

# Transcript of the Sheku Bayoh Inquiry

Wednesday, 5 June 2024.

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(10.04 am)

LORD BRACADALE: Good morning, Ms Edwards. Ms Grahame.

MS GRAHAME: Thank you.

Evidence of ASHLEY EDWARDS KC (continued)

Examination-in-chief by MS GRAHAME KC (continued)

MS GRAHAME: Good morning

A. Good morning.

Q. Yesterday we were just talking about Dr Lawler and I think we were talking about at the close the issues regarding his instruction and I would like to carry on doing that today, if I may.

I think yesterday during your evidence you had talked about wanting to know the position, seeking to clarify in relation to cause of death the possibility of asphyxia, mechanical asphyxia, positional asphyxia, and they were important from the point of establishing a causal link. And --

A. A mechanism of death I think I had said.

Q. Yes. Well, I am reading from your evidence and you said "those were important from a point of establishing a causal link." I think though at one point you did use the word "mechanism".

A. Yes.

Q. I just want to ask you to look very briefly at the final

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1 postmortem report which Dr Shearer prepared, PIRC 01445,  
2 and we'll have that on the screen. There we are.

3 Now, this is a pdf version and I think there are 32  
4 pages on the pdf, but I'm interested in pages 16, 17, 18  
5 of the pdf, although they don't necessarily correspond  
6 to the page numbers on the report. Here we are. This  
7 is the conclusions of the final postmortem report and  
8 you'll see that Dr Shearer and her colleague have  
9 explained the circumstances and at paragraph 3 they  
10 talk -- if we can move down the page -- they talk  
11 towards the bottom of that paragraph you'll see:

12 "Neuropathology was undertaken which showed changes  
13 consistent with evolving global ischemic brain injury  
14 secondary to cardiac arrest with resuscitation and a  
15 short survival period."

16 My understanding is that cardiac arrest occurred,  
17 then there's resuscitation, and from the signs that can  
18 be noticed by the pathologist are noted here in the  
19 conclusions.

20 And then can we move on to page 17 of the pdf,  
21 paragraph 3. There's discussion of the PAVA and the CS  
22 sprays and the role that they played, if any. We've  
23 heard evidence they didn't play any role in the death.  
24 But there's mention there of Dr Shearer considering  
25 preexisting cardiac problems which can be worsened, but

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1           there was no postmortem findings to suggest that  
2           Mr Bayoh had a preexisting heart abnormality. Do you  
3           see that?

4           A. I do.

5           Q. And then in the next page, which is page 18 of the PDF,  
6           page 17 of the final report, there's an explanation  
7           here, just very briefly to go through this:

8                     "In terms of the history of restraint here Mr Bayoh  
9           was reportedly face down with his hands cuffed in front  
10          of me. (This is supported by the presence of injury  
11          16). His legs were tied around the knees and ankles and  
12          at least four officers were straining him. Postmortem  
13          examination showed the presence of petechial hemorrhages  
14          within the eyes and whilst these are not specific and  
15          can be seen in someone who has been resuscitated, they  
16          could indicate a degree of asphyxia. In this case,  
17          given the reported circumstances, possible causes of  
18          asphyxia would include positional (the position of the  
19          body interferes with breathing) and mechanical  
20          (something impeding the body's ability to use muscles  
21          for breathing)."

22                     And then Dr Shearer goes on to say:

23                     "Taking everything into consideration, death here  
24          was sudden in nature. In summary, there was no evidence  
25          of gross or histological natural disease that would

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1 account for death. Toxicology revealed MDMA and  
2 alpha-PVP and these drugs could potentially have caused  
3 sudden death at any time due to a fatal cardiac  
4 arrhythmia. That said, it is recognised that restraint  
5 in itself can be a cause or contributing factor in some  
6 deaths and given the circumstances, in that this man was  
7 restrained at the time of his respiratory arrest and  
8 postmortem examination showed petechial hemorrhages,  
9 that may represent a degree of asphyxia. It cannot be  
10 completely excluded that restraint has also had a role  
11 to play in death here."

12 So these are the comments and the conclusions of  
13 Dr Shearer and Dr Bouhaidar. And I appreciate yesterday  
14 you said that you were interested in exploring and  
15 clarifying the possibility of asphyxia, mechanical  
16 asphyxia and positional asphyxia, all of which are  
17 mentioned in this final postmortem report and you wanted  
18 to seek out that clarity and that was one of the reasons  
19 that Dr Lawler was instructed.

20 I'm wondering why you didn't go back to Dr Shearer  
21 and Dr Bouhaidar first of all to clarify and explore  
22 these areas of interest to you rather than seeking out a  
23 further pathologist and, as I said yesterday, there were  
24 a number of forensic pathologists involved in this  
25 investigation, it wasn't just Dr Shearer and

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- 1 Dr Bouhaidar, there was Dr Carey, there was Crane and  
2 then there was Lawler and I'm wondering why you didn't  
3 just go back to Dr Shearer?
- 4 A. I think by the time I was involved, and we talked about  
5 this yesterday, there were a number of reports from  
6 experts with similar qualifications and they didn't all  
7 come to the same conclusions and I wanted really to have  
8 an oversight and a further understanding. I wanted an  
9 expert perhaps, as we talked about yesterday, who was an  
10 expert in asphyxia. Because of his experience with  
11 Hillsborough, I happened a little bit more input to  
12 assist me in how to reconcile the expert reports that I  
13 had.
- 14 Q. And when you say they didn't all come to the same  
15 conclusions, please correct me if I'm wrong, but it's my  
16 understanding that all of the forensic pathologists  
17 agreed on the cause of death?
- 18 A. I think -- I can't remember the details, I haven't gone  
19 over them in detail, the specific reports, but my  
20 recollection is that they might have agreed in the final  
21 conclusions, but the route to get there there were  
22 differing opinions.
- 23 Q. And do you remember what the differences were that were  
24 significant to the crown?
- 25 A. I don't, but the other thing that strikes me as you were

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1 taking me through that document is the circumstances  
2 that the experts -- the pathologists were aware of at  
3 the time was the information that that crown and the  
4 police and the PIRC knew at the time, but of course,  
5 with the further investigation, we knew that Mr Bayoh  
6 was not face down all the time, and that's one of the  
7 things that had concerned me with regard to the initial  
8 description, because the -- the potential for being face  
9 down and being cuffed to the front at the same time  
10 didn't seem to me to be possible and that's one of the  
11 reasons why we really looked at that in detail, as well  
12 as the differing explanations from the various  
13 witnesses.

14 So the factual position had changed, the medical  
15 position there had been a lot of experts and evidence  
16 obtained before I was involved, my view was that they  
17 perhaps weren't exactly the right experts, and I  
18 really -- I had instructed the further specialist  
19 experts, I think we talked about yesterday the  
20 pharmacologist and the bone specialist, and this,  
21 hopefully, Dr Lawler was going to assist us in just  
22 reviewing everything that we had to make sure that I  
23 wasn't misunderstanding anything or that he had any  
24 expert input to give us, he might not have, but that's  
25 what we were looking for. We were looking really to

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- 1           have the fullest understanding that we could.
- 2           Q.   So two things that you have mentioned there in that  
3           answer. You understood that the factual position had  
4           changed. Was it your understanding that the  
5           investigations progressed that more information became  
6           available to the crown about the factual position?
- 7           A.   Exactly.
- 8           Q.   And on that basis did you want to ensure that with each  
9           of the experts at the time they were instructed, at the  
10          time you consulted with them, that the factual position,  
11          as understood at that specific time, would be set out  
12          very clearly for the experts?
- 13          A.   As much as possible, yes.
- 14          Q.   Always on the understanding it could change in the  
15          future if more information came to light?
- 16          A.   And also making sure that they had the necessary  
17          foundation documents as well.
- 18          Q.   Right.
- 19          A.   And I think we talked about yesterday about the  
20          difference stages of an investigation with regard to  
21          what you're looking for at consultation.
- 22          Q.   And we also talked yesterday about where there's maybe a  
23          dispute or disagreement between witnesses as to the true  
24          factual position and what actually happened and where  
25          there is a dispute between different witnesses, was that

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1 something also that you wished to make clear to experts  
2 so they could determine or give an opinion on whether  
3 one version changed their opinions on the mechanism or  
4 the cause of death?

5 A. Unless we could be sure about which witnesses we were  
6 going to accept, so for example if we formed the view  
7 that witness X couldn't possibly have seen act Y,  
8 because of the position they were in or the timing, then  
9 we would have simply discounted -- not necessarily  
10 discounted it, but looked at the evidence that we could  
11 support.

12 Q. Where you had evidence from different eye witnesses,  
13 where they had the capacity to view what was happening,  
14 but it wasn't clear which version was true or accurate  
15 and where that would may be have to be left up to the  
16 jury in a criminal trial, what did the crown do in that  
17 situation, where they could not exclude one of the  
18 versions that was available?

19 A. We just made sure that it was there, it was noted and  
20 that we took into account both versions.

21 Q. And as part of your instruction of the experts, as part  
22 of your consultation with the experts, did you identify  
23 alternative factual hypotheses? I think yesterday you  
24 talked about a factual matrix where there were different  
25 versions.



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1       A. I can't remember. I don't know if you -- which  
2       particular expert you're speaking about. If there was a  
3       concern and an issue that I thought was important for  
4       that expert for the stage of the investigation we were  
5       at, which was considering the crown case at its highest,  
6       then I would have put that to the expert or discussed it  
7       with the expert.

8       Q. But at the very least I think yesterday you said you  
9       liked to have a core crown theory where you put the  
10      crown case at its highest. I think yesterday you  
11      described it as "the most prejudicial version of the  
12      facts". You would want that to be considered by each  
13      expert.

14     A. So, for example, I think a good example of what you're  
15     just asking about is the consultation or certainly the  
16     discussions even prior to my consultation with the OST  
17     expert was the potential for one witness describing a  
18     pileup on top of Mr Bayoh, so, yes, that is the crown  
19     case, that would potentially be the crown case at its  
20     highest, and something that we want to explore with the  
21     expert and I do remember particularly his answer to  
22     that.

23     Q. So one example, a witness has given a statement  
24     available to the crown describing a pileup and that  
25     would be something that would be discussed with the

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- 1 expert so that they could give an opinion --
- 2 A. Yes.
- 3 Q. -- on whether that was important or changed their views?
- 4 A. Yes.
- 5 Q. There may be alternative evidence available to the crown  
6 which does not suggest anything other than a perfectly  
7 normal non-pileup situation and that's something that  
8 you would use to contrast with the expert.
- 9 A. Yes. I'm pausing because my recollection is that the  
10 discussion that I had with the expert was particularly  
11 that crown evidence at its highest, the expert will have  
12 had all the other statements and the timeline and the  
13 letter of instruction.
- 14 Q. So if nothing else, you put the crown theory, the crown  
15 position at its highest and that is discussed with the  
16 expert?
- 17 A. Yes, if I think it needs clarified on top of the report.
- 18 Q. Thank you. Now, my understanding is, and I think in his  
19 report Dr Lawler said he had no criticisms of either the  
20 methodology or the approach adopted by Dr Shearer and  
21 Dr Bouhaidar, and I would like to go back to his report  
22 and was that your understanding that he did not  
23 criticise the methodology or the approach taken by the  
24 two pathologists who conducted the postmortem?
- 25 A. That's my recollection. In fact, my recollection is

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1           that there wasn't really any issue about the original  
2           postmortem. There was no real criticisms of it at all.

3           Q. By any of the experts?

4           A. No, even in the not finding the rib fracture that was --  
5           initially, that was considered perfectly acceptable,  
6           because it was a difficult fracture to find.

7           Q. And, in fact, was only found after a proper scan or  
8           body -- full body scan?

9           A. A CT scan I think and I think that's also normal in  
10          these types of situations as well.

11          Q. Thank you. Could we go back to Dr Lawler's first  
12          report, which was May 2017, COPFS 00333, and we see here  
13          it's 22 May 2017. This is the first report prepared in  
14          response to the letter of instruction that we looked at  
15          yesterday, which asked them to review the methodology of  
16          the other reports, and we'll see it's addressed to  
17          Mr MacLeod and we have heard evidence that the letter of  
18          instruction were prepared by Mr MacLeod and Dr Lawler  
19          responded by sending his report to Mr MacLeod.

20                 Did you have a hand in reviewing the letter of  
21          instruction that went to Dr Lawler?

22          A. I can't remember. I can't remember. I have seen  
23          correspondence where I have had the opportunity to  
24          review Martin Graves' letter of instruction, but at this  
25          stage in May of 2017 I don't know if that's something

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1           that I was involved in.

2           Q. All right. Thank you. So if you could look first of  
3           all -- I only want to look at certain sections of this.  
4           This is a lengthy report. Could we look first of all at  
5           pages 11 of 26 and this relates to a Dr Lipsedge whose  
6           name you recall?

7           A. I can recall him, but I do not recall the speciality.

8           Q. Right. Well, the first line here on page 11 says:

9                         "Dr Lipsedge is an emeritus consultant psychiatrist  
10           and he addresses the deceased's mental state."

11          A. And I don't remember whether this doctor was instructed  
12          before or after I became the Allocated Depute. I  
13          suspect before.

14          Q. He was instructed after.

15                         Dr Lipsedge is a consultant psychiatrist. Now, I --  
16          then we can look at page 12 and I would like to look at  
17          the -- there's comments, I don't want to look at those  
18          in any detail, but we see at the comments section:

19                         "This expert confirms what I, as an acknowledged  
20          nonexpert in this field, had concluded."

21                         The conclusions don't matter for my purposes. I'm  
22          interested in the fact that Dr Lawler has stipulated  
23          here that he is a non-expert in the field, he is not a  
24          consultant psychiatrist himself, he was a forensic  
25          psychologist and Dr Lipsedge was a psychiatrist.

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1 I asked James Wolffe, the former Lord Advocate,  
2 about this passage in the report from Dr Lawler and I  
3 asked him for any comments that he had in relation to a  
4 forensic pathologist, such as Dr Lawler, being asked to  
5 comment on the methodology and approach of a consultant  
6 psychiatrist and I noted and it's noted in the  
7 transcript that he was smiling and he said:

8 "Well, simply as a matter of the law of evidence an  
9 expert is qualified only to speak to areas in which the  
10 expert has expertise and to the extent that a witness  
11 offers opinion evidence on matters where they don't have  
12 expertise, that evidence is not of any evidential value  
13 or it's not evidence I suppose."

14 And I asked:

15 "If it's not of any evidential value [I said] in  
16 fact, is it admissible?"

17 And he said, "no".

18 I'm interested in your comments about why Dr Lawler  
19 was instructed to consider the methodology and the  
20 approach and the conclusions of a consultant  
21 psychiatrist when he himself recognises he is not an  
22 expert in that field?

23 A. I think the process that we had anticipated Dr Lawler  
24 would go through would be to essentially what I talked  
25 about yesterday is my understanding of what a

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1 pathologist does post the autopsy and comes to a final  
2 report, which is taking into account all the  
3 information, including the factual circumstances. In  
4 fact, you took me to it earlier the final conclusions in  
5 the pathologist's report, so I think we had understood  
6 that -- we had asked Dr Lawler to go through that kind  
7 of process.

8 It was not necessarily that this evidence, this  
9 particular part of the evidence, was going to be  
10 admissible in court. It was to assist us in the  
11 investigation. It may well be that he came to the  
12 comment section and said "I can say nothing about this"  
13 and that would be fine. The words used, "methodology  
14 and approach", I'm not sure those were words that I  
15 would particularly want to take out in his instructions.  
16 I just wanted to make sure that he had that report.  
17 This is the information we having gathered, is it of  
18 advance to your job, to what you're going to tell us?  
19 If it's not, then simply -- I would expect him simply to  
20 put it to one side and say "I have no comments to make",  
21 but that was the purpose of that exercise and it was  
22 really the fact that we had lots and lots of reports and  
23 we were looking for assistance in two ways, assistance  
24 with regard to asphyxia and also just making sense of  
25 everything that we had.

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1 Q. Before he was instructed, sent the copy of the  
2 consultant psychiatrist's report and specifically  
3 requested and instructed to consider the methodology and  
4 approach adopted and specifically whether or to what  
5 extent he agreed with the conclusions and findings of  
6 the others who had been instructed, I appreciate you're  
7 explaining the approach that was taken, but I'm  
8 wondering about the merit and the value of that approach  
9 to the crown, given he had no qualifications in  
10 psychiatry, no experience in psychiatry, and really, no  
11 practice in that sense at all, and I'm just wondering  
12 what the value and the merit of this exercise was?

13 A. I think I've already explained that. I thought that  
14 there would be value, if their -- if the expert -- we  
15 gave the expert Dr Lawler report which he felt he  
16 couldn't comment on at all and had no value with regard  
17 to his consideration of the questions that we were  
18 asking, then we would expect him to say "I just can't  
19 comment" and that would have been perfectly acceptable.

20 Again, this particular process wasn't specifically  
21 looking at an expert that we could lead necessarily in  
22 court or it might be an expert that we could lead on a  
23 particular point, but not necessarily this whole  
24 process.

25 Q. So you envisaged that he may just simply say "I can't --

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1 I've read the report, I've considered the report, but  
2 I can't add anything helpful"?

3 A. Absolutely, and that would be perfectly acceptable and  
4 perfectly proper.

5 Q. Did you not anticipate that he might say that before you  
6 even instructed him?

7 A. I can't remember how closely I was involved in the  
8 instruction letter, whether I knew what he was being  
9 given, but certainly what I have told you is in my head  
10 what I expected Dr Lawler to be able to do, but the nuts  
11 and bolts of what he was being asked to do and how we  
12 would go about it, I left that, as far as I can recall,  
13 to the team and to Dr Lawler himself. He may have come  
14 back to us and said "I can't help you at all" and  
15 that's, again, perfectly acceptable and I think a  
16 response that throughout my career we've had from many  
17 experts.

18 Q. All right. Can we move on to page 4 of 6, please, and  
19 this is Professor Michael Eddleston who's mentioned.  
20 Oh, sorry, I think I have actually accidentally missed a  
21 page of my notes.

22 Can we turn to page 14 of 26, please, and this  
23 relates Dr Bleetman. There we are. Dr Anthony Bleetman  
24 is a consultant in emergency medicine and if we look at  
25 the comments section I think you'll see that -- here we



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1 are -- again, same position as before, Dr Lawler says:

2 "Dr Bleetman provides what I as a nonexpert consider  
3 to be a good review of the entity"

4 And he goes to know on to make a number of comments  
5 about the report and my question is same. Why instruct  
6 Dr Lawler to review the report of Dr Bleetman and  
7 provide comment on an area where he's clearly not an  
8 expert, he has no qualifications, no experience?

9 A. And my answer is the same.

10 Q. The same. And then can we look at pages 23 and 24 of 26  
11 and I'm interested in Professor Freemont. Now,  
12 Dr Lawler is a forensic pathologist, professor Freemont  
13 is an osteoarticular pathologist, so they're both  
14 pathologists, but as we understand it Professor Freemont  
15 has a specialism. We talked about it yesterday. The  
16 Home Office asked him to train up another osteoarticular  
17 pathologist and that relates to bones and this was  
18 particularly in relation to the fractured rib, the  
19 timing and the mechanism and the use of force that may  
20 be applied.

21 And looking at this now, were you satisfied that as  
22 a forensic pathologist Dr Lawler was in a position to  
23 comment on the methodology and approach and the  
24 conclusions of Professor Freemont?

25 A. I think as I said earlier, I was personally was more

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1 interested in the conclusions and how that would affect  
2 any view that Dr Lawler had. I can't think that I would  
3 be expecting Dr Lawler to critique the professor's  
4 methodology, so I wasn't expecting that, and I would  
5 probably expect Dr Lawler simply to say "I don't  
6 disagree with any of that. If that's his conclusions,  
7 he is the expert". If it had changed any view that he  
8 was coming to, then that's what I would expect him to  
9 say.

10 Q. Did you expect Dr Lawler to provide some information  
11 about the qualifications which he had which may allow  
12 him to comment on Professor Freemont's evidence?

13 A. No, because of the answer I have just said, I wasn't  
14 really expecting him to critique the evidence of  
15 Dr Freemont. It was for him to look at the conclusions  
16 and tell us if that changed any view that he had.

17 Q. All right. So although Dr Lawler was instructed to  
18 consider the methodology and the approach taken and to  
19 tell you whether he agreed with the conclusions or the  
20 findings, that wasn't really what you were expecting  
21 from Dr Lawler?

22 A. I think -- not with regard to this particular expert and  
23 it may well be that there was just one -- I'm sure one  
24 letter of instruction which covered all the experts and  
25 it might be that some experts that we did want them to

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1 comment on the methodology.

2 Q. And if there were nuances, were those things that you  
3 would explore at consultation then?

4 A. I might do if that's something that was important for my  
5 final thinking, I remember that along with Les Brown I  
6 did consult with Dr Lawler and we went down to visit  
7 him. I remember the journey, because it was quite a  
8 difficult journey. There was lots of trains to get  
9 there. I don't remember the consultation being  
10 particularly long. I remember us going through his  
11 report and then focusing in on the asphyxial aspects,  
12 which I was interested in.

13 Q. Thank you. Could we look at a supplementary report that  
14 Dr Lawler prepared, which is COPFS 00034, and you'll see  
15 this is again addressed to Mr MacLeod dated 13 August  
16 2017. I would like to ask you about two specific  
17 entries. The first is on page 2. This relates to  
18 Professor Freemont. You'll see there he's asked to look  
19 at him again. Can we look at page 2, please:

20 "Although I readily accept that I am not a  
21 specialised osteoarticular pathologist, I do have a  
22 career background of diagnostic histopathology, albeit a  
23 long time ago!"

24 And I asked James Wolffe about this approach to  
25 Dr Lawler and asked him about the fact that Dr Lawler

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1           acknowledged he wasn't a specialist in the field,  
2           although he did have some background, and James Wolffe  
3           said -- I asked him if he expected that would be  
4           explored in some detail in relation to the value of any  
5           comments Dr Lawler made in relation to  
6           Professor Freemont and James Wolffe indicated, yes, he  
7           thought that that was something that would be explored  
8           with Dr Lawler to assess the weight really or the value  
9           to the crown of his views on Professor Freemont's  
10          report.

11                    Is that something that you did with Dr Lawler?

12          A.   As I have explained, at this stage we weren't looking at  
13                particularly admissibility of the evidence about all the  
14                other reports from Dr Lawler, so we weren't looking at  
15                admissibility in court. We were looking at assistance  
16                that he could give us. As I understand what he's saying  
17                there is he's simply saying that the very technical  
18                evidence that Dr Freemont was able to give, that he was  
19                able to understand what he was talking about, he was  
20                able to tell us that the PowerPoint was very helpful,  
21                I remember the PowerPoint, and really that's as much as  
22                I -- I was happy with that at this stage.

23                    If it got to a further stage and we were initiating  
24                proceedings and I was going to use Dr Lawler as an  
25                expert, what I would normally do is go through a trial

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1 and take all the source evidence, so all the original  
2 experts that I wanted to lead, and then finally, if  
3 there was anything that I required clarification from  
4 the reviewing expert, then I would call that reviewing  
5 expert, but at the end of the day, if I called all the  
6 source evidence that I needed, I wouldn't necessarily  
7 call this witness at the end.

8 Q. I don't really want to ask you about admissibility,  
9 because I appreciate this wasn't at the stage that you  
10 were going into trial.

11 A. No, but I think you put to me earlier about  
12 James Wolffe's comments.

13 Q. Yes.

14 A. And that was his answer.

15 Q. I did, but James Wolffe was saying, yes. I talked about  
16 admissibility earlier, but let me just tell you what I  
17 said in relation to James Wolffe, because I'm quoting  
18 from his evidence.

19 We pointed out that Dr Lawler was not a specialist  
20 in the field, but he does say he has some background of  
21 diagnostic histopathology, albeit a long time ago and I  
22 asked James Wolffe:

23 "Is that something that you would have expected  
24 would be explored in some detail in relation to the  
25 value of any comments Dr Lawler makes in relation to

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1 Professor Freemont?"

2 I wasn't asking him about admissibility. I was  
3 asking about the value of comments and the opinion  
4 evidence that Dr Lawler was giving. And he agreed, yes,  
5 he would have expected that that would be explored. So  
6 the question I'm asking you is: If we think not about  
7 admissibility on this indication but in relation to the  
8 value of the assistance you can get from Dr Lawler, so  
9 the quality of that assistance, in relation to  
10 Professor Freemont, did you explore in detail this  
11 comment that he was not a specialist, he's not a  
12 specialist osteoarticular pathologist, but he did have a  
13 career background of diagnostic histopathology, albeit a  
14 long time ago?

15 So did you ask questions along the lines of how long  
16 ago, what was your experience at the time, has it  
17 affected your ability comment because you have not been  
18 involved for many years? Did you ask and explore the  
19 questions of his qualifications and his experience in  
20 relation to osteoarticular pathologists and the views of  
21 Professor Freemont?

22 A. I don't think so and the reason for that is, if he had  
23 disagreed with Professor Freemont, then I would want to  
24 explore that, but he was agreeing with  
25 Professor Freemont and I had no issues with that.

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1 Q. Did you instruct the precognoscer or anyone in the team  
2 to explore with Dr Lawler his qualifications and  
3 experience and consider whether he was suitably  
4 qualified and in a position to comment in any way on  
5 Professor Freemont's views?

6 A. I think his qualifications and experience -- excuse  
7 me -- were extensively explored before he was  
8 instructed. With regards specifically to the  
9 osteoarticular pathology, I'm not sure, because I don't  
10 recall when Professor Freemont's report was obtained,  
11 whether it was prior or after we had instructed  
12 Dr Lawler.

13 Q. My understanding is that Dr Lawler was instructed as a  
14 reviewing pathologist and we talked yesterday about  
15 Les Brown saying it may have been a Lord Advocate who  
16 had introduced the idea of a reviewing pathologist and I  
17 think yesterday you spoke about having gone down that  
18 approach --

19 A. Yes, it's not a --

20 Q. -- before.

21 A. -- an approach that's alien to me. It is one that I  
22 have used with a pediatric consultant.

23 Q. Were you involved -- sorry I can't really your evidence  
24 yesterday -- were you involved in the identification of  
25 Dr Lawler?

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1 A. I don't think so, but I wasn't involved in the legwork  
2 of the identification of any of the experts, unless it's  
3 someone that I knew from my own experience, so I did  
4 have experience with Professor Freemont and so I was  
5 able to identify him although --

6 Q. Thank you.

7 A. -- I suspect I didn't remember his name.

8 Q. Right. And in terms of the, if I can use the phrase,  
9 "due diligence" or the research and the checking in  
10 terms of qualifications, experience, expertise,  
11 specialisms, any of that, who was -- were you expecting  
12 to carry out that work?

13 A. The case preparation team, and I know that they were  
14 doing that because I was getting reports about, from  
15 recollection, CVs or people that potentially they might  
16 have identified, not necessarily for the -- for the job  
17 that we wanted Dr Lawler to do, but throughout the case.

18 Q. So were you always provided with some detailed  
19 information about the qualifications or experience of  
20 every expert?

21 A. Not always, no.

22 Q. In relation to Dr Lawler?

23 A. I can't remember. I suspect I did see his CV. I knew  
24 about his experience in the Home Office and I knew about  
25 Hillsborough and I knew about his particular expertise



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- 1           in that area.
- 2           Q. And was it your practice in a consultation to explore  
3           areas such as qualifications and experience, insofar as  
4           they may be relevant?
- 5           A. Sometimes if it was relevant, but in the sage of this  
6           investigation, no, that wasn't something I would want to  
7           do at consultation. That might have been an earlier  
8           stage in the preparation of the precognition, but the  
9           consultations for my purpose, for me, had a specific  
10          purpose and that was to expand my knowledge and make  
11          sure that I had a full understanding of all the expert  
12          evidence and how it fitted into the factual matrix.
- 13          Q. So in a situation where an expert, Dr Lawler on this  
14          indication, specifies in a report that he's not a  
15          specialist and his background in the area was a long  
16          time ago, is that something that you considered merited  
17          further investigation, either by the precognoscer or the  
18          team or by you yourself?
- 19          A. No, it just -- at that stage, it just meant that I was  
20          satisfied that he acknowledged he wasn't an expert. If  
21          he had any particular views with regard to how it  
22          affected any of his final conclusions, then I would take  
23          that on board, but it just meant that I was able to deal  
24          with the information that he put in that particular part  
25          of his report appropriately.

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1 Q. So you didn't discuss any of this with Dr Lawler at  
2 consultation?

3 A. I don't think so.

4 Q. And on page 4, please, if we move on to  
5 Professor Eddleston, he is a consultant clinical  
6 toxicologist, and he was being asked about the possible  
7 effect of drugs and then on page 5, Dr Lawler says:

8 "Professor Eddleston's area of expertise is  
9 significantly different from mine."

10 But he found his report "very interesting".

11 And, again, I asked James Wolffe about this and  
12 asked if he had any concerns. Given the area of  
13 expertise of Professor Eddleston was significantly  
14 different from Dr Lawler, I asked Mr Wolffe if he had  
15 any concerns about the value of any comments he could  
16 give regarding the methodology or the opinions of  
17 Professor Eddleston and Mr Wolffe said:

18 "He clearly can't give expert evidence in area of  
19 expertise that is not his own area of expertise, whether  
20 as a skilled scientist or medical scientist."

21 So again, is your position in relation to that the  
22 same as you have already described?

23 A. It is, although here toxicology is something that  
24 pathologists, I'm sure they told you, are well used to  
25 reviewing before they produced their final report with

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1 the final cause of death so here that's more closely  
2 replicating the process he would go through in a  
3 pathology report and I think his final paragraph in that  
4 supplementary report really supports what I have been  
5 saying to you this morning is that I was looking to make  
6 sure that nothing that we had would change the views  
7 that he was giving us in the areas that he could -- that  
8 his speciality was in and there is confirmed in the  
9 final paragraph.

10 Q. So really rather than asking Dr Lawler to look at the  
11 methodology and the approach and to tell you whether he  
12 agreed with the conclusions findings of others, which  
13 was what the wording of the letter of instruction was,  
14 rather than that, you were actually just saying is there  
15 anything in here that makes you change your mind?

16 A. Yes, although from recollection there might have been  
17 areas where I was concerned about the qualifications of  
18 an expert or the validity of the conclusions and it may  
19 be that I was -- that we were looking for that as a --  
20 in those particular case.

21 So it may be that the letter of instruction was too  
22 general with regard to the individual experts, but also,  
23 if I had really thought about it, that might have been  
24 an approach that we wanted to give a broadbrush  
25 approach, because we might not have wanted to point

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1 particularly at individual reports. We wanted his  
2 conclusions, not ours.

3 Q. When you say "if I had really thought about it", what do  
4 you mean?

5 A. Well, as I'm telling you now, you're asking me those  
6 questions and I'm saying, well, maybe we could have  
7 separated it out, but as I'm telling you that I am  
8 thinking, well, actually maybe we shouldn't have  
9 separated it out, maybe there's a good argument for not  
10 separating it out.

11 Q. Right. Let's look at -- maybe we don't need to look at  
12 it, we looked at it earlier, the conclusion on cause of  
13 death, and I think that, as I understand it, there was  
14 no -- I think I have already asked you about this  
15 actually. I'll move on from this.

16 Can we move on to another expert. One last thing.  
17 We've heard evidence about the time it took for  
18 Dr Lawler to be instructed on a number of occasions and  
19 to come back and give reports and, obviously, you  
20 consulted with him.

21 You talked yesterday about time pressures and  
22 wanting to have things reach a conclusion because a  
23 considerable period of time had already passed. Did you  
24 consider those time pressures when you asked Dr Lawler  
25 to embark on the exercise that he was instructed to do?

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1       A. Time pressures were always -- was always in my mind.  
2       Obviously, we wanted the process that we were going  
3       through and any subsequent process to be Article 2  
4       compliant and so there was a pressure of getting things  
5       done as quickly and efficiently as possible, but while  
6       making sure that we followed all leads and did as much  
7       investigation as we felt was necessary.

8                You asked me earlier why we didn't just stop the  
9       original pathologist and go back to them and consult  
10      with them, why I didn't instruct that, I can't remember  
11      whether that had already been done, but by the time I  
12      became involved, there were a range of experts from the  
13      same specialist speciality, as I recall, and so we had  
14      really gone past that stage and by the time we had gone  
15      past that stage, it was really important to bottom  
16      everything out that we had.

17     Q. All right. Can I move on to ask you some questions  
18     about an expert called Dr Karch?

19     A. You can.

20     Q. And we've heard evidence -- you may have heard other  
21     give evidence about Dr Karch. He was instructed by  
22     PIRC, so prior to your involvement in the matter, and  
23     his report -- his first report came in on 10 September  
24     2015 and I understand, and you can perhaps confirm, that  
25     this was one of the expert reports that you had

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1 available to you. You talked yesterday about being  
2 given the PIRC report, interim and final, and some  
3 expert reports.

4 Now, Dr Karch's report had been prepared by the time  
5 you came on board as the Allocated AD. Was that one of  
6 the reports that you were seeing?

7 A. I think so. There is an email from Les Brown and he is  
8 sending me very early on after I was instructed the  
9 range of reports. I remember there were -- I've looked  
10 at it recently, but I can't remember which ones there  
11 were, but there were four attachments and I'm sure you  
12 have that email.

13 Q. We know there were two expert reports prepared by  
14 Dr Karch in relation to separate letters of instruction,  
15 one from August, one from September, but his two reports  
16 are both dated 10 September.

17 A. Okay, I don't remember two reports, but that's not to  
18 say that there weren't two reports.

19 Q. Right. And we have also heard about an expert called  
20 Payne-James that had been instructed at an early stage  
21 as well. Was that one of the other reports that you  
22 had?

23 A. I think so.

24 Q. We've heard evidence --

25 A. And I think I might have had a report from Nat Carey as

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1 well.

2 Q. All right, Thank you.

3 A. And Mary Sheppard now that I'm thinking about it, so  
4 that would be the four.

5 Q. I see, Thank you.

6 A. I think.

7 Q. We've heard evidence from Stephen McGowan and he talked  
8 about a meeting with the family and, again, this took  
9 place prior to your involvement on 26 August 2015 where  
10 the family, through their solicitor, expressed concerns  
11 about the instruction of Dr Karch and those concerns  
12 were also expressed by Deborah Coles, who is a director  
13 of Inquest, and Stephen McGowan gave evidence to the  
14 Inquiry that after that meeting there had been some  
15 research done, further research done by the crown, on  
16 Dr Karch and he looked at two things. He described his  
17 notebooks where he had noted concerns about Dr Karch,  
18 where he's instructed in defence of police in the United  
19 States. He noted that Dr Carey also had serious  
20 concerns and he was described and noted by McGowan as a  
21 proponent of excited delirium. He sat on a panel in the  
22 US who excluded restraint techniques and positional  
23 asphyxiation and there were various issues about  
24 Dr Karch and his position on excited delirium and he  
25 noted Deborah Coles' concerns and in evidence he said:

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1           "When we looked at Dr Karch in more detail, it did  
2           seem that his research was funded entirely by US  
3           military and law enforcement."

4           And there was also a concern and an element was in  
5           relation to what the crown had been told about his  
6           advocacy, as he described it, for excited delirium, and  
7           there seemed to be, as he put it, a lack of  
8           independence.

9           Now, were you aware of any of that in relation to  
10          Stephen McGowan and the meeting with the family and the  
11          concerns that had been expressed by Dr Karch -- in  
12          relation to Dr Karch?

13         A.   When the Rule 8 request came in and I prepared my  
14          statement, as I already indicated, I didn't have papers  
15          available to me and I had no memory of that. I do  
16          remember Dr Karch being an outrider or an outlier and  
17          that his opinions didn't fit with anyone else. I -- now  
18          that I have thought about it, I do remember there being  
19          issues with Dr Karch. I'm not sure I knew as much  
20          details as you have just given me.

21         Q.   You have watched the evidence of Les Brown I think you  
22          said?

23         A.   I have watched the evidence of Les Brown and I have  
24          watched some of the evidence of Stephen McGowan as well  
25          and Lindsey Miller, so I am aware of you asking those



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1 questions.

2 Q. You'll be aware of the background and you'll have heard  
3 me ask questions of the article in the Scottish Sun on  
4 Sunday on 1 November 2015, again before you were  
5 involved, where Dr Karch was quoted in relation to  
6 comments about heart disease and steroids.

7 And then we've also heard, and you will have  
8 listened to the comments by Les Brown in evidence, about  
9 the Lord Advocate at the time, who was Frank Mulholland  
10 then, who had understood Dr Karch to be a forensic  
11 pathologist and expert in cardiac pathology, but who  
12 expressed reservations, if I can put it in that way,  
13 about Dr Karch and in his Inquiry statement  
14 Lord Mulholland said:

15 "An expert witness will provide independent  
16 assistance to the court by way of objective unbiased  
17 opinion in relation to matters within his expertise.  
18 His interview to a newspaper was inconsistent with his  
19 duties as an independent expert."

20 And in relation to Dr Lawler, come back to that for  
21 a moment, and this -- he had been sent the Karch report.  
22 He was sent that in 2017, so not quite two years after  
23 the article by the comments by the Lord Advocate, and he  
24 was asked to comment on that and review the methodology  
25 and such like and Dr Lawler in his report describes his

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1 understanding of Dr Karch as a forensic pathologist  
2 based in America.

3 You were allocated in August 2016. At that time,  
4 were you aware of the history with Dr Karch?

5 A. I don't think in that detail. I was aware that there  
6 was an issue. I was aware that his medical opinion had  
7 to be looked at with caution, but as part of the case  
8 papers it was still a report that was there that we had  
9 obtained. If there was going to be any subsequent trial  
10 it, had to be dealt with, it would have to have been  
11 disclosed, and so I required to understand the report  
12 and understand where it had weaknesses. Because I was  
13 considering it at that stage, doesn't mean I was going  
14 to rely on it. It may well be -- in fact it was simply  
15 that I was looking to find out how I would deal with  
16 this expert's report.

17 Q. And if we look at your statement at paragraphs 22 and  
18 53 -- sorry, I have not got a note of that. It's  
19 SBPI 00445, and if we look at 22 first of all and you  
20 said at the time you prepared this response to the  
21 Inquiry team, this is before you had the papers, before  
22 you had heard -- listened to the evidence of Les Brown,  
23 you say you weren't aware of any issues relating to  
24 Dr Karch as you recall.

25 And then paragraph 53:

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1 "I have no recollection of the issues referred to."

2 And again this relates to -- sorry, I can't see  
3 that. Leave that aside for a moment.

4 A. 53 is about consultations I think.

5 Q. Would you have expected there to be something in the  
6 papers you were sent explaining the background of  
7 Dr Karch and would that have been helpful to you to know  
8 from the very beginning?

9 A. I think it would have been helpful to know from the very  
10 beginning the full extent of the issues. I think now  
11 looking back, as I went through the process, I was aware  
12 of that Dr Karch was an outlier, that his opinion was  
13 not in line with the other opinions that we had, that he  
14 might be giving opinions that he was not qualified to  
15 give. I don't recall if I knew about the content of the  
16 article in the newspaper in the particular issues  
17 surrounding the independence, but, yes, it might have  
18 been helpful to have it in writing when the report was  
19 forwarded to me, but I don't think it would have changed  
20 how I approached it because I would still have analysed  
21 it myself.

22 Obviously, if the Lord Advocate had of the time had  
23 indicated that he had concerns about that report, then  
24 I would take that on board, but I would also take on  
25 board the fact that at the time those comments were made

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1           it was at a very early stage of the investigation, that  
2           by the time I was coming to my Crown Counsel's  
3           instructions, I had look at more information and so  
4           although I would have taken those viewpoints on board,  
5           I would have still looked at myself independently.

6           Having gone back to the actual report which from the  
7           precognition I see that I have put comments in it,  
8           I don't know at what time I have added those, but  
9           certainly in parts of the conclusions I have made my own  
10          annotations in the actual report.

11         Q. Right. Can I ask you to look at, and you will already  
12         be aware of this from the evidence of Les Brown, can I  
13         ask you to look at COPFS 04881 and this is an email  
14         chain between you and Les Brown which we asked Les Brown  
15         about during the evidence. Can we go to -- often we  
16         have to go to the bottom of these to see them in  
17         chronological order. So this was originally an email  
18         from Fiona Carnan about an OST expert and then if we  
19         move up and that was sent to Les Brown and others and  
20         then you have responded to that again about the OST  
21         expert. If we can move up again, please.

22         A. I think perhaps that explains the approach that you had  
23         asked me about with regard to another expert is the --  
24         we're making sure that the experts have the full  
25         information.

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1 Q. Thank you. And then we can move up. And then you see  
2 there's an email from Les Brown on 19 January 2018, and  
3 he said responding to you:

4 "Many thanks, Ashley. I have copied others into the  
5 chain here."

6 And he talks about a document:

7 "I suggest that we remove all reference to Dr Karch  
8 on the basis that the previous LA indicated to  
9 Amar Anwar that we would not be relying on him  
10 following his comments to a newspaper. In respect of  
11 the 'officer down' comment I suggest... "

12 And he goes on to mention another matter. Your  
13 response to that --

14 A. And can I just highlight that that's in the January of  
15 2018, so this is at the time we have nearly got the  
16 final precognition and I am already thinking about  
17 consultations with experts.

18 Q. Yes.

19 A. And coming to my final CCI.

20 Q. He's saying there:

21 "I suggest we remove all reference to Dr Karch."

22 And then let's look at your response first of all  
23 and this is on the same day you reply to Les Brown:

24 "I agree. In any event, his histological analysis  
25 of the heart muscle is at odds with the rest of the

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1 experts and calls into question his reliability on other  
2 matters."

3 So it appears that Les Brown had drawn this to your  
4 attention in the January of 2018, if not before, and if  
5 we can go back down to his email, he says:

6 "I suggest we remove all reference to Dr Karch."

7 And mentions Lord Advocate's views. From what was  
8 he suggesting removing all reference to Dr Karch?

9 A. My -- if we're talking about the -- I thought actually  
10 at this point we were talking about the letter to  
11 Dr Lawler and we're not, we're talking about the OST  
12 expert. So my recollection was that Dr Karch's report  
13 went to Dr Lawler.

14 Q. Yes.

15 A. But here Les is recommending that we don't put in  
16 Dr Karch's report to the OST expert and I agreed with  
17 that, because he's not a medical expert so he really  
18 would have no value and it would just confuse matters.

19 Q. So Martin Graves is not a medical expert and it wouldn't  
20 be appropriate to send him a medical report from  
21 Dr Karch, because any comments Martin Graves had in  
22 relation to medical matters would be of no value to the  
23 crown?

24 A. And might simply muddy the waters, it might give us a  
25 skewed view and it wasn't part of the, if you like, by

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1           that stage the crown theory. It was something --  
2           Dr Karch's report required to be dealt with properly and  
3           properly analysed, but with regard to the actual actus  
4           reus which was important for the OST expert, then his  
5           report was not of value.

6           Q. Thank you. And when we asked Les Brown about Dr Karch  
7           and his report, he said:

8                     "We had a situation whereby Dr Karch was expressing  
9           an opinion that it was entirely at odds with every other  
10          opinion that had been expressed. So to that extent I  
11          consider that is partly why I expressed my view that I  
12          think it's highly unlikely that Crown Counsel would have  
13          placed any reliance on the evidence of the opinion of  
14          Dr Karch."

15          And subject your comments about requiring to deal  
16          with that report, would you agree with Les Brown's  
17          evidence?

18          A. Yes, I had already come to my own view with regard to  
19          that particular opinion by that particular expert and  
20          how it fitted with the rest of the medical evidence.

21          Q. Thank you. Can we look at your statement, first of all,  
22          paragraph 21, and here you comment on reading one of  
23          your notebooks, so this was in your initial statement,  
24          your response to the Inquiry, so you had -- you had  
25          access to some paperwork at that stage?

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1       A. The Inquiry sent me documents. So the Inquiry sent me  
2       documents which I think they had understood -- they had  
3       understood were relevant to the questions that were  
4       being asked and it was only those documents that I used.

5       Q. Right. And one of those was -- or you had a number of  
6       notebooks made available to you at that time from  
7       the Inquiry?

8       A. No, I just had the copies, so I just had the pages,  
9       I didn't have the full notebooks, I just had -- and  
10      sometimes not even the full page, just a paragraph or  
11      sometimes just a line.

12     Q. And that would be entries that related specifically to  
13      the Sheku Bayoh investigation?

14     A. Entries that related specifically to the questions that  
15      were being asked, so I wasn't able to see the entries  
16      that were round about it or give them context.

17     Q. Okay. And you have talked about looking at page  
18      numbers, you talk about seeing a to-do list:

19                "From the expert reports it can be seen that  
20      Dr Karch has a contrary view to all the other  
21      cardiovascular experts and this can be seen from item  
22      number 10 where I have been asked that Dr Lawler be  
23      asked about Dr Karch's findings and this was a process  
24      that we went through with all the other relevant  
25      experts."



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1           So you say item number 10:

2           "I have asked that Dr Lawler be asked about  
3           Dr Karch's findings."

4           And again, was this with a purpose and with a view  
5           to exploring Dr Karch's opinion in case it had to be  
6           responded to by some sort of -- at some sort of trial?

7           A. Yes.

8           Q. So this was specifically trial preparation in effect?

9           A. It was not trial preparation, it was investigating all  
10          potential contrary views, everything that might be an  
11          issue with regard to me making that decision on  
12          criminality.

13          Q. And did you feel that Dr Lawler was the right expert to  
14          ask about Dr Karch's opinions and views?

15          A. He was the expert that we were instructed for that whole  
16          process and you'll see that I'm asking about the  
17          conclusions of Dr Karch and, again, if Dr Lawler in his  
18          expertise with his qualifications felt he couldn't  
19          answer that question, then the answer is "I can't answer  
20          it" and that, again, is fine.

21          Q. Did you feel that you had a clear picture in your mind  
22          at that time as to what qualifications and expertise  
23          Dr Karch had?

24          A. I can't remember, because I can't tell you what time  
25          that was or because we don't know the date on the

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- 1 notebook and in fact it may not even have a date, so  
2 I don't know.
- 3 Q. Right.
- 4 A. I don't know whether this was made at the beginning of a  
5 process. It's certainly after Dr Lawler has been  
6 instructed, but I can't remember when in the process  
7 Dr Lawler was instructed.
- 8 Q. And during your consultation with Dr Lawler, do you  
9 remember exploring in any detail the issues with  
10 Dr Karch or discussing with him those matters as part of  
11 this process of reviewing the value of Dr Karch's  
12 opinions and issues with his report?
- 13 A. That might have been something I asked about because,  
14 obviously, this was an area of concern. I can't  
15 remember, but that may well be of something that I would  
16 have asked.
- 17 Q. All right. There's certainly mention in the  
18 consultation notes of Dr Karch. At the end, Dr Lawler  
19 was asked whether his views and opinions would alter if  
20 the reports by Dr Karch were discounted. That's the  
21 mention of Dr Karch. Was that part of a wider  
22 discussion by you at the time?
- 23 A. I suspect it will be. Those notes obviously weren't  
24 kept by me and there will be a summary of the points  
25 that we discussed. It won't be the full conversation.

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1 Q. Thank you. Can we move on to look at another matter.  
2 So in 2018, you've described how at some point you  
3 received the crown precognition in the early part of  
4 that year and the Inquiry has information and evidence  
5 available that in the May of 2018, Professor David Rees  
6 and Dr Elizabeth Soilleux were instructed and they were  
7 histopathologists and, in addition, on 29 May that a  
8 Dr Sebastian Lucas was instructed. So in that period,  
9 around about May 2018, there was a hematologist  
10 instructed and two histopathologists and that related to  
11 blood and, as I understand it, that was an exploration  
12 of the issue of sickle cell.

13 Now, do you remember if that arose after you had  
14 received the crown precognition or before you had  
15 received the crown precognition?

16 A. I don't remember. I do remember the issue being raised.  
17 My recollection was Dr Soilleux had already been  
18 instructed at an earlier stage and there was a  
19 supplementary report.

20 Q. She did a number of reports, that's correct.

21 A. So I think that might have been prior to the May of 2018  
22 and we were following up on some issues from her  
23 original report.

24 Q. I am interested in the issue about sickle cell. We have  
25 heard evidence already about sickle cell trait, sickle

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1 cell disease and we have heard evidence in that regard,  
2 but I'm interested in some of the matters that you  
3 raised yesterday and yesterday you talked about a number  
4 of things in relation to sickle cell. You talked about  
5 Afro-Caribbeans, you talked about a connection, you  
6 talked about the origins of the name of Mr Sheku Bayoh  
7 and you made a number of comments. You mentioned Creole  
8 and various other matters.

9 In relation to sickle cell, did you -- were you  
10 responsible for instructing that line of investigation,  
11 either through the team or otherwise?

12 A. I think the -- from my recollection was it was raised  
13 initially with the cardiologist, one of the  
14 cardiologists brought it up and indicated that we should  
15 look at that further.

16 Q. And was that then explored further?

17 A. Yes.

18 Q. And was that done by the team or was it done by you in  
19 consultation?

20 A. The experts, we instructed the experts as a result of  
21 one expert saying "I'm seeing something here. I think  
22 you should look at that." We -- I think the team did  
23 try and instruct an expert, we got an expert who then  
24 said "You need somebody else to look at this" and the  
25 team thereafter identified that somebody else.

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1 I consulted I think with the cardiologist and,  
2 ultimately, the expert in sickle cell.

3 Q. Right. Now, we have consultation notes in relation to  
4 Dr Soilleux and there's no mention of you being present  
5 at that consultation, were you actually present?

6 A. No, if there's no mention then, I wasn't present. I had  
7 a memory that I did consult with that doctor, but that's  
8 maybe incorrect. It may be simply that the team  
9 consulted or took a precognition and then reported back  
10 to me.

11 I did speak to a lot of doctors, I did a number of  
12 trips down south to consult, and my memory was that I  
13 had spoken to her, but perhaps not.

14 Q. All right. So that could be a mistake.

15 In relation to the specific issues regarding the  
16 origins of Mr Bayoh's family or his name or any of those  
17 matters, did you instruct a line of investigation where  
18 the family were approached and asked to provide some  
19 perhaps relevant background or history to the crown to  
20 then provide that history to the experts?

21 A. No, and my answer to you yesterday was in response to  
22 the issue that I had recalled that Mr Bayoh was  
23 Afro-Caribbean and that's where my memory, without the  
24 full case papers, I recalled he was from Sierra Leone,  
25 but there was a memory with regard to the academic paper

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- 1           that I had looked at.
- 2           Q.   And what was the source of this academic paper that you
- 3           looked at?
- 4           A.   We got it from one of the experts.  I think the last
- 5           expert.
- 6           Q.   And would that be Lucas?
- 7           A.   I think so.
- 8           Q.   And that is the source of your information?
- 9           A.   Yes, and that's why I gave you the explanation yesterday
- 10          as to why I had recalled that Mr Bayoh was
- 11          Afro-Caribbean.  I knew he was from Sierra Leone, but
- 12          there had been a connection between the prevalence of
- 13          the sickle cell traits and the sickle cell gene in the
- 14          Afro-Caribbean population and I recalled reading that
- 15          academic paper.
- 16          Q.   Did you consult with Lucas?
- 17          A.   I think so, but I'm not sure.  I certainly consulted
- 18          with one of the experts with regard to sickle cell, but
- 19          I'm not sure I consulted with them both, because I think
- 20          there was two.
- 21          Q.   Was it a man or a woman you consulted with?
- 22          A.   It was a man.
- 23          Q.   So you think you may have consulted with Lucas?
- 24          A.   Yes.
- 25          Q.   Did you specifically ask him about the paper, the

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1 academic paper, in relation to a connection between  
2 sickle cell and Afro-Caribbean?

3 A. No, I don't think so. I think he just gave that to me  
4 or it was part of his report and I read it.

5 Q. I am trying to understand why you were left with the  
6 impression that Mr Bayoh was Afro-Caribbean. You have  
7 explained you had an academic paper, but no contact  
8 whatsoever with the family, no information from the  
9 family and no detailed recollection of any discussion of  
10 this point with one of the experts, perhaps Dr Lucas?

11 A. That was my attempt to explain why I had an imperfect  
12 memory, so I thought that that is what -- what the  
13 expert had finally said, that was my memory, and it was  
14 incorrect. Even in my memory in giving the statement, I  
15 recalled that he was from Sierra Leone, but that was the  
16 reason I mentioned Afro-Caribbean and that was simply a  
17 result of an imperfect memory without the full papers so  
18 it wasn't anything that was explored at the time.

19 I do remember that there was an issue with regard to  
20 disclosure of the report because we were concerned about  
21 what we had found with regard to the sickle cell gene  
22 and we were -- we were concerned that that was important  
23 information that should be given to the family and we  
24 were also concerned that that should be conveyed  
25 sensitively to the family and so I remember quite a lot

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- 1 of discussion and emails about that.
- 2 Q. Do you remember that Dr Soilleux, the female  
3 histopathologist, had read the academic report and tore  
4 it apart?
- 5 A. No, and that's -- again, that wasn't the point of me  
6 mentioning. It wasn't that I was making any particular  
7 reliance on it. I just had remembered reading it.
- 8 Q. Did you consider that Dr Soilleux had been asked to  
9 comment on the publication and the comments made within  
10 it in relation to postmortem red blood cells, sickling,  
11 and described it:
- 12 "Justice authorities have misused sickle cell trait  
13 to try and explain away ten sudden deaths often  
14 associated with forced restraint of Afro-Caribbean  
15 people in custody."
- 16 A. I don't remember discussing the report with here. I  
17 don't even know if I had read it before. There was a  
18 consultation, you have told me I wasn't at it, but I  
19 don't remember that.
- 20 Q. You hadn't read the academic report or you hadn't read  
21 the comments by Dr Soilleux?
- 22 A. Were those comments in her report?
- 23 Q. You just said you hadn't read it. I am just trying to  
24 work out what it was you hadn't read.
- 25 A. I can't tell you whether I had read the report or not



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1           and you're telling me I didn't consult with Dr Soilleux,  
2           so I couldn't possibly have discussed it with him.

3       Q.   We have a consultation note for Dr Soilleux, you're not  
4           mentioned on it.

5       A.   Okay.

6       Q.   So I was asking you whether you had consulted?

7       A.   So the answer about the report is I can't remember  
8           whether she discussed it in her report, in her report to  
9           the investigation, so her medical opinion, I can't  
10          remember if that was discussed.

11      Q.   Let me help you with that. I have a report in front of  
12          me from Dr Soilleux, a supplementary report dated  
13          10 May 2018, and as part of that she comments on a  
14          publication about sickle cell trait in the criminal  
15          justice system. It's page 15 of the report, paragraph  
16          21 for those behind me:

17                "I have been asked in particular to comment on a  
18                publication [she gives the details] because of its  
19                comments on postmortem red blood sickling. It claims  
20                that sickle cell trait is a genetic carrier state and  
21                not an illness."

22                She goes on to say, and I'm summarising the entire  
23                report:

24                "Justice authorities have misused sickle cell trait  
25                to explain away ten sudden deaths often associated with

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1           forced restraint of Afro-Caribbean people in custody."

2           And without going into a lot of detail about the  
3           comments on Afro-Caribbeans, do you have a recollection  
4           of reading that report and being concerned about the  
5           academic paper and being concerned about the references  
6           in the academic paper to Afro-Caribbeans and wondering  
7           whether this had an relevance to Mr Bayoh?

8           A. I remember the line of investigation and if we've gone  
9           back to Dr Soilleux, then I was obviously concerned  
10          because I've asked her to comment about it.

11          Q. And given those concerns and given the complete lack of  
12          information that anyone had from the family about the  
13          history and the background of the Bayoh family and  
14          Mr Bayoh in particular, did you have concerns about the  
15          relevance of any of that to Mr Bayoh and his situation?

16          A. Obviously there were concerns, because that's why we've  
17          asked the expert to report again and to tell us about it  
18          and to help us with the publication and I think, as I  
19          recall, we followed the evidence further, because we  
20          asked for another expert to look at it so that we could  
21          sure that we had a clear picture of what the experts  
22          were saying.

23          Q. And yesterday when you gave evidence that you had done  
24          some research about the country and that you had,  
25          following a consultation with the expert, either Lucas

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1 or Dr Soilleux, regarding sickle cell and looking at an  
2 academic paper and you then went on to describe the  
3 recessive gene in the Afro-Caribbean population that  
4 that had been discussed, your recollection was you had  
5 done research in relation to the makeup of the  
6 population in Sierra Leone and there was a significant  
7 proportion of Afro-Caribbeans in Sierra Leone because of  
8 the way the country had come into being and in relation  
9 to that answer, is it fair to say that, in light of what  
10 you have told us now, perhaps the position was not as  
11 clear cut as perhaps the answer yesterday indicated?

12 A. My answer to that is that my answer yesterday was an  
13 explanation of why I had recalled Mr Bayoh was  
14 Afro-Caribbean. Once I had the papers, I realised that  
15 there was much more detail about that. I hadn't  
16 forgotten that he was from Sierra Leone, but that was  
17 the connection I had made in my mind six or seven years  
18 later. I do recall that there was quite significant  
19 detail gone into with regard to sickle cell. I recall  
20 that it was a gap in my own knowledge that I hadn't  
21 appreciated that it was a recessive gene and that you  
22 could have -- even if you were just a carrier, that you  
23 could have some of the symptoms in particular  
24 situations. So I remember being quite interested in  
25 following that and understanding that from the expert.

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1           But I -- the explanation I gave you yesterday was an  
2           explanation as to why it was in my original statement,  
3           not an explanation of anything that I had done  
4           particularly at the time.

5       Q.   And yesterday when you said -- when you mentioned  
6           specifically Mr Bayoh's name and said that that could be  
7           considered to have some sort of Creole influences, what  
8           was the basis for you saying that? Was it something  
9           from a report? Something from a document that you had  
10          seen or remembered?

11       A.   No, it was nothing to do with the original  
12          investigation. It was only my explanation as to why  
13          I had remembered that.

14       Q.   And where did you personally obtain information about a  
15          connection or a possible connection between the name of  
16          the family and Creole influences?

17       A.   From my own general knowledge. "Bayoh" is a Creole  
18          word. "Abayoh(?)" is a Creole word.

19       Q.   Do you have personal experience of Creole and the names  
20          and origins of people?

21       A.   No, just from my general knowledge. That was simply an  
22          explanation as to why I had put that in my statement,  
23          nothing more.

24       Q.   And without that personal experience, where did your  
25          general knowledge come from in relation to the names of

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- 1 families and their derivations or origins?
- 2 A. I don't understand what you're asking me. Where did my  
3 general knowledge come from? It comes from --
- 4 Q. Specifically in relation to this point, not just  
5 generally.
- 6 A. It just comes from my general knowledge of the usage of  
7 the name. It was, I suspect, a further explanation as  
8 to why in my memory I had made that link, but it's not  
9 something that I looked at the time, it's not something  
10 that featured at the time.
- 11 Q. So it's not information that was based on any  
12 communication or details from the family themselves, not  
13 information based on any expert report or academic paper  
14 and, effectively, it was something you know from what  
15 you describe as your general knowledge?
- 16 A. And not something I had made a link on at the time.  
17 This was only subsequently when I was giving my  
18 explanation to you yesterday as to why I put that in my  
19 statement.
- 20 Q. Right.
- 21 A. So not even something that was thought about at the  
22 time. It's not a connection I made at the time of the  
23 investigation.
- 24 Q. So something that you have provided as an explanation  
25 yesterday in relation to events some time ago?

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1 A. No, an explanation yesterday in relation to making up  
2 my -- to making my statement a few months ago.

3 Q. Thank you.

4 A. So absolutely no connection to the investigation at the  
5 time.

6 Q. Thank you. Given that background, would you perhaps  
7 feel more comfortable, given that those comments weren't  
8 based on any report or academic finding or otherwise,  
9 perhaps feel more comfortable if you withdrew those  
10 comments --

11 A. Absolutely.

12 Q. -- insofar as they may cause any issue for the family of  
13 Mr Bayoh in particular?

14 A. 100 per cent. If it caused any upset, or distress, that  
15 was not my intention and I would absolutely withdraw  
16 them and I would confirm that it's not something that  
17 featured in my decision-making at the time or I even  
18 thought about it.

19 Q. Thank you very much.

20 Can I ask you about -- we have spoken about Dr Lucas  
21 and Dr Soilleux and I'm interested in whether you  
22 explored, either by instructing a line of investigation  
23 with the team or yourself if you had a consultation with  
24 either of them, whether you explored their  
25 qualifications, because we have heard that it is of

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1           significance that the pathologists involved were  
2           forensic pathologists and that views and opinions should  
3           be expressed through that prism of forensic pathology.

4           Now, did you explore with either Dr Lucas or  
5           Dr Soilleux or through the team the nature of their  
6           qualifications, because we have heard that  
7           Sebastian Lucas is a non-forensic pathologist and he has  
8           been very -- he was very up front about that in his  
9           report and Dr Soilleux was also a general pathologist,  
10          not a forensic pathologist, and we can't find anything  
11          in the paperwork that suggests that that aspect of their  
12          qualifications was explored in any way, either by you or  
13          by the team, and I'm wondering if you have a  
14          recollection of this.

15         A. I don't have a recollection of exploring that. I do  
16          recall that this issue came quite late in the day so we  
17          were looking --

18         Q. The sickle cell issue?

19         A. Yes. So we were looking really to investigate that as  
20          much as possible in the time that we had, because by  
21          this time my recollection is we had started consulting  
22          and really this was an issue that had been raised and  
23          required to be further investigated. I don't recall the  
24          initial report for Dr Soilleux, but I'm not sure that we  
25          had any concerns about her qualifications with regard to

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1 her specific expertise. I'm sure that when she was  
2 identified and, again, I don't recall what stage she was  
3 identified at, that we would have had her CV, the team  
4 would have looked at her qualifications.

5 You tell me that there was a consultation with  
6 Dr Soilleux and I was not present. It may be --

7 Q. I don't know if you were present, as I said.

8 A. Okay.

9 Q. You're not named, but I didn't know if you were there.

10 A. Okay, and I cannot remember. If somebody else took the  
11 notes, then I would have thought that they were accurate  
12 notes of a consultation. If I was responsible for  
13 taking the notes, I might say to you that is definitely  
14 something I could have missed off, but if it was  
15 somebody else's notes, I would have said they were  
16 accurately and properly taken.

17 So whether the consultation with Dr Soilleux took  
18 the form of a more traditional consultation for going  
19 into a precognition, where you follow the format and you  
20 follow the Precognoscer's Handbook, you check with the  
21 expert the initial qualifications, all that is recorded  
22 in a particular formula and, thereafter, it's sent back  
23 to the expert, the expert agrees or disagrees, amends as  
24 appropriate, signs it and sends it back. So that's the  
25 kind of document that I would expect if there was a



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1 traditional consultation precognition for Crown Counsel.

2 If it's something else where I've asked for  
3 something to be investigated and bottomed out, then  
4 I wouldn't necessarily expect it to go through that  
5 process because they're going back to the expert with a  
6 particular aim.

7 Q. Right. There's evidence available to the Chair from a  
8 number of sources. For example, Dr Carey commented on  
9 Dr Soilleux in his Inquiry statement to the Inquiry. He  
10 knew Dr Soilleux and he said:

11 "This is a pure forensic kind of death and it's  
12 important to realise that. She should never have been  
13 instructed to be the primary pathologist investigating  
14 this death under the coronial system (coroner system  
15 down in England) or I suspect under the fiscal system."

16 And Dr Shearer similarly said:

17 "My understanding is that Dr Soilleux is a general  
18 pathologist not a forensic pathologist and I'm not sure  
19 if she undertakes restraint case and drug deaths."

20 In fact, with Sebastian Lucas, Dr Shearer said he  
21 was a non-forensic pathologist and in relation to  
22 restraint he says:

23 "The last feature, struggle against restraint, can  
24 include positional asphyxia, but as a non-forensic  
25 pathologist, I do not wish to be drawn into a more

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1 detailed discussion in that area."

2 And I wondered whether -- there's nothing in the  
3 consultation notes with Dr Soilleux to suggest that this  
4 area was explored to see to what extent the comments  
5 about sickle cell and the opinions expressed had an  
6 impact in relation to consideration of the events at  
7 Hayfield Road, primarily the restraint, and I'm  
8 wondering if that's something that you instructed the  
9 precognoscers to look into and they simply didn't or if  
10 it's something that was missed?

11 A. You'll have to remind me if my memory is not correct,  
12 but Dr Soilleux was the cardiologist; is that right?

13 Q. Histopathologist?

14 A. With a particular interest in cardiology?

15 Q. I can check other the next break, but my understanding  
16 was that in relation to sickle cell she was being asked  
17 with her expertise on histopathology, but I can check  
18 that.

19 I'm conscious of the time anyway. This might be an  
20 opportunity to give me a chance to looks at that.

21 LORD BRACADALE: We'll take the break now then. 20 minutes.  
22 (11.31 am)

23 (A short break)

24 (11.57 am)

25 LORD BRACADALE: Ms Grahame?

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1 MS GRAHAME: Thank you. Just before the break, we were  
2 talking about Dr Soilleux and and I can confirm I said  
3 I would check over the break and Dr Soilleux in her  
4 original expert report had provided a summary and a  
5 detailed CV, an appendix, as part of her report, where  
6 she said at that time, this was page 38, from March 2008  
7 to the present, she was consultant histopathologist with  
8 a special interest in hematopathology and postmortem  
9 pathology. She described herself as an academic  
10 clinical pathologist, not as a forensic pathologist, and  
11 the front page of her report described herself as a  
12 consultant pathologist, again, not as a forensic  
13 pathologist.

14 So it would appear that that information was  
15 available within the body of her first report and I had  
16 been asking if that issue about the lack of forensic  
17 experience in relation to Dr Soilleux and Dr Lucas  
18 regarding blood or sickle cell had been explored in any  
19 way by you or by the team, because we had nothing to  
20 suggest that that had ever be discussed with them and  
21 yet the evidence available to the Inquiry and available  
22 to the Chair is that this is something significant,  
23 because they don't consider things through that prism of  
24 forensic pathologist.

25 A. Before I answer that question, can I just repeat what I

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1           said before the break about what was said in my  
2           statement and whether -- and the matters that we were  
3           discussing before the break and can I just repeat that  
4           if anything that I said about that matter did cause the  
5           family upset, then they have me heartfelt apology. So  
6           before I answer that question, I just wanted to say  
7           that.

8           Q. Thank you very much.

9                         So can we move back now to the issue in relation to  
10           the question of the qualifications and experience of the  
11           experts in relation to histopathology and the lack of  
12           forensic experience that they had and whether that had  
13           been explored?

14          A. I don't remember. I do remember getting -- the issue  
15           being raised and my recollection was that the issue was  
16           raised with the cardiologist or one of the other  
17           experts, which led us to another expert, which led us to  
18           another expert. So I don't recall going through the  
19           process of us actually looking and searching for the  
20           experts, looking at CVs, going through that process,  
21           earlier on in the investigation.

22          Q. But at the point you were involved and thinking about  
23           consultations with experts, conducting consultations  
24           with experts and looking into this issue particularly of  
25           sickle cell, did you investigate and explore this issue

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1 of effectively again the weight or the value of comments  
2 and opinions that you were being given in the context of  
3 the job you were doing?

4 A. By the time those experts and that line of investigation  
5 was followed through, I had already started the  
6 consultation process in my recollection. If you're  
7 talking about May of 2018, I definitely had started that  
8 process, if I had not even completed perhaps all of them  
9 apart from the OST expert.

10 I was relying on the experts that we did have to  
11 give us an indication of who might be able to assist us  
12 in the questions that we had and, thereafter, getting  
13 that expert, getting the CVs and if they had dealt with  
14 the area that we were looking at, then being satisfied  
15 at that stage.

16 I wasn't -- I think in my mind at the time I simply  
17 wanted to bottom that piece of evidence out or that area  
18 of investigation out. As we went through it, I didn't  
19 think it had the potential to change the view that I was  
20 already coming to with regard to the causal link, but I  
21 felt that it was important that we followed things  
22 through.

23 Q. Thank you. Can I move on now, please, to the  
24 consultation with Dr Bleetman. We mentioned him  
25 earlier. He was a consultation in emergency medicine

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1 and we have consultation notes available to the Inquiry  
2 which show that you were present at that consultation  
3 with Les Brown.

4 A. I do remember that consultation and it was in  
5 Scotland House I think in London.

6 Q. In London, and it was on 9 May 2018?

7 A. I think as I indicated earlier then the process of  
8 consultation had already started in the May of 2018.

9 Q. I'm interested in again in the issue of the ability and  
10 capacity of Dr Bleetman to give you the opinion that you  
11 were seeking for the purposes of the crown.

12 Now, the limits of his expertise and how far he was  
13 prepared to express a view, did you -- and his  
14 qualifications and his experience, did you explore that  
15 at the consultation with Dr Bleetman and just so you  
16 know, there's no reference in the consultation notes to  
17 any of this being discussed with Dr Bleetman?

18 A. I think I was aware of his qualification prior to the  
19 consultation. I recollect there being discussions, some  
20 discussion, about trying to identify the correct expert.  
21 We weren't entirely sure that we had got to the correct  
22 expert, but from what was available to us, my  
23 recollection is, he was the closest match. I recall  
24 asking him about his experience and his qualifications.  
25 I do recall that he was a doctor in emergency medicine;

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- 1           is that correct?
- 2       Q.   That's correct.
- 3       A.   And that he had had some involvement with regard to some  
4           government guidelines and practices.  I wasn't sure that  
5           he was entirely a good fit and my recollection is that  
6           when I was speaking to him at consultation, there were  
7           areas that he strayed into that perhaps I thought he  
8           ought not to and my recollection is that I made a note  
9           of that for myself if he was subsequently going to be  
10          used as a witness, that he would have to be quite  
11          carefully controlled as a witness so that he didn't  
12          stray into areas that were beyond his expertise.  So  
13          that is my recollection of the consultation with  
14          Dr Bleetman.
- 15       Q.   I think in fairness to you there is a note within the  
16          consultation notes that he had worked with patients with  
17          extreme agitation and psychosis, so it may be that that  
18          was part of a conversation about his experience?
- 19       A.   Yes, yes.
- 20       Q.   You say he -- you had a concern that "he strayed on  
21          occasion into areas perhaps he ought not to", what do  
22          you mean by that?
- 23       A.   Just outwith his area of expertise, perhaps during the  
24          consultation had given me some opinions with regard -- I  
25          can't remember particular examples, but that is the

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1 impression I recall.

2 Q. Right. His resume, which was part of his report, said  
3 he was qualified as a police instructor for unarmed  
4 defensive tactics, safe prisoner restraint,  
5 communication skill, sprays and defence and in his  
6 letter of instruction he was asked to comment on whether  
7 in all the circumstances the restraint was appropriate  
8 and whether the officers who arrested and detained the  
9 deceased adhered to police standard operating procedures  
10 on restraint and use of force.

11 Were those -- although that was in his letter of  
12 instruction, were your concerns that he was simply not  
13 qualified to express a view on those matters --

14 A. Yes.

15 Q. -- being a consultant in emergency medicine?

16 A. Yes, and that's why we then led I think to get the OST  
17 expert, that was the more appropriate expert to ask  
18 those questions.

19 Q. All right, Certainly we have an Inquiry statement from  
20 Dr Bleetman that's available to the Chair and he said he  
21 was not prepared to provide an opinion on the mechanics  
22 of the restraint, whether the use of force was  
23 reasonable, proportionate or necessary. It would be for  
24 a use of force expert to comment on the restraint. He  
25 said:



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1            "I believe that I challenged the substance of  
2            instruction in a phone call indicating that I did not  
3            want to get involved with the use of force issue.  
4            I think there was likely to have been a phone call in  
5            which I advised that I did not want to deal with the  
6            issue of lawfulness of the restraint or anything to do  
7            with compliance with police procedures, guidelines and  
8            training. This was not within my area of expertise. I  
9            perhaps should have written in my report that I would  
10           deal with the medical implications of use of force, but  
11           not with other elements of the case."

12           Was that -- was that call with you?

13           A. No, I didn't speak to any of the experts directly, so it  
14           won't have been with me, and I didn't liaise with him in  
15           advance. I wasn't responsible for organising the  
16           consultation.

17           Q. Before the consultation, was it drawn to your attention  
18           that he had challenged the substance of his instructions  
19           and indicated he did not want to get involved with the  
20           use of force issue?

21           A. I don't remember that. That might have happened, but I  
22           do not recall it.

23           Q. Had you been aware that that was his position in advance  
24           of the consultation, would you even have addressed the  
25           issue of restraint or other matters like that with him

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1 on the basis that he had said he did not want to get  
2 involved with that issue and he could not deal with the  
3 issue of lawfulness, it was not within his area of  
4 expertise?

5 A. I don't remember specifically what I was interested in  
6 from him, but I -- obviously from the instruction of the  
7 OST expert, I agreed with his position and it wasn't  
8 sufficient for my purposes.

9 Q. Right. Again, we've looked at the consultation notes  
10 and it does not appear that there was any discussion of  
11 Mr Bayoh's medical injuries, their mechanism, other than  
12 the rib injury which was not causative of death. There  
13 is a discussion on restraint, but not in connection with  
14 the application of weight during the restraint by any  
15 officer lying on Mr Bayoh's body and there's no mention  
16 of the use of batons, baton blows to the head, there's  
17 no discussion about potential injuries in relation to  
18 that.

19 Why were those medical matters not discussed with or  
20 were they discussed with Dr Bleetman but just simply not  
21 noted in the consultation notes?

22 A. I can't remember. I think I was just interested in his  
23 experience with -- within his sphere which was in  
24 emergency medicine.

25 Q. Right.

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- 1 A. With acute behavioural disturbances and how he would  
2 deal with them in the hospital setting. So my  
3 recollection, as I sit here now, that was what I was  
4 interested in with him.
- 5 Q. So the focus of your consultation with him did not  
6 relate to the injuries per se of themselves or the  
7 application of weight or the baton blows?
- 8 A. No, but I do remember he did have a background of  
9 policing or something to do with the use of weapons or  
10 tasers or something like that.
- 11 Q. I think I indicated at the outset that his resume, which  
12 was included with his report, said he was qualified as a  
13 police instructor for unarmed defensive tactics,  
14 involving restraint, communication skills, incapacitant  
15 sprays, that type of thing.
- 16 A. I think by the time of the consultation, I was satisfied  
17 that was not someone that was going to give me the  
18 answers with regard to that that I needed.
- 19 Q. Right. I would like to talk about Dr Shearer. We have  
20 spoken about her already to do. You consulted with her  
21 not until 4 June 2018, we have consultation notes  
22 available to us and you attended that consultation,  
23 according to the notes, with Alisdair McLeod. Do you  
24 remember that consultation?
- 25 A. Can you remind me who Dr Shearer was and which

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1 speciality she was in?

2 Q. She was the pathologist that we have spoken about who  
3 conducted the postmortem.

4 A. Okay.

5 Q. Dr Shearer and Dr Bouhaidar.

6 A. Okay. Yes, of course.

7 Q. I would like to ask you about the information that was  
8 available to Dr Shearer and just check some information  
9 that we have.

10 Now, we know from the Precognoscer's Handbook that  
11 an expert must be given all necessary and relevant  
12 information to enable them to provide an opinion of the  
13 injuries to the deceased and you have talked about that  
14 in your evidence yesterday and this morning. We have  
15 heard evidence that Ashley Wyse's statement was  
16 transcribed inaccurately.

17 A. I recall that.

18 Q. And there was -- do you remember that?

19 A. I do.

20 Q. You remember that we spoke to other witnesses about  
21 this. And part of the paragraph that -- although these  
22 were anonymised when they were sent to the experts, part  
23 of the paragraph that was -- the paragraph that was  
24 absent and omitted from the statement of Ashley Wyse  
25 related to: at least six police officers lying on top of

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1 Mr Bayoh, crossing over him from both sides, covering  
2 his whole body. It was only when they moved, the  
3 witness said she could see his arm and she definitely  
4 knew that it was a black man. It looked like one  
5 officer was using a baton to hold the man down. It was  
6 on his upper chest towards his throat.

7 Now, we understand that that information was omitted  
8 from the statement that was originally sent to  
9 Dr Shearer.

10 A. I think it was omitted from a number of expert reports.

11 Q. Yes.

12 A. That's the piece of information that I recall that there  
13 was subsequently a finding by the crown that when we  
14 were -- when the team was checking, when Alisdair McLeod  
15 was checking, that there had been something missed out  
16 from the statement and that the experts that had been  
17 initially instructed all had the same statement.

18 Q. And we have asked witnesses about that and we have  
19 documentation available to the Inquiry that indicates  
20 that a number of witnesses were then sent a complete  
21 version of Ashley Wyse's statement.

22 A. I saw that from the correspondence that I now have  
23 access to. I didn't see it in Les Brown's evidence, but  
24 I saw it in the material that I have.

25 Q. It was other witnesses I asked, but the Inquiry doesn't

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1 have any record of Crown Office writing to Dr Shearer  
2 and Dr Bouhaidar to seek their opinion on the matter and  
3 to provide a complete copy.

4 And I just wonder, in terms of your consultation  
5 with Dr Shearer, if you recollect discussing that  
6 paragraph and that aspect? There is mention in the  
7 consultation notes of the use of a baton. Do you  
8 remember raising this with Dr Shearer at the  
9 consultation?

10 A. I don't remember raising the issue of a different  
11 statement. That was much earlier in the investigation.  
12 I would have expected that all the experts were given  
13 that the proper statement, that was my understanding,  
14 and it looks like to me like the correspondence confirms  
15 that.

16 Was I asking about potentially a baton? I think so,  
17 because I wanted to investigate that. I was aware that  
18 there was some information that the baton was applied to  
19 Mr Bayoh's upper arm, but other witnesses were talking  
20 about up near the chest area and that certainly  
21 something that I would want to explore.

22 Q. And is that something you did explore with Dr Shearer,  
23 even if you didn't mention the Ashley Wyse statement?

24 A. I think so.

25 Q. Yes.

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1 A. It will have been one of the injuries that I was  
2 interested or potential areas of injury that I was  
3 interested in.

4 Q. At any time did you confirm that a full Ashley Wyse  
5 statement, the complete version, had been sent to  
6 Dr Shearer?

7 A. I don't think I would have checked up. I think I would  
8 have noted that there was an issue, I would have seen  
9 the correspondence coming in, I would have seen the  
10 reason for the issue, it was quite a significant part of  
11 the statement, so that raised suspicions in our minds.

12 I was also aware that there was concern that the  
13 original experts hadn't had a full picture, because that  
14 was missing from the statements, and I was aware that  
15 there was then to be an effort for all the witnesses or  
16 all the experts to get the correct information.

17 I wouldn't have doublechecked that that had happened.

18 Q. All right. Can I ask you about another aspect of the  
19 information available to Dr Shearer and Dr Bouhaidar.

20 We've heard evidence about the weight of a number of  
21 the officers, the height and weight of the officers. We  
22 are aware that, initially at least, the weights of the  
23 officers were not provided to the pathologist as part of  
24 the factual matrix and it's not clear from the  
25 documentation we have if Dr Shearer was aware of the

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1 weights of the officers and as I say, we have  
2 documentation, but we can't confirm that that was  
3 provided to her.

4 Looked at the consultation notes as we have, again,  
5 we can't see any reference in those to the weights of  
6 the officers having been discussed and you'll know  
7 yourself, and we'll come on to this later, that there  
8 was evidence available to the crown that perhaps one of  
9 the officers was lying on or at the side of Mr Bayoh.

10 Do you remember now whether you discussed that  
11 specific issue with Dr Shearer?

12 A. I don't, but I do remember questioning the weight of one  
13 of the officers, because I saw it in print early on and  
14 I think it was 25 or 24 or 25 stone. I've again seen in  
15 my notation in some of the papers where I have  
16 underlined "25 stone" and I have got a question mark  
17 against it. I don't know whether it's in the pathology  
18 report or whether it's in one of the other documents,  
19 but certainly it's an issue that I was concerned about  
20 and I asked for confirmation whether that was correct.  
21 I thought it might have been a typo.

22 Q. We have heard evidence that that was correct, it was 25  
23 stone, it wasn't a typo, but we have evidence to suggest  
24 that the weights of the officers were not provided to  
25 Dr Shearer and Dr Bouhaidar.



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1           I wondered if you remember any -- you've obviously  
2 explored the issue to some extent with your team, you've  
3 considered the weight, but did you discuss that at a  
4 consultation with Dr Shearer?

5           A. I can't remember.

6           Q. If it's not in the consultation notes, is it likely you  
7 didn't raise that specifically with Dr Shearer?

8           A. It's potentially correct, but I suspect what I would  
9 have asked the officers -- particularly asked the  
10 witnesses, particularly when I'm putting individual  
11 allegations with regard to batons, I think I would have  
12 gone through that process of asking her about all the  
13 different potential positions of the officers, potential  
14 infliction of wounds and whether we would expect to see  
15 something or not. Whether I specifically mentioned 25  
16 stone, I can't remember.

17          Q. All right. Can I ask you now about toxicology. I think  
18 as my understanding of the evidence is that Dr Shearer  
19 was of the view that a toxicologist would have been the  
20 best person to speak to the effects of MDMA and  
21 alpha-PVP. And it was a qualified toxicologist that  
22 would have been in a position to provide assistance in  
23 regard to the impact and the effect that that can have  
24 on a person's body. My understanding is that both drugs  
25 could cause sudden death due to cardiac arrhythmias.

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1 A. I think you showed me that in the postmortem report this  
2 morning.

3 Q. Did you consider consulting with Dr Eddleston who was at  
4 a toxicologist?

5 A. Is he the pharmacologist and toxicologist?

6 Q. Toxicologist, yes, and I think he was also a  
7 pharmacologist.

8 A. I chose the experts to consult with on the areas which  
9 I didn't understand or where I felt there was a gap in  
10 my knowledge, if there was enough in the particular  
11 report, then I didn't necessarily need to consult with  
12 that expert. I have a background in pharmacology, my  
13 first degree is in pharmacology, so I was probably happy  
14 I understood his report.

15 Q. Now, we have heard evidence that alpha-PVP was  
16 relatively unknown, if I can summarise it in that way,  
17 in Scotland at the time and we have heard evidence from  
18 PIRC witnesses such as Mr McSporran, who was the lead  
19 investigator, that that was not something that they were  
20 familiar with and they wanted to seek expert views on  
21 that to assist their information.

22 Are you saying you actually knew more about  
23 alpha-PVP and ecstasy because of your background in  
24 pharmacology?

25 A. Not more than the expert, absolutely not. My

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1           recollection is that PIRC did have some expert that  
2           commented on that, but that qualifications weren't in  
3           place and my recollection was that I had input into  
4           saying, well, this is -- this is one of the directions  
5           that we need clarified.

6           Q. Well, we've certainly heard evidence that some of those  
7           involved thought Dr Karch was a qualified toxicologist  
8           and were under the impression that he would be able to  
9           provide that evidence. We have also heard other  
10          evidence from Dr Karch's Inquiry statement himself that  
11          he has no formal toxicology qualifications. But we know  
12          that Dr Eddleston was instructed by the crown and  
13          produced a report and he was a qualified toxicologist  
14          and I wonder why you decided not to consult with him.

15          A. I probably decided that at that stage I didn't need  
16          anything further, that I was satisfied that I had enough  
17          information. That's not to say it wouldn't have been  
18          good to consult with him, but I had to choose the  
19          thing -- the people that I had time to consult with and  
20          ability to go down south and make the consultations and  
21          also whether the expert was available. I understand  
22          there's a couple of experts who I tried to see who  
23          weren't available at the time and I wasn't able to  
24          consult with them.

25          Q. Who were they?

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1 A. I think it was Dr Sheppard.

2 Q. Mary Sheppard?

3 A. I think so.

4 Q. And anyone else?

5 A. I remember seeing an email that said "can we make  
6 arrangements for Dr Sheppard?" and my recollection is  
7 that that wasn't possible, unless you tell me that I  
8 have seen Dr Sheppard which also is entirely possible.

9 Q. No, I don't think that she is on the list of experts  
10 that you saw.

11 A. Okay.

12 Q. In relation to the comment you make about maybe not  
13 having time to consult or not being able to arrange a  
14 consultation because of experts' availability, in  
15 relation to the time, were you -- what pressure were you  
16 under in relation to time to -- if you thought an expert  
17 would have assisted you in your understanding of the  
18 circumstances, was that not something that you wanted to  
19 ensure you conducted?

20 A. If I really thought I needed to see the expert in order  
21 to have understanding, then I would have made time and  
22 done it, even if it had to have been on a weekend or a  
23 Sunday night, that kind of thing. As long as I could  
24 fit in with the expert, I would have travelled wherever  
25 it was necessary and consulted with that expert.

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1 Q. So even though Dr Shearer, the pathologist, said the  
2 best person to speak to would be a toxicologist and  
3 Dr Eddleston was a toxicologist, you felt that your own  
4 general knowledge and background of pharmacology, your  
5 degree in that, provided sufficient information in  
6 relation to MDMA and alpha-PVP and the impact that has  
7 on a person?

8 A. My recollection is that we had the toxicology report and  
9 we had -- I had that expert report, so I had his report.  
10 It's just I didn't need to consult to clarify anything  
11 in my mind, so it's not that I substituted my own  
12 knowledge for the expert, it's simply that I had enough  
13 information from that expert report.

14 Q. Thank you. We have an Inquiry statement from  
15 Dr Eddleston, I hope I'm not -- he may be a professor.  
16 I'm sorry.

17 A. I think he might be.

18 Q. I think he may be a professor. He has given an Inquiry  
19 statement to the Chair:

20 "It is my opinion on the balance of probabilities  
21 that but for Mr Bayoh's encounter with the police that  
22 morning and the subsequent restraint, he would not have  
23 died."

24 And I'm interested in whether you explored the  
25 possibility with Professor Eddleston whether but for the

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- 1           restraint he would have died; was that something that  
2           was clear to you from your reading of his report?
- 3       A.   By the time I was coming to the end of the investigation  
4           and my conclusions, I think I was already satisfied or  
5           becoming satisfied that the but-for test was satisfied,  
6           so that was establishing the causal link.
- 7       Q.   So you were satisfied that but for the restraint he  
8           would not have died?
- 9       A.   I think I was coming to that conclusion. In fact, even  
10          if I was not completely satisfied, as I said to you  
11          yesterday, I could see that there was a strong argument  
12          that I could put before a court to say that there was a  
13          causal link.
- 14      Q.   Thank you. Can I ask you one last matter in relation to  
15          Mr Bayoh's mental health. I wondered whether you  
16          instructed any lines of investigation through the team  
17          or whether you yourself expressed an interest in  
18          exploring the issues of mental health, Mr Bayoh's mental  
19          health and that aspect.
- 20      A.   I think -- I don't remember, but I think we would have  
21          potentially explored any mental health history and, my  
22          recollection, I don't recall that there was any specific  
23          mental health history, but that might be an incorrect  
24          recollection.
- 25      Q.   Right. Did you consider at any stage instructing an

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1 expert to specifically look into the issue of mental  
2 health?

3 A. Do you mean a history of mental health?

4 Q. Well, did you investigating an investigation both into  
5 the history and then to ask an expert to give an opinion  
6 on mental health issues?

7 A. I can't remember what the answer was to was there a  
8 mental health history. I do remember having some  
9 details, but I can't remember whether that was  
10 specifically targeted at mental health. If there had  
11 been anything in the history, then I think I would have  
12 asked for more information, because there would have  
13 been something. If there had been contact with mental  
14 health services, then there would have been records and  
15 we could have had an expert to look at those records.  
16 I don't remember that to be the case.

17 Q. Thank you. Can I ask you about some evidence that we've  
18 heard from Les Brown about consultation notes.

19 Now, the Inquiry has a number of consultation notes  
20 available that relate to consultations with the experts.  
21 And I asked Mr Brown a number of questions about those.  
22 I said that we have no record of a consultation with  
23 Dr John Parkes and I asked if he remembered whether  
24 there had been a consultation that we simply didn't have  
25 the records of and he said, no.

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1           Do you remember having any consultation with  
2           Dr Parkes?

3           A. Can you remind me who he is, what he spoke to and where  
4           he was based, because those things help me? I remember  
5           going to different cities and consulting, so if you  
6           could tell me where he was based.

7           Q. I will have to find that in my notes, but I will do  
8           that.

9           Maurice Lipsedge, we've talked about him already, he  
10          was the consultant psychiatrist. We don't have any  
11          notes of you consulting with Dr Lipsedge and do you  
12          remember any consultations with him? Les Brown's  
13          evidence was that, no, there was no consultation with  
14          him. Do you have any different recollection from  
15          Les Brown?

16          A. I don't think so.

17          Q. I asked Mr Brown about a consultation with Dr Lucas and  
18          asked if remembered a consultation with Dr Lucas. Now,  
19          you said you thought you had consulted.

20          A. I remember going to one of the big London hospitals and  
21          I recall quite a short consultation. Now, it may be  
22          that that short consultation was with the expert that  
23          came in between the two. There was someone that we were  
24          directed to by I think Dr Soilleux. We were --

25          Q. There was a Dr Rees also included at one point.



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1       A. Right. Well, it might have been that doctor, because  
2       there was a doctor that we had a very short consultation  
3       with who said "Actually, I can't help you, but you could  
4       maybe go to X person".

5       Q. I think that may have been Dr Rees.

6       A. Okay. So we were already down there and I think we had  
7       already set up the consultation with Dr Rees. It was  
8       very short. It was at the hospital. If I recall, it  
9       was in the emergency department in the hospital or  
10      certainly on of the main areas downstairs and it was  
11      very brief and he essentially said I can't assist you,  
12      that's not something I can help you with, but I can  
13      refer you to I presume it was during Lucas then.

14     Q. So you asked Mr Brown about Dr Sebastian Lucas, and we  
15     have spoken about him earlier about sickle cell, and I  
16     explained that the Inquiry does not have any records  
17     indicating a consultation took place with Dr Lucas,  
18     whether with you or Mr Brown or Mr MacLeod, and I asked  
19     him if he remembered a consultation with Dr Lucas and  
20     his reply was:

21                "There was no consultation evolving Crown Counsel  
22                and Sebastian Lucas, no."

23                Now, from your memory earlier you gave -- you have  
24                said you thought you had consulted with Dr Lucas. Can  
25                you give me any more information? It may be that

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1 Mr Brown wasn't present or it was someone else. Do you  
2 remember any more about this, because we simply don't  
3 have any records indicating that there was a  
4 consultation.

5 A. I think that Mr Brown will be correct. I wonder if what  
6 I had remembered was that consultation in London with  
7 the doctor you said was Dr Rees and I wondered if that  
8 was what I was mentioning.

9 Q. It is a possibility.

10 A. Because I do recall that Dr Lucas was coming right at  
11 the end of my consideration of the information.

12 Q. Right.

13 A. By the time he was reporting, I was already back up in  
14 Scotland, I wasn't still down in London.

15 Q. Right. I asked Mr Brown if there had been a  
16 consultation with a Dr Jason Payne-James. He was one of  
17 the experts who had been instructed by PIRC before you  
18 were involved and I said there was no record of any  
19 consultation with him and he said, no, there hadn't been  
20 a consultation with him. I'm assuming you will not  
21 disagree with that.

22 A. No, I won't.

23 Q. I asked him about Mary Sheppard and you have mentioned  
24 her today. He said -- Mr Brown said there was an  
25 attempt to have a consultation with Dr Mary Sheppard,

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1 but she was unavailable so that was postponed and wasn't  
2 pursued so that's right there wasn't a consultation.  
3 I think that's what you have just told us. You agree  
4 with that?

5 A. Yes. In my perusal of the documents that I had  
6 available to me for giving evidence, I remember seeing  
7 that email and it was really only that that jogged my  
8 memory.

9 Q. Right. And I asked about Professor Jack Crane. You'll  
10 remember that earlier today we've discussed the forensic  
11 pathologists who were in place and we have talked about  
12 Dr Shearer and Dr Bouhaidar, Professor Crane, and  
13 Dr Nat Carey and Dr Lawler. And I asked about  
14 Professor Crane and he said, no, there wasn't any  
15 consultation.

16 Does that accord with your recollection?

17 A. I don't recall if there was a consultation earlier than  
18 the precognition process, but there wasn't a  
19 consultation with me and I think, as I said to you  
20 earlier, the purpose of -- I chose who I wanted to  
21 consult with and it was for a very specific purpose.

22 Q. There was no consultation with Dr Karch. And Les Brown  
23 indicated that and, obviously, we have discussed the  
24 difficulties and issues that have been raised, concerns  
25 had been raised, in relation to Dr Karch. Did you

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1           consider at any stage as part of reviewing the substance  
2           of his opinion whether to consult with him?

3           A. I was satisfied that I had enough information to deal  
4           with his conclusions without consulting with him.

5           Q. Right. To invite a jury to reject his conclusions if  
6           they were --

7           A. Exactly.

8           Q. -- brought before a jury?

9           A. If they were brought before the court.

10          Q. I asked Mr Brown about Professor Anthony Freemont, the  
11          osteoarticular pathologist, we have spoken about him  
12          today, and I said the Inquiry have no record of a  
13          consultation with him having taken place and he also had  
14          no recollection of a consultation with him. Does that  
15          accord with your memory?

16          A. In this particular case, that is correct, but, as I  
17          mentioned yesterday, I had been down to Manchester and  
18          consulted with him at length. He had given me a lot of  
19          information about his work and what he did and how he  
20          was able to date fractures. I vividly remember him  
21          doing a little small sketch for me that I had taken  
22          away, so I was satisfied that I understood his report,  
23          as much as I needed to at that stage.

24          Q. So you did consult with Professor Freemont in relation  
25          to Sheku Bayoh?

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- 1 A. No, I'm sorry, in a different case.
- 2 Q. In a different case?
- 3 A. I'm sorry. I was following on from my answer yesterday,  
4 where I told you I had contact with Professor Freemont  
5 in a different case and I explained to you what that  
6 case was.
- 7 Q. Did you have any consultation with him in relation to  
8 Mr Bayoh's death?
- 9 A. No, and what I was trying to explain was I didn't think  
10 it was necessary because I had understood his report to  
11 a sufficient degree.
- 12 Q. And was that because of your previous consultation with  
13 him?
- 14 A. It was.
- 15 Q. And we have no record of you consulting with  
16 Professor Eddleston and I asked Les Brown about that and  
17 he said, no, there hadn't been anything along those  
18 lines and I think you accept you didn't consult with  
19 him?
- 20 A. Was he the toxicologist?
- 21 Q. Yes. Sorry.
- 22 A. Yes, that's correct.
- 23 Q. So in relation to the experts that you did not consult  
24 with, that was because you felt you understood their  
25 reports sufficiently and you were satisfied you didn't

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- 1           need further explanation?
- 2           A. Not at that stage. If there had been criminal  
3           proceedings and I was going to lead the expert in  
4           evidence, then I would have had subsequent  
5           consultations.
- 6           Q. Given the number of expert reports, and you have talked  
7           earlier about different views being expressed, I think  
8           earlier you suggested that the pathologists came to the  
9           same conclusion but by different routes, did you  
10          consider exploring those different routes with each  
11          pathologist to make sure you truly understood who was  
12          correct, whether there was significant differences  
13          between them, and what impact they may have had on you,  
14          the decision that you were going to come to in relation  
15          to whether there should be a prosecution?
- 16          A. No, from the information I had, I considered that I had  
17          the opportunity to analyse it sufficiently for the  
18          decision that I was going to make.
- 19          Q. Please tell me if I'm wrong about this, but as I  
20          understand your evidence you consulted with Dr Lawler?
- 21          A. I do remember that consultation.
- 22          Q. The reviewing psychologist. Dr Bleetman?
- 23          A. I remember that one, yes.
- 24          Q. The consultant in emergency medicine.
- 25                 Dr Shearer, the pathologist who did the postmortem?

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- 1 A. And that was either in Edinburgh or Glasgow, so I do  
2 remember that.
- 3 Q. And who else did you consult with?
- 4 A. I can't remember, I'm sorry. There was a lot of  
5 consultations and I'm trying to be careful to make sure  
6 that I don't confuse them. Round about that time, I  
7 travelled quite extensively down to London and the north  
8 of England and down to Bristol as well with regard to  
9 non-accidental head injury in children and there is  
10 something else round about that time that I went down to  
11 do consultations on, so there was a lot of consultations  
12 in -- in that short space of time.
- 13 Q. And that related to other trials?
- 14 A. Other cases.
- 15 Q. Other cases you were dealing with?
- 16 A. Yes.
- 17 Q. Such as the one with Professor Freemont about a  
18 different case?
- 19 A. Yes.
- 20 Q. But in relation to this phase of the process where you  
21 are consulting with experts in relation to this matter  
22 regarding Mr Bayoh's death, you consulted with  
23 Dr Shearer, Bleetman and Lawler?
- 24 A. I can't remember if there were more.
- 25 Q. Right. Thank you. I would like to move on actually and

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1 ask you now some questions about the instruction of the  
2 OST expert. We've touched on this throughout your  
3 evidence and, as I understand it, we've heard evidence  
4 from James Wolffe, who was the Lord Advocate at the  
5 time, that he had no involvement with the selection of  
6 experts other than, he says, in around December 2017,  
7 which was around the time that Fiona Carnan became  
8 involved, he had suggested that police officers  
9 elsewhere in the UK may have a suitably qualified  
10 restraint expert who could assist.

11 And in his Inquiry statement, and I don't need to go  
12 to this, at paragraph 52, he says there was an email  
13 exchange between his office and you, you at that time  
14 were the APCC, in around December 2017, in relation to  
15 identifying a suitably qualified restraint expert.

16 Is that the sort of context in which a decision was  
17 taken about who to instruct and that a restraint expert  
18 would be brought on to assist?

19 A. I think there was quite a lot of conversation about who  
20 we could instruct, who would be the best expert, where  
21 we should look for that expert, who we should consult  
22 about who might be a suitable expert, so I suspect that  
23 going to the Lord Advocate was part of that process.

24 Q. Right. I would -- do you remember after the  
25 Lord Advocate made that suggestion whether inquiries



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1           were made in England, Wales, other jurisdictions?

2           A. I didn't do that myself, but I'm -- obviously, that's  
3           what the Inquiry -- that's what the team did.

4           Q. Team, right. We have the benefit now of a briefing note  
5           that was prepared which describes the background and the  
6           context regarding the instruction of Mr Graves.

7                     Now, this wasn't prepared until February 2020, but  
8           it describes the circumstances at the time and it was  
9           prepared by Alisdair McLeod. I wonder, as with other  
10          witnesses, if I could put some of that to you and ask  
11          you simply if it accords with your recollection of what  
12          was happening at the time?

13          A. Okay.

14          Q. So this is a briefing note prepared by Alisdair McLeod,  
15          COPFS 02126A, 02126A, and this covers the period during  
16          which the crown precognition was being looked into and  
17          you'll see that it's headed "up Alisdair McLeod at CAAPD  
18          on 28 February 2020". At that time the head of CAAPD  
19          was Justin Farrell, so this is after the decision was  
20          made by you and your involvement. And it's a briefing  
21          note that covers the period and the work down between  
22          May 2015 and November 2019.

23                     And if we can look at the background, I'm interested  
24          in page 13, which covers the OST expert. There we are  
25          and I'll read this short, if I may, but you'll see it on

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1 the screen as I go through it:

2 "The crown encountered considerable difficulty in  
3 identifying a suitable OST expert. A number of  
4 inquiries were made in England and Northern Ireland. In  
5 December 2017, the Metropolitan Police College in Hendon  
6 was approached for assistance. Unable to put forward  
7 one of their own officers to assist, they provided  
8 details of a known and trusted former training officer,  
9 Martin Graves, now operating as an OST expert in the  
10 private sector."

11 And it was Martin Graves, ultimately, that was  
12 instructed in relation to this, wasn't it?

13 A. I do remember that.

14 Q. And we have actually heard from Martin Graves in  
15 evidence and the Chair has that evidence available to  
16 him. So he was contacted on 19 December 2017 and  
17 provided with nonspecific details and the next day he  
18 forwarded his CV and confirmed he would be in a position  
19 to start reviewing the materials and be in a position to  
20 provide a report from mid January 2018. I think at that  
21 stage it was anticipated that would be available to you  
22 before the crown precognition was in your hands.

23 Following Crown Counsel's agreement, Mr Graves was  
24 formally asked to provide a report on 22 December, 2017.  
25 So it would appear that if Mr Wolffe is correct in his

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1           recollection, he became involved in this issue because  
2           of the difficulties in December 2017, suggested looking  
3           down south or elsewhere for an expert, and as a result  
4           of those inquiries, Martin Graves was identified as a  
5           possible expert.

6           A. My recollection is we were already looking down south  
7           and potentially further afield.

8           Q. Right.

9           A. So that was already happening, there was already  
10          extensive investigations in trying to identify an expert  
11          and it was the fact that that was unsuccessful that we  
12          had gone to ask the Lord Advocate.

13          Q. I see. And had previous approaches been made to the  
14          Metropolitan Police College or was that only done after?  
15          Certainly in terms of the timing it seems Mr Graves was  
16          contacted on 19 December. Was it after the  
17          Lord Advocate had become involved that that approach was  
18          made?

19          A. I don't know, because I don't remember when the  
20          Lord Advocate became involved, but you will know that.

21          Q. It say here that following Crown Counsel's agreement  
22          Mr Graves was formally asked. I'm interested to what  
23          extent you had input into agreeing that Mr Graves should  
24          be asked and instructed as an expert?

25          A. I remember the process where we were trying to find an

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1 expert that we were looking quite widely, we were  
2 casting our net quite widely, and I remember that he was  
3 identified. I don't recall what I had in front of me in  
4 order to say, yes, I agree, but certainly I recall that  
5 he was instructed and I don't take any issue with the  
6 precognoscer noting that there. If he's noted that's  
7 what I have done, then that will be correct. He's an  
8 extremely experienced case preparer. I had worked with  
9 him previously on the prosecution of a police officer in  
10 a 12-week trial so I knew his work and I had full  
11 confidence in him.

12 Q. Is that Alisdair McLeod?

13 A. Yes.

14 Q. "And then Mr Graves was contacted by telephone call and  
15 then a detailed was letter of instruction and pen drive  
16 was couriered to Mr Graves' business address on  
17 24 January 2018. The letter of instruction referred to  
18 a report, delivery date of mid February, which had been  
19 discussed previously."

20 I'm interested in any involvement you had regarding  
21 the drafting of the letter of instruction or review of  
22 the letter of instruction that was prepared?

23 A. I think it might have been sent to me and I think in  
24 fact the Inquiry asked me about that in my statement.  
25 That was one of the documents that I had I think early

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- 1           on.
- 2           Q. The letter of instruction?
- 3           A. I think so and there's track changes on it and actually
- 4           now I'm saying, maybe I'm getting that confused with
- 5           another piece of correspondence, but I have certainly
- 6           seen something where I have been involved in looking at
- 7           the letter of instruction.
- 8           Q. Thank you. I have not seen a version with track
- 9           changes, but I can ask the team to check that over
- 10          lunch.
- 11          A. Okay. Maybe I'm getting confused with something else.
- 12          Q. All right. Thank you, and the pen drive did that
- 13          contain documents, digital documents, for the use by
- 14          Mr Graves as part of his instruction?
- 15          A. I would imagine that's what that's describing.
- 16          Q. And what part did you play in deciding which documents
- 17          should be sent to Mr Graves?
- 18          A. I think -- did you show me an email earlier from
- 19          Les Brown with regard to Dr Karch?
- 20          Q. Yes, I think I showed you a letter of instruction to
- 21          Dr Karch.
- 22          A. No, it was whether an expert should have Dr Karch's --
- 23          Q. Oh, the email chain.
- 24          A. Yes.
- 25          Q. Yes, we did look at that earlier. If you give me a

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1 moment, I may be able to find.

2 A. I think that is an example of me inputting into what the  
3 OST expert is getting.

4 Q. So you did have some input from that?

5 A. It looks like that from the email you should me this  
6 morning.

7 Q. Thank you.

8 "The original materials provided to Mr Graves in  
9 January included documentation in relation to the  
10 training delivered to the material officers. On  
11 21 February 2018, Mr Graves was advised by email that  
12 PIRC had carried out further inquiries in relation to  
13 the nature and content of officer training and a further  
14 letter of instruction and materials was being prepared."

15 So his instructions came not just simply in one  
16 letter of instruction, but a second supplementary letter  
17 of instruction, along with materials were sent to him.

18 And again, did you have some input into the second  
19 letter of instruction and the second bundles of  
20 materials?

21 A. I can't remember, but if there's correspondence to show  
22 that I did, then I'm happy to agree with that.

23 Q. Now, I think it then says on 22 February Mr Graves  
24 advised the crown he had not been able to devote time to  
25 preparing his report and there were some issues about

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1 receiving his report at that stage. I don't need to go  
2 into those in detail.

3 Can we move down the page, please. And then in  
4 March the precognoscers made arrangements with Mr Graves  
5 to discuss his emerging conclusions over the telephone.

6 And if we move on to the next page, please, and  
7 although there had been a consultation with  
8 Mr Graves that was very useful, he advised the crown  
9 that his report would not be completed until  
10 6 April 2018.

11 Can I ask you, when you consulted with Mr Graves,  
12 did you have his initial report?

13 A. I'm sorry. Can you repeat that question?

14 Q. When you consulted with Mr Graves, we have spoken about  
15 that already, it's my understanding you already had a  
16 report from Mr Graves when you consulted with him, but  
17 do you remember if you had a draft or initial version or  
18 was it revised after the consultation? Do you remember  
19 anything about that?

20 A. I don't.

21 Q. You don't. All right.

22 "It was decided not to submit a report to  
23 Crown Office until Mr Graves' report was received and  
24 assessed and ongoing sickle cell investigations  
25 progressed."

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1           So can you tell me what that means then as a result  
2           of not having the report from Mr Graves, it was decided  
3           not to submit a report to Crown Office until Mr Graves'  
4           report was received? So in terms of timing, was this in  
5           relation to when you got the crown precognition?

6           A. I think so.

7           Q. And they waited until Mr Graves' report or final report  
8           was available before they sent that crown precognition  
9           to you; is that correct? We're talking here about the  
10          report being available in April and I'm just trying to  
11          pin down when you would have received the crown  
12          precognition?

13          A. I don't remember when I received the crown precognition.  
14          I do know that there was a target date of the end -- in  
15          fact, it was the beginning of the year and then it moved  
16          to the end of January and then it was February/March.

17          Q. Right.

18          A. It seems from this report or this minute that it didn't  
19          come until even later than that.

20          Q. Mm-hmm.

21          A. And of course there was some urgency that I wanted  
22          everything before I started consulting with or deciding  
23          which experts I wanted to consult with.

24          Q. "It would appear that the report was expected to be  
25          received in April. On 5 April, the day before the



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1 decline, Mr Graves advised the crown he required further  
2 time to complete his report, given the complex nature of  
3 the questions contained in the letter of instruction and  
4 his report was received on 14 April. It was examined in  
5 detail. There were a number of typing and dictation  
6 errors. A number of points re factual inaccuracy were  
7 also raised with Mr Graves. After consideration of the  
8 points raised by the crown, his initial report was  
9 treated as a draft and he submitted his final report on  
10 29 April 2018."

11 I'm interested in what input you had at that time.  
12 After his initial report is received on 14 April,  
13 there's a number of typing errors, which are neither  
14 here nor there, but a number of points re factual  
15 accuracy were raised with Mr Graves and I'm interested  
16 in any input you had at that time raising issues of  
17 factual accuracy?

18 A. I don't remember, I'm sorry. I mean it could be that I  
19 have read the draft reports, I don't agree with that or  
20 questioned this or X or Y and then gone back to the  
21 precognoscer, it may be that Alisdair himself noted them  
22 even without recourse to me, I can't recall.

23 Q. Do you remember --

24 A. If he did, there would be correspondence, because we  
25 weren't working in the same office and he would have

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- 1 alerted me by email, so you will have that.
- 2 Q. Thinking back now, do you remember what those points of  
3 factual accuracy were?
- 4 A. I don't.
- 5 Q. Right. And it would appear that when you consulted with  
6 Dr Lawler, on 30 January 2018, you did not have at that  
7 stage the crown precognition or the report from  
8 Martin Graves?
- 9 A. That would be correct if this is correct and that  
10 accords with my recollection, because I recall an email,  
11 and I have seen it in correspondence that I have access  
12 to, where -- or maybe it is in my notes actually, it  
13 might be in my notebooks -- where there is a discussion  
14 about deadlines and I remember February and March being  
15 mentioned.
- 16 Q. Right. And his final report was submitted on 29 April  
17 having reflected on the typing errors and the factual  
18 accuracy and then Mr Graves was precognosed by the  
19 precognoscers at Paisley police officers on 11 May 2018.  
20 The Inquiry has information available that indicates it  
21 was Fiona Carnan at that stage that precognosed  
22 Mr Graves in relation to his report.
- 23 A. And it surprises me that it was in Paisley. He must  
24 have travelled up for that consultation or precognition.
- 25 Q. And prior to that consultation -- sorry -- precognition,

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1           which we understand was Fiona Carnan conducting with  
2           Mr Graves, did you have any input into what issues to  
3           explore with Mr Graves, what issues Fiona Carnan should  
4           explore with him, what points to probe or consider in  
5           detail?

6           A. I can't remember. I might have, but I can't remember.

7           Q. Now, if that took place on 11 May, would it have been  
8           after that precognition that you would have received the  
9           crown precognition or did you receive the crown  
10          precognition prior to Mr Graves being precognosed?

11          A. I don't know. I don't remember. The crown  
12          precognition, my recollection, came to me in hard copy.  
13          We worked almost exclusively in hard copy at that time.  
14          Whether I had some papers, working directly from the  
15          statements and the productions before I had the final  
16          narrative, because you will recall I mentioned before  
17          that I had had sections of the narrative and also draft  
18          narratives as well, whether I had access to that  
19          material and then the final precognition was delivered  
20          or the final folder was delivered, my recollection is my  
21          folders went to 15 or 20 ring-binders, so I just can't  
22          remember when that final piece was delivered or whether  
23          it all came as the fresh copy, sometimes it was termed  
24          as the golden copy, whether it was all the golden copy.

25          Q. Thinking back now, do you remember if you got or

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- 1 received a golden copy as a final version?
- 2 A. I can't remember. It might have -- even the papers that  
3 I did have, if it was going to be a trial, I probably  
4 wouldn't have been satisfied with what I had, I would  
5 want something else made up for a trial.
- 6 Q. And do you remember -- in this briefing note this  
7 precognition took place now into May, do you remember if  
8 the crown precognition came to you as late as May?
- 9 A. From my notes and from my recollection, I was pushing  
10 from the January of that year to have a full  
11 precognition, a full set of papers, so that I could  
12 start my consultations and decide who to consult with.  
13 I think from what you've told me already, I have already  
14 started consulting by 11 May.
- 15 Q. Well, certainly you consulted with Lawler on 30 January  
16 that year and you consulted with Bleetman on 9 May that  
17 year. You didn't consult with Shearer until the June.
- 18 A. Okay. So I have obviously decided that I'm going to  
19 consult with Dr Lawler even before I have the full set  
20 of papers and by the time I consulted with Bleetman,  
21 I don't know, I don't recall.
- 22 Q. All right, thank you.
- 23 A. But if I did have them by the 9th, then it didn't  
24 include the precognition of Mr Graves because that  
25 didn't happen until afterwards.

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1 Q. And I think I asked you about your involvement with his  
2 instruction and I have an email available, COPFS 04881,  
3 and I wonder if we could that on the screen, and I think  
4 this is an email exchange which we referred to earlier  
5 in relation to Dr Karch.

6 And if we can look at your reply of -- there's --  
7 sorry, I don't know which page it's on. There should be  
8 a quote about -- here with are, this is it, a reply from  
9 you, 19 January 2018, 11.34, to Fiona Carnan, and to  
10 Les Brown and Alisdair MacLeod and this related to the  
11 draft letter to the OST experts and I think that's the  
12 letter of instruction:

13 "Dear all. Mindful that this letter of instruction  
14 will become disclosable [and that will be disclosable to  
15 the defence if there was ever any trial] and ultimately  
16 form part of the full evidence of the expert, I have  
17 changed some of the language."

18 So it would appear that you have revised the letter  
19 of instruction to Mr Graves:

20 "Fiona, once you see the tracked changes, if you  
21 agree and accept, then we should have another look at  
22 how it reads as it is a bit difficult to double-check  
23 with all the tracks."

24 It sounds like you have made some substantial  
25 changes?

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- 1 A. And it sounds like also like other people have been  
2 involved in changing, because there are a number of  
3 tracks, presumably in different colours.
- 4 Q. And as the team was set up, if a number of people are  
5 commenting, that could be Fiona Carnan, Alisdair McLeod,  
6 Erin Campbell perhaps as if he was still involved?
- 7 A. I don't think Erin was there by that time.
- 8 Q. Maybe Les Brown?
- 9 A. Absolutely Les Brown, he's copied into this.
- 10 Q. Would you be given it to do the final review or would  
11 you receive it at the same time as everyone else?
- 12 A. I don't know. Sometimes I would get it right at the  
13 beginning and we would all get the -- I don't mean  
14 necessarily this team, sometimes it happens that it come  
15 it comes to me and everyone is asked for their comments  
16 and you end up with something where everyone is altering  
17 different versions or it could be that they waited and  
18 then gave it to me.
- 19 Q. And then the final paragraph reads:
- 20 "In the bit about the PM [postmortem, I assume] in  
21 conclusion I think we should add the quote from the PM  
22 repeated at page 130 volume 1 of the PIRC."
- 23 That is a reference to volume 1 of the PIRC report.
- 24 "I think that is a nice clear summary."
- 25 So you were adopting the summary in the PIRC report

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1 and sending that to the expert?

2 A. On a particular aspect.

3 Q. On a particular aspect in relation to the postmortem; is  
4 that correct?

5 A. That I have identified as clear.

6 Q. "I think all the important questions about restraint are  
7 spot on."

8 Thank you.

9 I'm conscious of the time again. I wonder if that  
10 might be an appropriate point to stop.

11 LORD BRACADALE: We'll stop for lunch again and sit at  
12 2 o'clock.

13 (1.01 pm)

14 (Luncheon adjournment)

15 LORD BRACADALE: Ms Grahame.

16 MS GRAHAME: Thank you. I was about to move on to ask you  
17 some questions about the letter of instruction that was  
18 sent to Martin Graves. That was dated 24 January 2018,  
19 but before that was sent, there was an email exchange  
20 with you and Les Brown and I would like to ask you about  
21 that. And that relates to a document -- let's look at a  
22 minute, Crown Office document COPFS 02214A, and we'll  
23 that on the screen. And this is a minute from  
24 Les Brown, head of CAAPD, and you were copied in to this  
25 minute which was to the law officers and if we could

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1 look, please, at paragraph 3 on page 1. There was the  
2 discussion set out there:

3 "The dedicated AD, Ashley Edwards QC..."

4 So this is end of November 2017, before you actually  
5 instructed Martin Graves:

6 "... discussed the ongoing investigation with  
7 members of the team on 15 November and reflected on the  
8 analysis of the statements provided by officers involved  
9 in the restraint process that has been carried out by  
10 the investigative team and the perception that these may  
11 not reflect the true picture. Consideration will  
12 therefore be given to identifying officers whose  
13 involvement in the incident is remote and who might be  
14 precognosed by the crown."

15 Can you help the Chair understand the remark here "a  
16 perception that these may not reflect the true picture  
17 in relation to the statements provided by the officers"  
18 Can you tell us a little bit more about that?

19 A. Obviously, I didn't write the minute, so I'm not  
20 entirely sure what was in the mind of -- I think you  
21 said to me it was from Les Brown.

22 Q. It does say however "The dedicated AD, Ashley Edwards  
23 QC, discussed the ongoing investigation with members of  
24 the team on 15 November", which was prior to this minute  
25 being prepared, just a matter of days, "and reflected on



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1 the analysis of the statements provided by officers  
2 involved in the restraint process that has been carried  
3 out by the investigative team and the perception that  
4 these may not reflect the true picture."

5 A. So I'm not sure about the choice of the word  
6 "perception", but the process that we were going through  
7 continuously was questioning the actual factual matrix  
8 so we were testing one statement against another. We  
9 were looking at the content of the statements. If  
10 something didn't quite ring true, then we were concerned  
11 about that.

12 You highlighted to me earlier bits missing in a  
13 statement of Ashley Wyse. That again is factored in so  
14 we're concerned that there's something more going on  
15 than just what we see in a particular statement.

16 So I think that's all that is talking about, that we  
17 are testing as we're going along whether one -- one  
18 statement contains evidence that can be supported by  
19 another statement. Continually testing.

20 Q. And was it the case that it was acknowledged and  
21 recognised by the team and yourself that there were  
22 different versions of events as to what happened?

23 A. Absolutely. And that -- I think an example of that was  
24 the different body positions that Mr Bayoh was said to  
25 be on on the ground, face down all the time, on his back

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1 all the time, lying down with his legs up, bent  
2 backwards, on his side, so we were aware that all those  
3 different viewpoints had come through the statements and  
4 one of the things that we were looking at was to try and  
5 see how we could support or discredit those individual  
6 elements.

7 Q. And were you also interested in exploring with the  
8 experts the extent to which those versions and those  
9 descriptions of different body positions may or not have  
10 impacted on their opinions?

11 A. I can't remember at what point the actual body  
12 positions, if you're talking about the multimedia, I  
13 can't recall what point they came into being, but  
14 certainly it was known from an early stage that they  
15 couldn't all be correct and so we were trying to  
16 reconcile one with the other. Is it possible that  
17 Mr Bayoh was in position X at one particular time in an  
18 early part of the restraint or a later part of the  
19 restraint, in another position at a different point of  
20 time where the -- was that the way, the angle that the  
21 witnesses were looking, did that effect the evidence?  
22 That was the sort of thing that we were looking at. We  
23 were continually trying to test the information that we  
24 had.

25 Q. So there was an acknowledgment that in terms of the

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1 evidence, the multiple statements that were available to  
2 the crown, not all could be truthful and accurate?

3 A. Correct.

4 Q. It wouldn't be for you to decide which were maybe  
5 untruthful or inaccurate?

6 A. No.

7 Q. But there was an issue there about the different  
8 versions that was presented and available to the crown  
9 and it wasn't for you to decide who was telling the  
10 truth and who was reliable in their memory and accurate?

11 A. And that's what made me pause before I answered there,  
12 because the question said truthful and reliable and,  
13 yes, it wasn't for me to decide at that stage, but what  
14 it was for me to decide was the crown case, potential  
15 crown case, or a case that could be at its highest.

16 Q. All right. And as part of exploring that, where you did  
17 have different versions, not being for you to make a  
18 decision on that, you would have to manage that  
19 situation because you would not be in a position to say,  
20 this is what's true and this is what's accurate and  
21 ignore everything else.

22 A. Sometimes when we looked at the facts, we were able to  
23 say actually that cannot be right or that witness cannot  
24 have seen that, because simply when we looked at maybe  
25 the CCTV we knew that wasn't supported, the witness

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1           wasn't there at that point, so we were able to discount  
2           some of the eye witness evidence.

3           Q. All right. And do you remember any specific examples of  
4           where you simply discounted the eye witness evidence?

5           A. I don't know. Maybe that was an imprecise use of words.  
6           Maybe we didn't completely discount it, but we certainly  
7           looked at it and thought, well, perhaps that is not  
8           right.

9           Q. So where you had a situation where you thought maybe  
10          perhaps that's not right, would you simply push it to  
11          one side, maybe not discount it as such, but push it to  
12          one side and not address that with experts and with your  
13          investigations or would you retain that and address it  
14          as part of your investigations?

15          A. It depended on the nature of the piece of evidence and  
16          what we had to contradict it. If it's something very  
17          strong to contradict it, it may be that I might not have  
18          mentioned it, but I don't recall with any of the experts  
19          that any of the statements were not included.

20          Q. Right. So in terms of the documents that were provided  
21          to experts, were you giving them the full picture or as  
22          much of the picture as you could?

23          A. As far as I'm aware, we were.

24          Q. And none of those statements were discounted or removed  
25          so the expert could not have those available?

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1 A. Not as far as I recall.

2 Q. And where there may be were issues or questions in your  
3 mind in relation to credibility and reliability that it  
4 would make it -- would that make it more important that  
5 you made sure the experts had the full picture of the  
6 versions that were put forward by witnesses?

7 A. Certainly all the statements anyway.

8 Q. Right. All right. Thank you. Can we --

9 A. Just before we move on.

10 Q. Sorry.

11 A. Because what I think that paragraph goes on to say was  
12 that what's been discussed there is not experts, but the  
13 potential for precognosing some of the police officers.

14 Q. Yes. I was asking about it specifically in relation to  
15 the wording "the perception that these statements may  
16 not reflect the true picture" and to flush out with you  
17 this issue of perhaps there were different versions of  
18 events available to the crown at that time.

19 A. Okay.

20 Q. And I think you've helped me with that. I would like to  
21 move on now, please, to the letter of instruction that  
22 was sent to Martin Graves from Alisdair McLeod and this  
23 is dated 24 January 2018, and it's COPFS 00008. And  
24 it's dated, as you'll see, 24 January 2018, to  
25 Martin Graves.

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1           There's two passages I am particularly interested in  
2           looking at, although this is a lengthy letter that's  
3           been prepared and the letter itself is nine pages long,  
4           but I'm interested in two paragraphs and over the course  
5           of lunchtime I have looked at every version that  
6           the Inquiry has available. There are nine versions with  
7           track changes, some from yourself and some from other  
8           members of the team.

9           Now, if we could look at -- you'll see it is the  
10          letter of instruction to Martin Graves. The first  
11          passage I'm interested is on paragraph it and it's in  
12          bold. Sorry, page 2, I'm sorry that was my mistake.  
13          Page 2, you'll see it in bold "Given your expertise"; do  
14          you see that on the screen?

15         A. Yes, I do.

16         Q. Having gone through the nine versions available to  
17          the Inquiry, I can tell you that the final sentence was  
18          one of the track changes that was added:

19                 "We would ask that you consider all of the materials  
20                 supplied to you in reaching your opinion."

21                 Personally, I don't want to labour that, that  
22                 doesn't seem controversial. The part I am interested in  
23                 is the beginning of this paragraph:

24                 "Given your expertise, the crown wish to instruct  
25                 you to prepare a report commenting on the actions of

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1 police from the point of engagement with Mr Bayoh and  
2 particularly providing opinion on whether the method of  
3 engagement with and restraint of the deceased by  
4 officers was reasonable and justifiable, taking into  
5 account the requirement for their use of force to be  
6 necessary, accountable, proportionate, legal and  
7 ethical."

8 Now, we've heard evidence that the officers are  
9 permitted to use force in this part of their duties,  
10 that that can be lawful, if it is justified, and it  
11 would be justified and lawful if the officer can explain  
12 why it was necessary to use force, why that was the  
13 minimum level, absolute minimum level of force that was  
14 needed to achieve their aims, whether it was reasonable.  
15 So they have to justify under reference to those  
16 concepts and I think that's what's set out here in this  
17 letter of instruction.

18 "And in general in providing your opinion please  
19 comment on whether the officers concerned seemed to have  
20 followed their OST training."

21 And that was a supplementary matter.

22 Now, looking at that paragraph first of all, I asked  
23 James Wolffe about this paragraph and the phrase  
24 "whether the method of engagement with and restraint of  
25 the deceased by officers was reasonable and

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1           justifiable."

2           And I asked him on reading that, whether it appeared  
3           to be an invitation to Martin Graves to look at the  
4           evidence and essentially take a view which was  
5           ultimately a decision to be taken by the fact-finder?  
6           In the case of a criminal trial, that would be the jury.  
7           I asked him if it was an invitation to read the evidence  
8           that was provided and to form his own judgment on the  
9           facts and to see whether he thought the restraint was  
10          reasonable and I think I used the phrase "perhaps  
11          usurping the function of the court", but in effect was  
12          this passing the responsibility to Martin Graves to form  
13          a view, which was ultimately the function of the jury,  
14          and in taking that approach, we're really asking him to  
15          decide that issue, the issue that ultimately would be  
16          one for the jury, and in response, Mr Wolffe said:

17                 "The important point... "

18                 After some discussion. I'm summarising his answer:

19                 "The important point is that the factual basis upon  
20                 which the view is reached is robust or if there are  
21                 alternative factual scenarios, that you know is explored  
22                 and is patent in the ultimate view of the expert so that  
23                 the expert's opinion and the basis for it can be  
24                 properly scrutinised and tested."

25                 Would you agree with Mr Wolffe that it's important



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1           that the facts and the factual basis of any view are  
2           properly explored with the expert?

3           A. Certainly that the expert has the information that's  
4           necessary for them to come to that expert opinion,  
5           absolutely.

6           Q. And Mr Wolffe also talked about -- he gave an example of  
7           a professional negligence case and he said:

8                     "The type of question that may be asked in that  
9                     would be whether the actions were consistent with what  
10                    you would expect from an ordinarily competent member of  
11                    a profession."

12                   And we also spoke about in a criminal context, say  
13                   in a section 1 death by dangerous driving trial, that  
14                   you would not ask a road traffic reconstruction expert  
15                   "Was the driving dangerous?" because that would be a  
16                   question exclusively for the jury, but you could ask the  
17                   expert "How would a careful driver have driven along  
18                   this road in these circumstances? What speed would a  
19                   careful driver have?" The answer to that may be within  
20                   a range, and you could even pose the question, "Would  
21                   that careful driver drive at ninety miles an hour in the  
22                   rain?" but you couldn't ask the jury or if you did ask  
23                   the jury "Was the driving dangerous," inviting the  
24                   expert to make that decision, which is solely for the  
25                   jury, that would be objectionable. Would you agree with

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1           that?

2           A.  If you were in a criminal trial and you were talking  
3           about --

4           Q.  In a criminal trial.

5           A.  -- evidence of admissibility, agreed.

6           Q.  And Mr Wolffe agreed with those matters and I asked him,  
7           is it possible taking this approach, as written down in  
8           this letter of instruction, taking that approach with  
9           Mr Graves could potentially give rise to a risk or  
10          perhaps a temptation to hand over responsibility for  
11          taking a view on the restraint and whether it was  
12          justified to the expert and asking them to make that  
13          decision and then simply there would be a risk that you  
14          could say "we accept what you said on that and we'll  
15          proceed on that basis" rather than applying -- the crown  
16          applying its own independent thought processes.

17                 And do you consider, looking at the way that's  
18          phrased and having agreed in relation to the points that  
19          we have been discussing, that there is a risk that  
20          posing that type of question to Martin Graves invites  
21          him to make his own decision and form his own  
22          conclusions about the factual position which is related  
23          to the events at Hayfield Road?

24          A.  I can see what you're talking about and what you're  
25          getting at.  I think we might have phrased it

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1           differently so that we could have asked the questions in  
2           an admissible fashion, if you're talking about in a  
3           criminal trial evidence sphere, and we could have put  
4           in, the way you phrased it, which was "In the  
5           circumstances what would you consider to be a reasonable  
6           approach?" That might be a way to have approached it.

7           I amn't concerned that the information that we got  
8           back in any way clouded or coloured or sent us, the  
9           investigation team, off in the wrong direction. If  
10          there was material in there that usurped the finding of  
11          a fact-finder, then I would know -- if I was going to  
12          use his evidence in a subsequent trial, I would know  
13          where to stop and in fact, by that point, it would  
14          probably already have been objected to and excised from  
15          the report and we may well have -- if there was  
16          something in there and we were in a criminal trial, we  
17          may simply lodge a redacted statement or have an  
18          agreement in advance before starting evidence.

19         Q. Right. And yesterday, and we also spoke to Mr Wolffe  
20          about this, we talked about a technique and a strategy  
21          that's used by -- could be used by the crown, is used by  
22          lawyers, where they appreciate and acknowledge the  
23          existence of different factual versions, and in order to  
24          explore fully each alternative version, that they  
25          develop hypotheses, factual hypotheses, and they can

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1 look at one, one version: if this is accepted, let's  
2 explore the implications of that and if it's not and  
3 version two is accepted, you can look at the  
4 implications of that and I think yesterday you talked  
5 about presenting a factual matrix which sets out and  
6 maintains the different versions that may be -- may  
7 exist in relation to any given incident.

8 A. And that sort of technique is the technique that you  
9 might use -- that a crown prosecutor might use in when  
10 examining a crown expert witness. But knowing that  
11 there's going to be particular challenges from the  
12 defense counsel or a defence expert, you might want to  
13 meet that head on in the crown case and put that  
14 alternative hypothesis to the witness. Before you do  
15 that in court, you will already have done that in  
16 consultation, because you want to know the answer before  
17 you do it.

18 Q. So the consultation when you're sitting with the expert  
19 is your opportunity in a relaxed atmosphere to explore  
20 those potentially different factual versions of events?

21 A. And as we talked about yesterday, that might be in  
22 different consultations, it might not always be in the  
23 initial consultation, it might be in a subsequent  
24 consultation immediately before trial or it might be at  
25 the stage that we're talking about.

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1 Q. But at the very least, in a consultation with an expert  
2 where there are different versions, you would want to  
3 have your core crown theory of the fact -- the most  
4 prejudicial version at least explored fully with the  
5 expert?

6 A. And I think that's what we said yesterday; the crown  
7 case at its highest.

8 Q. The crown case at its highest, thank you.

9 There's another section of this letter of  
10 instruction I would like to look at and that's page 7  
11 and it's towards the bottom and it talks about  
12 "restraint on the ground". And you will see that this  
13 as a section regarding the restraint part of the events  
14 in Hayfield Road. It refers to the CCTV timeline, which  
15 we talked about yesterday briefly, the duration.  
16 I would like to look at the final paragraph of that:

17 "The Snapchat footage taken by Witness Wyse  
18 (inserted at 1 minute, 1 second into the restraint)  
19 contains a brief glimpse of the methods of restraint  
20 being used at that time. Six officers are in various  
21 positions on/around the now deceased. From that  
22 Snapchat footage, it appears Mr Bayoh was lying on the  
23 southern pavement on Hayfield Road surrounded by five  
24 police officers, namely PC Smith, PC Tomlinson,  
25 PC Paton, PC Gibson and PC McDonough. A sixth officer,

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1 believed to be PC Walker, appears to be lying lengthwise  
2 on top of or beside Mr Bayoh, his high-visibility  
3 clothing visible momentarily."

4 Now, PC Walker is the officer who was 25 stone and I  
5 think 6 foot 4. Would you say that this version, which  
6 is being given in this letter of instruction, was the  
7 most prejudicial version, the crown version at its  
8 highest, that was available?

9 A. I would say if he's lying on top of Mr Bayoh, then  
10 absolutely, because my recollection was that his  
11 position might have been that he was kneeling, but that  
12 some of his body weight might have been on the top of  
13 Mr Bayoh, but of course if his knees are on the ground  
14 then not his full weight is on the upper part of  
15 Mr Bayoh so I -- from looking at that and from my  
16 memory, that would be a less prejudicial position.

17 Q. Thank you. I think we'll come on to that in a moment  
18 when we look at the report from Mr Graves.

19 A. What also strikes me about that is that there is the  
20 mention of the high-visibility clothing. I remember  
21 I didn't understand that, not necessarily at this stage,  
22 and I had asked to go back and have a look at the CCTV  
23 and for that to be explained to me, because I couldn't  
24 see that and I couldn't understand how that was relevant  
25 and how that related to that particular officer.

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- 1 Q. All right.
- 2 A. I remember looking at that in detail.
- 3 Q. Did you ultimately resolve that having reviewed the  
4 Snapchat footage?
- 5 A. I can't remember, but I'm not sure I did. I'm not sure  
6 I was satisfied that the CCTV was sufficiently clear,  
7 but I certainly wanted it explained to me.
- 8 Q. But regardless of your own personal views, this was  
9 setting out in the letter of instruction the crown case  
10 at its highest, it's most prejudicial?
- 11 A. With regard to that section.
- 12 Q. That aspect.
- 13 A. Yes.
- 14 Q. In relation -- we're talking about the restraint  
15 section.
- 16 A. Yes, I would think -- with regard to that particular  
17 officer and the alternative position that I have just  
18 suggested, then I think, yes.
- 19 Q. Okay.
- 20 A. Lying on top is certainly more prejudicial.
- 21 Q. The alternative isn't put there. It is simply the most  
22 prejudicial position. Do you have any comment about  
23 that? The alternative factual hypothesis is not present  
24 there; do you have any concerns about that?
- 25 A. My recollection is that there was a discussion about

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1           that witness simply there's weight being on the top of  
2           Mr Bayoh's body, the upper part and that was with the  
3           expert, but that's only my recollection at this stage.

4           Q. Right. No, I mean in the letter of instruction. You  
5           obviously had an opportunity to review it, you did track  
6           changes, did you when you read that think there should  
7           also be the alternative factual matrix or the  
8           alternative factual hypothesis put or did you take a  
9           view that that was sufficient because this represented  
10          the most prejudicial version?

11          A. I think I might have taken the view that the words  
12          "beside" was sufficient to convey that other position.

13          Q. Right.

14          A. So kneeling beside.

15          Q. Right.

16          A. It just doesn't go on to say "with the weight on the  
17          upper part of the body", so I think -- as I'm looking at  
18          that now, I think I was probably satisfied that that was  
19          sufficient in the letter of instruction to convey both  
20          positions.

21          Q. Thank you. Could we now look at the report that Martin  
22          Graves produced, COPFS 00024, and I would like to look  
23          at page 30. There are 41 pages on this pdf and this is  
24          the report that ultimately was sent by Mr Graves to the  
25          crown. And I'm interested in -- you'll see that on this



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1 page there are paragraph numbers. I'm interested, first  
2 of all, in S. Here with her. And this is where  
3 Martin Graves talks about the factual position and I  
4 will go through a number of paragraphs with you just to  
5 put this in context:

6 "PC Walker also fell to the ground at this time  
7 dropping the baton he had taken from his colleague. He  
8 states that he ended up on his knees next to Mr Bayoh  
9 who was on his back."

10 So at the very least Mr Graves has acknowledged and  
11 noted that he was aware of PC Walker's version at this  
12 point that he ended up on his knees next to Mr Bayoh.

13 And then if we can look at page 31 and this is in  
14 the taking to the ground and restraint of Mr Bayoh  
15 section, page 31, and if we can look at -- well, from D  
16 we talks about the restraint and the information he had  
17 available. He talks at E:

18 "At the start of this process, PC Walker describes  
19 the subject lying on his left side with him [that is  
20 PC Walker] behind on his knees. He states he attempted  
21 to get hold of Mr Bayoh and was placing some downward  
22 pressure on his shoulder with his upper body."

23 And I think that's what you were talking about  
24 earlier. So Martin Graves recognised that there was a  
25 version given by PC Walker which was not aligned with

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1 the most prejudicial version available to the crown.

2 And then if we look at J, please:

3 "At this time there are differing accounts of the  
4 body position of Mr Bayoh. PC Tomlinson, Smith and  
5 Mr Nelson appear to have him on his front with PC Walker  
6 lying over his upper body."

7 So that's the high point of the crown case and --

8 A. It is though slightly different than the bit you took me  
9 to before, because we were indicating that he was  
10 completely over Mr Bayoh, lying on top of him, whereas  
11 here that looks slightly different.

12 Q. Right.

13 A. Lying across. The picture that paints for me is across  
14 the upper body.

15 Q. Right. So what it says here is "lying over his upper  
16 body".

17 A. But also from inference all his weight on his upper  
18 body, so nothing to suggest that any other part is on  
19 the ground bearing his weight.

20 Q. Right. So in the original section we looked at, let me  
21 just see if I can find it, the position presented in the  
22 letter of instruction on page 7 was that PC Walker  
23 appeared to be lying lengthwise on top of or beside  
24 Mr Bayoh, and here Mr Graves is stating in his report  
25 that Tomlinson, Smith and Nelson appear to have him on

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1 his front with PC Walker lying over his upper body, so  
2 there's nuance there between the versions?

3 A. I think so.

4 Q. That what's stated at J. It is not completely in line  
5 with the crown's most prejudicial version, the high  
6 point of the crown case, but it gives an example of one  
7 version at least from three of these witnesses and  
8 PC Walker describes this as being on his knees with his  
9 upper body over the subject's right shoulder with him  
10 lying on his left side.

11 So what we have here in J is a description,  
12 Mr Graves' interpretation of the evidence, the  
13 statements of Tomlinson, Smith and Nelson, which are  
14 lying over his upper body, and he has the -- he's  
15 recognised the version given by PC Walker about him  
16 being on his knees with his upper body over the  
17 subject's right shoulder and him lying on his left side.  
18 There's no recognition in there of the high point of the  
19 crown case which was stipulated in the letter of  
20 instruction. That's not mentioned there.

21 A. And I can't remember whether we did in fact have a  
22 witness saying he was completely over the top of  
23 Mr Bayoh.

24 Q. Right. So do you think that the letter of instruction  
25 was -- do you not remember or do you think that may be

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1           was --

2           A. I just don't remember. I don't remember the details of

3           each individual's statement well enough at this stage to

4           be able to comment on that.

5           Q. Right.

6           A. I did at one stage, but not today.

7           Q. Thank you. So we were at J, and I asked Mr Wolffe about

8           the position in relation to this, and he was of the view

9           that it would have been a useful way to explore the

10          factual issues with the expert if there were these

11          potential variations and different versions to adopt a

12          method involving the use of hypotheses and do you agree

13          that this is a useful technique in how the crown can

14          discuss issues with an expert?

15          A. I think, yes, I have already agreed that.

16          Q. Right. And the letter of instruction did not present

17          factual hypotheses to Mr Graves either -- obviously, it

18          stipulated the lying across the body. There was no

19          mention of Tomlinson, Smith and Nelson lying over his

20          upper body as a factual hypothesis and there was mention

21          of PC Walker at the side of Mr Bayoh, but, again, no

22          factual hypothesis developed within the letter of

23          instruction. And I'm wondering, looking at it now, do

24          you think that would have been a very helpful technique

25          to use in the letter of instruction with Mr Graves?

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1       A. I think the sentence that you took me to in the letter  
2       of instruction is quite general. It will cover all the  
3       situations that we saw that we've talked about beside  
4       kneeling, half on, half off, fully on, it could cover  
5       all those things and I think the expectation was that  
6       the expert would look at all those things, he having the  
7       source material.

8       Q. And in terms of developing issues with Mr Graves and  
9       exploring issues, to what extent did you explore those  
10      hypotheses with Mr Graves although they hadn't actually  
11      been addressed in the letter of instruction? So we  
12      having heard evidence from Mr Wolffe, and he talked  
13      about the use of hypotheses, was it part of your  
14      exploration of this issue to ask Mr Graves if the facts  
15      are that PC Walker was lying -- let me get this right --  
16      lying lengthwise on top of Mr Bayoh, did you ask  
17      Mr Graves was that consistent with the actions of a  
18      reasonably -- a hypothetical reasonable police officer?

19     A. I can't remember. I mean those were the issues that  
20     were concerning us, those were the issues that were  
21     highlighted in the letter of instruction. If I  
22     consult -- if -- when I consulted with Mr Graves, I was  
23     the second person to consult, because I think you told  
24     me already that Fiona Carnan consulted.

25     Q. She precognosed Mr Graves?

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1 A. Precognosed.

2 Q. Yes.

3 A. Then it would be entirely consistent with normal  
4 practice for me to put the issues that we were concerned  
5 about to the expert.

6 Q. So it would be normal practice to say if the factual  
7 position is that PC Walker, 25 stone, was lying  
8 lengthwise on top of Mr Bayoh during the restraint, was  
9 that consistent with the actions of a hypothetical  
10 reasonable officer and to have that answer explored with  
11 the expert?

12 A. If that was not something that was dealt with properly  
13 in the report, then I would expect to question that and  
14 ask those questions, if I wasn't satisfied that I had  
15 got the answer from the report.

16 Q. Right. And then another alternative hypothesis could  
17 have been that, as it says here, that Tomlinson, Smith  
18 and Nelson spoke to him being on his front with  
19 PC Walker lying over his upper body, that could have  
20 been another alternative factual hypothesis explored  
21 with Mr Graves and he could have been asked "Would that  
22 be consistent with the actions of a hypothetical  
23 reasonable police officer?" and, equally, in relation to  
24 the version given by PC Walker, where PC Walker was on  
25 his knees with his upper body over the subject's right

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1           shoulder and him lying to his left side, equally you  
2           could have then explored with Mr Graves, "Would that  
3           have been consistent with the actions of a hypothetical  
4           reasonable officer?"

5           A. Yes, absolutely, and of course the expert has already  
6           dealt with those -- that position earlier on in his  
7           report.

8           Q. Where in his report does he talk about factual  
9           hypotheses?

10          A. I don't think he says that, but he puts -- he has  
11          highlighted that he is aware of what's in Walker's  
12          statement.

13          Q. Yes.

14          A. So he knows that that's one of the viewpoints or one of  
15          the positions on the witnesses.

16          Q. Mm-hmm. But -- and you can correct me if I'm wrong, but  
17          I have read through the report and I don't see any  
18          factual hypotheses being put to Mr Graves for his  
19          comment in the report. It's not part of the letter of  
20          instruction and it doesn't appear to form part of the  
21          report; is that fair to say?

22          A. You have read through the report and I wouldn't disagree  
23          with you.

24          Q. All right. Thank you. Do you think that was perhaps a  
25          missed opportunity to explore these different versions

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1 at an early stage in a clearly identified way and to  
2 make it clear that Mr Graves that these were different  
3 versions, he wasn't being asked to decide which one was  
4 right, but to clearly identify what his opinion was in  
5 relation to the actions as described?

6 A. I think with hindsight, yes, it might have been better  
7 to ask the question. Would I expect those different  
8 hypotheses to be in the report, not necessarily.

9 Q. All right. And looking now, in the absence of clearly  
10 identified alternative factual hypotheses in the report,  
11 thinking now about the question that was posed in the  
12 letter of instruction:

13 "Whether the method of engagement with and restraint  
14 of the deceased by officer was reasonable and  
15 justifiable, taking into account the requirement for the  
16 use of force to be necessary, accountable,  
17 proportionate, legal and ethical".

18 Does that add to you any concerns about the way the  
19 question is phrased, that perhaps you were inviting or  
20 there was a risk that you were inviting Mr Graves to  
21 form his own view about the facts?

22 A. I can see that there might have been a risk and I can  
23 see your point. I'm not sure at that stage it would  
24 have been a particular problem for us and for me with  
25 regard to my decision-making process, but I can see that



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1 looking back, if I was preparing for a trial, then  
2 I would want to explore all those different options with  
3 the expert.

4 At the stage I was looking at and the decision I had  
5 to make, I think looking at the letter of instruction  
6 and from my recollection of what the expert had, I was  
7 sufficient at that stage -- I was happy that it was  
8 sufficient for my purposes.

9 Q. And obviously you weren't preparing for trial at this  
10 stage.

11 A. No.

12 Q. But why -- can you explain why you felt that was  
13 sufficient for your purposes, given you want to  
14 presumably have a very clear view about the opinion of  
15 the expert and to make sure as Mr Wolffe gave evidence  
16 that it was -- excuse me, give me a moment to find a  
17 phrase he used -- but ultimately I think that it was  
18 important that the expert be given a clear picture of  
19 what the factual position could be.

20 Sorry, I can't find the particular phrase, I read it  
21 earlier. So do you not think that even though you  
22 weren't preparing for trial that there would still have  
23 been merit and benefit in taking that perhaps more  
24 formal approach to the instruction of the expert and  
25 clearly identifying the different versions of fact?

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1 A. I don't think I can disagree with that.

2 Q. Right. Thank you. Could we look at page 32, please,  
3 and I'm interested in L, and this again is Mr Graves'  
4 report:

5 "I would also be very surprised that during this  
6 time PC Walker was not at times lying across the upper  
7 body of Mr Bayoh and putting a degree of pressure on to  
8 him. I do not think this could have been sustained or  
9 prolonged pressure due to my comment in the next  
10 paragraph and continued resistance of Mr Bayoh until  
11 full restraint was achieved."

12 And just for completeness, at M:

13 "PC Tomlinson provides an example of this when he  
14 states that Mr Bayoh was bench pressing PC Walker, who  
15 was a substantial weight, off the ground. In this  
16 position the fact that PC Walker was on his back would  
17 not have placed any pressure on his chest if this was  
18 not on the ground and Mr Bayoh would have been able to  
19 breathe if this position."

20 Looking at those two paragraphs now, looking at L in  
21 particular, do you consider that may give the impression  
22 that Mr Graves was forming his own view about the  
23 factual position?

24 A. Yes, it might give that impression, but it also gives me  
25 the impression that he is considering the crown case at

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1           its highest.

2           Q. Right.

3           A. So putting all his weight onto Mr Bayoh.

4           Q. Right. Well, he says he would be very surprised that  
5           PC Walker was not at times lying across the upper body  
6           putting pressure on Mr Bayoh:

7                     "I do not think this could have been ascertained or  
8                     prolonged pressure."

9                     Do you consider that he was forming a view about  
10           whether that particular factual version was truthful and  
11           accurate?

12          A. I have to agree with that, because he uses the words "I  
13           do not think". I think if I disagreed with that, that  
14           would be quite hard for me to support.

15          Q. And earlier today you talked about how it was simply not  
16           appropriate for a restraint expert to talk about medical  
17           matters and that would be of absolutely no value to the  
18           crown, because he was not a medical expert, did  
19           paragraph M cause you any concern when you read it when  
20           he talks about pressure on the chest and his view on  
21           whether or not Mr Bayoh would have been able to breathe  
22           in this position?

23          A. Yes, and that -- when I look at our report, I don't have  
24           to take everything in the report. Like an ultimate  
25           fact-finder, I can look at bits that I can accept

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1           because of the experience and bits which I could say,  
2           well, actually I couldn't lead that in evidence or  
3           I wouldn't lead that in evidence, because the witness is  
4           not in a position to say that and so it's perfectly open  
5           to me when I get the report to look at it in that way,  
6           to look at it in a critical way.

7           Q. Although at the trial you wouldn't need to lead that  
8           evidence, but reading it before you consulted with  
9           Mr Graves, did it cause you to be concerned that he was  
10          embarking on a course of action where he was forming his  
11          own views about the position, what the true and accurate  
12          version was and he was going down, can I use a  
13          colloquialism, he was going down a rabbit hole? Did you  
14          consider it part of your role to perhaps draw him back  
15          from that and, again, would there have been benefit in  
16          setting out very clearly the alternative hypotheses and  
17          asking Mr Graves to remain within those hypotheses and  
18          give his own views?

19          A. I think, yes, there's benefit in that. If the case had  
20          gone further, then that is perhaps something that I  
21          would do. I wouldn't ask him to change his report,  
22          because that brings with it its own complications, but I  
23          might have discussed that particular paragraph and it  
24          indicated that we might have come to the view together  
25          that that was not something that he really could express

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- 1 an opinion on.
- 2 Q. And did you do that when you consulted with him?
- 3 A. I don't know. I suspect I focused on the things that
- 4 were of real interest to me and not necessarily the
- 5 things that I thought I might ultimately ask him to put
- 6 to one side. I might have done. I just don't remember.
- 7 Q. Was it not of real interest to the crown, however, for
- 8 the most prejudicial version to be absolutely clearly
- 9 identified and to be discussed in detail with the
- 10 expert?
- 11 A. Thinking back, I was happy that he had the absolute most
- 12 prejudicial position. If you've looked at this and
- 13 decided that he hasn't then that is a matter for
- 14 the Inquiry.
- 15 Q. Well, what I'm saying here in relation to L and M is
- 16 that perhaps the perception could be that he was forming
- 17 his own views, which may be, and, again, it will be
- 18 entirely a matter for the Chair, but those views may not
- 19 have entirely aligned with the high point of the crown
- 20 case?
- 21 A. Well, I can see that you might think that when you
- 22 looked at those paragraphs, but also, alternatively, you
- 23 might look at other paragraphs and come to a different
- 24 conclusion.
- 25 Q. Did you want to clarify that with Mr Graves when you

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1 consulted with him?

2 A. I can't remember.

3 Q. Do you, looking at it now, think you definitely ought to  
4 have considered that and addressed that with Mr Graves,  
5 given the concerns you've expressed about what may be  
6 the perception about these paragraphs?

7 A. I think, as we have agreed, I might have thought that  
8 paragraph I was outwith the expert --

9 Q. L.

10 A. L, sorry, and M were outwith his expertise, so it's  
11 maybe not something I would have explored further with  
12 him.

13 Q. All right. And if we look at paragraph 33 -- sorry --  
14 page 33, paragraph V for victor, he then goes on to say:

15 "Whilst I'm not a medical expert in such matters, I  
16 have dealt with and reviewed many such cases and this is  
17 not one that jumps out as a typical case of positional  
18 asphyxia. It does have some of the hallmarks, but due  
19 to the short time of restraint, the constant movement of  
20 Mr Bayoh and his opportunity to take breaths during the  
21 restraint process, I do not believe this was a major  
22 contributing factor to his unfortunate death."

23 And, again, given he himself says "I am not a  
24 medical expert" is this the type of view being expressed  
25 by an expert that you would simply not consider to be of

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- 1           any value to the crown.
- 2           A. Yes, I put that to one side. We already had some of  
3           that information directly from suitably qualified  
4           experts so that would not even have registered with me  
5           beyond the fact he had said it.
- 6           Q. Knowing that it's there in his report, however, that you  
7           have an expert who's instructed in terms of his  
8           expertise regarding restraint, he's talking about  
9           medical matters, did that raise a red flag with you in  
10          relation to why is an expert on restraint going outwith  
11          his field of expertise? Is this something I should be  
12          concerned about? Is this something I should address?
- 13          A. It is a red flag, but it's not unusual with experts.  
14          I would want to satisfy myself that the things that he  
15          was telling us about, that he was qualified, had  
16          validity and I was -- I was content with them.
- 17          Q. Right.
- 18          A. So if I compared this to the other pieces of his report  
19          that were properly expressed as an expert, then as long  
20          as I was satisfied with those, that particular -- those  
21          particular paragraphs wouldn't cause me concern.
- 22          Q. But as red flags would you consider raising them during  
23          a consultation with Mr Graves?
- 24          A. I might do, perhaps in the way we might go to that  
25          paragraph and agree that that's not something that he is

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1 qualified to give an opinion on. I might even go as far  
2 as to check that it didn't go -- it didn't colour that  
3 particular paragraph, didn't colour any of his other  
4 conclusions, but since I can't remember the actual  
5 consultation I can't tell you whether I actually did  
6 that.

7 Q. All right. I would like to move on to his conclusions,  
8 so if you could turn to page 38, and if we could look at  
9 letter -- move down the page, please, summary of  
10 conclusions, section 8, and I would like to look at  
11 letter F for foxtrot and he says:

12 "In relation to all the variations and body position  
13 of Mr Bayoh and the officers, I would suggest this fits  
14 with my explanation as to the fluidity of the control  
15 and restraint process and that there were indeed times  
16 when Mr Bayoh was face down and the officers were at  
17 times placing pressure on to him to keep him on the  
18 ground. However, I do not believe this was constant or  
19 prolonged."

20 And I think in terms of the conclusions where we see  
21 here a reference to "my explanation" and "I do not  
22 believe this was constant and prolonged", again, looking  
23 at that paragraph now, does that give rise to any  
24 concerns in your mind?

25 A. I think I would want to be clear that I was giving the



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1 expert the crown theory at its highest and that was our  
2 explanation and not his and I can see the point that you  
3 are making about him being left to interpret the  
4 different statements.

5 Q. And once you have given an excerpt the crown theory, am  
6 I right in saying that you would then invite them to  
7 assume that that was correct and that was the true and  
8 accurate version and then explain how a reasonable  
9 hypothetical officer would react to that version?

10 A. Yes, in this particular case, I would be putting the  
11 crown case at its highest, because I'm not sure the  
12 crown were satisfied at that stage what exactly was the  
13 particular theory. So yes, I would want, as we talked  
14 about before, to put the crown case at its highest, but  
15 not necessarily saying this is the one that I am going  
16 to go with.

17 Q. No, and indeed I think we set out at the beginning of  
18 this series of questions that there may be different  
19 versions and it's not for you personally to decide which  
20 one you prefer, just as it it's not for Mr Graves to  
21 decide which one he prefers, and then proceed only along  
22 that basis and you would agree with that I think?

23 A. I do.

24 Q. I am going to move on now to look at the precognition of  
25 Mr Graves, which was conducted on 11 May 2018 and I

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1 would like to look at COPFS 00041.

2 LORD BRACADALE: Ms Grahame, it's just coming up to

3 3 o'clock, so we'll take a 15-minute break before you do

4 that.

5 (2.59 pm)

6 (A short break)

7 (3.16 pm)

8 LORD BRACADALE: Ms Grahame.

9 MS GRAHAME: Thank you. We were about to move on to the

10 precognition that was taken by the crown of

11 Martin Graves and if we could have on the screen

12 COPFS 00041.

13 Now, in evidence, Fiona Carnan had explained to

14 the Chair that she had precognosed Mr Graves, but

15 actually if we look at the very bottom I think we can

16 see not just her initials but Alisdair McLeod's initials

17 as well, "AM FC". But if we can look at page 8, this

18 is -- on the screen what we have here is the

19 precognition that was taken, and this is dated 11 May

20 2018, so it's after the report was initially sent to

21 crown, and I am interested in the section that says:

22 "I am asked about what can be seen on Snapchat 1."

23 Do you see that paragraph?

24 A. I do.

25 Q. And he says:

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1            "This looks to me like a standard position of team  
2            restraint. The first two officers go for the arms, the  
3            next officer takes control of head or legs. Standard  
4            set-up. It looks like one officer is lying across the  
5            legs. From reading the statements, my impression was  
6            that this was PC Tomlinson lying across the legs of  
7            Mr Bayoh. (This position is shown in the training  
8            manual). I would say that PC Tomlinson (I believe) is  
9            lying diagonally across the legs as shown in that  
10           picture. It looks like a 'bog standard' restraint  
11           position on the floor trying to get legs restraint on.  
12           In my view, the police officer lying diagonally across  
13           legs corresponds with Tomlinson. I don't see anyone  
14           lying across the upper torso. I am sure PC Walker was  
15           at times lying over the torso of Mr Bayoh, but that's  
16           not evident in that Snapchat."

17           So again, subject to questions of what can be seen  
18           in the Snapchat, it would appear that Mr Graves has been  
19           asked to look at the Snapchat and to express his own  
20           view about what can be seen on the Snapchat and having  
21           read other statements, namely PC Nichols and  
22           Tomlinson's, he has formed a view that PC Tomlinson can  
23           be seen lying diagonally across the legs. This appears  
24           to be a fourth version of the factual position which has  
25           been put and this is in the precognition.

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1           Now, given what we have said about the high point of  
2           the crown case, the alternative versions that have come  
3           out from our consideration of Martin Graves' report, and  
4           now this version, would you have expected the  
5           precognoscer to explore those different versions with  
6           Mr Graves and to consider the possibilities or perhaps  
7           to address these different factual positions with him to  
8           explore what was meant here?

9           A. My recollection of the information that we had was that  
10          the restraint was fluid and although we might be able to  
11          identify particular people doing things at particular  
12          times, we weren't necessarily exactly sure that we were  
13          getting that right and so what I see the expert being  
14          asked here and doing here is two things. First of all,  
15          looking at the images that he's being asked to look at  
16          and commenting on the positions of the different  
17          officers and I think, as far as that goes, that's  
18          perfectly acceptable, because he's looking at something  
19          and he's viewing it and he's giving us an indication of  
20          what he can see. I can see what he goes on to do is to  
21          try and fit together who's who and perhaps that's not an  
22          appropriate step.

23          Q. Would you have expected the precognoscer to really  
24          explore this further with Mr Graves either within the  
25          precognition or is this something that you addressed in

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1 the consultation that you had with Mr Graves?

2 A. I think what I would be interested in is sitting with  
3 him or the precognoscer sitting with him and looking at  
4 the Snapchat, but not taking it any further with regard  
5 to the statements, leaving that for the precognition  
6 team, but actually taking him through what could be seen  
7 on the Snapchats and the CCTV, but not necessarily going  
8 to the stage of identifying particular officers. So  
9 that would give you the positions but without that  
10 further element.

11 Q. Right, thank you. Let's look at the consultation notes.  
12 We have notes in the Inquiry which appear to be  
13 consultation notes with Martin Graves which was in  
14 London on 20 August 2018, COPFS 02337, and your name and  
15 Les Brown's names are at the top and there's four pages,  
16 or three and a half pages, and what I -- perhaps you  
17 would be willing to take from me is that there is no  
18 mention of factual hypotheses as part of this  
19 conversation, there is no clear identification of  
20 different versions, or Mr Graves' opinion on what are  
21 reasonable hypothetical officer would do depending on  
22 which version was being considered, there's no mention  
23 of a core crown theory or crown case at its highest or  
24 the most prejudicial version and no mention of three or  
25 a fourth version as given in the precognition.

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1           Now, reflecting now and looking back and given the  
2           issues that we've been discussing this afternoon, do you  
3           think that perhaps a better approach to make sure that  
4           Mr Graves was reined in, speaking within his area of  
5           expertise, and not making decisions about the factual  
6           evidence, not giving opinion on medical matters, that  
7           that was an opportunity for him to in a sense be reined  
8           in slightly and to explore very clearly what the  
9           different factual versions were and what his views were  
10          about the actions of a reasonable hypothetical officer?

11        A. I can agree with you that that was an opportunity to do  
12          that.

13        Q. And would you agree that that opportunity was not taken  
14          in August of 2018?

15        A. I can't remember and if it's not reflected in the notes,  
16          then I can't go anything beyond that.

17        Q. Right. Now, yesterday I asked you about a very specific  
18          question in relation to the speed at which officers  
19          elected to use force against Mr Bayoh. And I asked you  
20          if -- if that was considered and also whether, as a  
21          result of that, whether it was considered that it could  
22          give rise to any inferences or conclusions which might  
23          relate to bias, racial bias, and I think as part of your  
24          evidence on that series of questions, you express that  
25          it was very important that the OST expert could assist

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1           you with regard to what's normal, what's reasonable,  
2           what you would expect when a police officer arrives with  
3           the information that he has. So it was important that  
4           you knew exactly what the officers -- first officers  
5           knew and those are the kinds things that we would be  
6           looking for the expert to assist us with. We can look  
7           at the factual matrix, we can establish that as much as  
8           we can, but the expert would assist with that  
9           assessment, what reasonable -- hypothetical reasonable  
10          officers would do in that situation and within that  
11          timescale, the speed of events.

12                 And I pointed out to you there was nothing really in  
13          the analysis which addressed that specific issue and  
14          whether any racial motivation or racial inferences could  
15          be drawn and I explained to you that I had asked, for  
16          example, Fiona Carnan about that and Mr Brown and they  
17          had said they hadn't addressed those questions.

18          A. I'm sorry. They hadn't addressed what questions?

19          Q. The question about whether the speed at which officers  
20          had elected to use force against Mr Bayoh could  
21          ultimately give rise to any inferences in relation to  
22          racial bias?

23          A. Okay.

24          Q. They said they didn't consider the speed at which the  
25          incident occurred and whether that could give rise to

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1 any inferences regarding racial bias. And when I asked  
2 you about it, you thought that was something, as I  
3 understand your evidence, that the OST expert may have  
4 been able to assist with.

5 A. He would have been able to assist what a reasonable  
6 officer would have done or the reasonable range of  
7 options in those circumstances.

8 Q. Yes, and on the assumption, of course, that a  
9 reasonable -- hypothetical reasonable officer would not  
10 act in accordance with racial bias, would you accept  
11 that?

12 A. Yes, absolutely.

13 Q. Again, taking from me, with the consultation notes, I  
14 cannot see any issues along those lines being discussed  
15 with Mr Graves, so did you discuss the speed of the  
16 incident, issues of race, racial -- possible racial  
17 bias? Did you talk about any of that with Martin Graves  
18 at the consultation August 2018?

19 A. I don't think I talked about racial bias with  
20 Martin Graves. My recollection is that the speed of  
21 what the officers did at the different stages was  
22 something that was discussed. Whether it was discussed  
23 at consultation or whether it was in the report or  
24 whether I had seen it in the precognition, it's  
25 certainly something that I'm aware was looked at,



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1 because, from recollection, what we were talking about  
2 was the chronology.

3 So officer X did that particular thing at that time  
4 within X amount of time being at the location. Was that  
5 reasonable? Is that what you would expect? Are there a  
6 range of options? The one that was chosen is that  
7 reasonable or unreasonable. Those are the kind of  
8 things that I was -- that I recall discussing. I don't  
9 recall discussing it directly with the expert because  
10 I don't recall the consultation, but certainly my  
11 recollection was that those are questions that he did  
12 answer.

13 Did I discuss particularly racial motivation with  
14 him? No. I wasn't sure that that was something that  
15 was appropriate to discuss with him. I of course, as  
16 we've talked about before, was looking like at the mens  
17 rea element continuously and I was looking at evil  
18 intent. Once -- if he had said to me that was not a  
19 reasonable option, then I would be looking as to why  
20 that option was taken and was there an explanation that  
21 there was some evil intent and so perhaps a racial  
22 motivation behind that supporting that evil intent.

23 Q. Can you help the Chair when you say he looked at that  
24 question that is Martin Graves that you're referring to?

25 A. Mm-hm.

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1 Q. When was he asked to look at that question about the  
2 speed at which officers elected to use force against  
3 Mr Bayoh?  
4 A. My recollection is that was part of his instructions.  
5 I don't know whether it was in the letter of  
6 instruction, but he was asked -- my understanding of  
7 what he was going to look at was the whole restraint  
8 period, so right from the start that they had attended  
9 at Hayfield Road, right through, so not just the actions  
10 of the individual elements of the restraint, but the  
11 preamble to that with regard to batons and CS spray.

12 Q. All right. Maybe we should go back to the letter of  
13 instruction then, which was 24 January 2018, and I'm  
14 sorry -- thank you.

15 Let's look at the section that's headed up, page 6,  
16 "Questions about PCs Walker and Paton initial  
17 engagement":

18 "Given the information available to those first two  
19 police officers, please provide your comment on the  
20 profile of the now deceased, the initial risk assessment  
21 by those police officers on their initial engagement  
22 with the deceased and on their use of force."

23 We have heard evidence that the first two officers  
24 at the scene who arrived in a van were PC Walker and  
25 PC Paton:

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1            "What, if anything, could or should the officers  
2            have done differently? Could you please address, in  
3            your opinion, the question of whether they ought to have  
4            been at that time alert to the possibility that Mr Bayoh  
5            was suffering from drug induced psychosis given the  
6            information to hand and his response to their initial  
7            engagement with him. If so, what, if anything, could  
8            they and should they have done differently in light of  
9            this in accordance with their training?

10           "Initial engagement by PCs Short and Tomlinson.  
11           "Constables Short and Tomlinson were the next two police  
12           officers at the scene. Neither of these saw a knife in  
13           the possession of the now deceased and there is varied  
14           evidence from the officers."

15           I won't go into that.

16           So in relation to the initial engagement, and I'm  
17           happy to be corrected if I'm wrong, there doesn't appear  
18           to be any focus on a question from Martin Graves about  
19           the speed at which they elected to use force against  
20           Mr Bayoh, but you think that perhaps that was something  
21           that was discussed with him at some point?

22           A. My understanding of those paragraphs is that that is  
23           part of what we're asking him to look at: what, if  
24           anything, could or should the officers have done  
25           differently? In other words, rather than within X

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1 amount of seconds discharging their CS spray, could they  
2 have done something different at that point and, again,  
3 there's more detail in that last highlighted paragraph  
4 that we were looking at. Should the officers have made  
5 a different assessment? Should they have attempt to  
6 have talked Mr Bayoh down, rather than immediately  
7 moving to one of their force option. So that is what I  
8 had anticipated the expert would have addressed at that  
9 stage.

10 Q. Right.

11 A. And that's to me what that -- those paragraphs mean.

12 Q. Right. Although it does not specifically raise that  
13 issue, but I'm wondering, looking at it now, with the  
14 benefit of hindsight, do you think it may have been  
15 clearer to Mr Graves if it had set out in relation to  
16 initial engagement perhaps the question of what would a  
17 hypothetical reasonable officer have done if they had  
18 arrived at this particular moment in time, parked the  
19 vehicle and within that period of time, this is what  
20 they could see at the scene? And would a reasonably --  
21 hypothetical reasonable officer have elected to use  
22 force within that timescale? And would that perhaps  
23 have been a clearer way of identifying this particular  
24 issue to Mr Graves?

25 A. Well, it's certainly a longer way, but I think perhaps

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1 the statement "what, if anything, could or should the  
2 officers have done differently?" covers that situation  
3 that you have just highlighted. We could have put more  
4 detail in there in the way that you've just outlined,  
5 but, as I'm looking at that now, I think that paragraph  
6 covers exactly what you have just outlined.

7 Q. Do you see any difference between asking Mr Graves what  
8 these officers should have done differently or asking  
9 Mr Graves what a hypothetical reasonable officer should  
10 have done in the circumstances?

11 A. I suspect that the thinking was that in asking that  
12 particular question in that way was that he would give  
13 us an example of what a reasonable officer would do in  
14 those circumstances.

15 Q. Right.

16 A. So if he formed a view that what the officers had done  
17 was not correct and was not reasonable, then he would  
18 outline, my understanding, what he thought a reasonable  
19 officer would have done. So in order to support the  
20 answer, I don't think they were correct, then he would  
21 then have to have gone on and say "I don't think they  
22 were correct, because here in my view is what a  
23 reasonable officer would have done."

24 Q. So although there is no mention in the letter of  
25 instruction to the concept of a hypothetical reasonable

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1 officer, you would have anticipated that Mr Graves would  
2 have come up with that himself and explained his  
3 position about what that reasonable officer should have  
4 done as part of his instruction?

5 A. He's the expert, he is the one that is coming in to tell  
6 us what the training is, what an officer should have  
7 done, why that training was in place, what he would  
8 expect in the different circumstances.

9 Q. All right. Thank you. Can I move on and ask you about  
10 another passage of your Inquiry statement -- actually, I  
11 will not ask you that.

12 What I would like to ask you is I understand that  
13 you were instrumental in setting up what has ultimately  
14 become the Deaths in Custody Unit that is part of SFIU  
15 and I wonder if you could help the Chair understand the  
16 background to that unit. We have heard something of it  
17 I think from Les Brown in evidence, but I would be  
18 interested in your evidence.

19 A. Well, I don't know if I would go so far as to say I was  
20 instrumental, but I was certainly involved in the  
21 setting up of the unit and I was involved with the  
22 pilot, the original pilot, that ran for I think about  
23 six or seven months and thereafter I was involved, just  
24 as I was made Principal Crown Counsel, in the  
25 involvement of the actual setting up of the full unit.

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1           So the Deaths in Custody Unit was initially piloted  
2           and I have some information in an email form, if I can  
3           refer to that, if that's okay.

4       Q. Please do, yes.

5       A. Just so I can remember the dates.

6       Q. Is this an email that was available to you from  
7           the Inquiry team or is it something that you would be  
8           prepared to give the Inquiry?

9       A. No, absolutely prepared to give the Inquiry. This is an  
10          email from one of the senior procurators fiscals in the  
11          CD Unit. It's in response to an inquiry by me on 31 May  
12          of this year just for me to refresh my memory with  
13          regard to the timeline and so that's what it does. It  
14          sets out a timeline of the inception of the Death in  
15          Custody Unit and it confirms that initially the  
16          Lord Advocate gave evidence to the Justice Committee in  
17          November of 2021 and there was announcement that a  
18          bespoke unit was to be established and it was bringing  
19          together the experiences of SFIU and of HSIU.

20          At that time, the pilot unit was tasked with looking  
21          at a number of deaths, particularly in one of  
22          Her Majesty's prisons and in December of 2021 there was  
23          a pilot commenced and that was continued until August of  
24          2022. At its inception, the role of the pilot was to  
25          consider deaths in custody due to suicides or drugs

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1 occurring after 1 November 2021 and to consider  
2 referrals of other deaths in custody before 1 November  
3 where SFIU considered that these required -- they  
4 required to be considered by the Health and Safety Unit.  
5 And so it was potential at that time to identify deaths  
6 that had a potential criminal element as well in terms  
7 of health and safety.

8 The Custody Death Unit was formally launched on  
9 1 August 2022 and at that time the unit started taking  
10 cases from the various SFIU units.

11 Q. So is it fair to say that expertise in handling custody  
12 deaths now is concentrated within the Custody Deaths  
13 Unit which has been set up?

14 A. It is. There are some legacy cases I understand that  
15 are still being dealt with SFIU, but any of the new ones  
16 which are identified as coming within the remit of the  
17 unit are dealt with specifically by the unit. The unit  
18 also has a group of Advocate Deputes that are solely  
19 allocated to that particular unit. It's not the only  
20 work they do, but it's one of their specialist  
21 allocations so there will be -- I think there is about  
22 10 or 11 Advocate Deputes because it's quite a big area  
23 that are allocated to the unit and they will look at  
24 cases that are coming in from the death in custody units  
25 and they will be marked specifically by those dedicated



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- 1 Advocate Deputes.
- 2 Q. So in terms of the Crown Office staff, there will be  
3 precognoscers, solemn legal managers and there will be  
4 Advocate Deputes who now have relevant experience in  
5 relation to deaths in custody and deaths following  
6 police contact?
- 7 A. That's correct, and the reason I was involved in the  
8 pilot was because I was involved in some other deaths  
9 in custody as well.
- 10 Q. Thank you. And there are a number of ADs who have that  
11 special experience that can provide information and  
12 marking decisions for that unit.
- 13 A. There are and that -- the learning and the knowledge and  
14 the training is shared between the unit and the Advocate  
15 Deputes. Any new Advocate Depute who's allocated to  
16 that unit will be trained in the same manner and have  
17 the same materials and the aim is to provide consistency  
18 with regard to the issuing of Crown Counsel's  
19 instructions and what I explained to you yesterday  
20 I think was the template for Crown Counsel's  
21 instructions, that's also embedded into the instructions  
22 that we get from the CDU unit.
- 23 Q. So if a death in custody or a death after police contact  
24 happened now, today, it would be directed and routed  
25 towards that unit?

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- 1 A. It would be and it would probably have an  
2 Allocated Depute right from the beginning.
- 3 Q. From the day it happened or thereabouts?
- 4 A. Yes.
- 5 Q. And would that Allocated AD be in a position to provide  
6 similar direction and instruction and assistance to the  
7 team in the sense that you've described yesterday when  
8 you were talking about that role?
- 9 A. Absolutely.
- 10 Q. Right, thank you. Do you understand or have any  
11 knowledge of the reasons why that particular specialist  
12 unit was being set up?
- 13 A. Only from what the Lord Advocate had said to the  
14 Justice Committee and to give them assurances that  
15 the -- that was going to happen that there was going to  
16 be a specialised unit set up.
- 17 Q. And was it seen that that would be of benefit to the  
18 handling of these cases, cases of this type?
- 19 A. Absolutely.
- 20 Q. Right. Can I ask you one last thing in relation to  
21 after you had met the Lord Advocate and you had  
22 discussed the issue with him regarding your decision,  
23 and I don't wish to ask you about that decision, can you  
24 recollect now what happened to the papers after that  
25 decision not to prosecute? Were the papers routed to

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1 another department to investigate issues to race or  
2 racial motivation?

3 A. I'm not sure about that answer, but I think ordinarily  
4 they would then sit with SFIU, because potentially there  
5 was going to be a fatal accident inquiry and there would  
6 be a lot -- at that time more of the incremental work to  
7 be done before it was ready for a fatal accident  
8 inquiry.

9 Q. Would you have any reason why progress couldn't be made  
10 at that stage in relation to investigating race, racial  
11 motivation, issues that were broader than perhaps would  
12 be more akin to the subjects and topics covered by an  
13 FAI rather than a criminal trial?

14 A. I think there could have been some investigation going  
15 on in parallel and, as you have heard, that is the way  
16 that we do that now, that cases are not dealt with --  
17 particularly deaths and deaths in custody or suspicious  
18 deaths are not dealt with in that incremental way, they  
19 are dealt with as much as possible in a much more  
20 collaborative way where different units are involved in  
21 preparing at the same time.

22 I think I have highlighted to you that one of the  
23 things that I thought might be possible to do once a  
24 decision was made with regard to criminality was to go  
25 back and take statements from the police officers or

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1           precognitions from the police officers. That of course  
2           could not happen until a decision on criminality was  
3           made.

4           Q. And were you aware of any progress that was made in  
5           relation to that regarding the officers after the  
6           decision was made on criminality?

7           A. I think the decision on the next steps was made pretty  
8           quickly, from recollection, and it was decided that the  
9           next steps would be potentially a public inquiry as  
10          opposed to a fatal accident inquiry.

11          Q. Right. And the decision was made on criminality in  
12          around August 2018 and the decision on the public  
13          inquiry was the following year, as I understand it,  
14          2019. Do you know what happened to the papers during  
15          that period?

16          A. I don't, but of course the distinction is that it's --  
17          it's within the Lord Advocate's gift, it's part of his  
18          duties into investigation of death to hold the fatal  
19          accident inquiry or instruct the fatal accident inquiry  
20          is held. I don't -- as I understand the procedure, it's  
21          not within his gift to do that with regard to a public  
22          inquiry. He can give advice, but he doesn't control the  
23          timeframe with regard to the setting up of a public  
24          inquiry.

25          LORD BRACADALE: There was a VRR process that went on from

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1           2018 and 2019. Now, during that period, was there  
2           anything to prevent preparation being done of the kind  
3           of matters that Ms Grahame has identified?

4           A. There was and I have forgotten about at the VRR process  
5           because of course I'm not involved at all in the VRR  
6           process and I don't even get to know what's happening  
7           with that for very good reasons. It's meant to be  
8           completely separate from the original decision-maker.

9           Beyond my comments with regard to the finality of  
10          criminal decisions, in other words the steps could not  
11          be made to go ahead and take statements from police  
12          officers until there was a final decision with  
13          criminality, with regard to criminality, I don't think  
14          that there was anything stopping further investigation,  
15          although my recollection was I was also asked to make a  
16          decision or give CCI with regard to a fatal accident  
17          inquiry and my recollection is that was -- that  
18          discussion with the Lord Advocate and a wider team was  
19          pretty soon after I had issued my Crown Counsel's  
20          instructions.

21          MS GRAHAME: Thank you. Could you give me one moment,  
22          please. Thank you very much. I have no further  
23          questions.

24          LORD BRACADALE: Are there any Rule 9 applications?

25          Ms Mitchell. Any others.

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1 Ms Edwards, would you mind withdrawing to the  
2 witness room, please, while I hear submissions.

3 (Witness leaves).

4 Submissions by MS MITCHELL KC

5 MS MITCHELL: I have six issues that I would like to raise.

6 The first is in relation to independence and this arises  
7 as a result of evidence that has been given by the  
8 witness about the independence of Crown Counsel. And  
9 that in particular was used to explain why there wasn't  
10 more involvement, for example, in obtaining details  
11 about the precognitions. In -- the independence of  
12 Crown Counsel is supposed to act as a check balance  
13 within the system and what I want to ascertain is what  
14 the weight of this procedural safeguard is, how is that  
15 independence shown.

16 The witness stated that Crown Counsel's team is an  
17 independent team:

18 "A counsel of lawyers of Advocate Deputes were not  
19 part of Crown Office and Procurator Fiscal so we provide  
20 independent legal advice and analysis on case, depending  
21 on the stage that we're at."

22 And what I would like to ask the witness is, is  
23 there any structural independence from Crown Office and  
24 by that, I mean are the systems and processes that are  
25 used in the course of working the Crown Office ones ie,

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1           you know, where you work, what email systems you use,  
2           are they all part of the same body?

3           The second question or second issue I would like to  
4           ask also relates to independence, which is that the  
5           witness said that she would get involved at a high level  
6           in relation to precognitions and she said that she  
7           didn't want to over influence what was in a precognition  
8           and what I would like to test with the witness is how  
9           does the involvement at all in this process sit with the  
10          idea of independence? There are two documents which I  
11          could refer to which relate to the witness asking  
12          questions, but I don't really think I need to go there.  
13          I think I can just ask it without going to those  
14          documents.

15          The third issue I would like to ask about is the  
16          issue of tropes. Yesterday in the witness' evidence she  
17          identified what I think was described as the "angry  
18          black man" in respect of tropes. I want to check with  
19          her if she identified those in statements which she read  
20          and did she give consideration to instructing any expert  
21          in case she missed any tropes and what I would like to  
22          ask her about, specifically, is there was an example  
23          given where Mr Bayoh, at that time unconscious, was  
24          lying down and there's evidence Mr Patent slapped him  
25          twice on the face to see if he was unconscious or

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1           conscious and to ask her whether or not she identified  
2           that as a possible racist stereotyping and, in that  
3           regard, I can call to the Inquiry's attention  
4           SBPI 00151 -- sorry -- 00515, page 20, which is a  
5           document from Inquest which highlights another case  
6           where violence was done to a person whilst they were  
7           unconscious to see whether or not they were really  
8           unconscious or whether or not they were faking it and  
9           that's to identify that as part of a possible racial  
10          trope. And if the witness didn't do that, to ask her  
11          whether or not the instruction in race, for example as  
12          had been done before in the case of a white supremacist,  
13          would have assisted in the process.

14                 Four, tropes and Mr Graves. My learned friend has  
15          been over at some length the letter from the crown to  
16          Martin Graves and she has touched upon this issue, but  
17          I would like to look at it in a slightly different way.  
18          For right or wrong, and putting aside the issue of  
19          whether it was appropriate to instruct an expert in that  
20          way, the crown asked whether or not -- he was to provide  
21          an opinion on whether the behaviour was reasonable and  
22          justifiable taking into account the requirement for the  
23          use of force to be necessary, accountable,  
24          proportionate, legal and ethical and that's a direct  
25          quote from the letter. What I would like to ask this



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1 witness is: If racial bias affected the perceived risk,  
2 for example, terrorism, the biggest man I have ever  
3 seen, super human strength, if that is racial bias and  
4 it's affected the perceived risk, ought that not to have  
5 been explored in relation, firstly, to the question of  
6 risk before you then go on to look at whether or not the  
7 behaviour was necessary, accountable, proportionate,  
8 legal and ethical and whether or not that is something  
9 that should have been highlighted and explored.

10 The fifth issue relates to a comment that was made  
11 about going the extra mile to unmask any motives and I  
12 want to ask that about that in the context of Article 2  
13 and Article 14, because we focused understandably on the  
14 basis that -- that work was being done to ascertain  
15 whether or not there was criminality, but of course the  
16 duty was not just to investigate crime, it was to ensure  
17 that the state had implied with its duties under  
18 Articles 2 and 14. And when the witness expressed the  
19 view about unmasking any motives, it of course is a  
20 reflection of the prohibition under Article 14:

21 "Authorities are under a duty to take all reasonable  
22 steps to unmask any racist or discriminatory motive and  
23 establish whether prejudice played a role in a death."

24 Now, we've heard at length in this Inquiry about the  
25 police officers' views that this matter may be linked to

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1 terrorism. One of the officers indicated and linked it  
2 with the coloured male and the potential terrorist  
3 connotations. He was described as deranged with super  
4 human strength. He was described as massive; "the  
5 biggest male I have ever seen". And what I would like  
6 to put to this witness we don't see anywhere an analysis  
7 done by the crown of whether or not there was a  
8 discriminatory motive and that can be part of a more  
9 general motive, it doesn't have to be the only motive,  
10 or whether prejudice played a role in his death and to  
11 ask, ought that to have been done by the crown and ought  
12 it to have been committed to writing, given the need for  
13 transparency and accountability?

14 The final issue I want to ask about is in relation  
15 to comments made about Mr Bayoh's name and the links  
16 with Creole. You will recall this took place in the  
17 context of whether or not the witness was correct when  
18 she spoke about the Afro-Caribbean population and that  
19 was explained and I think the Inquiry should have the  
20 explanation from that witness quite clearly as to the  
21 process that went through and what that meant. However,  
22 my question is slightly different. The witness said  
23 this in her evidence:

24 "Now, we have heard that Mr Bayoh was not part of an  
25 Afro-Caribbean population. He originally came from

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1 Sierra Leone."

2 That was my learned friend counsel to the Inquiry.

3 The witness answered:

4 "I knew that and I knew he had come from  
5 Sierra Leone and I think I indicated to you that I had  
6 done some research about the country and how it came  
7 into being. I think where -- you will recall I didn't  
8 have the papers at the time. My memory was I look at,  
9 following a consultation with the experts, I think it  
10 was Professor Lucas or Soilleux, one of the two, with  
11 regard to sickle cell anaemia. I had looked at an  
12 academic paper where the prevalence of sickle cell gene,  
13 the recessive gene in the Afro-Caribbean population, had  
14 been discussed and my recollection was I had done a bit  
15 of research on that with regard to the makeup of the  
16 population in Sierra Leone and there was a significant  
17 portion of Afro-Caribbeans in Sierra Leone because of  
18 the way that the country had come into being."

19 So I will pause there. It seems to be that a link  
20 has been made with sickle cell, the recessive gene in  
21 the Afro-Caribbean community, and then a link with  
22 people in Sierra Leone. Now, that must have been made  
23 because of course the family were from Sierra Leone.

24 The witness went on:

25 "There were resettled slaves from South America and

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1 I think this was why I was thinking of the  
2 Afro-Caribbean, that of course and the name, Mr Bayoh's  
3 name, which may be considered to have sort of Creole  
4 inferences. That's what triggered my memory."

5 Now, the Inquiry may not know, but Bayoh is a  
6 Mandingo name. It's native of Africa. Sheku's family  
7 have no connection with the Afro-Caribbean community, no  
8 connection with Creole, there is no slavery connection  
9 and no connection to the Caribbean. And what I would  
10 like to check with this witness when she was looking at  
11 the name Bahoh, was she linking the word "Bayoh" and the  
12 name which may be considered to have Creole inferences,  
13 with the "Bayou" in the US. The reason that I'm asking  
14 this is, this Inquiry has to look at whether or not the  
15 crown were taking the issue of race in a way where they  
16 looked at their own limitations and it may be contended  
17 should have got experts in and, I respectfully submit,  
18 this may be another example of the crown adopting a path  
19 or looking at things they believe to be correct which  
20 simply aren't and a reference to a race expert or  
21 speaking to the family themselves about it would have  
22 been able to avoid any of that particular issue.

23 Those are my six issues.

24 LORD BRACADALE: Thank you. Well, in relation to the last  
25 matter, having regard to the evidence which the witness

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1 gave this morning, I do not think that I would be  
2 assisted by further exploration, but I will allow you to  
3 explore each of issues 1 to 5.

4 We can make a start on that now, but we have to rise  
5 sharply at quarter past 4 and continue tomorrow morning.

6 Could we have the witness back, please.

7 (Witness returns).

8 LORD BRACADALE: Ms Edwards, Ms Mitchell, who represents the  
9 families of Sheku Bayoh, has some questions for you.

10 I think it unlikely that we will finish that because we  
11 have to rise at quarter past 4 promptly today, so we'll  
12 sit until quarter past 4 and then we'll adjourn until  
13 tomorrow morning.

14 Ms Mitchell.

15 Cross-examination BY MS MITCHELL KC

16 MS MITCHELL: First of all, I would like to ask about the  
17 independence of Crown Counsel. You explained to us why  
18 you were involved in some parts and less involved in  
19 others and you explained to us by saying the following:

20 "So Crown Counsel team is an independent team of  
21 counsel of lawyers of Advocate Deputes. We're not part  
22 of Crown Office and Procurator Fiscal Service so we  
23 provide independent legal advice and analysis on cases  
24 depending on the stage they're at."

25 And then you sort of went on to describe that.

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1           What I'm wanting to do so is really test what --  
2           where does the independence lie and the first question  
3           I want to ask you is about structural independence. Is  
4           there any definitive structural independence between you  
5           acting as Crown Counsel and you acting in your ordinary  
6           course as an Advocate Depute?

7           A. No, they're one and the same.

8           Q. Okay.

9           A. My understanding is that the classification of  
10          Crown Counsel includes the Lord Advocate and the  
11          Solicitor General and, as a whole, those are the  
12          Crown Counsel team and Advocate Deputes are the ones  
13          below Solicitor General, so me and the rest of the  
14          Advocate Deputes.

15          Q. So you have narrowed my questioning already, because  
16          you've already answered two of the questions I want to  
17          ask you.

18                 I suppose, having identified that then, what is it  
19          that provides the independence from Crown Office and the  
20          Procurator Fiscal Service?

21          A. Okay. So Advocate Deputes are not employees of  
22          Crown Office and Procurator Fiscal Service. We hold our  
23          commission at the pleasure of the Lord Advocate and it  
24          is the Lord Advocate that appoints Advocate Deputes and  
25          the Lord Advocate can withdraw that commission at any

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1 time that he or she wants.

2 Although we receive our remuneration from the crown,  
3 we are contracted separately to work usually 220 days a  
4 year and we -- within the vagaries of the rota, we can  
5 choose how we allocate those 220 days.

6 Q. So you've anticipated again another one of my questions  
7 which was about payment and you are paid by  
8 Crown Office, but I understand the difference that you  
9 make.

10 So that's in terms of structural independence.

11 I would like to move on then to the second issue, which  
12 is testing the independence in a practical sense. In a  
13 practical sense, you indicated that if you read through  
14 a precognition, for example, and you thought more needed  
15 to be done in a certain area, you would say that you  
16 didn't want to over influence something but you might  
17 get involved in it to ask for something else to be done.

18 Now, what I would like to look at there is, is  
19 there -- can it properly be said if you're able to  
20 become involved in that way that there is independence?  
21 Where is the line drawn? Is there indeed a line or is  
22 it a grey area as to how much you get involved and how  
23 much you don't in that process?

24 A. I think it very much depends on the team and the  
25 Advocate Depute, but I think we would all strive to make

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1           sure that there was a line and not a grey area. And I  
2           think, practically, what we would be careful to do is if  
3           we need further work done, then we would ask for that  
4           further work done and that further analysis, but we  
5           wouldn't necessarily impose the answer before we ask for  
6           the further work done.

7           Also, if we are consulting with the team, my  
8           personal practice is to try to make sure that I don't  
9           too much influence the actual answer, that I direct the  
10          team towards further information that would be of  
11          assistance to me without trying to impose my view on  
12          what I think is the correct answer.

13         Q. I suppose in the asking of the question, that might give  
14          the impression that you are becoming involved or  
15          expressing a particular view if your question is pointed  
16          at a certain thing. And what I'm wondering is from an  
17          external perspective whether or not you can truly  
18          analyse that as indeed independent if you have any  
19          crossover at all?

20         A. I think it's a difficult line but I think it's a line  
21          that Advocate Deputes tread very well day in and day  
22          out.

23         Q. I would like to move on then, please, to the issue of  
24          tropes. You spoke yesterday about "angry black man" as  
25          a type of trope and you said that you had read a number



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- 1 of statements but not all the statements. I am  
2 presuming you read all the statements of the relevant  
3 officers who were involved in the restraint?
- 4 A. Absolutely, and that is evidenced to me at this, looking  
5 back, by the fact that I was able to speak to the  
6 experts and also discuss different positions.  
7 I understand now, looking back, that I had quite a  
8 detailed knowledge of those particular statements.
- 9 Q. Did you identify at the time that there were what could  
10 be identified as racist tropes in the police statements?
- 11 A. I think I said yesterday I didn't necessarily know at  
12 the time the word "trope", I think I have come to learn  
13 that word over the intervening years but I was aware of  
14 racist stereotypes and I think at the time I was aware  
15 of the racist stereotype "angry black man" or "big scary  
16 black man" but I don't think I would necessarily have  
17 called them tropes at the time.
- 18 Q. The fact that you've accepted that you weren't using the  
19 word "tropes" and you had identified "angry black man",  
20 would you accept perhaps that when you were dealing with  
21 this at this time, you didn't -- were not best placed to  
22 be able to identify tropes?
- 23 A. Well, the Inquiry will know more than me because you  
24 have taken evidence and about to -- or the Inquiry has  
25 taken evidence and about to take evidence. I was aware

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1 of racist stereotyping and potential -- how that  
2 potentially might influence what I was looking at, which  
3 was mens rea and evil intent. Whether it would have  
4 assisted me to know that particular word, I'm not sure.  
5 I guess that's a matter for the inquiry.

6 Q. Sorry, perhaps -- I'm not focusing on the word so much,  
7 that's perhaps my error. I'm focusing more on the types  
8 of racist tropes. For example, "superhuman strength",  
9 were you aware that that was one of the classifications?

10 A. I was and I was aware that was an issue here and that --  
11 my recollection is that we explored that not with anyone  
12 with regard to race but certainly with regard to  
13 pharmacology.

14 Q. And "superhuman strength", "he was the largest man I had  
15 ever seen", did you identify that?

16 A. Well, that fits in with the "big scary black man"  
17 stereotype.

18 Q. Did you -- this inquiry has heard evidence about the use  
19 of force on Mr Bayoh and by that I mean that when he was  
20 lying on the ground he was slapped and that was to see  
21 if he was unconscious. Did you identify that as  
22 inclusive and possible racial stereotyping?

23 A. I don't remember the slap, unless it was the police  
24 officer who first identified the fact that he perhaps  
25 was not breathing?

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1 Q. Yes.

2 A. And I don't recall if I knew -- if it was as strong as a  
3 slap.

4 Q. It was, it was -- he slapped him twice, that was in the  
5 PIRC statement.

6 A. Okay.

7 Q. Just for --

8 A. No, I don't think so. I don't think that's something  
9 that really registered with me as inappropriate or  
10 something that would be racially motivated.

11 Q. I see. I wonder if we can have a look briefly at SBPI  
12 00515 at page 20. Just for the record, the statement  
13 where it appears the slap is Alan Paton's statement,  
14 that's COPFS 00262, just in case the Inquiry knows that.  
15 This is a document, "Achieving Racial Justice at  
16 Inquests", and I wonder if we could scroll briefly to  
17 paragraph 20, or page 20. Scroll up slightly. Thank  
18 you. Now, do we see here the heading "Racial  
19 stereotyping can contribute to a culture of disbelief  
20 characterised by a refusal to accept symptoms of  
21 vulnerability or distress as genuine." And if we can  
22 look here at the bottom of the first paragraph it says:  
23 "For example, the inquest into the death of  
24 Sean Rigg, a Black man in a mental health crisis, found  
25 that with his eyes... "

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1           That doesn't make sense, sorry. If you go up to the  
2 top:

3           "... found that the failure to recognise Sean as a  
4 vulnerable person at the point of arrest and take him to  
5 an Accident and Emergency department rather than a  
6 police station contributed to his death.

7           "Sean's death also raises how racial stereotyping  
8 can contribute to a culture of disbelief, characterised  
9 by a refusal to accept symptoms of vulnerability or  
10 distress as genuine."

11          And then it goes on:

12          "Sean had been subject to eight minutes of prone  
13 restraint by police officers, he was taken to a custody  
14 suite where he slumped on the floor with his eyes  
15 closed. Police officers said he was 'faking'  
16 unconsciousness."

17          And it goes on to another example of someone  
18 suggesting a black man was feigning or passing out as a  
19 ploy to escape. So there are issues, would you agree,  
20 arising from slapping someone in the face which  
21 the Inquiry has heard is not legitimate use of force,  
22 there are issues there which have been identified by  
23 independent experts on the matter as issues relating to  
24 race?

25          A. I would accept that is what that says and that that is

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1 something that is a possibility.

2 Q. In those circumstances do you think -- I have been able  
3 to show you just this as one example -- would the  
4 instruction of an expert on race to analyse the language  
5 that was used by officers to assist with understanding  
6 what their perception of the situation was and what  
7 their perception of risk was would have assisted the  
8 crown in this case, for example, in the way that you  
9 used the white supremacist and got an expert report?

10 A. Potentially, yes.

11 MS MITCHELL: I think that's as close to ...

12 LORD BRACADALE: Thank you, so that's the end of your  
13 question?

14 MS MITCHELL: No, I think that's as close as I can get to  
15 without embarking upon a new ...

16 THE ARBITRATOR: Right, well, we'll stop there and continue  
17 at 10 o'clock tomorrow morning.

18 (4.13 pm)

19 (The hearing was adjourned to 10.00 am on Thursday, 6 June

20 2024)

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