

The Thursday Midday Webinar

**POLICE LAW**  
**Ian Stebbings &**  
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**The webinar will start shortly**

**Next Webinar 11<sup>th</sup> March**

**STRIKE OUT- FRANCESCA O'NEILL & HENK SOEDE**

25<sup>th</sup> February 2021

## The Thursday Midday Webinar

### Issues for Discussion

- Lawful/Unlawful Arrest  
(without warrant)
- Counter Factual scenarios
- Damages-Nominal/Exemplary
  - Disclosure/Warrants

## Lawful/Unlawful Arrest

- Whether an 'arrest' is lawful/unlawful was looked at in detail in the leading case of *O'Hara v CC of RUC* [1997] A.C 286
- Information in a briefing for example can give officers grounds for reasonable grounds.

## PARKER CASE

Parker v CC of Essex Police.

[2018] EWCA Civ 2788

Michael Barrymore case

Facts

## COUNTER FACTUAL SCENERIOS

- Parker sought substantial damages.
- The alternative argument by CC of Essex was that he was only entitled to nominal damages because he would have been lawfully arrested in any event.

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### FIRST INSTANCE DECISION

In 2017 Stuart-Smith J held that Mr. Parker could have been lawfully arrested by DC Jenkins but that he was nevertheless entitled to substantial damages for false imprisonment because he had not been lawfully arrested by the surveillance officer and had he been arrested by any other surveillance officer that would have been unlawful because they did not have the requisite information to form the reasonable beliefs.

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### FIRST INSTANCE DECISION

The trial judge found that there was no alternative to the designated officer arresting Mr. Parker;

nor did any officer from the enquiry team give thought to the legal requirement as to the state of mind of the arresting officer. He found that if DC Jenkins was not available to arrest Mr. Parker then no other could have lawfully done so.

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The judge then turned to the issue of damages

The judge correctly identified the principles derived from the leading cases of

R (Lumba) v Secretary of State for the Home Department [2011] UKSC 12 ("Lumba")

R (Kambadzi) v Secretary of State for the Home Department [2011] UKSC 23 ("Kambadzi")

Bostridge v Oxleas NHS Foundation Trust [2015] EWCA Civ 79 ("Bostridge").

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# Damages

The first two of the leading cases relate to Home Office detention orders made against individuals, the first concerned a detention which was derived from an unlawful policy, the second had resulted from a failure to carry out a review. The third concerned the detention of a mentally disordered patient

What is now known as the “Lumba Principle” gives rise that only nominal damages should be awarded where the outcome would have been the same absent the unlawfulness.

The judge decided that it was not enough for a defendant to show that the counterfactual scenario could have resulted in the same outcome as has been caused by the tort, the defendant must go onto show that it would have done so.

## TRIAL JUDGES FINDINGS

On the facts the judge found that all the evidence pointed one way as to whether Mr. Parker would have been arrested lawfully. The surveillance officers had not been sufficiently briefed, but Det Supt Wilson had stated that Mr Parker was to be arrested 'come what may' but the surveillance team lacked the requisite knowledge under O'Hara and there was no evidence that any officer had borne this in mind before, during or after arrest or was the any alternative plan to lawfully arrest Mr. Parker. This is further evidence by the fact that he was not lawfully rearrested subsequently

# POINTS OF APPEAL & COURT OF APPEAL FINDINGS

Three appeal grounds were advanced

1. Parker could and would have been arrested had the officers acted lawfully;
2. Judge had constructed wrong counterfactual scenarios namely what would have been the position if the surveillance officer had not arrested him;
3. Judge's suggestion was wrong that limiting the C entitlement to nominal damages would undermine the constitutional protection of the O'Hara principle. There is strong public interest in applying the "Lumba principle" to situations where an officer could lawfully have arrested a suspect but for the unlawful arrest by another.

## POINTS OF APPEAL & COURT OF APPEAL FINDINGS

Court of Appeal found that If the power to detain had been exercised by the application of a lawful arrest then it is inevitable that the defendant would have been detained; in short, they have suffered no loss or damage as a result of the unlawful act. Hence it must follow that they should receive no more than nominal damages.

# POINTS OF APPEAL & COURT OF APPEAL FINDINGS

The C of A found that the test was not what would, in fact, have happened had the surveillance officer not arrested Parker but what would have happened had it been appreciated what the law required.

## A QUICK REVIEW OF

R (ON THE APPLICATION OF TERENCE NORMAN & ORTHS) V  
CC OF ESSEX POLICE [2020] EWHC 3456

Case concerned the execution of a search warrant at the Normans home address, Ropers Farm on 16<sup>th</sup> April 2019 concerning a fraud investigation.

The policy decision by the DI in charge was to arrest ‘all adult members of the family present at Ropers Farm’

After a number of failed attempts and altered warrants, warrants were granted for Ropers Farm and the offices of Mr. Norman.

The house was entered but the offices turned out to be those of an accountancy firm who had nothing to do with the Normans, entry was therefore refused.

Various items were seized. The Normans then raised complaints about the lawfulness of both the warrants and the arrest.

It was conceded by the CC of Essex that the search warrants should be quashed since they disclosed no authority to seize certain items, no statutory authority for the issue of the warrant, no offences were particularised and the courts approval on each page was not marked. It was further conceded that there had been a failure to give proper disclosure to HHJ Gratwicke.

However, the court found that the arrests were lawful because at the time of arrest the officers had a reasonable ground to suspect that both Mr. and Mrs Norman had committed offences.

## RECENT DISCLOSURES CASES

**R (on app of Grice) v HM Coroner of Brighton and Hove [2020] EWHC 3581**- The Admin court found that the coroner had been correct to refuse to reopen an inquest into the murder of a woman by her ex-partner. The court found that a criminal trial did not satisfy the requirement of ECHR Art 2 for an effective investigation but the complaints investigation into the mishandling did. It was clear from the disclosure of these independent investigations that the obligation under Art 2 had been collectively met.

## RECENT DISCLOSURES CASES

**R (on app of SKELTON) v HM Coroner of WEST SUSSEX [2020] EWHC 2813-** Heard before the previous case and found that alleged failures including those of disclosure, in an investigation by the Police could constitute an arguable violation of ECHR Art 2 rights and that the coroner was wrong and had erred in law not to hold such. The court ordered an Art 2 complaint inquest into the death/murder

## RECENT DISCLOSURES CASES

**R (on app of Jordan) v CC of Merseyside [2020] EWHC 2408-** Police failed to disclose all relevant matters when applying for a warrant to the Magistrates Court, however the court held that the warrant would not be quashed as the non-disclosure was not material which would have led to the warrant being refused. The court gave guidance on the duty to disclose 1. whether the applicant had failed to disclose something which he was legally obliged to disclose and 2 if so, whether the non-disclosure was material.

## WHO KNEW IT WAS AN OFFENCE TO BE OFFENSIVE?



THANK YOU FOR LISTENING  
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