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Case No: HQ12X00232

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
NEWCASTLE DISTRICT REGISTRY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/02/2016

Before :

MR JUSTICE MALES

- -

Between :

DARREN RATHBAND and DEBBIE ESSERY [appointed under CPR 19.8(1)(b) to represent the Estate of DAVID RATHBAND Deceased]	**Claimant**
- and -	
THE CHIEF CONSTABLE OF THE NORTHUMBRIA CONSTABULARY	**Defendant**

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Mr Geoffrey Tattersall QC and Mr Darryl Allen QC (instructed by **Hill Dickinson LLP**) for the **Claimant**
Mr John Beggs QC and Mr Aaron Rathmell (instructed by **Northumbria Police Legal Department**) for the **Defendant**

Hearing dates: 12th – 15th, 18th – 20th & 22nd January 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MALES

Mr Justice Males :

Introduction

1. Shortly after midnight on Sunday 4 July 2010 Police Constable David Rathband was on duty in a police vehicle parked in a prominent position on the Denton Burn roundabout at the junction of the A1 and A69 near Newcastle. In the early hours of the previous day Raoul Moat, who had recently been released from prison, had shot and injured his former partner and had killed her current partner. He was as a result the subject of an extensive police manhunt. At 00:29 on the Sunday morning, Moat made a 999 call in which he outlined his supposed grievances against the police and made threats to kill or injure police officers. He concluded by saying that he was "hunting for officers now". Less than nine minutes later, he shot PC Rathband in the head at close range.

2. PC Rathband suffered horrific injuries, including the loss of his eyesight. It is surprising that he was not killed. He continued to suffer significant pain and discomfort, although he also responded with great courage to his injuries, founding a charity, the Blue Lamp Foundation, to support and raise money for members of the emergency services injured in the course of duty. Sadly, however, his marriage broke down and on 29 February 2012 he committed suicide. Before he did so, he had begun this action against the Chief Constable of Northumbria Police, which has been continued by his brother and sister on behalf of his dependants and estate.

3. The claimants say that the police owed PC Rathband a duty of care to warn him of the threats made by Moat, that they were negligent in failing to issue an immediate warning, and that if an appropriate warning had been issued, PC Rathband would not have been (as he was later to describe his position) "a sitting duck". Although their pleaded case ranged more widely, at the trial the claimants' case focused almost entirely on the absence of a warning. They say that even if more time would have been needed to obtain cell site information and to analyse fully what Moat was saying in the course of a call which lasted about five minutes, what was required was an immediate warning to police officers that Moat had made these threats, which could if necessary have been followed up at a later stage with more detailed information and instructions. They say that the officer in charge of the operation, Superintendent Joanna Farrell, was negligent in failing to give immediate instructions for an interim warning of this kind to be issued.

4. The defendant Chief Constable, who is vicariously responsible for the actions of the relevant police officers, denies that any such duty of care existed, denies in any event that it was negligent not to issue an immediate warning in the few minutes following Moat's call, and does not accept that doing so would have prevented the shooting of PC Rathband.

5. This trial of liability alone has therefore focused mainly on the period of less than 15 minutes from the beginning of the 999 call made by Moat to the shooting of PC Rathband. What happened during that short period has rightly been the subject of intense forensic scrutiny over a trial lasting eight days. Inevitably this has taken place in the knowledge of the brutal shooting of a defenceless police officer and the tragic consequences which followed. I recognise the feelings of PC Rathband in contemplating a situation where he remained completely ignorant of threats which

were known to those in command of the operation to locate and capture Moat. However, in assessing the conduct of police officers who had to deal with a fast moving and unprecedented situation and who had (as matters turned out) only a few minutes within which to act, I am acutely conscious that it is easy to be wise after the event and that the dangers of hindsight must be avoided.

The evidence

6. In addition to the documents generated by the operation, the factual evidence consisted mainly of written and oral statements made by PC Rathband before his death and the evidence of numerous police witnesses. In the account which follows I refer to police officers by the rank which they held at the time. Many of those involved have since been promoted or have retired (or, in some cases, both).

7. Broadly speaking I accept PC Rathband's account given in his witness statement of the events which led to his shooting, although his criticisms of the police and his evidence about what he would have done if a warning had been issued are inevitably affected to some extent not only by hindsight but also by anger as a result of his view that he had been let down by those responsible for the decision that no immediate warning should be issued on receipt of the 999 call. I do not, however, accept his account of conversations with police officers in the weeks after his shooting as recounted in the book which (with assistance) he later wrote, "Tango 190". While I accept that the passages to which I was referred represent PC Rathband's genuinely held interpretation of those (often highly emotional) conversations, the book has clearly been written to maximise dramatic effect and in some respects appears unreliable.

8. I accept also that the police witnesses gave accurate evidence of their involvement in the operation and were doing their best to explain the reasoning behind the decisions which they made, and that the opinions which they expressed (for example as to the desirability or possible consequences of a warning) were genuinely held. Many of the police witnesses were deeply affected by the shooting of PC Rathband, a valued colleague, and will have to live with the events of that night for the rest of their lives.

9. There was also expert evidence from Mr Peter Power and Mr Ian Arundale QPM. Mr Power served as a police officer for 22 years, retiring as long ago as 1992 with the rank of Superintendent. He has, therefore, little or no relevant experience of modern policing, which has changed significantly in the years since he retired, not only as a result of changes in the applicable legal and regulatory framework but also because of technological developments – to take one example relevant in the circumstances of this case, the advent of mobile phones and developments in cell site technology. I found his evidence of no real assistance on the issues which I have to determine.

10. The defendant's expert, Mr Arundale, was a police officer for 32 years, retiring in June 2012 as Chief Constable of Dyfed Powys Police. He had extensive experience of conflict management as well as responsibility on behalf of the UK Association of Chief Police Officers for the oversight of the "Armed Policing" portfolio from 2002 to 2008 and the "Conflict Management" portfolio from 2008 to 2012. This included oversight of all armed policing policy, procedure and practice. During his service he commanded over 100 major police deployments as a "Silver" Commander, experience of particular relevance to the issues in this case. He was responsible for

overseeing the production of the 2009 manual ("The Manual of Guidance on the Management, Command and Deployment of Armed Police Officers") which was current at the time of the events with which this case is concerned. Although it is fair to acknowledge the valid criticism that parts of Mr Arundale's evidence, especially his written evidence, were mistaken and did not distinguish between matters which were known at the relevant time and matters which were only ascertained later, by the time he came to give evidence he had sat through the evidence which had been given at the trial and had a good understanding of it. I found him to be a fair and impressive witness.

11. The written expert evidence was inordinately lengthy and highly repetitive on both sides. Much of it was irrelevant, mainly because the claimants' expert Mr Power had misunderstood the command structure in force at the material time and therefore advanced numerous criticisms of the police operation most of which had no substance and, in the end, were (rightly) not even put to the police witnesses. He made other criticisms also, including of the strategic objectives set by the Acting Chief Constable, which in the event were not pursued.

12. It was common ground between the experts that although it is not uncommon for threats to be made against police officers, the situation faced as a result of the 999 call by Moat was unprecedented. There was nothing in any of the manuals or other guidance relating to the conduct of armed police operations which even came close to advising how a police force should react to such a call. In the end, therefore, the relevant expert evidence fell within a fairly narrow compass.

The facts

13. Many of the events relevant to this case were recorded electronically so that their timing can be given accurately to the second. There was unchallenged evidence to demonstrate the accuracy of the recorded times or, in some cases, to reconcile them to BST.

The shooting at Birtley

14. At about 11:00 on Thursday 1 July 2010 Moat was released from prison where he had been serving a sentence for common assault on one of his daughters. During his imprisonment his partner Samantha Stobbart had ended their six year relationship and had started a new relationship with Christopher Brown, a karate instructor. Ms Stobbart told Moat that Mr Brown was a police officer, although this was not true.

15. Upon release Moat met two associates, Karl Ness and Qhuram Awan. Within hours he had obtained a shotgun. He lay in wait for Ms Stobbart and her new boyfriend and, at about 02:30 on the morning of Saturday 3 July 2010, he murdered Mr Brown with three shots from the shotgun and seriously injured Ms Stobbart with one shot to her stomach. This happened in Scafell, in the Birtley area of Gateshead. Moat was driven to and from the murder scene by Ness and then went on the run, with the assistance of Ness and Awan.

The manhunt

16. A well publicised manhunt which included the deployment of armed officers was launched by Northumbria Police, who made it clear that Moat was a serious danger to members of the public and anyone else with whom he might come into contact. Threat assessments carried out by Inspector Paul Keogh and Superintendent Alan Veitch concluded that Moat posed a high risk to (among others) police officers and included the possibility that he might create a situation where an armed officer was forced to shoot him (a scenario known colloquially as "death by cop"). There was, however, no reason at this stage to conclude that Moat was actively seeking out unarmed officers in order to harm them, as distinct from being willing to shoot those who might confront him or with whom he might happen to come in contact. The assessment made by Acting Chief Constable Susan Sim, which was shared by other officers and which I find to have been reasonable, was that Moat's attack had been motivated by his ex-partner's new relationship with Mr Brown and was not specifically targeted at the police. It was therefore viewed as a "domestic murder".

17. The police service in England and Wales utilises a tiered command structure for the management of serious incidents, including those involving firearms. This structure has three layers of command, namely Gold, Silver and Bronze. The individuals performing these roles are also referred to as Strategic Commanders (Gold), Tactical Commanders (Silver) and Operational Commanders (Bronze). The Strategic (Gold) Commander is responsible for determining the strategic objectives of an operation and for setting any tactical parameters which he or she believes to be appropriate. The Tactical (Silver) Commander is responsible for developing, commanding and coordinating the overall tactical response in accordance with those strategic objectives. The Operational (Bronze) Commanders, of which there may be several, are responsible for commanding a group of officers carrying out functional or territorial responsibilities related to the tactical plan. In addition, when armed officers have to be deployed as part of an operation, Firearm Commanders may be appointed who themselves are divided between Strategic, Tactical and Operational Commanders. These may, but will not necessarily, be the same individuals as the overall Gold, Silver and Bronze Commanders.

Moat's belief that Mr Brown was a police officer

18. By the afternoon of 3 July 2010 it was known that Ms Stobbart had told Moat that Mr Brown was a police officer, even though in fact he was not, and therefore that Moat had shot someone he believed to be a police officer. He was, therefore, (as PC Stephen Botone put it in reporting this information) someone who "will happily shoot at police officers". Chief Superintendent Neil Mackay, who at that time was fulfilling the combined roles of overall Silver Commander and Tactical Firearms Commander ("TFC"), concluded that this information represented an increased threat to police officers, but what he had particularly in mind was the threat to armed officers who might be required to confront or arrest Moat. Armed officers involved in the operation were informed accordingly. However, this information did not mean that Moat was actively seeking out unarmed officers. For example, as could have been predicted, there had been a significant concentration of unarmed officers securing the scene of the shooting of Mr Brown and Ms Stobbart, but Moat had made no attempt to return to the scene in order to attack them as he might have done if his objective had been to kill as many police officers as he could without regard to his own life.

19. Chief Superintendent Mackay concluded that there was no need at this stage to put out any additional warning to unarmed officers not specifically involved in the operation. He said in evidence that officers would already know that Moat was armed and extremely dangerous, and that he should not be approached, but it may be that he was mistaken about that. No evidence of any such briefing or other communication to officers before the shooting of PC Rathband was produced in evidence and the existence of any such force-wide communication is hard to reconcile with the evidence of Inspector Ian Dey referred to below. On the other hand, the shooting had been widely publicised. It is hard to think that there were many, if any, police officers on duty in the Newcastle and Gateshead area by the time Moat made his 999 call who did not know that he was wanted for murder and was armed and dangerous.

20. The possibility was canvassed in evidence that Moat's belief that Mr Brown was a police officer increased the risk to unarmed officers who might choose to approach Moat in reliance on the fact that armed criminals, even those who have already committed serious acts of violence, are sometimes reluctant to shoot police officers because of the higher sentencing tariff which such crimes attract. The point was made that officers ought to have been told about Moat, and that there would be no such reluctance in his case because, as was now known, he had already shot and killed someone he believed to be a police officer. There is some force in this point, but in my judgment it is of no relevance in this case. It was not a factor in the shooting of PC Rathband, who (as explained below) did know about Moat and who never had any intention of confronting him. To have told unarmed officers that Moat had shot a man he believed to be a police officer would have made no difference to what happened to PC Rathband.

The role of Superintendent Farrell

21. At 17:15 on the afternoon of 3 July 2010, Superintendent Joanna Farrell (then located at Gilbridge police station in Sunderland) assumed the role of Silver Commander and TFC from Chief Superintendent Mackay and received a detailed briefing. By this time a Major Incident Room (staffed by Criminal Investigation Department officers) had been established at Byker police station in Newcastle while the Intelligence team was located at the Etal Lane police station also in Newcastle. At about 18:10, Superintendent Farrell re-located herself to Etal Lane to enable her to work alongside the intelligence team, since it was that team which was searching for Moat.

22. At 20:15 Acting Chief Constable Sim (who was at this time fulfilling the role of Gold Commander) convened what was described as a Gold meeting to discuss the operation with the police commanders and managers involved. The meeting discussed intelligence which had been received to the effect that Moat had made threats to kill a number of named individuals in addition to Ms Stobbart and Mr Brown. These were all individuals connected with him in some way, for example previous partners or those associated with them, including a social worker and psychiatrist. None of them was a police officer. This information significantly altered the assessment of the threat posed by Moat, so that the protection of these individuals became a high priority. These were credible threats and the lives of these individuals were considered to be at risk. Steps were taken accordingly, including the deployment of armed police. There was nothing in this intelligence to change the assessment of the threat posed to police officers not specifically involved in the operation.

23. Due to the increasing scale and complexity of the operation, Acting Chief Constable Sim decided at this meeting to change her command structure. She appointed Chief Superintendent Graham Davis as the overall Silver Commander while maintaining Superintendent Farrell as the Silver or TFC specifically for the firearms and manhunt operation. This enabled Superintendent Farrell to concentrate on the search for and capture of Moat and the management of the threat which he posed, while Chief Superintendent Davis took responsibility for other aspects of the operation. As was eventually common ground, this meant that at the relevant time it was Superintendent Farrell to whom the 999 call made by Moat had to be reported (as it was) and that it was her responsibility to decide what action needed to be taken in the light of it, including whether and when anything needed to be said to unarmed officers not specifically involved in the operation such as PC Rathband. Despite the criticisms of this structure made by the claimants' expert (but not pursued by the claimants at the trial), this was both appropriate and clear to all concerned in the operation.

24. Superintendent Farrell was a highly experienced police officer with (at the time) almost 19 years service. She had extensive experience of firearms operations and other critical incidents. She was one of Northumbria Police's most experienced TFCs and was well qualified to perform this role in the operation to locate and capture Moat. Her evidence that she had been deployed on many occasions where lives were threatened and an ability to think quickly in response to dynamically changing circumstances was required was not challenged. Since this incident she has qualified as a Strategic (Gold) Firearms Commander and has been promoted to Assistant Chief Constable.

PC Rathband's shift

25. PC Rathband worked within the Motor Patrols Department based at Etal Lane. He reported for his shift in the afternoon of 3 July 2010 and was given a detailed handover relating to traffic matters by Inspector Dey which did not, however, include any discussion of Moat. PC Rathband knew because he had heard it on the news (but at that stage Inspector Dey did not know) that there had been a shooting on the previous night and raised this subject himself. As it happened PC Rathband had previously come across Moat when seizing an uninsured vehicle which Moat was driving and remembered him well. He described him in his witness statement as "an angry, angry man" who did not like police officers. He referred to him in the briefing with Inspector Dey as "a lunatic". He wanted to find out more about the shooting, so he checked the police log of the incident and, as a result, was well informed about the situation.

26. Although the claimants suggest that police officers in general ought to have been more fully briefed about the threat posed by Moat, PC Rathband was in fact aware from his checking of the log and his own previous knowledge that Moat was wanted for murder, was armed and dangerous, and was hostile towards police officers. I need not decide whether there are valid criticisms to be made of the way in which officers generally were briefed. If there are, such criticisms have no application in PC Rathband's case. There is no reason to think that he would ever have approached Moat deliberately. There was a risk which could not be avoided that a traffic policeman might unexpectedly come into contact with Moat, for example if Moat was in a vehicle which he happened to stop for speeding, but I accept the evidence of Inspector Dey that there was no need for a specific instruction to be given to such

officers what to do in such circumstances. PC Rathband was an experienced officer and was aware of the risk of such an unexpected confrontation. In any event this is not what happened.

27. One of the first tasks which PC Rathband was given was that he was sent, with colleagues, to look for a vehicle which was believed to be connected with an associate of Moat. That inquiry came to nothing. He was surprised that traffic officers were sent on such a task, but it did at least ensure that he was fully aware of the circumstances in which Moat was being sought as they were then known.

28. By about 23:30 PC Rathband was parked on the Denton Burn roundabout. This is a busy roundabout above the A1, at the junction with the A69, just north of the River Tyne. The A1 runs underneath with slip roads up to the roundabout. PC Rathband parked with a view of traffic leaving the northbound slip road and entering the southbound slip road, with a line of vision directly into the centre of the roundabout, and with a view of the A69 in both directions. It was a good position from which to pick up suspected drink drivers. The roundabout was well lit, and his vehicle was easily seen, but he also had a good view of all traffic. To the rear of his vehicle was a low concrete barrier at the edge of the roundabout, which extended down the sides of the slip road to the A1.

29. PC Rathband was not part of the operation to find Moat but he was thinking about him. Indeed he sent a jokey text to his wife saying that he was looking for a man with a gun.

Moat's 999 call

30. At 00:29:47 on 4 July 2010 Moat made a 999 call from his mobile phone which was connected to the Northern Communications Centre of Northumbria Police at Ponteland in Newcastle. The call handler was Rachel Blake. The part of the call involving Moat speaking lasted 4 minutes and 56 seconds. He was ranting and aggressive, with a lot to say, and did not give Ms Blake an opportunity to say much. There is a recording of the call, which was played in evidence.

31. Moat began by identifying himself as "the gunman from Birtley last night" and gave his name. He continued by giving an explanation of why he had shot Mr Brown, referring to what he described as police harassment over the years:

> "What I'm phoning about is to tell you exactly why I've done what I've done, right. Now, my girlfriend has been having an affair behind my back with one of your officers, this gentleman that I shot last night the karate instructor, right – now you, you bastards have been on to me right for years, you's have hassled Iz hassled Iz, you's just won't leave Iz alone, I went straight six years ago when I met her and I've tried me best to have a normal life and you just won't let up right you's won't leave Iz alone for five minutes. I can't drive down the street without the blue flashing lights you know, you's have stitched Iz up for years you've been caught stitching Iz up so the fact of the matter is right she's had an affair with one of your officers, if he hadn't have been a police officer I wouldn't have shot him."

32. Ms Blake had the presence of mind to realise immediately that this was an important call and that others needed to be aware of it. She wrote the name "MOAT" on a piece of paper and waved it at Acting Sergeant Lucas Rowlands to alert him. He in turn spoke to Linda Dean, a Communications Supervisor, who immediately began to listen in to the call. So too did Craig Jones, another Communications Supervisor. The statement that "If he hadn't been a police officer I wouldn't have shot him" was not necessarily true. Moat's state of mind was not such as to make his utterances reliable. Whether or not true, however, the fact that he had made this statement was potentially important information, but the statement was made before Ms Dean and Mr Jones began to listen in. It was not, therefore, information which was or should have been available to Superintendent Farrell when she had to decide how to react on receiving an initial report of this call. It was information which would only have been available to her after the tape had been listened to again with care.

33. Moat continued his list of complaints against the police, complaining that he had been sent to prison for something he had not done and that while he was in prison his partner was "having an affair with one of your officers". He said that although Mr Brown had deserved to be shot, he had not meant to injure Ms Stobbart as seriously as he had, his intention having been to give her a claim for compensation "because obviously I'm not going to be around in a few days, it was meant to just give her a little injury so she can get loads of compensation".

34. At about 00:32:32, so 2 minutes and 45 seconds into the call, by which time Ms Dean and Mr Jones were listening, Moat continued:

> "I can't, I can't – to be honest I'm quite surprised she is critical you know but I didn't mean that but the fact of the matter is I'm not coming in alive, you's have hassled me for so many years if you come anywhere near me and I'll kill you's, I've got two hostages at the minute, right, come anywhere near me and I'll kill them as well, I'm coming to get you's I'm not on the run I am coming to get you. You, you's have made me unwell, you's have made me do this cos you's just won't leave me out – you know you's just wont leave Iz alone."

35. There were four important new pieces of information here, not entirely consistent with each other, although this would not necessarily have been immediately apparent. In the trial, of course, we had the advantage of listening to the call with the benefit of a transcript as well as knowledge of the kind of statement which was to prove particularly significant. That advantage was not available to those who had to react at the time.

36. The first new piece of information was the statement of a determination not to be taken alive. The second was a threat to kill police officers if they came near him. The third was a claim to have two hostages. This was not true, and may have been intended to protect Moat's two associates Awan and Ness, although it was plainly a claim which had to be taken very seriously. At approximately 00.33 Mr Jones, who was listening, sent a message to Acting Sergeant Rowlands that "he's got two hostages!!!???" The fourth was a threat, not merely to kill police officers if they sought to approach him, but actively to seek them out: "I'm coming to get you's I'm not on the run I am coming to get you". This was the first time that this threat had

been made. This too was something which had to be taken seriously, although it was a threat which it might be difficult for Moat to carry out if he did indeed have hostages.

37. The Critical Incident Manager for the operation at this time was Inspector Michael Dwyer. He sat opposite Ms Dean in the Communications Room. She informed him that Moat was on the line and was claiming to be responsible for the Birtley shootings. Inspector Dwyer checked Moat's date of birth on the police computer and asked Ms Dean to get the caller to give this information. This was passed to Ms Blake, and Moat responded with the correct date. This provided confirmation, albeit not necessarily conclusive, that the caller was indeed Moat. All concerned proceeded, correctly, on the basis that the call was genuine.

38. At about 00:34:33, right at the end of the call, Moat declared:

> "Aye you's you's wanted me to kill myself but I'm gonna do give you's a chance cos I'm hunting for officers now right."

39. This repeated the threat made about two minutes earlier that Moat was not on the run but was "coming to get you".

40. Ms Blake's response shows that she understood this as a threat to kill the police officers for whom Moat said that he was hunting. She said:

> "No. Please don't do that. We don't want any more killings, all right."

41. Moat then terminated the call at 00.34.47.

Eastings and Northings

42. Ms Blake then spoke to the BT operator and obtained (1) the mobile number from which Moat made the call; (2) the fact that the mobile telephone service provider was Orange; and (3) the "Eastings and Northings" (i.e. the Ordnance Survey grid reference from which the call had been made together with other technical information which can be provided when a 999 call is made). The first and second of these were sufficient to enable cell site analysis to be undertaken. The Eastings and Northings information provided was also of some importance, distinct from any cell site analysis.

43. According to Inspector Dwyer, the way in which the police computer was programmed meant that entering the grid reference given by the BT operator would have shown the police area from which it was likely that the call had been made, in this case an area called "Charlie 6", but that this was all that the computer would have revealed. In fact, although Inspector Dwyer and some other officers who gave evidence did not know this (although Superintendent Farrell may have done), the Eastings and Northings information provided by the BT operator revealed much more than this. Properly understood it would have enabled the police to calculate with what was said to be 80% probability that in this particular case the call had been made from a mobile phone somewhere within a circle whose centre was the Ordnance Survey grid reference and which had a radius of 5.039 kilometres (3.1 miles) and thus an area of about 80 square kilometres. The BT operator had provided the data from which this

circle could have been plotted by 00:36:10 when the conversation with Ms Blake was concluded.

44. It may be that this information was more precise than Eastings and Northings would typically provide. Unusually, moreover, the Eastings and Northings information also turned out to be more precise than the cell site data.

45. By 00:38:46 (i.e. within 2 minutes and 36 seconds of the conclusion of the call) Inspector Dwyer told Superintendent Farrell that the data indicated that Moat was in the Charlie 6 area. This appears to have been the result of entering the Eastings and Northings grid reference into the police computer. Charlie 6 was an area to the west and south of Gateshead very much larger than the area covered by the circle. Nobody, however, analysed the remaining data provided by the BT operator so as to plot the circle with a radius of 5.039 kilometres although this could have been done without difficulty by anyone who understood the data. In fact, although the grid reference which was the centre of the circle was in Ryton, within Charlie 6, much of the circle was outside that area. The Denton Burn roundabout where PC Rathband was parked was not in Charlie 6 but was in the area covered by the circle. Moat, as was later to appear, was not in Charlie 6 but was in the circle, in the vicinity of the roundabout, while the call was being made.

46. Plotting the circle should have been a straightforward matter and would have yielded useful albeit limited information, more useful than saying that Moat was somewhere within Charlie 6 (which in fact was not correct but anyway covered a large area), but limited because it would only indicate his approximate location at the time of making the call, and (as the information had only an 80% level of confidence) because there was in any event a 20% possibility that he had not been anywhere in the circle at all. It is unlikely, however, that it would have made any difference to what happened next. Even if Superintendent Farrell had asked for this to be done as a matter of urgency, it would have taken a little time. As it was, of course, within only a few more minutes when the report of PC Rathband's shooting was received, the police had more up to date information about Moat's precise location.

Cell site analysis

47. Entirely separate from the analysis of Eastings and Northings was the process of cell site analysis. This enables a mobile phone service provider, in this case Orange, to provide information as to the mast with which the mobile phone has connected, together with the coverage area served by the mast in question. In urban and some rural areas this may provide very precise information as to the location from which a call was made, as some masts will cover only a few streets or even a single street, while in other cases the area of coverage may be much greater. It was the experience of all the relevant police witnesses that cell site analysis is typically much more accurate and precise than the information available from Eastings and Northings. I accept that this is generally the case, even allowing for the fact that some of the police witnesses did not fully understand the information that Eastings and Northings are able to provide. Further, whereas Eastings and Northings provide only static information as to the likely location of a mobile phone at the time when a 999 call is made, cell site analysis has the advantage of being able to provide dynamic information. Provided that a mobile phone remains switched on, it will continue to transmit signals connecting with telephone masts, even if it is not actually in use.

Thus cell site analysis may and often will provide not only information about where the phone was when a call was made or text message was sent, but information as to its likely current location and direction of travel. This is known as live transmission analysis.

48. It was therefore important that cell site analysis be undertaken following the 999 call made by Moat. This was the responsibility of Susan Fatkin, a "Single Point of Contact" with telephone and internet service providers. At about 00:37 she was informed of the number of Moat's mobile phone and was authorised to obtain the necessary analysis. She contacted Orange at about 00:40 and was informed that the phone was now switched off (which meant that live transmission analysis was impossible) but that the 999 call had connected to a mast located at Heddon Low Farm north west of Newcastle, which covered an area on a sector between 4 and 7 on the clock face, with a coverage of up to 16.5 kilometres. Unfortunately this represented a very large area of over 200 square kilometres. In the event, therefore, and disappointingly, the cell site analysis provided no useful information.

49. A service provider can also provide prompt information about the phones with which a mobile phone has been in contact. Thus if Moat had used or was using his phone to contact associates, that could have been valuable information which might well have assisted in locating him. It was reasonable to think that this information would be available in much the same time as cell site analysis, although in the event no useful information was obtained.

The information provided to Superintendent Farrell

50. At 00:33:52 while Moat was still on the line Inspector Dwyer telephoned Superintendent Farrell and spoke with her directly for about two minutes. He told her that Moat was currently on the phone to a call handler and they discussed trying to persuade Moat to hand himself in. With hindsight, there was never any prospect of this happening, but it needed to be considered. It is by no means unknown for people who have committed even the most serious violent crimes to decide to give themselves up. At 00:35:45 (that is, after Moat had terminated the call but before the exchange between Ms Blake and the BT operator had concluded) Mr Jones who had been listening in called Acting Sergeant Rowlands and told him that Moat had made "very specific threats that he will shoot a police officer, and he's claiming to have two hostages … he said if we go near him, he will shoot the hostages". This was not quite right, as Moat had not used the word "shoot", but in substance was a fair reflection of at least part of what he had said. Mr Jones also said that, from the sound of the call, Moat appeared to be in a car.

51. Acting Sergeant Rowlands relayed the reference to threats (but not the reference to hostages or the fact that Moat appeared to be in a car) to the Critical Incident Manager, Inspector Dwyer, who was still speaking to Superintendent Farrell. Inspector Dwyer told her, at approximately 00:36:10 (i.e. 1 minute and 23 seconds after Moat had terminated the call):

> "Oh hang on, I've just been told that he's making specific threats in this call that he will shoot a police officer".

52. Superintendent Farrell acknowledged this information. Inspector Dwyer promised to call her again as soon as he could.

Superintendent Farrell's response

53. It was Superintendent Farrell's responsibility to decide what steps should be taken as a result of the 999 call made by Moat. As the Critical Incident Manager, Inspector Dwyer had authority to broadcast a warning message to police officers if that was necessary in an emergency, but it would have been highly unusual for him to have done so without consulting Superintendent Farrell, a senior officer with specific responsibility for the operation who could be and was consulted immediately. The claimants do not in the end say that anyone else should have taken the decision to issue a warning. Certainly Mr Power accepted this. Nor do they criticise the speed with which the information that Moat had threatened to shoot a police officer reached Superintendent Farrell. Indeed, Mr Power accepted that this could be described as impressive. The claimants do criticise the way in which she reacted to this information.

54. Superintendent Farrell realised from the outset that the call made by Moat was extremely important. It was the first contact with Moat and the first opportunity to ascertain his whereabouts for almost 24 hours, since the shooting of Mr Brown and Ms Stobbart. There were a number of factors, all of them urgent, which needed to be considered. These included establishing Moat's current location and situation and, if he was on the move, his direction of travel, ascertaining whether there was any prospect of persuading him to turn himself in, obtaining any new information relevant to the safety of the named individuals against whom Moat was known to have made threats, and considering the safety of the public generally, as well as the safety of police officers whom he had threatened during the 999 call. It was therefore necessary to establish with the greatest possible speed what could be learned from the phone call and to consider its implications (and what action needed to be taken as a result) in a number of respects, all of which were important and of which the safety of police officers was only one.

55. In fact the only substantive point from the phone call reported to Superintendent Farrell at this stage was the fact that Moat was threatening to shoot police officers. Although she did not discuss with others involved whether a warning of some kind should be issued to police officers, I accept Superintendent Farrell's evidence that she did consider this question and decided not to do so for the moment. She wanted first to obtain two pieces of information, both of which she expected to be able to obtain within a matter of minutes and which, depending on what information was obtained, would affect the scope and terms of any warning.

56. The first item of information which Superintendent Farrell wanted to have was cell site analysis. She knew that some providers (of which Orange was one, although she may not have known at this stage that Moat had been calling from an Orange phone) can provide this information within a very few minutes, as in fact happened. She knew, therefore that she would either have this information very quickly or would be told equally quickly that it would not be available for a while, in which case she would have to do without it. She hoped and expected, reasonably as I find, that cell site analysis would be available within a few minutes and would provide a much better indication of Moat's location than turned out to be the case and that live

transmission analysis would also reveal further valuable information – whether he was on foot or in a vehicle, and if he was on the move, in which direction he was heading. This would have been extremely valuable information in many respects and, among other things, would have enabled a focused warning to be given to police officers likely to be in Moat's vicinity, although in the event the analysis did not yield such information.

57. The second step which Superintendent Farrell wanted to take was to have a proper analysis of the 999 call. Listening to the call would necessarily take about five minutes (although Superintendent Farrell did not at that stage know its precise duration) but could be expected to provide a much better understanding of what Moat was threatening to do and how imminently his threat might be carried out, as well as of other matters mentioned in the call which had not been reported to her in the brief "headline" report provided over the telephone by Inspector Dwyer but which it would be imperative for her to know: an example would be the reference to hostages, of which Superintendent Farrell was so far unaware; another was the possibility that Moat had made further threats against other individuals not yet known to the police, although in fact there were no such threats.

58. Accordingly Superintendent Farrell arranged for a recording of the 999 call to be emailed to PC Paul Backburn, who was with her fulfilling the role of her Tactical Adviser, so that he could listen to the call in full. The procedure envisaged was that he would listen to the call while present in the room with Superintendent Farrell, and would relay to her the key points emerging as he did so. She would, therefore, have an understanding of those key points within something of the order of five minutes, even if a full in-depth analysis might take longer.

59. The claimants accept that both of these steps, cell site analysis and call analysis, were sensible and necessary and would (or at least might) have assisted Superintendent Farrell in developing a more fully informed warning which could have been broadcast to police officers. The defendant in turn accepts that, once these steps had been completed, it would have been necessary to broadcast an appropriate warning, whatever form that might have taken as a result of the information obtained. The issue (which I address below) is whether it was negligent of Superintendent Farrell not to broadcast an immediate interim warning in the relatively few minutes before these steps could be completed.

60. As already noted, it was 00:36:10 when Superintendent Farrell was first told of Moat's threat to shoot a police officer. At 00:44:00 PC Rathband radioed in to say that he had been shot. As it is likely that he was shot at the latest about 15 seconds before this time, from the moment when she first heard of the threat there was at most a period of only about 7½ minutes for Superintendent Farrell to have made the decision to issue an immediate warning, formulated the terms in which it should be broadcast and given the necessary instructions, for the warning to be issued to police officers, and for PC Rathband to have acted upon it by driving away from the roundabout where his vehicle was parked. In reality, however, the time available to her was less than this. The conversation in which she was first told of Moat's threat ended at 00:36:26, with Inspector Dwyer promising to "get back to you as soon as I can". He did so in a second call just over two minutes later, at 00:38:45, in a call lasting 1 minute and 27 seconds during which he passed on the important (but as noted above incorrect) information that the Eastings and Northings indicated that Moat had called

from the Charlie 6 area, as well as a report of what Moat had said at the end of the call, which he described as follows:

> "Basically saying I know you want to kill us and I'm hunting for cops and you're going to get the chance to kill us … I know you want to kill me and I'm out looking for cops and I'm going to give you the chance."

61. Inspector Dwyer added his interpretation of this comment, but also made clear that he had not listened to the call himself:

> "So from that he seems to be indicating that he's in the possession of a weapon and he's going to force the situation … That's my interpretation I haven't listened to the call."

62. Thus although Superintendent Farrell was being told about the threats against police officers, she was also told that this was being relayed to her at second or third hand. This would have reinforced her understanding that there might well be other things in the call which she needed to know urgently. Inspector Dwyer concluded by confirming that Mrs Fatkin would be providing cell site analysis imminently.

63. This second call ended at 00:40:12. If any step was to be taken to avert the shooting of PC Rathband, it had to be taken within about 3½ minutes at the most.

64. By 00:44:00 when PC Rathband reported that he had been shot, the cell site analysis had been completed. The result was reported to Superintendent Farrell (who was in a different room) at about the same time as the report of PC Rathband's shooting. At that point the process of listening to the 999 call had not yet been begun. The email sending the recording reached PC Blackburn's computer at about 00:43:50, just a few seconds before PC Rathband reported in.

The shooting of PC Rathband

65. Shortly before 00:44 PC Rathband became aware that someone was approaching his vehicle. He saw a figure running towards the nearside front window from the concrete barrier of the roundabout. In seconds the figure was at the nearside car window and PC Rathband recognised Moat. Moat pointed his shotgun at the window and fired through it with the gun right against the glass. PC Rathband was shot in the head, suffering excruciating pain. He was able to open the car door and, as he did so, realised that Moat was still there. Moat then shot him again, once more through the passenger window, and the bullet hit PC Rathband in the shoulder. In PC Rathband's words, he decided at this point "to play dead" in order to avoid being shot again. After a while, displaying extraordinary strength and presence of mind, he was able to press the microphone button on his car radio. He was not able to speak immediately, but managed to report that he had been shot and needed urgent assistance.

66. As already mentioned, the radio report by PC Rathband was timed at 00:44:00. His own assessment was that the gap between the two shots was about 10 to 15 seconds and between being shot a second time and radioing for assistance was about five or ten seconds, but in the circumstances that assessment cannot be regarded as reliable. The ANPR camera on his vehicle records a flash from the left hand side of the

vehicle, possibly from the discharge of a firearm, at 00:44:01, but only one such flash is recorded even though two separate shots were fired. It seems likely from the timings and from PC Rathband's account that the flash recorded represents the second shot. The time of 00:44:01 cannot be correct as he succeeded in reporting the shooting one second before this time, but the evidence was that the timer may be inaccurate by up to (but no more than) ten seconds. I find, therefore, on the balance of probabilities, that the second shot was fired at or within a few seconds of 00:43:51 and that the first shot was fired about five to ten seconds before that, within a few seconds of 00:43:45.

67. Hence my findings above that the shooting occurred about 7½ minutes after Superintendent Farrell first learned of the threat and about 3½ minutes after the conclusion of her second telephone conversation with Inspector Dwyer.

68. PC Rathband's ANPR system records a black Lexus vehicle travelling west across his camera view onto the A69 at 00:31:48 (sc. 00:31:38), in fact while Moat was in the course of making his 999 call. It is now known, although the police had no reason to associate this vehicle with Moat at the time, that this was a vehicle in which he was travelling with his associates Ness and Awan (who were subsequently convicted of conspiracy to murder police officers and of the attempted murder of PC Rathband, as well as of other offences). The same vehicle is shown travelling north from the slip road from the A1, across the roundabout and out of view at 00:44:26 (sc. 00:44:16), only a few seconds after PC Rathband was shot.

69. Two conclusions follow from this. First, it shows that during the 999 call Moat was not in the Charlie 6 area at all, but somewhere to the north east of it, although he was within the circle which could have been plotted from the Eastings and Northings data. Second, it is likely that Moat had already noticed PC Rathband's vehicle as he crossed the roundabout at 00:31:38 and doubled back after the call was concluded, using the low concrete barrier on the A1 slip road as cover. (I understand that these conclusions are supported by evidence given in the criminal trial of Moat's associates).

The instruction to return to police stations

70. The emergency services were on the scene within minutes and PC Rathband was taken to hospital.

71. At 00:49:55 Superintendent Farrell gave an instruction that all unarmed police officers in Newcastle and Gateshead should return to a police station. Although in the event some officers ignored this instruction and emergency calls were still attended, for a short while there was a very limited police presence on the streets of Newcastle and Gateshead at a very busy time. That was a drastic step to take, but by this time of course it was known that one officer had been shot and that the lives of other officers might be in immediate danger. The order to return had its own dangers, however, as officers returning to a police station would present a potential target for Moat.

72. The police had available a facility for broadcasting to all officers simultaneously, although this would have meant interrupting and overriding all radio traffic, however urgent, for the duration of the broadcast. However, this facility was not used in giving the order to return, apparently because those concerned were not aware of its existence. Instead a separate broadcast was made to each of the individual police talk groups in the areas affected, which took several minutes. For the purpose of this case,

I proceed on the basis that if the exercise of reasonable care required an immediate broadcast to be made in the minutes before PC Rathband was shot, the simultaneous facility would or at any rate should have been used. The defendant could not sensibly (and did not) contend that it would have been reasonable to use a more time consuming procedure when the facility for an immediate simultaneous broadcast was available, even if officers were unaware of it (cf. *Bolitho v City & Hackney Health Authority* [1998] AC 232 at 240 per Lord Browne-Wilkinson: "A defendant cannot escape liability by saying that the damage would have occurred in any event because he would have committed some other breach of duty thereafter"). The issue, therefore, is whether the exercise of reasonable care did require such a broadcast.

The subsequent location and death of Moat

73. Shortly after the shooting of PC Rathband, Moat made a second 999 call in which he admitted (indeed, gloated about) the shooting. Two days later, on 6 July 2010, Awan and Ness were arrested in Rothbury. Just after 19:00 on 9 July 2010 Moat was located by the riverbank in Rothbury, in possession of a sawn-off shotgun. Lengthy and highly publicised negotiations with him started. However, just after 01:00 on 10 July 2010 Moat shot himself in the head with his shotgun and died.

Visits to PC Rathband

74. I should mention two visits to PC Rathband in July 2010 while he was recovering at home after being discharged from hospital. One was by Craig Jones who had listened in to much of Moat's 999 call. At 00:41:20, so some 6½ minutes after Moat had rung off and only about 2½ minutes before the shooting, Mr Jones had a telephone conversation with his colleague Linda Dean in which he asked:

> "Is something going to go out? Do you think we need to put something out, to all, all, over the air?"

75. Ms Dean replied that the call was being emailed to Superintendent Farrell.

76. In his book PC Rathband described a conversation at his home in which Mr Jones told him that the recording of the 999 call had already been listened to twice before his shooting and that Mr Jones "had tried to get his superiors to warn the guys on the ground but had been fobbed off". Mr Jones was a friend of PC Rathband. He was greatly affected by the shooting and this was a highly emotional conversation. I accept the evidence of Mrs Kath Rathband, PC Rathband's widow, that Mr Jones was angry about what had happened and the way it had been dealt with. I do not accept that Mr Jones said that he had been "fobbed off", although this was what PC Rathband took from the conversation. However, this was not a fair characterisation of what had actually happened in the police control room. If Mr Jones did say that the recording had already been listened to twice, which I think is doubtful, he was wrong. There had not been time for it to be listened to at all. It appears to have been this conversation, or at any rate PC Rathband's understanding of it, which eventually led to his decision to bring this action.

77. The other visit was by Acting Chief Constable Sim, who visited numerous times and was described by PC Rathband in his book as "a rock by my side". He told her about what Mr Jones had said and that he was considering action against the police (in

effect, suing her as the Chief Constable). I do not accept the suggestion in the book that Acting Chief Constable Sim told him or encouraged him to sue. She did say, fairly and properly, that if he decided to do so, that would not affect her relationship with him.

Chief Superintendent Milward's review

78. In part as a result of this conversation, Acting Chief Constable Sim instructed Chief Superintendent Gordon Milward to conduct a Management Review of the Communication Department`s handling of events. The first draft of his report stated that:

> "It was not possible to develop a response to Moat`s threats and communicate it concisely in the time between the call and the assault on PC Rathband ... ."

79. However, Acting Chief Constable Sim did not agree with this. Her view was that it would have been possible to issue some form of warning. She therefore required the report to be changed. Accordingly the final version of the report stated that:

> "Information obtained in this review describes a very fast moving sequence of events, with two key priorities running in parallel; officer safety and detaining Moat. There was an immediate need to respond to the former, proportionately and in a measured way, and to retain a policing service in some form. It was not possible to develop an all encompassing, fully risk-assessed response to Moat`s threats and communicate it concisely in the time between the call and the assault on PC Rathband, however a more immediate, interim warning could have been given by the CIM whilst the full response was being devised in conjunction with the TFC.
>
> …
>
> The CIM and supervisors acknowledged the need to expedite a broadcast of some kind to warn officers of Moat`s threats however, in interview as part of this review, none could articulate what the message should have been and accept that the preparation and broadcast of a fully meaningful and manageable message would not have been possible within the timescales.
>
> One solution would have been to direct all patrolling staff to keep mobile i.e. not to remain static in any place until such times as further specific direction was given."

80. The claimants rely on this report as an acknowledgement, in particular by Superintendent Farrell, that an immediate interim warning *should* have been given, and that officers should have been instructed to keep mobile. In my judgment this is not a valid reading of the report. The reference to an acknowledgement by "the CIM and supervisors" does not as a matter of fact include Superintendent Farrell. Further,

while all concerned acknowledge that a broadcast at some stage not long after Moat's 999 call would have been appropriate and it is agreed that it would have been physically possible to broadcast an interim warning, in my view the report does not go further than this. In particular, it does not record any acknowledgement that an interim warning should have been given, or in what terms, in the few minutes between Superintendent Farrell's receipt of the information that Moat was threatening to shoot police officers and the shooting of PC Rathband. Moreover, it is clear, and not surprising, that this report was written with the benefit of hindsight, for example as to the way in which PC Rathband had in fact been shot. If, as would have been possible, another police officer had been shot in some other way, for example while deployed on foot in Newcastle city centre, the report would have been written differently.

Amendments to the Safe Patrolling Procedures

81. Following the production of this report, Chief Superintendent Milward made a number of recommendations to amend the Northumbria Police's Safe Patrolling Procedures. These were intended to provide guidance if a similar situation were to arise in the future. They included a recommendation that:

> "Where information is received of a specific threat to harm police officers or police staff and the assessment of that information indicates a verifiable or potential risk, then the following actions must be considered:
>
> 1. The duty Critical Incident Manager (CIM) will ensure that information concerning the threat is broadcast at the earliest opportunity to frontline staff.
>
> 2. The broadcast will consider procedures for Safe Patrolling and in the first instance include guidance to staff as follows:
>
>   - Officers and staff must remain vigilant according to the nature and type of threat;
>
>   - Uniformed resources will be double-crewed at all times;
>
>   - Staff will avoid static positions when on patrol and must remain mobile or return to police premises; and
>
>   - No foot patrols will be deployed.
>
> 3. The CIM will, as far as is practicable, confirm that frontline supervisors are aware of the threat and the broadcast, and that they have put in place measures to ensure their staff are aware of the threat and are accounted for.
>
> 4. Having completed the above, the CIM will refer the matter to a Silver Commander who will review the information

> and intelligence and, if appropriate, develop a broader Patrol Strategy."

82. This recommendation was accepted at a meeting of the Northumbria Police Strategic Management Board on 13 December 2010. The Force Safe Patrolling Procedure was amended accordingly.

83. The claimants rely on this as a statement of what ought to have happened, as a matter of good practice and common sense, after Moat's 999 call. However, the recommendation does not say that an immediate broadcast *must* be made, only that a broadcast at the earliest opportunity must be considered. Here, such a broadcast was considered, and it was decided that no immediate broadcast should be made, at any rate until cell site analysis and an initial analysis of the call had been undertaken. Chief Superintendent Milward's recommendations do not assist materially in determining whether that decision was negligent.

Duty of care

The three stage test

84. The first issue is whether the defendant owed PC Rathband a relevant duty of care. It is common ground that this issue must be decided by reference to the familiar "three stage test" described in the speech of Lord Bridge in *Caparo Industries Plc v Dickman* [1990] 2 AC 605, 617-8:

> "… in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other."

85. The applicability of this test to negligence claims against the police was affirmed in *Robinson v Chief Constable of West Yorkshire Police* [2014] EWCA Civ 15, [2014] PIQR 238.

86. Although all three elements of this test are in dispute, the real issue between the parties is the third requirement, whether in the circumstances of this case the imposition of a duty is fair, just and reasonable.

87. The requirement of foreseeability is easily satisfied. Moat made credible express threats against police officers. He had already killed and was believed to be armed. That he might carry them out was not merely foreseeable but foreseen. It could not be foreseen which of several hundred police officers on duty might be the victim of his murderous activity, but that does not mean that damage was not foreseeable. Indeed, the fact that the issue of a warning to all officers on duty was considered demonstrates that all those on duty were considered to be potentially at risk.

88. The second requirement, proximity, needs to be viewed differently according to the way in which the claim is put. As explained below, the cases establish that a claim by a police officer for injury suffered in the course of duty may be put in two ways. The first is that a defendant Chief Constable is vicariously liable for the negligence of an individual police officer (in this case, that would be Superintendent Farrell) for whom he or she is responsible. In that case, what matters is whether there was a relationship of proximity between (in this case) PC Rathband and Superintendent Farrell. The defendant submits, with some force, that this requirement of proximity is not satisfied. Thus Superintendent Farrell was not supervising PC Rathband, and had not spoken with him or deployed him. He was not part of the operation to find Moat. They were merely officers in the same force. The claimants did not challenge this analysis.

89. However, the second way in which such a claim may be put, and the way in which the claimants do put the claim, is that the relationship between a Chief Constable and an officer in his force is a relationship akin to employment, so that a Chief Constable owes the officer a non-delegable duty of care to devise and operate a safe system of work: see in particular *Mullaney v Chief Constable of West Midlands Police* [2001] EWCA Civ 700, which is considered further below. This way of putting the case avoids the need to establish a relationship of proximity between individual officers. The relevant relationship is between the Chief Constable and the injured officer, which is itself a relationship of proximity.

90. Accordingly, at least so far as this second way of putting the case is concerned, the requirements of foreseeability and proximity are satisfied.

91. In the case of claims against the police, the question whether it is fair, just and reasonable to impose a duty of care is closely connected to the principle of public policy that the police are generally under no duty of care in respect of activities inextricably bound up with the investigation and prevention of crime and, in particular, owe no private law duty to protect individuals against harm caused by criminals. As Hallett LJ explained in *Robinson* at [46]:

> “The general principle is that most claims against the police in negligence for their acts or omissions in the course of investigating and suppressing crime and apprehending offenders will fail the third stage of the *Caparo* test. It will not be fair just and reasonable to impose a duty. This is because the courts have concluded that the interests of the public will not be best served by imposing a duty to individuals. I shall not repeat the justification so eloquently expressed by others, in particular Lord Steyn [in *Brooks*: see below], save for these two sentences: ‘The prime function of the police is the preservation of the Queen's peace. The police must concentrate on preventing the commission of crime; protecting life and property; and apprehending criminals and preserving evidence’.”

92. It is therefore necessary to examine that principle of public policy and then to consider its application to claims by police officers.

The Hill principle of public policy

93. The principle that the police are generally under no private law duty of care in respect of activities inextricably bound up with the investigation and prevention of crime has been firmly established since *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53 (a claim on behalf of a victim of the "Yorkshire Ripper") and has been repeatedly reaffirmed at the highest level: see *Brooks v Commissioner of Police of the Metropolis* [2005] UKHL 24, [2005] 1 WLR 1495 (negligence in the investigation of the murder of Stephen Lawrence); *Van Colle v Chief Constable of the Hertfordshire Police, Smith v Chief Constable of Sussex Police* [2008] UKHL 50, [2009] 1 AC 225 (negligent failure to protect against prolonged threats of extreme violence by an ex-partner) and *Michael v Chief Constable of South Wales Police* [2015] UKSC 2, [2015] AC 1732 (negligent failure to respond to an emergency call after a threat to kill by an ex-partner).

94. The principle and its rationale were clearly stated by Lord Steyn in *Brooks* at [30]:

> "The prime function of the police is the preservation of the Queen's peace. The police must concentrate on preventing the commission of crime; protecting life and property; and apprehending criminals and preserving evidence … A retreat from the principle in *Hill* would have detrimental effects for law enforcement. Whilst focusing on investigating crime, and the arrest of suspects, police officers would in practice be required to ensure that in every contact with a potential witness or a potential victim time and resources were deployed to avoid the risk of causing harm or offence. Such legal duties would tend to inhibit a robust approach in assessing a person as a possible suspect, witness or victim. By placing general duties of care on the police to victims and witnesses the police's ability to perform their public functions in the interests of the community, fearlessly and with despatch, would be impeded. It would, as was recognised in *Hill,* be bound to lead to an unduly defensive approach in combating crime."

95. The principle is one of general application, in the interests of the community as a whole, which does not depend on the facts of individual cases and which may therefore produce harsh results in such individual cases, as Lord Hope of Craighead explained in *Van Colle* at [75]:

> "… the principle had been enunciated in the interests of the whole community. Replacing it with a legal principle which focuses on the facts of each case would amount, in Lord Steyn's words [in *Brooks*], to a retreat from the core principle. We must be careful not to allow ourselves to be persuaded by the shortcomings of the police in individual cases to undermine that principle. That was the very thing that he was warning against, because of the risks that this would give rise to. As Ward LJ said in *Swinney v Chief Constable of Northumbria Police Force* [1997] QB 464, 487, the greater public good outweighs any individual hardship. A principle of public policy

> that applies generally may be seen to operate harshly in some cases, when they are judged by ordinary delictual principles. Those are indeed the cases where, as Lord Steyn put it, the interests of the wider community must prevail over those of the individual."

96. See also to the same effect the reasoning of Lord Phillips CJ at [97], Lord Carswell at [106] and Lord Brown at [139].

97. Some aspects of the justification for this principle given in *Hill* itself have fallen by the wayside in the intervening years, but the principle remains. Its surviving rationale is based upon two points, essentially those stated by Lord Steyn in *Brooks,* as explained by Lord Phillips CJ in *Van Colle* at [88]:

> "The first is the danger that the existence of a duty of care would alter, detrimentally, the manner in which the police performed their duties in as much as they would act defensively out of apprehension of the risk of legal proceedings. The second is that time and resources would have to be devoted to meeting claims brought against the police which could better be devoted to their primary duties."

98. However, as the principle is one of public policy, it may sometimes have to yield to other important principles of public policy. An example from the cases is the need to protect informers (*Swinney v Chief Constable of Northumbria Police Force* [1997] QB 464). Moreover, while the principle means that it will generally not be fair just and reasonable to impose a private law duty of care, it will not prevent such a duty arising in some other way, for example where there is an assumption of responsibility by the police (Lord Brown in *Van Colle* at [119] to [122]).

Claims by police officers

99. The claimants submit that the cases where it has been held that no duty is owed to members of the public are of little or no relevance to a claim by a police officer against the Chief Constable in his capacity as a quasi employer, where different considerations arise. The leading case here is *Mullaney v Chief Constable of West Midlands Police* [2001] EWCA Civ 700, where a probationary police constable was seriously injured while trying to effect an arrest while other members of the team of which he formed part failed to listen to the police radio as instructed or to monitor calls for assistance. The case was put in two ways, as Clarke LJ explained at [25]:

> "The first was that one or more individual officers owed the claimant a duty of care of which he or they was or were in breach, which caused the claimant injury for which the defendant is vicariously liable. The second was that there was an employment or quasi-employment relationship between the claimant and the defendant, that the defendant owed the claimant the same duty as every employer owes to his employees, namely to take reasonable care for their safety in all the circumstances of the case so as not to expose them to unnecessary risk, that the duty is non-delegable, that there was

> a breach of that duty and that the claimant suffered loss as a result. It is appropriate to consider these two different ways of formulating the duty separately because they have been treated separately in the authorities."

100. Clarke LJ dealt first with the claim based on vicarious liability, referring to previous cases in which such claims had been advanced, in some of which the claims had succeeded, while in others they had either failed at trial or been struck out. Cases in the former category were those in which the individual officers had assumed responsibility towards the claimant (e.g. *Costello v Chief Constable of Northumbria Police* [1999] 1 All ER 550), while cases in the latter category were those in which the principle of public policy applicable to claims by members of the public was held to apply equally to claims by police officers. For example, in *Hughes v National Union of Mineworkers* [1991] 4 All ER 278 May J struck out a claim by a police officer deployed while policing the miners' strike who alleged that the officer in charge had deployed his men negligently:

> "In my judgment, having considered *Hill v Chief Constable of West Yorkshire* [1989] AC 53 on the one hand and *Knightley v Johns* [1982] 1 WLR 389 and *Rigby v Chief Constable of Northamptonshire* [1985] 1 WLR 1242 on the other, as a matter of public policy, if senior police officers charged with the task of deploying what may or may not be an adequate force of officers to control serious public disorder are to be potentially liable to individual officers under their command if those individuals are injured by attacks from rioters, that would, in my judgment, be significantly detrimental to the control of public order.
>
> It will no doubt often happen that in such circumstances critical decisions have to be made with little or no time for considered thought and where many individual officers may be in some danger of physical injury of one kind or another. It is not, I consider, in the public interest that those decisions should generally be the potential target of a negligence claim if rioters do injure an individual officer, since the fear of such a claim would be likely to affect the decisions to the prejudice of the very task which the decisions are intended to advance. Accordingly, in my judgment, public policy requires that senior police officers should not generally be liable to their subordinates who may be injured by rioters or the like for on the spot operational decisions taken in the course of attempts to control serious public disorder. That, in my judgment, should be the general rule in cases of policing serious public disorders. There may be exceptions where the plaintiff's injuries arise, as in *Knightley v Johns,* from specifically identified antecedent negligence or specific breach of identified regulations, orders or instructions by a particular senior officer. There is no such specific allegation in the statement of claim in this case and none has been suggested in argument. It follows that the

> plaintiff's claim against the third defendant taken at its pleaded highest is bound to fail and that the claim should be struck out. I therefore allow this appeal."

101. Subsequently, in *Costello*, May LJ (as he had become) cited *Hughes* as deciding that:

> "For public policy reasons, a senior police officer is not generally to be held liable to a subordinate for operational decisions taken in the heat of the moment and when resources may be inadequate to cover all possibilities (*Hughes's* case)."

102. Applying these principles in *Mullaney*, Clarke LJ held on the facts that the individual officers had assumed responsibility to the claimant to take reasonable steps for his safety by responding to a call for assistance made on the emergency police radio channel. Accordingly the first way of putting the case succeeded. That first way of putting the case does not arise on the facts of the present case. That is not how the claimants put their case, for good reason as there was no relationship of proximity between Superintendent Farrell and PC Rathband, and no assumption of responsibility by her. The present relevance of Clarke LJ's reasoning on this aspect of the case is the application, where there is no assumption of responsibility, of the *Hill* principle to a claim by a police officer and the approval of what was said about the scope and rationale of that principle in *Hughes* and *Costello*.

103. Clarke LJ then turned to the second way of putting the case, which as he observed had achieved prominence only recently. This was the Chief Constable's duty to take reasonable care for the safety of his officers, including a non-delegable duty to take reasonable care to ensure the provision of a safe system of work. He stated his conclusion at [52]:

> "52. In all these circumstances, it is, in my judgment, now clear that the chief constable should be treated as owing to his officers the same duties as an employer owes to his employees, subject to such considerations of public policy as arise on the facts of a particular case. That proposition seems to me to be consistent, not only with the authorities to which I have just referred, but also with principle. The relationship between a chief constable and his officers is so closely analogous to that between an employer and his employees as to make it just in principle to hold that he owes the same duties to his officers as an employer does to his employees.
>
> …
>
> 55. It follows that, subject to any relevant considerations of public policy, the defendant owed the claimant a non-delegable duty of care both to devise and to operate a safe system of work. Thus, whether or not the system of work devised for the claimant was safe, the defendant is liable to the claimant for breach of duty if care was not exercised to operate the system safely and the claimant suffered injury as a result."

104. As Clarke LJ went on to say, there remains a role for public policy in deciding whether on the facts of any particular case such a duty should be imposed on a Chief Constable in his capacity as a quasi employer. In this regard Clarke LJ identified two relevant considerations.

105. The first, referred to at [59], was the *Hill* principle "that the police may not be sued for negligence in the investigation and suppression of crime". The second, referred to at [61], was "the fact that it is ordinarily the duty of an employer to take reasonable care to devise and operate a safe system of work".

106. On the facts of *Mullaney*, Clarke LJ held that there was a duty of care. It was not a case of a decision in the heat of the moment, but a straightforward failure to operate a safe system of work.

Summary of legal principles

107. In the light of this review of the cases I would for present purposes summarise the position in this way:

(1) The starting point is that a Chief Constable owes to officers within his force a non-delegable duty to take reasonable care for their safety by ensuring both the provision and operation of a safe system of work. That is a different starting point from that which applies in cases by members of the public, where the general rule in the absence of any assumption of responsibility is the exclusion of a duty to protect against harm caused by criminals pursuant to the *Hill* principle.

(2) The duty as a quasi employer may, however, be excluded as a matter of public policy (or because it would not be fair, just and reasonable for such a duty to exist) by reference to the *Hill* principle.

(3) The duty will be excluded, or at least is more likely to be excluded, in cases involving operational decisions concerning the investigation or prevention of crime which are taken under pressure, whether of time or due to other circumstances. That will be a particularly important consideration in circumstances where there is a risk that imposition of a duty would give rise to "defensive policing". These are the kind of circumstances which have been described as falling within "the core principle of *Hill*" (e.g. *Robinson* at [26]) or which involve the performance of the "core functions" of the police (*Robinson* at [46] and [50]). In such cases the important public policy represented by the *Hill* principle is likely to outweigh the public interest in the performance of the Chief Constable's duty as a quasi employer.

(4) What matters, therefore, is the nature of the decision that falls to be made. Save perhaps in wholly exceptional circumstances which it is unnecessary to consider in the present case, that will be so regardless of whether the circumstances alleged to amount to a breach of any duty are particularly egregious (*Robinson* at [49]).

108. Many policing decisions involving the performance of the "core functions" of the police will affect the safety of members of the public as well as of police officers. It

would be anomalous if, in such cases, a private law duty of care was owed to police officers as a result of their quasi employment relationship with the Chief Constable when it is clear from the *Hill* line of cases that no such duty is owed to members of the public. Application of the principles summarised above will mean that, even if the starting points in the two cases are different, this anomalous result does not arise.

Application of the principles

109. The decision which Superintendent Farrell had to make in the present case involved a reaction to an unexpected and unforeseeable 999 call in the course of a complex and challenging police manhunt for a highly dangerous criminal wanted for murder. The decision was not merely whether to issue a warning. Rather, she had to decide whether to issue an immediate warning to a large number of police officers (about 700 in all) currently on duty throughout the Northumbrian police area, without waiting for a proper understanding of what had been said in the call and without waiting for cell site analysis to see whether the area at risk could be narrowed down. She knew that what she had been told was based on a brief but necessarily second or third hand report of a threat to shoot police officers, passed on by an officer, Inspector Dwyer, who had not himself listened to the call. While the information available to her was unlikely to be simply wrong, it was obviously incomplete. Superintendent Farrell had to decide, therefore, whether to issue an immediate warning, knowing that she was not making use of all the information available to her and that other information available in the recording of the call at least might put what she had been told in a different light, or to wait for a relatively short time when other information would be available which might enable a more focussed and effective warning to be given.

110. Superintendent Farrell did not have time to analyse in any detail the pros and cons of issuing an immediate warning or to think through the implications of such a course. There was no guidance in any manual on which she could draw. She had, therefore, to rely on her instincts and experience as a TFC. She would have been aware, however, that the issue of such a warning would have at least some implications for the performance of the police's duties to protect members of the public during what was, on the evidence, the busiest time of the week. It would at least involve some distraction of police officers on duty in the busy city centres of Newcastle and Gateshead from performance of their normal duties. It might, as explained below, cause real difficulties in police communications and thus the ability of the police to respond promptly to unrelated emergencies. Therefore, in addition to the matters which were already centre stage in the operation to find Moat, including the safety of the individuals against whom he was known to have made threats and the threat which he posed to the public in general, the threats which he had now made against police officers had to be weighed against whatever impact on police operations, and therefore public safety, the issue of a warning might have had.

111. Further, it would have been artificial to consider in the abstract whether a warning should be given without some consideration of what that warning should say. There was an obvious trade-off between police officers' safety and the impact on normal police operations. The more directive the terms of any warning (for example, an instruction to stay mobile or return to base), the greater the impact on officers' ability to perform other duties, either by maintaining a visible police presence around the night clubs and bars in the city centre or by responding to emergency calls. The less

directive the warning (for example, merely to be vigilant), the less impact it would have on the performance of normal duties, but the less effective it might prove to be.

112. I do not accept, therefore, the submission of Mr Geoffrey Tattersall QC for the claimants that the issue of an immediate warning was a "no brainer". On the contrary, the decision whether to issue an immediate warning and, if so, in what terms, was one which required careful albeit rapid thought and a weighing of the possible courses of action and their likely consequences.

113. Focussing on the nature of the decision which Superintendent Farrell had to make, as distinct for the moment from whether the decision which she made was right or wrong, the decision fell clearly, in my judgment, within the scope of the core *Hill* principle. It was an operational decision which had to be taken under considerable pressure of time. It involved the weighing of a number of factors, including public safety as well as the safety of police officers. It was directly concerned with the investigation and prevention of crime. To impose a duty of care owed to police officers in these circumstances would plainly give rise to a risk of defensive policing and would inhibit rapid decision making.

114. For these reasons, I conclude that the public interest in the performance of the Chief Constable's duty as a quasi employer is outweighed by the public policy represented by the *Hill* principle and that it would not be fair, just and reasonable for a duty of care to be owed in the circumstances of this case. This is not – at this stage of the analysis – to say that Superintendent Farrell made the right decision, although the considerations to which I have referred will also be relevant to that question. Rather, it means that even if the decision which she made was negligent, the law makes a policy decision that there shall be no private law claim for negligence in order to ensure that the police's ability to perform their public functions in the interests of the community, fearlessly and with despatch, is not impeded. Undoubtedly that policy decision may bear harshly on PC Rathband, just as it did on the claimants in the *Hill* line of cases, but that is a consequence which the law is prepared to accept in the overall public interest.

115. This does not mean that the police owed no duty at all or that a victim of police misconduct has no remedy. It is common ground that (as in *Van Colle*) there may in appropriate circumstances be a claim under the Human Rights Act 1998 for infringement of Article 2 of the European Convention on Human Rights (violation of a positive obligation to protect the right to life) but the requirements for such a claim are demanding (see *Osman v United Kingdom* (2009) 29 EHRR 245). So too are the requirements for a private law claim under domestic law for misconduct in public office. It is not suggested that either of these claims is possible in the present case. The only claim advanced here is in the tort of negligence, for which a private law duty of care is an essential element of the cause of action, but in my judgment there is on the facts of this case no such duty.

116. This conclusion means that this claim must be dismissed. It would not, however, be right to leave the matter there. The issue whether Superintendent Farrell was negligent was the subject of extensive evidence, taking up the greater part of the trial, and was fully argued. Fairness to both parties requires a conclusion to be reached.

Breach of duty

The issue

117. As already indicated, the issue between the parties is fairly narrow. The claimants' case on negligence, as formulated in their final submissions, is that:

(1) Superintendent Farrell should have considered the threat posed to unarmed police officers and issued an initial interim warning following:

i. her first conversation with Inspector Dwyer (from 00:33:52 to 00:36:26); and/or

ii. her second conversation with Inspector Dwyer (from 00:38:46 to 00:40:13).

(2) An appropriate warning would have included the following:

i. that Moat, who was wanted for murder, had called the police;

ii. that he was making threats to shoot police officers *and was hunting for police officers*;

iii. *that the call from Moat was believed to have been made from Charlie 6*;

iv. that officers were to be vigilant at all times; and

v. that officers should await further instruction and keep the communications channels free.

(3) The warning should have been issued using the defendant's all talk groups simultaneous transmission facility.

118. The words which I have italicised could only have been included in a warning issued after the second conversation with Inspector Dwyer, as it was only at that stage that these matters were reported to Superintendent Farrell.

119. The defendant, on the other hand, accepts that a warning needed to be issued, but not necessarily an immediate warning. His case is that although some commanders in Superintendent Farrell's position might have taken immediate steps to issue a warning in some form, her decision to await what she reasonably believed to be further imminent detail on Moat's location and at least an initial analysis of his call before doing so was to be preferred to the issuing of an interim and necessarily ambiguous warning (which could have provoked confusion in police ranks as officers sought greater detail of what they should do) and in any event was rational rather than negligent.

120. This led the claimants to suggest that the only issue was one of timing: if it was necessary to issue an appropriate warning at some stage, why not do so immediately, and in any event sooner rather than later? That, however, does not quite state the position accurately. The hope and expectation, which I find to have been reasonable

even if (with hindsight) we now know that it would have been disappointed, was that cell site analysis and analysis of the call would provide useful information which would affect the content of any warning and the location of officers to whom it would need to be issued or who would need to be particularly alerted to the likelihood that Moat was in their vicinity. Indeed, depending on what information was obtained, a warning to unarmed officers might have been combined with an order to withdraw from a particular location while armed officers were deployed to move in and capture Moat. That would have been rather different from the immediate interim warning contemplated by the claimants. However, the defendant accepts that if it became clear within a relatively short time, of the order of no more than about 15 or 20 minutes, that cell site analysis and analysis of the call was going to provide no useful information, it would have been necessary to issue a warning despite any adverse effect on normal police operations. Superintendent Farrell acknowledged that in those circumstances she would have issued a warning very similar to that suggested by the claimants.

121. In evaluating these rival contentions, I propose to consider first the views expressed by the witnesses, in particular as to the likely consequences of issuing an immediate warning; second, the terms of any warning which might have been issued; and third, whether an appropriate warning could have been formulated and issued in time to avert the shooting of PC Rathband.

The evidence

122. The decision whether the failure to issue an immediate warning was negligent must be a decision for the court to decide in the light of all the evidence, rather than a matter of expert evidence. Nevertheless a number of factual police witnesses either volunteered an opinion or were asked about this in cross examination. So too did both expert witnesses, albeit that the scope of the permission given for expert evidence was limited to the adoption or otherwise of guidance and command procedures, a topic which in the end did not really arise. This evidence was of assistance in illustrating the views of senior police officers with highly relevant experience, albeit that the decision remains a decision for the court. It was informed by their views as to the likely impact on "business as usual" of any warning that might have been issued.

123. Whether the issue of a warning would have had an adverse impact on ordinary Saturday night and Sunday morning police operations is a matter of evidence, with any such impact needing to be weighed in the balance before a conclusion can be reached that the failure to issue a warning was negligent. Conversely, if there were no risk of any adverse impact, the arguments against the issue of an immediate warning would be much reduced and perhaps eliminated.

124. A number of police witnesses said that it was inevitable that "business as usual" would be affected if a warning was issued. For example, Saturday night and the early hours of Sunday morning were the busiest time of the week for police officers in the Newcastle area. There would be a large and visible police presence in the city centre where people were congregated around the clubs and bars of the night time economy. The function of these officers, among other things, was to deal with, and by their presence to deter, disturbances and fights fuelled by alcohol which can often break out, and to provide protection to those, often young women on their own, who have become particularly vulnerable as a result of too much alcohol. In addition it was a

time of the week when it is common for emergency calls for police attendance to be made by single women, alone in a house or with children, faced with a drunken ex-partner banging on the door and making threats.

125. Performance of all of these duties would be affected if a warning was issued. Officers would inevitably want more information about the threat which they faced and about what they should do, for example in remaining visible to deter outbreaks of violence and provide assistance to those in need or in responding to emergency calls. There would be a potentially chaotic flood of calls to the police communications centre seeking further information or instructions, not only from individual officers but from supervisors concerned for the officers under their command. This would have the effect of blocking police radio communications at what was already an extremely busy time and would impede the ability of the police to respond to emergencies. This effect could not be avoided by instructing officers not to radio in for information. There were so many officers on duty that it would only take a small number to disregard that instruction, as would inevitably happen, for the adverse consequences to ensue.

126. The witnesses who expressed these concerns were senior police officers of very great experience of policing in Northumbria. Despite the scepticism expressed by the claimants, this evidence cannot be dismissed as unrealistic. I find that there was at any rate a real risk that the kind of warning contended for by the claimants would have had an adverse effect on the ability of the police to provide a proper service for the protection of the public. This was, therefore, a matter which needed to be taken into account in considering whether an immediate warning should be issued.

127. The views expressed by the witnesses fell into three broad categories. In the first category was Temporary Deputy Chief Constable James Campbell who retired in August 2013 after 30 years service in the Northumbria Constabulary with the rank of Assistant Chief Constable. He was himself an experienced firearms commander and was involved in the operation to trace Moat on Saturday 3 July 2010 as Strategic (Gold) Commander while Acting Chief Constable Sim was off duty. He went so far as to say it would have been "foolhardy" to issue a warning without first listening to the recording and seeking cell site analysis. His view was not that no warning should be issued, but that it would be reasonable to defer this for a short time in order to obtain proper information and that it would be wrong not to do so. His reasoning, in essence, had three strands. The first was that it was basic firearms training not to take brief second hand information at face value when it was possible to check the information at source within minutes, in this case by listening to the recording, and to make a decision based on proper information. The second was that there was nothing in what was reported to Superintendent Farrell to suggest that Moat was likely to strike immediately, so as to require that tried and tested training to be abandoned. While that was necessarily a calculated risk, it was one which should be accepted in order to avoid the risk of making a decision which might prove to be wrong in the light of fuller information. The third was his view of the inevitability of "business as usual" being affected if a warning was issued for the reasons summarised above.

128. The second category of witness was exemplified by Acting Chief Constable Sim (who was the Strategic (Gold) Commander at the time of Moat's 999 call but was not involved in the decision how to respond to it) and by the defendant's expert, Mr Arundale (whose experience has been summarised above). Their view, in short, was

that while some commanders might have issued an immediate warning (Acting Chief Constable Sim said that she would have done so in Superintendent Farrell's place), it was not negligent not to do so. This was an unprecedented situation in which, taking into account the considerations identified above, it was reasonable to want the best available information (not least as it was not unknown for second or third hand information shouted across a control room to be misleading) and either decision could reasonably be made.

129. The only witness in the third category was the claimant's expert, Mr Power. His view was that the need for an immediate warning was obvious from the moment that Superintendent Farrell heard of the threat and that no other conclusion was possible. For the reasons already given, however, I regard Mr Power's view as of little or no weight. Such policing experience as he had was outdated, he had no experience as a TFC and admitted that he could express no opinion on Superintendent Farrell's conduct or decision making in that capacity, and he had no real understanding of the potential adverse impact of issuing a warning. His evidence was in any event undermined by his misunderstanding of the command structure in force and the numerous insubstantial criticisms which he made which in the event were not pursued.

130. I do not regard the concern raised at the time by Mr Jones about whether a warning was to be issued as supporting Mr Power's view. Mr Jones was not addressing the question whether an immediate warning should be issued without waiting for cell site analysis and analysis of the call. His point was merely that a warning should be issued, without focusing on its timing, which is a point on which both parties agree. He was not in any event a firearms commander and was in no position to evaluate the implications of the timing issue.

131. The consequence is that there is a real weight of police evidence to the effect that the issue of a warning would have involved at least some adverse consequences for ordinary police operations at a very busy time and that a number of senior officers with substantial relevant experience of command in firearms operations would regard the decision not to issue an immediate warning as a reasonable exercise of judgment. A balance had to be struck between the potential immediacy of a threat which, at that stage, could not be tied to any specific location and the adverse consequences for policing in general (what Superintendent Milward described as "some very significant implications for the operation and safety of policing services in Northumbria") of an immediate warning which it was reasonable to suppose could be avoided or mitigated by waiting a short time for further and more specific information, enabling a more focused warning to be issued.

132. I accept that evidence, although I would not go so far as to say that the issue of a warning would have been "foolhardy". Although not conclusive, this evidence is a factor of real importance. So far as the evidence goes, there is simply nothing to put in the scales on the other side. As a matter of common sense, moreover, it seems to me that the reasoning which supports this view is compelling.

The terms of any warning

133. The claimants' final formulation of the warning for which they contend was as set out above. As explained, that formulation does not distinguish between what could have

been said after Superintendent Farrell's first conversation with Inspector Dwyer and her second conversation. In its final form the claimant's formulation of the warning could only have been given after the second conversation.

134. It is notable that this final formulation differed in some respects from that which had been proposed at earlier stages of the case. There were (at least) four previous versions.

(1) The claimants' pleaded case was that an appropriate and immediate instruction would have been "that police vehicles should avoid static positions when out on patrol, must remain mobile or return to police premises." This suggestion, which was clearly tailored with the benefit of hindsight to the circumstances in which PC Rathband was shot and did not deal with the position of officers on foot at all, was abandoned at trial. Not only that, it was accepted that an instruction in these terms would have been a bad idea.

(2) In his expert report Mr Power said that a warning should have said that credible information had been received that Moat, who was wanted for murder, had just made threats to shoot police officers, that his whereabouts were currently unknown, that all officers (sc. those on foot as well as in vehicles) should be vigilant and remain mobile unless on emergency calls, that there were no further details at this time, and that all units should stand by for further information.

(3) In the claimants' written opening it was said that a warning "could have been as simple as stating that Moat had made threats to kill police officers in a telephone call to the police and that police officers should exercise extreme caution whatever their location may be" or, alternatively, "could have been slightly more specific that police officers should avoid presenting themselves as possible targets by not parking in public view or keeping mobile". Thus neither these formulations nor Mr Power's expert report said anything to prohibit requests for further information.

(4) In cross examination Mr Power struggled to formulate the terms of the warning which, in his view, it was essential to issue within at most a few minutes of first learning of the threats made by Moat. It is true that he was put under some pressure to do so by Mr John Beggs QC for the defendant, but I regarded that as completely fair. It was always obvious that this question would be asked, and Mr Power had plenty of time in advance to think about his answer. Moreover, the pressure of cross examination was much less than that under which Superintendent Farrell had to operate at the time. This cross examination demonstrated vividly that the immediate formulation of an appropriate warning was not straightforward. In the event Mr Power's evidence was that a warning needed to comprise four elements: (i) a statement that Moat who was armed and dangerous had made credible threats to kill police officers, (ii) a brief description of Moat, (iii) instructions to be vigilant (but not necessarily to remain mobile) and (iv) a statement that further information would be given shortly. The requirement of a description was new. Again, there was no prohibition of requests for further information.

135. No doubt the terms of a warning could have been formulated if Superintendent Farrell had decided that it was necessary for an immediate warning to be issued without first listening to the recording of the 999 call or obtaining cell site information, but these changes in the way the claimants put the case are significant in my view. Three points should be mentioned. First, it would have been easy to issue a warning which, as it is now common ground, should *not* have been given. An example is an instruction to return to a police station. This would not only have impacted adversely on police operations, but would also have presented Moat with what could have been a very easy target. Second, although the claimants canvassed this at some stages, they now accept that it was not necessary for any warning to have included an instruction to remain mobile and that it would have been sufficient that it advised officers to be vigilant. This is of some importance on the question of causation. Third, the claimants' initial formulations of the proposed warnings did not include any instruction to keep the communication channels free. It was not suggested to Superintendent Farrell, for example, that this should have been included in any interim warning. This part of the claimants' formulation was only introduced into their case in the course of the trial, no doubt as a result of the clearly genuine concerns expressed by the police witnesses that the issue of a brief interim warning in the terms suggested would have prompted a flood of requests for further information or instructions.

136. All this suggests that although the terms of a warning could have been formulated, they did need at least some thought, as well as needing to be communicated in precise terms to the radio officer who would actually issue the warning to officers on duty. It would have been reasonable, in my view, for this process to have taken at least a few minutes.

Timing

137. The question whether an immediate warning should have been given must be considered at two distinct stages, after each of Superintendent Farrell's telephone conversations with Inspector Dwyer. The claimants' primary case is that an initial warning should have been issued even before the second conversation took place. In my judgment, however, it is unrealistic to suggest that a warning should or even could have been issued between 00:36:26 when the first conversation ended and 00:38:46 when Inspector Dwyer telephoned for a second time. When that second call came, it was obviously reasonable (I would say necessary) for Superintendent Farrell to hear what he had to say. Obviously she could not, at one and the same time, be speaking to Inspector Dwyer while also giving instructions for a warning to be issued and determining the content of any such warning.

138. In practice, therefore, if any step was to be taken to issue a warning, it had to be taken at or after 00:40:12 when this second call ended. In the event, therefore, Superintendent Farrell had only 3½ minutes to avert the shooting of PC Rathband. I am extremely doubtful whether it would have been practicable within this short time to give even brief consideration to the pros and cons issuing a warning, to formulate its terms with proper thought for the likely consequences, to give the necessary instructions including briefing radio communication officers how they should deal with the enquiries which would inevitably be received, and then to have those instructions implemented. Even if it was practicable, the failure to do all these things in sufficient time before the expiry of 3½ minutes to give PC Rathband time to move

away (assuming for the moment that he would have done so) cannot possibly be regarded as negligent.

Conclusion on breach of duty

139. I conclude that the decision which Superintendent Farrell made to await the imminent arrival of cell site analysis and to have the 999 call listened to properly before issuing any warning to police officers was reasonable, even if other commanders might have taken a different course. With hindsight, and in the knowledge of what was about to happen to PC Rathband, it is easy to wish that something had been said which might at least have given him a chance to avoid his injuries, but that hindsight was a luxury which Superintendent Farrell did not have. She had to operate, under pressure, in a complex operation where many different strands were in play, and with no time for full reflection. If sympathy for PC Rathband and hindsight knowledge of the imminence of Moat's attack upon him are stripped away, as they must be, I have no doubt that Superintendent Farrell made a decision at which other commanders facing a similar dilemma would also have arrived, even if there are others again who would have taken a different course. Her decision cannot fairly be regarded as negligent.

140. This is not to say that the conduct of the operation to locate Moat, or even the response to the 999 call which he made, was flawless in every respect. It is surprising that some senior officers were not aware of the full significance of the information provided as part of the Eastings and Northings at the conclusion of a 999 call. It is also surprising (to say the least) that they were unaware of the possibility of broadcasting simultaneously across all police radio communication channels. Mr Beggs described these aspects as "sub optimal", although a harsher term might be thought appropriate. But it is clear that these failings made no difference to what happened to PC Rathband and, although they represent lessons to be learned, they have no bearing on the outcome of this case.

Causation

141. Even if I am wrong so far, the question remains whether the issue of a warning would in fact have averted the injuries which PC Rathband suffered. The claimants say that it would, submitting that he would probably have taken positive action by mobilising from his exposed and static position on the roundabout, or at least would have been more vigilant so that he would have spotted Moat's approach and moved away before Moat was able to shoot him. It is for the claimants to prove on the balance of probabilities that the issue of warning would have made a difference in this way.

142. This issue involves a degree of speculation as nobody can say with any confidence what PC Rathband would have done. His own comment, in a radio interview, was that if a warning had been issued he would not have been a "sitting duck", but this is so clearly the result of hindsight that it carries little weight. In my view any consideration of this issue must first determine what the content of any warning would have been and when it would have been issued, as that is the situation by reference to which PC Rathband's probable response must be assessed.

143. The content of any warning is important because it would be likely to play a critical role in determining what PC Rathband would have done in response. For example, it is reasonable to suppose that an order to do something, whether to stay mobile or to

return to base, would be obeyed unless there was some compelling reason to the contrary, but the claimants no longer suggest that such an order should have been given. Their case, rather, as indicated above, is limited to advice to officers to be vigilant at all times, coupled with the statement of a belief that Moat had made his call from somewhere within the Charlie 6 area. How would PC Rathband have responded to that information?

144. If that is all that had been said – and the claimants now accept that it is all that needed to be said – I am not persuaded that PC Rathband would probably have moved away from the location where he was parked, or at least that he would have done so almost immediately. The roundabout was not in (although it was not far away from) the Charlie 6 area. It was on the other side of the River Tyne, a significant (although obviously not insuperable) natural barrier. A warning in these terms would not, therefore, have conveyed to PC Rathband particular urgency that he himself was in imminent danger. Although he was parked in a prominent and visible position, it was a position from which he had good all-round visibility, with his rear protected by the barrier at the edge of the roundabout, on the other side of which was a drop to the A1. It seems to me rather unlikely that he would have contemplated that Moat was about to creep up on him using that part of the barrier which extended down the slip road from the A1 as cover. It is at least as likely that he would have seen no reason to move away with any great urgency from the position which he had selected as the most appropriate position from which to perform his duties that night.

145. Similarly, given what is now known about the way in which Moat did in fact carry out his attack, it is doubtful whether additional vigilance would have made any difference. From the moment when Moat broke cover to approach PC Rathband's vehicle, and therefore the moment when PC Rathband would first have had an opportunity to spot his approach, there can at most have been only a very few seconds. I am not persuaded that additional vigilance would have given PC Rathband any opportunity on first seeing Moat to move away before being shot.

146. The timing of any warning is also relevant. As already explained, there were only 3½ minutes from the conclusion of Superintendent Farrell's second conversation with Inspector Dwyer within which any warning would have had to be issued. Even if it was negligent not to issue a warning within that short time, some time must be allowed for the decision to be made and for performance of the necessary steps to carry it into effect. The claimants' own case in final submissions was that the formulation of a warning, its communication to Inspector Dwyer and its delivery by means of a simultaneous broadcast to all officers would have taken about 2½ minutes. That, however, allows no time at all to weigh up the advantages and disadvantages of issuing a warning without waiting for cell site analysis and analysis of the call. Some time must be allowed for that, however rapid the thought process and (perhaps) any brief discussion would have had to be.

147. In practice, therefore, the time between the issue of any warning and the approach of Moat would have been, on any view, no more than a minute, and probably considerably less, even if it is assumed that the warning would have been broadcast before PC Rathband was shot. So if PC Rathband was going to avoid the shooting, he would have had to react almost instantaneously by moving away from the position where he was parked. I cannot find that it is more likely than not that he would have done so.

148. The claimants place weight on a statement made by Acting Chief Constable Sim to the effect that if a general warning to be vigilant had been given, PC Rathband (whom she knew to be a good police officer) would have been able to undertake his own risk assessment and consider what steps were necessary to protect himself. That, however, is little more than a statement of the obvious. It leaves open the possibility that he might well have concluded that he did not need to move away from the position he had taken up. It implies a thought process, which is what would be expected, rather than an instantaneous reaction to any warning, which would in all probability have taken time which PC Rathband did not have available to him. Accordingly I do not regard these comments by Acting Chief Constable Sim as advancing significantly the claimants' case on causation. I find that this case has not been proved.

Double crewing

149. I should for completeness mention a subsidiary way in which the claimants put their case, which is that Inspector Dey should have been provided with a briefing about Moat before the beginning of PC Rathband's shift, informing him that Moat was wanted for murder and was believed to be armed and dangerous. It is said that if he had been so provided, this would (or at any rate should) have led to a risk assessment which would in turn have led to police vehicles being double crewed. It is said that this would have prevented PC Rathband from being shot.

150. I do not accept this alternative way of putting the case. Even though Inspector Dey received no briefing about Moat, he knew about him from his conversation with PC Rathband at the beginning of the shift, while any briefing would have indicated that, despite being armed and dangerous, Moat was wanted for what was reasonably understood to be a domestic murder even if he had believed his victim to be a police officer. There was at this stage no information which could reasonably have caused the police to believe that Mr Brown had been shot because he was a police officer, let alone that Moat was "hunting for officers", or which would or should have caused Inspector Dey to require that police vehicles should be double crewed. Nor did that situation change at any time before the 999 call. Single crewing was in accordance with normal police practice for motor patrols in Northumbria, while double crewing would have halved the number of vehicles which could be deployed on a Saturday night when proper coverage for ordinary operational reasons would need to be maintained.

Conclusions

151. This is an immensely sad case but for the reasons given in this judgment I conclude that this claim must fail.

152. It is well established law that in making operational decisions concerning the investigation and suppression of crime, particularly when such decisions have to be made under pressure of time, the police do not owe a private law duty of care either to members of the public or to police officers. This is a rule of public policy which, even if it results in hardship in individual cases, has been held to be in the public interest as contributing to the overall effectiveness of policing in this country. The decision which Superintendent Farrell had to make, whether to issue an immediate warning to police officers without waiting the relatively few minutes which would be required in order to obtain a proper understanding of what Moat had said and to obtain cell site

analysis which could reasonably be expected to provide better information as to his location, was a decision which fell within the scope of this rule of public policy. The consequence is that as a matter of law no relevant duty of care was owed to PC Rathband.

153. Even if a duty had been owed, however, I conclude that the decision which Superintendent Farrell made was not negligent. There was at least a real risk that the issue of an interim warning such as the claimants propose would have had an adverse effect on the ability of the police to respond to other emergencies and to provide a proper service for the protection of the public which is their primary responsibility. Far from being a "no brainer", therefore, the decision whether to issue such a warning was one which required an exercise of judgement. Although some commanders in Superintendent Farrell's position might well have issued such a warning, her decision not to do so for a short time while further information was obtained which was reasonably expected to affect the content of any warning was a reasonable exercise of judgement which cannot fairly be regarded as negligent.

154. Moreover, even if a decision had been made to issue an interim warning, it would have taken some time before that warning could be broadcast. In the event, Superintendent Farrell had only 3½ minutes in which to do anything which would have averted the shooting. In all probability that was simply not enough time. Even if a warning had been broadcast within that short period, it would have left PC Rathband with very little time, measured (at most) in seconds rather than minutes, in which to decide that he needed to move away from the position in which his vehicle was parked. Unless he moved off almost instantaneously, a warning would not have averted his shooting. I am not persuaded that he would have done so.

155. When he began this action PC Rathband appears to have been under the impression that there was a much greater delay between the making of Moat's threats and the time when those threats were carried out than was in fact the case. His understanding appears to have been that the recording of the 999 call had already been listened to twice in the control room before he was shot, and that there was an unaccountable delay in responding to it during which time suggestions that a warning should be issued were "fobbed off" by those in command. In his book he referred to a "realisation of cock-up and cover-up". It was no doubt for those reasons that PC Rathband felt that he had been let down by the police force of which he had been proud to be a member. The detailed scrutiny of what happened in the few minutes between the conclusion of Moat's 999 call and the shooting of PC Rathband which has taken place in the course of this trial, including searching cross-examination by leading counsel of all those who played any part in the question of how to respond to the call, has emphatically made clear that this was not the case. One of the many sad aspects of this case is that PC Rathband died under this mistaken impression.

156. Finally, it is worth referring to the emotion which PC Rathband described in his book in contemplating the likelihood that, if it had not been him who was shot, it would have been one of his fellow officers:

> "It could have been any of us. My pride tells me that I stopped one of my mates getting shot and who knows how many members of the public. He could have gone into the city centre, pretending to ask for directions and blown any cop's face off

> when they wound down the window. Or turned up at the police station and done the same. Imagine that happening to a female colleague of yours in her twenties and having to explain it to her parents or young baby. I have to believe that I took one for my colleagues."

157. Moat was a resourceful and determined criminal, well capable of carrying out his threat, who remained at large for some days after PC Rathband was shot. Regardless of the issue of any warning to be vigilant, PC Rathband's bleak assessment was probably right. He was desperately unlucky to be the victim of Moat's cruelty and hatred, but if it had not been him, it would probably have been somebody else.