This is a draft of the ruling to be handed down on 16th February 2000 at 10.30 a.m. in Court No 9. It is confidential to Counsel and Solicitors, but the substance may be communicated to clients not more than two hours before the giving of ruling. The contents of this ruling may not be published until verdict or further order.

Case No: T19991569

IN THE CROWN COURT AT LEEDS

See page 34 onwards

The Courthouse,
1 Oxford Row,
Leeds LS1 3BG

Date: 16th February 2000

Before:

THE HON MR JUSTICE HOOPER

REGINA
- v -
DAVID DUCKENFIELD
and
BERNARD MURRAY

RULING

Mr Justice Hooper:

The two defendants are charged with manslaughter (Counts 1 and 2) and misconduct in public office (Count 3) arising out of the events at Hillsborough Stadium on the 15th April 1989. The prosecution is what is commonly known as a private prosecution. The decision to bring the proceedings in 1998 was made by the Hillsborough Family Support Group ("HFSG") as a whole (8/30). That group is unincorporated and consists of some 86 of the bereaved families. Ann Adlington has been seconded by Liverpool City Council to act as the solicitor for the Group and she laid the informations.

David Duckenfield ("Duckenfield") was a chief superintendent in charge of the policing on that day. Bernard Murray ("Murray"), a superintendent, was the officer with specific responsibility for the control room. Following a decision by Duckenfield to order the opening of the gates, a decision not criticised by the prosecution, 96 people who were watching the game in pens 3 and 4 of the West Terraces died from traumatic asphyxiation. Duckenfield also faces a charge of misconduct arising from an admitted lie told by him at the time to the effect that the gates had been forced open by the Liverpool fans. (Count 5) Count 4 charged him with perverting the course of justice, a charge which he no longer faces following intervention by the Attorney-General who entered a "nolle prosequi".

In this ruling I shall concentrate on Counts 1, 2 and 3.

It is the prosecution's case that the two defendants are guilty of manslaughter because they failed to prevent a crush in pens 3 and 4 of the West Terraces "by failing between 2.40 and 3.06 p.m. to procure the diversion of spectators entering the ground from the entrance to the pen." In argument Mr Jones QC for the prosecution said that his case was that police officers should have been stationed in front of the tunnel leading to the pen to prevent access. It appears, at this stage, to be the defence case that neither of the officers, in the situation in which they found themselves, thought about closing off the tunnel or foresaw the risk of serious injury in the pen if they did not do so. The prosecution submit that they ought to have done. This is likely to be the most important issue in the case. There may well be a further issue: if the risk had been foreseen, would it have been possible or practicable to have closed the tunnel.

It was the worst stadium disaster in British football history and has left the parents and loved ones of those who died not only with an enduring grief but also with a deep seated and obviously genuine grievance that those thought responsible have not been prosecuted nor

indeed even disciplined. They have campaigned long and hard for what they see as justice and have attracted wide-spread support. Amongst other things of which they have complained are the lack of any apology, the conduct of the inquest, the disparity between the damages awarded to the families and to the police officers and a cover-up amounting to a conspiracy to pervert the course of justice, particularly on the part of the South Yorkshire Police and their then legal advisers.

It is submitted that the proceedings should now be stayed on the following grounds:

1. The prosecution is a breach of the defendants' rights to a fair trial under Article 6(1)} of the European Convention on Human Rights.
2. The prosecution is so oppressive to these defendants, so unfair and so wrong that it should not be allowed to continue.
3. The pre-trial publicity has been such that no fair trial is possible.
4. The delay has been such that no fair trial is possible.

Chronology of principal events referred to during the hearing

I have necessarily had to be selective. I have chosen those events which are or may be relevant to the decisions which I have to make. In particular the media coverage referred to in the chronology is only a small sample of the full coverage.

15.04.89

The day of the disaster.

04. 89

West Midlands Police appointed to carry out inquiry into the policing operation.

04.89

Liverpool City Council set up the Hillsborough Disaster Working Party, part of its terms of reference "being to establish the truth of the circumstances surrounding the disaster." (8/31, para 9)

Early April 89

Duckenfield makes a statement which is handed to the West Midlands Police and subsequently to the Inquiry.

05-06.89

Taylor Inquiry first stage. 174 oral witnesses called, including Duckenfield and Murray who were not personally advised by LJ Taylor of their right not to answer questions which might incriminate them because LJ Taylor and Mr Andrew Collins QC Counsel to the Inquiry took the view that manslaughter charges were not a realistic possibility (see my earlier ruling on December 22, 1999). Both Collins J as he now is and Mr William Woodward QC gave evidence before me that there were at this stage murmurings of private prosecutions.

04.08.89

Publication of Taylor Interim report.

I set out some of the findings of the Report. In obtaining her application for the summonses Ann Adlington relied upon a document prepared by Mr Jones (8/13A) in which it was stated that the facts set out in chapters 1-5, 9-11 and 16 of the Taylor Report "form the basis of the allegations against the two potential defendants."

> **"Chapter 1**
>
> **Police Communications**
>
> 49. The nerve centre for police control is the control room or box situated at the south-west corner of the ground between the south stand and pen 1 of the west terracing. The box is elevated and reached by a number of steps. It has windows commanding views across the pitch and straight along the line of the west perimeter fence. The box is very small and has seats for only three officers. Superintendent Murray was in control of it and was advisor to Mr Duckenfield as he had been to Mr Mole the year before. Next to him sat Sergeant Goddard who operated the radios. The third seat was for Police Constable Ryan who operated the telephone and public address systems. At the back of the box stood Police Constable Bichard who was in control of the police closed circuit television system operated by a row of consoles on a bench in front of him and behind the three seated officers.
>
> **Chapter 3**
>
> **'Open the Gates'**
> 70. The largest entry, however, was through gate C. In the five minutes it was open about 2,000 fans passed through it steadily at a fast walk. Some may have had tickets for the stands. No doubt some had no tickets at all. The majority had tickets for the terraces. Of these, some found their way either right to pens 1 and 2 or left through the dividing wall to 6 and 7. But a large proportion headed straight for the tunnel in front of them.
>
> **Chapter 5**
>
> **Misinformation**
>
> 98. At about 3.15 p.m. Mr Graham Kelly, Chief Executive of the FA, Mr Kirton also of the FA and Mr Graham Mackrell, Secretary of Sheffield Wednesday, went to the

control room for information. Mr Duckenfield told them he thought there were fatalities and the game was likely to be abandoned. He also said a gate had been forced and there had been an inrush of Liverpool supporters. He pointed to one of the television screens focused on gate C by the Leppings Lane turnstiles and said "That's the gate that's been forced: there's been an inrush". Inevitably Mr Kelly was interviewed a little later live on television. He spoke of the two stories concerning the gate - the fans' account that the police had opened it, the police assertion that the fans had forced their way in.

The Dead and the Injured

108. Of the 95 who died the evidence suggests that at least 16 and probably 21 came through gate C after it opened at 2.52 p.m. That is established by the statements of relatives and friends who came through with them but survived.

111. Although the great majority of those who died were in pen 3 at least five were in pen 4. Most deaths occurred at the front of the pens but there were a few fatalities further back.

Part 11

Why did it happen?

The Archbishop of York, Dr John Habgood, preaching at the Hillsborough Memorial Service on 23 April 1989 said:

> "Events of the magnitude of Hillsborough don't usually happen just for one single reason, nor is it usually possible to pin the blame on one single scapegoat ... Disasters happen because a whole series of mistakes, misjudgments and mischances happen to come together in a deadly combination."

115. This disaster was the worst in the history of British football. It happened because pens 3 and 4 became grossly overcrowded. They were uncomfortably overcrowded by 2.50 p.m. at least to a degree which required that they should be closed to further arrivals. Even the numbers coming through the turnstiles in the last 10 minutes would have increased the pressure beyond danger point and there would have been injuries if not fatalities. As it was the influx through gate C after 2.52 p.m. so increased the pressure in the two pens as to cause fatal crushing.

Chapter 9

Summary

183. Although the police had accepted *de facto* responsibility for monitoring the pens their policy on the day was to leave fans to "find their own level" and to concentrate their own attention on possible disorder. Whilst in theory the police would intervene if a pen became "full" in practice they permitted the test of fullness to be what the fans would tolerate.

184. By 2.52 p.m. when gate C was opened pens 3 and 4 were over-full even by this test. Many were uncomfortable. To allow any more into those pens was likely to

cause injuries: to allow in a large stream was courting disaster.

Chapter 10

Summary

228. The layout of the turnstiles and the number they were required to serve left no margin of safety against an uneven flow of fans. Because police strategy in advance and on the day did not cater for it the arrival of a large number of supporters between 2.30 p.m. and 2.40 p.m. created an unmanageable crush. The presence of a substantial minority of fans who had drunk too much aggravated that problem. Having lost control and rejected the option of postponing kick-off the police were faced with a serious danger of deaths or injuries. They were left therefore with no alternative but to open the gates. Superintendent Marshall was right at that stage to ask for it and Mr Duckenfield was right to agree. But the possible effects of so dramatic a step required other action.

Chapter 11

The Blunder on opening the gates

229. The decision to order the opening of the gates was not accompanied or followed by any other order to deal with the consequences. When gate C was opened a steady stream of about 2,000 fans poured through it over some five minutes. Clearly they were going to go into the ground somewhere and unless they were diverted their likeliest route was through the tunnel for reasons already given. No warning was issued from the control room that the gate was to be opened. Serials on the concourse were not alerted. Neither the Club control room nor the Chief Steward at the Leppings Lane end was warned. Not even Mr Greenwood, the Ground Commander, was informed. From 2.47 p.m. when Mr Marshall made his first request until 2.52 p.m. when Mr Duckenfield acceded to it there were five minutes in which orders could have been given as to how the influx was to be absorbed. It was not done. In evidence Mr Duckenfield began by saying that no officer made any wrong decision but he later conceded he had erred in this regard. He said he did not consider where the people would go when the gate opened. Even after it opened, when he could see the influx on the television screen, no order was given to steer the fans to the wing pens. Mr Duckenfield said it did not cross his mind to detail officers on the concourse to shut off the tunnel. Those officers could not have known from their position how full pens 3 and 4 were. That was a matter for the control room to monitor from its own observations and using intelligence from around the ground.

230. Since pens 3 and 4 were full by 2.50 p.m. the tunnel should have been closed off whether gate C was to be opened or not. The exercise was a simple one and had been carried out in 1988. All that was necessary was for a few officers to act as a cordon at the entrance to the tunnel and divert fans elsewhere. Unfortunately the 1988 closure seems to have been unknown to the senior officers on duty at the time. It did not figure in the debriefing notes. It therefore had no influence on the planning for 1989.

231. Planning apart, however, it should have been clear in the control room where there was a view of the pens and of the crowd at the turnstiles that the tunnel had to be closed. If orders had been given to that effect when gate C was opened the fans could

have been directed to the empty areas of the wings and this disaster could still have been avoided. Failure to give that order was a blunder of the first magnitude.

232. Significantly, when permission was given to open gate A, Mr Duckenfield did order serials to go to that part of the concourse to monitor the influx towards the north stand. He did this because he feared that if fans went to the north stand without tickets, they would not get seats and there being no perimeter fences at the north side, they might invade the pitch. This illustrates again the preoccupation with avoiding pitch invasion as against safety and the risks of overcrowding. Because those entering through gate C could not get onto the pitch it was not thought necessary to alert officers to monitor them. The possibility of overcrowding simply was not considered.

Chapter 16
Brief summary of causes

265. The immediate cause of the gross overcrowding and hence the disaster was the failure when gate C was opened to cut off access to the central pens which were already overfull.

266. They were already overfull because no safe maximum capacities had been laid down, no attempt was made to control entry to individual pens numerically and there was no effective visual monitoring of crowd density.

Chapter 18

Policing on the Day

280. By contrast, with some notable exceptions, the senior officers in command were defensive and evasive witnesses. Their feelings of grief and sorrow were obvious and genuine. No doubt those feelings were intensified by the knowledge that such a disaster had occurred under their management. But, neither their handling of problems on the day nor their account of it in evidence showed the qualities of leadership to be expected of their rank.

281. Mr Duckenfield leant heavily on Mr Murray's experience. Between them they misjudged the build-up at the turnstiles and did little about it until they received Mr Marshall's request to open the gate. They did not, for example, check the turnstile figures available from Club control or check with Tango units as to the numbers still to come. They did not alert Mr Greenwood to the situation at the fringe of his area of command. They gave no instructions as to the management of the crowd at Leppings Lane. Inflexibly they declined to postpone kick-off.

282. When Mr Marshall's request came Mr Duckenfield's capacity to take decisions and give orders seemed to collapse. Having sanctioned, at last, the opening of the gates, he failed to give necessary consequential orders or to exert any control when the disaster occurred. He misinterpreted the emergence of fans from pens 3 and 4. When he was unsure of the problem he sent others down to "assess the situation" rather than descend to see for himself. He gave no information to the crowd.

283. Most surprisingly he gave Mr Kelly and others to think that there had been an inrush due to Liverpool fans forcing open a gate. This was not only untruthful, it set off a widely reported allegation against the supporters which caused grave offence and distress. It revived against football fans, and especially those from Liverpool, accusations of hooliganism which caused reaction not only nationwide but from Europe too. I can only assume that Mr Duckenfield's lack of candour on this occasion was out of character. He said his reason for not telling the truth was that if the crowd became aware of it there might be a very hostile reaction and this might impede rescue work. He did not wish to divulge what had happened until he had spoken to a senior officer. However, reluctance to tell Mr Kelly the truth did not require that he be told a falsehood. Moreover, although Assistant Chief Constable Jackson was at hand, Mr Duckenfield did not disclose the truth to him until much later.

284. The likeliest explanation of Mr Duckenfield's conduct is that he simply could not face the enormity of the decision to open the gates and all that flowed therefrom. That would explain what he said to Mr Kelly, what he did not say to Mr Jackson, his aversion to addressing the crowd and his failure to take effective control of the disaster situation. He froze.

The Police Case at the Inquiry

285. It is a matter of regret that at the hearing and in their submissions the South Yorkshire Police were not prepared to concede they were in any respect at fault in what occurred. Mr Duckenfield, under pressure of cross-examination, apologised for blaming the Liverpool fans for causing the deaths. But, that apart, the police case was to blame the fans for being late and drunk and to blame the Club for failing to monitor the pens. It was argued that the fatal crush was not caused by the influx through gate C but was due to barrier 124a being defective. Such an unrealistic approach gives cause for anxiety as to whether lessons have been learnt. It would have been far more seemly and encouraging for the future if responsibility had been faced.

7.89- c. 91

A number of public statements made to the effect that there would be private prosecutions (see Tab 3 of Defendants' Media File prepared for this hearing, "Media file").

Mid to late '89

HFSG founded, most of the bereaved families involved.

15.12.89

Implicit admission by solicitors on behalf of Chief Constable of South Yorkshire Police of negligence.

18.01.90

Taylor final report.

03.90

West Midlands Police report submitted to DPP and DPP begins deliberations as to whether to prosecute anyone in connection with the disaster.

18.04.90

Inquests open. Given that the DPP was to consider whether charges should be brought the inquest at this stage related only to who the deceased was and when and where he/she met his/her death but not to how he/she had met his/her death. These inquests came to be known as the "mini inquests".

25.06.90

Murray interviewed under caution in the presence of his solicitor by a Detective Chief Superintendent. Some 200 pages of interview. (File 6) He was told at the outset that:

> "Following a public enquiry and report the Chief Constable of South Yorkshire Police consulted with the Director of Public Prosecutions and as a result West Midland police were requested to do a criminal investigation. This investigation came at the same time as certain members of the public decided to make specific allegations against named police officers. You are one of those officers and you have already been served with Regulation 7 [disciplinary] Notice dealing with specific complaints. The nature of those complaints and the particular duty you were performing at Hillsborough on the 15th April 1989 suggests that you may have contributed to the deaths of some of those that died. Also that you may have failed to perform your lawful duty as a Police Officer ..."

Murray was then cautioned that he did not have to say anything unless he wished to do so "but what you say may be given in evidence". Having answered many questions Murray was told (483):

> "The final thing that I need to say to you is that the facts will be reported to the Director of Public Prosecutions and it will be a matter for him to decide whether any criminal offences have been committed."

The appropriate Code of Practice required the caution to be given if there were grounds to suspect a person of an offence.

03.07.90

Duckenfield interviewed under caution. He was given the same information and warning as Murray but, unlike Murray, declined to answer questions, as was his right.

06.08.90

DPP receives a joint opinion from Gareth Williams QC (as he then was) and Peter Birts QC as to whether there should be prosecutions. At the conclusion of the hearing I asked the DPP to provide me with a copy, which was then made available (subject to some irrelevant editing) to the prosecution and the defendants. I received further oral submissions dated 13,14 and 18 January. Insofar as the law is concerned the authors of the opinion wrote:

> "(2) Definition of manslaughter
> 57. Involuntary manslaughter is committed when a person causes the death of another either (1) intending to do an act which, whether he knows it or not, is unlawful and dangerous in that it is likely to cause direct personal injury ("an unlawful and dangerous act"), or (2) intending to do an act which creates an obvious and serious risk of causing personal injury (a) not giving thought to the possibility of such risk, or (b) having recognised that there was some risk involved, nonetheless going on to take it ("recklessness" as defined by Lord Diplock in **R v Lawrence** [1982] AC 510).
>
> 58. To amount to manslaughter a person's conduct need not be the only cause of the death, but it must be a substantial cause in that it contributed significantly to the result. Whether it did so contribute is generally a question of fact for the jury: **Pagett** (1983) 76 Cr. App Rep 279, 287-91.
>
> 59. It may also be that manslaughter is committed if the person causing the death intends to do an act, or omits to do an act where there is a duty to do so, being grossly negligent whether death or serious personal injury results ("gross negligence"): see e.g. Smith and Hogan, Criminal Law, 6th ed. (1988) at p 345. The law is at present uncertain whether gross negligence still exists as a separate head of liability, two recent authorities having held that the earlier cases where manslaughter is defined in terms of negligence should not be followed and that Lord Diplock's test should be applied universally.
>
> 60. In **Seymour** (1983) 76 Cr. App Rep 211, Watkins LJ, giving the judgment of the Court of Appeal in a reckless driving case, said:
>
> > "... we are of the view that it is no longer necessary or helpful to make reference to compensation and negligence. The **Lawrence** direction on recklessness is comprehensive and of general application to all offences, including manslaughter involving the driving of motor vehicles recklessly and should be given to juries without in any way being diluted. Whether a driver at the material time was conscious of the risk he was running or gave no thought to its existence, is a matter which affects punishment for which purposes the judge will have to decide, if he can, giving the benefit of doubt to

the convicted person, in which state of mind that person had driven at the material time."

61. In **Kong Cheuk Kwan v R** (1985) 82 Cr. App Rep 18 Lord Roskill, giving the opinion of the Privy Council, said at p 25:

> "Their Lordships are of the view that the present state of the relevant law in England and Wales ... is clear. The model direction suggested in **Lawrence** and held in **Seymour** equally applicable to cases of motor manslaughter requires, first, that the vehicle was in fact being driven in such a manner as to create an obvious and serious risk of causing physical injury to another and secondly that the defendant so drove either without having given any thought to the possibility of there being such a risk or having recognised that there was such a risk nevertheless took it.
>
> In principle their Lordships see no reason why a comparable direction should not have been given in the present case as regards that part of the case which concerned the alleged navigation of the Flying Goldfinch by Kong and indeed as regards the alleged navigation of the Flying Flamingo by the other two defendants. Did their respective acts of navigation create an obvious and serious risk of causing physical damage to some other ship and thus to other persons who might have been travelling in the area of the collision at the material time? If so did any of the defendants ... so navigate either without having given any thought to the possibility of that risk or, while recognising that the risk existed, take that risk?"

At p 26, Lord Roskill said:

> "Their Lordships ... respectively agree with the comment made by Watkins LJ ... in **Seymour**."

62. However, as pointed out by Smith and Hogan (6th ed. (1988) at p 353), whilst the clear implication from **Kong Cheuk Kwan** is that there is no longer any separate test of gross negligence in manslaughter, it may be that the courts would not be prepared to exclude it altogether in an appropriate case. Some support for this view is found in **Goodfellow** (1986) 83 Cr. App Rep 23, where Lord Lane LCJ said that the question in **Kong Cheuk Kwan** was whether the defendant was "guilty of recklessness (or gross negligence)".

63. We consider it right in the circumstances of Hillsborough to approach the evidence on the basis that the gross negligence test is sufficient to establish the offence of manslaughter and we propose to advise accordingly.

(3) Neglect by police

64. When gross negligence or manslaughter by neglect is alleged against the police, however, authority indicates a more detailed test of liability. In **R v West London Coroner's Court, ex p Gray** [1988] QB 467, allegations were made against police following the death of a man while in police custody concerning the use of force against him and failure to summon an ambulance promptly when he became unconscious. The coroner's directions to the jury as to unlawful killing were quashed by the Divisional Court, which held that a coroner directing a jury on manslaughter comprising unlawful killing alleged to have occurred because of neglect by police was required to direct them as follows:

(1) that they had to be satisfied of four ingredients, namely (a) that the police were under a duty to have regard to the health and welfare of the deceased, (b) that in the circumstances there was a failure to do what should have been done for the health and welfare of the deceased. (c) that the failure amounted to a substantial cause of death, and (d) that the failure amounted to recklessness;
(2) that the test of "recklessness" was whether a police officer, having regard to his duty, was indifferent to an obvious and serious risk to the health and welfare of the deceased or, recognising that risk to be present, deliberately chose to run it by doing nothing about it;
(3) that a failure to appreciate that there was such a risk was not by itself sufficient to amount to recklessness; and
(4) that the jury could only return a verdict of unlawful killing if they could attribute the unlawful conduct to a single police officer.

65. Plainly those directions are those to be given in any criminal prosecution of a police officer where omission to act is alleged to have caused death. In our view they have a direct bearing on our consideration of the evidence in this case."

In relation to Chief Superintendent Duckenfield the authors wrote:

"87. Clearly there was no unlawful and dangerous act on his part or intended by him which would found the first head of liability in involuntary manslaughter. But in failing to postpone the kick-off, or to order the closure of the tunnel after the opening of gate C, or both, did he intend an act which created an obvious and serious risk of causing personal injury, either not giving thought to the possibility of such risk, or having recognised that there was some risk involved nonetheless go on to take it?

88. We consider that there are difficulties in proving that he intended to do an act which created an obvious and serious risk of causing personal injury. In the first place there was no "act" as such, but an omission or omissions to act which contributed to a rapidly developing state of affairs ending in serious risk of injury. But was it an obvious risk at the time? We think not. The complexity of the disaster as now known to those who have analysed it in hindsight demonstrates that there must be grave doubt as to whether the omissions created a risk which was obvious to anyone at the time. The considerations here are, of course, wholly different from the driving cases or the collision at sea in the **Kong Cheuk Kwan** case.

89. We conclude, therefore, that there is insufficient evidence on which to found a charge of recklessness against Mr Duckenfield. Nor is there evidence that he was grossly negligent in failing to act as mentioned above. We bear in mind particularly the judgment of the Divisional Court in the **West London Coroner's Court** case, the requirements of which are not in our view satisfied.

90. It follows, and we have come to the clear conclusion, that there is no evidence that Mr Duckenfield was wilfully neglectful of his duty or was culpable so as to have committed the offence of culpable misfeasance.

91. We conclude that there is no sufficient evidence of any criminal offence having been committed by Mr Duckenfield."

30.08.90

DPP announces that there will be no prosecutions. In a letter to HFSG dated 27 July 1998, the CPS explained in outline the 1990 decision. The letter explained that the CPS code requires a Crown prosecutor to be satisfied that there is enough evidence to provide a realistic prospect of conviction, that is, a conviction is more likely than not. The letter went on to state that the reason for not prosecuting was the insufficiency of evidence to justify criminal proceedings.

19.11.90 -28.03.91

Inquests resumed, 230 oral witnesses called. During the inquest both Murray and Duckenfield give evidence. "The families were represented by various solicitors acting as 'The Steering Group of Solicitors' who formed the 'Hillsborough Steering Committee'". (8/32) Mr Jones told me that some 100 solicitors were involved but that only two played a part in the inquest, Mr Douglas Fraser and Miss Elizabeth Steel, as she then was, the former playing the far greater role. A barrister, Mr King, was instructed by the Committee. "The Steering Committee was instructed by a group of forty-three families who each eventually contributed £3.500 ..." "an enormous burden" to many of them. (AA, 8/33)

At the conclusion of the inquests the jury returned verdicts of accidental death by a majority of 9-2.

> "The verdicts of accidental death in 1991 were demoralising for the families .... The Steering Committee considered that further action would not succeed. The views of a junior barrister contacted in June 1991 by Trevor Hicks, Chairman of HFSG, were sought upon the prospects of a judicial review of the verdicts, but nothing came of it at that stage, having regard to the need for a new lawyer to study volumes of evidence given at the inquest and the probable expense." (AA, 8/34)

11.07.91

PCA direct disciplinary hearings against Duckenfield and Murray for neglect of duty.

09.91

Mr Edward Fitzgerald of counsel instructed by six families to advise on the question of challenge to the inquest verdicts. (AA, 8/36)

11.91

Duckenfield retired from police on grounds of ill health. Disciplinary proceedings abandoned thereafter against both men and in 08.92 Murray retires on grounds of ill health.

1992

Ann Adlington became solicitor to the Hillsborough Disaster Working Party.

15.04.92

Solicitors acting on behalf of the relatives of six of the deceased sought from the Attorney General an order granting them leave under s.13(1)(b) of the Coroner's Act 1988 to apply to the High Court for the inquest verdicts to be quashed and a fresh series of inquests held.

04.92

Application for leave to apply for judicial review of various decisions of the coroner and of the verdict of accidental death. That application adjourned to await the outcome of the application to the Attorney General. Ann Adlington actively concerned in the applications but they were not lodged on behalf of the HFSG. (8/34)

08.92

Attorney General declines to grant leave under s.13(1)(b) of the Coroner's Act 1988.

06.04.93

Application for leave to move for judicial review granted by Macpherson J.

09.93

Alun Jones QC instructed on legal aid by the applicants for judicial review.

05.11.93

Divisional Court refuses the application for judicial review. (Volume 12 tab M) Applicants were represented at the hearing by Mr Alun Jones QC and Mr Edward Fitzgerald. The Divisional Court refused an application to add an allegation against the Coroner of apparent bias. That proposed new ground had been advanced at the end of October 1993. The Court also refused an application to add a further ground relating to the Coroner's direction upon

the elements of the offence of manslaughter. McCowan LJ. giving his judgment, with which Turner J. agreed, said: (pages 8-9 of the transcript)

> "Assuming, without deciding, that there was a mis-direction, no blame can be attached to the Coroner since he summed up as he was told to do by the Divisional Court and with the approval of counsel for the relatives. That Mr Jones accepts. What exactly is it that Mr Jones would have the Coroner say? He gave us a long passage ending with these words:
>
> > '... that the attempted avoidance of the perceived risk, namely by opening the gates, was attended by such a high degree of negligence that it justifies a conviction for unlawful killing".
>
> So directed, he submits, the jury could have found unlawful killing. But there is nothing to say they would have done. The verdict they in fact brought in was a perfectly rational one.
> What then, we ask, would be the point of sending the matter back for another inquest? Mr Jones's answer was that, whatever the verdict might prove to be, the function of the jury would have been fulfilled. He agreed that no prosecution of any police officer would result because the decision was taken as long ago as September 1990 (before the main inquest) that no one should be prosecuted. It is, he said, a point of legal purity."

In rejecting the application to add this ground the Court took the view that it had been made far too late and, if successful, would have achieved nothing of value.

05.12.96

Granada television broadcast Jimmy McGovern's dramatised reconstruction "Hillsborough". Watched by some 7 million people. Included in the film were very moving accounts of the plight of the bereaved families on the day and thereafter. The film portrays Duckenfield in a very unsympathetic manner. The film also included allegations that video tapes had been stolen by South Yorkshire Police as part of a cover-up, allegations that police had deliberately and falsely blamed failure to see overcrowding in pens 3 and 4 on the fact that camera 5 was defective, that evidence from video tapes of what was filmed by camera 5 deliberately suppressed and concealed, that the evidence of Mr Houldsworth, a video technician at Sheffield Wednesday Football Club, was deliberately withheld from the Inquest jury and that the inquest verdicts were procured by fraud, suppression of evidence or insufficiency of enquiry. The documentary was accompanied by considerable press publicity both before and after the programme in both local (Yorkshire Post) and national newspapers particularly the Mirror but also the broadsheets, (see e.g. Tab 3/43 and following of Media file) and led to a considerable amount of public national support for the families. For example, the Mirror

obtained 13,500 signatures on a petition to re-open inquest and 34,000 people phoned hot line.

(In argument Mr Harrison QC submitted that that it was from about this time that the allegations in the media on the alleged scandalous nature of the police conduct were such that a fair trial is not possible.)

1.04.97

According to the Mirror, (Tab 3/63 of Media file) Mr Alun Jones said that there was strong evidence of perjury at the inquest and suppression of evidence organised successfully to pervert the course of justice at the inquest. Mr Jones told me in argument that he thought that that had come from an opinion which he wrote for the HFSG.

03 .05.97

DPP reviews the case and the allegations made in the Hillsborough programme. Decides not to prosecute, no reasonable prospect of a conviction.

05.97 The Manic Street Preachers ("perhaps the most successful band currently playing in this country" according to Mr Clegg QC) perform in the Hillsborough Justice Rock Concert which raises, according to press reports, some £1 million. (Tab 3/68 of Media File)

30.06.97

Home Secretary announces an independent scrutiny conducted by Stuart-Smith LJ. His terms of reference were:

> "To ascertain whether any evidence exists relating to the disaster at the Hillsborough Stadium on 15 April 1989 which was not available;
>
> (a) to the Inquiry conducted by the late Lord Taylor; or
>
> (b) to the Director of Public Prosecutions or the Attorney General for the purpose of discharging their respective statutory responsibilities; or
>
> (c) to the Chief Officer of South Yorkshire Police in relation to police disciplinary matters;
>
> and in relation to (a) to advise whether any evidence not previously available is of such significance as to justify establishment by the Secretary of State for the Home Department of a further public inquiry; and in relation to (b) and (c) to draw to their attention any evidence not previously considered by them which may be relevant to their respective duties; and to advise whether there is any other action which should be taken in the public interest."

08.97

Ann Adlington seconded full-time to the HFSG.

18.02.98

Lord Justice Stuart-Smith's report presented to Parliament. Having considered and rejected the allegations contained in the Hillsborough film, he concluded that there was no basis for any further public enquiry and no basis for a renewed application to quash the verdict of the inquest, that there was no material that should be put before the DPP or the police disciplinary authorities. He further concluded that none of the evidence which he had been asked to consider added anything significant to the evidence that was available to Lord Taylor's inquiry or to the inquests. He considered the alterations to statements and said that it would have been preferable if alterations to a few of the statements had not been made. He wrote in paragraph 57:

> "The causes of the disaster were many and complex. So far as the [defendants] were concerned, the prosecution would have to prove to the high standard required for a criminal conviction that the failure to give the order to close off the tunnel when Gate C was opened amounted to a serious degree of recklessness necessary to constitute manslaughter"

The Home Secretary announced in Parliament that he, the Attorney General and the DPP had each considered the report very carefully and had no reason to doubt the conclusions. The Minister said that the system had failed the families and cited a passage from Chapter 7 of his report, in which Stuart-Smith LJ wrote that he understood the dismay felt by the families that no individual has been personally held to account in a criminal court, in disciplinary proceedings or even to the extent of losing his job.

24.02.98

Second showing of the Hillsborough film. Average viewing: 1.5 million.

8.03.98

According to the Sunday Mirror Mr Jack Straw, Home Secretary said: "I share the anger that no one has suffered punishment or has been disciplined for what happened in Hillsborough" (Tab 3/70 Media file).

26.06.98

Informations laid against Duckenfield and Murray before the South Sefton Justices, Liverpool, by Ann Adlington.

03.07.98

Application made on behalf of Murray to the DPP to take over the proceedings and discontinue them.

10.07.98

Informations withdrawn.

13.07.98

Identical informations laid before Leeds Justices.

10.07.98

Submissions prepared by Mr Jones to support the issue of summonses heard by the Leeds Justices. Vol. 8 pages 13a-13e)

09.98

The Manic Street Preachers publish an album on which the last track is entitled S.Y.M.M. which obviously means: South Yorkshire Mass Murderer. The third and fifth verse read:

> " South, South Yorkshire mass murderer
> How can you sleep at night
> South, South Yorkshire mass murderer
> How can you sleep at night, sleep at night."

The mass-murderer must be a reference to Duckenfield. The group had earlier starred in a pop concert said to have raised £1m for the HFSG.

By mid-December 1999 an estimated 868,000 copies sold in England and Wales. The album is still on sale. According to a press report, the publication of the album was welcomed by Mr Hicks.

11.02.99

Following representations from both the prosecution and the defendants the Crown Prosecution Service declined a request to take over and discontinue the prosecution. I shall

summarise the relevant material below when I deal with the decision of the Divisional Court not to quash this decision.

08.98

Summonses issued and 20.08.98 Duckenfield and Murray appear for the first time at Leeds Magistrates Court.

28.02.99

Under the headline "Revealed- Hillsborough Police altered statements" the Sunday Telegraph reported: (Tab 3/76 of Media File):

> "Dozens of statements made by police officers on duty at the Hillsborough soccer ground at the time of the disaster were altered to remove their initial criticisms of the South Yorkshire force, an investigation by The Sunday Telegraph has found.
> Hundreds of sentences which criticised crowd control at the 1989 FA Cup semi-final at the Sheffield ground were deleted or amended.
> The original written recollections were changed within a month on the advice of solicitors acting for South Yorkshire police or the force itself. It was the amended statements which were presented to future inquiries into the disaster. Today's disclosures put renewed pressure on Jack Straw, the Home Secretary, to order a new public inquiry just weeks before the 10th anniversary of the tragedy, in which overcrowding and late arrivals led to 96 people being crushed to death and another 400 injured.
> Trevor Hicks, chairman of the Hillsborough Family Support Group (HFSG), said yesterday the new study revealed a scale of statement altering which had been greatly underestimated by Lord Justice Stuart-Smith's "scrutiny of evidence" last year.
> "The sheer scale of the altering of the statements is an absolute disgrace," said Mr Hicks, who lost his only two children, Sarah 19, and Victoria, 15, at the match.
> The disclosures come as Mr Straw faced growing criticism yesterday of the bungled handling of the Stephen Lawrence inquiry report.
> Yesterday South Yorkshire police denied that there was a need for a public inquiry and said the alterations had been examined by Lord Stuart-Smith who decided they did not affect the inquiries' outcomes or the 1991 inquest where the jury returned verdicts of accidental death."

The statements referred to are, it appears, the statements which had been considered by Stuart-Smith LJ and deposited in the House of Commons library by the Home Secretary following his announcement. That theme was developed in the Independent (3/77) and Yorkshire Post (3/78) on 1.03.99. The Yorkshire Post cited Mr Hicks as saying that all that Stuart-Smith had done was to "scrimp" across the surface.

9.03.99

Ann Adlington writes to Professor Scraton, thought to have been behind the story in the Sunday Telegraph, asking whether, in his new book "Hillsborough-the Truth", he had included anything about the guilt of either defendant to which he replied that he had not: "References to either former officer are restricted solely to that which is already in the public domain."

21.03.99

The Sunday Mirror writes about a "disturbing new book" by Professor Scraton who says that around a hundred first-hand recollections of Hillsborough were altered in a damage limitation exercise by the South Yorkshire Police and the "censored" statements were submitted as evidence to the Taylor inquiry. (Tab 3/79 of Media file) The newspaper reported that "The statement changes became apparent when Lord Justice Stuart-Smith carried out" his enquiry.

9.04.99

Newsnight carries a 15 minute programme on the altered statements.

11.04.99

Everyman programme

12.04.99

The Independent publishes a review of Professor Scraton's new book:

> "I read this book in a fog of anger. At the disaster itself, naturally, but also at the way the establishment ganged together to make sure that the truth - a scarcely believable story of incompetence and mendacity - was never officially told.
> Let's establish a couple of facts: Hillsborough was not caused by alcohol and violence; Liverpool people had not, in Brian Clough's words, "killed their own". A combination of police incompetence and structural defects at the ground caused the disaster. How the world reacted to it was conditioned by the first action of the man in charge, Chief Superintendent David Duckenfield (who had no experience of such events): he informed Graham Kelly that Gate C had been forced by drunken fans.
> In fact it was opened by the police. Kelly innocently passed this on in a TV interview. One is left hoping that Mr Duckenfield, who retired through "ill health" to pre-empt disciplinary proceedings, wakes up every morning full of remorse.
> Afterwards the police questioned survivors and bereaved with appalling insensitivity, trying desperately to establish that Leppings Lane that Saturday afternoon had been populated by insensate, aggressive drunkards intent on self-destruction.

> Throughout the protracted process of inquest and inquiry they told despicable and systematic lies at every stage. By the end my copy was splattered with exclamation marks next to underlined passages.
> Here, at random, are one or two of the bits that made my jaw drop: the ambulance driver who tried to drive on to a pitch littered with dead and dying, to be told by a policeman: "You can't go on there, they're still fighting", another policeman who, when told by the mother of victim Andrew Sefton that he neither smoked nor drank, turned to his colleague and said: "She'll be telling us next he's a bloody virgin!"; the remark to a family member by Mr Justice Stuart-Smith on the steps of the Liverpool Maritime Museum before the so-called independent scrutiny: "Have you got a few of your people or are they like the Liverpool fans, turning up at the last minute?"
> The story of the Hillsborough disaster is, in the end, grimly familiar: the little people, the ordinary people, the you and the me, we don't count. Not really. Alive or dead."

16.04.99

The day after the events of 10 years before had been marked in Liverpool by a minute of silence and in Anfield Stadium by speeches and music, the Independent reported that the families and the entire city of Liverpool "want to see police officers in the dock, charged with neglect and incompetence". "Yesterday was all about remembrance. It did credit to a city and its people in its simplicity and reverence. But under the surface the rage and cries for revenge and punishment are still strong. It may be that someday those now broken and despised men, like Chief Superintendent David Duckenfield and several of his named colleagues, may have to answer for their disastrous decisions on that day. Others may have to explain the lies and deceit that was rife among South Yorkshire police in the following years. But they did not set out to kill anyone on that spring afternoon. It was the Glory game itself." (Tab 3/91-92 of Media File) The Mirror reported on the same day the words of Mr Hicks at the Stadium referring to the astonishing verdict of the coroner's jury and to the alteration of 150 statements, many significantly, "If that isn't wrong I don't know what is." The full text of Mr Hicks' statement can be found in Tab 6/6 of the Media File, itself taken from the HFSG website. In another article reference was made to the length of time taken to bring the Lockerbie suspects and a Nazi war criminal to trial: "... the families of the 96 deserve justice. However long it takes... You cannot be at peace with injustice". (3/95)

21.03.99

Application for judicial review of the decision of the DPP's decision not to intervene and discontinue, dismissed other than in respect of what was count 4 (R. v. DPP ex parte

Duckenfield and Murray, unreported 31/01/1999 (bundle 12 divider PQ). Giving the judgment of the Divisional Court, Laws LJ said:

> "Representations had first been made to the DPP on behalf of D [Duckenfield] and M [Murray] in early July 1998, after the commencement of the proceedings in the South Sefton Petty Sessional Division which proved abortive. In the course of correspondence the HFSG again contended that it had discovered new evidence, which, it was said, had not been before Lord Taylor, the DPP, the Coroner, or Stuart-Smith LJ. At length, after AA's [Ann Adlington] informations had been laid in the Leeds Petty Sessional Division, the considered views of the DPP as to the approach to be taken to a request to take over and discontinue a private prosecution were set out in a letter to the HFSG on 27 July 1998. The letter did not contain a decision, but it explained the DPP's policy:
>
> > 'The policy where proceedings have been commenced by a private prosecutor builds on that contained in the Code for Crown Prosecutors. The right to bring a private prosecution is preserved by s.6(1)... subject to the power under s.6(2). The CPS will take over a private prosecution where there is a particular need for it to do so on behalf of the public...
> > In the instant case where we have been asked by the defendants to take over the prosecution in order to discontinue it, we would do so if one (or more) of the following circumstances applies:
> >
> > - There is clearly no case to answer. A private prosecution commenced in these circumstances would be unfounded, and would, therefore be an abuse of the right to bring a prosecution.
> > - The public interest factors tending against prosecution clearly outweigh those factors tending in favour.
> > - The prosecution is clearly likely to damage the interests of justice.
> >
> > The CPS would then regard itself as having to act in accordance with our policy.
> > If none of the above apply there would be no need for the CPS to become involved and we would not interfere with the private prosecution.
> > Clearly there is a distinction between the 'realistic prospect of conviction' test in the Code [the Code for Crown Prosecutors issued by the DPP under s.10 of the 1985 Act] and the 'clearly no case to answer' test mentioned above. Accordingly we recognise that there will be some cases which do not meet the CPS Code tests where nevertheless we will not intervene. It has been considered that to apply the Code tests to private prosecutions would unfairly limit the right of individuals to bring their own cases.
> > Before this decision can properly be made the CPS must be assured that all relevant material has been considered...
> > Until there has been a detailed review of the many papers in the case the Crown's position cannot be determined...'
>
> There followed very substantial representations from D and M and from the HFSG. ... the DPP communicated his decision not to intervene, as I have said by letter of 18 December 1998. The letter merely stated:
>
> > 'We have considered the evidence, the representations made by the parties and all the relevant circumstances of the case. We have concluded that we should not intervene to take over any of the charges.'

The respective solicitors for D and M asked for reasons to be given. There followed a letter of 1 February 1999 (the 'reasons letter') from the CPS' Casework Director to M's solicitor form which it is necessary to cite at some length:

> 'As you know, the Code for Crown Prosecutors sets out the general principles applied by the Service when (inter alia) deciding whether to continue a prosecution it has taken over; or whether to institute proceedings, or whether to advise the police to do so. It is correct that the CPS decided in 1997 that the evidence available at that time was not sufficient, in its view, to provide a realistic prospect of the conviction of either your client or Mr Duckenfield for any offence. However, it does not follow that, when considering the evidence and the representations submitted by the private prosecutor, and by yourselves on behalf of your client, the CPS should seek merely to identify whether there is now any new evidence sufficient to provide a realistic prospect of a conviction. The decision whether to intervene in a private prosecution with a view to terminating it calls for different considerations to be applied. It is quite possible for a private prosecution to continue, notwithstanding that the CPS is not satisfied, on the basis of its own assessment of the strength of the evidence, that the evidence would pass the evidential sufficiency test in the Code (that there should be a 'realistic prospect of a conviction').
>
> In broad terms, the reason for this is that s.6(1)... specifically preserved the right of private individuals and prosecuting authorities and bodies other than the CPS to bring criminal proceedings. This right is subject (among other limitations) to the limitation in s.6(2) that the CPS may nevertheless take over the proceedings with a view either to conducting or to terminating those proceedings.
>
> Private prosecutors are not bound to apply the Code for Crown Prosecutors when deciding whether to institute proceedings, nor do the courts apply the evidential sufficiency test in the Code when deciding whether there is a case to answer. The Service therefore recognises that it is not appropriate to intervene to terminate a private prosecution without good reason. That general principle has recently been endorsed by the Law Commission in its Consultation Paper No. 149 'Consents to Prosecution' (see paragraphs 6.3 and 6.4).
>
> [The letter then proceeds to set out the DPP's policy in the same terms as those in which it had earlier been described by the three "bullet-points" in the letter of 27 July 1998, save that it gives instances of the "public interest factors" test as follows:
>
> > 'examples might be where the prosecution is malicious, or vexatious; or the offence is one for which the defendant should clearly have been cautioned; or where, although the offence may be serious, the defendant is terminally ill.'
>
> Then the letter continues as follows]
>
> In this case, I took the decision not to intervene... I concluded in respect of the charges of manslaughter and wilful neglect to perform a public duty (which, for the avoidance of doubt, were each considered against each individual separately) that I could not say that there is clearly no case to answer. It was not right, therefore, for the Service to take over the proceedings with a view to terminating them.
>
> ...
>
> I also considered whether, nevertheless, there were overriding public interest factors that should lead to the Service intervening with a view to

> discontinuance, but I came to the conclusion that any public interest factors tending against prosecution did not clearly outweigh those in favour; nor did I consider that the prosecution is clearly likely to damage the interests of justice... .'

The Divisional court concluded that the DPP's policy was a lawful one (page 22). The Court went on to consider what it described as the real question: had the policy been lawfully applied? Dealing with the DPP's judgment on the issue of public interest, the Court said:

> "Mr Harrison submitted that in the light of everything that had gone before, and not least Stuart-Smith LJ's Scrutiny, there were no public interest factors favouring continuation of the prosecutions of D and M. He said that there is nothing in the reasons letter to show that the DPP accepted the suggestion, urged forcefully and at length by the HFSG in the course of their representations, that further evidence had come to light since the Scrutiny. With this latter proposition I agree. But the reasons letter clearly implies an acceptance that some factors existed which favoured the prosecutions. It stated: "I came to the conclusion that any public interest factors tending against prosecution did not clearly outweigh those in favour". What were those in favour? If in truth there were no factors which a reasonable decision-maker could regard as going in favour of the prosecutions, then the DPP's decision would be vulnerable to a challenge on Wednesbury grounds (as indeed Mr Harrison claims it is) since there would be nothing in public interest terms to weight in the scales against discontinuance. When the case was opened there was no affidavit from the DPP dealing with the point, nor did Mr Havers' skeleton argument articulate any such factors, Mr Newell swore an affidavit for the DPP on 22 March 1999. He is the CPS' Director of Casework and the author of the reasons letter. Paras 2 - 4 are as follows:
>
> > '2. As I now recall, the public interest factors tending against prosecution which I considered were as follows:
> >
> > (1) Previous reviews of the case, in particular those carried out by the DPP when considering the question whether criminal proceedings should be taken against Mr Duckenfield and Mr Murray and the more recent report of Lord Justice Stuart-Smith.
> >
> > (2) The fact that the Applicants had been told on previous occasions that the DPP did not intend to prosecute.
> >
> > (3) The delay which had occurred between the commission of the alleged offences and the commencement of the prosecution and its likely effect on the Applicants, although I took the view that delay may be offset by the seriousness of the alleged offences (as is reflected in paragraph 6.5(d) of the Code...).
> >
> > (4) The effect of the delay on the evidence, for example in terms of the potential impairment of the recollections of witnesses.
> >
> > (5) The assertion made on behalf of Mr Murray of ill-health, although I noted that no medical evidence had been put forward in support of this assertion and that, as again reflected in the Code (at paragraph 6.5(e)), ill-health may be offset by the seriousness of the offence.
> >
> > 3. As against these factors tending against prosecution, there was in my view one extremely important factor in favour of prosecution, namely the very serious nature of the alleged offences, in particular, the alleged offences of manslaughter. In my opinion, the allegation that two senior police officers

were responsible for the deaths of a number of people as a result of criminal negligence was a very grave allegation.

4. Paragraph 6.2 of the Code reflects the considerable weight attached by the CPS to the seriousness of the alleged offence when seeking to strike the right balance as to the factors for and against prosecution. (I refer also to the opening words of paragraph 6.4) Having carefully considered the factors tending against prosecution and this extremely important factor in favour of it, I came to the firm conclusion that the factors tending against prosecution did not clearly outweigh what I considered to be the very strong public interest in favour of prosecution.'

One of Mr Harrison's complaints, advanced before this affidavit was sworn, was that the policy should have taken account of para 10.1 of the Code which includes this:

'Normally, if the Crown Prosecution Service tells a suspect or defendant that there will not be a prosecution... that is the end of the matter... But occasionally there are special reasons why the Crown Prosecution Service will re-start the prosecution, particularly if the case is serious.'

This is one of the points relating to the Code which, as it seems to me, bear on the application of the policy rather than the policy itself; and para 2(2) of Mr Newell's affidavit shows that regard was had to assurances or statements made to D and M that for his part the DPP would not prosecute. Clearly it was right to do so, within the public interest balance. But I think there is a qualitative difference between the situation where the DPP himself goes back upon a previous assurance not to prosecute and one where the DPP does not change his mind but a private prosecutor chooses to instigate proceedings.

In reply, having by then seen Mr Newell's affidavit, Mr Harrison made further submissions. While accepting that there could be a case in which a single factor favouring prosecution might not be outweighed by a multiplicity of factors going the other way, he submitted that if the raft of public interest considerations favouring discontinuance in this case was held not to be enough to outweigh the single factor of the allegations' gravity, it was difficult or impossible to imagine what set of considerations might do so; and the court should conclude that DPP had fettered his discretion by treating the seriousness of the allegations as overriding everything else, so that he had not in truth carried out a proper balancing exercise at all.

I would reject this argument. There is no reason to suppose that the factors against prosecution were not properly weighed and considered, and certainly no basis for the supposition that once faced with a private prosecution for something as serious as manslaughter the DPP would inevitably decide to allow it to proceed.

Mr Harrison submitted next that Mr Newell's affidavit showed that the DPP had transposed from the Code the 'seriousness of the charge' factor as a consideration favouring the prosecution without also taking account of his own view that the Code test of "realistic prospect of conviction" was not met. I agree that the DPP's view of the prospects of conviction is a proper matter for him to consider, within the public interest test contained in the policy, when deciding whether to discontinue; but, as it seems to me, para 2(1) of Mr Newell's affidavit shows that in this case he has done so.

Then Mr Harrison suggested that para 3 of the affidavit demonstrated that the DPP's view of the gravity of the allegation was informed simply by the fact that there was a manslaughter charge. He had not properly considered the real degree of culpability inherent in the facts alleged; and the gravity of the offence of manslaughter can vary very widely. There is nothing in this. Mr Newell made it perfectly clear that he had

> regard to the species of manslaughter in question ("criminal negligence") and it cannot sensibly be doubted that he was well aware and took account of the circumstances in which the alleged offences are said to have been committed.
> Lastly on this part of the case Mr Harrison submitted that the refusal to discontinue was simply perverse, given the 'enormous weight' of the public interest considerations going the other way.
> The DPP might, in my judgment, lawfully have decided to discontinue. The tragic events at Hillsborough have been the subject of repeated, detailed, thorough enquiries. Nearly ten years have passed. But the judgment was for the DPP to make. If we acceded to Mr Harrison's submission, we would I think usurp the role of the primary decision-maker.
> In my judgment the decision not to discontinue is no more unlawful than is the policy which the DPP applied."

An application brought by the prosecution seeking to prevent the funding of the two defendants by the South Yorkshire Police was also dismissed. If that second application had been successful then the defendants would have had to pay for their own representation or, subject to a means enquiry, seek legal aid.

07.99

Following a five day hearing during which it was submitted on behalf of the defendants that the proceedings should be stayed, Mr Nigel Cadbury, Stipendiary Magistrate, dismissed the application and, in doing so, concluded: "The defence have not persuaded me to the required standard of proof that a fair trial is not possible". (Vol. 8 tab 7) The prosecution prepared for the committal proceedings an opening note. (Vol. 8 tab 1 pages 1-13) For the purposes of the hearing the prosecution prepared a "Revised Skeleton Argument of the Prosecution on Abuse of Process". Paragraph 73 reads in part: "Present leading counsel was involved in the judicial review from September 1993 to November 1993 and from December 1996. He was not asked to advise on criminal law until 1998." During argument, Mr Jones made a correction to that.

20.07.99

Following a finding that there was a case to answer, the defendants were committed for trial to the Leeds Crown Court.

03.09.99

First appearance in Leeds Crown Court. I conducted the Plea and Directions Hearing and ordered that the application which I am now considering should be heard on 4th January

2000. I also ordered that, if the application was unsuccessful, the trial was to take place starting on 6th June 2000.

Web site

There is an active web site run by the HFSG. Following indications which I gave at the PDH it has not been updated since October 26. (Tab 6 of Media file) Above the name of Mr Phil Hammond, Vice Chairman and Secretary of HFSG can be found a message about the need to avoid prejudicial media coverage. (6-3)

Publicity following the hearing

Following the hearing I was asked my tentative views about the showing of a repeat of 3 episodes of Cracker, a fictional series starring Robbie Coltrane as a forensic psychologist. The episodes concerned a young man who was at Hillsborough and resolves to kill 96 people, principally police officers. I reached the tentative conclusion that I would not be prepared to grant an injunction. Understandably, no injunction was thereafter sought. I have also been sent material in the public domain reporting and commenting upon an award of damages for a nurse who suffered PTSD as a result of help which she gave at Hillsborough.

Preliminary observations

Mr Jones submits that the test for manslaughter is that which, he argues, was laid down by the House of Lords in **Adomako** [1995] 1 AC 181. Manslaughter will be proved if it is shown that:

a) That the defendant owed the deceased a duty of care;
b) That he was negligent;
c) That his negligent actions or omissions were a substantial cause of death;
d) That, having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances to amount, in the judgment of the jury, to a criminal act or omission.

If this is the correct test, then, it seems to me, that it was not the test applied by the authors of the 1990 opinion, which includes a subjective element.

Mr Harrison in his written submission prepared after receipt of counsel's 1990 opinion, now argues that Mr Jones' suggested test , although applicable to medical negligence, is not the test for cases of the present kind. Relying particularly on a passage in Lord Mackay's speech

in **Adomako** and his apparent approval of **Stone and Dobinson** [1977] QB and **Ex parte Gray** (referred to in that opinion), Mr Harrison submits that the prosecution must additionally prove that the defendant was at least indifferent to the risk of serious injury (para. 7 of note dated 13/01/2000). If this is right, then manslaughter in this kind of case requires a subjective element. He further submits that, therefore, the test applied by the authors of the opinion remains the correct one.

This is not the time for me to reach any final conclusion on the matter. Nor is it necessary for me to deal with a further matter relating to breach of duty raised by Mr Clegg in his written submission dated 18 January 2000.

I note that Mr Harrison's submissions do not seem to receive the support of Professor Smith, Criminal Law, Smith and Hogan, 9th edition, page 376-377, where it is argued that there is now only one "single, simple test of gross negligence", an objective one. I take the view that it is, at least, arguable (with the great benefit of hindsight) that the authors of the opinion did not apply the correct test. There is nothing to suggest that this error, if error it be, was recognised when the matter was reconsidered in 1997. I should add that an examination of the judgment in the Divisional Court in March 1999 does not suggest that it was being argued by Mr Harrison that Mr Newell had erred in reaching the conclusion that the "no evidence test" was not met. If the proper test for manslaughter involves a subjective element of the kind for which he now contends, one might have expected Mr Harrison to have argued that the "no evidence test" was met.

The stipendiary magistrate has found that both defendants have a case to answer. It was not and could not, as a matter of procedure, be suggested before me that this decision was wrong. He gave no reasons and I am therefore unsure which test he applied. I suspect that it was the test propounded by Mr Jones.

The Director of Public Prosecutions in the person of Mr Christopher Newell has reached the conclusion that the DPP should not intervene and take over the prosecution to bring it to an end. As I have already mentioned, the policy and the decision were analysed in detail by the Divisional Court in March last year and the policy was found to be lawful and the decision not one that should be quashed.

The delay has been such that no fair trial is possible

I propose to deal with this submission first. During the course of the hearing I made it clear that I did not accept it. As the prosecution's case now stands, all or almost all of the evidence

upon which the prosecution rely is the evidence upon which Lord Justice Taylor relied to reach his conclusions. Significant parts of the evidence are recorded on video tapes which have been edited into a compilation tape. I have seen that tape and, in my view formed at this early stage of the proceedings, it will provide an invaluable and objective account of what happened that afternoon in so far as relevant to these proceedings. This is not a case where anyone involved that day, witness or defendant, is going to forget what happened.

Mr Harrison submitted that the defendants could be faced with insuperable difficulties when examining whether, if thought had been given to closing off the tunnel, it would have been possible or practicable so to do. It is now too late, he submits, to know, for example, which police officers could have been used to close it off. Experience shows that judges must be cautious when arguments of this kind are submitted. In my own experience, having rejected similar submissions, I have found that, at the trial, the difficulties proved non-existent. At the present time and having regard, for example, to the video tape, I cannot see how such a difficulty may arise. The tape shows a number of officers inside the gates. As a result of the opening of the gates, some of those officers, such as those who had been searching, could no longer perform that task. If I am wrong and the difficulties outlined by Mr Harrison prove to be real difficulties then I have the power at any stage to either stop the case or make some less draconian ruling. Likewise Mr Harrison expresses concern should the prosecution seek to rely on experience gained at earlier matches. Should the prosecution seek to do this I will, if asked, consider whether it would be fair to do so having regard to the delay.

The publicity has been such that no fair trial is possible.

There is no doubt that there has been a massive amount of adverse publicity about the role of the police and of senior police officers on and after the day of the disaster at Hillsborough. It was submitted on behalf of the defendants that the publicity has been more adverse than in any other case. Mr Jones submitted that the publicity in the **Maxwell** case, particularly as far as Robert Maxwell was concerned, was as adverse, if not more adverse.

I turn to the appropriate legal principles. In **Maxwell and others**, unreported, March 5 1995, Phillips J, as he then was, referred to the "unrelenting adverse media publicity" about Mr Robert Maxwell, whose "name has become a synonym for fraud" (page 53). Phillips J said that there had "been significant adverse publicity to Mr Kevin and Mr Ian Maxwell." In ruling against an application to quash the proceedings on this ground, Phillips J said:

> "I am satisfied, nonetheless, that the effect of pre-trial publicity alone can constitute a valid ground for ordering a stay of proceedings. The principles that govern the exercise of such jurisdiction merit careful consideration.
> ...
> No stay should be imposed unless the Defendant shows on the balance of probabilities that owing to the extent and the nature of the pre-trial publicity he will suffer serious prejudice to the extent that no fair trial can be held.
> I would accept this test, so far as it goes, but it remains necessary to identify the essential aspects of a fair trial for the purpose of the test.
> If it were enough to render a trial unfair that publicity has created the risk of prejudice against the Defendant our system of criminal justice would be seriously flawed. There will inevitably be cases where the facts are so dramatic that almost everyone in the lands will know of them. There will be circumstances when arrests are made or Defendants whose guilt will, or may, appear likely. Intense media coverage may well take place before a suspect is identified or apprehended. If in the most notorious cases Defendants were to claim immunity from trial because of the risk of prejudice public confidence in the criminal justice system would be destroyed." (Pages 60-62)

Having given two examples **Alcindor** (The herald of Free Enterprise) and **Savundranayagan**, he went on to say:

> "Our system of criminal justice is founded on the belief that the jury trial provides the fairest and most reliable method of determining whether guilt is established. This belief is based on the premise that that the jury will do their best to be true to their oath and to try the case according to the evidence. The ability of the jury to disregard extrinsic material has been repeatedly emphasised by judges of great experience."

Phillips J then cited passages from judgments given by Lawton J in **Kray**, and as Lawton LJ in **Coughlan**, by Lord Denning and Sir John Donaldson in **AG v. News Group Newspapers Ltd** [1987] QB 1. In **Kray**, Lawton J said:

> "It is ... a matter of human experience, and certainly a matter of the experience of those who practise in the criminal courts, first that the public's recollection is short and, secondly, that the drama, if I may use that term, of a trial almost always has the effect of excluding from recollection that which went before."

As to recollections being short, my own experience may be of interest. When I first came to this case last year I thought that the criticism of the senior police officer on the day (whose name I did not recollect) was that he had ordered the opening of the gates when he ought not to have done. I now know that it is accepted that the order to open the gates was the proper course to take.

Lawton J went on to say that a juror would not disqualify himself merely by reading newspapers containing discreditable allegations unless his mind had become so "clogged with prejudice that he was unable to try the case impartially".

Again my own experience may be of interest. In a trial last year of a doctor charged with the murder of an elderly and very sick patient in great pain, two potential jurors, without being asked, both indicated that they were unable to act as jurors because of their views on the topic of euthanasia, one being apparently in favour and one against.

In **AG v. News Group Newspapers Ltd** Sir John Donaldson said (page 16):

> ".. a trial by its very nature, seems to cause all concerned to become progressively more inward looking, studying the evidence given and submissions made to the exclusion of other sources of enlightenment. This is a well-known phenomenon."

Phillips J went on to say:

> "How then, in the case such as this, should the Court approach the question of whether pre-trial publicity has made a fair trial impossible? I am inclined to think Mr Lawson provided the answer when he advanced by way of submission the following test:
>
> > "If prejudicial publicity would, in hindsight result in a conviction being unsafe and unsatisfactory, it cannot a fortiori, be fair to embark on a trial which may so result."
>
> It seems to me that the Court will only be justified in staying a trial on the ground of adverse pre-trial publicity, if satisfied on balance of probabilities that if the jury return a verdict of guilty, the effect of the pre-trial publicity will be such as to render that verdict unsafe and unsatisfactory.
>
> In considering this question the Court has to consider the likely length of time the jury will be subject to the trial process, the issues that are likely to arise and the evidence that is likely to be called in order to form a view as to whether it is probable that - try as they may to disregard the pre-trial publicity - the jury's verdict will be rendered unsafe on account of it.
>
> ...
>
> I now turn to consider whether the Defendants have satisfied me that because of the pre-trial publicity, a fair trial cannot take place.
>
> ...
>
> The second point to consider is the possibility of potential jurors whose minds - to use the words of Lawton J - have become clogged with prejudice as a result of adverse publicity. That such there may be is indicated by some of the answers to the opinion polls and by compelling oral evidence given by Mr Kevin Maxwell on this application. They also must be identified by an appropriate process of jury questioning.
>
> The question then remains of whether jurors who set out to perform their duties in accordance with their oaths will, by the end of the trial, be at risk of acting under the influence of publicity rather than reaching their verdicts on the basis of the evidence that they have heard in Court.
>
> Let me deal first with prejudice that may have been engendered by publicity adverse to particular Defendants. So far as Mr Trachtenberg and Mr Bunn are concerned, their Counsel did not suggest that such publicity as there has been about them would prevent their having a fair trial. I think it unlikely that any juror would even remember their names.

> The adverse publicity that there has been directed against Mr Kevin and Mr Ian Maxwell is far more significant. Nonetheless I do not consider it that it is such as to pose a threat to the fairness of the trial. It is too early yet to form a precise estimate of the duration of this trial. I have no doubt, however, it will run for a period of months. The phenomenon spoken to by Sir John Donaldson of becoming more inward looking and studying the evidence and submissions to the exclusion of other forms of enlightenment is one of which I have had personal experience in the context of a long fraud trial. It is something that it is impossible to exaggerate. As the weeks go by the trial becomes not merely part of life, but the dominant feature of it so that the stage is reached when one can hardly see behind it or beyond it, and I am quite sure that this is truly true of all involved in the trial.
>
> The responsibility of reaching verdicts is a heavy one is any case, but in a case such as this it is one of which the jury will be particularly aware. I do not believe that their verdicts will be influenced by anything that they may have read about individual Defendants before the trial begins. Nor can I accept the suggestion made by Mr Jones that they will permit their verdicts to be influenced by views expressed by friends or relatives outside court." (Pages 72-76)

Phillips J went on to consider the publicity surrounding the late Mr Robert Maxwell and said: "on reflection, I am not persuaded that, if he were to stand trial, a jury would not try him fairly and reach verdicts on the evidence" (page 77).

It will be remembered that the defendants in the **Maxwell** case were acquitted by the jury.

I turn to this case applying the principles enunciated by Phillips J. It is anticipated that the trial will take about 6 weeks, although it may well be shorter. Certainly it will last long enough for the phenomenon of which Sir John Donaldson and Phillips J spoke, to take effect. It can be assumed that every potential juror will know about Hillsborough and be appalled by the death of 96 people, many of whom were so young, and feel the greatest sympathy for the relatives of those who lost their lives, particularly the parents of the young. That assumption can be made in many high profile trials. In addition to those mentioned by Phillips J we have the more recent examples of Rosemary West and Dr Shipman. It can also be assumed that every potential juror may well feel that someone must be at fault for the tragedy, whether the police, the fans or the Club. In this case it is noteworthy that at the Inquest the jury brought in verdicts of accidental death, knowing, as they must have done, that the families of the deceased, many of whom were present at the hearings, would be deeply disappointed if not devastated by the verdict. I see no reason why a jury cannot be chosen all members of which will try the case on the evidence before them.

It can also be assumed that every potential juror may well have read or heard about an alleged police cover-up after the disaster. Any concern about that may be met by making it clear to the jury, if need be, that the alleged cover-up has nothing to do with these defendants and that,

in any event, many of the allegations made against the police inspired by Jimmy McGovern's film have no foundation. Furthermore questions could be so framed to exclude anyone who has read, for example, Professor Scraton's book.

Are there any special features in this case which might have the effect that a juror's mind could be "clogged with prejudice as a result of adverse publicity". Counsel point particularly to the song contained in the Manic Street Preachers album to which I have made reference. Although many copies have been sold, it would be easy to select jurors who have not heard the song. In any event, with all respect to the persons responsible for it and to those who have welcomed it, the suggestion of mass murder is so outrageous and so far from the truth that no sensible juror could ever be influenced by it.

It will be necessary, if this trial continues, to prepare a list of questions for the jury, the precise contents of which will be the subject matter of discussion. As I indicated in argument, I have reached the tentative view that it will be easier to select a jury if the trial were to be conducted outside West Yorkshire. Given the proximity to Sheffield and the extensive coverage of the matters in the Yorkshire newspapers, there is likely to be more potential jurors in West Yorkshire who will answer the questions in such a way that they should not be empanelled. In any event, as Presiding Judge, I am well aware of the difficulties faced by the West Yorkshire courts (Leeds and Bradford) in coping with the volume of criminal cases. Cases, particularly long ones, are often moved out of West Yorkshire when it is practicable so to do in order to relieve the strain on the system. I am also aware that none of the courtrooms in Leeds is ideal for a trial of this kind. I have also reached the tentative view that, for these reasons, a trial, if there is to be one, should be conducted in the Moot Hall at Newcastle. However, counsel indicated that they wished to address me about that, should I decide not to quash the proceedings.

Ever mindful of the obligation to ensure a fair trial, I have reached the conclusion that the defendants have failed to prove on the balance of probabilities that the adverse publicity will prevent or impede a fair trial. I go further. I am quite satisfied that they will have a fair trial. If there is to be trial, I shall reconsider the issue if it is necessary to do.

<u>The prosecution is so oppressive, unfair and wrong that it should not be allowed to continue.</u>

An attack was made on the objectivity of the prosecution team and particularly Miss Adlington. I confess to some reservations about the manner in which the prosecution has been conducted, for example the decision to start these proceedings in the Liverpool area, Mr

Jones' argument at the PDH to the effect that admissions made by the defendants only for the purposes of the committal proceedings were binding at trial and his argument that I should admit into evidence an attendance note of a solicitor who was not to be called because the prosecution did not believe a word he said. A similar argument was raised about Miss Adlington before Mr Cadbury and was rejected by him. (volume 8, tab 7 pages 100-101) I see no reason to depart from his finding nor to stop the proceedings for this reason. I make it clear, however, that I expect the prosecution to act properly and fairly. I am sure it will. If it does not I shall not hesitate to act.

It is submitted that the proceedings should be stayed because the prosecution was only launched after the McGovern film which was a distortion of the truth. The prosecution has been "prompted by a distorted and misrepresented view of the true facts". I understood the description "misrepresented" to refer to matters unconnected with the evidence upon which the prosecution rely in this case. It is submitted that this prosecution has "become a private persecution brought against the background of an unprecedented level of media vilification of the defendants and a stirring up of emotional passions." I see no merit in these arguments provided the defendants can have a fair trial, as I have found they can and provided that the prosecution is not so oppressive that it ought not be allowed to continue, a matter to which I return shortly.

It is submitted that, given that the evidence has not changed since 1989-90, the prosecution should be stayed having regard to the earlier decisions not to prosecute, the verdict of the Coroner's jury, the results of the review conducted by Stuart-Smith LJ and the endorsement of the conclusions therein by the Home Secretary and the DPP. It is submitted that there is here "a refusal to accept earlier decisions". Similar arguments were put to the DPP and, it appears, to the Divisional Court in March of last year. Mr Newell outlined this argument in paragraph 2(1) of his affidavit where he dealt with factors tending against prosecution. The position has further changed in favour of the prosecution in that there is now a case to answer. Against this background, I see no justification in quashing the proceedings for this reason, assuming, without deciding, that this could be a free-standing ground to quash.

It is submitted that a court has a duty to be extra vigilant when a private prosecution is brought because private prosecutors are nor subject to the same code as public prosecuting authorities: "the duty of the court to protect defendants from oppression and abuse against a private prosecutor calls for a different approach" than that followed where public prosecuting authorities are concerned. Private prosecution "must not be allowed to become an unfettered

indulgence". It is submitted that this prosecution is so unfair, unreasonable and wrong that it should not be allowed to proceed. These are similar arguments to those developed in the Divisional Court, since when, as I have said, there has been found a case to answer. In my view it would not be right for me to apply the CPS evidentiary test and decide whether there is a realistic prospect of a conviction. Indeed I was not asked to carry out a detailed examination of the evidence. Insofar as public interest is concerned, assuming that a private prosecutor should take that into account, the Divisional Court has already held that the decision not to intervene is not Wednesbury unreasonable. Subject to the issue of oppression, I see no reason why I should interfere with the decision to prosecute which, it seems to me, is also one that a reasonable prosecutor could reach.

It is submitted on the analogy of cases like **R. v. Croydon Justices, ex parte Dean** (1994) 98 Cr.App.R. 76 that there had been, in effect, an undertaking to the defendants that they would not be prosecuted. Reliance is placed on what Mr Jones said during the Divisional Court hearing in 1993 against the background of the CPS decisions not to prosecute. Nothing that Mr Jones said on behalf of the six families who took those proceedings can be regarded as an undertaking of the kind referred to in **Croydon Justices**. This is not a case, on the evidence before me, where a person has relied upon a promise or undertaking (see **Attorney-General of Trinidad and Tobago** [1995] 1AC 396 at 417).

I turn to the question which has given me the most concern: "Is this prosecution so oppressive to these defendants that it ought to be stayed?" There was no dispute that an prosecution could be so oppressive that it should be stayed. In **Latif** [1996] 2 Cr. App. R. 92, at 101 (H.L.) Lord Steyn said the law is settled:

> "Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed ... or where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. ... [T]he judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means."

In **Attorney-General's Reference (No. 1 of 1990)** (1992) 95 Cr.App.R. 296, at 302-303 Lord Lane CJ said:

> "Stays imposed on the grounds of delay or for any other reason should only be employed in exceptional circumstances. If they were to become a matter of routine, it would be only a short time before the public, understandably, viewed the process

with suspicion and mistrust. ..."

That case and the earlier case of **Heston-Francois** (1984) 78 Cr.App.R. 209 refer to the alternatives open to a trial judge other than stopping a trial.

In **Dept. of Transport v. Chris Smaller Ltd** 1989 AC 1197, at 1210 (a civil case) Lord Griffiths said:

> "I would, however, express a note of caution against allowing the mere fact of the anxiety that accompanies any litigation being regarded as of itself a sufficient prejudice to justify striking out an action. ... There are, however, passages in some of the judgments that suggest that the mere sword of Damocles, hanging for an unnecessary period, might be a sufficient reason of itself to strike out. On this aspect I repeat the note of caution I expressed in the Court of Appeal in *Eagil Trust Co. Ltd. v. Pigott-Brown* [1985] 3 All ER 119, 124, where I said:
>
> > "Any action is bound to cause anxiety, but it would as a general rule be an exceptional case where that sort of anxiety alone would found a sufficient ground for striking out in the absence of evidence of any particular prejudice. *Biss's* case is an example of such an exceptional case, the action hanging over for 11 years, with professional reputations at stake."

In the ruling of Buckley J. (unreported, 09/96, C.C.C.) following the acquittal of Kevin Maxwell and others at the first trial can be found the following passage (at page 233-234):

> "Finally, an important, though not decisive consideration; fairness to the Defendants. I have mentioned the time that these criminal proceedings would have been hanging over their heads in the event of a further trial, at least five years. That would be so, in Mr. Kevin Maxwell's case, notwithstanding that in going through the extremely lengthy trial process he gave evidence before the jury for twenty days and notwithstanding the acquittals. The disruption to personal and business life is inevitably considerable. The stress and pain that criminals inflict on their families is a sad but inevitable consequence of their misdeeds. Courts are mindful of it but obviously cannot allow it to outweigh consideration for victims and the general public interest in punishing crime. But I remind myself here that these Defendants have been acquitted and in the circumstances I have described. As I mentioned earlier Mrs. Kevin Maxwell gave evidence before me. Her obvious distress was, I am convinced, entirely genuine. She described the agony of trial and the days waiting for the verdict with the prospect of a significant prison sentence in the balance. She told me of problems with her children. In particular, their son who had been told by schoolmates that his father was going to prison for a long time. When ever her husband goes out she is now repeatedly asked "Will daddy be coming home again?".
>
> I can understand the expectation that built up in the family's mind that an acquittal would be the end of the matter. Mrs. Maxwell's bewilderment and anger at the decision to proceed to another trial were not feigned. I cannot be over influenced by such matters but no one could have been unmoved by her evidence."

Some help can be obtained from the ECHR. The requirement in Article 6 of a hearing within a reasonable time is designed to prevent a person charged from remaining "too long in a state of uncertainty about his fate" (**Stögmüller v. Austria** 1 E.H.R.R. 155, at para. 5 at 191).

This is not a case where new evidence has been found many years later (for example DNA evidence) or where the defendants have misled the prosecuting authorities in some way. Clearly different principles apply in those kinds of cases. As I have said before, the evidence against these defendants is the same evidence as it was in 1989. Even if the test applied in 1990 was not the **Adomako** test (which I shall assume to be the correct test), that is not in the same category as the finding of new evidence. Nor is this a case where the authorities have acted improperly- the decisions not to prosecute were made in good faith and it has not been suggested otherwise. Nor is this a case where there has been undue delay caused by the prosecution following the institution of these proceedings against the defendants.

In this case neither the defendants or members of their family have given evidence, but I have no difficulty in inferring that they must be suffering a considerable amount of strain. They are likely to have thought following the verdict of the jury in the Coroner's enquiry in 1991, if not earlier, that a prosecution was, at the least, very unlikely, except perhaps during the continuance of the 1993 Divisional Court proceedings and in the period leading up to and including the enquiry conducted by Stuart-Smith LJ. In 1998 the defendants, I infer, must have started suffering the stress which they had suffered during the period 1989-1991. They have, of course, both resigned from the police force and there is no evidence before me that a conviction would have any particular financial consequence. I add that, on the evidence before me, they are receiving the best possible legal representation thanks to the South Yorkshire police.

The thought of being convicted for a serious offence of manslaughter must be a strain on anybody. However, and I can say this from my own experience defending in criminal cases over many years, it is the thought of prison which, for most defendants, is the greatest worry. In the words of Buckley J., Mrs Pandora Maxwell "described the agony of trial and the days waiting for the verdict with the prospect of a significant prison sentence in the balance." That is familiar to anyone who has defended in serious criminal cases. For police officers or ex-police officers, the threat of prison has even more significance than for others. These two defendants, if sentenced to prison for the manslaughter of, in effect, 96 people, would necessarily be at considerable risk of serious injury if not of death at the hands of those who feel very strongly about Hillsborough.

On the other side of the balance is the public interest put succinctly by Mr Newell in the 1999 Divisional Court proceedings:

> "... there was in my view one extremely important factor in favour of prosecution, namely the very serious nature of the alleged offences, in particular, the alleged offences of manslaughter. In my opinion, the allegation that two senior police officers were responsible for the deaths of a number of people as a result of criminal negligence was a very grave allegation".

Doing my best to resolve the competing interests of the defendants and the public, I have decided that there is an alternative to a stay. I conclude that the oppression is not such as to prevent the trial from taking place but that I should now reduce to a significant extent the anguish being suffered by these defendants. I do that by making it clear that the two defendants will not immediately lose their liberty should they be convicted. This is, I accept, a highly unusual course, but this is a highly unusual case. When I canvassed this possibility with Mr Jones, he fairly and helpfully drew my attention to evidence that the families were not, apparently, seeking punishment of this kind (page 6 of transcript of evidence of Miss Adlington before the Stipendiary Magistrate).

The prosecution is a breach of the defendants' rights to a fair trial under Article 6(1)} of the European Convention on Human Rights.

Mr Clegg submits that even if, applying the English law of abuse of process, there should be no stay, I should nonetheless stay the proceedings. To order the trial to continue would be, he submits, a breach of Article 6(1) of the ECHR. He relies on the words in that Article: "In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time". Contrary to the submissions of Mr Jones, he submits that time started to run when the defendants were interviewed under caution in 1990, that it did not thereafter cease to run and that a determination of the charges at the earliest in June would not be within a reasonable time. He further submits that I should anticipate the coming into force of section 6(1) of the Human Rights Act which provides that: "It is unlawful for a public authority [which includes a court] to act in a way which is incompatible with a Convention right". Alternatively, I should adjourn the trial until October when it is anticipated that the Act will come into force.

He accepts, on the authority of **R. v D.P.P. ex parte Kebilene** [1990] 3 W.L.R. 972 (H.L.) that it would be contrary to the legislative intention to treat section 6(1) as though it was now in force. He points to passages in the speeches in that case (984H-985A, 996F-H). Relying

upon them, he submits that, if there is a clear breach of section 6(1), a decision should be taken at this stage rather than on appeal following a conviction. I shall assume the correctness of this submission.

In my judgment the position is far from clear. I was referred to a large number of authorities which deal with when time starts to run. They, in very large measure, concern the very different system of criminal investigation followed on the continent. It is far from clear whether time would start to run at the moment of arrest or charge in this country or from the moment of an interview under caution. In this case there is the added difficulty that this is a private prosecution, a type of prosecution unknown, I believe, on the continent. Although I am inclined to think that time would not cease to run, that is certainly not clear. Mr Jones strenuously argued that, even if time had started to run in 1990 and continued to run, the determination would still be within a reasonable time. My inclination would be that the determination would not be within a reasonable time but is not clear how that should be determined in a case of this kind.

Amongst the many cases to which I was referred is **Eckle v. Federal Republic of Germany** (1982) 5 E.H.R.R. 1. In that case the Court said (at page 25) that a German court had available a means of affording reparation for a breach of the reasonable time requirement in Article 6(1): "according to well-established case law in the Federal Court of Justice, when determining sentence the judge must take proper account of any over-stepping of the 'reasonable time' within the meaning of Article 6(1)". Mr Jones relied on this case and on section 8 of the Act which provides that, in relation to any act which the court finds is unlawful, "it may grant such relief ... as it considers just and appropriate." Mr Clegg submitted that section 6(1) of the Act prevented the approach in **Eckle**- if the reasonable time had expired there was only one remedy available, namely stay the proceedings. He submitted that the court had no discretion in the matter. The balancing approach developed in the English courts could not be adopted. If all else were clear, this certainly is not. This alone prevents this case from falling into the category of clear cases referred to in **Kebilene**.

Should I then grant an adjournment until October, when it is anticipated that the Act will come into force? The trial date was set in September of last year, with the consent of all concerned. It would not be right now to adjourn it. Should either of the defendants be convicted, the arguments raised by Mr Clegg can be raised again in the Court of Appeal and the chronology which I have set out coupled with the written evidence of Miss Adlington and her oral evidence before the Stipendiary Magistrate, should enable the appellate court to

resolve any issues of fact and, in particular, whether the determination will have been within a reasonable time.

Conclusion

I decline to stay the proceedings and the trial will start in June. I shall now hear submissions as to whether it will be in Leeds or Newcastle.