunn suggested useful reference could be made to the

guidance contained in the United Kingdom Crown Prosecution Guidelines, which state that a private prosecution should be taken over where:[216]

(a) there is evidential sufficiency;

(b) the public interest test is met; and

(c) there is a particular need for the Crown prosecution service to take over the prosecution.

Discussion

[594] It is convenient to begin my analysis by setting out the relevant parts of the Deputy Solicitor-General's 16 July 2002 letter declining to take over the prosecution again. She said:

> In [the Solicitor-General's] view this is a classic private prosecution. The Police have investigated and after taking legal advice, including a review of that advice by the Crown Law Office, decided not to prosecute Mr Abbott.
>
> …
>
> It is accepted that in New Zealand the right to take a private prosecution is a constitutional safe guard for the citizen. However, that does not mean any particular prosecution is of constitutional significance.
>
> The Solicitor-General is of the view that the public interest factors here should operate to leave the prosecution of Mr Abbott at trial as a private prosecution. It follows that costs of such prosecution should not be borne by the Crown.
>
> On the Solicitor-General's behalf I have reviewed the ruling of the Chief Justice in the light of the specific provisions you have referred to in your letter.[217] It is considered that they are all matters that the Chief Justice thought should be left to the tribunal of fact; the jury. None of them operate to elevate the matter to such a degree that the Crown should intervene to take over the trial.

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216 Crown Prosecution Service (UK) "The Code for Crown Prosecutors: Private Prosecutions" (October 2019) <www.cps.gov.uk>.

217 By "provisions" it appears the Deputy Solicitor-General meant the particular paragraphs of the Chief Justice's decision to which her attention had been drawn by Mr Rowan.

[595] As noted earlier, this cause of action was originally focused on the contention that the Chief Justice's judgment *required* the Crown to then take the prosecution over or (at least) to assist with its funding.

[596] In my view, that contention is wrong.

[597] The Solicitor-General's refusal to prosecute is not inconsistent with the Chief Justice's decision; the refusal does not amount to an executive override or a failure to comply with that decision. The authority relied on by Mr Minchin—*R (on the application of Evans) and another v Attorney-General*—is not analogous.[218] As Mr Gunn submitted, there is an important difference between the standard the Chief Justice was applying and the test under the 1992 Guidelines. The Chief Justice determined that (taking the prosecution case at its highest and resolving credibility issues in the prosecution's favour) there was evidence on which a jury *could* reasonably convict. But as the 1992 Guidelines make clear, the existence of a prima facie case is only the first part of the required analysis. What the Chief Justice did not—and could not—address is the second part: whether a prosecution would be in the public interest.

[598] For essentially the same reasons, there can be no constitutional principle or reason of comity that required the Crown to take over the private prosecution.

[599] But a potentially more fruitful line of argument was also developed by Mr Minchin: that the Deputy Solicitor-General's letter of 16 July 2002 did not contain any (or, alternatively, adequate) reasons. Although she referred to a Crown prosecution not being in the public interest, she gave no indication of why that was so, or what factors were regarded as relevant to her assessment.

[600] As the Court of Appeal's review of the authorities in *Osborne* indicates, the judicial high watermark on this point is undoubtedly the decision in *Manning*.[219] I have summarised the facts and key findings above. As indicated there, it is what the Court had to say about the obligation to give reasons that is of particular interest in

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218 *R (on the application of Evans) and another v Attorney-General* [2015] UKSC 21.
219 *Manning,* above n 164.

this case. In that regard Lord Bingham place particular emphasis on the "right to life" context:[220]

> [33] It is not contended that the Director is subject to an obligation to give reasons in every case in which he decides not to prosecute. Even in the small and very narrowly defined cases which meet Mr Blake's conditions set out above, we do not understand domestic law or the jurisprudence of the European Court of Human Rights to impose an absolute and unqualified obligation to give reasons for a decision not to prosecute. *But the right to life is the most fundamental of all human rights. It is put at the forefront of the Convention. The power to derogate from it is very limited. The death of a person in the custody of the State must always arouse concern*, … *and if the death resulted from violence inflicted by agents of the State that concern must be profound.* …

[601] In *Manning*, there had been an inquest that qualified, in art 2 terms, as a full and effective inquiry. And because the inquest had culminated in a verdict of unlawful killing (implicating an identifiable person) the Court considered that the ordinary expectation would be that a prosecution would follow. Moreover:[221]

> [33] … *In the absence of compelling grounds for not giving reasons, we would expect the Director to give reasons in such a case*: to meet the reasonable expectation of interested parties that either a prosecution would follow or a reasonable explanation for not prosecuting be given, to vindicate the Director's decision by showing that solid grounds exist for what might otherwise appear to be a surprising or even inexplicable decision and *to meet the European Court's expectation that if a prosecution is not to follow a plausible explanation will be given*. … We readily accept that such reasons would have to be drawn with care and skill so as to respect third party and public interests and avoid undue prejudice to those who would have no opportunity to defend themselves. We also accept that time and skill would be needed to prepare a summary which was reasonably brief but did not distort the true basis of the decision. But the number of cases … is very small (we were told that since 1981, including deaths in police custody, there have been seven such cases), and the time and expense involved could scarcely be greater than that involved in resisting an application for judicial review. In any event it would seem to be wrong in principle to require the citizen to make a complaint of unlawfulness against the Director in order to obtain a response which good administrative practice would in the ordinary course require.

[602] The Court was therefore prepared to consider whether the reasons given by the DPP were capable of supporting a decision not to prosecute, in light of the Code for

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220 Emphasis added.
221 Emphasis added.

Crown Prosecutors.[222] Having done so, it held that the DPP had failed to take certain relevant factual and evidential matters into account, and quashed the decision.

Were reasons required in this case?

[603] In my view, there are several matters that suggest reasons were required in the present case.

[604] First, like *Manning*, the case involves the death of an individual at the hands of an agent of the state, which directly engages the right to life.

[605] Secondly, the starting point was (or should have been) that the Chief Justice's judgment meant that the basis for the Solicitor-General's earlier decision not to prosecute was wrong. Not only had the Wallace family already spent considerable time and money in establishing this, but reliance could no longer be placed on the absence of evidential sufficiency, which was the sole reason given for declining to prosecute in the Solicitor-General's press statement in 2000.

[606] And finally, the focus of the proposed prosecution had changed. One of the key questions was whether the number of shots fired suggested that Constable Abbott may not (when the later shots were fired) have been acting in self-defence. And there was also the new expert evidence given at depositions by Messrs Rowe and Maubach in relation to the appropriateness of the Police response and, in particular, whether (in the moment) Constable Abbott had viable alternative options other than shooting.

Were adequate reasons provided?

[607] The next question is whether the Deputy Solicitor-General's letter July 2002 letter in fact contains adequate reasons. Notwithstanding the Crown's submission to the contrary, I do not think it does.

[608] In light of the fact that the reasons given for the first refusal no longer pertained, the new decision could—in terms of the 1992 Guidelines—only turn on the

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[222] The reasons there were not contained in the decision itself but rather in a review note (and only cursorily explained to the applicants in two letters written to them).

question of the public interest. The letter recognises this, but only in a conclusory way. There is no elaboration. Nor does the letter explain what is meant by the case being "a classic private prosecution".

[609] It is, I suppose, possible to surmise from the last paragraph (where the Deputy Solicitor-General said she had reviewed the Chief Justice's decision but that none of the matters raised in it "operate to elevate the matter to such a degree that the Crown should … take over the trial") that reliance was placed on her assessment that it was more likely than not that a prosecution would *not* result in a conviction. As will be evident from the excerpt from the 1992 Guidelines set out above, this is commonly regarded as a "dominant" consideration. And with the benefit of hindsight, such a view (if indeed it was held) proved to be correct.

[610] But even so, there is no recognition in the letter of the fact that the prosecution case as put before the Chief Justice was *different* from the case first presented by Police, which the Solicitor-General had previously decided did not warrant prosecution. In particular, there is no acknowledgement of the new prosecution focus on the sequence (and number) of shots, a matter expressly drawn to the attention of the Solicitor-General by Mr Rowan in his 19 June 2002 letter. There is no recognition of the new evidence referred to earlier. Although I do not think this new focus (and the Chief Justice's decision) makes this case completely on all fours with the inquest jury's "unlawful killing" finding in *Manning*, it gets tolerably close.

[611] As well, the new focus (and the Chief Justice's decision) is a complete answer to Mr Gunn's submission that the (slightly fuller) reasons given for the initial Police decision not to prosecute can somehow be transmogrified into reasons for the second decision here.

[612] Even proceeding on the basis that the Deputy Solicitor-General believed that a prosecution on these modified bases was unlikely to succeed, it is difficult to accept there were not other relevant matters referred to in the 1992 Guidelines that should have been weighed in the mix. For example, the seriousness of the offence and the fact that s 8 was plainly engaged might be thought to favour taking over the prosecution. Public opinion on the matter (which was strong, but not necessarily all

in one direction) might, understandably, be thought relevant. And a further (and also relevant) consideration might be the fact that the inquest was yet to come, and that the coronial process might (or might not) be thought to be a "proper alternative" to prosecution. While such matters might well have been considered, there is nothing on the face of the letter to suggest that they were.

[613] The short point is that, in the circumstances of this case, more was required. I accept entirely that—assuming that the decision itself remained the same—"more" would not have satisfied the Wallaces. But in a case where it was very important that the decisions made be transparent and the decision-makers potentially accountable, a bland reference to the "public interest" did not meet the required standard.

[614] The absence of reasons necessarily makes other potential grounds of review more difficult. For example, it is not possible to say whether the Deputy Solicitor-General took into account relevant considerations or failed to take into account irrelevant ones, or whether the decision somehow strayed beyond the 1992 Guidelines. I doubt, however, that it could be said (particularly in light of the outcome of the trial) that the decision was *Wednesbury* unreasonable. But without reasons, it is simply not possible to take the failure to prosecute ground of review much further.

[615] Out of an abundance of caution, however, I end by recording that my conclusion that reasons were required in the (possibly unique) circumstances of this case does *not* mean that:

(a) there is a duty to give reasons for all (or even most) decisions not to prosecute;

(b) in cases where reasons are required, those reasons need to be made public (here, I am saying that reasons should have been made available to the Wallace family); or

(c) if such reasons had been given, the Solicitor-General's assessment of where the public interest lay could then have been second-guessed on review.[223]

[616] As well, there is, of course, no possibility of the decision being made again. Constable Abbott has been tried and he has been acquitted. Double jeopardy applies. So although I have found for Mrs Wallace on this ground, a declaration will have to stand alone as the relevant relief.

REMEDIES AND RELIEF

[617] I have found for Mrs Wallace on two fronts. I have found a breach of s 8 of the NZBORA because there has been no (s 8) rights-compliant inquiry into the death of her son, Steven. And I have found that the Solicitor-General should have given reasons for declining to prosecute following the Chief Justice's decision that there was a case to answer in June 2002. The question now is what, if any, relief should follow.

[618] As regards the failure to give reasons, I have already expressed the view that nothing other than declaratory relief is available. In the form in which the claim succeeded, it did not engage the NZBORA. As an "ordinary" claim for judicial review, damages are not an option. And given that Constable Abbott was subsequently prosecuted and acquitted there is no possibility of the decision being made again.

[619] As regards the breach of the procedural obligation in s 8, Mrs Wallace seeks both declaratory relief and damages.

[620] As the Crown submitted, however, public law damages are discretionary and not always awarded for breach of a right. In *Taunoa v Attorney-General* Blanchard J said:[224]

> …a Court… must begin by considering the non-monetary relief which should be given, and having done so, it should ask whether that is enough to address the breach and the consequent inquiry to the rights of the plaintiff in the particular circumstances…It is only if the Court concludes that just

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223 I note, in particular, what this Court said about matters of that kind in *Polynesian Spa Ltd v Osborne* [2005] NZAR 408 (HC) at [82].

224 *Taunoa v Attorney-General* [2008] 1 NZLR 429 (SC) at [258].

> satisfaction is not thereby being achieved that it should consider an award of Bill of Rights Act damages….

[621] *Taunoa* also makes it clear that, when considering whether damages should be awarded at all, the Court should consider the nature of the right breached, the circumstances and seriousness of the breach, the seriousness of the consequences of the breach, the response of the defendant to the breach and any relief awarded on a related cause of action.[225] When damages for breach of the NZBORA are awarded, they are at modest levels.[226]

[622] The purpose of any award damages is vindication of the right—the need to uphold the right in the face of the state's infringement.[227] This is both for the benefit of the individual victim(s) themselves and also in order to protect the important values underlying the right, which is in the interests of society as a whole.[228] The purpose is not to compensate for loss.

[623] Here, the Crown accepted that due to the importance of the right at issue, if a substantive breach of s 8 was found to have occurred, damages would be a necessary response. But in the event of a procedural breach (such as a breach of the investigative obligation) the Crown says that a declaration is appropriate. This was, for example, the outcome in the recent decision of the UK Supreme Court in *In re Finucane's Application for Judicial Review*.[229]

[624] I am satisfied that a declaration is the appropriate remedial response here. Although any breach of s 8 is a far from trivial matter, the breach in this case has occurred largely as a consequence of the rather unusual course this matter has taken. For the reasons I have explained, the fact that the Police homicide inquiry was not rights-compliant is as much a function of the inherent nature of such inquiries as a result of defects in the inquiry itself. And had there been a Crown prosecution of Constable Abbott, the investigatory requirements of s 8 would have been met.

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225 At [306], per Tipping J.
226 For example, awards of $25,000 and $35,000 were made in *Taunoa*, for breach of s 9.
227 At [366] per McGrath J.
228 At [317], per Tipping J and [367], per McGrath J.
229 Above, n 130 at [153].

[625] On the other hand, if there had been no Crown prosecution and no private prosecution, then I am sure that either the Coroner or the IPCA would have considered and reached their own conclusion on the question of self-defence, as (in my view) the investigative obligation under s 8 requires. As well, the s 8 issues raised by this case (including the existence of an investigative obligation) are novel in this country and—on any analysis—quite difficult. Given the undeveloped state of the s 8 jurisprudence at the time it is difficult to conclude that either the Coroner nor the IPCA should reasonably have been aware of the relevant requirement at the time of their inquiries.

[626] And lastly, in making a declaration that there has been no s 8 compliant investigation here, it is important to record that I should not be taken as suggesting that there should now be a further inquiry into Steven's death. While I acknowledge that that is not ultimately a question for me, that is not my view. In truth, the circumstances of his death have been fully and independently ventilated in these proceedings. It is my sincere hope that matters can end here.

SUMMARY AND CONCLUSIONS

[627] I attempt to summarise my key legal and factual findings and conclusions, below.

The claims under s 8

[628] Steven Wallace was shot and killed by Police on 30 April 2000. His death engaged his right not to be unlawfully deprived of life under s 8 of the NZBORA.

[629] In a claim for breach of the substantive s 8 right, the onus is on the defendant to establish that the killing is on grounds that are established by law and in accordance with the principles of fundamental justice.

[630] As well as confirming Steven's substantive right not to be unlawfully deprived of life, s 8 incorporates an obligation on the Crown to conduct a rights-compliant investigation into Steven's death. A rights-compliant investigation must be independent, effective, conducted in public and accountable. It must afford an opportunity for Steven's family to be appropriately involved.

[631] That s 8 incorporates this investigative obligation is the necessary result of a purposive reading of s 8 and is supported by a wealth of international authority relating to the cognate right to life enshrined in art 2 of the European Convention in Human Rights.

[632] The s 8 right also incorporates an obligation on state actors (such as Police officers) to plan and control potentially lethal operations in a way that does not unreasonably place individuals' lives at risk. That it does so is also supported by a purposive reading of s 8 and the international authorities.

[633] In order to breach this obligation, however, any alleged operational failing must be significant and egregious. It is also an obligation that is unlikely to be breached in cases where the relevant operational decisions are made over a short period of time, in situations of urgency.

[634] Adopting a tortious approach to causation in this context is inapt; there need not be a causal connection between the alleged operational failing and the outcome (here, Steven's death). Rather, the relevant focus is on the risk to life posed by those alleged failings, and what could reasonably be expected to have been done in the circumstances to mitigate that risk.

No breach of the substantive right

[635] On the balance of probabilities, I have found that the officer who shot Steven did so in self-defence. That is because, at the time of the shooting the officer genuinely and reasonably believed that his life was in immediate danger. In the circumstances as the officer honestly and reasonably believed them to be, shooting Steven four times did not constitute unreasonable or excessive force.

[636] A killing in self-defence is regarded as justified, both as a matter of criminal and civil law. In terms of s 8, self-defence is properly regarded as an exception that is "established by law" and that is "consistent with the principles of fundamental justice".

[637] There has therefore been no breach of Steven's substantive s 8 right not to be deprived of life.

Obligation to investigate

[638] Notwithstanding the number of investigations since 2000 into the circumstances surrounding Steven's death, there has been a breach of the Crown's procedural s 8 obligation to conduct a rights-compliant inquiry into his killing. That is because:

(a) The Police homicide investigation was not (and could not be) sufficiently independent and so, was not effective or accountable. Nor could it meet the requirement for rights-compliant family involvement.

(b) The private prosecution and the criminal trial was not effective for s 8 purposes because it was not instigated or supported by the Crown.

(c) While the jury's verdict was a formal and lawful finding that Constable Abbott was not criminally liable for Steven's death, it was not a finding resulting from, or that was part of, an investigation that complied with s 8.

(d) Both the subsequent inquest and the IPCA investigation were, similarly, not effective because both had proceeded—on the question of self-defence—on the basis of the verdict returned at the criminal trial which:

    (i) was itself not relevantly effective; and

    (ii) could not properly be seen as constituting a positive finding that Constable Abbott had killed Steven in self-defence.

(e) Even viewed collectively, the inquiries cannot be viewed as rights-compliant because none of them can be said to be relevantly effective.

Planning and control

[639] I have found that there has been no breach of this aspect of the s 8 obligation. The operational acts or omissions complained of either did not put Steven's life at risk or were reasonable in the circumstances.

[640] In particular, given the officers' reasonable view that Steven posed an immediate risk to the lives of others they could not reasonably be expected to have considered options that might have posed less risk to Steven's life, such as waiting for the arrival of the dog unit or calling out the AOS. Whether or not those options would in fact have posed less risk is, in any event, contestable.

[641] As well, given the urgency, the limited Police resources immediately available and the wider circumstances, a cordon and contain approach was not an option reasonably available to the officers.

[642] Issues going to the appropriate chain of command (considered by both the Coroner and the IPCA) have little relevance to this cause of action because the focus is on the risk posed by the decisions made (or not made) not the identity of the decision-maker.

Review of the second decision not to prosecute

[643] Decisions by the Crown not to prosecute are susceptible to the normal grounds of review.

[644] The first decision not to prosecute had been made on the ground that the evidence was insufficient to support a conviction. Following the release of the Chief Justice's decision in June 2002 that—taking the evidence at its highest—there was a case to answer, that ground no longer pertained.

[645] In light of that, and the wider circumstances at play, the Solicitor-General should have provided the Wallace family with reasons when he made his second decision not to prosecute. In particular, the reasons should have explained why it was thought that the public interest did not warrant prosecution.

FORMAL RESULT

[646] Mrs Wallace's claim that there has not been a rights-compliant investigation into Steven's death succeeds. I make the following declaration:

> At the date these proceedings were filed, there had not been an inquiry into the death of Steven Wallace that complied with the investigative obligation inherent in s 8 of the New Zealand Bill of Rights Act 1990.

[647] Mrs Wallace's application for judicial review of the Solicitor-General's second (2002) refusal to prosecute Constable Abbott also succeeds. I make the following declaration:

> The Solicitor-General should have given reasons for declining to prosecute Constable Abbott in relation to Steven Wallace's death, following release of the Chief Justice's judgment in June 2002.

[648] The remainder of Mrs Wallace's claims are dismissed. In particular, I find on the balance of probabilities that Constable Abbott shot and killed Steven in self-defence.

COSTS

[649] I have not heard from the parties on costs. I am not certain whether Mrs Wallace is legally aided or, if she is, what effect that might have on the issue.

[650] But putting that point to one side, my own preliminary inclination would be to award costs to Mrs Wallace. I say that because she has wholly succeeded on two causes of action and she has succeeded—against opposition from the Crown—on almost all the novel and important legal issues raised by her claims.

[651] And while the Crown succeeded in its defence of the substantive s 8 claim, it is relevant to note that that claim was not precluded by the various other inquiries into Steven's death. On the contrary—as Mrs Wallace's success on the investigative aspect of s 8 shows—none of those inquiries met the requirements of s 8; it was important that this aspect of her claim be heard, regardless of the outcome.

[652] As I have said, however, these are only my preliminary views and the legal aid position is also unknown.

[653] I would therefore be grateful if counsel could confer on these matters and attempt to arrive at an agreed position. If that is not possible, then memoranda are to be filed within 15 working days of the date of this judgment.

[654] I also note that Brown J also left costs in the two matters dealt with by him in 2016 (the strike out and an application for security for costs) to be dealt with as part of the costs in the substantive matter. Any discussions between counsel (and any memoranda filed) should also address the question of those costs.

POSTSCRIPT

[655] By way of addendum I record my view that Mrs Wallace owes a significant debt of gratitude to Mr Minchin. My perception is that he left no stone unturned to help her advance her position in this proceeding. He has partly—and in some quite legally notable ways—succeeded in that endeavour.

Rebecca Ellis J

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CAUSATION AND RISK IN NEGLIGENCE AND HUMAN RIGHTS LAW

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ABSTRACT. *The UKSC noted in* Smith v Chief Constable of Sussex Police *that the approach to causation in article 2 ECHR claims is "looser" than in negligence in that "it appears sufficient generally to establish merely that [the claimant] lost a substantial chance" of avoiding harm. This paper has two aims. The first is to establish a clearer picture of what the ECHR approach to causation entails and how it differs from that in negligence. The second is to consider why these differences exist and what they tell us about the objectives of negligence and human rights law and the nature of the different rights being protected. It contrasts the English approach with the decision of the South African Constitutional Court in* Lee v Minister for Correctional Services *which adopted a flexible approach to the factual causation requirement in a negligence action against a state body.*

KEYWORDS: *causation, negligence, right to life, human rights.*

I. INTRODUCTION

The UK Supreme Court noted in *Smith v Chief Constable of Sussex Police* that the approach to causation in claims based on Article 2 of the European Convention on Human Rights (ECHR) is "looser" than in negligence. While the but-for test is generally applied in negligence, in Article 2 claims "it appears sufficient generally to establish merely that [the claimant] lost a substantial chance" of avoiding harm.[1] The English courts have not always been comfortable with this divergence. In *Re E. (A Child)* Lady Hale stated that she was "troubled by the rejection of the 'but for' test" by the European Court of

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[1] *Smith v Chief Constable of Sussex Police; Van Colle v Chief Constable of Hertfordshire* [2008] UKHL 50, [2009] 1 A.C. 225, at [138].

Human Rights (ECtHR).[2] In part this discomfort seems attributable to a lack of detailed exposition as to how the approaches to causation differ in negligence and human rights law. The lack of clarity as to what the "looser" approach consists of is unsatisfactory. Although the reference to causation in *Smith* was a relatively minor observation in the wider decision not to develop the duty of care owed by the police in negligence to a victim of crime, we cannot appreciate whether the difference in approach is justified without first understanding what the difference actually is. In response, one purpose of this paper is to draw together key decisions on causation in the ECHR to identify what the "looser" approach entails and how it differs from the approach in negligence.

Divergences in legal doctrines are generally attributed to the fact that the two causes of action have different aims. In *Van Colle*, Lord Brown explained that

> Convention claims have very different objectives from civil actions. Where civil actions are designed essentially to compensate claimants for their losses, Convention claims are intended rather to uphold minimum human rights standards and to vindicate those rights. That is why time limits are markedly shorter. . . It is also why section 8(3) of the [Human Rights Act 1998] provides that no damages are to be awarded unless necessary for just satisfaction.[3]

There has, however, been little analysis of whether those differing aims explain the differences in approach to causation. A second purpose of this paper is therefore to address concerns about the divergences by considering why they exist, and whether they can be justified by the different objectives of negligence and human rights law and by the different nature of the rights being protected.

The paper begins, in Section II, by elucidating the causal requirements and the function of causation within each area of law. It is beyond the scope of this paper to address all of the ECHR rights, so the focus is on Articles 2 and 3, and, in the final section Article 8, which have useful parallels with negligence law. Section III then contemplates in greater depth the relationship between the nature of the rights being protected and the approaches adopted towards causation. It does this by comparing developments in causation in a jurisdiction that does not maintain the same separation between negligence and human rights law, South Africa. South African courts must "respect, protect, promote and fulfil the rights in the Bill of Rights" (s. 7(2) of the South African Constitution) which, it has been held, requires convergence between the law of delict and the Bill of Rights: "where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it

[2] *Re E. (A Child)* [2008] UKHL 66, [2009] 1 A.C. 536, at [14].
[3] *Van Colle v Chief Constable of Hertfordshire* [2008] UKHL 50, [2009] 1 A.C. 225, at [138].

by removing that deviation".[4] This led the Constitutional Court in *Lee v Minister for Correctional Services* to adopt a flexible approach to the factual causation requirement in a negligence action against a state body in order to protect the claimant's constitutional right to human dignity.[5] This was a risk-based approach to causation, which has some parallels in the *Fairchild* exception in English law and is similarly difficult to reconcile with wider negligence principles,[6] yet is more difficult to circumscribe as an exceptional approach. In comparison, the separate development of negligence and human rights law in the UK permits differences of approach to causation which, it is argued, better reflect the objectives of each area of law. The final section of the paper returns its focus to the jurisprudence of the ECtHR and highlights areas where a "looser" approach shades into opacity, where the court's failure to articulate its reasoning as to causation obscures the function of the damages award. Where the right to private and family life is engaged by a failure to provide information about risks of harm, the court does not differentiate between damages that vindicate the right and damages that compensate any resulting injury. These issues are not inherent in the "looser approach" and ought to be resolved by the court. Additionally, by appreciating what the "looser approach" does entail and how it reflects the right being protected, it is suggested that the Article 8 right could potentially be developed in relation to failure to warn of risk in a healthcare context. Finally, where the right to life is engaged in a healthcare context it will be seen that there is a lack of clarity as to the causal requirements, and the court generally fails to identify whether those causal principles affect liability or merely the availability or quantum of damages. The result, it is argued, is that the vindicatory objective of liability is frustrated by an implicit damage requirement.

II. The Function of Causation in Negligence and Human Rights Actions

To bring a negligence action the claimant must generally establish that the defendant's negligence was a but-for cause of,[7] or materially contributed to,[8] the damage suffered. In contrast, to bring a human rights claim it is not necessary to show that what the defendant did resulted in damage, it is enough to show that what they did violated the relevant right. Causal concepts are relevant to establishing this violation in some contexts, but their role is much more limited as will be explored below. The limited relevance

[4] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) S.A. 938 (CC), at [33].
[5] *Lee v Minister of Correctional Services* 2013 (2) S.A. 144 (CC).
[6] *Fairchild v Glenhaven Funeral Services (t/a GH Dovener and Son)* [2002] UKHL 22, [2003] 1 A.C. 32.
[7] *Barnett v Chelsea and Kensington Hospital Management Committee* [1968] 2 W.L.R. 422.
[8] *Bonnington Castings v Wardlaw* [1956] A.C. 613.

of causation of damage is also reflected in the remedies. While the remedy in negligence is compensatory damages, "just satisfaction" under Article 13 of the ECHR and section 8 of the Human Rights Act 1998 (HRA) allows for a range of remedies such as declarations, and damages are not available as of right. Where damages are sought for pecuniary or non-pecuniary loss, it must be shown that the violation of the relevant right caused this loss,[9] but this affects the remedy rather than liability itself.

The different function of causation in the two types of action reflects the different kinds of rights being protected. As Nolan has argued, damage is a constitutive element of the claim right in negligence, so that the wrong consists of negligently causing damage rather than simply of exposing others to unreasonable risks of interference with their bodily integrity, personal property, etc., with damage confined to a role as a condition of actionability.[10] The right is therefore a right against the other person that they not cause damage to the right-holder through a failure to take reasonable care (against the risk of that damage). Causation occupies a central role since it is the relation that connects the unreasonable risk with the damage suffered by the claimant.[11] In contrast, the violation of ECHR rights need not entail damage or loss. These fundamental rights can be violated by acts (or omissions) that have the potential to cause loss, so that the violation of the right itself is actionable.[12]

Violation of the right to life need not entail death at all, for example the manner in which the police pursued the applicant in *Makaratzis v Greece* violated his right to life through "conduct which, by its very nature, put his life at risk, even though, in the event, he survived".[13] As Wicks explains:

> it is not, or at least not only, the sanctity of life that is protected under the ECHR's right to life but rather the necessary respect for all human life. The focus seems to be less upon life versus death than upon the protection of

[9] See A. Mowbray, "The European Court of Human Rights' Approach to Just Satisfaction" [1997] P.L. 647.

[10] D. Nolan, "Rights, Damages and Loss" (2017) 37 O.J.L.S. 255, 257–58. In this paper, "damage" is used in the sense defined by Nolan as a certain kind of interference with a protected interest and distinct from "loss" and the idea of being worse off.

[11] This is still true, although perhaps carries less force, when damage is treated merely as a condition of actionability.

[12] Protocol 14 introduced into Art. 35(3)(b) the admissibility criterion that the applicant must have suffered "significant disadvantage". In *Giusti v Italy* (Application no. 13175/03), Judgment of 18 October 2011, not yet reported, at [39], the ECtHR interpreted this criterion more widely than just financial disadvantage, setting out the following factors to take into account: "la nature du droit prétendument violé, la gravité de l'incidence de la violation alléguée dans l'exercice d'un droit et/ou les conséquences éventuelles de la violation sur la situation personnelle du requérant. Dans l'évaluation de ces conséquences, la Cour examinera, en particulier, l'enjeu de la procédure nationale ou son issue" [the nature of the right allegedly violated, the seriousness of the impact of the alleged violation and/or its possible consequences on the personal situation of the applicant. In assessing these consequences, the court will consider, in particular, what is at stake in, or the outcome of, the national proceedings]. See generally N. Vogiatzis, "The Admissibility Criterion Under Article 35(3)(b) ECHR: A 'Significant Disadvantage' to Human Rights Protection?" (2016) 65 I.C.L.Q. 185.

[13] *Makaratzis v Greece* (Application no. 50385/99) (2005) 41 EHRR 49, at [55].

> everyone from actions that put their life at risk and thus fail adequately to respect it.[14]

The Article 2 right to life entails various duties: a negative duty on the state to refrain from interfering with the right to life, a positive duty on the state to secure the protection of the right to life against interference by non-state actors in certain circumstances, and a procedural duty to investigate interferences. Clearly a breach of the procedural obligation does not cause death, indeed the procedural obligation highlights that an important aspect of the right to life is having a finding of fact about the circumstances, and not just the causes, of death. The decision in *R. (on the application of Tainton) v HM Senior Coroner for Preston and West Lancashire* considers how causation should be addressed by a coroner when the deceased has died in circumstances where the possibility of an Article 2 violation cannot be excluded. This was a case where the deceased died of natural causes, oesophageal cancer, but there was a five month delay in diagnosis due to the substandard healthcare he received while in custody. The High Court concluded that the coroner was right not to put the issue to the jury because it would not have been safe for it to conclude, on the balance of probabilities, that the substandard medical care had causally contributed to the death. While recording a verdict of death from natural causes the jury ought, however, to have included in the Record of Inquest a brief narrative "of any admitted failings forming part of the circumstances in which the deceased came by his death, which are given in evidence before the coroner, even if, on the balance of probabilities, the jury cannot properly find them causative of the death".[15] The court went on to state that this "was required in this case in order to discharge in full the obligation on the state imposed by article 2 of the ECHR".[16] In this way, Article 2 demonstrates concern with respect for life rather than solely with protection for the sanctity of life.

The emphasis on risk rather than damage is evident in *Osman v United Kingdom*, where the ECtHR held that to bring an Article 2 claim against the police under the positive duty to safeguard, it must be shown that

> the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[17]

[14] E. Wicks, "The Meaning of 'Life': Dignity and the Right to Life in International Human Rights Treaties" (2012) 12 H.R.L.R. 199, 202.

[15] *R. (on the application of Tainton) v HM Senior Coroner for Preston and West Lancashire* [2016] EWHC 1396 (Admin), [2016] 4 W.L.R. 157, at [74].

[16] Ibid., at para. [75].

[17] *Osman v United Kingdom* (Application no. 87/1997/871/1083) (2000) 29 EHRR 245, at [116]. See V. Stoyanova, "Causation between State Omission and Harm within the Framework of Positive

Wright correctly states that

> This is a very much weaker test than the standard "but for" test, but it is consistent with the aims of the ECHR which are the promotion and protection of human rights standards and the rule of law, rather than compensation for damage dependent upon proof of loss.[18]

In respect of Article 3 claims, where it is likewise not necessary for the victim to suffer physical or mental harm since the right is violated when the treatment of the victim amounts to inhuman or degrading treatment or punishment,[19] the same approach applies. This was explained in *E. v United Kingdom*, a case where the local authority failed to monitor a step-father after he was convicted of sexual abuse so failed to detect that he was abusing the children and take steps to protect them. The ECtHR said there

> The test under article 3 however does not require it to be shown that "but for" the failing or omission of the public authority ill-treatment would not have happened. A failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the state.[20]

The significance of this risk-focused approach is evident from the case of *Sarjantson v Chief Constable of Humberside Police*.[21] The claimant in that case suffered serious injury when he was attacked by a group of young men. As the incident unfolded a number of calls were made to the police, by various people, reporting that the group were armed with baseball bats and attacking individuals, eventually including the claimant. An internal police investigation found that there had been an 11 minute delay before police officers were deployed to the scene of the incident. The claim was brought under Articles 2 and 3, arguing that there had been a breach of the positive duty to take measures to avert a real and immediate risk to life and a real and immediate risk of injury, respectively. One of the arguments made by the police was that they should not be held liable since causation was not established because even if there had been an immediate despatch of officers they would not have arrived until after the claimant had been assaulted. This argument did not succeed and the Court of Appeal was clear that for Article 2 and 3 claims such a causation inquiry is not necessary: "the fact that a response would have made no difference is not relevant to liability".[22] They explained:

Obligations under the European Convention on Human Rights" (2018) 18 H.R.L.R. 309 for discussion of a "real and immediate risk" and the degree of knowledge required by the state.

[18] J. Wright, *Tort Law and Human Rights*, 2nd ed. (Oxford 2017), 197.

[19] *Napier v Scottish Ministers* 2005 1 S.C. 307. See J. Blackie, "Liability of Public Authorities and Public Officials" in E. Reid and D. Visser (eds.), *Private Law and Human Rights: Bringing Rights Home in Scotland and South Africa* (Edinburgh 2013), 241–42.

[20] *E. v United Kingdom* (Application no. 33218/96) (2003) 36 EHRR 31, at [99].

[21] *Sarjantson v Chief Constable of Humberside Police* [2013] EWCA Civ 1252, [2014] Q.B. 411.

[22] Ibid., at para. [28].

> The duty to provide protection arose at the time when the first emergency call was made. At that time, it was impossible to know whether and, if so, how quickly an assault would take place …. As the court made clear at para 116 in *Osman*, it must be established that the police knew or ought to have known "at the time" of the existence of a real risk and immediate risk …. This implies that compliance with article 2 should not be determined with the benefit of hindsight. This is confirmed by the court saying at para 116 "… and that [the authorities] failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk".[23]

This is what Wright describes as an obligation "of means, not results".[24] By focusing on the *ex ante* risk rather than the result, the element of moral luck is excluded from the determination of liability,[25] and the inquiry squarely addresses the question of whether the police showed adequate respect for the claimant's life. The court did clarify that causation is relevant to quantum: "A finding that a response would have made no difference may mean that there is no right to damages. But it is not relevant to liability".[26]

This is particularly important to note in the context of claims against the police where the courts have resisted attempts to impose a duty of care on the police in negligence for failure to prevent harm caused by a third party. Wright is critical of this refusal to develop the duty of care in light of the HRA, arguing that negligence cases like *Hill* and *Smith*,[27] "whether we like it or not…were cases about human rights; formalistic reasoning can cast dust in our eyes and prevent us from seeing the real issues".[28] Tofaris and Steel also note that there are disadvantages to bringing a HRA claim such as the shorter limitation period and that damages are not available as of right.[29] It is not necessary to reject the argument that these cases were about human rights to accept the view that they were *also* cases about the private law rights protected by the tort of negligence. The case of *Sarjantson* highlights the potential benefits to the claimant of bringing a claim under Article 2/3 rather than in negligence. Even if the police had owed a duty of care to the claimant in *Sarjantson* in negligence, the claim would have failed for lack of causation. Instead, the claim under Article 2 was successful. While the claimant would not have recovered compensatory damages for the injury suffered, they were still entitled to a remedy.

[23] Ibid., at paras. [26]–[27].
[24] Wright, *Tort Law and Human Rights*, 2nd ed. p. 197.
[25] Wicks, "The Meaning of 'Life'", p. 202.
[26] *Sarjantson v Chief Constable of Humberside Police* [2013] EWCA Civ 1252, [2014] Q.B. 411, at [29].
[27] *Hill v Chief Constable of West Yorkshire* [1989] A.C. 53; *Smith v Chief Constable of Sussex Police* [2008] UKHL 50, [2009] 1 A.C. 225.
[28] Wright, *Tort Law and Human Rights*, 2nd ed. pp. 230–31.
[29] S. Tofaris and S. Steel, "Negligence Liability for Omissions and the Police" (2016) 75 C.L.J. 128, 139–40.

The risk-based approach has troubled the English courts at times. In *Re E. (A Child)*,[30] Lady Hale expressed concern that it was not necessary to satisfy the but-for test in order to establish an Article 3 claim. The claims in that case concerned a mother and daughter who, along with others attending the same school, had to walk to and from school for a period of a few months through an area of sectarian protest and disorder where they were subjected to abuse of a violent and intimidating nature,[31] and where the walkway established by police was delineated by armoured vehicles and police officers with riot shields. The protest was eventually resolved through ongoing efforts of the police and other bodies, and the claimant argued that the police should have taken action sooner to remove the protestors. Ultimately the court found that given the delicate and volatile situation, the police had taken reasonable measures because acting sooner may have exacerbated the problem. Lady Hale stated, however, that she was "troubled by the rejection of the 'but for' test" in *E. v UK*,[32] and observed that "I do not think that it has been demonstrated that, had the police behaved at the outset in the way in which it is now said that they should have behaved, the children's experience would have been any better. Indeed, it could have been a great deal worse".[33] In practice it may be difficult to distinguish clearly between measures that would have prevented the outcome and measures that "could have had a real prospect of altering the outcome".[34] The key to understanding the difference is that the but-for test depends upon hindsight while the *Osman/E.* approach is prospective. *Osman* is a risk-based analysis so it is an *ex ante* inquiry into the impact measures could have been expected to have, assessed at the time the measures should have been taken. It seems to be a very contextualised, fact-specific approach, so rather than asking simply whether police action could have reduced the risk in *Re E.*, the court was concerned with whether the specific steps it is argued that the police should have taken could have affected the outcome, including whether they could also have made the outcome worse. This is still, however, a forward-looking inquiry. As Steel has explained, the creation of risk in the absence of causation is insufficient to justify negligence liability since the idea of undoing the wrong cannot justify the obligation to compensate: in the world in which the defendant's wrong (risk creation) does not occur, the claimant is still injured.[35] Since human rights liability is not primarily concerned with compensation but

[30] *Re E. (A Child)* [2008] UKHL 66, [2009] 1 A.C. 536.
[31] Lord Carswell considered that "it is entirely clear that the behaviour complained of far exceeded the bounds of that which could be associated with any legitimate protest" but used the word "protest" in his judgment since it had been used in so much of the evidence: ibid., at para. [21].
[32] Ibid., at para. [14].
[33] Ibid.
[34] *E. v United Kingdom* (Application no. 33218/96) (2003) 36 EHRR 31, at [99].
[35] S. Steel, *Proof of Causation in Tort Law* (Cambridge 2015), 110–11.

with upholding respect for particular rights, the wrong can consist of risk creation irrespective of whether loss follows.

We must not ignore the fact that in *Fairchild v Glenhaven Funeral Services*, the House of Lords did adopt a risk-based approach to proof of causation in a negligence action.[36] The victim in *Fairchild* had been exposed to asbestos through the defendant's negligence and died from mesothelioma, a cancer that is caused by asbestos. A combination of factors meant that the claimant, his widow,[37] was unable to establish causation on the but-for test: in addition to the defendant's negligent asbestos exposure, the victim had been exposed to asbestos by a number of former employers over the course of his working life, and there was an evidentiary gap in that while it was known to medical science that asbestos *does* cause mesothelioma, it was not known *how* it does so: whether it is caused by one or many fibres, and at what stages in the development of the disease asbestos plays a role. The court adopted an exceptional approach to causation, holding that it was sufficient to prove that the defendant's negligence had materially increased the risk of harm. On this basis the defendant was held liable for the whole of the claimant's loss. It was subsequently held in *Barker v Corus* that liability should be apportioned among those who had exposed the claimant to asbestos,[38] and Lord Hoffmann rationalised this on the basis that the "damage" the defendant had been proved to have caused was not the disease but the risk of that disease,[39] but more recent decisions have held that it is still the mesothelioma that forms the gist of the negligence action.[40] This damage requirement is an important point of difference from the risk-based approach to HRA liability.[41] As we have seen, liability under Article 2 is imposed when the defendant fails adequately to respect the relevant right of the victim by exposing them to a risk of death. Death need not occur. For negligence liability to arise within the scope of the *Fairchild* exception the claimant must have developed mesothelioma.[42] This means that while the causation requirement has been significantly relaxed, it is still regarded by the courts as an essential ingredient of liability along with damage. This is not to suggest that the *Fairchild* exception can be easily reconciled with wider negligence principles, but it reflects the importance of damage and causation within the rights protected in negligence.

[36] *Fairchild v Glenhaven Funeral Services* [2002] UKHL 22, [2003] 1 A.C. 32.
[37] And the vast number of other mesothelioma victims who would find themselves in the same position.
[38] *Barker v Corus* [2006] UKHL 20, [2006] 2 A.C. 572. Parliament quickly legislated to restore joint and several liability, but only in respect of mesothelioma: Compensation Act 2006, s. 3.
[39] Ibid., at para. [35].
[40] *BAI v Durham* [2012] UKSC 14, [2012] 1 W.L.R. 867.
[41] See G. Turton, *Evidential Uncertainty in Causation in Negligence* (Oxford 2016), 194–201 on the idea of risk as damage.
[42] Or other disease presenting an analogous evidential gap: *Heneghan v Manchester Dry Docks* [2016] EWCA Civ 86, [2016] 1 W.L.R. 2036.

III. Causal Tensions between Negligence and Human Rights

Having clarified the differences of approach to causal issues in negligence and human rights law, this section considers the complications that arise when negligence law is developed as a mechanism for protecting human rights. It takes as a comparator South Africa, where the courts must develop the common law in order to protect, promote and fulfil the rights contained in the Bill of Rights. This will help further the argument that causal principles occupy different roles in negligence and HRA claims, reflecting the different nature of the rights being protected, such that in some instances it may be appropriate to hold the defendant liable in both branches of law.

A. The South African Experience: Lee

The decision of the South African Constitutional Court in *Lee v Minister of Correctional Services* provides an example of the strain that is placed on the causation requirement in negligence, delict in South Africa, when there is less clear separation between negligence and human rights law.[43] Faced with a problem of proof of factual causation, the majority "stretched" the concept of causation,[44] while the minority favoured developing the law to carve out an exception. The former solution challenges the internal coherence of the causation requirement, and both approaches strain the coherence of the law by pursuing the goal of protecting the constitutional right to human dignity within the law of delict.

The claimant in that case had contracted tuberculosis whilst in prison. He sought to recover damages in delict arguing that the state had failed to implement a reasonable system for the management of tuberculosis in the prison. Tuberculosis is an airborne communicable disease which spreads easily, especially in confined, poorly ventilated, overcrowded environments. The overcrowded, poor conditions in the prison were ideal for transmission of the disease. The negligence in this case consisted not of the individual treatment of the claimant, but of systemic failure to take preventive and precautionary measures against the spread of tuberculosis. The Supreme Court of Appeal had rejected Mr. Lee's claim since he had failed to establish that but-for the negligence of the prison authority he would not have developed tuberculosis. The Court considered that to succeed he needed to show what a reasonable system would have consisted of, and that such a system "would have altogether eliminated the risk of contagion".[45] While this seems to apply a standard of proof more demanding than the balance of probabilities, this view was based on the difficulty of pinpointing the source of the

[43] *Lee v Minister of Correctional Services* 2013 (2) S.A. 144 (CC). "Human rights" is used to reflect a right of the same kind as in the English context. The instrument providing for these in South Africa is the Bill of Rights which forms part of the Constitution.
[44] "Stretching" is a term adopted in P.S. Atiyah, *The Damages Lottery* (Oxford 1997), 32–65.
[45] *Minister of Correctional Services v Lee* 2012 (3) S.A. 617 (SCA), at [64].

claimant's infection and therefore the difficulty of showing that his individual case of tuberculosis would have been avoided unless it was possible to show that all cases would have been avoided.

Under section 7(2) of the South African Constitution, courts, as organs of the state, must "respect, protect, promote and fulfil the rights in the Bill of Rights". The Constitutional Court explained in *Carmichele* that this requires convergence between the law of delict and the Bill of Rights: "where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation".[46] This is a more onerous obligation than UK courts face under section 6 of the HRA, which provides that it is unlawful for a public authority, including a court, to act in a way which is incompatible with a Convention right. Wright notes that this is "an obligation to 'respect', but not to protect or fulfil the relevant standards",[47] so the horizontal effect of the HRA is much more limited. The relevant right in *Lee* is the right to human dignity: "Everyone has inherent dignity and the right to have their dignity respected and protected".[48] The court therefore framed the issue in the following way:

> The complaint is that the unlawful detention and specific omissions violated the applicant's right to freedom and security of the person and the right to be detained under conditions consistent with human dignity, and to be provided with adequate accommodation, nutrition and medical treatment at state expense. The question is whether the causation aspect of the common law test for delictual liability was established and, if not, whether the common law needs to be developed to prevent an unjust outcome.[49]

Just as there are various causes of action in English law to address the failings of state bodies including liability in tort law and under the HRA 1998, in South African law there are also a range of sources of damages including the law of delict, statutory compensation schemes, the Promotion of Administrative Justice Act 3 of 2000 (PAJA) which gives courts the power in judicial review actions to award compensation in exceptional cases, and "constitutional damages" which may constitute "appropriate relief" where the state breaches a requirement imposed by the Constitution.[50] Both the majority and minority approaches in *Lee* will be explored in more detail since arguably both threaten the coherence of delictual liability and a preferable solution would have been an award of constitutional damages.

The decision of the Supreme Court of Appeal was overturned by a 5:4 majority of the Constitutional Court who considered the law of delict

[46] *Carmichele v Minister of Safety and Security* 2001 (4) S.A. 938 (CC), at [33].
[47] Wright, *Tort Law and Human Rights*, 2nd ed. p. 24.
[48] The Constitution of the Republic of South Africa 1996, s. 10.
[49] *Lee v Minister of Correctional Services* 2013 (2) S.A. 144 (CC), at [2].
[50] See A. Price, "State Liability and Accountability" (2015) Acta Juridica 313, at 321.

already adopted a "flexible" approach to factual causation, which was satisfied on these facts, so there was no need to develop the law. The majority considered that this "flexibility" allowed the court to accept proof of an increase in risk as sufficient in this case:

> It seems to me that if a non-negligent system reduced the risk of general contagion, it follows – or at least there is nothing inevitable in logic or common sense to prevent the further inference being made – that specific individual contagion within a non-negligent system would be less likely than in a negligent system. It would be enough, I think, to satisfy probable factual causation where the evidence establishes that the plaintiff found himself in the kind of situation where the risk of contagion would have been reduced by proper systemic measures.[51]

While there is much to be said for an approach that is qualitative and avoids recourse to a merely quantitative approach to proof such as the "doubles the risk" test which conflates the balance of probabilities standard of proof with what it is that is being proven,[52] this approach effectively substitutes the but-for test with a material increase in risk test. This is problematic because, unlike in the English decision in *Fairchild*,[53] there is no suggestion in the majority judgment that this is an exceptional approach with a limited scope of application. Indeed, the court expressly distanced itself from the need for exceptional approaches to causation that have been developed in other jurisdictions, stating that the need for such exceptional approaches arises out of inflexible application of the but-for test, so the flexible application of the but-for test in South African law eliminates the need for recourse to exceptions.[54] This means that it potentially applies to claims against non-state actors and to cases involving operational rather than systemic negligence; indeed, subsequent case law discussed below reinforces this impression. The coherence of the causation requirement is disrupted by this solution since it is unclear when courts should insist on but-for causation and when the increase in risk test is appropriate. Furthermore, it fails to acknowledge that proof of factual causation is central to establishing interpersonal responsibility and justifying why the defendant should be liable to compensate the claimant.

The minority judgment highlights the constitutional aspect of the issue: "All this indicates that the common law but-for test for causation is an overblunt and inadequate tool for securing constitutionally tailored justice in cases where prisoners have proved exposure to disease because of negligence on the part of the prison authorities, but cannot pinpoint the source

[51] *Lee v Minister of Correctional Services* 2013 (2) S.A. 144 (CC), at [60].
[52] See e.g. Turton, *Evidential Uncertainty*, pp. 105–12; C. McIvor, "The 'Doubles the Risk' Test for Causation and Other Related Judicial Misconceptions about Epidemiology" in S.G.A. Pitel, J.W. Neyers and E. Chamberlain (eds.), *Tort Law: Challenging Orthodoxy* (Oxford 2013).
[53] *Fairchild v Glenhaven Funeral Services* [2002] UKHL 22, [2003] 1 A.C. 32.
[54] *Lee v Minister of Correctional Services* 2013 (2) S.A. 144 (CC), at [72]–[73].

of their injury".[55] The minority's preferred approach was to explicitly develop the law of delict in order to satisfy the requirements of the Constitution. This task, it argued, was best done by the High Court which could undertake a "full assessment of the intricacies of a system of risk-based compensation",[56] for example whether it should lead to proportionate damages, and what should be its scope of application. There are various defining features of the case that may assist in determining the scope of the exception. As concerns tuberculosis itself, it was noted to be a serious public health problem in South Africa,[57] and its aetiology entails problems of proof of causation since it can be spread by a single airborne mycobacterium and carriers can be contagious before showing symptoms, meaning it is extremely difficult, perhaps impossible, to pinpoint the source of infection for an individual.[58] On a more policy-based level, the claimant was part of "a vulnerable group to whom our system of constitutional protections owes particular solicitude";[59] the defendant was a state body; there was a public interest in liability: "The country's interest in the development of a sound system of incarceration, in which risk of exposure to pathogens is minimised as much as is reasonably possible, suggests there may be a need to develop the common law of causation".[60] The question remains whether the exception can be rationally circumscribed; the following section argues that this remains problematic.

B. The Aftermath of Lee*: Blurred Lines*

By blurring the lines between delict and constitutionally protected rights, it becomes unclear where the lines ought to be drawn around the increase in risk approach to causation. Although the majority in *Lee* rationalised their approach to causation as relying on existing flexibility, the South African High Court in *Nkala v Harmony Gold Mining* has since expressed the view that the Constitutional Court in *Lee* "has expanded our perceptions of causation".[61] This decision concerned a negligence class action brought by mineworkers against gold mining companies in respect of silicosis and TB contracted during their employment. A number of the parties have subsequently reached a settlement,[62] but the remaining parties may still proceed with their claims. Proof of causation is particularly problematic in

[55] Ibid., at para. [101].
[56] Ibid., at para. [79].
[57] Ibid., at para. [103].
[58] Ibid., at para. [84].
[59] Ibid., at para. [113].
[60] Ibid.
[61] *Nkala and others v Harmony Gold Mining Co Ltd and others* [2016] ZAGPJHC 97, [2016] 3 All S.A. 233, at [76]. This and other more recent cases are highlighted by A. Price, "Constitutionalising Rights and Reacting to Risk in South Africa" in M. Dyson (ed.), *Regulating Risk Through Private Law* (Cambridge 2017).
[62] *Ex parte Nkala and others* [2019] ZAGPJHC 260.

the TB claims, but the High Court has held that it is clear from the "development of the law" in *Lee* that the claimants are not incapable of proving a causal link.[63] The *Lee* approach still imposes substantial hurdles for these claimants,[64] but it is significant that the court was willing to adopt it in a negligence claim against a non-state defendant. The Constitutional Court in *Mashongwa v PRASA* considered further the effect of *Lee*, confirming the view that "it adopted an approach to causation premised on the flexibility that has always been recognised in the traditional approach",[65] whilst clearly regarding it as being a wider approach than but-for causation, stating "where the traditional but-for test is adequate to establish a causal link it may not be necessary, as in the present case, to resort to the *Lee* test".[66] This case is also noteworthy in that, while the defendant was a state body, the negligence claim did not arise out of a systemic failing but from a failure to close the doors of the train compartment in which the claimant was travelling, which meant that criminals who attacked the claimant were able to throw him from the moving train. These cases suggest that the *Lee* test will be raised, and potentially applied, when causation cannot be established on the but-for test, in claims against state and non-state defendants, in cases involving systemic or isolated failings, and involving omissions and positive creation of risk.

Price has suggested that *Lee* might rationally be limited to cases involving systemic failures, noting that *Lee* itself

> involved a systemic failure to provide an obligatory government service, rather than any specified negligent act or omission. That is, it involved a failure by an organ of state adequately to perform a positive constitutional obligation to design and implement a reasonable system to protect a vulnerable class of people against a genuine risk to their life and personal security.[67]

This is significant because, besides any scientific problems of proof, and beyond the status of the defendant as a state body, it means that when applying the but-for test and constructing the hypothetical world in which the defendant took reasonable care there are a range of possible systems that would satisfy the requirement of reasonableness. The scope of the exception could therefore be limited to cases of systemic failings where proof of causation is hampered by the range of satisfactory counterfactual systems possible.

This is arguably more relevant than the act/omission distinction. In a more recent decision in *Oppelt v Department of Health*, the Constitutional Court emphasised that *Lee* arose in the context of omissions

[63] *Nkala and others* [2016] ZAGPJHC 97, [2016] 3 All S.A. 233, at [76].
[64] See Price, "Constitutionalising Rights", p. 433.
[65] *Mashongwa v Passenger Rail Agency of South Africa* [2015] ZACC 36, at [65].
[66] Ibid.
[67] A. Price, "Factual Causation After *Lee*" (2014) 131 S.A.L.J. 491, 495.

liability and held that "the 'but-for' test is not always the be-all and end-all of the causation enquiry when dealing with negligent omissions".[68] The act/omission distinction does not adequately circumscribe the *Lee* test. Besides the much discussed blurred border between acts and omissions, the need to replace the defendant's conduct with hypothetical non-negligent conduct is just as much a part of the application of the but-for test to acts as it is to omissions. In contrast, where there has been a systemic failure to provide a service, the hypothetical non-negligent conduct is more difficult to insert into the causation inquiry because a range of possible systems would likely have been reasonable. In the healthcare context, the ECtHR requires a systemic or structural dysfunction in hospital services which results in a patient being deprived of access to life-saving emergency treatment.[69] The facts of *Oppelt* resemble those where the ECtHR has established liability under Article 2 since it did not involve negligent medical treatment but "unreasonable delays [which] justified the conclusion that the applicant was *refused* emergency medical treatment",[70] so might come within the scope of *Lee* even if *Lee* were confined to cases of systemic negligence. The application of *Lee* in the context of medical negligence still stands in contrast to the English approach to medical negligence where courts have resisted a loss of chance or increase in risk approach to proof of causation so would surely be slow to adopt it simply because the negligence consisted of a systemic failing.[71]

It may not, however, be rational to limit a risk-based approach to causation to cases involving systemic failings as the following case shows. In the UK case of *Re E.*, discussed above, Lady Hale similarly observed that it was not obvious what the police could have done to protect the children from harm because alternative responses would have carried different risks.[72] Yet *Re E.* did not concern a systemic failing, but the response to a particular situation (albeit a situation extending over a few months); the uncertainty seems to flow from the discretion afforded to public bodies. The *Osman* test also applies not only to systemic failings but to operational failings, and in the recent decision in *Commissioner of Police of the Metropolis v DSD* a majority of the Supreme Court accepted that there could be a violation of the Article 3 right in cases of operational failure rather than failure to implement an adequate system of investigation.[73]

[68] *Oppelt v Head: Health, Department of Health, Provincial Administration: Western Cape* [2015] ZACC 33, at [48].

[69] Unless, exceptionally an individual patient's life is knowingly put in danger by denial of access to such treatment, with "denial" being interpreted restrictively so that it does not extend to deficient, incorrect, or delayed treatment: *Lopes de Sousa Fernandes v Portugal* (Application no. 56080/13) (2018) 66 EHRR 28, at [191]–[192]. This is discussed in more detail in the final section of this article.

[70] *Oppelt v Head; Health, Department of Health, Provincial Administration: Western Cape* [2015] ZACC 33, at [7], emphasis added.

[71] *Gregg v Scott* [2005] UKHL 2, [2005] 2 A.C. 176.

[72] *Re E. (A Child)* [2008] UKHL 66, [2009] 1 A.C. 536, at [14].

[73] *Commissioner of Police of the Metropolis v DSD and another* [2018] UKSC 11, [2019] A.C. 196.

While cases involving systemic failures do, therefore, give rise to difficulties in establishing causation, from the perspective of protecting human rights this may not be a rational limit. From the perspective of ensuring that the state body affords sufficient respect to the right to human dignity and maintains appropriate standards, the prospective risk-based approach to causation is coherent but should apply across the full spectrum of cases engaging that right rather than only those involving systemic failings, and need not attract an award of compensatory damages.

Given the difficulty of drawing coherent limits on the scope of the increase in risk approach within delict, whether one adopts the majority solution of viewing it as part of the existing flexible approach or the minority solution of explicitly developing an exceptional approach pursuant to their constitutional obligation, it would be preferable to maintain the integrity of delict and develop the award of constitutional damages instead. This would also enable courts to draw directly on the range of constitutional remedies which are able to more effectively tackle the conditions giving rise to a claim. This can be seen from another decision, highlighted by Keehn and Nevin,[74] concerning Pollsmoor prison, *Sonke v Government of Republic of South Africa*.[75] This case directly addressed the overcrowding and inhumane conditions of detention as a violation of detainees' constitutional rights to health and human dignity. The remedy included an order requiring the Government to reduce overcrowding to 150% within six months (the population of the prison was previously around 225–250%), and to develop a comprehensive plan for addressing the deficiencies in the prison conditions. This remedy is better tailored to promoting the prisoners' right to dignity than an award of damages in negligence.

One challenge, however, is that in light of the obligation to develop the common law, the objectives of delictual and constitutional awards are not so explicitly divergent as the separation between negligence and HRA liability in English law. In South Africa, Price explains that "these liability regimes potentially overlap" so that state bodies "may wrong individuals by acting unlawfully in these different ways, and therefore could in principle be held liable to pay damages on various grounds".[76] That said, he goes on to explain that "an award of constitutional damages is correctly regarded as a subsidiary remedy, which should not be made where adequate statutory or common-law remedies are available".[77] This stands in contrast to the position in English law where a claimant can be awarded damages under

[74] E.N. Keehn and A. Nevin, "Health, Human Rights, and the Transformation of Punishment: South African Litigation to Address HIV and Tuberculosis in Prisons" (2018) 20 Health and Human Rights Journal 213, 219.
[75] *Sonke v Government of Republic of South Africa* 24087/15, not yet reported, available at <https://genderjustice.org.za/publication/pollsmoor-court-order/>.
[76] Price, "State Liability", p. 321.
[77] Ibid., at p. 333.

the HRA for breach of a Convention right in addition to recovering damages from other sources.[78] This is significant because in allowing for concurrent liability in negligence and the HRA, English law recognises that the two actions involve the interference with different kinds of rights, and that an adequate remedy may require an award of damages for both.

C. The Nature of the Rights in Negligence and the HRA

In *Van Colle*, Lord Brown explained that

> Convention claims have very different objectives from civil actions. Where civil actions are designed essentially to compensate claimants for their losses, Convention claims are intended rather to uphold minimum human rights standards and to vindicate those rights. That is why time limits are markedly shorter. . . It is also why section 8(3) of the [HRA] provides that no damages are to be awarded unless necessary for just satisfaction.[79]

Lord Kerr elaborated on that in the Supreme Court decision in *Commissioner of Police of the Metropolis v DSD* which concerned the investigative obligation on the police under Article 3:[80]

> Laws L.J. said in para 68 of his judgment in the Court of Appeal, that the inquiry into compliance with the article 3 duty is "first and foremost concerned, not with the effect on the claimant, but with the overall nature of the investigative steps to be taken by the State". I agree with that. The award of compensation is geared principally to the upholding of standards concerning the discharge of the state's duty to conduct proper investigations into criminal conduct which falls foul of article 3.[81]

This meant that it was appropriate to award damages for the breach of Article 3 in addition to damages that were received from the perpetrator of the attacks on the claimants and from the CICA.[82] The vindicatory imperative underpins Varuhas's argument that damages awarded by UK courts in HRA claims should be assessed on the same principles as torts actionable per se where, for example, courts are willing to presume that certain losses, such as injury to feelings and distress, have been suffered once liability is established.[83] Mowbray also notes that the ECtHR has expressed a "hint, albeit limited in explanation, of the moral foundations underpinning its equitable conception of just satisfaction" in declining to make an award of damages to the victims in *McCann and others v UK*.[84] In that case, the

[78] *Commissioner of Police of the Metropolis* [2018] UKSC 11, [2019] A.C. 196, at [65].
[79] *Van Colle v Chief Constable of Hertfordshire* [2008] UKHL 50, [2009] 1 A.C. 225, at [138].
[80] Not the operational duty to investigate with a view to avoiding the risk to the applicant, but the procedural duty to investigate the past violent crime suffered by the applicant.
[81] *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11, [2019] A.C. 196, at [65].
[82] Ibid., at para. [65].
[83] J. Varuhas, "A Tort-Based Approach to Damages under the Human Rights Act 1998" (2009) 72 M.L.R. 750, 767.
[84] Mowbray, "The European Court of Human Rights", p. 652.

court did not consider it "appropriate" to award damages where the victims had suffered a violation of their right to life in being killed by the police, but had been intending to plant a bomb at the time.[85] The aim of upholding standards rather than allocating responsibility for outcomes is thus reflected in numerous doctrines; causation is no exception.

The difference in aims was echoed by Lord Hughes in the same decision: "in substance, the Convention-based duty is not aimed at compensation but at upholding and vindicating minimum human rights standards. It is, substantially, to insist on performance of a public duty".[86] But while he agreed with the majority on the outcome of the case in *DSD*, he did not agree that liability under Article 3 should be based on operational as opposed to systemic failures since this would impose an operational duty on the police that courts have strongly resisted imposing in negligence law: "one cannot both uphold the distinction and effectively eliminate it by employing a Convention claim to serve substantially the same purpose as an action in tort".[87] Rather than drawing on human rights as a reason to develop the common law of negligence, this argument draws on the limits of negligence as a reason to constrain the development of human rights law. Lord Hughes argued:

> True it is that the limitation period differs, but this will not remove the disadvantages to policing which were identified in the English [negligence] cases. It may be that there is a more relaxed approach to causation in a Convention-based claim, but that if anything only increases the prospect of such a claim becoming a substitute for a claim in tort. There is no doubt some difference of approach to the calculation of compensation, but the present case is a good illustration of the marginal, if not imperceptible, nature of the distinction in outcome.[88]

As we have seen, the impact of the relaxed approach to causation is important but should not be overstated since, as noted in *Sarjantson*, compensatory damages will not be available where it is not proved that the violation of the right made a difference to the outcome. The HRA claim is unlikely to become a substitute for a negligence action if compensatory damages remain unavailable. While the difference in the aims and theoretical underpinnings of human rights and negligence actions has resulted in different doctrinal requirements for establishing liability, Lord Hughes' concern is with the practical impact of liability which, in his view, raises the same public policy concerns about interfering with policing regardless of the legal basis of the duty.

[85] *McCann and Others v UK* (Application no. 18984/91) (1995) 21 EHRR 97, 178.
[86] *Commissioner of Police of the Metropolis v DSD* [2018] UKSC 11, [2019] A.C. 196, at [136].
[87] Ibid., at para. [136].
[88] Ibid.

The recent decisions in *Michael*[89] and *Robinson*[90] are important in this regard because the legal reasoning for establishing or denying a duty of care on the part of the police has shifted away from public policy arguments and more firmly onto a principled basis. The decision in *Michael* applies to the police the same principles that apply to other defendants in respect of omissions liability, rather than relying on public policy arguments as to why the police specifically should not be under a duty of care to prevent harm from being inflicted by a third party. In a Diceyan approach, the police are treated as a defendant like any other. If anything, the status of the police as a public authority arguably weighs in favour of treating them differently by imposing a duty on them in respect of omissions. Steel and Tofaris suggest:

> it must be questioned how valuable the freedom of a public authority negligently to fail to take steps to assist an identified individual at serious risk of physical injury is. A private individual's freedom arguably has intrinsic value in so far as her having freedom to do various things contributes to her having an autonomous life. By contrast, the value of the state's freedom is purely instrumental: the state's freedom is valuable only in so far as it contributes to the fulfilment of its proper functions.[91]

The obligations imposed under the ECHR arise specifically because the defendant is the state, so an argument in favour of limiting those obligations because the state is not subject to them in negligence, does not get us far when negligence law treats the state as a defendant like any other. In negligence the question is "why" impose an obligation on the police, in human rights law the question is "why not". It does not make sense to "normalise" state responsibility, by aligning it with the negligence-based obligations of individuals, in an area of law that is premised on the exceptional status of the state.

McBride suggests that an explanation for the duties that may be imposed in human rights law but not in negligence lies in what he calls a "personalist view" based on the idea that "*everyone should count for something* with the state".[92] He explains:

> on the personalist view we *do* have a right, in the case where a public body *knows* we are in danger, that it *try* to save us from harm. This duty to try is a very different duty from a duty of care, which requires the public body not just to try to save us from harm but to make a good fist of the attempt.[93]

This duty to try echoes the objective of human rights law, identified above, to secure respect for life and other rights and not solely to protect citizens from

[89] *Michael v Chief Constable of South Wales* [2015] UKSC 2, [2015] A.C. 1732.
[90] *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4, [2018] A.C. 736.
[91] Tofaris and Steel, "Negligence Liability", p. 130.
[92] N.J. McBride, "*Michael* and the Future of Tort Law" (2016) 32 P.N. 14, 28, emphasis in original.
[93] Ibid., at p. 29, emphasis in original.

harm. Risk-based liability is essential to securing this respect, while the causation requirement in negligence reflects the interpersonal responsibility at stake there. It is not necessary to agree/disagree with Lord Hughes on the boundaries of this duty of means to accept both that the rights protected by each area of law, as well as the objectives of each area of law, differ in a way that not only justifies but requires a different approach to causation (as well as to other elements of liability not explored in this paper).

In 2003, Fairgrieve stated that the award of HRA damages "is perceived as a residual remedy"[94]; this is surely no longer true. The actions complement each other by developing distinct principles that reflect the distinct rights at stake, and enabling concurrent protection of both rights where appropriate. The causal principles are a key point of difference, and we have seen that applying negligence-based causal principles in a human rights action would artificially truncate liability and fail to adequately protect the victim's human right, while encroachment of the risk-based human rights principles into negligence law is inconsistent with the interpersonal right and difficult to coherently circumscribe. Recognition of the distinct causes of action reflects the richness of the law rather than simply a failure of negligence law to develop in line with human rights law or vice versa.

IV. The ECHR Approach to Causation: Gaps and Potential Developments

Having identified the difference of approach to factual causation in negligence and the positive operational duty under Articles 2 and 3 of the ECHR, and explored the underlying reasons for this, the final section of the paper turns its focus more squarely to the jurisprudence of the ECtHR. It draws out a more fine-grained picture of the ECHR approach to causation. This will lead both to identification of issues that remain to be clarified and to insights into areas where human rights actions could be developed to protect rights more effectively than is possible in negligence.

A. Article 8 and Risks to Health

The analysis thus far has focused on the protection against risks to life and health under Articles 2 and 3. Article 8, which protects the right to private and family life, home and correspondence, also warrants comparison with negligence law because the ECtHR has developed this right to impose obligations on the state to provide individuals with information that would enable them to assess risks to their health. Although this paper criticises the court for a lack of clarity as to causal requirements, it will be suggested

[94] D. Fairgrieve, *State Liability in Tort: A Comparative Law Study* (Oxford 2003), p. 80.

that it might be beneficial for the English courts to develop the Article 8 right more fully in the healthcare context.

The Strasbourg court recently considered the Article 8 right in the context of asbestos-related injury in *Brincat and others v Malta*.[95] The applicants had been exposed to asbestos as employees of Malta Drydocks Corporation (MDC), a state-owned enterprise. Mr. Dyer was not suffering any asbestos-related disease but was at an increased risk of such diseases developing in the future as a result of his exposure. The remaining applicants were suffering from pleural plaques and the increased risk of developing mesothelioma in future as a result of their asbestos exposure, and some were suffering from asbestosis, with Mr. Abela being confined to bed for years as a result of acute respiratory problems. The court found that the state had violated the applicants' Article 8 right to private and family life by failing to provide access to essential information enabling them to assess the risk to their health and lives.

Once the violation was established, causation of the injury grounding the claim for damages for pecuniary and non-pecuniary loss was addressed fleetingly: "The Court has accepted the link between the medical conditions affecting the relevant applicants and their exposure to asbestos during the time they worked at MDC, and it thus discerns a causal link between the violation found and some of their claims in respect of pecuniary damage".[96] Ultimately these applicants failed to substantiate their claims for pecuniary loss but the court considered that the mere finding of a violation of the Article 8 right was not a sufficient remedy and awarded non-pecuniary damages of 9,000 EUR to each applicant, apart from Mr. Dyer who received 1,000 EUR and Mr. Abela who received 12,000 EUR. The lack of explanation surrounding causation is characteristic of ECtHR jurisprudence but surprising to a tort lawyer.[97] The Government had argued, based on a 2009 factsheet produced by the National Cancer Institute, "Asbestos Exposure and Cancer Risk", that the risks of developing asbestos-related disease depend on a variety of factors, including smoking,[98] and while the court noted that most of the applicants were non-smokers,[99] that implies that some of them were smokers but the court did not differentiate between the causal contribution made by asbestos to each. Sulyok therefore suggests that the court found causation to be

[95] *Brincat and others v Malta* (Application nos. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11), Judgment of 24 July 2014, not yet reported.
[96] Ibid., at para. [150].
[97] Varuhas has observed that "Strasbourg jurisprudence is renowned for its lack of principles and 'parsimonious' reasoning": "Damages under the Human Rights Act", p. 750.
[98] *Brincat and others* (Application nos. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11), Judgment of 24 July 2014, not yet reported, at [76].
[99] Ibid., at para. [12].

established "not primarily on the basis of the expert evidence but on account of widely held views on the toxic nature of asbestos".[100]

One concern with the decision in *Brincat* and doubtless many other cases, is that the ECtHR does not specify what the non-pecuniary damages relate to. This means it is unclear whether the purpose of the award was solely to vindicate the interference with the right to private and family life, or whether it also compensated physical damage and other forms of non-pecuniary loss such as mental distress. It would be helpful for the court to distinguish the vindicatory and compensatory portions of the award. Each applicant's right to private life was violated by the failure to provide information about the risks to which they were exposed, so the vindicatory portion should be consistent across the applicants. So while it may at first seem surprising that Mr. Dyer, who was not suffering any asbestos-related illness, was awarded non-pecuniary damages, the damages correspond to the direct adverse effect on his private life. Damages are higher for those suffering physical illness, but the exposure and lack of information themselves interfere with the applicant's private life to a degree that requires non-pecuniary damages in order to vindicate that right. The real concern then is that the other applicants both received 9,000 EUR when the information about their conditions early in the judgment suggests that while they both suffered pleural plaques, they were not both suffering asbestosis. The House of Lords decision in *Rothwell* was clear that pleural plaques do not constitute damage for the purposes of negligence liability since they are asymptomatic and in most cases remain so, while asbestosis produces deleterious symptoms and constitutes damage.[101] Given that the court in *Brincat* has sought to differentiate between the applicants with the most and least harm, one might expect a more fine-grained differentiation between levels of award of damages. Varuhas has argued for a tort-based approach to HRA damages, drawing on the proposition that "our courts must be free to try to give a lead to Europe as well as to be led",[102] and this seems like an area that would benefit from the more detailed assessments of quantum that take place in tort claims.

In *Guerra v Italy*,[103] the state was found to have violated the applicants' Article 8 right where they lived near to a factory emitting toxic substances and there was a failure to provide them with information about the risks, both the ongoing risks and what to do in the event of an accident. The factory itself was not operated by the state so the basis of liability was a

[100] K. Sulyok, "Managing Uncertain Causation in Toxic Exposure Cases: Lessons for the European Court of Human Rights from US Toxic Tort Litigation" (2017) 18 Vermont Journal of Environmental Law 519, 554.

[101] *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39, [2008] 1 A.C. 281.

[102] Varuhas, "Damages under the Human Rights Act", p. 754, citing HL Deb. vol. 583 cols. 513–515 (18 November 1997).

[103] *Guerra v Italy* (Application no. 116/1996/735/932) (1998) 26 EHRR 357.

positive duty to take steps in relation to a risk created by a private individual, in other words an Article 8 equivalent of the positive duty arising under Article 2 in *Osman*. The court stated that

> severe environmental pollution may affect individuals' well being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely. In the instant case the applicants waited, right up until the production of fertilisers ceased in 1994, for essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia, a town particularly exposed to danger in the event of an accident at the factory.[104]

The applicants had not shown that they suffered pecuniary losses but were awarded 10,000,000 lire (about £5,000) each for the non-pecuniary damage that they had "undoubtedly"[105] suffered.

Risk has a more limited role in establishing liability here than in Article 2 since the question is not whether the state failed to reduce the risk but merely, given the existence of the risk, whether the state failed to take steps to put information about it into the victim's hands. Wright notes that "it was not necessary for the victims to prove causation by showing that they would have moved away if they had known of the risk".[106] Where the state has failed to provide information about physical risk, that risk must exist and must be a risk to the applicant in order to engage their right to private and family life. In *Guerra* the factors considered relevant by the court focus on the proximity between the factory and the town: the short distance (the applicants lived around 1km from the factory), the ongoing emission of toxic materials, that there had been an accident in the past which resulted in 150 people being hospitalised, and that the geographical position of the factory meant that emissions were often channelled towards the applicants' town. The court explained that "the direct effect of the toxic emissions on the applicants' right to respect for their private and family life means that Article 8 is applicable".[107] In other words, Article 8 will be engaged when there is a direct risk to the applicant, and will be violated when the state has failed to provide information enabling the applicants to evaluate that risk for themselves, or even where it has failed to undertake a "genuine and procedurally fair environmental impact assessment" of an activity that presents risks to the environment which might impact on the personal lives of those living nearby.[108] The positive obligation on the state does not extend as far as taking steps to mitigate the risk, but simply involves the provision of information about the risk to

[104] Ibid., at para. [60].
[105] Ibid., at para. [7].
[106] J. Wright, *Tort Law and Human Rights*, 1st ed. (Oxford 2001), 66.
[107] *Guerra v Italy* (Application no. 116/1996/735/932) (1998) 26 EHRR 357, at [57].
[108] R.C.A. White and C. Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights*, 5th ed. (Oxford 2010), 395.

those potentially affected by it. There is certainly no requirement to show that the applicants would have taken steps to avoid the risk if they had received adequate information, and again this highlights that the obligations created by the ECHR are obligations "of means, not ends". What matters is putting the information in the applicants' hands, not what result that ultimately leads to. This highlights that the concern of Article 8 is similarly wider than risks to life or to private life, and requires states to act in a manner that shows adequate respect for the right to private life.

This leads Wright to suggest an HRA action might be an alternative source of a remedy in cases of medical non-disclosure of risk where claimants face difficulties of proof of causation in negligence.[109] The decision in *Vilnes v Norway* lends weight to this suggestion.[110] The applicants in *Vilnes* were divers suffering health problems associated with the conditions under which they dived, and the court found a violation of Article 8 in the state's failure to ensure that their employers were transparent about the diving tables they used, allowing them instead to go undisclosed in the interests of competition between the companies conducting the dives. Transparency about the diving tables and their concerns for the divers' health "constituted essential information that they needed to be able to assess the risk to their health and to give informed consent to the risks involved".[111] This focus on the provision of information required for informed consent may assist claimants struggling to prove causation in negligence in cases of medical non-disclosure of risk. An Article 8 claim would relieve them from the need to prove that the failure to disclose the risk actually affected their decision to consent to the procedure, instead needing to show simply that the information should have been disclosed in order for them to give informed consent. This would go even further than the exceptional approach adopted in *Chester v Afshar*.[112] The defendant doctor in that case had negligently failed to disclose to the claimant patient a risk inherent in the proposed operation, which materialised when the operation was performed, resulting in injury. The claimant was unable to establish causation on orthodox principles because she may still have undergone the operation if she had been properly informed of the risks; although this would have been on a different date having sought a second opinion, the inherent risks would have been the same.[113] The House of Lords exceptionally allowed her claim to succeed, and Lord Steyn justified this on the basis that the patient's "right of autonomy and dignity can and ought to be

[109] Wright, *Tort Law and Human Rights*, 1st ed., p. 67.
[110] *Vilnes and others v Norway* (Application nos. 52806/09 and 22703/10) [2013] 12 WLUK 183. I am grateful to Professor Liz Wicks for drawing this case to my attention.
[111] Ibid., at para. [244].
[112] *Chester v Afshar* [2004] UKHL 41, [2005] 1 A.C. 134.
[113] There is academic disagreement as to whether the problem was one of factual (but-for) causation or legal causation (coincidence), see G. Turton, "Informed Consent to Medical Treatment Post-*Montgomery*: Causation and Coincidence" (2019) 27 Med.L.R. 108, 118–21.

vindicated by a narrow and modest departure from traditional causation principles".[114] While this case might suggest the English courts see vindication of rights as an objective of negligence, at least in a healthcare context, it has not been applied more widely and recent decisions indicate a concern to tightly circumscribe *Chester*, insisting both that the patient suffer physical harm and that the harm be intimately connected to the duty to warn.[115] These requirements, which are consistent with wider negligence principles, act as a barrier to achieving vindication of patient rights. An Article 8 action would be a more suitable vehicle for achieving this aim, since causation of damage is not an element of liability. English courts ought, however, to continue to apply causal principles with the same rigour as in tort law if the victim seeks an award of damages in respect of physical harm that ensues so that this does not become a back-door route to achieving compensation. From a patient's perspective it may be difficult to explain the result that NHS patients would have a remedy where recipients of private medical care would not. The core concern is the patient's right to make an informed, autonomous choice, regardless of whether the defendant healthcare provider is the state. From that perspective an Article 8 claim draws an arbitrary distinction while a negligence action is an unsuitable vehicle for vindicating that right because of the causation and damage requirements. In any case it is unclear that the ECtHR would be inclined to adopt the *Guerra* approach in a case involving medical non-disclosure of risk since, as the final section now explores, the court's approach to the Article 2 right suggests a greater reluctance to impose human rights obligations in the healthcare context.

B. Article 2 and Healthcare Provision

In *Lopes de Sousa Fernandes v Portugal* the Grand Chamber of the ECtHR stated that errors in diagnosis leading to delay in treatment or delay in performing a medical intervention are not on a par with the denial of healthcare.[116] Liability may arise where there is a delay in the provision of any healthcare service, but where healthcare provision is made and performed negligently, there will not be liability unless there is a systemic deficiency in the regulatory framework. Throughout the case law on denial of healthcare provision there is a lack of clarity as to what the causal requirements are. It is also unclear whether the observations as to causation underpin the court's finding of liability or their decision as to the availability of damages.

In *Anguelova v Bulgaria*, where the applicant's son died in police custody several hours after his arrest from a skull fracture suffered prior to

[114] *Chester v Afshar* [2004] UKHL 41, [2005] 1 A.C. 134, at [24].
[115] *Diamond v Royal Devon and Exeter NHS Foundation Trust* [2017] EWHC 1495 (QB); *Correia v University Hospital of North Staffordshire NHS Trust* [2017] EWCA Civ 356.
[116] *Lopes de Sousa Fernandes v Portugal* (Application no. 56080/13) (2018) 66 EHRR 28.

arrest, in recognising liability under Article 2 in respect of the delayed provision of medical care, the court stated that the medical report had found that the delay "contributed in a decisive manner to the fatal outcome".[117] In contrast, in the more recent decision in *Mustafayev v Azerbaijan* concerning failure to provide medical care to a prisoner, the state objected that there was no link between the delayed transfer to hospital and the death of the applicant's son but the court responded that "the object of its examination is whether or not the domestic authorities fulfilled their duty to safeguard the life of the applicant's son by providing him with proper medical treatment in a timely manner".[118] This difference was not explained by the court. Perhaps it is the case that where causation is present it will be noted, but is not required for liability to be established, although this does not explain why both cases resulted in similar awards of non-pecuniary damages.[119] The decision in *Mustafayev* suggests that, as in other contexts, the focus in cases of failure to provide medical care is on respect for the right to life through provision of appropriate medical treatment, rather than specifically whether the lack of provision actually resulted in death. It is also possible that the court's approach to causation is more relaxed in cases arising from failure to provide healthcare to a person in custody. White and Ovey observe that

> the protection afforded by Article 2 would be of no value if a State could avoid international sanction by concealing the evidence of killings caused by its agents. Where an individual is known to have been taken into custody and subsequently disappears or is found dead, therefore, it is logical that a heavy burden should fall on the State to establish an innocent explanation.[120]

In cases arising squarely in a healthcare context, where medical treatment is provided but is alleged to involve some systemic deficiency, it appears that there is a causal requirement but again this area is characterised by a lack of consistency and clarity. In *Lopes de Sousa Fernandes*, the court used the vague terminology of "a link": "there must be a link between the dysfunction complained of and the harm which the patient sustained".[121] The earlier Chamber decision had held that "Without wishing to speculate on the applicant's husband's prospects of survival if his meningitis had been diagnosed earlier" the hospital's negligence had deprived the applicant's husband of access to appropriate emergency care so found a breach of Article 2.[122] A "link" appears to be a very loose concept. Yet the Grand

[117] *Anguelova v Bulgaria* (Application no. 38361/97) (2004) 38 EHRR 31, at [125].
[118] *Mustafayev v Azerbaijan* (Application no. 47095/09), Judgment of 4 May 2017, not yet reported, at [65].
[119] €19,050 in *Anguelova v Bulgaria* (Application no. 38361/97) (2004) 38 EHRR 31 and €20,000 in *Mustafayev v Azerbaijan* (Application no. 47095/09), Judgment of 4 May 2017, not yet reported.
[120] White and Ovey, *The European Convention*, p. 147. See e.g. *Sheppard v Home Office* [2002] EWCA Civ 1921, at [13]; *Salman v Turkey* (Application no. 21986/93) (2002) 34 EHRR 17, at [99].
[121] *Lopes de Sousa Fernandes v Portugal* (Application no. 56080/13) (2018) 66 EHRR 28, at [196].
[122] Ibid., at para. [114].

Chamber later went on to state that it had not been established that there was a structural or systemic failing, about which the authorities knew or ought to have known, and "and that such a deficiency contributed decisively to the death of the applicant's husband".[123] This suggests that risk creation is not sufficient in this context, and that an actual causal link to the death is required for liability to arise.

Yet the meaning of a "causal link" in this context requires further elucidation. In *Aydoğdu v Turkey*, the court explicitly found that a causal link existed between the systemic failings and the death of the applicant's baby,[124] on the basis that the authorities had not done what could reasonably be expected of them to protect the baby's life from a real risk, whilst still stating that it was not necessary to speculate on the baby's chances of survival given proper treatment.[125] Similarly in *Asiye Genç v Turkey*, where a lack of neonatal care facilities meant that the applicant's baby was sent back and forth between hospitals with each refusing to admit him, the court held that

> while it is inappropriate to speculate as to the baby's chances of survival had he received immediate treatment, the court notes that, in spite of the above risk, the staff members in question did not take the necessary measures to ensure that the patient would be properly cared for at the KTÜ Farabi public hospital before deciding to transfer him there.[126]

This contrasts with negligence law where the patient's chances of survival are central to determining whether, on the balance of probabilities, she or he would have died even with proper treatment.[127]

It appears that in cases involving systemic failings in the provision of healthcare, there is a causal requirement, in that the court generally insists that the systemic failings have "caused" the victim's death. Yet it is clear from the fact that the court generally declines to speculate as to the victim's chances of survival given proper treatment, that this is not the same as the causation requirement in negligence. Instead, it seems to indicate that in the healthcare context death is required. In contrast to, for example *Makaratzis*,[128] it is insufficient that the state's failings merely expose the victim to a risk to their life which they ultimately survive. But this "causal" requirement will be satisfied by proof that the state failed to take steps that could reasonably be expected of it to protect the victim from a risk to their life, and the fact

[123] Ibid., at para. [201].
[124] *Aydoğdu v Turkey* (Application no. 40448/06), Judgment of 30 August 2016, not yet reported: "un lien de causalité se trouve donc également établi entre le décès déploré en l'espèce et les problems structurels susmentionnés" (at [88]).
[125] Ibid.: "Sans devoir spéculer sur les chances de survie de la petite fille si elle avait bénéficié d'une prise en charge immédiate et adéquate" (at [83]).
[126] *Asiye Genç v Turkey* (Application no. 24109/07), Judgment of 27 January 2015, not yet reported, at [78].
[127] *Gregg Scott* [2005] UKHL 2, [2005] 2 A.C. 176.
[128] See the text accompanying note 13 above.

that the victim died. This amounts to something akin to a *Fairchild* approach in that it must be shown that the defendant exposed the victim to a risk to their life *and* that harm materialised which was within the scope of that risk. By avoiding speculation as to the victim's chances of survival the court avoids suggestions that it is the loss of the chance rather than the death that is the relevant outcome being compensated by any award of damages. A possible explanation of the opacity as to causation lies in the earlier discussion in relation to the South African decision in *Lee*. There we saw that where the fault of the state consists of systemic failings, proof of causation is problematic because the state enjoys a margin of appreciation as to how to fulfil its obligations so it is not appropriate to posit a single alternative system for the purposes of the counterfactual analysis of causation. This may explain the court's refusal to speculate as to the victim's chance of survival in the healthcare cases. If this is the case, it would be preferable for the court to avoid causal language such as "contributed decisively to the death" and state explicitly that it suffices that the state's systemic failings increased the risk of death and that death within the scope of that risk occurred. Yet it is difficult to reconcile this damage requirement with the vindicatory objective of human rights liability.

V. Conclusion

The aims of this paper were twofold: to establish a clearer picture of what the ECHR/HRA approach to causation entails and how it differs from that in negligence, and to consider whether the differing objectives of liability that are oft-cited as a rationale for any divergences really are capable of explaining the different causal requirements. On the first point we now have a clearer picture of how causation is addressed in human rights claims and how this leads to different results from factually similar negligence claims. There is, however, a need for greater clarity from the ECtHR as to the causal requirements, if any, in the healthcare context and how this fulfils the aims of human rights liability. In particular, the court ought to clarify whether any causal requirements are relevant to liability or merely to damages, and when awarding non-pecuniary damages should delineate between those that vindicate the right that has been violated and those that compensate for consequential loss.

From this base of understanding of the law it has been possible to appreciate the function of the causation inquiry within the two areas of law and see that the different approaches can be explained in a coherent way by reference to the different rights protected and the different aims of liability. This has implications both for human rights law and negligence law. Where the ECtHR appears to have adopted a damage requirement for Article 2 actions in a healthcare context, this risks frustrating the objective of Article 2 which is to secure respect for life in addition to protecting the

sanctity of life. Greater clarity is needed as to whether damage is strictly required for liability to arise in that context and how this is to be justified. Looking more widely, in the context of the negligence liability of public authorities, in particular the police, the insights acquired as to the function of causation within the different rights add weight to the case for separate development of negligence and human rights liability. This has been the clear position of the courts, and Nolan, among others, has argued that convergence between negligence and human rights law is not only unnecessary, but that it is also not desirable.[129] While we have seen that Wright is critical of "formalistic reasoning", making the case that negligence actions against the police do raise human rights issues so that negligence principles should be developed to reflect the human rights aspects of the claims,[130] this paper has highlighted that elements such as the causation requirement are not simply formalistic but reflect the objective and rights at stake. Nolan's view is that the argument for convergence is based on the false assumption that negligence and human rights law serve the same purpose.[131] As their purposes actually differ, convergence would "weaken [the] structural underpinnings [of negligence] and cut across its core principles" so separate development is necessary to preserve the coherence of negligence law.[132] In elucidating not only the different approaches to causation but also how those approaches fulfil the different functions of the causal requirements which further reflect the objectives and rights in question, this paper adds weight to the case for separate development. If the duty of care owed by police in negligence were to be extended to cover situations like *Osman* and *Sarjantson*, this would result in incoherence. One possibility is that the orthodox rules of causation would continue to apply but would constitute an artificial barrier to protecting the right to life. The alternative is the relaxation of the rules of causation, as has occurred in South Africa in *Lee*, and courts would then be faced with the task of defining when this exceptional approach should apply. Instead, separate development reflects the richness of English law and maintains the coherence of both areas of law while allowing the distinct aims of each to be achieved, and causation is a key aspect of this.

[129] D. Nolan, "Negligence and Human Rights Law: The Case for Separate Development" (2013) 76 M.L.R. 286.
[130] See the text accompanying note 28 above.
[131] Nolan, "Negligence and Human Rights Law", pp. 293–97.
[132] Ibid., at p. 287.

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Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights

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ABSTRACT

The issue of causation has been surprisingly overlooked in the area of international human rights law. The objective of this article is to fill this gap by investigating how the ECtHR finds causal connections between harm and state omissions within the framework of positive obligations. By engaging with causation, this article seeks to partially address the widely voiced concerns about the indeterminacy that clouds positive obligations in the case law. Four main arguments are articulated. First, assessments whether the state knew, or ought to have known, about the (risk of) harm, whether demanding state action is reasonable and whether harm is caused by state failures, are merged and affect each other in the enquiry as to whether the state has failed to fulfill its positive obligations. Secondly, the level of state control structures lines of causation. Thirdly, since the question as to how much control the state should have could imply normative judgments in which the Court might not want to see itself implicated, and since empirical and epistemological uncertainly might hamper assessments of causation, the Court has recourse to techniques to avoid direct resolution of these normative issues and uncertainties. Two such techniques are discussed: domestic legality and national procedural guarantees. Finally, even in cases where omissions might be causative to harm, additional considerations might militate against finding the state responsible under the ECHR: reasonableness, no immediacy of the harm and no systemic failures.

KEYWORDS: human rights, positive obligations, causation, reasonableness, European Convention on Human Rights

1. INTRODUCTION

Positive obligations have penetrated all parts of the European Convention on Human Rights (ECHR or the Convention) and there are no *a priori* limits to the

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contexts in which they may be found to arise.[1] Due to their considerable importance, scholarly contributions have focused on different areas covered by positive obligations, such as domestic violence and other forms of interpersonal violence,[2] environmental pollution[3] or socio-economic assistance.[4] Efforts to systematize positive obligations as developed in the case law have also been made.[5] There has also been extensive discussion of certain principles that affect these obligations, such as subsidiarity,[6] margin of appreciation[7] and proportionality.[8] The role of causation, however, has been hitherto largely neglected. No analysis has been offered as to how the Court (ECtHR) finds causal connections between harm and state omissions. Filling this gap is the aim of this article.

The importance of addressing this blind spot relates to the general uncertainty that clouds positive obligations. The ECtHR has not proposed a general analytical framework for reviewing them and has explicitly refused 'to develop a general theory of the positive obligations which may flow from the Convention.'[9] Perhaps as a consequence, it has been observed that the ECtHR's approach to positive obligations is incoherent and even arbitrary, which is not conductive to certainty and predictability.[10]

1 Costa, 'The European Court of Human Rights: Consistency of its Case-Law and Positive Obligations' (2008) 26 *Netherlands Quarterly of Human Rights* 449 at 453.

2 Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States' Positive Obligations in European Law* (2017) at 319; McQuigg, 'Domestic Violence as a Human Rights Issue: *Rumor v. Italy*' (2016) 26 *European Journal of International Law* 1009.

3 Koch, *Human Rights as Indivisible Rights: The Protection of Socio-economic Demands under the European Convention on Human Rights* (2009); Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004) at 181.

4 Generally, authors have broken down their analysis depending on the specific subject areas covered in the case law: see Haijev, 'The Evolution of Positive Obligations under the European Convention on Human Rights – by the European Court of Human Rights' in Spielmann, Tsirli and Voyatzis (eds), *The European Convention on Human Rights: A Living Instrument. Essays in Honour of Christos L. Rozakis* (2011) 207.

5 The ECtHR itself has referred to two types of positive obligations: procedural and substantive: see *Öneryildiz v Turkey* Application No 48939/99, Merits and Just Satisfaction, 30 November 2004 [GC] at paras 89–96; Dröge, *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention* (2003); Starmer, 'Positive Obligations under the Convention' in Jowell and Cooper (eds), *Understanding Human Rights Principles* (2001) 139; Mowbray, supra n 3.

6 See *O'Keeffe v Ireland* Application No 35810/09, Merits and Just Satisfaction, 28 January 2014 [GC], where Judges Zupanicic, Gyulumyan, Kalaydjieva, De Gaetno and Wojtyczek in their Partly Dissenting Opinion (at para 7) observed how the scope of the positive obligations is affected by the principle of subsidiary.

7 Kratochvil, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) 29 *Netherlands Quarterly of Human Rights* 324; *Lambert and Others v France* Application No 46043/14, Merits and Just Satisfaction, 5 June 2015 [GC] at paras 144–148 (discussion of the margin of appreciation in the context of positive obligations).

8 Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (2009); Klatt and Meister, *The Constitutional Structure of Proportionality* (2012) at 86.

9 *Plattform Arzte fur das Leben v Austria* Application No 10126/82, Merits and Just Satisfaction, 21 June 1988 at para 31; Mowbray, supra n 3 at 221.

10 Hakimi, 'State Bystander Responsibility' (2012) 21 *European Journal of International Law* 341 at 349. Since the Court has justified positive obligations with the principle of effectiveness, Pieter van Dijk has observed that there are no clear-cut criteria for determining whether and when effectiveness will be achieved: see Dijk, '"Positive Obligations" Implied in the European Convention on Human Rights: Are the States Still the 'Masters' of the Convention?' in Castermans-Holleman, van Hoof and Smith (eds), *The Role of the Nation-State in the 21st Century. Human Rights, International Organizations and Foreign Policy. Essays in Honour of Peter Baehr* (1998) 17 at 22. On the unpredictability of the ECtHR's reasoning in relation to positive obligations, see also the Dissenting Opinion of Judge Kalaydjieva in *Söderman v*

One is left with the impression that the Court simply makes *in casu* judgments when dealing with positive obligations, and that it is hard to direct and structure these by extracting distinctions as to the steps taken and the principles applied. The quality of the Court's reasoning has also been criticized. It has been noted that the problem with positive obligations is that 'their proper scope appears open-ended' and the Strasbourg court 'does not set general conceptual limitations' for its interventions in developing them.[11] It has been added that such an approach 'put[s] the concept of positive obligations into disrepute.'[12]

By engaging with causation, this article seeks to partially address the above concerns. While the problem of indeterminacy cannot be eliminated[13] and in fact, should not be conclusively resolved,[14] there are certain elements identifiable in the judgments which determine the intensity of the positive obligations.[15] In this contribution, I focus on the element of causation as also related to the elements of knowledge and reasonableness. Causation implies some nexus/proximity between the harm sustained by the applicant (harm that falls within the definitional scope of one of the protected rights) and the alleged omission by the state to ensure the right. The issue of causation has been extensively addressed in other areas of law, but surprisingly neglected in the area of international human rights law.[16] However, causation is essential for understanding positive obligations and responding to the above mentioned concerns as to the elusiveness of their scope.

Any engagement with causation has to start with the awareness that ascribing causality in human society is fraught with complexities.[17] There has been a clear

Sweden Application No 5786/08, Merits and Just Satisfaction, 12 November 2013 [GC]. See also Gerards and Brems, 'Introduction' in Brems and Gerards (eds), *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (2014) 1.

11 Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (2011) at 3; Than, 'Positive Obligations under the European Convention on Human Rights: Towards the Human Rights of Victims and Vulnerable Witnesses' [2003] *Journal of Criminal Law* 165 at 178.

12 Thielbörger, 'Positive Obligations in the ECHR after the *Stoicescu* Case: A Concept in Search of Content?' [2012] *European Yearbook on Human Rights* 259 at 261.

13 The Court has to navigate among different tensions and considerations: see Christoffersen, 'Individual and Constitutional Justice: Can the Power Balance of Adjudication be Reversed?' in Christoffersen and Madsen (eds), *The European Court of Human Rights between Law and Politics* (2011) 181.

14 Rights have a 'dynamic aspect' since they can generate new duties, which is fundamental for the understanding of their nature and function: see Raz, 'On the Nature of Rights' (1984) XCIII *Mind* 194 at 200. The strength of this approach is that it allows for flexibility for the emergence of new duties and the adaptation of the duties in light of the context and societal developments: see Report on the Right to Adequate Food as a Human Right submitted by Mr Asbjørn Eide, E/CN.4/Sub.2/1987/23, 7 July 1987 at para 47. On the dynamic aspect of rights, see also Gerards, 'The Prism of Fundamental Rights' (2008) 8 *European Constitutional Law Review* 173 at 178.

15 See also Hakimi, supra n 10 at 341, who has tried to identify such elements in the context of positive obligations under international law more generally.

16 McGrogan, 'The Problem of Causality in International Human Rights Law' (2016) 65 *International and Comparative Law Quarterly* 615 (the author argues that the UN monitoring system should focus on what can be known 'rather than on abstract, aggregated quantitative measurements where causality cannot be plausibly attributed.'); Rigaux, 'International Responsibility and the Principle of Causality' in Ragazzi (ed.), *International Responsibility Today. Essays in Memory of Oscar Schachter* (2005) 81; Lavrysen, *Human Rights in a Positive State* (2016) at 137.

17 Ho and Rubin, 'Credible Causal Interference for Empirical Legal Studies' (2011) 7 *Annual Review of Law and Social Science* 17.

acknowledgment that causality by omission is hard to ascertain. National law has struggled with issues of causality by omission[18] and philosophy has also struggled with this issue.[19] A further problem is that causality by omission implies a counterfactual and speculative analysis. It might be possible to identify different omissions that might have causal connections to the harm.[20] The role of normativity and policy considerations when determining causality has been also noted.[21] The issue of causality is also fraught with difficulties from an evidential point of view since determining causality might be a highly factual process.

The ECtHR is certainly confronted with all these challenges that can be also related to the uncertainties about the scope and the intensity of the positive obligations generated by the ECHR. In this article, I will show how the ECtHR approaches these challenges. Section 2 will elaborate on the question as to why causation is significant in the context of positive obligations under the ECHR. Since the establishment of causation is related to the determination whether the state knew or should have known about harm or risk of harm, Section 3 will discuss the interrelationship between causation on the one hand, and knowledge and foreseeability on the other. Even if harm or risk of harm is foreseeable, the Court can still verify the place of state omissions in the chain of events. For this purpose, however, no clear test of causation has been articulated, as Section 4 will show. Against this backdrop, I suggest that inspiration from other areas of the law on state responsibility could be useful. Section 5 thus draws a parallel with the rules on attribution in international law. Since these rules express lines of proximity, it is useful to assess their underlying justifications so that we better understand the linkages between harm and state conduct. More specifically, the rules on attribution are founded on the principle that control implies responsibility and the same principle can be extended in the context of positive obligations. Accordingly, the degree of control exercised by the state is essential for assessing lines of causation. This is also reflected in the case law of the Court.

Since the question as to how much control the state should have could imply normative judgments in which the Court might not want to see itself implicated, and since empirical and epistemological uncertainly might hamper assessments of causations, the Court can resort to techniques that avoid the direct resolution of these normative issues and uncertainties. Section 6 will identify two such techniques: domestic legality and procedural guarantees. Finally, Section 7 will demonstrate that an additional corrective can be used, namely the test of reasonableness, which permeates the whole case law on positive obligations. The last implies that even in cases of clear causal connections between harm and state omissions, it might be unreasonable to expand the scope of the positive obligations to such as an extent as to lead to state responsibility. Section 7 will also discuss two other techniques for limiting state

18 Fairgrieve, 'Pushing the Boundaries of Public Authority Liability' in Fairgrieve, Andenas and Bell (eds), *Tort Liability of Public Authorities in Comparative Perspective* (2002) 475 at 494; Booth and Squires, *The Negligence Liability of Public Authorities* (2006).

19 Husak, 'Omissions, Causation and Liability' (1980) 30 *Philosophical Quarterly* 318.

20 McGrath, 'Causation by Omissions: A Dilemma' (2005) 123 *Philosophical Studies* 125.

21 Steel, 'Causation in Tort Law and Criminal Law: Unity and Divergence?' in Dyson (ed.), *Unravelling Tort and Crime* (2014) 239; Fumerton and Kress, 'Causation and the Law: Preemption, Lawful Sufficiency, and Causal Sufficiency' (2001) 64 *Law and Contemporary Problems* 83.

responsibility: the 'real and immediate risk' test and the requirement for systemic as opposed to incidental failures.

A brief note regarding methodology is due. In the selection of case law, priority is given to judgments under Articles 2, 3 and 8 of the ECHR delivered by the Grand Chamber. I have also analysed Chamber judgments, including those that are given prominence in the existing literature as heralding important developments concerning positive obligations. Although there are areas that have remained uncharted in this article,[22] the selected case law can adequately serve the purpose of exploring the role of causation in the context of positive obligations. The method employed here is to both reflect upon and explain the approach taken by the Court. At certain points, however, I do take a critical approach to the case law. I extend the limits of my descriptive approach in the face of some inconsistencies within the case law and inadequacies as to how the Court has grappled with some issues that demand more serious consideration in the future.

2. WHY DOES CAUSATION MATTER?

Identifying the causation between harm and state omission is crucial for finding the respondent state responsible for that omission under the ECHR. This was clearly exemplified in *L.C.B. v United Kingdom,* a case demonstrative of a failure to establish this connection. The applicant sought to attribute her leukemia to her father's exposure to radiation from atmospheric tests of nuclear weapons during his military service. She claimed that the failure by the state to warn her parents of the possible risk to her health caused by her father's participation in the nuclear tests, and its earlier failure to monitor her father's radiation dose levels, gave rise to violation of Article 2. The Court did not dispute that the respondent state was generally under a positive obligation to protect the right to life. Accordingly, it defined its task as determining whether 'given the circumstances of the case, the state did all that could have been required of it to prevent the applicant's life from being avoidably put at risk.' The Court could not, however, establish a connection between any omission by the state and the disease from which the *particular* applicant suffered: '[I]t is clearly uncertain whether monitoring of the applicant's health *in utero* and from birth would have led to earlier diagnosis and medical intervention such as to diminish the severity of her disease.'[23] *Botta v Italy* is another case where the absence of proximity was decisive. The applicant complained that the state had failed to take measures to remedy omissions imputable to private bathing establishments, which prevented disabled people from gaining access to the beach and the sea. The Court found that there was no 'direct and immediate link' between the measures sought by the applicant and his rights under Article 8 of the ECHR.[24]

Causality and its function in the case law of the Court have not received adequate consideration in the existing literature. Benedetto Conforti, a former judge of the Court, is among the few who have noted its importance:

22 Such an area is, for example, the extraterritorial application of positive obligations: see *Ilascu and Others v Moldova and Russia* Application No 48787/99, Merits and Just Satisfaction, 8 July 2004 [GC] at para 317.

23 *L.C.B. v United Kingdom* Application No 14/1997/798/1001, Merits and Just Satisfaction, 9 June 1998 at para 40.

24 *Botta v Italy* Application No 153/1996/772/973, Merits and Just Satisfaction, 24 February 1998 at paras 34–35.

> A conclusion that can be drawn from the Strasbourg case-law is that no violation is found in cases where there is *lack of a causal link between the behaviour of the State and the event.* The same reasoning applies to cases where the event is not 'the immediate consequences of state behaviour', i.e. where the State omission is too remote in the chain of the various circumstances which led to the final wrongful event. . . . Couched in simple terms, in the opinion of the present author, the causation, as it appears in the case-law of the Court concerning the obligations of prevention, is strictly linked to the '*foreseeability*' of the wrongful event. It is an *ex post* test of 'foreseeability' of the event: even if the event was predictable there is still room, even after the wrongful event occurred, for verifying its place in the chain of events.[25]

Conforti correctly draws attention to the interdependence between foreseeability of the harm and the imputability of the harm to an omission by the state. States are certainly not omniscient entities and it cannot be expected from them to know about and foresee any potential harm that individuals might suffer. It must therefore be established that the state knew or ought to have known about the harm.[26] Accordingly, the establishment of causation is related to the establishment of knowledge.[27]

3. KNOWLEDGE AND CAUSATION

It is important to clarity two points in relation to the knowledge requirement. First, it is not necessary to prove actual knowledge; it suffices to demonstrate that the state should have known about the harm.[28] Secondly, the knowledge requirement operates differently in different contexts. In some circumstances, knowledge that a *specific* individual might be harmed has to be established.[29] In other circumstances, however, this will be too demanding, since the applicant might simply be a representative victim of some general failure in the national regulatory system.[30] In these circumstances, it suffices to establish that the state knew or ought to have known that this system caused harm. It is not necessary to show that the state knew or ought to have known that the *particular* applicant would be negatively affected.[31] It

25 Conforti, 'Exploring the Strasbourg Case-Law: Reflections on the State Responsibility for the Breach of Positive Obligations' in Fitzmaurice and Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (2004) 129 at 134–5 (emphasis added); Conforti, 'Reflections on State Responsibility for the Breach of Positive Obligations: The Case-Law of the European Court of Human Rights' (2003) 13 *Italian Yearbook of International Law* 3 at 3.

26 *Rantsev v Cyprus and Russia* Application No 25965/04, Merits and Just Satisfaction, 7 January 2010 at para 222; *Mastromatteo v Italy*, Application No 37703/97, Merits and Just Satisfaction, 24 October 2002 [GC] at para 76. See also Stoyanova, 'Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the *Rantsev* Case' (2012) 30 *Netherlands Quarterly of Human Rights* 163.

27 Xenos has also linked the elements of knowledge and causation: see Xenos, supra n 11 at 76.

28 *O'Keeffe v Ireland*, supra n 6 at para 144.

29 See Section 7.A where the obligation to take protective operational measures is addressed.

30 *Brincat and Others v Malta* Application No 60908/11, Merits and Just Satisfaction, 24 July 2014 at para 111.

31 The Court sometimes confuses the two contexts. See Section 7.B below.

might be enough to demonstrate that the state knew or ought to have known about the *source* of the harm.[32]

How is knowledge of an organisational entity such as the state established? The mere existence of legislation against certain harms suffices for concluding that the state knew about these harms.[33] The Court has also referred to the standard of 'objective scientific research',[34] to various reports that might have been drafted at national level, and to various channels of communication between state institutions.[35] The state is to a certain extent involved in many activities, such as issuing permits,[36] which might also facilitate the establishment of knowledge.

As Lavrysen has argued, knowledge is not a static issue, and the state should constantly anticipate new harms.[37] On the other hand, the existence of knowledge and its accuracy might be contingent on state resources, which warns against unreasonable expectations concerning the state's capacity to augur potential harms. This unavoidably has an impact in assessing whether these harms bear nexus with the state. In this context, the Court has not yet fully appreciated the following distinction: whether the question as to when the authorities 'ought to have known' of the existence of a risk can be answered by asking whether (i) they ought to have correctly assessed the risk based on the information they would have had if they had carried out their duties with due diligence or, instead, (ii) they ought to have known of the risk based on the information that was in fact available to them. The first alternative presupposes that the authorities actually had duties, which might be a premature conclusion since it might be also contingent on the reasonableness of imposing such duties.[38] This can explain the reluctance of the Court to make fine distinctions and instead to bundle issues of knowledge, reasonableness and causation in its assessment of state responsibility in the framework of positive obligations. The merging of these elements will resurface as an issue at various other points below. Knowledge and causation are intertwined elements also because in some circumstances the degree of foreseeability of the harm might be such that it is from that alone that the requisite proximity between the harm and the state can be deduced. Still, it is helpful to maintain the distinction between the different elements, since in other circumstances it would make little sense to enquire what measures could have prevented

32 *K.U. v Finland* Application No 2872/02, Merits and Just Satisfaction, 2 December 2008 at para 48.

33 In *O'Keeffe v Ireland*, supra n 6 at para 168, the GC established that the respondent state was aware in the 1970s of risks associated with sexual abuse of children by adults through, *inter alia,* 'its prosecution of such crimes at a significant rate'. A similar approach was applied in *Brincat and Others v Malta,* supra n 30 at para 105, where the Court accepted that as early as 1987 laws were adopted to protect employees from asbestos and therefore since that date the state knew about the dangers associated with this substance.

34 *Brincat and Others v Malta,* supra n 30 at para 106.

35 *Nencheva v Bulgaria* Application No 48609/06, Merits and Just Satisfaction, 18 June 2013 at paras 121–2.

36 *Cevriogli v Turkey* Application No 69546/12, Merits and Just Satisfaction, 4 October 2016 at para 68.

37 Lavrysen, 'Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect the ECHR Rights' in Brems and Haeck (eds), *Human Rights and Civil Rights in the 21st Century* (2014) 69.

38 In some circumstances an initial assumption that the authorities had duties, and therefore ought to have known about risks of harm, might be warranted: see *Premininy v Russia* Application No 44973/04, 10 February 2011 at para 85 (prisoner beaten by other prisoners).

the harm, if the state authorities did not know about the risk of such harm in the first place.[39]

4. THE STANDARD OF CAUSATION

What standard of causation has been applied in the case law? Ugrekhelidze, a former judge of the Court, has noted:

> It must be ascertained whether the violation would have been avoided had the relevant positive obligations been duly honoured, i.e. whether that is a causal connection between the failure to honour them and the violation. This is necessary in order for the attribution of international legal responsibility to a State to have a solid objective legal basis.[40]

Framing causation as requiring an affirmative answer to the question whether 'violation would have been avoided', as proposed in the above quotation, is however problematic for the following reason. It appears that Ugrekhelidze assumes that the cause of the harm is the state omission and the consequence of this omission is the harm. These strict causality links are an erroneous reflection of the requirement for proximity between the harm and the state conduct as developed in the case law. The omission by the state might be just one factor contributing to the occurrence of the harm. The 'but for' test, which means that but for the state failure the harm would not have happened, has been explicitly rejected by the ECtHR.[41] From the perspective of the individual who claims to be a victim of a human rights violation, it would be too demanding and, ultimately, it might be impossible to prove that if the state had adopted effective protective measures, the abuse would not have happened.[42] In short, there is no requirement that but for the omission, harm would not have materialized.

Yet as highlighted in Section 2 above, there needs to be a proximity between the harm and the state omission, and the Court has formulated the following standard to this effect: 'A failure to take reasonably available measures which could have had a *real prospect* of altering the outcome *or* mitigating the harm is sufficient to engage the responsibility of the State.'[43] Avoidance of the harm and its mitigation are

39 *Van Colle v United Kingdom* Application No 7678/09, Merits and Just Satisfaction, 13 November 2012 at para 96, where the Court determined that the harm was not foreseeable in the first place. See also *Hiller v Austria*, Application No 1967/14, Merits and Just Satisfaction, 22 November 2016 at para 53 (the psychiatric hospital staff could not have foreseen that a patient will escape and commit suicide).

40 Ugrekhelidze, 'Causation: Reflection in the Mirror of the European Convention on Human Rights (A Sketch)' in Calflisch, Callewaert, Liddell, Mahoney and Villeger (eds), *Liber Amicorum Luzius Wildhaber Human Rights–Strasbourg Views* (2007) 469 at 476.

41 See *E. and Others v United Kingdom* Application No 33218/96, Merits and Just Satisfaction, 26 November 2002 at para 99.

42 *Salakhov and Islyamova v Ukraine* Application No 28005/08, Merits and Just Satisfaction, 14 March 2013 at para 181 ('Whether or not the authorities' efforts could in principle have averted the fatal outcome in the present case is not decisive for this conclusion [failure to discharge a positive obligation]. What matters for the Court is whether they did everything reasonably possible in the circumstances, in good faith and in a timely manner, to try to save the first applicant's life.')

43 *O'Keeffe v Ireland*, supra n 6 at para 149; *Opuz v Turkey* Application No 33401/02, Merits and Just Satisfaction, 9 June 2009 at para 136; *Premininy v Russia* Application No 44973/04, Merits and Just

formulated as alternatives, which leads to further relaxation of the standard. In addition, the undertaking of protective measures by the state might only have had a real prospect of avoiding or mitigating the *risk* of harm, which adds further flexibility to the causation analysis. For example, in *O'Keeffe v Ireland,* the enquiry was framed as to whether 'effective regulatory framework of protection in place before 1973 might "judged reasonably, have been expected to avoid, or at least, minimise *the risk or the damage* suffered" by the present applicant.'[44]

The Court does not consistently refer to the 'real prospect' test in all of its judgments, though. Note in this respect that the Court uses different expressions in order to refer to the causation between the harm and any omissions. For example, in *Vilnes and Others v Norway* it framed the question as to whether harm is 'caused', 'attributable' or 'imputable to any specific shortcomings for which he [the applicant] criticized the State.'[45] This question was asked without considering the degree of likelihood that the absence of these shortcomings would have mitigated the harm or the risk of harm. In *Budayeva and Others v Russia,* the review was framed as whether 'there was a causal link' between the serious administrative flaws that impeded the implementation of the land-planning and emergency relief policies and the death and the injuries sustained by the applicants.[46] The Court has also used the expressions 'direct causal link',[47] 'direct and immediate link'[48] and 'strong enough link'.[49] The term 'nexus' has been also utilized: '[t]he combination of these factors shows a *sufficient nexus* between the pollutant emissions and the State to raise an issue of the State's positive obligation under Article 8 of the Convention.'[50] The expressions 'due to'[51] and 'can be linked directly' have also been used.[52] In *E. and Others v United Kingdom*, the Court referred to the standard of 'significant influence': the failings of the relevant authorities disclosed in the case 'must be regarded as having had a significant influence on the course of events.'[53] In contrast, in *Makaratzis v Greece,* it was observed that the deficiencies in the legal and administrative framework had a

Satisfaction, 10 February 2011 at para 84; *Bljakaj and Others v Croatia* Application No 74448/12, Merits and Just Satisfaction, 18 September 2014 at para 124 [emphasis added].

44 Supra n 6 at para 166. See also *E. and Others v United Kingdom* supra n 41 at para 100.

45 Application No 52806/09 and 22703/10, Merits and Just Satisfaction, 5 December 2013 at paras 225 and 229.

46 Applications Nos 15339/02 et al., Merits and Just Satisfaction, 20 March 2008 at para 158.

47 *Dodov v Bulgaria* Application No 59548/00, Merits and Just Satisfaction, 17 January 2008 at para 97.

48 *Draon v France* Application No 1513/03, Merits and Just Satisfaction, 6 October 2005 [GC] at para 106. A clarification as to the application of the 'direct and immediate link' test in the context of Article 8 is due here. The Court seems to use the test to also determine whether the definitional threshold of Article 8 can be engaged in the first place. This can be related to the tendency of collapsing the definitional threshold enquiry, on the one hand, with the enquiry about the triggering and scope of positive obligations, on the other: see Gerards and Senden, 'The Structure of Fundamental Rights and the European Court of Human Rights' (2009) 7 *International Journal of Constitutional Law* 619.

49 *Dubetska and Others v Ukraine* Application No 30499/03, Merits and Just Satisfaction, 10 February 2011 at para 123.

50 *Fadeyeva v Russia* Application No 55723/00, Merits and Just Satisfaction, 9 June 2005 at para 92 [emphasis added].

51 *Stoyanovi v Bulgaria* Application No 42980/04, Merits and Just Satisfaction, 9 November 2010 at para 61.

52 *Giuliani and Gaggio v Italy* Application No 23458/02, Merits and Just Satisfaction, 24 March 2011 [GC] at para 253.

53 Supra n 41 at para 100.

'*bearing* . . . on the way in which the potentially lethal police operation culminating in the applicant's arrest was conducted.'[54] In *Hiller v Austria*, the Court found that 'M.K.'s escape [from psychiatric hospital] and subsequent suicide had not been foreseeable for the hospital and was not therefore attributable to it;' this is a formulation that echoes the above discussion about the interdependence between foreseeability and causation.[55]

It is doubtful whether these various terms reflect any differences in the substance of the analysis, varying scrutiny as to the proximity element and different standards of causation. The Court has not developed anything close to a consistent terminology. Overall then and despite the usage of the 'real prospect' standard that appears to offer a more principled approach, uncertainty pervades the case law.

5. CONTROL AND CAUSATION

A. The Rules on Attribution

Against the backdrop of the above tangle and intricacy in the case law, the question emerges whether it is possible to find some structure by drawing inspiration from other areas of the law on state responsibility. Within the framework of state responsibility, issues of proximity arise in contexts other than positive obligations.[56] More specifically, the rules of attribution in general international law themselves reflect lines of proximity. Attribution as defined in the International Law Commission (ILC) Draft Articles reflects rules for connecting conduct to the state.[57] The rationale behind these rules is 'limiting responsibility to conduct which engages the State as an organization.'[58] As I will show below, the role of proximity in the realm of positive obligations is very similar: limiting the responsibility of the state to circumstances where the state is engaged in the harm as an organization. It needs to be acknowledged, however, that once attribution is established, the causation between state action and harm is evident. In contrast, in the context of positive obligations and claimed omissions, the lines of causation might not be that easily discernible and might raise challenges.

The rules on attribution connect agents and entities to the state. Conduct is attributable to the state when committed by its actual organs[59] and *de facto* organs[60]

54 Application No 50385/99, Merits and Just Satisfaction, 20 December 2004 [GC] at para 63 [emphasis added].

55 Application No 1967/14, Merits and Just Satisfaction, 22 November 2016 at para 53.

56 Another way in which causation matters in human rights law and in international law more generally, relates to remedies. In particular, once a violation of a right has been found, causation needs to be established between the violation and any harm for the purposes of awarding damages. See Article 41 ECHR. For an in-depth discussion on causation in the context of Article 41, see Kellner and Durant, 'Causation' in Fenyves, Karner, Koziol and Steinder (eds), *Tort Law in the Jurisprudence of the European Court of Human Rights* (2011) 449. This is an area of enquiry not pursued in this article.

57 Crawford, *State Responsibility. The General Part* (2013) at 113.

58 Draft Articles on Responsibility of States for International Wrongful Acts with Commentaries, *Yearbook of International Law Commission*, 2001, Vol II (Part Two) at 38, para 2.

59 Articles 4–7 ILC Draft Articles form the hard core of the doctrine of attribution since they deal with organs and agencies of state exercising sovereignty authority: see Crawford, supra n 57 at 115.

60 See Article 4(2) ILC Draft Articles; and Crawford, ibid. at 126.

or by entities directed and controlled by the state.[61] As to the first group of organs, the fundamental principle is that the state is responsible for the actions of its organs, even if they act *ultra vires*[62] and even if they are no longer under the control of the state.[63] That the state controls its organs is a normative assumption; the capacity to control and the actual control are irrelevant. The conduct of state organs thus might give rise to *per se* responsibility on the part of the state.[64] As the ILC has framed it: '[t]he attribution of conduct to the State as a subject of international law is based on criteria determined by international law and *not on the mere recognition of a link of factual causality* [emphasis added]'.[65]

With regard to non-state entities, their actions may be attributable to a state if they act under the instruction, direction or control of that state. Attribution arises in this context because 'there exists a specific factual relationship between the person or entity engaging in the conduct and the State' and 'a real link between the person or group performing the act and the State machinery'.[66] The ILC Draft Articles do not specify the level of control required, which has led to controversies. The International Court of Justice has applied the test of 'effective control'; while other adjudicative bodies have endorsed the standard of 'overall control.'[67] This debate need not to detain us here.

It might come as a surprise that I mention the rules on attribution in the context of positive obligations. While these rules are certainly of importance in the context of negative obligations, they are generally perceived as irrelevant when the case is formulated as one involving a failure to fulfill positive obligations.[68] The obligation to ensure human rights does not require a determination that the actual harm is attributable to the state in the sense of the ILC Draft Articles on State Responsibility[69]

61 Article 8 ILC Draft Articles.

62 See Article 7 ILC Draft Articles; and *Armed Activities (DRC v Uganda)* ICJ Reports 2005, 162 at 242. The difficulty here lay in distinguishing an official, though *ultra vires*, act from a purely private act: see Crawford, supra n 57 at 115.

63 Article 7 Draft Articles Commentary at para 18; and ILC Commentary, supra n 58 at 43, para 7.

64 I say 'might' because '[a]s a normative operation, attribution must be clearly distinguished from the characterization of conduct as internationally wrongful': see ILC Commentary, supra n 58 at 39, para 4.

65 ILC Commentary, supra n 58 at 39 para 4.

66 ILC Commentary, supra n 58 at 47 para 1.

67 Contrast *Military and Paramilitary Activities in against* Nicaragua *(Nicaragua v US)* (Merits) [1986] ICJ Reports 14 at paras 109–115 (requiring effective control) with Case IT-94-1, *Prosecutor v Tadic (Appeal Judgement)* IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999 at paras 115-131 (adopting a standard of overall control). See also the confirmation of the effective control test in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Reports 2007, 43 at 207; and *DRC v Uganda*, supra n 62 at 226.

68 International law has accepted the distinction between primary and secondary rules of state responsibility. Primary rules are the substantive obligations in the various subject areas of international law. Secondary rules are those that elaborate on what it means for a state to be held responsible for violations of these duties. The rules on attribution belong to the latter. Positive obligations belong to the former: see Draft Articles on State Responsibility, supra n 58 at para 1.

69 It needs to be acknowledged, however, that on some occasions the ECtHR is not clear in its judgments as to why the respondent state can be held responsible: is it because harmful conduct is attributable to it or is it because it failed to fulfill its positive obligations: see *Cyprus v Turkey* Application No 25781/94, 10 May 2011 at paras 69–80. For discussion on the Court's unclear logic, see Milanovic, 'From Compromise to Principle: Clarifying the Concept of State "Jurisdiction" in Human Rights Treaties' (2008) 8 *Human Rights Law Review* 411.

and the previously mentioned rules of attribution. The triggering of positive obligations and the scope of these obligations are contingent on the primary obligations at stake, which are not a subject of the law on state responsibility as such. However, it is still relevant to engage with attribution since the rules of attribution under international law articulate lines of proximity. They express relationships of directness and immediacy between the act of the state and the harm. It is meaningful to consider the justifications and the theoretical underpinnings of these relationships, so that we better understand the linkages between harm and state conduct in the form of omission.

B. The Role of Control and the Extension of the Logic of the Rules on Attribution

The rules on attribution seek to establish a nexus between the state and the *agent* who caused the harm. The status of the agent is thus of importance and the harm caused by him/her is directly attributable to the state. Even if the conduct is in breach of the national legislation or the state agent exceeds the authority granted by national law (*ultra vires* acts),[70] attribution is still established as long as the organ acts *within its capacity*.[71] This must be differentiated from cases 'where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the state.'[72]

In contrast, Article 8 of the ILC Draft Articles highlights the question of 'direction and control.' It clarifies that 'such control will be attributable to the State only if it [the State] directed or controlled the specific operation and the conduct complaint of was an integral part of the operation.' However, as observed by Evans, this is not the way the ECtHR has extended the scope of the obligations under the ECHR. It is rather positive obligations that have served this purpose.[73] For example, there might be situations where it is not really possible to show that the state has directly caused harm through its agents or entities under its control.[74]

Two basic principles follow from the above. First, acts of state organs are attributable to the state and the issue of control seems to be immaterial.[75] Secondly, when

70 *Ilascu and Others v Moldova and Russia* supra n 22 at para 319.

71 Report of the ILC A/56/10 (2001) 'Draft Articles' at 44, ('State's authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will and cannot shelter behind their inability to ensure that it is respected'). See also ibid. at para 319.

72 Report of the ILC A/56/10 (2001) Draft Articles at 102.

73 Evans, 'State Responsibility and the European Convention on Human Rights: Role and Realm' in Fitzmaurice and Sarooshi (eds), *Issues of State Responsibility before International Judicial Institutions* (2004) 139 at 157.

74 *Medova v Russia* Application No 25385/04, Merits and Just Satisfaction, 15 January 2009 at para 95 (disappearance case); *Albekov and Others v Russia* Application No 68216/01, Merits and Just Satisfaction, 9 October 2008 at paras 80–86 (it was not possible to establish who laid the mines which caused death; the Court did not have to decide on the issue since the respondent state was aware that mines were laid in the area and were under the positive obligation to protect the residents from the risks involved).

75 In the context of human rights law, there is a jurisdiction threshold which has to be passed so that the application of human rights treaties is triggered in the first place: see Milanovic, *Extraterritorial Application of Human Rigts Treaties: Law, Principles, and Policy* (2011). Control might be crucial for passing this threshold: see Lawson, 'Life After Bankovic: On the Extraterritorial Application of the European Convention on Human Rights' in Coomans and Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004) 83.

the first principle is not applicable since, for example, none of the requirements in Articles 4, 5 and 6 of the ILC Draft Articles is fulfilled, the second principle is triggered: control implies responsibility.[76] This principle is not sidelined once a case is framed as involving positive obligations. On the contrary, control by the state (not in the sense of Article 8 of the ILC Draft Articles though, which aims to link the state with a specific *agent*) is still relevant for determining the scope of these positive obligations. Public authorities are established to fulfill prescribed aims and they are conferred powers. They assume control over areas of activity, in this way putting themselves in proximate relationship with harm that might arise in these areas.[77] It follows that control structures lines of proximity. The more control, the closer proximity may be expected between state conduct and harm, and accordingly, the positive obligations are more demanding. These positive obligations are thus commensurate with the extent of the control. In this sense, we can see some extension of the logic that applies to the rules on attribution. This normative account fits current practice since, as we will see below, it is reflected in the case law under the ECHR.

The question which emerges at this junction is what principles apply if the state authorities are out of control. Do states have positive obligations when they do not have control? Can states absolve themselves from responsibility under human rights law by simply saying that they did not have control? Can they decide to relinquish control and free themselves from responsibility? The presumption that operates is that states have control over their territory and therefore continue to be under the obligation to ensure the rights enshrined in the ECHR.[78] This implies that States have to re-assert control and take measures to secure these rights *as a matter of principle*.[79] This certainly does not translate into state responsibility for failure to ensure human rights in every concrete case. States might face some practical difficulties in re-asserting control and in the degree of control that they can practically exercise; however, these will have to be taken into account in the assessment of the scope of the positive obligations in the particular case. In addition to issues of practicality and feasibility, certain areas of activities are underpinned with the normative assumption

76 For this distinction, see Lawson, 'Out of Control. State Responsibility and Human Rights: Will the ILC's Definition of the "Act of State" Meet the Challenges of the 21st Century' in Castermans-Holleman, Hoof and Smith (eds), supra n 10, 91 at 97.

77 Similar considerations have been made relevant in the context of claims against public authorities for damages at national level: see Brodie, 'Compulsory Altruism and Public Authorities' in Fairgrieve, Andenas and Bell (eds), *Tort Liability of Public Authorities in Comparative Perspective* (2002) 541 at 551 ('I would suggest that where a public authority is concerned the court should, rather than seeking to identify pure omissions, look to see whether the authority in question has statutory responsibility to control, regulate, or supervise the relevant area of social or economic activity in the community').

78 *Sargyan v Azerbaijan* Application No 40167/06, Merits, 16 June 2015 [GC] at paras 128–131; Besson, 'The Bearers of Human Rights; Duties and Responsibilities for Human Rights: A Quite (R)evolution' (2015) 32 *Social Philosophy and Policy* 244 at 253 ('there is a general human rights' positive duty for states to exercise jurisdiction and hence to incur human rights duties').

79 *Sargyan v Azerbaijan*, ibid. at para 131. The following clarification is due here. In *Sargyan v Azerbaijan*, the issue under discussion was control for the purpose of establishing jurisdiction under Article 1 ECHR. However, the same logic can be extended in the context of positive obligations. On the use of the notion of 'control' for different purposes (establishing jurisdiction, attribution and positive obligations), see Besson, 'Concurrent Responsibilities under the European Convention on Human Rights: The Concurrence of Human Rights Jurisdictions, Duties and Responsibilities' in van Aaken and Motoc (eds), *The European Convention on Human Rights and General International Law* (forthcoming).

that the state must wield more control. I engage with these areas in more detail in Section 5.D below. First, however, I turn to circumstances where state agents inflict harm and how the positive obligations in relation to this harm are shaped by the degree of control exercised.

C. Control and Prevention of State-inflicted Harm

Positive obligations are usually analysed in circumstances when private actors cause harm. However, they are as much relevant in circumstances where state agents inflict harm. States are equally under the obligation to structure the relationships between their agents and individuals in such a way that harm is prevented and, if it occurs, is adequately addressed. In this context, the harm caused by failures in these structures is more closely proximate to the state and, accordingly, the obligation to prevent it is more demanding. For these reasons and in relation to the right to life, the Court has observed that '[w]hen lethal force is used within a "policing operation" by the authorities, it is difficult to separate the State's negative obligations under the Convention from its positive obligations'.[80] Still, in its analysis the Court distinguishes the two, and to this effect it has been established that Article 2 requires careful scrutiny not only as to whether the use of force by state agents was strictly proportionate to the aim of protecting persons against unlawful violence (negative obligation),[81] but also whether the overall operation was 'planned and controlled by the authorities so as to minimize, to the greatest extent possible, recourse to lethal force' (positive obligation).[82]

The intensity of the above positive obligation is influenced by the level of control that the state has over the situation. For example, in *Giuliani and Gaggio v Italy,* the absence of foreseeability as to the course of the events, as well as the ensuing reduced level of control by the state over the situation, were taken into account in determining whether the organization and the planning of the policing operations were compatible with the obligation to protect life.[83] Similarly, in *Isayeva v Russia*, where the applicant's close relatives were killed by indiscriminate bombing by the Russian military, one of the factors considered by the Court was that the military operation conducted by Russia was not spontaneous and, therefore, the state had control over the circumstances.[84] Likewise, in *Makaratzis v Greece* the Court did not overlook the fact 'the applicant was injured during an unplanned operation which gave rise to developments to which the police were called upon to react without prior preparation.' In the latter judgment it was also added that if the unpredictability of the events and the resultant reduction of the level of control were not taken into account in the assessment of the positive obligations, this might lead to the imposition of an 'impossible burden on the authorities'.[85]

80 *Finogenov and Others v Russia* Application 18299/03 and 27311/03, 20 December 2011 at para 208.

81 See Article 2(2) of the ECHR which delineates limited circumstances when use of force might be justified.

82 *McCann and Others v United Kingdom* Application No 18984/91, Merits and Just Satisfaction, 27 September 1995 [GC] at para 194.

83 Supra n 52 at paras 253–262.

84 Application No 57950/00, Merits and Just Satisfaction, 24 February 2005 at para 188.

85 Supra n 54 at para 69.

In the course of assessing the control over the situation and the scope of the positive obligations, the reasons as to why the state authorities did not have control are also of importance. Absence of foreseeability could be a reason. In *Makaratzis v Greece,* however, it was established that the degeneration of the situation and the ensuring chaos

> was largely due to the fact that at the time neither individual police officers nor the chase, seen as a collective police operation, had the benefit of the appropriate structure which should have been provided by the domestic law and practice.[86]

Since the absence of control was seen as attributable to deficiencies in the national legislation, Greece was found to have failed to protect the right to life. Therefore, despite the unpredictability of the events and the ensuing reduced level of practical control over the circumstances, the normative expectation that police operations are regulated by laws was determinative.

Finogenov and Others v Russia, a case involving hostage-taking in a theatre that was stormed by the Russian authorities after the injection of an unknown narcotic gas, strongly supports the argument that there is a correlation between the control and the scope of the positive obligations. In *Finogenov and Others v Russia,* the Court modified the well-established *Osman* test, by observing:

> The authorities' positive obligations under Article 2 of the Convention are not unqualified: not every presumed threat to life obliges the authorities to take specific measures to avoid the risk. A duty to take specific measures arises only if the authorities knew or ought to have known at the time of the existence of a real and immediate risk to life *and if the authorities retained a certain degree of control over the situation.*[87]

The Court delineated a different intensity of obligations and applied a different degree of scrutiny depending on the degree of control that the state had over the situation. It distinguished *Finogenov* from the above mentioned *Isayeva v Russia* since '[t]he hostage taking came as a surprise for the authorities, so the military preparations for the storming had to be made very quickly and in full secrecy.' In addition, the authorities were not in control of the situation inside the theatre where the hostages were kept, which was also of material consideration.[88]

In contrast to the storming of the theatre, however, the positive obligations in relation to the subsequent rescue operation were of different intensity since 'no serious time constraint existed and the authorities were in control of the situation.' This justified a different approach when assessing the conduct of the Russian authorities.[89] While the use of the gas and the storming was found not to be disproportionate

86 Ibid. at para 70.
87 Supra n 80 at 209.
88 Ibid. at para 213 [emphasis added].
89 Ibid. at para 214.

measures in breach of Article 2, the rescue and evacuation operation were found inadequate. The latter operation was subjected to more thorough scrutiny because it was not spontaneous. In addition, it could be expected from the authorities that they had some general emergency plan and some control of the situation outside the building where the rescue efforts took place. The predictability of the harm also implied a higher level of control and more demanding positive obligations: 'the more predictable a hazard, the greater the obligation to protect against it.'[90]

In conclusion, control over the situation is crucial for a finding of proximity, and important for assessing the intensity of the positive obligation. At the same time and as already intimated in the end of Section 5.B above, positive obligations themselves might require more pervasive control in certain circumstances. The next section will expand on this argument. Prior to this, however, the circularity in the above argumentation needs to be acknowledged. If states have control they put themselves in closer proximate relations with harm that might materialize and the positive obligations invoked in these circumstances are more robust. At the same time, the positive obligations themselves might require more control by the state. Instead of occluding this paradox, it should be rather openly acknowledged. It is beyond the scope of this article to resolve it because it is part of a much broader issue that ultimately concerns the role of the state in the society and to what extent and under what circumstances this role should be more intrusive.[91]

D. Assumption of Control in the Area of Public Services

A cluster of positive obligations cases involve provision of public services. These services can be provided by public bodies or by private bodies. It has been well-established in the case law that states are not absolved of their human rights law obligations by delegating certain services to private bodies.[92] The designation of the body is thus not of significance. For example, the Court has observed that 'in the public-health sphere, these positive obligations require the State to make regulations compelling hospitals, *whether private or public*, to adopt appropriate measures for the protection of patients' lives.'[93] The nature of the activity, however, that is, public

90 Ibid. at para 243. See also *Mikayil Mammadov v Azerbaijan* Application No 4762/05, Merits and Just Satisfaction, 17 December 2009 at paras 116–119, where the applicant complained that police officers were responsible for his wife's death because upon their entry into the family's dwelling she set herself on fire. The degree to which the state agents had control over the situation and the related degree to which they could have predicted the course of the events were essential in determining the scope of positive obligations under Article 2.

91 This paradox is further exaggerated if one takes into account that human rights are traditionally invoked to circumscribe the exercise of state control (states' negative obligations to refrain), while positive human rights obligations might require more state control: see Reus-Smit, 'On Rights and Institutions' in Beits and Goodin (eds), *Global Basic Rights* (2011) 26 at 44.

92 *Costello-Roberts v United Kingdom* Application No 13134/87, Merits and Just Satisfaction, 25 March 1993; *Dodov v Bulgaria*, supra n 47; *Storck v Germany* Application No 61603/00, Merits and Just Satisfaction, 16 June 2005 at para 103; *O'Keeffe v Ireland*, supra n 6 at para 150.

93 *Calvelli and Ciglio v Italy* Application No 32967/96, Merits, 17 January 2002 [GC] at para 49; *Vo v France* Application No 53924/00, Merits, 8 July 2004 [GC] at para 89; *Center for Legal Resources on behalf of Valentin Câmpeany v Romania* Application No 47848/08, Merits and Just Satisfaction, 17 July 2014 [GC] at para 130; *Lambert and Others v France* Application No 46043/14, Merits and Just Satisfaction, 5 June 2015 [GC] at para 140 [emphasis added].

services, is of important material consideration since the breadth of the positive obligation increases with a function of this nature. The normative assumption that operates in this context is that the state should assume control in relation to these services and, as a consequence, the intensity of the obligation rises.

A question which emerges here is how to define public services.[94] The importance of the interest at stake, and also the relational context, can be determinative in delineating the contours of this definition. For example, in relation to education, the Court has emphasized that children have no alternative but to attend school since primary education is obligatory.[95] In *O'Keeffe v Ireland*, the Court went so far as to establish an '*inherent* obligation [of the State] to protect children in this context, of potential risks.'[96] The applicant in this case complained that the system of primary education failed to protect her from sexual abuse by a teacher. In relation to this complaint, the Court held that

> the primary education context of the present case *defines to a large extent the nature and the importance of this obligation.* The Court's case law makes it clear that the positive obligation of protection assumes particular importance in the context of the *provision of an important public service* such as primary education, school authorities being obliged to protect the health and well-being of pupils and, in particular, of young children who are especially vulnerable and are under the exclusive control of those authorities.[97]

Although the school in question was owned and managed by a non-state actor, the Court relied on the fact that education is an importance public service and on the vulnerability of children to determine the scope of the positive obligation.[98]

The importance of the activity in question and the control of the authorities were also emphasized in *Ilbeyi Kemaloglu and Meriye Kemaloglu v Turkey*, a case about the child who froze to death after being left alone by the school authorities in a heavy snow storm:

> [T]he State's duty to safeguard the right to life is also applicable to school authorities, who carry an obligation to protect the health and well-being of pupils, in particular young children who are especially vulnerable and are under the exclusive control of the authorities.[99]

The same principle has been applied to psychiatric institutions, in relation to which 'the State remained under a duty to exercise supervision and control'[100] and nursing

94 One way will be to say that public functions are the ones that the state has historically performed. For a more in depth discussion, see Thomas, *Public Rights, Private Relations* (2015) at 41.

95 Supra n 6 at para 151.

96 Ibid. at para 162. This notion of 'inherent obligation' has not remained unchallenged. In their dissenting opinion, five judges challenged the assumption that there is some inherent risk of sexual abuse in the context of education (at para 15).

97 Ibid. at para 145 [emphasis added].

98 Ibid. at para 157.

99 Application No 19986/06, Merits and Just Satisfaction, 10 April 2010 at para 35.

100 *Storck v Germany*, supra n 92 at para 103.

homes, which the state is under the obligation to regulate.[101] Similar reasoning underpinned *Iliya Petrov v Bulgaria,* where a boy was severely harmed after entering a transformer and receiving an electric shock. The Court acknowledged that the boy was very unwise to enter such a dangerous place, but it still held that the 'decisive factor' for the occurrence of the incident was the deficient control by the authorities regarding the safety of electric transformers,[102] the latter being a public service in relation to which the state is expected to exercise control. *Cevriogli v Turkey* is also illustrative in this respect. The case concerns the death of a boy as a result of falling into a large water-filled hole outside a private building under construction in a residential area. The Court referred to the 'inherently hazardous nature' of construction sites and, accordingly, the expectation that the state controls, inspects and supervises the activities at these sites.[103] In its reasoning, the Court added that the state 'in the present context had a more compelling responsibility towards the members of the public who had to live with the very real dangers posed by construction work on their doorsteps.'[104]

The above outlined expectation that in certain areas the state assumes control, shapes the approach to causation. For example, in *Cevriogli v Turkey,* it was admitted that no causal link may exist between the failings to inspect the construction site and the death of the boy 'for the purposes of civil liability.' However, in the context of state responsibility where the objective is to find the responsibility of a collective, strict causation lines are inappropriate. In this respect, the Court observed that 'proper implementation of an inspection mechanism would undoubtedly have increased the possibility of identifying and remedying the failings which were responsible for the death of the applicant's son.'[105]

E. Source of the Harm and the Related Level of Control

The establishment of causation between failures on behalf of the state to take measures and harm is also affected by the source of the harm: whether the source is a natural or a man-made phenomenon. In both contexts, the state is under the general obligation to protect; however, in the event of a harm ensuing from a man-made phenomenon, proximity is easier to establish and the scope of the positive obligations is more demanding.

In situations involving 'dangerous activities', where the harm is perceived as man-made, or in relation to events 'regulated and controlled by the State', it is easier to establish that state omissions are causative to harm. An example to this effect is *Öneryildiz v Turkey,* a case about an explosion at a garbage collection point. In its submissions to the Court, Turkey tried to challenge the extension of positive obligations under Article 2 to all circumstances of unintentional death. The Court, however, emphasized the dangerous nature of the activity and the ensuing expectation

101 *Dodov v Bulgaria* Application No 59548/00, Merits and Just Satisfaction, 17 January 2008 at paras 84–86.

102 Application No 19202/03, Merits and Just Satisfaction, 24 April 2012 at para 63 (basic safety precautions were missing including not locking the door of the transformer located at a park for children).

103 Supra n 36 at para 57.

104 Ibid. at para 67.

105 Ibid. at para 69.

that the state regulates it. In this way, it established a proximity between the harm and failure by the state to regulate,[106] which also implied that the positive obligation to ensure the right to life 'must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and *a fortiori* in the case of industrial activities, which by their very nature are dangerous, such as the operation of waste-collection sites.'[107]

In *Vilnes and Others v Norway*, the Court extended this logic to *risky activities* and observed that 'it sees no need to consider in detail the degree of involvement of the respondent State in the hazardous activity in question, since the Convention obligation applies "any activity, whether public or not"'.[108] The same approach was adopted in *Kolyadenko and Others v Russia,* a case about an urgent massive evacuation of water from reservoir, where the Court also emphasized that a reservoir is a man-made industrial facility.[109]

The above analysis is not modified by the nature of the agent that performs the activity. Whether that activity is performed by a public entity or by, for example, private corporations, is immaterial. Thus, the Court's assertion in *Brincat and Others v Malta*, that the positive obligation to safeguard lives '*may* apply in cases, such as the present one, dealing with exposure to asbestos at a workplace which was *run by a public corporation owned and controlled by the Government*' is confusing.[110] If consistency in the case law is to be maintained, the public or private nature of the entity that engages in the activity is not pertinent. As the Court itself has observed, the positive obligation to protect life applies 'in the context of any activity, whether public or not'.[111]

The above cases implicating man-made harm can be distinguished from circumstances where harm is caused by 'natural' disasters. It is more difficult to establish proximity and therefore the positive obligations are not that extensive in cases of natural disasters 'which are as such beyond human control' and 'do not call for the same extent of State involvement'.[112] In *Budayeva and Others v Russia,* a case about a mudslide causing loss of life and destruction of property, the Court observed that '[t]he scope of the positive obligations imputable to the State in the particular

106 Reference was made to the various texts adopted by the Council of Europe in the field of environment and the industrial activities: *Öneryildiz v Turkey*, supra n 5 at paras 59–62 and 71.

107 Ibid. at para 71. Other industrial activities reviewed by the Court are nuclear testing (*L.C.B. v United Kingdom* Application No 14/1997/798/1001, Merits and Just Satisfaction, 9 June 1998), toxic emission from fertilizer factory (*Guerra and Others v Italy* Application No 14967/89, Merits and Just Satisfaction, 19 February 1998 [GC]) and exposure to asbestos at a workplace (*Brincat and Others v Malta*, supra n 30).

108 *Vilnes and Others v Norway,* supra n 45 at para 223.

109 *Kolyadenko and Others v Russia* Application No 17423/05, Merits and Just Satisfaction, 28 February 2012 at para 164.

110 *Brincat and Others v Malta,* supra n 30 at para 81 [emphasis added].

111 *Vilnes and Others v Norway,* supra n 45 at para 223 (the Court 'sees no need to consider in detail the degree of involvement of the respondent State in the hazardous activity in question, since the Convention obligation applies to "any activity, whether public or private"').

112 *Budayeva and Others v Russia,* supra n 46 at para 174. The same distinction between man-made harm and natural harm is very clearly reflected in the Court's *non-refoulement* case law under Article 3 of the ECHR: see Stoyanova, 'How Exceptional Must "Very Exceptional" Be? *Non-Refoulement*, Socio-Economic Deprivation and *Paposhvili v Belgium*' (2017) 29 *International Journal of Refugee Law* 580.

circumstances would depend on the origin of the threat and the extent to which one or the other risk is susceptible to mitigation.'[113] It was added that the consideration of not imposing a disproportionate burden on the state 'must be afforded even greater weight in the sphere of emergency relief in relation to a meteorological event, which is as such *beyond human control, than in the sphere of dangerous activities of a man-made nature*.'[114] Still, against the background of the national authorities' omissions in the implementation of land-planning and emergency relief policies in the hazardous area where the mudslide occurred, and the existence of a causal link between these failures and death of the victim, Russia was found to have failed to discharge its positive obligations under Article 2.[115]

The same logic has been extended in relation to the positive obligations corresponding to the right to property. In *Öneryildiz v Turkey,* the Court observed:

> Genuine, effective exercise of the right protected by that provision [Article 1, Protocol 1] does not depend merely on the State's duty not to interfere, but may require positive measures of protection, *particularly where there is a direct link between the measures an applicant may legitimately expect from the authorities and his effective enjoyment of his possessions.*[116]

The establishment of this causal link is affected by the source of the harm. In *Öneryildiz v Turkey* such a link was found to be present: 'there is no doubt that the causal link established between the gross negligence attributable to the State and the loss of human lives also applies to the engulfment of the applicant's house.'[117] In *Budayeva and Others v Russia,* however, the Court introduced a distinction along the following lines. As opposed to *Öneryildiz v Turkey*, where the events occurred 'under the responsibility of the public authorities' and where '[t]reatment of waste . . . is regulated and controlled by the State, which brings accidents in the sphere within its responsibility',[118] in *Budayeva and Others v Russia*

> the Court considers that natural disasters, which are as such beyond human control, do not call for the same extent of State involvement. Accordingly, its positive obligations as regards the protection of property from weather hazards do not necessarily extend as far in the sphere of dangerous activities of a man-made nature.[119]

While the implementation of certain measures (mud-defence infrastructure and an early warning system) were considered by the Court as vital for the protection of life in case of a mudslide (and in this sense the Court was prepared to find causality between the absence of these measures and the loss of life), no evidence was found

113 Ibid. at para 137.
114 Ibid. at para 135 [emphasis added].
115 Ibid. at paras 158-159.
116 Supra n 5 at para 134 [emphasis added].
117 Ibid. at para 135.
118 *Budayeva and Others v Russia,* supra n 46 at para 173.
119 Ibid. at para 174.

that these measures could have prevented the damage to the applicants' possession: '[I]t cannot be said that the causal link between the State's failure to take these measures and the extent of the material damage is similarly well-established.'[120] In *Budayeva and Others v Russia*, the Court thus appears to suggest that to a certain extent some of the damage to property was imputable to state negligence; however, it is difficult to ascertain how much. The Court's approach is also based on the premise that even if mud-defence infrastructure had been installed, damage to property would still have occurred.

F. Assumption of Control over the Victim[121]

While the preceding sections addressed the issue of state control over certain circumstances and activities, this section focuses on control over individuals. Once the state has undertaken any special responsibilities in relation to certain individuals, the lines of proximity between harm and state omissions solidify. States owe more extensive positive obligations to those with whom they have special ties. The primary example in this respect are prisoners, who are placed under extensive state control.[122] This control implies more demanding positive obligations. These have been considered in various contexts (protection from private violence,[123] protection from suicide,[124] acceptable detention conditions, including prevention of health hazards,[125] and provision of minimum socio-economic assistance). It will suffice to compare the scope of the positive obligations in relation to the provision of health care for prisoners with the scope of the positive obligation in relation to provision of healthcare to the population at large.[126] In the latter context, the Court applies a high definitional threshold to find violations of Articles 3 and 8 in the sphere of socio-economic assistance.[127] The Court has not excluded the possibility that violations of Articles 3 and 8 might be found in circumstances characterized with deprivations resulting from, for example,

120 Ibid. at paras 76–77.

121 I use the term 'victim' here in a general sense as a person who has sustained harm without prejudice to the determination whether the state can be held responsible under ECHR for this harm.

122 *Keenan v United Kingdom* Application No 27229/95, Merits and Just Satisfaction, 3 April 2001 at para 91.

123 *Paul and Audrey Edwards v United* Kingdom Application No 46477/99, Merits and Just Satisfaction, 14 March 2012 at paras 57–64 (a detainee was killed by another detainee while held in prison); *Premininy v Russia* Application No 44973/04, Merits and Just Satisfaction, 10 February 2011 at para 91 (a detainee was systematically beaten by other detainees).

124 *Keenan v United Kingdom,* supra n 122 at para 90 (the applicant argued that her son died from suicide due to the prison authorities failure to protect his life).

125 *Florea v Romania* Application No 37186/03, Merits and Just Satisfaction, 14 September 2010 (protection from passive smoking); *Jashi v Georgia* Application No 10799/06, Merits and Just Satisfaction, 8 January 2013 (provision of adequate care for detainee's mental health).

126 Oette, 'Austerity and the Limits of Policy-Induced Suffering: What Role for the Prohibition of Torture and Other Ill-Treatment?' (2015) 15 *Human Rights Law Review* 669 at 681; O'Cinneide, 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights' (2008) 5 *European Human Rights Law Review* 583.

127 *Waiter v Poland* Application No 42290/08, Admissibility, 15 May 2012 at paras 36-42 (access to life-saving drug); *Budina v Russia* Application No 45603/05, Admissibility, 18 June 2009.

insufficient welfare benefits; however, such a finding will be made under exceptional circumstances.[128]

The exceptionality approach, however, will be modified if other elements intervene. As mentioned above, no such approach is applied in relation to prisoners. The Court has taken this very far since not even financial considerations (for example, the argument that the state does not have enough money to maintain prisons) are accepted.[129] There are other circumstances where, due to the special relationship between the state and the victim and more specifically due to the assumption of control by the state over the victim, the logic of exceptionality is displaced. In *Denis Vasilyev v Russia,* the Court observed that the duty to protect is not 'confined to the specific context of the military and penitentiary facilities.'[130] It added:

> It also becomes relevant in other situations in which the physical well-being of individuals is dependent, to a decisive extent, on the actions by the authorities, who are legally required to take measures within the scope of their powers which might have been necessary to avoid the risk of damage to life and limb.[131]

The factual substratum of *Denis Vasilyev v Russia* was underpinned by omissions by police officers. In particular, after finding the applicant unconscious on the street, they left without calling for medical assistance. Despite the important assertion framed by the Court in the above quotation to the effect that the obligation to protect is triggered when the well-being of the individual is dependent on the state, the reasoning in the judgment overall is confusing. The Court pointed to various factors (vulnerability of the person, knowledge about his position, control over him once the state authorities knew about his position and the requirements under the national legislation to render assistance) to find that the state was in breach of its positive obligations. Overall, the reasoning manifests a heavy emphasis on the requisites of the national legislation to assist the person, which tilted the Court to find a violation of Article 3. In the next section, I will discuss in more detail the role of domestic legality.

Here it is pertinent to observe that there might be other situations where the above mentioned exceptionality might be displaced. One such example is where the

128 Gerards, 'The ECtHR's Response to Fundamental Rights Issues related to Financial and Economic Difficulties: The Problem of Compartmentalization' (2015) 13 *Netherlands Quarterly of Human Rights* 274.

129 *Orchowski v Poland* Application No 17885/04, Merits and Just Satisfaction, 22 October 2009 at para 153.

130 See also *Nencheva v Bulgaria* Application No 48609/06, Merits and Just Satisfaction, 18 June 2013 at para 119 (severely disabled children held in an institution died during the winter); *Centre for Legal Resources on Behalf of Valentin Campeanu v Romania*, supra n 93 at paras 134–144. This might also explain the Court's lenient approach to causation in relation to victims of human trafficking held in immigration detention in the context of the application of Article 4 ECHR: see Stoyanova, 'L.E. v. Greece: Human Trafficking and the Scope of States' Positive Obligations under the ECHR' (2016) 3 *European Human Rights Law Review* 290 at 299.

131 *Denis Vasilyev v Russia* Application No 32704/04, Merits and Just Satisfaction, 17 December 2009 at paras 115–116.

state has precluded the availability of alternative means of protection and assistance. Such a situation might transpire in relation to asylum-seekers, who might not be allowed to work in the first place, which will inevitably modify the analysis as to whether the absence of socio-economic assistance by the state causes harm falling within the scope of Article 3 or 8.[132]

Because of the special relationship between the person and the state that arises in the above-mentioned contexts, the foreseeability of the harm requirement might be loosened.[133] In light of the special position of the victim in relation to the state, it might be hardly possible to argue that the state did not know or ought not to have known about the harm or the risk of harm. Some aspects of the case law, however, cause confusion. For example, in *Nencheva v Bulgaria,* the Court extensively reviewed whether the central national authorities knew about the dire circumstances of the disabled children who were accommodated in a home. In light of the fact that the home in question was under the control of these authorities, one is left to wonder whether the authorities should in any case have known about the risks faced by the children. Even if they did not actually know, there should have been mechanisms for channeling such information.[134] In sum, the case law is ambiguous as to which factor has a dominating role: the actual knowledge about harm, on the one hand, or the normative supposition that state authorities should know or necessarily knew about the harm (or risk of harm) to individuals under their control.

One final observation is due in this section. The special position of the victim can be related to the particular vulnerability of certain categories of persons.[135] The Court has recognized various groups as vulnerable: children,[136] asylum-seekers,[137] prisoners, military conscripts,[138] persons with disabilities,[139] victims of domestic violence[140] and Roma.[141] It is useful, however, to distinguish between the sources of these various vulnerabilities. Some of them might be innate and inherent vulnerabilities (for example, children). Others might be related to the social context (for example, Roma, religious minorities).[142] In this section, I draw attention to a distinctive vulnerability that stems from the specific relationship with the state and, in particular, from the exposure of the person to state power. Prisoners, for example, who due to their detention are exposed to state power and deprived of other sources of help, are

132 See *Adam, R v Secretary of the State for the Home Department* [2005] UKHL 66 (depriving asylum-seekers from social support when they are not allowed to engage in remunerated employment).

133 *Keller v Russia* Application No 26824/04, Merits and Just Satisfaction, 17 October 2013 at para 88.

134 *Nencheva and Others v Bulgaria* Application No 48609/06, Merits and Just Satisfaction, 18 June 2013 at paras 121–122.

135 Peroni and Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 *International Journal of Constitutional Law* 1056; Ippolito and Sanchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (2015).

136 *E. and Others v United Kingdom,* supra n 41 at para 88.

137 *M.S.S. v Belgium and Greece* Application No 30696/09, Merits and Just Satisfaction, 21 January 2011 [GC] at para 232.

138 *Placi v Italy* Application No 48754/11, Merits and Just Satisfaction, 21 January 2014 at para 49.

139 *Storck v Germany,* supra n 92 at para 105.

140 *Bevacqua and S. v Bulgaria* Application No 71127/01, Merits and Just Satisfaction, 12 June 2008 at para 65.

141 *D.H. and Others v Czech Republic* Application No 57325/00, Merits and Just Satisfaction, 13 November 2007 [GC] at para 182.

142 *Milanovic v Serbia* Application No 44614/07, Merits and Just Satisfaction, 14 December 2010 at para 89.

placed in a special relationship with the state, which explains the more demanding positive obligations.[143] Certainly, this special relationship could be intimately related to or substantiated by vulnerability stemming from innateness or social context (for example, protection of children in the context of compulsory education) and in this sense, the different sources of vulnerability might be interrelated.

6. TECHNIQUES FOR AVOIDING CAUSATION

So far this article has covered areas where traditionally the state has had an important role and in this sense the state more easily places itself in closer proximate relations with harm that might materialize (for example, policing operations, provision of public services, industrial activities, restraints imposed upon individuals). In other areas, however, the intensity of the involvement of the state can be more controversial (for example, protection of the environment, regulation of private companies) and, as already suggested at the end of Section 5.C, the question as to how intrusive the role of the state should be and how much control the state should exercise can be more contentious. Moreover, the establishment of causation between harm and state omissions might be hampered by empirical and epistemological uncertainties. Since the Court might not want to see itself deeply implicated in normative judgments about the role of the state in society more generally, and since the Court might not be in a position to resolve empirical and epistemological uncertainties, it has crafted techniques to avoid making these judgments and resolutions. These techniques also imply that the Court does not have to directly confront the issue as to whether state omission is causative to harm. Two such techniques will be discussed here: domestic legality and procedural protection.

A. Domestic Legality

When an omission is contrary to the national regulatory framework, proximity between this omission and the harm amounting to violation of human rights law is easier to assume. In other words, when the national legislation or applicable regulatory standards themselves envisioned the undertaking of certain measures and these were not performed, the Court is more willing to accept that there is a nexus between the non-performance and harm. The underlying assumption is that the national regulatory framework was adopted in order to prevent harm. Once this is transposed at the level of the ECHR, whether or not this is indeed the case (to wit, whether or not generally or in relation to the particular applicant the proper application of the legal framework would have indeed prevented harm or reduced the risk of harm), seems to be less relevant, since the above assumption continues to operate.

How non-compliance with the national legal requirements renders the proximity standard less stringent from the perspective of the applicant was made obvious in *I v Finland*. The applicant complained that a hospital has failed to guarantee the security of her data against unauthorized access. She worked as a nurse and was diagnosed as HIV-positive. At a certain point, she suspected that her colleagues were aware of her illness and soon her contract was not renewed. On the facts, it was not possible to determine whether her records were actually accessed by an unauthorized third person. As a

143 One can distinguish this situation from 'pre-existing vulnerabilities.' For a discussion in the context of tort law, see Green, *Causation in Negligence* (2015) at 38.

consequence, it was not possible to prove a causal connection between deficiencies in the access rules in this particular hospital (that is, not maintaining a log of all persons who had accessed her medical files) and the harm that she has experienced (that is, dissemination of information about her medical condition). However, the Court did not find it necessary to prove such causation. Instead, it observed that '*what is decisive* is that the records system in place in the hospital was clearly not in accordance with the legal requirements' in the national legislation and did not hesitate to find a failure on behalf of the state to fulfill its positive obligation under Article 8.[144]

The requirements laid down in the national legislation, including those that require positive measures, establish a baseline. Any deviation from this baseline is suspect and makes it easier to argue that a state's failure to comply with its own baseline is causative of harm. Support for this approach can be found in the context of the right to life and the adequate standard of health care.[145] *Lopes de Sousa Fernandes v Portugal* and *Elena Cojocaru v Romania* are judgments in point. The Court observed that it would not speculate on the particular patient's prospects for survival, if the measures required by the medical protocols had been actually undertaken. It sufficed for the establishment of state responsibility that there was 'apparent lack of coordination of the medical services and . . . delay in administering the appropriate emergency treatment,' which 'attest to a dysfunctionality of the public hospital services'.[146] In the reasoning of the majority, this dysfunctionality could be related to non-observance of medical protocols. On the facts, however, it was not entirely clear whether non-compliance with the protocols caused the death of the applicants' relatives. The Court's leniency regarding causality in the above-mentioned two cases prompted Judges Sajó and Tsotsoria to attach a Dissenting Opinion to the Chamber judgment in *Lopes de Sousa Fernandes*, in which they observed that it is hard to understand 'how an alleged organisational negligence that did not result in death can be construed as the basis of State responsibility for failing to protect life.' In their Joint Dissenting Opinion, they also added that even if there had been a causal relation, this is still not enough to find a violation. I will return to this aspect of their argument in Section 7.C below, where I address the distinction between incidental and systemic failures. Here is it pertinent to observe that the Grand Chamber in *Lopes de Sousa Fernandes* addressed the dissenters' concerns by observing that

> the question whether there has been a failure by the State in its regulatory duties calls for a concrete assessment of the alleged deficiencies rather than an abstract one. . . . Therefore, the mere fact that the regulatory framework may be deficient in some respect is not sufficient in itself to raise an issue under Article 2 of the Convention. It must be shown to have operated to the patient's detriment.[147]

144 *I v Finland* Application No 20511/03, Merits and Just Satisfaction, 17 July 2008 at para 44.

145 *Cyprus v Turkey* Application No 25781/94, Merits, 10 May 2001 [GC] at para 219; *Waiter v Poland*, supra n 127 at para 35.

146 *Lopes de Sousa Fernandes v Portugal* Application No 56080/13, Merits and Just Satisfaction, 15 December 2015 at para 114; *Elena Cojocaru v Romania* Application No 74114/12, Merits and Just Satisfaction, 22 March 2016 at para 111.

147 Ibid. at para 188.

It follows that the Grand Chamber has modified the Chamber's approach. As the above quotation shows, causality needs to be established between the organisational negligence and the condition of the specific applicant.

Using the national regulatory framework as a metric has been applied in other areas of the case law. More specifically, in *A v Croatia*, a domestic violence case, the failure by the national authorities to implement measures ordered by the national courts was highlighted, and led the Court to conclude that the respondent state failed to ensure the victim's right to private life.[148] In *Taskin and Others v Turkey*, the applicant complained that the operation of a gold mine posed risks to their right to life and private life. The respondent government challenged the assertion that the operation of the mine had harmful effects, and in this sense scientific uncertainty permeated the facts. The Court did not find it necessary to engage with the issue as to whether the operation of the mine was indeed contributory to harm, since this operation was contrary to domestic law.[149]

Certainly, the state might have perfectly complied with the existing national legal and regulatory framework and still have failed to fulfill its positive obligations under the ECHR, since deficiencies in this very framework might be causative to harm.[150] On the other hand, even if a failure to take certain protective measures was contrary to the national law and regulation, this is not in itself conclusive that the state has failed to fulfill its positive obligations under the ECHR. The Court might pursue further enquiries into lines of proximity.[151] Domestic legality is thus not a conclusive test.[152] This renders the analysis distinctive in comparison with cases framed as implicating negative obligations, where if a measure restricting the right is not 'in accordance with the law', this automatically renders the restriction contrary to human rights law.[153] Still, as clarified above, even in the context of positive obligations, domestic legality plays an important role in shaping lines of proximity. In addition, the notion of legality does not only have a substantive aspect, which, as explicated above, concerns compliance with domestic regulatory frameworks; it also has a procedural aspect, to which I now turn.

148 Application No 55164/08, Merits and Just Satisfaction, 14 October 2010 at para 79.

149 Application No 46117/99, Merits and Just Satisfaction, 10 November 2004 (the national authorities did not comply with decisions by the national court ordering the closure of a mine); *Giacomelli v Italy* Application No 59909/00, Merits and Just Satisfaction, 2 November 2006 at para 93 (the state authorities did not comply with domestic legislation on environmental matters and failed to enforce judicial decisions); *Kalender v Turkey* Application No 4314/02, Merits and Just Satisfaction, 15 December 2009 at paras 43–47 (relatives of the applicants were killed in an accident at a railway station; the Court found a violation of Article 2 in its substantive aspect in view of the significant number and the seriousness of the breaches of the national safety regulations).

150 See generally, Lavrysen, supra n 37 at 82.

151 See, for example, *Panaitescu v Romania* Application No 30909/06, Merits and Just Satisfaction, 10 April 2012 at para 36.

152 *Fadeyeva v Russia,* supra n 50 at para 98 (after observing that the domestic legality is not a separate and conclusive test, the Court added that it is 'rather one of many aspects which should be taken into account in assessing whether the State has struck a "fair balance" in accordance with Article 8(2)'). The problem with this approach is that the Court combines various factors, including non-compliance with the national legislation, into the general and very elusive standard of fair balance. This makes it impossible to objectively assess the role of and the weight attached to each individual factor, including non-compliance with domestic legislation.

153 Gerards and Senden, supra n 48 at 619.

B. Procedural Protection

In various fields of its case law on positive obligations, the ECtHR has added a procedural layer to the scope of the Convention rights by requiring states to ensure the availability of effective national procedures. As Brems and Lavrysen have observed, the rationale behind this move is the proposition that procedural guarantees are instrumental for better protection of the substantive guarantees.[154] The task of this section is not to offer a general analysis of the development of procedural protection by the Court, which has been already done by the above-mentioned authors. Its focus is rather the underlying causality, namely the understanding that the substantive harm is less likely to have materialized, had the decision-making process at national level been of sufficient quality. The main argument that I advance here is that procedural protection offers an avenue for the Court to deal (or rather not to deal) with empirical and epistemological uncertainty. This uncertainty poses challenges in ascertaining the remoteness or the proximity between the harm sustained by the individual and state omissions; procedural protection resolves the difficulty. The Court can eschew conclusive determinations that certain substantive omissions cause harm, and instead can focus on procedural omissions and deficiencies at national level.

The inclusion of a right to access to information in the environment-related judgments delivered by the Court supports the above argument.[155] In *Roche v United Kingdom*, there was uncertainty whether the applicant had been put at risk through his participation in chemical tests. This uncertainty did not have to be resolved because the Court framed its task as considering whether

> a positive obligation arose to provide an "effective and accessible procedure" enabling the applicant to have access to "all relevant and appropriate information" which would allow him to assess any risk to which he had been exposed during his participation in the tests.[156]

The Court also added that the applicant's uncertainty 'as to whether or not he had been put at risk through his participation in the test carried out at Porton Down could reasonably be accepted to have caused him substantial anxiety and stress.'[157] Accordingly, the core issue in the case was shaped as not how the tests themselves contributed to the harm falling within the scope of Article 8; but how the denial of

154 Brems and Lavrysen, 'Procedural Justice in Human Rights Adjudication: the European Court of Human Rights' (2013) 35 *Human Rights Quarterly* 182; Brems, 'Procedural Protection. An Examination of Procedural Safeguards Read into Substantive Convention Rights' in Brems and Gerards (eds), *Shaping Rights in the ECHR. The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (2014) 137; Gerards and Brems (eds), *Procedural Review in European Fundamental Rights Cases* (2017).

155 *Öneryildiz v Turkey,* supra n 5 at paras 89–90; *Budayeva and Others v Russia,* supra n 46 at para 132; *Roche v United Kingdom* Application No 32555/96, Merits and Just Satisfaction, 19 October 2005 [GC] at paras 161–162; *Hatton and Others v United Kingdom* Application No 36022/97, Merits and Just Satisfaction, 8 July 1997 [GC] at para 104. See also Steyn and Slarks, 'Positive Obligation to Provide Access to Information under the European Convention on Human Rights' (2012) 17 *Judicial Review* 308.

156 *Roche v United Kingdom,* ibid. at para 162.

157 Ibid. at para 161.

access to information about the tests caused harm falling within the scope of Article 8. These are certainly two distinct, although related, types of harm.

Access to information is only one element for assessing procedural protection. As *Hatton and Others v United Kingdom* shows, the Court can scrutinize more generally the quality of the national decision making process.[158] In particular, scientific uncertainty underpinned the case since '[t]he position concerning research into sleep disturbance and night flights is far from static'.[159] No finding on this specific point had to be made at the level of the Strasbourg Court because the national decision-making process was found adequate. No fundamental procedural flaws in the preparation of the night flight scheme at Heathrow airport were found.

Vilnes and Others v Norway is an example of a case where quite wide-ranging assumptions about causal relationships and procedural protection were made.[160] This merits more detailed examination. The applicants, who worked as divers in the North Sea for private companies, complained that Norway did not adopt an effective legal framework of safety regulations that could prevent the divers' lives and health being put at risk. While dismissing most of the divers' allegations, the ECtHR still found a failure on behalf of Norway. The underlying reason was that the companies were left with little accountability *vis-à-vis* the state authorities in relation to the usage of diving tables, which were treated as company business secrets.[161] In other words, Norway allowed a situation in which the divers were not informed about the health and life-related risks pertaining to the usage of diving tables.

There are two types of causality underpinning *Vilnes and Others v Norway* that have to be separated and further clarified. The first relates to the extent to which the rapid decompression tables did in fact contribute to the applicants' medical problems. The standard for assessing this contribution was formulated in the following way by the Court:

> The Court, having regard to the parties' arguments in the light of the material submitted, finds a *strong likelihood* that the applicants' health had significantly deteriorated as a result of decompression sickness, amongst other factors. This state of affairs *had presumably been caused* by the use of too-rapid decompression tables. . . . Thus, with the hindsight at least, it seems *probable* that had the authorities intervened to forestall the use of rapid decompression tables earlier, they would have succeeded in removing more rapidly what appears to have been a major cause of excessive risk to the applicants' safety and health in the present case.[162]

However, as the Court framed the case, the core issue was not that the state had not prevented the use of rapid decompression tables *as such* or that the state had not prevented their use earlier. As the Court alluded in the above citation, the conclusion that elimination of the tables would have reduced the risk can be reached only with

158 *Hatton and Others v United Kingdom,* supra n 155.
159 Ibid. at para 128.
160 *Vilnes and Others v Norway,* supra n 45 at paras 233–244.
161 Diving tables relate to the planning and the monitoring of the decompression.
162 *Vilnes and Others v Norway,* supra n 45 at para 233 [emphasis added].

the benefit of hindsight. At the material time in the past, it was widely believed that diving did not have serious long-term effects in the absence of decompression sickness. A procedural duty was rather placed at the heart of the case, namely the duty of the state to provide information essential for the divers to assess the health risks. Although the risks associated with diving at that time were still disputed, the *raison d'etre* of the decompression tables themselves was to provide information essential for the assessment of risk to personal health.[163] As the Court observed, the authorities were aware that the diving companies kept the tables confidential for competitive reasons.[164] The authorities failed to enlighten the divers about the risks, which in the logic of the judgment would have enabled the divers to give informed consent to the taking of such risks.[165]

In light of the above, a second type of causality was brought forward in the judgment: if the state had ensured that the divers could assess the risks to their health and give informed consent to the risks involved, this would lead to the elimination of the use of the rapid tables. The Court frames this in the following way:

> Had they done so [had the authorities ensured that the companies provide information by not keeping the tables confidential] they might conceivably have helped to eliminate sooner the use of rapid tables as a means for companies to promote their own commercial interest, potentially adding to the risks to divers' health and safety.[166]

Two comments are pertinent here. First, the standard of 'conceivably have helped' as a test of causation appears to be very low, and has not been used before *Vilnes and Others v Norway*. Secondly, the reasoning in the above quotation leads to contradictions within the judgment. In light of the absence of clear expert understanding at the material time of the consequences of the usage of decompression tables, as in fact acknowledged by the Court itself, it is hard to maintain that if the divers themselves had had access to the tables, this information would have been of use and led them to change their behaviour.

The above analysis is not a suggestion that the state was not at fault. The wrong that can be clearly imputed to the state is that it allowed the companies to treat the decompression tables as their business secret and keep them confidential for competitive reasons. How that wrong can be linked with the harm sustained by the particular applicants so that this harm can be translated into international responsibility under the ECHR, however, is a separate question. In its response to this question, the Court appeared to be very flexible when assessing causation. Admittedly, this could be counterbalanced with the understanding that it is not reasonable to allow business secrets in relation to issues that raise controversies as to their impact on human health. In other words, it would not have been anything close to an

163 Ibid. at para 240.
164 Ibid. at para 238.
165 Ibid. at para 243.
166 Ibid. at para 244 [emphasis added].

unreasonable burden on the state to demand disclosure of the tables. It is precisely the test of reasonableness that the next section will address.

7. TECHNIQUE FOR LIMITING RESPONSIBILITY WHEN CAUSATION IS PRESENT

A. Reasonableness

The Court has consistently reiterated that 'the positive obligation to protect is to be interpreted in such a way as not to impose an excessive burden on the authorities.'[167] The scope of the positive obligations under the Convention cannot therefore be unreasonable. When the Court refers to reasonableness in the context of positive obligations, it has in mind public interests—including public policy considerations, budgetary concerns and the rights of others—as factors that might compete with the assistance and protection interests of the particular applicant.[168] This section considers how the reasonableness standard might affect and mould the assessment of causation. As already suggested above in relation to *Vilnes and Others v Norway*, even if the lines of causation between state omissions and harm are tenuous, reasonableness might intervene and buttress a finding of a violation. Here I will focus on the other end of the spectrum, where even if there is clear factual causality between state conduct and harm, additional factors related to the reasonableness standard influence the determination whether the respondent state is responsible under human rights law.

Mastromatteo v Italy is illustrative in this respect. A brief summary of the facts is apposite here. The applicant's son was murdered by a gang of criminals. The murder was carried out at a time when they were on special prison leave or benefiting from a regime of semi-liberty. It was undisputed that if the state had not released the criminals, Mastromatteo would not have been murdered. In this sense, one can see a clear causation: failure by the state to keep them in prison resulted in severe harm. The Court, however, observed that

> a mere condition *sine qua non* does not suffice to engage the responsibility of the State under the Convention; it must be shown that the death of A. Mastromatteo resulted from a failure on the part of the national authorities to 'do all that could reasonably be expected of them to avoid a real and immediate risk to life of which they had or ought to have had knowledge', the relevant risk in the present case being a risk to life for members of the public at large rather than for one or more identified individuals.[169]

The Court went on to examine the decision of the national authorities to let the criminals on leave and concluded that

167 *O'Keeffe v Ireland,* supra n 6 at para 144.

168 See Hickman, 'The Reasonableness Principle: Reassessing its Place in the Public Sphere' (2004) 63 *Cambridge Law Journal* 166.

169 *Mastromatteo v Italy,* supra n 26 at para 74.

> there was nothing in the material before the national authorities to alert them to the fact that the release of M.R. or G.M. would pose *a real and immediate threat to life*, still less that it would lead to the tragic death of A. Mastromatteo as a result of the chance sequence of events which occurred in the present case.[170]

In light of the benefits associated with rehabilitation programs for prisoners, the judgment suggests that it would not have been reasonable to keep M.R. and G.M. in prison when the state did not know that they posed 'real and immediate' risk to harm. The Court thus took note of broader considerations related to reasonableness and the interest of others,[171] namely the benefits associated with letting prisoners on leave for the purpose of social reintegration.

B. The 'Real and Immediate Risk' Standard

A question that merits further investigation at this junction relates to the role of the 'real and immediate risk' test and, more specifically, how it affects causation and the reasonableness standard. In support of the standards set in the above-quoted paragraphs from *Mastromatteo v Italy*, the Court referred to *Osman v United Kingdom*. The test of 'real and immediate risk to life' was established therein in the context of the positive obligation to take protective operational measures. For a violation of this obligation to be found

> it must be established to its [the Court's] satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[172]

This test is relevant in circumstances where the state knew or should have known about dangers for a *specific* identifiable individual from the criminal acts of another individual.[173] The Court has never clarified the meaning of 'real' and 'immediate' and usually bundles these criteria together without elucidating how they differ. Often, it refers to them as 'general principles' without clarifying their application to the concrete circumstances of the case.

'Real' risk could be understood as risk that is objectively given and not merely speculative. The qualifier 'real' could refer to the likelihood that the risk will

170 Ibid. at para 76 [emphasis added].

171 For a useful outline of the interests involved, see the Partly Dissenting Opinion of Judge Bonello in *Mastromatteo v* Italy, supra n 26 at para 7.

172 *Osman v United Kingdom* Application No 23452/94, Merits and Just Satisfaction, 28 October 1998 [GC] at para 116.

173 Gerry, 'Obligation to Prevent Crime and to Protect and Provide Redress to Victims of Crime' in Colvin and Cooper (eds), *Human Rights in the Investigation and Prosecution of Crime* (2009) 423 at 432.

materialise.[174] In this sense, a parallel can be drawn with the 'real prospect' test discussed in Section 4, which refers to the likelihood that a protective measures could obviate the risk. 'Immediate risk' could be understood as risk that is 'present and continuing'.[175] It has also been suggested that immediacy implies that the harm could be expected to 'materialize at any time'.[176] The immediacy prong of the test and the identifiability of the person exposed to the immediate harm are the distinguishing features that characterize the circumstances where the positive obligation of taking protective operational measures is applicable.

The existence of a 'real and immediate risk' needs to be conceptually separated from the existence of official knowledge about the risk (the latter requirement was addressed in Section 3 above). Such a risk might exist even if the state authorities are not aware of it, and thus state responsibility will be precluded when there is no official awareness. However, this preclusion of responsibility is undermined by the requirement formulated as 'ought to have known' about the risk, which is given as an alternative to 'the authorities knew' standard. As already observed in Section 3 above, the 'ought to have known' test implies calculations as to how reasonable it is to actually expect that the authorities know about and foresee harm.

It is important to clarify here that the 'real and immediate risk' test is not of general applicability to positive obligations. Accordingly, McBride's argument that the Court has responded to the difficulties arising from different possible sources of harm by 'adopting an exacting causal test, namely that the risk of death from the supposed threat be "real and immediate"' needs to be rejected.[177] This test is rather limited to circumstances where the person exposed to the harm can be individualized and identified in advance, and the risk of harm is immediate. In this sense, *Osman v United Kingdom* and the other cases in which the positive obligation of taking protective operational measures has been found to be triggered,[178] have a factual substratum that only tenuously resembles *Mastromatteo v Italy*. The 'real and immediate risk' test might appear well-suited in cases where identifiable individuals are exposed to the risk of criminal acts of others, since it might be

174 The interpretation advanced by McBride that the likelihood 'has at least to be compelling' is too stringent: see McBride, 'Protecting Life: Positive Obligation to Help' (1999) 24 *European Law Review* 43.

175 See *Re W's Application* [2004] NIQB 67; *Re Officer L* [2007] UKHL 36 per Lord Carswell; *Smith v Chief Constable of Sussex* [2008] EWCA Civ 39; and Wright, 'The Operational obligation under Article 2 of the European Convention on Human Rights and Challenges of Coherence–Views from English Supreme Court and Strasbourg' (2016) 1 *Journal of European Tort Law* 58 at 67.

176 Ebert and Sijniensky, 'Preventing Violation of the Right to Life in the European and the Inter-American Human Rights Systems: From *Osman* Test to a Coherent Doctrine on Risk Prevention?' (2015) 15 *Human Rights Law Review* 343 at 359.

177 McBride, supra n 174. Xenos has also objected to the general applicability of the 'real and immediate' test. However, the substantiation of his objection is questionable. More specifically, he has observed that 'the *Osman* test contains calculating parameters of "seriousness" and "immediacy" that confine the scope of positive obligations *to mere reactive responses*' [emphasis added]. National authorities are, however, under the obligation to take protective operational measures upon risk of harm and before the harm has actually materialized. Certainly, once a case reaches the ECtHR, then an assessment of the national authorities' reaction is made: see Xenos, supra n 11 at 112.

178 *Opuz v Turkey,* supra n 43 at paras 133-136; *Rantsev v Cyprus and Russia,* supra n 26 at para 286; *Branko Tomasic and Others v Croatia* Application No 46598/06, Merits and Just Satisfaction, 15 January 2009 at para 52.

unreasonable to expect the authorities to take protective operation measures of an *ad hoc* nature without some imminence and concreteness of the risk to which a particular individual is exposed. In other words, it would be unreasonable to expect the state to take such measures in relation to an indeterminate class of people.

In contrast, when the issue is general protection of the society, the test of 'real and immediate risk' is ill-suited. Therefore, the factual substratum of *Mastromatteo v Italy* does not call for the invocation of protective operational measures since there was no immediate danger to the life of any specific individual; it rather reveals circumstances where the applicant's son happened to be an accidental victim of various errors in relation to the application of the national regulations about prison leave.[179] These errors were, however, assessed as not sufficiently material and systemic, an issue I address in the next subsection.

In sum, 'the real and immediate risk' test limits the circumstances where the state might be found responsible for its omissions. However, this limitative function is not of general applicability.[180] It is not appropriate to operate in circumstances demanding general protection of the society, where there is no immediate danger to any specific individual,[181] and where the state is rather under the obligation to put in place a general legislative and administrative framework for regulating activities so that harm is prevented.[182] The current uncertainty as to the meaning of 'immediate' risk, however, and the threshold of immediacy required, will continue to spread confusion in the case law.[183]

The reason for this confusion is not simply the Court's inadequate stringency in the application of the standards, a point already intimated above; there are also broader considerations that need to be seriously considered. In particular, if the state were to take protective actions against any potential risk *regardless of its immediacy*, then we might be confronted with the problem of a too intrusive state. This is a dilemma already

179 See the Partly Dissenting Opinion of Judge Bonello in *Mastromatteo v Italy,* supra n 26.

180 In some judgments, the Court incorrectly applies the 'real and immediate risk' test. For example, in *Öneryilidz v Turkey,* supra n 5 at paras 100–102, the Court applied this test in its assessment as to whether Turkey was responsible for the deaths in the light of the substantive aspect of Article 2, that is, whether the national safety regulations were effective. The reference to the test in this context was, however, hard to defend. While the establishment that the national authorities knew about the dangers associated with the garbage collection point was necessary for the finding that state omissions were causative to harm (see Section 3 above), it is hard to understand why it needed to be also established that these dangers were *immediate* in the sense of the *Osman* test. In *Öneryilidz v Turkey* the notion of immediacy seems to be stretched to a breaking point (at para 100): 'the risk of an explosion had clearly come into being long before it was highlighted in the report of 7 May 1991 and that, as the site continued to operate in the same conditions, that risk could only have increased during the period until it materialized on 28 April 1993.' A period of two years is hardly what the Court had in mind when it established the 'real and immediate risk' test in *Osman v United Kingdom.*

181 There are judgments where the Court is very clear about the distinction between circumstances calling for protective operational measures and circumstances requiring general protection of the society: see *Bljakaj and Others v Croatia* Application No 74448/12, Merits and Just Satisfaction, 18 September 2014 at para 124; *Stoyanovi v Bulgaria* Application No 42980/04, Merits and Just Satisfaction, 9 November 2010 at paras 59 and 62; *Mikhno v Ukrain* Application No 32514/12, Merits and Just Satisfaction, 1 September 2016 at para 126.

182 For a useful outline, see Lavrysen, supra n 37.

183 See the Partly Concurring and Partly Dissenting Opinion of Judge Sajó in *Banel v Lithuania* Application No 14326/11, Merits and Just Satisfaction, 18 June 2013 (death of a boy after collapse of a roof).

identified in Section 5 above and, it calls for caution when expanding the scope of the positive obligation of putting in place general legislative and administrative framework for regulating activities so that harm is prevented. On a related point, we as a society might have to accept certain levels of risk,[184] and this might militate against expansive construction of positive obligations. This is an argument that bulwarks the proposition that even in cases of clear factual causality, violations of human rights should not be found because society has to tolerate and accept certain risks.

C. Incidental as Opposed to Systemic Failures

In addition to the 'real and immediate risk' test, another technique utilized by the Court for limiting state responsibility relates to the distinction between incidental and systemic failures. As touched on above, a reason that might explain the outcome in *Mastromatteo v Italy,* where no violation was eventually found, is that the errors on the part of the national authorities appeared incidental and not systematic.[185] In this sense, it might be unreasonable to find Italy responsible under ECHR for isolated errors and omissions even if they might have caused harm. This line of reasoning clearly emerges in the context of Article 2 and health care:

> [W]here a Contacting State had made adequate provision to secure high professional standards among health professionals and to protect the lives of patients, it cannot accept that matters such as error of judgment on the part of a health professional or negligent coordination among health professionals in the treatment of a particular patient are sufficient of themselves to call a Contracting State to account from the standpoint of its positive obligations under Article 2 of the Convention to protect life.[186]

As pointed out in the Joint Dissenting Opinion of the Chamber judgment in *Lopes De Sousa Fernandes v Portugal*, the majority had set a standard that casual acts of negligence by members of staff would not give rise to a substantive breach of Article 2. The Grand Chamber judgment in *Lopes De Sousa Fernandes v Portugal,* not only unequivocally upheld the principle embodied in the above quotation, but it added an additional layer of restrictiveness as compared to the approach by the Chamber in the same case.[187] Any deficiencies that might give rise to a substantive violation of Article 2 in medical cases, need not only be systemic or structural (and thus not 'a

184 The issue of acceptable level of risk has come to a head in the context of home births and state imposed regulations as to the conditions under which women can give birth: see the Dissenting Opinion of Judges Sajó, Karakas, Nicolaou, Laffranque and Kellder in *Dubská and Krejzová v Czech Republic* Applications Nos 28859/11 and 28473/12, Merits and Just Satisfaction, 15 November 2016 [GC] at para 29.

185 See *Mastromatteo v Italy,* supra n 26 at para 73, where it was observed that the percentage of crimes committed by prisoners on semi-custodial regime was very low.

186 *Lopes de Sousa Fernandes v Portugal,* supra n 146 at para 108; *Lopes de Fernandes v Portugal*, supra n 147 at paras 168 and 187; *Elena Cojocaru v Romania,* supra n 146 at para 100. Similar reasoning has been endorsed in other contexts too: see *Stoyanovi v Bulgaria.* supra n 181 at para 61.

187 As opposed to the Chamber in *Lopes de Sousa Fernandes*, supra n 146, which found a substantive violation of Article 2, the Grand Chamber, supra n 147, did not, in this way overruling the Chamber. For a more detailed analysis, see Lavrysen, 'Medical Negligence after *Lopes de Sousa Fernandes*: A Blank Check

mere error or medical negligence'), but they must also implicate denial of immediate emergency care.[188]

The suggestion that incidental failures might not afford a basis for state responsibility is reminiscent of another test that has been invoked in the case law, namely the 'significant flaw' test. The Chamber invoked this test in precluding responsibility in *Söderman v Sweden.* In particular, it observed that 'only significant flaws in legislation and practice, and their application, would amount to a breach of a State's positive obligations under the said provision [Article 8]'.[189] Subsequently, however, when the Grand Chamber reviewed *Söderman v Sweden*, it partially rejected the 'significant flaws' test:

> [S]uch a significant-flaw test, while understandable in the context of investigations, has no meaningful role in an assessment as to whether the respondent State had in place an *adequate legal framework* [emphasis in the original] in compliance with its positive obligations under Article 8 of the Convention since the issue before the Court concerns the question whether *the law afforded an acceptable level of protection* to the applicant in the circumstances.[190]

'Acceptable level of protection' is a standard the Court had never used before.[191] What is also interesting about *Söderman v Sweden* is that no reasonableness standard was even invoked: the Grand Chamber was simply not satisfied that the relevant Swedish law, both criminal and civil, as it stood at the time when the applicant's stepfather covertly attempted to film her naked in their bathroom for a sexual purpose, ensured protection of her right to respect for her private life.[192] In particular, the act of filming was not criminalized.

The approach by the Grand Chamber in *Söderman v Sweden* barely squares with the approach in *Mastromatteo v Italy,* or in fact, in other judgments where the issue was whether the national legal and administrative framework was effective and where reasonableness was applied as a factor in the delimitation of the scope of the positive obligation.[193] Can any explanations concerning this inconsistency be found? An overview of the case law shows that when criminal legislation is invoked as a means of ensuring the rights,[194] no test of reasonableness is applied and, in fact, the issue of causation seems to be immaterial. As a consequence, it is simply assumed that

to the Member States with Respect to the Substantive Right to Life?' *Strasbourg Observers Blog*, 8 February 2018.

188 *Lopes de Sousa Fernandes v Portugal*, supra n 147 at paras 182, 190–192. In paras 191 and 192 of the judgment, the Grand Chamber explained the circumstances when 'denial of immediate emergency care' will transpire. These circumstances are framed as 'very exceptional circumstances'. On the application of the 'very exceptional circumstances' standards, see Stoyanova, 'How Exceptional Must "Very Exceptional" be? Non-Refoulement, Socio-Economic Deprivation and *Paposhvili v Belgium*' (2017) 29 *International Journal of Refugee Law* 580.

189 Supra n 10 at para 50.

190 Ibid. at para 91 [emphasis added].

191 The standards have not been applied in other cases either since *Söderman v Sweden*, ibid.

192 Ibid. at para 117.

193 *O'Keeffe v Ireland*, supra n 6 at para 166.

194 In *Söderman v Sweden,* supra n 10, the applicant invoked the ineffectiveness of not only the national criminal law remedies, but also of the civil law remedies. However, the civil law remedies were contingent on the criminal law remedies.

criminalization (or an interpretation of the national criminal law so that its reach is more expansive) contributes to better protection of human rights.[195] In contrast, when legal frameworks other than criminal law are at issue, reasonableness and competing interests are included as factors in the analysis. *Mastromatteo v Italy* exemplifies this since ultimately the issue in this case was whether the national framework regulating prison leave contained sufficient safeguards to protect the general population from prisoners on leave.

The approach described above, under which the test of reasonableness is not applied when the issue is whether the national criminal law ensures effective protection, is, however, balanced in the following way. Criminalization, as a means of ensuring human rights, is required only where the harm sustained by the victim meets a certain threshold of severity. This will be the case, for example, where Articles 2, 3 or 4 are found applicable,[196] and where 'fundamental values and essential aspects of private life are at stake.'[197]

In sum, it was relatively easy to reject the 'significant flaw' test in *Söderman v Sweden* because the effectiveness of the criminal law lay at the core of the case. In contrast, the health care cases seem to raise more challenging issues related to allocation of resources and medical expertise. These cases might prompt the Court to be more cautious in finding a substantive violation of Article 2, since *inter alia* it might be difficult to assess the causal connections between the alleged inappropriate medical treatment and the harm sustained by the specific person. Perhaps for this reason, many of the cases in this area conclude only with a finding of a procedural violation (that is, failure to set up an independent judicial system so that the cause of death of patients in the care of the medical profession can be determined and those responsible held accountable).[198] In this way and as already clarified in Section 6.B above, the Court avoids engagement with difficult questions of causation. The difficulties in establishing causal connections might also invite the Court to maintain the distinction between systemic and incidental failures. When confronted with information about deficiencies of a more systemic nature, the Court might more readily link the concrete case with these general shortcomings.

195 *M.C. v Bulgaria* Application No 39272/98, Merits and Just Satisfaction, 4 December 2003; *Siliadin v France* Application No 73316/01, Merits and Just Satisfaction, 26 July 2005. See generally Stoyanova, supra n 2 at 330; Lazarus, 'Positive Obligations and Criminal Justice: Duties to Protect or Coerce' in Zadner and Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (2012) 136 at 150; Stoyanova, 'Article 4 of the ECHR and the Obligation of Criminalising Slavery, Servitude, Forced Labour and Human Trafficking' (2014) 3 *Cambridge Journal of International and Comparative Law* 407 at 414.

196 In the circumstances of unintentional killing, the Court has clarified that absence of a criminal law remedy might not be problematic: see *Calvelli and Ciglio v Italy*, supra n 93; and *Vo v France*, supra n 93.

197 *Söderman v Sweden,* supra n 10 at para 82.

198 *Belenko v Russia* Application No 25435/06, Merits and Just Satisfaction, 18 December 2014 at paras 84–85; *Burzykowski v Poland* Application No 11562/05, Merits and Just Satisfaction, 27 June 2006 at para 118; *Dodov v Bulgaria*, supra n 47 at para 98; *Kudra v Croatia* Application No 13904/07, Merits and Just Satisfaction, 18 December 2012 at paras 106–121; *Bilbija and Blazevic v Croatia* Application No 62870/13, Merits and Just Satisfaction, 12 January 2016 at para 119.

7. CONCLUSION

No hard-edged legal tests apply to cases invoking positive obligations under the ECHR. This flexibility is similarly applied to the requirement for causation, that is, the linkage between the harm sustained by the individual applicant and state omissions. While certainty is not required that the interposition of a missing action would have prevented the harm, no general threshold has been articulated as to how likely it is that a protective measure would have averted the harm. The Court also merges issues of knowledge, reasonableness and causation in its assessment of state responsibility in the framework of positive obligations.

Human rights law is thus far from rigid in the assessment of the linkage between state omissions and harm, an approach that can be understood in light of the objective of this body of law, namely assessing the responsibility of a collective (that is, the state). This assessment is underpinned by the assumption that the state is the entity tasked to ensure the rights of the individuals within its jurisdiction. As a consequence, the ECtHR's approach wavers between effective protection of human rights, on the one hand, and not imposing an unreasonable burden on the state on the other. The establishment of causation is influenced by these considerations. Still, it would not be satisfactory to simply say that the standard of causation applied oscillates between effectiveness and reasonableness. Analytical rigour demands that we further scrutinize the role of causation in the context of positive obligations.

This scrutiny shows that by assuming control over certain activities, the state places itself in proximate relationships with harm that might arise in relation to these activities even if this harm is not directly attributable to state agents. Control thus implies closer proximity and more demanding positive obligations. Paradoxically, in certain areas the absence of sufficient control by the state creates the basis for the finding that the state has failed to fulfill positive obligations. This paradox is perhaps only apparent since these areas are underpinned by the normative assumption that the state should assume control. This shapes the approach to causation by making it less stringent.

Establishing causation between harm and state omission may be fraught with factual and epistemological uncertainty. In these circumstances, a conclusive determination that the nexus between state omission and harm is too attenuated or sufficiently solid to sustain a violation might be eschewed. Instead, we might rather ask whether the omission was contrary to the applicable domestic legal framework. In cases of non-compliance with this framework, the Court is more prepared to find that the omission has led to harm. Another avenue for avoiding issues of causality is by focusing on the process at national level leading to a decision that is allegedly contrary to states' positive obligations. If this process is of sufficient quality, the finding of a violation is less likely. The assessment of the quality of the process also includes the availability of procedural guarantees. If these are incorporated at national level, the finding of a violation is also less likely.

Finally, I have elaborated on three techniques that might limit the finding that the state is responsible. The standard of reasonableness, and the requirement that the risk of harm is 'real and immediate', might have such limiting functions. Although still with uncertain contours, the distinction between incidental and systemic failures might also be determinative. As a consequence, even if a failure is causative to harm,

when the concrete case is representative of a mere incidental failure, no state responsibility might be found.

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In the matter of

The Coroners Act 2006

And

A submission to the Chief Coroner on behalf of surviving families

On the matter of opening a coronial inquiry into the deaths of

The 51 persons killed as a result of the Masjidain attacks on 15 March 2015

“Issues Requiring Further Investigation”

8 October 2021

Filed by:

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Enclosures:

Correspondence re scope

Family summaries

May It Please The Chief Coroner

(1) INTRODUCTION

Scope

1. This submission has been invited by Her Honour, the Chief Coroner, to assist the consideration of whether to hold a coronial inquiry.

2. This submission is filed in support of the opening and conduct of an inquiry under s57 of the Coroner's Act 2006 (the Act) and the holding of an inquest under s80 of the Act.

3. This submission has had the benefit of another submission made on behalf of families', filed by Mr Hampton QC and Ms Dalziel. The families herein represented (the families) support that submission.

4. The scope of this submission has been specifically limited to issues which interested parties have identified to be outstanding from their "copies of the evidential overview and individual information packs relating to their loved ones provided to give them an overview of the police investigation, and key information about the death of their loved ones".[1]

Submission

5. Submission that an inquiry "must" be held, or ought to be decided to be held:

6. Our submission is that an inquiry must be opened in accordance with s 60 of the Act.

7. Section 60 addresses "deaths into which inquiries must be opened":

> A responsible coroner must open and conduct an inquiry into a death if—
>
> (a) the death appears to have been self-inflicted; or
>
> (b) the dead person appears to have been a person in official custody or care; or
>
> (c) the coroner is not satisfied that the matters required by this Act to be established by an inquiry are already adequately disclosed in respect of the death by information arising from investigations or examinations the coroner has made or caused to be made.

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[1] This was further indication that this process was not to invite submissions in order to satisfy the Coroner that an inquiry should occur or to make submissions regarding the the scope of any inquiry, but rather to provide the Coroner with some preliminary sense of families' perspectives regarding what kinds of matters are presently at the forefront of their minds: what matters relating specifically to the death-related processes are they concerned about, and what kinds of issues do they feel are outstanding. The preliminary nature of this process is confirmed in the reply to this quoted correspondence, attached herewith, dated 28 September 2021.

8. While the victim community is not in official custody or care *per se,* there is now little doubt about tiny communities specifically vulnerable to far-right extremism being dependent on the care of the state specifically under its duty of care to protect and preserve life given the steep rise in far-right extremism, to the point of threats being made against mosques the very day of 15th March 2019.

9. The Coroner cannot be satisfied that the matters to be established are already adequately disclosed, especially pursuant to s 57(2):

> (c) when and where the person died; and
>
> (d) the causes of the death; and
>
> (e) the circumstances of the death.

10. Further, under s 57(3) & (4), especially: recommendations that may reduce the chances of further deaths occurring in circumstances similar to those in which the death occurred.

11. In addition, the following s 63 factors apply in favour of holding an inquiry:

> 63 Decision whether to open and conduct inquiry
>
> In deciding whether to open and conduct an inquiry, a coroner must have regard to the following matters:
>
> (b) in the case of a death that appears to have been unnatural or violent, whether or not it appears to have been due to the actions or inaction of any other person; and
>
> (c) the existence and extent of any allegations, rumours, suspicions, or public concern, about the death; and
>
> (d) the extent to which the drawing of attention to the circumstances of the death may be likely to reduce the chances of the occurrence of other deaths in similar circumstances;
>
> (e) the desire of any members of the immediate family of the person who is or appears to be the person concerned that an inquiry should be conducted; and
>
> (f) any other matters the coroner thinks fit.

12. It is submitted that pursuant to the above provisions the families need a inquiry that is ready and willing to conduct its own exercise and draw its own conclusions

with the benefit of a public hearing, victim representation, expert input and a sense of connectedness to families' relevant concerns.

Families and public interest

13. The masjidain attacks were directed towards and struck at the heart of, the families'[2] cultural and spiritual values. That fact alone centres the Act's prioritisation of such values in the consideration and course of an inquiry.

14. The issues raised have been the subject of suspicions and concern by many families and the public. The victims are, in fact, also the group with the widest possible interest in the events that lead up, occurred in the course of the event and have happened thereafter. As such, they also represent the interests of the entire New Zealand public who have an interest in ensuring that no event of this kind ever takes place in New Zealand again.

15. Given the virtual inevitability (according to experts) of attacks in future, there must be a proportionate efforts made to reduce the risk of their occurrence especially of this magnitude and this level of atrocity given the effectiveness of this attack, and the inspiration it has sparked online and in others; and the pattern of inspiration that such attacks follow.

16. Stepping back, taking a global view of the coronial legal regime that aims to address and restore basic human needs upon the death of a family member or upon the occurrence of a death(s) of public significance, it is submitted that:

> a coronial inquiry is essential in order that substantive outstanding issues are afforded adequate inquiry and attention, and that a participative process is available for those directly to engage in rendering a critically therapeutic aspect of agency. There is a widespread sentiment such a sense of agency and addressing of the most basic human needs upon the occurrence of such an atrocity has so far eluded families. That sentiment extends well beyond families themselves, to such independent observers as the Human Rights Commission.[3]

17. Due to the attacks targeting an entire community, the concerns of the families represented herein are shared by the wider Muslim, faith, migrant and associated communities. Many of these concerns overlap both with the wider public and with diverse communities, including Muslim, of which there are various, albeit smaller, denominations. There are those who are wrongly associated with Muslims such

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[2] 'Families' and 'victims' may be used interchangeably in this submission depending on context

[3] Reflections on the Report of the Royal Commission of Inquiry into the terrorist attacks on Christchurch Masjidain on 15th March 2019: Human rights of affected whānau, survivors and witnesses to accountability
and remedies in the aftermath of the Report. Human Rights Commission | Te Kāhui Tika Tangata. March 2021, Wellington: New Zealand. Accessible: https://www.hrc.co.nz/files/3716/1588/7040/HRC_Reflections_on_the_report_of_the_RCI_on_terrorist_attacks_on_Christchurch_Masjidain_FINAL.pdf

as the Sikh community, similarly vulnerable faith communities such as the Jewish community, former-refugee and migrant communities of which the Muslim community forms a significant subset, indigenous communities of which Muslims are an important part, and prominent civil society personalities who are known to support such groups[4] and finally, the wider general public.[5]

18. Thus the investigation of substantive concerns regarding the Masjidain attacks is in the public interest as it will provide lessons critical to prevention of further deaths occurring in such circumstances.

Opportunity to transform authorities-families relationship into one of cooperation

19. Discussions with or about families have so far seldom been centred around how things can be improved or any such constructive topics; they are all on the basis that the government needs to dispose of all of their concerns, bat away all their questions, dispense with all their queries. This approach to victims of being a problem to solve and get rid of, rather than as being the solution or at least an important part of it, has been consistently seen throughout the response process. The families' level of knowledge and breadth of interest tends to be undermined by the labeling of them as victims who are largely illiterate at least of relevant procedures and principles that govern NZ legal processes.

20. In various meetings about the victims they are often treated as a group needing to have various wide-ranging needs and concerns met with minimal impact to the state purse, rather than as a group who can help effect much needed towards retained institutional learning about mass-victim experiences in NZ, especially given the ongoing grievances of various such overlapping experiences from Christchurch earthquake victims to Maori racial grievances. Yet families tend to be seen by the government, wittingly or unwittingly, more as a potential fiscal liability than a group who holds the potential for improving our avoidance of and response to, mass incident casualties.

21. On the other hand, a coronial inquiry is very much a forward looking or future focused process albeit using the lessons learnt of the events in question; an inquiry will allow victims to directly participate in shedding light on these lessons with a view to preventing such incidents in future. The now clearly forming pattern of evidence for this tendency is the 2 years of approach by the government to them and especially after the Royal Commission of Inquiry (RCI) process.

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[4] A prominent example is the murder of UK MP Jo Cox by Thomas Mair shouting "Britain first".

[5] Similarly various sections of the public will be the subject of particular kinds of attacks; for example INCEL attacks such as the Toronto van attack several months prior to the Masjidain attacks, was characterised as misogynist terrorism (revenge for sexual and social rejection by women) targetted the general public. A current NZ case counsel is involved advice to the Court for involves a young man go through a fairly common radicalisation process which took him through INCEL, white supremacy and finally ISIS, he only deciding to remain with the latter due to his not feeling excluded as a person of indigenous Maori (coloured) background.

22. The initial response to the March 15 massacre and the genuine attempt at inclusion of the Muslim community means New Zealand is potentially in a unique situation. It is possible that a response to potential terrorism could be developed such that intelligence and enforcement and the NZ Muslim community can engage meaningfully and with respect. This could result in an ongoing national response to our internal security that is non-discriminatory and supported and strengthened by all parties. The events leading up to the 3 September 2021 Countdown (New Lynn) attack suggest this is not yet happening and a complete investigation with specific recommendations may be necessary to ensure that policy is established and actions taken to achieve such responses.

23. The New Lynn attack again highlighted the concerns relating to security intelligence and enforcement sector operational issues. The rise in online radicalisation underscores the disappointment that the online activity of the terrorist ("T") including on social media remain largely uninvestigated. Further, expert reports have confirmed the unrivalled rise of far-right extremism online, including in New Zealand, and recent reports from all points on the terrorism-focus spectrum emphasise this. For example, a US Military Academy counterterrorism journal from last month notes:

> In a recent Institute for Strategic Dialogue (ISD) study into the New Zealand online extremist ecosystem, researchers found the extreme far-right to have by far the most numerous and active online extremist presence, comprising around half the total posts of a dataset of over 600,000 extremist posts—dwarfing the activities of Islamist, extreme far-left, and conspiracy-based extremists like QAnon.[6]

24. The recent case unwittingly demonstrates the stark reality that a far-right extremist attack is able to be prepared for immeasurably more, without detection or suspicion being raised. That is one of many concerns underlying the need for clearer answers as to the lack of specifics around key missed opportunities in detecting T. The stark contrast has reiterated the concerns of Masjidain survivors and families, and as previously claimed by wider representative Muslim organisations across Aotearoa such as the Islamic Women's Council of NZ, that the landscape of systemic discrimination across the various relevant security and enforcement sectors is a key central factor in Muslim community experiences. Those experiences extend to survivors' and families' attempts to have their most basic needs after the attacks addressed and restored, and to thereby be able to heal from the attacks.

25. A coronial inquiry will focus all the relevant parties on improving processes to prevent such an attack and such rate of casualties in the future. The immense resources available to developed countries for public safety are now being redirected towards more constructive and preventative measures to help prevent

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[6] In the Shadow of Christchurch: International Lessons from New Zealand's Extreme Far-Right Milo Comerford, Jakob Guhl, and Elise Thomas. CTC Sentinel, Combating Terrorism Center at West Point, July/August 2021 Vol. 14 Issue 6. Accessible: https://ctc.usma.edu/wp-content/uploads/2021/07/CTC-SENTINEL-062021.pdf

terrorism climates developing. As more awareness and acceptance of racism, Islamophobia, and awareness of non-Islamist extremism continues to grow, there is a trend towards diversifying towards a more principled approach to preventing of such terrorism climates. This trend presents an opportunity for Aotearoa to benefit in a very timely manner from the lessons learnt through a coronial inquiry process.

26. Pursuant to the above criteria and in particular s63(c), s63(d), s63(e), and s63(f), the matters in this submission are raised further, in support of an inquiry that will provide families with answers and reassurances about the concerns and issues they have raised with us over the past 5 weeks of counsel being involved in this process.

27. After stating our broad concerns, this document goes into limited detail about some of the most common and fundamental questions regarding

    1. the lead up to the event, some of which questions have been addressed to some degree or in some (e.g. more general) ways
    2. the background of the terrorist (T);
    3. T's use of social media,
    4. T's ability to carry out such a level of attack and the related issue of evidence for his receiving any support, directly or indirectly;
    5. the event itself as it took place;
    6. the aftermath;
    7. the investigation;
    8. The consequent processes so far

28. Due to various constraints, as outlined in the correspondence to the Office of the Chief Coroner, especially the limited time to prepare this document, not all of these sections are able to be adequately introduced here.

29. There is an acknowledgement of the preliminary issues affecting families at the most basic level, and an expounding of these issues, including:

    1. The need for insight into the moments before during and after the attack, for each shaheed and affected person, and including:
    2. Their travel to the mosque;
    3. Their movements in the mosque;
    4. Who they were with;
    5. Their movements in/around the mosque;
    6. The immediate cause and mechanism of each death, including;

7. The mechanism and cause of death;
8. Exactly when and where each person died (to the extent that this is possible to ascertain);
9. Survivability, including whether any inadequacies in the emergency response contributed to individual deaths and/or whether any of the deaths could have been prevented.

(2) THE ROYAL COMMISSION OF INQUIRY

The Royal Commission of Inquiry — a troubled prelude to this process

30. The Royal Commission of Inquiry ("RCI") process is critical to the context of document. The RCI process, given its cost, expectation, and weight attributed to it by the government, ought to have had a wider scope, more time and resources and be directly connected to families and communities. There is a wide range of sentiment regarding this process that indicates it failed the families in many areas. We commence this section with a hopeful such comment:

> "[The] ROYAL COMMISSION HAS DONE A FANTASTIC JOB BUT SOME OF IT [IT'S WORK] IS INCOMPLETE AND NEEDS TO BE COMPLETED"

31. These submissions elaborate on comments such as the one above, which is appreciative of the work done so far, but notes the many important answers still outstanding. They emphasise the need for victims to have a process in which they can meaningfully participate (including through lawyers) in the substantive inquiry process itself, rather than feel very much at its periphery.

32. The scope of the Commission's work was restricted to the actions of state agencies in the lead up to the terrorist attacks, what intelligence those agencies had and whether they could have intervened before the attacks occurred. The Commission described some of the matters outside the scope of their Inquiry as being activities by entities or organisations outside the public sector agencies (such as media platforms).

Terms of Reference

33. The scope of the Commission's work was restricted to the actions of state agencies in the lead up to the terrorist attacks, what intelligence those agencies had and whether they could have intervened before the attacks occurred.

34. The RCI terms of reference excluded key parts of the investigation required to understand the events leading up to and during the attack. It was not within the scope of the Royal Commission of Inquiry to investigate:

    1. The causes of T's online deradicalisation

2. The role of social media and internet in T's ability to connect with and gain support from others for his cause
3. The role of New Zealand right-wing extremist groups in inciting, aiding and abetting T directly or indirectly.
4. Overseas connections (including Australia) (T. had formed his extreme right wing views before arriving in NZ)
5. Events after attack commenced

35. Exclusion of such key areas affected confidence in the process from the outset. Both the scope and circumstances of formation of the RCI and the absence of any important members who had community or cultural literacy was a major factor affecting credibility and engagement which was increasingly pronounced and obvious as the process went on.

36. The narrow scope imposed on the Royal Commission of Inquiry by the New Zealand Government has ensured opportunities to properly investigate far right extremism in the New Zealand context as required to address the fundamental causes of these terrorist attacks have been lost:

37. The media itself has been a traumatising yet important source of often unknown information for families.

38. The Commission stated that for many lone actors, participation in extremist groups and access to extremist material and role models helps to break down any moral barriers they may have to using violence.

39. The Commission further stated that the wider radical environment in which lone actors exist and draw inspiration from, plays an important role in their decision to undertake violence.

40. It is acknowledged throughout the Royal Commission report that social media platforms significantly influenced T.

41. The Commission states that T's manifesto used language found on right-wing extremists' social media posts, and used social media platforms to livestream the terrorist attacks.

42. The limitations imposed on the Commission excluding entities and organisations outside public sector agencies has left families disillusioned.

43. The therapeutic value of participation is a coronial inquiry will be significantly heightened due to the lack of meaningful participation in both the criminal trial process of T and in the Royal Commission process and the great need an inquiry process will fulfil for families to be able to directly participate in a process rather than be marginalised as observers.

Victim voice vs victim input

44. JustCommunity (“JC”) attempted to intervene in this process from late 2019 until the end of the process (nearly one year), in order to just get victim voices heard by the Commission. This was partially successful to the extent the RCI heard more voices that felt more empowered, directly from victims, including for some, in their homes.

45. However, the overwhelming reality that the RCI was one which was at some distance from families through its inherent scope, constitution and cultural distance, and that the RCI process was rushed, was unavoidable.

46. The RCI process provided very limited opportunity for interaction; and where there was interaction there was limited opportunity to discuss issues (very brief visits); where there was opportunity to discuss, it involved merely whatever the victim had prepared at that time; many victims had not been able at that stage, to prepare substantive questions or concerns.

47. Transparency issues: the 30 year suppression order is a blanket order without any delineation as to the seriousness of sensitivity or gravity of classification. It indicates a general tendency towards suppression. It does not indicate striking an effective balance between transparency and protection of national security.

48. The agencies involved in hiding behind for example their classification of documents are the same ones that are under scrutiny. The RCI being at the mercy of agencies centrally implicated in the failures that led to the attack leaves the process tainted especially given the RCI’s unwillingness to state as much (regarding this inherent dependence and apparent need to preserve agency credibility) in its report.

49. Public participation with the RCI was severely limited and we are not aware of the extent of the Commission's deliberations, and [New point?] the victims were not given any special status whatsoever in regards to these deliberations.Our direct involvement with victims and our liaison with them throughout this process have made us aware of this. This connects with the absence of wider victim engagement in the process, which would have been far worse but for the human connection facilitated by our assistance to the Commission.

50. As several key parties have pointed out, the Commission’s report falls short of the concrete clarity and specificity that was expected of it. The Royal Commission was felt in many ways to be at the mercy of the intelligence agencies. It is unclear from their report how conscious they were of this reality. The report appears to have not been able to engage at a sufficiently granular level in order to get the specific answers and accountability expected from the process and report. It is no surprise that the final report was thus particularly hard to engage with for victims, in addition to the various language, lack of professional support, and other accessibility issues.

RCI - The Process

51. The process did not give victims a chance to be heard in a manner that facilitated their readiness to tell their story e.g. short and structured RCI hui with inadequate time for questions:

    1. Much of the time the RCI was behind schedule and trying to catch up on a time-sensitive process
    2. This also meant that families' questions were nearly always left inadequately answered
    3. The RCI repeatedly was not able to answers regarding the Police reviews, or queries; they repeatedly told victims they did not receive the Police reports
    4. The RCI suppressed key details for 30 years which could have evidenced a robust investigation despite the perceived weakness of the final report; the inability for even approved experts to view this material exacerbates the very limited involvement of informed experts on behalf of the victims and the wider victim community in the process.
    5. It also compounds the feeling of security agencies having been let off the hook by the way reasoning in the report appears to accept crucial errors as being largely inconsequential or otherwise acceptable based on resources or other limitations on the security agencies;
    6. Had there been effective responsibility taken or assigned by the RCI for the attacks, the issue of 30 year suppression of critical information would not have been as relevant.

Transparency Versus Protection Of Sensitive Information:

52. The 30-year suppression order, as noted, is as much a symptom of feelings of lack of transparency in the process. The following issues have accumulated over the past several months, many of which had been raised throughout the process also:

    1. The Royal Commission of Inquiry was conducted in private.
    2. Information supplied in confidence by international partners (such as Five Eyes) remained confidential.
    3. There is no ability to independently assess the level of influence the Five Eyes partners had on the establishment of NZSIS and GCSB counter-terrorism priorities.
    4. It is unclear whether current and former employees of the intelligence agencies were protected from criminal liability by disclosing to the Commission material carrying Top Secret and Secret classifications.

5. Reference is made to a description within the Commission report to the exclusion of sensitive information from the report (page 59).

6. The Commission describes sensitive information being information relating to the operations of the intelligence and security agencies, which if released, would prejudice the security, defence, or international relations of New Zealand, or would endanger the safety of any person.

7. Extensive surveillance of the Islamic communities conducted by the NZSIS, and denied by the Director-General, took place in New Zealand over an extended period of time.

8. The Commission report states that some Public sector agencies objected to the publication of classified information and that a sanitisation process was used by the Commission, in consultation with those agencies.

9. It is understandable that the families and communities remains suspicious of assurances provided by the Commission that the sanitisation process "did not affect the substance of what we wanted to say".

RCI: Depth of investigation.

53. There is quite a bit of uncertainty and disappointment around the perceived absence of the Royal Commission robustly testing, such as through allowing questioning by contradicting parties, the various sources of evidence that resulted in relatively tidy conclusions.

54. There was a lack of power to compel and examine under oath. Failing to force witnesses to testify under oath allowed them to obfuscate, misinform and omit relevant information. There is so much at stake that the lack of formal compulsion mechanisms that it is not inconceivable that the Royal Commission were simply not told the truth on key issues. Families need not resort to prominent such cases in the media; they cite examples they are personally and experientially aware of. The community and families point to for example the NZSIS claims that they are directly aware are untrue.[7]

55. Many of the instances where the RCI just "took their word for it" was due to the lack of punitive enforcement powers that would have levied penalties on those who refused the compulsion order and/or played loose with the facts under oath. It also permitted officials to coordinate their "voluntary" testimony as opposed to being ordered to refrain fro contacting each other about the RCI investigation.

56. The terms of reference also prevented the RCI from ordering the supply of any and all documents related to the case by the relevant agencies. The RCI instead relied on voluntary provision of documents, which is absurd in any context but

[7] Assurances given by NZSIS Director Rebecca Kitteridge (press statement dated 8 December 2020), that the Muslim community was not being monitored by the NZSIS are disputed. The NZSIS conducted an intensive and extensive surveillance operation against the wider Muslim community between 2016 and 2019, which the community itself is aware of and which was even the subject of attempted dialogue between lead organisations.

especially when the issue is one of failing to prevent the attacks from happening. Absent compulsion, why would those involved in the intelligence failures that facilitated the attacks voluntarily provide documentation and witness testimony that proves their negligence/incompetence/biases?

57. The RCI level of inquiry is seen as superficial, reflected in both their answers throughout the process and in their final report.

58. For example, the Royal Commission was aware of the chronic experiences of Muslims for over 20 years, and discusses the complete misses of the Customs service relating to Tarrant who visited all kinds of far-right extremist countries. But it does not draw any logical conclusions from those two irreconcilable facts.

59. At page 233 of its report, the Commission states that "... from a very early stage the New Zealand Police were satisfied that T acted alone". Accordingly, the Royal Commission found that T 'acted alone' (page 12), that he was a 'lone actor'.

60. The Commission bases this classification on the fact that it did not find evidence that he received personalised encouragement.

61. It has gradually become too coincidental for families that classifying T as a "lone actor" reduces criticism of intelligence agency failures on the basis that it is a greater challenge for those agencies to identify an extremist who is isolated from like-minded people.

62. Classification of T as a "lone actor" at a very early stage raises the possibility of confirmation bias, where Police/investigating agencies conducting non-independent reviews can tend search for material that confirms their hypotheses.

63. The Royal Commission found that T did not have any known links to New Zealand extreme right-wing groups but qualified this in the following terms:

    1. The hard drive from T's computer was not located by the Police (page 188) and it was not possible to reconstruct his internet activity nor to establish whether he had communications with New Zealand based extreme-right wing groups such as the Dominion Movement.

    2. The Commission stated that lone actor right-wing extremist terrorists are never quite alone as they are often part of virtual communities on the Internet.

    3. The Commission did acknowledge a view held by some, that T was part of a network of people holding similar views and was therefore not in that sense a lone actor (Report Page 233).

    4. T's manifesto contained language used in extreme right-wing websites and associated memes and in-jokes.

    5. T told the Royal Commission that he acted alone but its report does refer to the fact that T also told untruths.

64. Within the scope of the Inquiry, the Royal Commission was required to analyse T's activities in Australia. The Commission appears to have failed to meet this scope requirement.

65. At page 111 of the Commission's report it is stated that the report excludes any analysis of Australian extreme right wing groups because "[w]e are not investigating the actions of Australian Public Sector Agencies".

Suspicious Activity Reports

66. The RCI report does not shed any light on the details of how many reports of suspicious activity there were in the preceding years prior to the Masjidain attacks, to give any sense of an accumulating sense of urgency around safety at mosques.

67. The RCI report cites two important reports which are enough on their own to justify increased presence by the time of 15 March 2019, and at the very least a basic level of intelligence around possible masjid attacks.

68. The first report related to information provided to the Police in February 2019 about a threatened attack at a Masjid in Hamilton.

    1. The attack was to take place on 15 March 2019.
    2. The Police advised the Commission that the person threatening an attack had been identified and given both verbal and written warnings.
    3. The person making the threats was not T.
    4. The date of the threatened attack was the same as T's terrorist attacks in Christchurch.
    5. The Commission determined that there was no link and that it was 'just a coincidence' that the date of the threatened attack in Hamilton was the same as the actual attack in Christchurch.
    6. There is no reported assessment of an association, physically or virtually, between the person making the threats in Hamilton and T.

69. The Wellington Islamic Centre.

    1. Report received in February 2019, was of a person acting suspiciously at the masjid.
    2. This person has not been identified.
    3. The Commission concluded the person was not T for the following reason that there was no record that T travelled to Wellington by air or ferry and that T himself denied he was the person.

RCI: Final Report

70. The final decisive indicator of just how incisive the RCI investigation and analysis was lies solely in the force (or lack thereof) of its final report. The report emphatically confirms that the RCI seems to have taken a broad approach to analysis leaving matters short of conclusive. Alternatively, the report fundamentally failed to articulate the investigation undertaken report on the investigation findings in anything more than a speculative way on those key issues. Given what is known about the lack of openness and immediacy of testing of the inquiry evidence, the former appears more likely.

71. As another submission referred to states, the RCI failed to analyse the combined impact of possible avoidance of failures in their totality. Given that doing so is not a complex task, families are left wondering why only each failure was analysed in isolation for the impact of its avoidance. What emerges for families is a pattern of reluctance to go where decisive conclusions around the preventability of the attack may be found.

72. The final report was underwhelming, vague and did not provide concrete answers.

    1. The report appeared eager to clear the agencies of their responsibilities
    2. The report made little to no acknowledgement of its failures or even limitations as a process given the terms of reference, lack of full cooperation by e.g. the Police, limited time and resource of victims to be heard and the inadequacies of many questions posed.

73. Key omissions from the report include:

    1. Inquiry into types of training at range
    2. Inquiry into all electronic equipment
    3. Information from modem
    4. Information from forensic analysis of mobile phone
    5. Online search history
    6. Contents of the actual report from Operation Phoenix
        1. No request to look at Spark archive records
        2. Not referred to GCSB by NZSIS
        3. RCI seemed content to take explanations for why this was not done;
    7. Detailed handover of the Op Phoenix report and subsequent action taken by whom under what advice and for what purpose

8. Support for Right Wing Extremism ("RWE") groups for T; according to the RCI there is no evidence to support this issue, and as with several issues it is difficult to gauge the rigour put into investigating this;

9. T's Hard-drive was missing from his computer and it is unknown what attempts were made to retrieve that afterwards or since.

Related limitations

74. Operational practices by state agencies sanitised within report ~ sanitisation was undertaken in consultation with those agencies. This sanitization appears to have protected the agencies from legitimate public criticism: evidence it is required to maintain effective security is lacking.

75. Impact on New Zealand counter-terrorism priorities by Five Eyes agenda appears sanitised; specifically the disproportionate surveillance of the families' community for nearly 20 years since 9/11 but in some cases prior to that also.

76. Material was excluded from the Commission's report on the basis that it might prejudice the maintenance of the law.

77. No objective analysis of the social media influence on T (and other future terrorists).

78. No objective, independent analysis on the Police response ~ the Police were permitted to critique their own performance.

79. Parameters and conditions of engagement with intelligence agencies, as well as former agents, unclear. For example, were current and former agents of the intelligence community provided with written guarantees of immunity from prosecution.

80. The suppressions put in place appears to victims to enable state sector agencies to mislead them and/or the public after the report's release.

81. The lone actor status assigned to T did not properly assess any personalised encouragement he received from other right-wing extremists.

82. The lone actor status does not analyse the right wing extremist cells in New Zealand and in particular the cell operating within the New Zealand Defence Force

83. The Commission failed to properly analyse right wing extremism in Australia and the impact of that on T (he came to NZ committed to undertaking terrorist acts).

84. Witnesses who provided evidence that conflicted with state agency scenarios were denigrated and maligned by the Commission

85. Complaints made to the Police by the Muslim Community were not qualified by the Commission.

86. The Police timeline is challenged by a number of families' accounts.

Wider context of concern to victims:

87. The focus was on their community, rather than on RWE, and therefore it was that misplaced prioritising that led to the dismissal of these queries provided to NZSIS.

88. NZSIS officer allegedly identified T's communications and access to sites and reported his activity to NZSIS, however, the NZSIS claims no record of this and the RCI simply accepted NZSIS's explanation;

89. There is an issue of credibility with NZSIS given the claims made, such as there was no targeting of the Muslim community; NZSIS officers and the Muslim community is only too well aware that they were being targeted and have been the subject of many complaints over the years;

90. The RCI cites a lack of social license among intelligence agencies. Whereas cases like Samsudeen's confirm that this was not the case. This was again something that the RCI was willing to accept.

91. Peace activists and others who have been closely associated with the community that has been monitored have also expressed their concern about the patterns of surveillance. On the other hand, the RCI report accepts vague explanations such as "lack of social licence" from the agencies.

92. NZSIS-specific concern: were agents permitted to give full and frank evidence to the RCI? Did agents have immunity from prosecution if they gave full and frank evidence to the RCI (it is not unknown for intelligence employees to be threatened with prosecution for unauthorised disclosure of information)

93. A common link with right-wing extremists appears to be bodybuilding clubs. T was obsessed with bodybuilding, alleging using steroids and injecting himself with testosterone. Could T have been come across in his dealings with parties involved in the supply of steroids and associated drugs, given that associated drugs and retailed by skinhead gangs in NZ, and given his association with relevant persons at the gun club and referees used for his gun licence application. Was he noticed but discounted because he was not a person of interest?

94. The unavoidable issue is why the SIS made the connection between his IP address, gun parts and ammo purchases and on-line ideological extremism but did not pursue it because it was "under-resourced (the SIS says that it only had one person tracking down leads on the IP connections and that the person gave up after a while) when the Muslim community at the same time were suffering all kinds of discrmination from inappropriate surveillance.

95. Ultimately, families cannot help but see what the RCI clearly avoided:

    1. it avoided having compulsion or prosecutorial powers;

    2. It avoided serious, coercive investigating of security agency mistakes;

3. It avoided key embarrassment to those agencies;

4. It avoided Crown liability for the agency failures that facilitated the commission of the attacks.

96. This approach in not being incisive also affected the penetration of the lone actor issue. The "stochastic terrorism" of the kind that T practised is one that characteristically encourages self-generating violence and obscures links to other actors, whether they are involved or not. This approach has deep roots in far-right extremism (for example James Mason, KKK "leaderless resistance" etc.) The RCI needed to be more assertive in penetrating this obscurity in order to see if there was for example any connection to Russian military, Russian intelligence or Russian-based groups such as The Base, or the Russian Imperial Movement[8] or others, many of whom had converged on St Petersburg just prior to T's arrival there.[9] Conversely, there were early reports of intense Russian and Ukrainian "worshipping" of T's actions.[10]

97. Last but not least, the RCI and the government have to date, done very little to elucidate the idea of the Great Replacement theory and also its origins in radicalising him. The RCI makes important observations in Chapter 5 including helpful illustrations such as Figure 5 & 6 to situate this extremism in its wider landscape. There are passages of important discussion which fail to make any meaningful impact on the outcomes of the report in terms of findings or recommendations. These are disconnected from the genesis of his radicalisation through apparent historical missions to key sites such as ancient battle sites between European and Ottoman powers. There is no treatment whatsoever in the report of the very songs and writings that he chose to accompany his attacks, alone their chilling connection to his inspiration and the connection to the ideology behind it.

98. The end result has been the absence of any discussion around T's ideology, manifesto, motivations, and views. This has prevented him from being situated in the background more broadly in terms of what inspired him and who he is ideologically connected to. Failing to identify clearly who in fact is connected to T

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[8] T spent an entire month in Russia in 2015 while RIM was training there; refer terror attacks by Viktor Melin: Mapping Militant Organizations. "Russian Imperial Movement." Stanford University. Last modified February 2021. Accessible: https://cisac.fsi.stanford.edu/mappingmilitants/profiles/russian-imperial-movement#text_block_22721

[9] The Base: Exporting Accelerationist Terror, Hatewarch, Southern Poverty Law Center, August 12, 2020, Accessible: https://www.splcenter.org/hatewatch/2020/08/12/base-exporting-accelerationist-terror

[10] The Russians and Ukrainians Translating the Christchurch Shooter's Manifesto, Bellingcat Global Investigative Journalism Network, August 14, 2019. Accessible: https://www.bellingcat.com/news/uk-and-europe/2019/08/14/the-russians-and-ukrainians-translating-the-christchurch-shooters-manifesto/ This has been acted on by Ukrainian authorities: Ukraine raids houses of neo-Nazi followers of Christchurch shooter, Latika Bourke, The Sydney Morning Herald, June 18, 2020 Accessible: https://www.smh.com.au/world/europe/ukraine-raids-houses-of-neo-nazi-followers-of-christchurch-shooter-20200617-p553p8.html

in what ways in NZ is a fundamental failure and one that is systemically rooted in preventing access or publication or discussion of all kinds of relevant material relating to the attacks. The families have felt the weight of suppression, restriction of discussion, and overall suffocation of their plight to be a chronic experience since the early days of T's prosecution. They complied but often under the clear grievance that things would not have been so suppressed if the proverbial shoe was on the other foot -- if the attack had been on the core of our own identity as a country, rather than by someone who is demographically representative of New Zealand.

99. An expert summarises The Great Replacement argument thus:

> "This argument holds that white, Christian Europe has been overrun by masses of black and brown Muslim immigrants from North and sub-Saharan Africa. Since the refugee crisis of 2015, in which more than a million asylum seekers fleeing conflict landed on the shores of the European Union, white supremacist-friendly intellectuals, social media, political personalities and movements have sought to mainstream the Great Replacement motif within European societies."[11] The overwhelming sense of sanitisation of all these critical issues unfortunately undoes all of the work done by the Royal Commission. That good work can be built on progressed and completed by an inquiry that is more direct, engaged and seen to be less vulnerable to the powerful forces and deterrent factors at play.

100. A final corollary is that the role of NZ right-wing extremist groups, and those associated with them ideologically or otherwise has been meagrely addressed. It is not surprising then that there is no sense that the mischief that lies at the heart of these attacks have been pinpointed, let alone discussed, dismantled and thereby prevented from committing these attacks again.

101. Disparate pieces of analysis and journalism provide fleeting insight into just how entrenched and pervasive the ideologies that T follows are in Australia and New Zealand, but which have failed to be incorporated into any meaningful let alone remedial discussion on the widespread prevalence of such sentiment and groups within our own borders and amongst the social fabric of society[12]:

> Mr Cottrell emerged as a public figure in 2015 for his opposition to a mosque in Victoria and a graphic stunt in which he performed a mock beheading.
>
> Since then he has become the highest profile leader of Australia's alt right.

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[11] TARRANT'S LAST LAUGH? THE SPECTRE OF WHITE SUPREMACIST PENETRATION OF WESTERN SECURITY FORCES, Kumar Ramakrishna, Associate Dean for Policy Studies, Head of the International Centre for Political Violence and Terrorism Research, and Research Adviser to the National Security Studies Programme, at the S. Rajaratnam School of International Studies, Nanyang Technological University, Singapore Accessible: https://apcss.org/wp-content/uploads/2020/09/N2522_Ramakrishna_Tarrants_Laugh_final.pdf

[12] Christchurch shooting accused Brenton Tarrant supports Australian far-right figure Blair Cottrell - Background Briefing, Alex Mann, Kevin Nguyen and Katherine Gregory Sat 23 Mar 2019 Accessible: https://www.abc.net.au/news/2019-03-23/christchurch-shooting-accused-praised-blair-cottrell/10930632

For many he is the symbol of the so-called "white resistance" in Australia and is the figurehead for a movement that in recent times has been defined by its virulent anti-Islamic views.

Before the Facebook page of his group, the UPF, was deleted, it had more than 120,000 followers, and the data reveals Tarrant also followed the group.

Tarrant's comments, dating back as early as April 2016, showed the Australian-born man was a vocal supporter of then UPF-leader Mr Cottrell.

In the information, Tarrant made more than 30 comments on the UPF and TBC pages over a 10-month period.

…

The last activity we have from Tarrant on the UPF Facebook page is from January 2017, in response to a post discussing Mr Cottrell's impending appearance in the Melbourne Magistrates' Court over staging a fake beheading in Bendigo two years earlier.

Tarrant was one of more than 200 people who commented on this thread in support of Mr Cottrell.

Mr Cottrell and two other former UPF members were found guilty of inciting serious contempt of Muslims in September 2017.

Post-report engagement

1. The DPMC against recommendations of RCI and of those assisting RCI refused to provide for a session for victims to be explained the report by those who supported
2. Despite the families enduring a long period of a sense of suppression and being unable to speak about many aspects of their predicament publicly, they could not be trusted to be given the report before Ministers had the chance to read it and after which, within a few days, the families would have to face successive visits by the government armed with a report the families had not read nor had explained;
3. The government launched into a series of meetings before the RCI report was able to be read let alone understood and discussed, which eventually were retrospectively characterised as consultation meetings with families;
4. The engagement with the report by victims is unsurprisingly, as a result, very low. This was significantly contributed to by the lack of concrete discernible findings that families could anchor their understanding and sentiments to;

5. This disengagement was very apparent from the victims' submissions not being entirely aware of what the RCI had said on key issues, or being somewhat debilitated from understanding it.
6. There was not enough time in this process since December 2020 for the RCI report to be appreciated and engaged with
7. An important step after this submission is to facilitate engagement with and understanding of the RCI report in a way that allows increasing background and clarity on what was covered and equally what was not adequately covered.

Conclusions — RCI

102. The victims need a full coronial investigation in order to feel that a lot of their concerns that have been downplayed or ignored has actually been investigated, especially those that were unaddressed by the RCI due to the very limited interaction victims had with them.

103. This process — primary concern of victims

104. Naturally the victims are primarily interested in the issues that could have avoided this tragedy. Unsurprisingly, their most substantive concerns are those which are consistent with the statutory regime. The answers that they have been seeking relate primarily to the cause of the attack and how it could have been prevented.

105. Reiteration of concerns about adequacy of support and time

106. It is important to appreciate that constraints in this process are connected to pre-existing and ongoing limitations and tend to exacerbate those, which significantly affect the motivation and ability to engage in this process. We hope in raising these issues they can be mitigated with a view to this process being able to engage a great number of victims who are able to discern by the end of the overall coronial process a fulfilment of statutory objectives and that a sense of accountability and clarity has been provided.

107. There has so far been a lot of compilation of information and not a lot of primary investigation and analysis of issues most relevant to families. This has been contributed to by the lack of families' engagement in legal processes so far, about which some context is relevant.

Legal processes generally

108. Initially, this process did not provide for legal support for families; it provided instead for a narrower legal information kind of service where no substantive legal support was to be provided. This is consistent with the previous provision of "legal support" for victims facilitated by the Ministry of Justice. However, families for the first time had access to lawyers who were independent of the process and the Crown.

109. The families have not had any dedicated assistance to engage with the various relevant legal documents and issues. For example, they have not had any dedicated assistance to engage with the Royal Commission report. Such a service would require a substantive level of engagement well outside the very limited scope of legal support available in the present process.

110. Counsel was advised on 10 September that the information requested by counsel in order to assist victims would not, at all, be provided. It was instead stated that the "evidential overview" document was to be the basis for the issues for the Coroner to consider. It was noted that "interested parties have had the ability to have copies of the evidential overview and the individual information packs relating to their loved ones provided to them to give them an overview of the police investigation, and key information about the death of their loved ones. From those documents interested parties are asked to identify issues that they consider to be outstanding that the Chief Coroner could look at". Examples given were photographs of their loved ones, their identification documents "and some have identified issues they consider to be outstanding." The information request made by counsel was said to go "well beyond the matters that can be provided or need to be provided to interested parties in order for them to identify issues they consider to be outstanding.

111. This approach tells victims that they should not and cannot focus substantially on key issues to be raised. Rather, a mix of informational requests together with some limited requests for outstanding issues, is what is invited. That is also all that is possible, given the limits of the information provided. Accordingly, this submission process has heavily relied on additional volunteer hours.

112. As such, the process is one where only very limited, broad assistance is intended on a mix of both legally important and less important issues. This process is not one in which the victims can utilise adequate legal support in order to raise issues to the extent that they wish, after some 2.5 years after the attacks.

113. With adequate legal support and a very focused assistance regime, the victims would have been in a far more empowered position to be able to raise the issues that they wish to raise. This does not preclude them of course from requesting things like photographs and identification documents. Rather, it empowers them to be able to choose and to include alongside items of memorabilia the more substantive issues that they are grappling with on a daily basis for the last 2 1/2 years.

114. This has had the result that victims who played a very important role in carrying the unheard voice of others have themselves become completely disengaged. Those whom we worked with in the Court process who were then ready to do anything in order to be able to hire lawyers, now have no interest in any legal or government process whatsoever. They have come to realise that their unending efforts to engage and be heard have had a negative impact on them and their family. They have finally succumbed to the impenetrability of the legal processes.

(3) OUTSIDE THE RCI PROCESS

Life after the RCI process — key aspects *outside* RCI Scope

115. In addition to those issues within the scope of the RCI process that remain unaddressed, there are critical issues outside the scope.

116. A key concern is where injuries were potentially survivable assuming an effective emergency response. This response phase is critical to many deaths thought to be preventable by such an effective response and medical attention.

117. Some of these concerns regarding the emergency response include:

    1. preparation for responding to a terrorist attack in regards to coordination between emergency services.

    2. policies, systems and practices developed in accordance with preparation. Include joint planning and exercises;

    3. the above may include written procedures and planning and control of operations including of police and joint operations and instructions to special police units and partner agencies;

    4. compliance with these planning, preparation, policies, systems and practices.

    5. the operational responses of police and paramedic services and any of those services providing first aid;

    6. local mosque or national Islamic organisational protocols; including what kinds of security systems had been advised by security agencies to Mosques following steadily increasing risk to them over the preceding years;

    7. the Canterbury/Christchurch regional/local authority provisions for such responses including;

    8. coordination of hospitals, their adequacy and compliance with relevant planning, preparation, policies, systems and practices.

    9. inter-agency communication and coordination between relevant emergency services, and with civilian services

    10. adequacy of utilisable and coordinated resources

    11. the impact of all of the above on preparation for and execution of the emergency response;

    12. where did lack of any training or preparation or policy or lack of compliance with policies and systems impact the response ability to save lives or in any other way contribute to the extent of the loss of life that occurred.

Cultural Response and associated coronial inquiry queries

118. A number of important cultural-related issues have been raised by families which speak to the task of being aware of and accommodating cultural needs, some quite basic, at each stage of evolving processes:

    1. The cultural and spiritual needs of the shaheed's families, for example the handling, photographing and general treatment of bodies during the coroner investigation (from a cultural aspect)

    2. Correct names of masjidain

        1. Linwood Islamic Centre referred as Linwood Masjid Mosque

        2. An Nur Masjid referred to Al Noor Mosque

    3. Correct and consistent spelling of names

    4. During the post-mortem process, cultural understanding in terms of cross-gender handling of a body and the protocol for minimising handling of deceased in such situations, or otherwise discussing possibility or viability of compliance with any other cultural rites in the circumstances;

    5. Some families have had personal e.g. clothing items returned, others not;

    6. This also raises the importance of cultural advice to the Coroner given that it is hoped that this process will be able to learn many if not all of the lessons from the previous processes.

Exclusion of those in culturally recognised family group (VRA 2002)

119. Some family members who are victims under the Victims Rights Act 2002 have been excluded from consultation and communications. An official Police list has been used and some practices adopted which has been a key cause of this exclusion. The coronial process can mitigate this ongoing trauma by starting afresh, rather than inheriting a somewhat exclusionary process, by ensuring it devises its own list of whanau victims.

120. This outright exclusion of victims is in addition to families who despite being superficially or even substantially engaged, felt excluded by the nature of the processes they had tried to engage in, which also included not being consulted on matters. These experiences began from the outset and affected final moments with their shaheed family members.

121. Inclusion of all victims will mitigate the trauma of those estranged from formal processes due to not being discriminated against based on policy reasons.

122. An official list needs to encumbrance all the victims as per legislation, not just a spokesperson or a key person for next of kin.

123. *This issue is an example of where the coronial process not only continues on from previous processes, but can remediate systemic re-traumatisation.*

Other forms of exclusion

124. There is an important group omitted from this process entirely, who are directly affected by the attacks such as medical events in the aftermath of the attacks, who are neither aware of this process nor invited to participate in it, yet who would be technically covered under the Act as anyone who has other than a public interest; survivors and witnesses are already themselves deprioritised in this process but also the entire wider process; because of the basing of everything (modelling) on the Police charge list. Whereas there is an important group who continue to be impacted who are largely unsupported who have suffered by medical events, suicides, fatal accidents directly affected by loss of those who are not actively connected (e.g. ex-partner deceased); inadequate time to grieve or get things done; inadequate time off work which led to further suffering and ripple effects on others.

125. A number of questions arose from this and related issues.

126. Do we know the full impact of the attacks? We yet may not because of our lack of cultural awareness in the community and the communication avenues that are not open except with those who are forthcoming?

127. Is there as yet a definitive list of who are interested parties according to the Act?

128. Coordination and collaboration across the various delineated lists between MSD, Police, Victim Support may help achieve global, credible official list of victims and families. An MSD list appears to be somewhat dependent a third party contract. Presently different NGOs have unofficial lists. Even the mosque does not have a proper list.

129. There is a reliance on the integrity of Police information rather a more holistic view of all key stakeholders. Police have an official list based on the prosecutorial investigation. However, some victims just left went home and didn't come back. More victims are leaving the country as the recovery process is not working for them. Some are New Zealanders and may well come back, as they often can't cope back home for very long, but yet they also lose any entitlements once they leave.

130. The Coroner may facilitate a full list of victims and affected families, affected individuals and facilitate an official, complete, accurate centrally held such system. Preliminary discussions with the Privacy Commissioner are providing for privacy-safe options, such as ensuring families understand the purpose of any such corrective/comprehensive list.

131. Many victims were not aware of information available through the website information for this process. As such, not all families are aware they can be part of this process.

132. There remain people not connecting into the MSD recovery team or know they can be part of this process.

133. There doesnt appear to be a collaborative approach to reconciling and correcting information across NZP, MSD etc in the critical early stages that may have resulted in an accurate complete collation, which could then be used for the recovery model to mitigate or eliminate exclusion of some from the list? There appears to be limited validation of the credibility of sources and whether they were were covering all families, cultures, ethnicities and other diverse victim needs.

134. Who or what process was used to identify who needed to be involved in the decision making for the families and the wider impacted communities as a whole? Was there an evolving process to check in to see if others needed to be involved at different stages of the recovery process? What information and input needs were identified if any and what system or process was used to gradually fill the identified gaps in information, cultural, spiritual and other needs?

Death Certificate Process

135. Additional trauma caused due to integrity of information gathered, some have been changed 4 to 6 times with evidence of incorrect death certificates still in existence.

136. What was the process to identify and collate relevant information for death certificates and at what stage was there guiding information to the communities for the information that was required.

Excerpt: Operation Deans 1st 48 hours report

NZP utilised community knowledge to compile a provisional list which could be released on Friday evening without undermining the legal obligations of the Coroner.

137. What was the process for auditing of the provisional list for integrity of information? Families spoke of confusion with these lists especially when they were called out, whilst some names are spelt the same they are pronounced directly. This was further exacerbated with the lists not being left out to recheck for their loved ones names.

138. What volume of death certificates were amended and how many times for the same family?

139. Evidence of missing children, incorrect parents names, missing information and previous marriages not documented. In the absence of not having the information the death certificates still today have some areas as not recorded when in fact they could be recorded if the information was sought by working with the families to understand the importance of the death certificate and connection to whakapapa of what the certificate also represents. In some countries death certificates don't always have the same importance placed on them.

140. Examples of discrepancies on death certificates are spelling of names, missing children, incorrect parents names, missing information and previous marriages not documented.

Evidential overview reports:

141. While in some cases there has been very limited time to review there are some clear patterns of feedback emerging:

    1. Families wanted to see more victim-centredness in these reports. This need not detract from the medical or scientific content of the report. In particular families wanted to see an estimate of how long victim would have taken to die. Some also would have preferred to see at least a symbolic acknowledgement of what the victim may have gone through prior to death, even if expressed in appropriate medical terms.

    2. The reports do not appear to have been adapted to the current culturally diverse/complex mass-incident in any material way in order to better inform or provide for the relevant needs of families.

    3. Prior to the final provision of these reports to Victim families, nearly 2 years after the incident, there been some time and opportunity to confer culturally and medically in order to provide a more meaningful and victim-centred report to the families.

    4. Nevertheless, the families hope that the Coronial process will be willing to complement other statutory processes in order to fulfil its own process and utilise its own broad range of parameters to provide for families' needs.

DVI documentation process

142. The following concerns arise out of discussion with families:

    1. What procedures were followed to afford families their important cultural right to have body parts or bodily samples (that were not released with the deceased body) returned to them?

    2. Were families advised before of any procedures involving cremation?

3. Families need more and precise information regarding timing of death and any estimated implications for the victim in terms of survivability and how long they may have been alive;

4. Regarding survivability, families request expert medical opinion from an independent expert whom they can feel confident will provide an objective opinion not affected by the traumatic impact of the events on everyone connected to the response that day or since.

5. How were whanau advised of their rights to have representation at the post-mortem (pursuant to s38)?

6. DVI reports refer to numerous referenced reports or attachments which were not provided as part of the documents given to families.

7. Evidential overview reports that indicate 50 victims dying need updating (to the correct number of 51).

(4) MAJOR PRIORITY AREAS FOR A CORONIAL PROCESS

Emergency Responses

143. The primary concern here is response to the terrorist attack once it had begun. To answer the question of how someone died there is a legitimate issue of how and why they received delayed assistance including medical assistance as well as additional bullets that they would not have received in the case of more effective response. This response is of critical relevance to a coronial inquiry.

144. These concerns are numerous and will be listed here for brevity. Some issues may overlap where we have honoured different versions of similar concerns received from different victims in different interviews, in which concerns may be similar but which have different emphases.

145. Were there any barriers to first medical responders imposed by the Police which may have had adverse impacts on the survival outcomes of some victims?

146. Did emergency responders use hot or warm zones (high risk and low risk zones) and what plans should they put in place for coordinating, supporting and communicating with emergency responders who are already in those zones. The zoning terminology is adopted as an emergency response zoning system was introduced in some countries from 2017 to clearly demarcate between different threat zones in order to efficiently and effectively identify where help can be first provided.)

147. Was there any system of picking up and collecting of victims or any other such systems of joint work to get victims out of the mosque to treatment?

148. How much advice and training was there about utilising the full range of rapid response options to an active shooter situation?

149. Given this was only one active shooter, what opportunities were there to use these rapid response systems, if any?

150. What level or quality of emergency first aid and dressing was there or should there be in the vehicles attending this mass incident?

151. Who were the overall incident commanders and how did they communicate effectively with emergency responders on the ground?

152. Radio communication: was there a problem with any form of communication such as radio communication? Was there enough or too much radio traffic for the amount of teams available? Were all available teams on the right radio channels? What was the problem with the radio communications or any other communication channel used to communicate between the emergency teams?

153. Was there a prioritisation of key post-death processes for families after completing primary issues like determining the cause of death, such as receiving and accompanying victim families and a quick return of bodies to the families.

154. Was there an appropriate use of targeted and indiscriminate autopsies or other mechanisms in order to mitigate the various resource and/or cultural or other considerations such as time delays?

155. What availability was there of pathologists, autopsy tables, radiologists, odontologists, and forensic and ballistics specialists and how was any further capacity in such areas facilitated or increased to accommodate needs.

156. Formal identification of all victims: how was the usual requirement to determine the circumstances of each fatality, as should be the case in individual criminal situations, balanced against the overwhelming demand of dealing with a large number of victims and the need to return bodies.

157. Was there any implementation of cultural protocol of having cover for the body and only photographing parts of the body as required?

158. Review: Just as the Royal Commission terms of reference and “way of operating” was determined by “the government”, were the terms of reference of the internal reviews done by the police also set by their own reviewers or did someone truly independent set this?

159. Why did police officers not engage the shooter?

160. Why was the shooter not followed using, for example, his livestream footage?

161. Why weren't other Islamic sites in the city secured?

162. Why did Police not arrive in time to prevent the second round of shooting at Deans Ave?

163. Did parliament notifications lead to any emergency preparation such as hospital or other emergency service preparation?

164. Was the livestream and manifesto used, even retrospectively after the shooting started to identify the kind of attacker and his being alone?

165. What facilities were being used to monitor and command the situation for example using the live feed of the video or real time CCTV footage?

166. The survivors who dropped the first victims

167. A survivor escaped through a fire escape door and left the Masjid an Nur when the shooter was firing in another direction. He picked up two seriously injured victims at about 1.44pm. He drove with those victims to the Ambulance Bay at Christchurch Hospital and dropped those victims.

168. In another area of the hospital at the ED entrance, another survivor who broke the window at the Masjid escaped by jumping the fence at the back of the car park at about 1.44pm and was transported to hospital by another worshipper. On arrival he advised the nursing staff at the Emergency Department to expect more people but was not taken very seriously in that regard. He was asked to take a seat. Several minutes later when armed Police arrived and told everyone in the waiting area to get on the ground. He explained to them that he had been injured and that is when they took him immediately through into the clinical area for emergency treatment.

169. These two accounts raise the issue of if, when and how alerts within the emergency response system were activated in order to facilitate readiness for more victims. Could appropriate resources have been activated earlier than they were if a more prompt response system activation has been deployed?

170. Did any such activation happen and how did this activation effect coordination and communication to other units in the emergency medical response system?

171. Some survivors and victims in horrific states themselves, narrate being treated aggressively and threateningly by the special armed Police units attending, which exacerbated their trauma; was this treatment avoidable through better communication and coordination? Was better intelligence regarding T's movements immediately available from the livestream, manifesto or other on-ground sources?

172. Some survivors, bystanders and witnesses are yet to provide their account of what occurred. Was there an appropriate deployment of officers to secure the surrounding areas as well as secure the overall investigation requirements? Some left in their vehicles and others were told to leave the area without giving their details. Some were critical to the investigation due to being shot at or being an eyewitness to parts of the shooting.

173. Was there advice taken from experts locally or internationally regarding how to investigate a mass incident of this nature, magnitude and context?

174. Were doctors from the local medical centre involved in triage at Linwood Islamic Centre?

Follow up

175. The following areas of follow-up are the subject of concern from families:

176. What investigations were done at the hospital post-event with attending staff and review of the security CCTV footage?

177. NZP used CCTV footage to locate the vehicle. Was CCTV footage able to be used to access the situation at Deans Avenue at time of shooting?

178. While there are over 700 CCTV cameras in the area, only a limited number have live feeds. Which ones can be viewed from Wellington?

179. Are any CCTV live feeds recorded?

180. Communications Centre - 111. Was managing crisis communication and the flow of information challenging? Victims were left waiting on calls. Could this have proven a critical source of immediate information on the attacker, and assisted greatly in the coordination of locating T?

181. There was a significant amount of armed officer resources in the city on the day. Could this have been better utilised to allow a spontaneous and effective control of the threat to provide high-impact pressure at the relevant sites, rather than just waiting and “holding a perimeter”?

182. Was there any timely decision to engage the shooter and deploy an impactful rescue effort to clear the mosque for medical staff or for appropriate officers to transport survivable victims. Was there an appropriate triaging of critical victims from non-critical or survivable from non-survivable?

183. Was prompt securing of the scene followed by effecting zone management in order to mitigate chances of deaths in the mosque?

184. Was there enough crisis response leadership to coordinate such resources?

185. Did too many officers “self-deploy” in the absence of such leadership?

186. How did any self-deployment of officers from NZPolice, NZDF and St John’s Ambulance staff in the absence of leadership in the early onset of the incident impact coordination?

187. If assault rifles of this calibre produce wounds that can only be managed in an operating room, was the need to transport victims promptly appropriately prioritised?

188. At Linwood Islamic Centre numerous calls were made but still didn’t get a response or didn’t connect,an initial call was made at 1.52 pm as the first shots were fired also a deceased shaheed called emergency services and was on hold for 6 minutes.

189. Did high activity congestion contribute to calls being missed or how calls were managed, such as in relation to their relevance to the live incident?

190. Were all calls put through to Police and what capacity did they have in terms of manpower to be able to deal with the high volume of calls?[13]

191. The delays in response to emergencies when there is congestion is not a new issue in NZ. Is there a support system available to boost communication and coordination resources in a mass incident situation? Are call centers being appropriately resourced?

192. How did frontline emergency services communicate (NZ Police, St Johns, Health) and was there any coordination e.g. back to the single point of command at any location or site such as the Justice Precinct.

193. Could adequate systems for response and coordination have resulted in more lives being saved?

194. What line of communication was there from the front line of the hospital to any command centre?

195. Was there any independent review of the hospital services or of paramedic staff who were part of the emergency response in the first 48 hours?

196. Were initial survivors ignored and how did that affect any emergency response / mass incident plan?

197. Which particular emergency system was activated and how did this affect the communication dissemination to other units in the medical response system?

198. What criteria was used to decide whether to activate these emergency response/ mass incident response plans, and when were these plans activated?

Coordinated Response

199. Post-attack, this extends to assumption of responsibility for the welfare of the deceased and the vulnerability of victims after they have become disabled or have died; this is critical to the second round of attacks at the mosque and the second site of attack at Linwood.

200. Was there a greater availability of armed forces or police units and/or emergency paramedic units available in the city on that day?

201. Which units were these and what was their ability to be deployed?

202. Was there an opportunity to have mutual coordinated awareness of the presence of all kinds of emergency services that day who could have coordinated a response?

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[13] A key component of the emergency calling system is the Initial Call Answering Platform (ICAP) that answers all 111 calls. Spark New Zealand Ltd operates the ICAP so emergency calls are first answered at a Spark call centre. Genuine emergency calls are then forwarded to the appropriate Emergency Service Provider (Police, Fire, Ambulance).

203. How can the full spectrum of services in each of these emergency areas be aware of each other's location and ability to respond when needed?

204. Could a local operation command centre like the Justice Precinct if properly informed by the relevant agencies, play a role in maintaining a calendar of all emergency events and services on the ground, and assist with coordination of these services if required?

205. Could such a communication command centre have played a key role in overall coordination?

206. Could some kind of emergency services identification could have alleviated the issue of police needing to identify who were sworn officers?

207. Could such coordination and identification enhancements have helped the predicament of not only Police identifying other officers but also victims being able to identify police and emergency responders?

208. How were vehicles deployed to search for the attacker(s)? Where were they searching?

209. If an initial vehicle missed T, where were the other vehicles?

210. Was there a conscious decision made not to chase after T?

211. Were routes around the mosque attempted to be sealed off once the site of the attack was known?

212. Why was there inadequate reasoning available regarding the kind of attack and the next probable target(s)?

213. Why was T’s route to Linwood not blocked?

214. Why did they not focus their attention on the immediate vicinity as opposed to somewhere else in the city?

215. Why were some officers/units sent to other general highly populated sites?

216. What intel did the Police have when searching for the potential terrorist(s)?

217. Were they aware of the likely profile, motive and targets of someone who attacks a mosque?

218. Was there any concept of responding to a mosque attack in the police strategy at that time?

219. Why did some parts of Police HQ turn off the livestream, and did this affect the quality of their coordinated response such as obtaining critical information about the attack from the video in combinatino with the manifesto?

220. What were the implications of civilians managing or assisting at the scene?

Preparation & Assistance -- Training & Equipment

221. T's military performance -- features and discrepancies, include:

    1. tactics training;
    2. use of the tactical kit and equipment;
    3. effective, consistent weapon handling skills;
    4. manipulation of magazine changes

222. T's military performance is assessed to be exceptional considering the amount of movement, situational awareness, risk mitigation, aiming etc apparent, even to the non-expert eye. The simple shooting range training/practices allegedly conducted at the rifle club do not align with performance of the shooter's displayed at the masjidain. This performance includes:

223. Weapon sights and Gun modifications (questions like how did the shooter identify what weapon and weapon sights he will require to conduct his mission. This required knowledge and training to be conducted with different sights systems and different weapons leading T to finally settle on his weapons of choice.)

224. All of these require considerable training, discipline and guidance. T's ability to consistently perform under pressure requires the actions he performed to be perfected.

225. Knowledge in regards to how to prepare and train for a militia style "assault" including target reconnaissance, route reconnaissance followed by sanitising of sensitive materials is not something that an ordinary self-trained person is expected to know. How is it that such operating procedures were brought to the shooter's attention? These are some of the critical task evaluations that require thorough investigation in order to eliminate any possibility of second and third parties' involvement (directly or indirectly).

226. This section discusses the preparation of T which, so far, are said to have been carried out alone.

227. Was there a conversation with another male person while on route to Linwood Islamic Centre (a discussion regarding answering questions about victims and damage caused at the mosque)?

228. What were the general outcomes of the forensic evidential extraction from T's phone and how does this confirm/suggest/reject preparatory contact with others.?

229. In relation to the references that were provided for the gun license as well as other acquaintances apparent, these relationships and acquaintances require better investigation for example regarding their criminal convictions, their personal IT systems, whereabouts and communications with T. Have these been completed and to what degree?

230. What is the connection of Troy Dubovskiy to T?

231. How did T get access to so much tactical gear such as knee and elbow pads, chest rig with a helmet and gloves, and why did he use these?

232. Was gear for self preservation and increasing his survivability?

233. Was it to portray himself in a particular way? Or to pretend to be an AOS/STG officer in order to reduce the chances of being confronted by bystanders before during and after the attack?

234. What does his gear acquisition and preparation tell us about his level of preparation and assistance or cooperation involved from others direct or indirect?

235. How did he know how to be so well equipped?

236. How did he carry on combination or special drills? How did he know how to carry weapons in the way he did?

237. How did he know to take a shotgun to make (forced) entry if required? This suggests the tactical training T has gained in order to execute his intent.

238. How did T train to switch such powerful weapons with relative ease?

239. How did T train to change his magazines so quickly?

240. How did he get access to some of the advanced military skills (such as different kinds of shooting techniques at different times) which he performs with such discipline and sustained skill throughout the attack?

241. How did T know which upgrades to make of his guns? How did he know which sights to match which guns for what purpose?

242. How did the shooter learn the execution style techniques he used to first maim victims in order to prevent escape followed by deliberate executions at his choice of time and speed, and thereby maximising terror inside the mosque?

243. Where, with whom and how did he perfect his ability to shoot on the move whilst maiming and executing “targets” in a very competent manner?

244. How did he learn to cope with multiple groups in the multiple rooms in the mosque, achieving the task of immobilising victims and maintaining his own security?

245. How was he so well drilled in this that he showed a settling into the rhythm of this kind of killing in a ruthlessly competent manner to the point of almost being relaxed?

246. How did he learn to regulate his breathing in a very deliberate and controlled manner?

247. Where did he learn to maintain discipline, focus and continue with his mission whilst performing the critical tasks of aiming, weapon stoppages, moving, changing magazines and utilising advanced techniques?

248. How did he learn to walk, run, fire at different points without disadvantaging himself tactically where he can be overwhelmed by any person inside or outside the mosque.

249. How did he manage to sustain all the changing and reloading of weapons for that period without fail or any even minor mishap?

250. How did he learn he at certain key moments such as upon his retreat back to his vehicle still maintain the same composure, motor skills to change magazines, and maintain focus?

251. Can this all be done by a shooter who allegedly had not trained in Australia?

252. Around the times the NZSIS received notification regarding his IP address when he was accessing relevant content, where could he have been conducting training?

253. How was he able to combine all other skills he demonstrated, such as performs at a high standard under stress utilising the various weapon firing techniques, conducting a tactical assault on mosques and using a drone to conduct prior reconnaissance of his target and complete preparation for his mission, all without any assistance at all?

254. Was this all learnt at the Bruce Rifle Club?

255. Why is there no mention or proper analysis of all these aspects of the attack by the club or any investigation so far?

Other areas of concern, suspicion, uninvestigated areas:

256. A NZ Defence Force soldier based at Linton Military Camp is described as a member of an extreme right-wing cell at the camp. This soldier is about to appear before a military court martial on charges of espionage, accessing a computer for a dishonest purpose, and possession of objectionable material. He was a member of the Dominion Movement before it was disbanded after the Christchurch terrorist attacks and he is a current member of Wargus Christi and Action Zealandia. The above questions of how T was able to be equipped becomes ever curious in light of such individuals who had access to armour as an armourer. The individual was known to be Hamilton based where the 15/3 threats were targeted.

257. In the aftermath of the attacks, there was expert comment about police and intelligence agencies not taking white supremacists seriously enough. There has

also been concerns around direct links to law enforcement, thanks to reported cases in NZ and Australia, and analysis of this phenomena internationally[14].

258. There results an obvious cause of obstacle and obstruction in investigating root causes of extremism, when attitudes to it are lacking in any objectivity. That concern is critical to the underlying frustration in T not being detected. This frustration recently re-emerged when it was clear how much resource agencies had to provide for surveil, track, monitor, Samsudeen during this time.

259. Victims and families have for 2.5 years been asking legitimate questions about links to others. These have been summarily dismissed but not apparently fully investigated.

260. For example, it is not clear what stage of the coronial inquiry the Artemiy Dubovskiy is at, and whether it has made arrangements to investigate matters of relevance to the masjidain attacks.

261. Why has Linton information only been released in the media, now, rather than as part of a briefing to victims in order to reassure or simply update them?

NB: This is a common question from victims who often came to know important information through the media. In each of the formal processes, the media have approached victims and/or their representatives with information that they victims and/or their representatives do not themselves know about.

262. The fact that T went to the lengths of disposing of his hard-drive and making irrecoverable despite not intending to evade apprehension, is a clear indicator of such information as connections and assistance that was sought to be concealed. This fact does not appear to have given any process so far the incentive to rigorously pursue his electronic devices such as his router or other devices in order to have information extracted from it to help elucidate any connections. Why have T's devices not been comprehensively and forensically analysed? If they have what were the key outcomes?

263. Was the log from his router investigated in regard to his searches and browsing? Was all the information from the people he was in communication with followed up?

264. How complex or expensive were the tools the SIS needed to trace Virtual Private Networks (VPNs)? Why is the RCI readily willing to accept that the SIS not having adequate resources was an excuse not to investigate properly?

265. How did he become so skilled at flying drones?

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[14] White Supremacist Links to Law Enforcement Are an Urgent Concern Brennan Center for Justice, Mike German, September 1, 2020 Accessible: https://www.brennancenter.org/our-work/analysis-opinion/white-supremacist-links-law-enforcement-are-urgent-concern

266. Have his gym-mates, next to where he had considered planning an attack on a Muslim-populated school, had much scrutiny, or where they or he purchased steroids from?

267. What about social media accounts, email accounts and other equipment he was using, which would appear on his router logs that he was using?

268. The individual used his email account to send notes to himself for future reference. Although he deleted his emails before the terrorist attack, a few were recovered. Some of the recovered emails record elements of his planning and preparation.

269. What level of forensic IT assistance was available to recover deleted emails and other deleted data?

270. Have all recipients of emails or other online messages been investigated with the assistance of relevant international authorities?

Recent mass-incident lessons

271. What “institutional memory” of key principles of effective mass incident response was retained and employed from earthquakes experiences and lessons?

272. For example in the area of coordination of available services, was there any enlisting of civilian community groups with specific expertise or equipment such as access to specific kinds of terrain vehicles, to assist with e.g. transportation of victims?

273. How could have learnings from the earthquakes and such mass incident responses have informed this response?

274. Was there any engagement of the command centre for monitoring (e.g. live feeds) for deployment of emergency services?

275. Use of CCTV footage: how did access to live feeds (or lack thereof) impact the response?

276. What sources of intelligence was any coordinating centre drawing from in order to help coordinate the response? Who is playing any intel support roles and how?

277. What earthquake lessons from the coordinated emergency response aspects were not/able to be implemented and why?

278. Could a coordinated response have been assisted by the Wellington National Crisis Management Centre, or other national monitoring and coordinating of a multi-agency response from a central mass incident unit?

Post-Attack analysis:

279. This includes, as an immediate step, initial interviewing post-attacks

280. The Police interviewing and investigation process directly affects the quality of the immediate investigation, and has a bearing on many aspects including victims' and families' management in the short and medium term.

281. Better quality information from the police interviews could have better informed both the response in the subsequent days and weeks and done a much better job of providing loved ones with meaningful information, and would have informed the medical response approach better for both acute treatment, as well as follow-up psychological or other MSD-coordinated treatment in the medium term.

282. The following questions are raised by families.

    1. Was there a review of the Police interviewing and statement-taking process?

    2. How could these processes have been completed more comprehensively, more promptly and more effectively, in order to get more, higher quality information, from more people?

    3. How could police interviews (over 100) have better been done to better inform Police and the public about what happened, what the response was, and how the response could be improved?

    4. How could the interview process have yielded far more information at a much earlier stage when matters were fresh, rather than leaving out important details to emerge months or years later, such as through re-traumatising conversations between victims?

    5. How can connections, inferences and analysis be done in order to reconstruct and explain what happened to families in a more comprehensive manner?

    6. Why were some families not attended to until months later?

    7. How can we mitigate victims resorting to speaking to other victims for key facts and information? One mother recently founded out that her son was in a carload of victims

283. Post-attack analysis includes various kinds of analysis of the available audio-visual recordings

284. What analysis of the audio recording from inside T's car while he was en route to the Linwood Islamic Centre has been conducted to establish who, if anyone, he was in a two-way conversion with?

285. What recordings and timings were available from his Go-Pro to form part of the investigation available of any live CCTV footage on his way to the Linwood Islamic Centre?

Conclusion — Previous vs Future Outcomes for Families

286. The issues raised so far in the limited time available to prepare this unfinished document are exacerbated by the impact of the RCI process deficiencies as well as the way the post-report process was handled with families over the past nine months.

287. This includes the lack of any substantive briefing for families on the RCI report. There has been no coherent support or assistance to the families in order to make sense of the attacks through the lens or mechanism of the RCI process (which they were advised to invest and trust in). There has been a lack of empowerment for a great majority of families to be able to engage in the issues raised if not entirely addressed by the RCI report, and from which further analysis could continue to such processes at this potential inquiry. Counsel reiterates this absence of a sense of empowerment and agency, despite the RCI being an inquisitorial process, so that deliberate efforts can be made to establish a process that can work for families. Whereas in the RCI process, families — and their needs and context as victims — were very much an afterthought to the formation of the RCI, scope, terms of reference, constitution and for some time, even its process.

288. As the organisation that facilitated families' participation in the RCI process we can confirm that it was not possible for the victims to exchange free and frank questions and comments with the commissioners regarding the cause of the attacks. The Commission constrained on many occasions about what they could say and reveal regarding the information they had access to, or perhaps did not yet have access to at all anyway.

289. The victims did not have a continuous coherent process of inquiry that they were involved in. The meetings were scheduled very wide apart and a large part of the meetings were dedicated to understanding the process itself, including providing the commissioners adequate time to explain to the victims aspects of the process that would hopefully instil their confidence in it.

290. While some confidence and participation in the process was able to be secured in terms of retaining a reasonable expectation from the final outcome of the process namely the report, that outcome confirmed that weariness that many families had ever since their initial engagements with the RCI and despite the improvements in engagement that were facilitated by community-based organisations like Navigate Your Way and JustCommunity as acknowledged in the RCI report. As such, families were never able to transition from being granted special bystander importance to actually becoming important participants in the process.

291. As the cited Human Rights Commission of March 2021 noted, that there was very little in the report findings or recommendations that reflected or was dedicated respectively, to the needs and concerns of families. A regrettable conclusion is that the families are to yet to experience any kind of victim-centred process. It is for this reason that counsel has initiated discussion of restorative processes with families during the RCI process, with a view to such processes being a final recommendation. This discussion managed to successfully have a restorative process recommendation, and it is hoped that any coronial inquiry will be the first process to actively adapt restorative processes that are more trauma-literate and culturally-literate than has traditionally been the case in such processes.

292. The victims did not have any access to specific legal support that could investigate the issues in a meaningful way with the RCI legal team. Our role as the RCI report notes, was to provide access to the victims and better access to the commissioners. This access was still very limited but provided important cultural insights and accessibility. The RIC simply did not have the time to go at the victims' pace, especially as the victims had no dedicated assistance to keep up with the inquiry process.

293. Accordingly, the victims have still been waiting for any process that could give them a sense of agency and partnership in the inquiry into the causation of the attacks. This process has also now diminished that possibility and indeed prevented it so ar by the very limited access to legal support and information but which is now being addressed.

294. The RCI process did not allow for victims to engage in the issues in any substantive manner, yet it was far better able to engage than the criminal court process, from which most victims were significantly alienated and disillusioned by until very close to the sentencing date which eventually many but not all victims were able to participate in.

295. For example, a number of timings, views and concerns expressed by the victims were contradicted by the RCI findings. The victims coming forward with their concerns, such as the widespread concern that no other people have been caught by the Police in relation to the attack, is a clear indication, if any was needed, that victims wish to engage in the substantive issues and concerns. In some rare instances the Commission was willing to go through some information such as the timings, or the movements of the terrorist. However, even in such cases, there was no organised event or access for them to be able to engage in this manner. The RCI's time and resource constraints (in addition to of course the victims' emotional resource constraints) did not allow for any meaningful acceptance of a rare such offer.

296. The upshot of this is that the victims' views and concerns were not able to be engaged with such that they could understand the reasons behind the findings and any process that the RCI followed to give meaning to their views and inquiries. As such, the victims did not receive any indication that their views had been respected enough to be specifically investigated. Nor have the victims had

any opportunity to engage with any investigation to so engage in a way that gives them a reassurance that their views have been genuinely grappled with before being dismissed. There is the inherent difficulty, now of engaging with the RCI findings merely on the basis of the published report.

297. Given the lack of credibility of the RCI process and the lack of confidence in the relevant agencies, there is an unwillingness to merely swallow reports. That is becoming clearer. There is therefore a critical need for victims to be assured that they or their representatives can engage with original evidence rather than just succumbing to official reports.

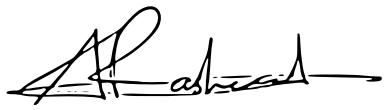
298. There are both pre-and post attack investigation relationships and patterns that have been prevented from being drawn due to this systemic failure of engagement of families. It is ultimately that systemic failure that the coronial process through its unique regime, unique focus on whanau and families and its awareness of the lessons so far learnt by previous processes, can remedy through a coronial inquiry and inquest.

299. While this process will have the benefit of hindsight the focus is to meaningfully and actively prevent such an attack from occurring in the future or at least with such devastating effect. If some agencies need to bear a little more discomfort, embarrassment or even criticism for that critical goal to be achieved, that should not be deterrent for such a large victim community and wider connected communities to be able to heal and ultimately turn their loss into a source of long-term learning and benefit for their country and indeed those agencies needing urgently to reform and adapt to present global realities of extremism, radicalisation, community-partnership and community-collaboration to combat extremism and promote social cohesion and resilience.

300. It is submitted that just as we have been asking the families to trust the process, the process of the coronial regime, its whanau-centredness and other culturally-compatible restorative processes should now be utilised to follow through and trust in the process and outcomes of a coronial inquiry. There are also various international such inquiries stemming from mass incidents which involve diverse communities which remain a source of potential learning. When measuring the potential of a coronial inquiry, it is submitted that the high goals of achieving cultural and trauma-competency in the process should inform how much needed and how beneficial this process would be.

301. The families are grateful for the opportunity to make this submission to the Chief Coroner.

Dated this 8th day of October 2021



A A Rasheed — Counsel

From: **JustCommunity Office** office@justcommunity.org.nz
Subject: Re: 18 August issues deadline — extension for newly supported whanau assisted by newly appointed counsel
Date: 28 September 2021 at 5:46 PM
To: Coronial Response coronial.response@justice.govt.nz
Bcc: Deborah Lemon deborah.lemon17@gmail.com, David Horsburgh david@srm.co.nz

JO

Good afternoon Robert

I am writing back in response to your refusal of information and limited extension of the submission deadline 30 September. In sum, it is important to appreciate that constraints in this process are connected to pre-existing and ongoing limitations and tend to exacerbate those, which significantly affect the motivation and ability to engage in this process. We hope in raising these issues they can be mitigated with a view to this process being able to engage a great number of victims who are able to discern by the end of the overall coronial process a fulfilment of statutory objectives and that a sense of accountability and clarity has been provided.

1. The purpose of this response is to bring to your attention a number of relevant issues affecting the proper discharge of our duties to affected families or victims. These essentially relate to the constraints applicable to this process some of which we respectfully say could be alleviated as we go forward in this process together.

2. I note that our extension request to 31 October was granted only to 30 September. As you are aware, this month (September) is our first month as part of this process. We have largely spent it trying to get a gauge of the issues, scope, wider concerns, logistical challenges and other systemic issues which have continue to affect families since the attacks starting with the criminal court process.

3. An example is receiving and engaging with information, even at this basic level. In some cases families have received some information and in other cases they have not received or registered the information, or not received it at all. We have been finding, since entering this process and trying to assist one group of victims, that there are other victims who still not fully aware of this process or the participation they can have, nor aware of the access they have to information. While this may seem remarkable given that that this process has now been running for over 10 months, the context is as you know the number of such formal legal processes that have been visited upon already, the personal challenges facing victims, and the gradual enhancement of these processes as we all learn about and attempt to meet the needs of families.

4. This is due to a variety of factors, but some key aspects include the predictable or known ones of fatigue levels, communication, information requiring explanation, persuasion from a trusted source that the process is one worthy of engaging in etc. We note that even previously prominent and vocal survivors and families have withdrawn from such processes. We also note that we have been able to have such candid conversations with some victims due to our connection with them for well over 2 years. There are some who may have similar or other challenges who we have not talked to.

5. A period of engaging the victims in this process is needed, while equipped with relevant information, clarity around the process, and time for the victims to understand the information and the process. This also includes being able to be involved in the process to an extent that provides a meaningful level of relief from their concerns; some victims may be content with requesting a photograph, but others, such as those researching issues for the past 2+ years, may not be.
This brings us to the refusal of information requested.
From your restriction on the supply of information requested, there is a natural consequent constraint in fulfilling the request of the Coroner to provide a list of outstanding issues. We would like to discuss some of the implications of this situation with you.

6. Regarding your comments on our initial full request we have, as mentioned in our update on Friday, been consulting with families, virtually all of whom we have been acquainted with through various legal processes for some time. We hope these comments provide some level of insight into the varying expectations of this process.

Scope of this process

7. Thank you for explaining this. We do, we think, understand the request of the Coroner for a list of outstanding issues together with requests for information. Although this correspondence may enhance that understanding especially in relation to limitations and subsequent phases.

Need for meaningful insight

8. Families require information from which to be able to meaningfully engage with that information in order to then raise outstanding issues. Our request was to assist that. This ability to meaningfully engage is also essential to the renewed motivation required of victims to take part in this process.

Outright refusal of a detailed information request

9. We note that it may be more helpful to provide refusal reasons/details to families in respect of each kind of item requested, even if that requires re-classifying or even re-expressing items or categories according to your organisation of classification of the information. For example, some items may:
- not be readily available and subject to delay;
- subject to privacy and therefore require redaction pending permission of the relevant victims (some of whom have already indicated their intention to facilitate legal access to information)
- may be held to be well outside the scope of this process (naturally brief reasons would be essential in such a case)
- etc.

Pre-emptive refusals

10. Typically information would not be refused on the basis of predetermining its relevance (for example whether it needs to be provided in order to identify issues they considered to be outstanding) unless it was well outside the conceivable scope of the current process. In such a complex matter with such a vast range of victims a vast range of issues and a vast diversity of priorities and perspectives, it is possible to assert that certain information is simply not needed in order to fulfil what is a general and broad request to identify issues ***they consider*** to be outstanding. It would be pre-determinative to assume what kind of issues they are considered to be outstanding, or to limit what those issues could be by significantly limiting the information available to raise such issues.
That (need to avoid assumption and predetermination around what issues are important for victims) is particularly the case given that a vast range of outstanding issues have been the subject of ongoing discussion in both public and private fora since the attacks occurred 2 and a half years ago.

11. For our part, from the initial response and conversations or updates from your office, we expected that there would be a steady if not efficient provision of information requested, given its essentiality and the available use of basic technology for this purpose and our flexibility in being able to receive it. It was also information that was overdue for legal professionals to explain to victims or at least offer them to engage with, some 2 and a half years after the incident.

Context to impact of refusal of information

12. We make some closing contextual observations for your benefit, please. There is a significant loss of confidence in "reports". Reports and conclusions of agencies have all broadly followed comparable themes. One pattern in these themes, as seen by victims, is the that of the absence of drilling down into specific details to provide concrete answers and fix responsibility for errors and omissions, in order to facilitate the healing process that is obviously needed especially as the years now pass by. In order to assist the motivation to engage in this process and engage with what is re-traumatising information, there is a need for a higher quality of more primary, rather than conclusive, pre-interpreted report-type information, such as what primary evidence provides, in order to enable a meaningful level of analysis and engagement, and in order to inform the outstanding issues. This level of information provision would thus help restore confidence amongst families in the ongoing processes, especially now that they have culturally appropriate legal assistance that would allow them to cope with and process such information, and thus be in a far better position to raise outstanding issues with the Coroner.

13. Currently, however, that is not the case. It is indeed striking that this process is dependent for this informational aspect on a remarkably limited number of reports. While you are likely correct that parties have had the ability to have copies of documents since December, the delay in arranging unfettered, culturally competent, legal support for victims is that actually accessing the required information, understanding it, relating it to the other aspects of the processes they have been through so far and those which they expected to subsequently occur, are essential steps that require far more than making information accessible.

Subsequent phases to further encourage participation

14. The explanation you have offered, and supported by the examples that you provide, appears to confirm that this process is a very limited one.
We infer from your explanation of the limitations of this current phase of the process that the process will continue to improve in the quality of engagement with victims, starting with a fair opportunity -- from meaningful information -- to list outstanding issues.

15. Based on the outright refusal of our 30 August information request, and the extremely limited information (and coincidentally, limited time and resources) on which this process is dependent, we conclude that the process of victims offering a list of outstanding issues is still in a relatively preliminary phase. As access to information, resources and opportunity to engage gradually increases for families, we expect that this process will continue to be open so that issues can continue to be raised. These subsequent phases of this process will we hope further facilitate an ongoing commitment to informing and enabling families to increase their quality of participation in the coronial process. We remain motivated to help families begin the coronial process with this important initial step of providing a list of outstanding information and issues which, while not exhaustive, would help provide a sense of having gained something from the initial step process and

would help provide a sense of having gained something from the initial steps and process

issues which, while not exhaustive, would help provide a sense of having gained something from the initial step process and thus encourage further participation in it.

16. We appreciate that we must start somewhere, to obtain a baseline and preliminary indication of such issues as you have outlined. We we take from the refusal of our 31 October timeframe that this preliminary information is urgently required by the Coroner. While we respect the timeframe, we also note that this process is the final official statutory process for families to get answers to long-held questions. We would respectfully ask for 10-14 days in order to process information that we are continuing to receive and to finalise a preliminary submissions. Now that much of the basic information has been/is being received, this short period would be critical to compiling at least a very basic list of preliminary issues. We hope such a list will meet the expectations of the Coroner given the constraints outlined above, and that continued opportunity to add to this list will be available to the families as we provide more information, opportunity and incentive for engagement by them with this process.

Interim information:

17. Thank you for the Evidential Overview reports and your assistance in providing information.
Request: any other other information you have readily available in respect of these victims and/or generally.
An example of victim-specific information would be the DVI Post-Mortem reports.

Please do not hesitate to telephone me to discuss any of the above matters.

Ngā mihi nui | With thanks,

JustCommunity
Professional advice, community concern

for:

Aarif Rasheed (AAMINZ) Mediator | Barrister

T: 09 282 6484 M: 021 29 555 49
e: aarif@justcommunity.org.nz

w: justcommunity.org.nz
p: P O Box 16 072, Auckland 1351
681 Sandringham Rd, Sandringham

LinkedIn.com/in/lawhelp

Ngā mihi nui | With thanks,

Aarif Rasheed (AAMINZ) Mediator | Barrister

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On 27/09/2021, at 8:30 AM, Coronial Response <coronial.response@justice.govt.nz> wrote:

Good morning Aarif,

Please find attached evidential overviews for

I hope these help.

Robert

From: JustCommunity Office <office@justcommunity.org.nz>
Sent: Friday, 24 September 2021 5:03 pm
To: Coronial Response <coronial.response@justice.govt.nz>
Subject: Re: 18 August issues deadline — extension for newly supported whanau assisted by newly appointed counsel

Dear Robert

I have been discussing these issues with the team and families and should have a final response by Monday.

We have been trying to obtain adequate information in various ways to try to do a meaningful job for victims.

Yes I would be grateful if in the meantime you send through the general/specific overview documents, given the time constraints.

Ngā mihi nui | With thanks,

JustCommunity
Professional advice, community concern

for:

Aarif Rasheed (AAMINZ) Mediator | Barrister

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On 10/09/2021, at 3:04 PM, Coronial Response <coronial.response@justice.govt.nz> wrote:

Dear Mr Rasheed,

Thank you for your information request dated 30 August 2021. Your request seeks almost the entire police file, among other things. Providing all of these documents, many of which are not held by Coronial Services in any event, would not meet the purpose of what the Chief Coroner has asked families to identify.

Since 14 December 2020 interested parties have had the ability to have copies of the evidential overview and the individual information packs relating to their loved ones provided to them to give them an overview of the police investigation, and key information about the death of their loved ones. From those documents interested parties are asked to identify issues that they consider to be outstanding that the Chief Coroner could look at. For example, some interested parties have asked for available photographs of their loved ones, some have asked for copies of their deceased identification documents and some have identified issues they consider to be outstanding. The interested parties that you represent may well already, from the above process, have some issues they would like to raise with the Coroner as outstanding. It is the identification of those issues which the Chief Coroner has asked be done by 9 September.

Your request is akin to a criminal full disclosure request (aspects of which would have been relevant to a criminal trial), or a particularly broad Official Information Act request. As such it goes well beyond the matters that can be provided or need to be provided to interested parties in order for them to identify issues they consider to be outstanding. In addition the volume of the material you seek could not practically be provided to you in any event. Many of the documents contain information about other individuals that you do not represent and would be withheld on the grounds of privacy.

With that context in mind the scope of documents you seek will not be provided. You are invited to submit any issues using the above process to the Chief Coroner for consideration on behalf of your clients by 30 September 2021.

If you would find it helpful, I can send you the general evidential overview and the overviews specific to the shaheed families you are representing. I note that we have not had contact with some of them, so this is an opportunity to provide that to them as well.

Warm regards,

Robert

From: Coronial Response <coronial.response@justice.govt.nz>
Sent: Friday, 10 September 2021 8:47 am
To: JustCommunity Office <office@justcommunity.org.nz>; Coronial Response <coronial.response@justice.govt.nz>
Subject: RE: 18 August issues deadline — extension for newly supported whanau assisted by newly appointed counsel
Importance: High

Good morning Mr Rasheed,

I am writing to advise that your request for an extension to the deadline has been granted by the Chief Coroner.

Your new deadline is **30th September 2021**.

We will be in touch regarding your request for the information.