Challenges to search warrants

Wellbeing initiative

CBQ

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Defending the Indefensible

The right to a fair trial

Joint Enterprise Appeals

The Human Rights Argument

Publication of

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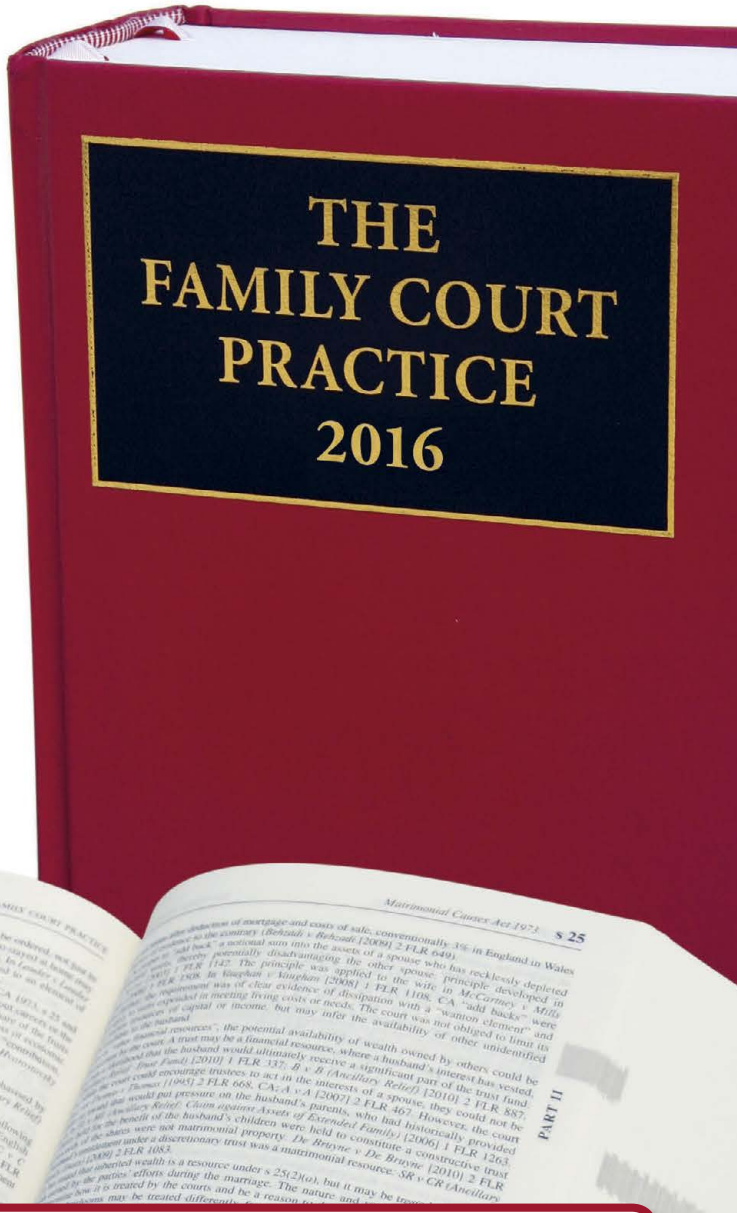

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FEATURED IN THIS ISSUE

VIEW FROM THE EDITOR

Daily Risks

EDITOR **John Cooper QC**

In a recent edition of *CBQ* [Winter 2015 - Issue 4 p.3] I raised my continuing concern about the safety of barristers when doing their jobs of work.

We are exposed to daily risks at the Criminal Bar, and whilst we all acknowledge the unpredictable environments in which we work, that exposure to daily risk must not go unquestioned.

All this was brought sharply into mind with the tragic death of Jo Cox MP and the natural debate about how vulnerable constituency Members of Parliament are to violent assault, particularly at local surgeries with a number of calls for better practices to minimise those risks.

It did make me once again call to mind the vulnerabilities of our own colleagues.

Some years ago a solicitor was shot dead by a member of the public during the course of their work.

How often are we locked into cells, rooms in prisons or interview rooms in court custody suites, sometimes alone with volatile or unpredictable clients?

In fact the instances of being alone, unsupported by solicitors is increased the more inexperienced the advocate is.

This cannot go on.

The Government are proposing that whilst traditional court buildings are closed down, criminal courts can be convened in public places such as libraries and other local authority properties. If this is going to happen, we should be demanding that there are proper security arrangements both in the public parts and any custody area to protect those going about their professional duties.

We should require that the due care and attention afforded by prison officers and police mutually to each other when doing their jobs is extended to our own colleagues. All too often at the sharp end of practice we are treated second rate when it comes to protections and one day that could end in one of our own being a victim.

I again suggest that for a start, the practice of locking barristers in a cell or room with defendants should cease. Some of these rooms do not even have alarms and you are reduced to banging hard on reinforced glass in an attempt to make yourself heard.

But it should not stop there. There should be a comprehensive review into working practices, guidance and if necessary changes made to make sure that so far as we can we make sure that we are protected.

It should be done without delay. ■

QC. 25 Bedford Row. The comments made are not necessarily those of the CBA

Wellbeing Initiative

CHAIRMAN'S COLUMN

Mark Fenhalls QC

Readers of the Monday Message will need no reminders of the stresses and strains we all face. I welcome the publication of the Public Accounts Committee Report: *Efficiency in the Criminal Justice System* published on May 27. Here at last is a cross-party report that recognises what the CBA has been telling politicians, civil servants and journalists – anyone who will listen – for years.

The 26% cuts inflicted on the CJS, the prosecution and defence, in the last few years have gone too far and have been counter-productive. What better "back-up" could we have to counter any future fights with the Treasury than the PAC saying "the cuts have damaged justice and hurt the interests of victims"?

It is easy to forget how far we have come in the last year. Summer 2015 saw a strike and turmoil as we contemplated the existential threat of "two tier". This threat has gone completely.

I believe we are on the cusp of a number of potential positive reforms to the world in which we operate. You all know what ambitions I have for the replacement of AGFS, the panel scheme and our attempts to kill warned lists. I hope by the end of July that there will be significant news to report on one or more of these fronts. A sense of optimism helps me function day to day, but of course not everyone will have so much faith that things are getting better.

Every day, hard pressed professionals struggle with ever diminishing supplies of "sticky back plastic" to hold the fabric of our part of the universe together. Often we deal with the most gruesome human behaviour and are expected to be unaffected, day in and day out, month after month and year after year. The rise of sexual offences in the Crown Court is relentless and these are difficult and stressful cases and can strike at the heart of who we are and our own mental health. I regret to say that notwithstanding the best of intentions the most well run set, or conscientious friend, can sometimes fail to note the human cost as people work longer and harder in evenings and at weekends, for less reward, bills mount and prospects sometimes seem bleak. It is so easy to be wrapped up in daily existence that one can forget the wider picture.

> "Wellbeing is about having the resilience and ability to carry out your professional duties in a healthy way"

On June 6, I attended an evening run by the Association of Women Barristers. The keynote speaker was Lord Justice Fulford and there was a very distinguished panel of brilliant silks. The point of mentioning the evening is a remark made by one of the panel, who spoke of her own mental health difficulties several years ago before she took silk. It takes real courage to speak publicly of such matters. We all need to look around ourselves and ask what more we can do within chambers, when illness, money woes and other problems arise. A dear friend of mind took his own life some 14 years ago and even now few days pass without me thinking of him.

So "wellbeing" is on many people's lips and with good reason. I cannot be alone when I think of the friends at the Bar I have lost to alcohol, stress and depression. The CBA is utterly committed to helping the Bar Council with its "wellbeing" initiative. This is a perfect example of how we, a Specialist Bar Association, cannot do without the work of the Bar Council. We gain from sharing what the best of what the rest of the Bar has to offer. I know that the other officers share my views and I am particularly grateful to our secretary, Sarah Vine, who is at the forefront of our efforts. But what practical steps are being taken and why? In one sense the "why?" is easy to answer. We need to do more to encourage the young, so often intimidated by colossal debts, to come to and remain at the publicly funded Bar. We also need to do more to encourage returners and to sustain established practitioners.

To borrow someone else's description: "Wellbeing is about having the resilience and ability to carry out your professional duties in a healthy way." The "Wellbeing at the Bar" programme is designed to: (i) provide members of the profession with the information and skills they need to stay well; (ii) support members of the profession as they deal with difficulties that arise in so far as they affect a barrister's professional life; and (iii) provide assistance to those with responsibility (or taking on a supporting role) for those in difficulty or crisis.

The project has its genesis in research[1] done in 2014 funded by the four Inns of Court, the Bar Council and Charlie Waller Memorial Trust. A survey of 2,500 barristers found:

- 1 in 3 find it difficult to control/ stop worrying.
- 2 in 3 feel showing signs of stress equals weakness.
- 1 in 6 feeling in low spirits most of the time.
- 59% demonstrate unhealthy levels of perfectionism.
- Psychological wellbeing within the profession is rarely discussed.

1. For a full copy of the research see: http://www.barcouncil.org.uk/media/348371/wellbeing_at_the_bar_report_april_2015__final_.pdf

Since the research has been completed work has continued on the practical steps to be taken. The Bar Council says that in 2016 the Wellbeing at the Bar programme will:

1. Deliver online resources for individuals (pupils/new practitioners/practising barristers) and those with a management/other responsibility for barristers (Heads of Chambers, Clerks/Practice Managers, Pupil Supervisors and EDOs). These will be accessed *via* a Bar Wellbeing portal (hosted by the Bar Council).
2. Expand and support any/all Bar mentoring programmes.
3. Work with third parties supplying support for those in crisis (eg, LawCare, MIND etc).
4. Keep up a steady stream of articles and stories (lived experience) aimed at normalising wellbeing and encouraging members of the Bar to talk about wellbeing issues.

The wellbeing website is now planned for the autumn. There will be guidance available that will address the following areas:

1. How to spot a wellbeing issue in yourself (for individuals) and in others (for chambers).
2. How to have a conversation about wellbeing (for individuals – who recognise they have an issue) with others (for chambers – when they see someone has a problem).
3. Interventions – including how to choose/secure the best/most suitable support. And to try others if one doesn't work. How to spot poor quality advisors/trainers/courses etc. Specific reference to counselling and mindfulness.
4. Rumination and perfectionism.
5. Bullying, and
6. Secondary Stress.

The CBA is looking for individuals to tell their stories. The more senior the better, because a willingness to disclose really needs to come from all levels of the profession. Those at the junior end are going to be reluctant

to speak about something that is already stigmatised as impermissible weakness without the lead from those at the top. And they are going to be most encouraged by hearing about those people who have survived the problems they have faced and emerged on the other side.

I am increasingly concerned that the new digital age that we are entering has created a number of other challenges for which we must prepare. When I joined chambers as a pupil in the autumn of 1992, most members of chambers lived in zones 1, 2 or 3 – central London. Almost everyone passed through the clerks' room on a daily basis. Almost no one had mobile phones and computers were still a real novelty. (For the first several years I survived on putting 10p pieces into telephone boxes – including when I wanted to make personal calls which I was certainly not going to do from chambers!)

The result was that chambers was a real community and there was a culture of daily meetings. It was not quite a question of all taking tea together, but it was not far off. Times change, not least because the world, and those who work in the City of London, have bought out central London property. Now no one who practises in the South East who has children can afford to buy a family home in London on publicly funded incomes. As people move to the outer regions of the capital and the Home Counties the social cohesion of chambers is damaged. We see our friends less. Now our cases appear on the Digital Case System the need to come to chambers has hugely diminished. As we have all sought to cut costs by reducing the amount of space rented by chambers, or by expanding our numbers, we have all ended up sharing desks. This may be more efficient, but it means people are more likely to work from home when they can.

"Chambers" as a vital and thriving idea depends on social cohesion. This derives in many ways, from the silk who works in chambers, whose door is always open to juniors who want to ask questions, to those juniors all being around to go out together in the evenings. In our digital age, junior tenants and pupils in many chambers now depend on whatsapp groups to seek advice and contact their friends. This is all very well but it is not the answer. The sad truth is that if they came into chambers they might be far less confident of finding someone around to ask for help or with whom to chat about the saga of the day's events in court. And if this trend continues unabated we are going to lose something very precious.

I am going to close with a story I think may be illuminating. One of my oldest friends was in the British army. So was his younger brother. Both were stationed in the former Yugoslavia during the tumult of the 1990s, but served in very different roles. One was isolated and alone for many months as a UN liaison officer; the other flew helicopters and returned each night after missions to an airbase with fellow pilots and aircrew. Both saw some of the most awful things one could see in that ghastly civil war. One was able to "debrief" each night in the mess with his close friends. The other remained alone for many months without that kind of social contact. One suffered from debilitating PTSD; the other did not.

We want ideas as to what will help you most, so please do not be shy about coming forward. ■

Putting into Practice: The Right to a Fair Trial

Preface

"Defending the indefensible"

Contributor

John Butterfield QC

The emotive role played by a defence lawyer in a criminal court case has on occasion been described as "defending the indefensible", an accusation which can come hot on the heels of the query "how can you support someone you know is guilty"?

My response is and always has been "That's not what happens" but it could equally be followed by the observation that a defence barrister acts because every person is entitled to a robust defence and a fair trial – powerful principles which I believe constitute fundamental cornerstones of British law.

Our legal system is of course based on the vital principle that a person is innocent until proved guilty, a system that has evolved over hundreds of years and is renowned not just in Europe but worldwide.

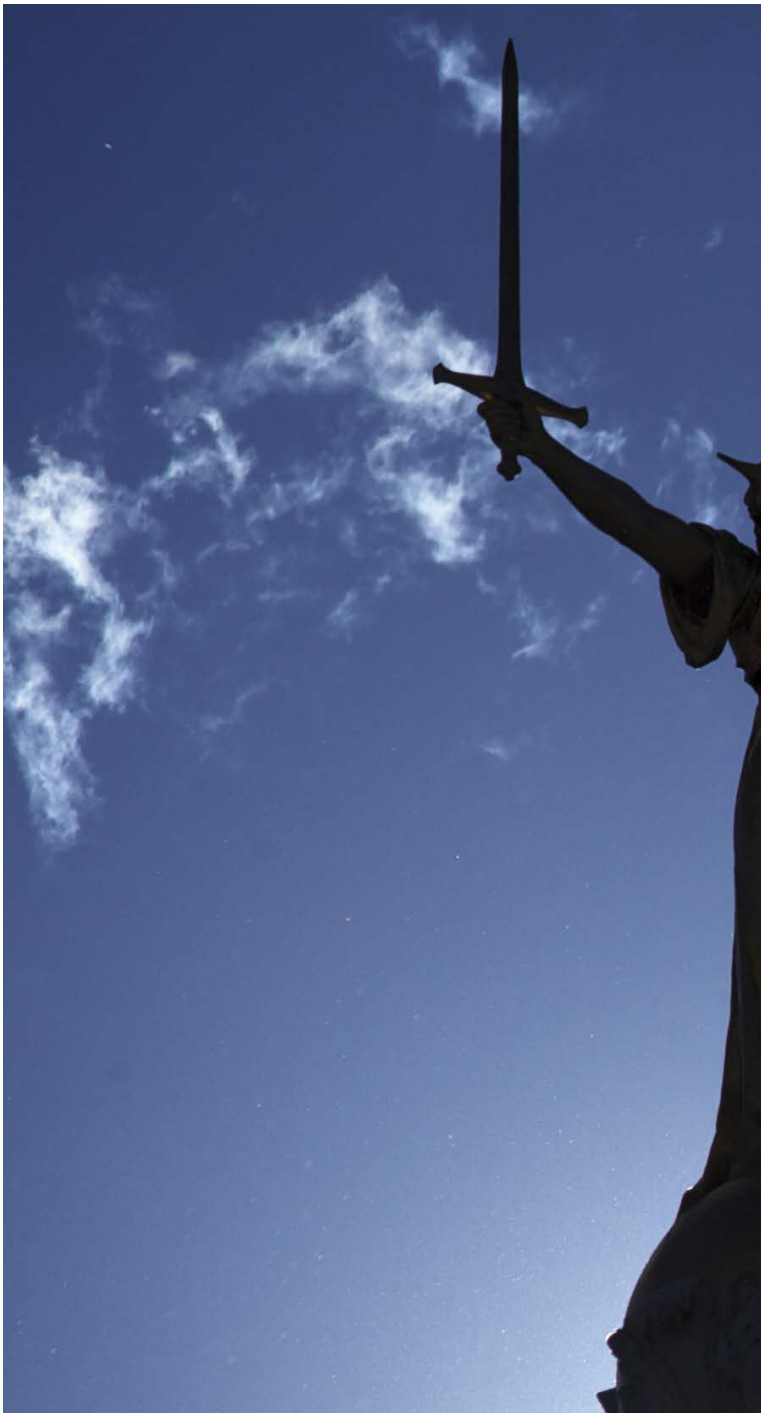
Popular TV dramas have often focussed on depictions of the law – from *Crown Court* in the old days to the hugely popular BBC series *Silks*. Even fictional American court rooms – from the final scene of *A Few Good Men* to the finale of *The Good Wife* – have contributed to making armchair lawyers of the general public.

And as these works of fiction play out, more often than not it is the leading actor who comes out as the hero – rather than the law itself. Whereas in real life, when the true day-to-day "drama" unfolds, one would hope that it is the British rule of law that emerges as the real winner, the pillar of society that makes our system so widely respected.

It is those very principles that have today created a legal system envied across the world – not to mention an industry that is worth billions of pounds to the UK.

A barrister's life is varied, but working days can routinely include trials of gravity and complexity.

Some court cases receive an avalanche of media coverage and at times they can provide a field day for the red-top headline writers. It is usually the more salacious or repugnant cases which provide the most column inches – or ones involving celebrities.



Even those cases which have a life within the media forum, however, can have the effect of reiterating the principles and beliefs which brought many of us to the Bar in the first place: justice, fairness and the right to a fair trial.

That was my experience recently, when I was involved in the much publicised trial that followed the tragic death of 21-month-old Ayeeshia-Jane Smith. Ayeeshia collapsed at her mother's flat in Britannia Drive, in Burton-upon-Trent, Staffordshire in May 2014. Her heart had ripped due to the force of a fatal blow – a type of injury usually only found in car-crash victims. In the months before she was killed she had suffered many other injuries, including one which led to a bleed on the brain.

Kathryn Smith, the toddler's mother, was found guilty of her murder at the conclusion of a three week trial at Birmingham

Crown Court and sentenced to life imprisonment. Her partner and co-accused Matthew Rigby was jailed for three years six months for causing or allowing Ayeeshia's death.

I was the defence barrister representing Miss Smith. Crucially, the case reminds us again that it is not the lawyers who decide whether a defendant is guilty – it is the jury. Twelve members of the public with no vested interest, no axe to grind, no paid job of work colouring an argument for or against a defendant render the judgment on the case. The system gathers great strength from gathering a group of ordinary British citizens sworn to deliver an impartial verdict.

Key to the findings of a jury is that a decision must be reached which is beyond reasonable doubt – the standard of evidence required to validate a criminal conviction.

The role of the lawyer is simply to present the facts and arguments – not to judge the issues themselves. They paint the pictures for others to interpret. To extend the metaphor – while the nuances of colour and form will vary from lawyer to lawyer (depending on their experience and skill) the court room becomes the gallery, the jury the critic.

For a defence barrister – even when the most heinous of crimes is involved – our starting point is always the same: innocent until proven guilty. Our role is to uphold that principle and tell the defendant's story in such a way that the jury is able to reach its conclusion beyond reasonable doubt.

For anyone who may feel troubled by the sorts of rules

> "The system gathers great strength from gathering a group of ordinary British citizens sworn to deliver an impartial verdict"

and structures which the system puts in place it is worth contemplating how appalling any opposite approach would be… innocent people automatically presumed guilty, no opportunity to be heard, incarcerated without trial? Whatever the approach may be in other countries – and despite a danger of erosion by ill-considered changes – we retain in this country a belief in impartial justice overseen by considerations of what is just and fair.

In consequence, everybody is entitled to a defence – and a fair and robust one at that. Without that, the system crumbles.

It may be true that a particularly animated or engaging barrister can bid to sway jurors to his or her point of view, the letter of the law perhaps momentarily masked by particularly flamboyant courtroom performance. But, fortunately for the British justice system, the selection of jurors – casting the net to include all classes, backgrounds and professions – acts as a protection and ensures that a jury continues to act in the interests of the public. Statistics and research have shown that jurors in this country take their responsibilities extremely seriously.

Equally, we must remember that advocates approach their responsibilities in the same way. Entering the profession does not come about by accident but *via* a commitment, a passion for justice and years of honing communication and analytical skills as well as perseverance and determination.

And so we return to the beginning: no-one is indefensible, no crime totally without mitigation. Everybody deserves a fair and robust defence. Because the day that we stop questioning and listening, or opt instead for a presumption other than that of innocence, is the day we turn our back on a system based on exemplary values. ■

John Butterfield QC *has practised exclusively in crime, both prosecuting and defending, since his call to the Bar in 1995. He took silk in 2014. He is a member of the crime group at No5 Chambers and achieved national publicity for his defence of a journalist facing a charge of conspiracy to commit misconduct in a public office as part of the Crown's Operation Elveden investigation.*

Joint Enterprise Appeals, "Dog Law" and the Human Rights Argument

Preface

R. v. Jogee – in relation to accessorial liability

Contributors

Adam Wagner, Diarmuid Laffan, Felicity Gerry QC and Brian Chang

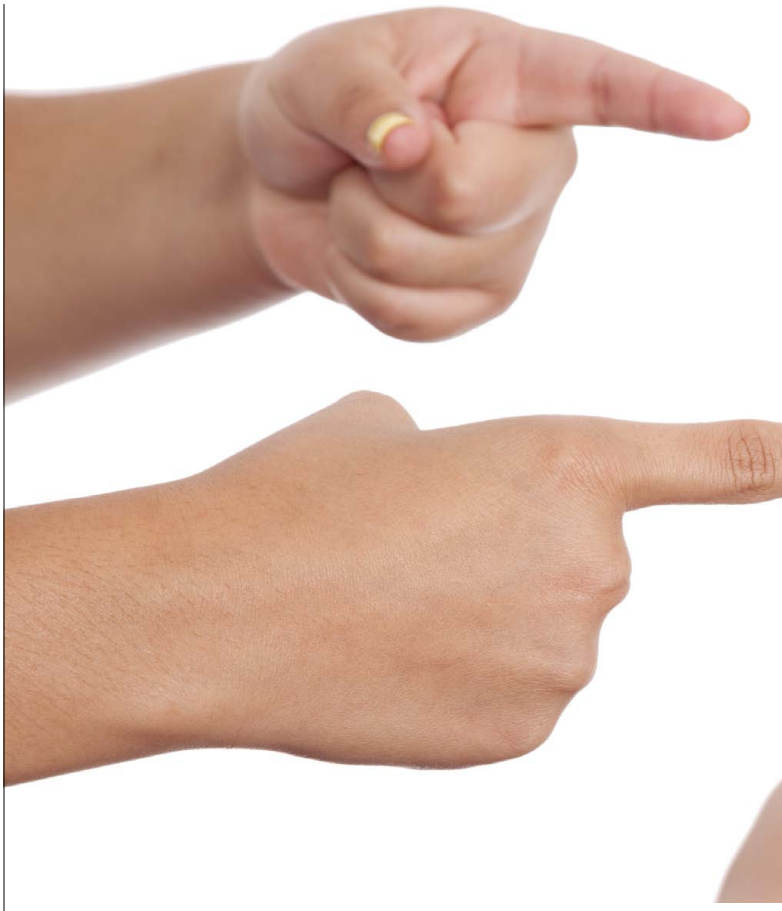


In a note for the Judicial College, Professor David Ormerod has raised crucial questions about appeals after *R. v. Jogee* in relation to accessorial liability as follows:

"Appeals out of time

39. The issue of broader immediate concern that arises from the judgment is what to do about those individuals who were convicted under the 'old' (37) law. The Supreme Court states in emphatic terms that it does not follow from the fact that an individual was convicted under the old law that his conviction will now be quashed. The Court points out, when a conviction is based upon the law as it applied at the time, the only option available to the defendant is to apply to the Court of Appeal for exceptional leave to appeal: 'Moreover, where a conviction has been arrived at by faithfully applying the law as it stood at the time, it can be set aside only by seeking exceptional leave to appeal to the Court of Appeal out of time. That court has power to grant such leave, and may do so if *substantial injustice be demonstrated*, but it will not do so simply because the law applied has now been declared to have been mistaken. This principle has been consistently applied for many years' [100]; emphasis added.

40. The fact of the change of law alone will not suffice: as recognised in the Supreme Court reiterating (at [100]) one of the leading CACD cases on the issue, *R. v. R* (38).The period by which the appeal is out of time should have no bearing. An injustice surely does not become more or less substantial because it was perpetrated a long time ago.



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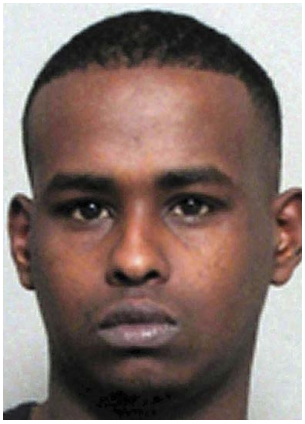

Mohammed Adnam Hirsi

41. If, having regard to the direction given to the jury at his trial, D would not (applying the 'new' law) have been convicted of murder or manslaughter, then there must surely be a substantial injustice. Such cases may be rare or at least hard to spot.

42. The far more likely scenario is that, having regard to the direction given to the jury the applicant convicted of murder would under the new law have been guilty of at least manslaughter for his foresight of some harm. Is there a substantial injustice based on: (1) being labelled as a murderer (a unique stigma attaching for life); and (2) sentence, which is not only unique because it is mandatory life, but also because under sch.21 it is significantly longer and indeterminate with a life long threat of recall? Is it qualitatively and quantitatively different?"

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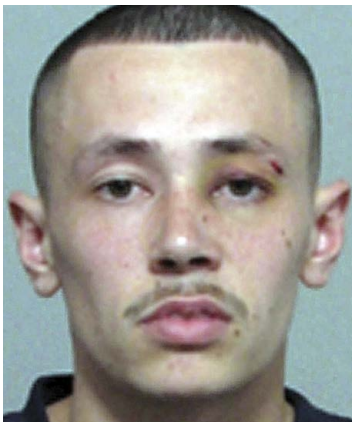

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Ameen Hassan Jogee

This article raises another issue which was argued but not reported in *Jogee*. Publicity restrictions allow for academic discussion but facts will not be mentioned here. Was joint enterprise in the sense of parasitic accessorial liability contrary to the common law principle of legality and the requirements of art.7 of the European Convention on Human Rights? Criminal lawyers may wish to consider making similar arguments in future when challenging judge-made law that has shaky foundations.

The Common Law Principle of Legality

One of the leading cases on the application of the principle of legality to common law offences is *R. v. Rimmington* [2005] UKHL 63, in which the House of Lords allowed the appeal of two men who had been convicted of the common law offence of public nuisance, rejecting the argument that the novel application of the crime of public nuisance met the certainty and predictability requirements of the common law or art.7. Lord Bingham identified two guiding principles within the common law: first, that no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; secondly, that no one should be punished for any act which was not clearly and ascertainably punishable when the act was done (at [33]). Lord Bingham also stated that the principles arising from the common law are "entirely consistent" with art.7(at [34]). *R. v. Rimmington* is also memorable because of Lord Bingham's statement that the domestic law of England and Wales "has set its face firmly against "dog-law", referring to a term used by Jeremy Bentham in his famous 1792 polemic *Truth versus Ashurst*, criticising Judge-made law:

> "It is the Judges (as we have seen) that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the Judges make law for you and me. They won't tell a man beforehand what it is he should not do they won't so much as allow of his being told: they lie by till he has done something which they say he should not have done, and then they hang him for it."

Article 7 of the European Convention on Human Rights

Since its earliest rulings on art.7, and in its leading decision of *Kafkaris v. Cyprus*, the European Court on Human Rights has found that art.7 does not just contain a principle of non-retrospectivity (the *nullum crimen, nullum poena sine lege* principle), but also "quality of law" requirements, applying its

jurisprudence on the concept of "law" from elsewhere to art.7. These "quality of law" requirements include accessibility and foreseeability, which readers may be more familiar with in the art.5 context of determining whether detention is "lawful" and in the arts.8 to 11 context of determining whether interferences with qualified rights are "prescribed by law" or "in accordance with law".

It should be emphasised that the Strasbourg Court has not read art.7 in such a way as to prevent the gradual clarification of the criminal law "through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen". Thus, in *SW* and *CR v. United Kingdom*, the court held that the removal of the marital rape exemption available in common law by the House of Lords did not amount to a violation of art.7. The court found that marital rape was an "area where the law had been subject to progressive development and there were strong indications that still wider interpretation by the courts of the inroads on the immunity was probable" (para.40), and that the House of Lords' decision was a reasonably foreseeable further step in the progressive *development* of the criminal law. It is therefore only in extremely rare cases that the Strasbourg Court finds a violation of art.7. *UK Human Rights Blog* has recent blogged about *Dallas v. United Kingdom*, an art.7 case in which no violation was found here.

Nevertheless, amongst the factors in favour of art.7 being breached in joint enterprise cases might be: (1) over-criminalisation rather than under-criminalisation; (2) the disparity in having a lower *mens rea* requirement (of foresight of a possibility) for the secondary party than the principal (for whom intention would normally be required); (3) the harshness of the sentence (with a mandatory life sentence for secondary parties convicted for murder in parasitic accessorial liability cases); and (4) the lack of clarity in the applicable law, demonstrable by the number of appeals reaching the higher courts (*R. v. Rahman* [2008] UKHL 45, *R. v Yemoh* [2009] EWCA Crim 930, *R. v. Mendez and Thompson* [2010] EWCA Crim 516 and *R. v. Jogee* itself) over the scope of parasitic accessorial liability.

The principle of legality and art.7 arguments in *R. v. Jogee* did not need to be answered since the first point on correcting the common law on accessorial liability were decided. However, hey can be summarised on the basis that the previous rules on parasitic accessorial liability were not foreseeable or accessible, and were "dog law" with punishment occurring first, and explanations given later. This was incompatible with the principle of legality and art.7 ECHR, which require that the law be sufficiently clear and foreseeable, so that we as citizens may have reasonable foresight of whether we are committing a crime. It had previously been conceded in the judgment of *R. v. Mendez* and *Thompson* that the test of whether an act (of murder or manslaughter) by the principal was so "fundamentally different" as to exculpate the secondary party, who did not foresee such an act happening, was a question of degree, rather than a bright-line test (at [40]). This, it was argued, meant that the main safeguard designed to limit the application of parasitic accessorial liability was not effective, and did not enable citizens to regulate their conduct, resulting in arbitrariness. It was also argued that the rules on withdrawal were not sufficiently clear to enable individuals to know when their conduct would result in parasitic accessorial liability being imposed. If the *mens rea* element was satisfied at the moment that there was foresight that there was a possibility of a weapon being used, then criminality was being imposed at a point where anything was possible. The consequence was that there was no clear delineating point at which an individual could draw the line that she or he had a duty to withdraw, and make a decision to do so. This was incompatible with the common law principle of legality stated by Lord Bingham in *R. v. Rimmington*.

Turning to the ECHR concept of foreseeability, it was argued that because lawyers had found it difficult to describe the previous state of the law on parasitic accessorial liability and its ineffective and arbitrary safeguards excluding liability where there was withdrawal or "fundamentally different" acts (leading Professor Jeremy Horder to note that the "common law has tied itself in knots trying to understand or give extra detail to the meaning of "fundamental difference"), ordinary citizens would not find the law sufficiently foreseeable in order to regulate their conduct.

Evaluation and Conclusion

In its judgment in *R. v. Jogee*, the UK Supreme Court appeared to accept that parasitic accessorial liability did not develop through a gradual clarification of the common law that is consistent with the essence of the offence, as required by art.7, but was: based on an incomplete, and in some respects erroneous, reading of the previous case law, coupled with generalized and questionable policy arguments (at [79]). It also acknowledged that, despite its 30 year vintage, parasitic accessorial liability was not working for trial Judges, which strongly suggests that it was not foreseeable for potential defendants, as required by art.7.

It could not be said that the law was well established and working satisfactorily. It was highly controversial and a continuing source of difficulty for trial judges. It has also led to large numbers of appeals (at [81]). These *dicta* demonstrate that the principle of legality and art.7 arguments were persuasive, though to what extent remains to be explored in future cases.

To conclude, criminal lawyers should be encouraged by David Ormerod's views and to consider using both common law and ECHR arguments to give appeal applications a broader focus. Keeping in mind that s.6 of the Human Rights Act may be invoked to argue that the courts have an obligation, as public authorities, to remedy Judge-made law that is incompatible with the ECHR, rather than waiting for Parliament to do so. Where they believe that they have strong arguments on common law principle of legality and/or art.7, they may also consider taking the case to the European Court of Human Rights. Finally, the spirit of the Bar can arise where one feels a burning sense that justice is not being done. This can on occasion result in the courts overturning more than 30 years of "dog law". ■

Brian Chang was a member of the Defence team in *R. v. Jogee*, and contributed to the development of the art.7 ECHR argument. Felicity Gerry QC, Adam Wagner and Diarmuid Laffan acted for the appellant *Ameen Jogee*.

Open Season, in Closed Session

Preface

Challenges to search warrants

Contributor

Rupert Bowers QC

The number of challenges to search warrants continues to increase, largely because it now appears to be a forlorn hope that either those responsible for drafting and applying for them, or the lower courts responsible for scrutinising those applications, will heed the repeated *dicta* of the Divisional Court to exercise caution in consideration of these intrusive orders. However, the author has noticed that since the high point for claimants in recent years represented by the decisions in *Kouyoumjian* [2015] Crim LR 455 and *Chatwani* [2015] ACD 110, where the respective courts departed from the now usual position of permitting the seizing authority a second chance to remedy its unlawful possession of the material in the Crown Court under s.59 of the Criminal Justice and Police Act 2001 after quashing unlawful warrants, and instead ordered delivery up, the court has become more reluctant to allow seemingly meritorious claims. Two recent decisions illustrate how the court is starting to shoot down these applications.

The Crown Court Intervenes

In *Singh v. South Cheshire Magistrates' Court* [2015] EWHC 4147 (Admin) a Divisional Court was convened at the end of term to deal with an interlocutory hearing relating to timetabling, administrative matters, and the listing of a challenge to search warrants. This purpose did not require a Divisional Court, and the reason it had been convened in London when the case was issued in Leeds, became clear when the court ordered that because there had been a limited concession of one of a number of linked claims, a s.59 hearing could be held prior to the conclusion of the judicial review proceedings. Plainly this decision meant that the practical utility in terms of remedy in bringing judicial proceedings was substantially emasculated. The s.59 hearing went ahead, and was granted. The final hearing of the conjoined applications for judicial review, *HS and others v. South Cheshire Magistrates' Court and others* [2016] 4 WLR 74, therefore encompassed a review of the Crown Court Judge's decision to hold the s.59 hearing before the JR, and the extant search warrant matters. Contrary to what had been practice to that point, developed through the case law, the court ruled that there was no rule of law which meant that a s.59 hearing could not proceed before the conclusion of judicial review proceedings. Each case would turn on its own facts.

The likelihood now is that when proceedings for judicial review are issued, the seizing authority will then issue a s.59 application, perhaps whether or not there is any concession of the claim. There will then be a need for a pre-determination of the issues to decide whether in the given case it is appropriate for the s.59 hearing to be held before the judicial review is resolved. Such a process will be cumbersome, and certainly rubs against the issue that has always troubled the interface between the two jurisdictions: that only the High Court may determine the validity of a warrant and quash it, while the Crown Court must proceed on the basis that an extant warrant is lawfully valid unless and until it is quashed. Further, the reason for the expedition of the s.59 hearing as stated in *Singh*; an imminent trial with custody time limits looming, in the event was of no consequence. The Crown Court Judge's decision in the s.59 hearing was itself reviewed, which caused the trial to be vacated, and the defendants to be released. Such a course of events is unlikely to be unusual if s.59 hearings are ordered to precede extant judicial review proceedings in relation to the underlying search warrants. The process will not be quicker, but much more likely longer.

Closed Evidence in Judicial Review

To further complicate the position regarding the interplay between the judicial review of search warrants and s.59, the Divisional Court recently gave judgment in *Haralambous v. St Albans Crown Court and another* [2016] EWHC 916 (Admin). The claimant had brought earlier proceedings for judicial review arguing that someone subject to the search of his premises under warrant was entitled to have disclosed to him enough information so that he would be in a position to assess the lawfulness of the search warrant issued by the court. That claim settled by consent and the warrants were quashed. The police launched s.59 proceedings in which they relied on the same undisclosed information in the *inter*

partes procedure, the Judge ruling that that it was not in the public interest for there to be further disclosure. At no point could the claimant understand the basis for the application for the warrant or ascertain why the statutory criteria were fulfilled, each application being effectively based on the same material.

The claimant applied to judicially review that decision on the basis that given the earlier concession of the judicial review, the police could not justify retention of the material on the basis of evidence not disclosed to him. Alternatively, if the closed evidence procedure was possible, it was necessary for enough information to be disclosed in the s.59 application to enable the claimant to understand the nature of the case and call evidence to refute it. The claimant argued that Parliament had not provided for a closed evidence procedure, certainly not when s.59 proceedings were inter partes and accordingly, applying *Al-Rawi v. Security Service* [2012] 1 AC 531, the person affected was entitled to at least the "core irreducible minimum" of information necessary to justify the process which he challenged.

The settled common law position that a person whose premises have been the subject of a search and seizure operation under a warrant should be able to understand why his premises have been invaded exists so that he may take advice upon that information, and challenge the lawfulness of the issue of the warrant if there are proper grounds so to do. The nature of the entitlement could not be more clearly stated than by Thomas LCJ in *R (Golfrate) v. The Crown Court at Southwark* [2014] 2 Cr App 12; [2014] Lloyd's Rep FC 431 at [17] and [18]:

> "17. … we wish to make it clear that if the party obtaining the warrant wishes to redact any part of the Information or any part of the transcript of the hearing … an immediate application must be made by that party to the court on proper grounds supported by evidence … so that the court can consider whether the redactions should be permitted on PII or other grounds. The claim to withhold material on such an intrusive a process as a search and seizure warrant is one of very considerable importance as, if permitted, it infringes an otherwise applicable principle of justice that a party is entitled to know the grounds on which an application against him has been made. It is therefore essential that the claim to withhold is only made on the basis of the personal decision of the Chief Constable or Commissioner."

What practitioners in this field will find troubling about this decision is that it holds that the general entitlement as expressed above in *Golfrate* only arises in the court of first instance, and does not exist on any application for judicial review either of a search warrant or of a subsequent decision under s.59 if that warrant is quashed. Very often, given the strict time limit, judicial review proceedings are issued challenging a warrant on the terms that appear on their face, while the seizing authority initially resists disclosure of the information only to disclose it once proceedings have been issued. In coming to this conclusion the reasoning contained at [39] is respectfully, wanting. At [39] the court states that the entitlement:

> "…arises before a magistrate under the procedure approved in *Bangs* for challenging its issue or execution, or when a Judge hears a s.59 application… " (emphasis added).

Thus, the court concluded, *Al-Rawi* did not apply, and the High Court could have regard to evidence not disclosed to the claimant. That the entitlement arises before any judicial proceedings are issued must be correct, but why that entitlement should not also exist within proceedings for judicial review cannot be understood from the passage. Respectfully, it is illogical, and will force claimants to make applications for disclosure after judicial review proceedings have been issued, to the court of first instance which would by then be a defendant in those proceedings, and have that application resisted by the other defendant in the judicial review proceedings, the police or similar.

It may be that the reason this seeming contradiction exists is because fundamentally a PII application seeks to resist disclosure of sensitive material which is not relied upon, rather than evidence which is or has been advanced and relied upon in support of the application, but is given in closed session because of its sensitive nature. The difference between the two was the basis of the claimant's case.

The procedure for obtaining the written information is now governed by r.5.7 of the Criminal Procedure Rules. It is settled law that the issue (though not the execution) of a warrant may only be challenged in judicial review proceedings (see by way of example *R (Chaudhary) v. Bristol Crown Court* [2015] 1 Cr App R 18 at [61]). Neither *Bangs*, nor s.59, is a procedure for challenging the issue or execution of a search warrant.

Bangs had nothing to do with challenging the issue or execution of the warrant itself and only concerned the procedure to be adopted when obtaining the information. There can be no challenge to the validity of a warrant in a court of co-ordinate jurisdiction, hence why any challenge must be brought by way of judicial review. Further, the court in *Bangs* (though on an appeal by way of case stated rather than judicial review) did conduct its own PII hearing, a process which would appear at odds with the instant decision. The court in *Bangs* certainly decided that the common law entitlement arose without the need to issue judicial review proceedings, but that is a far cry from deciding that that must be the procedure followed once judicial review proceedings are in train. Assessment of the lawfulness of the warrant before any proceedings were issued was the very purpose of the procedure. For these reasons it is respectfully submitted that para.39 of the judgment is obviously wrong, and that given this paragraph contains the kernel of reasoning whereby the court concluded that *Al-Rawi* did not apply, that reasoning is fundamentally flawed.

The confluence of these decisions means that a person subject to an oft stated Draconian order may be denied any proper opportunity to challenge the warrant, advance a case in a s.59 hearing, or properly engage the machinery of judicial review to challenge either procedure, a process integral to the protection of the individual's fundamental rights. [This first appeared in *CL&J* http://www.criminallawandjustice.co.uk/features/Open-Season-Closed-Session.] ■

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Efficiency in a time of austerity

Preface
Efficiency in the CJS

Contributor
Dan Bunting

For criminal barristers, it was hardly a case of "hold the front page". On May 27, 2016 the House of Commons Public Accounts Committee published its report *Efficiency in the Criminal Justice System*. [https://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/inquiries/parliament-2015/efficiency-criminal-justice-system-15-16/.]

This says what we have all been saying for years – the system is in crisis. This isn't hyperbole, or exaggeration for a cheap headline. In the Public Accounts Committee's own words – "*the criminal justice system is close to breaking point*" with a picture of "*long standing poor performance including delays and inefficiencies*".

The report could barely have been more condemnatory if it had written by the CBA. As has been repeatedly pointed out, when a measure to save money is implemented it often has the consequence of increasing costs somewhere else in the system.

The fundamental problem is a lack of resources. Five years ago this was an issue, but since then HMCTS has had a brutal cut of 35%. The consequences of that have been inevitable. To take one example, cases are taking a lot longer to come to Court. The main reason for this is simply that the number of sitting days for the judiciary have been reduced to save money.

There are worryingly wide variations in the rates of effective trials. Nationally, only a third of trials started as planned on the day they with listed. However, this varied from 20% of trials in Manchester starting on time, as opposed to 70% in North Wales (which isn't much to write home about of course). The MoJ state that the reason for this variance is unknown, although it would be appear that there was more of a problem in the major cities. Whatever the reason, it is unlikely that this can be turned around by "Better Case Management".

It is welcome to see it recognised that we are now at the stage where we have "*exhausted the scope to make more cuts without further detriment to performance*". Although some might say that we are long past that point of course. Short of cutting the number of cases that are prosecuted, by diverting more cases away from the criminal justice system (which is probably politically unacceptable) there is not much that can be done other than to increase the amount of money to the Court Estate.

There are other problems. In what could be seen as a huge understatement, it is noted that the "*Government does not have a good track record of delivering projects that involve significant changes to IT*".

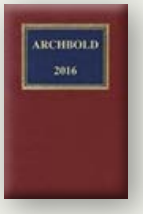
The CPS are not immune from criticism, or the impact of the cuts. The number of CPS lawyers has fallen by more than a quarter in the last six years, the number of admin staff by a third. Here again, the consequences of that are inevitable. As an example, only six in ten CPS files were reviewed before reaching court. Further, the CPS state that 80% of Court Orders are complied with on time by them, although many people may question how that figure is calculated and whether it is accurate. Even if it is correct, a four in five compliance rate cannot be regarded as acceptable. Again without more money, or a dramatically reduced workload, it is hard to see how this will improved.

There is an optimistic note, in that it is believed that real benefits of digital working will be seen in four years. Some will be concerned that the "benefits" are increased guilty pleas, which raises its own issues, but it is likely that digital working will save money in the long run. As always however, a greater investment at this stage may dividends down the line.

But the more pressing question is whether the system will last that long? Four years is a long time with staff and lawyers stretched to breaking point, and most goodwill dissipated. Realistically, in one way or another people will muddle through, although at the expense of victims, defendant, witnesses and, ultimately, justice. One point that I wouldn't bet on is whether the MoJ can last four years without suggesting any more cuts. ■

2 Dr Johnson's Buildings

REVIEW



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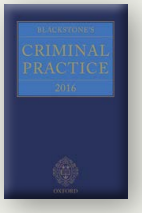


Blackstone's Criminal Practice 2016

Professor David Ormerod QC (Hon) and David Perry QC
Available online: https://global.oup.com/academic/product/blackstones-criminal-practice-2016-9780198757047?cc=gb&lang=en&.
Price £320.00

The 2016 Editions of both *Archbold* and *Blackstone's* are now out so it is well worth looking at the two and how they can be utilised by practitioners.

As *Archbold* states, of the thirty 2015 Acts passed by the former coalition government, four could be described as core criminal legislation, the Counter-Terrorism and Security Act, the Modern Slavery Act, the Criminal Justice and Courts Act and the Serious Crime Act. Secondary legislation was notable for the revision of the Criminal Procedure Rules, now amounting to 50 parts. These developments are, of course mirrored in Blackstone who also note the important transposition of relevant EU provisions relating to crime in the Criminal Justice and Data Protection (Protocol No.36) Regulations 2014 (SI 2014 No.3141) which has been in effect since the 3rd December last year.

Both volumes recognise the developments in the criminal law throughout the court hierarchy and whilst there has been little in the Supreme Court of direct impact on criminal practitioners other than *R. v. G* on the fast developing area of money laundering, the ECHR has handed down four decisions within the criminal law sphere worthy of attention, including the latest and probably the last instalment in the *Horncastle* saga on hearsay.

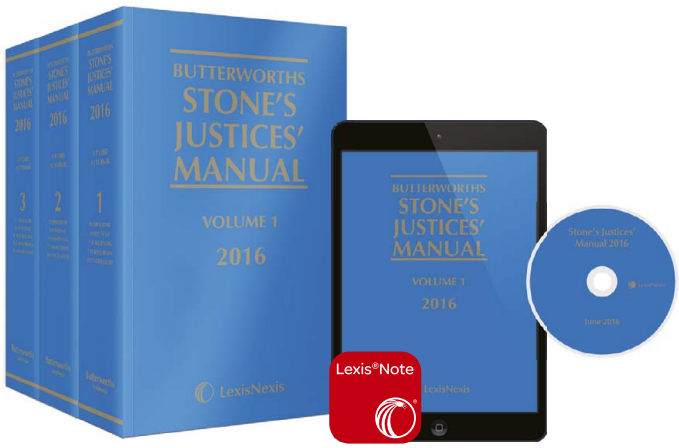
Archbold makes the interesting observation that over the last few years the ECHR has become less confrontational with domestic courts and in *Horncastle* became "dove-like". The Preface also observes, somewhat astutely that the attitude of Europe can probably be put down to the sensitive political times in which we live… is there no limit to the "Brexit" debate?

Again both editions have the now expected presence as an eBook, available on iPad, PC and Mac as well as the essential updates electronically and through the well researched supplements.

In the past comparisons between these two central works was a useful exercise but today, it is a fruitless exercise as both books, as you would expect with their impressive list of contributors, cover the same central ground. What has become most apparent over recent years is how both editions can supplement the other and the differences really lie in the choice and depth of cases chosen to illustrate general principles. Again it would be of little use making case by case, section by section general comparisons but it is right to say that whilst both books provide an exceptional and essential service to the profession, they can vary in detail within individual sections of the book, as one would expect with individual contributors.

That is why ownership of both texts is required. By doing so the strengths and relative weaknesses of individual sections is calibrated into an overall comprehensive practitioners library for the year. It is an attractive package, the searing depth of analysis, essential for the modern practitioner and provided page after page in *Archbold*, married to the finely researched and integrated presentation of the criminal law, now a hallmark of *Blackstone's*. **JCQC** ■

Stone's Justices' Manual 2016



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