



## Broker Bulletin No. 8

# POLICE Risks – Detention of Persons – Mental Health – Public Liability – October 2017

### Background

Recently we have received a number of enquiries about policy cover in relation to the possible detention of individuals with mental health issues who are no longer subject to the Police and Criminal Evidence Act 1984 (PACE) / detention. In some cases we have seen claims flow from such situations. A note (August 2017) on this subject was prepared by the Police Superintendent's Association of England & Wales (PSAEW) setting out some of the practical legal challenges that have arisen.

The issue that needs to be considered is the fact a Superintendent, in doing what they believe to be 'the right thing', may be making decisions without possible legal authority and therefore potentially place themselves at risk of legal or disciplinary proceedings.

In this case the 'right thing' is to detain an individual, outside of PACE, who maybe struggling with issues of mental capacity and where the continued detention is thought essential for the individual's own welfare until a suitable alternative solution (possibly hospital admission) can be achieved. The detention will usually be for a short period of time – maybe no more than a few hours.

The purposes of this paper is to set out the position in relation to the public liability cover offered by RMP/QBE, and *we recommend if you are not insured with RMP/QBE for public liability risks that you seek your own independent advice from your insurer/broker.*

In explaining our position with regard to policy cover, we have also taken the opportunity to clarify some other points so as to contribute to the wider discussion around this highly sensitive subject. In setting out our thoughts we have canvassed the views of a number of leading law firms on this topic and fed that advice into the points below.

### Points of Discussion

1. The detention of individuals in police custody is by and large managed in accordance with the Police & Criminal Evidence Act and Code of Practice C. Section 34(2) PACE requires a custody officer to release an individual from police detention once a decision is taken not to charge them. Any detention beyond this point will amount to a period of false imprisonment and can potentially give rise to a civil claim for damages.
2. Accordingly any situation where individuals continue to be detained without lawful authority is a concern and an area of risk to a police force. This is particularly so if those individuals are in mental health crisis.
3. The PSAEW paper\* highlights three scenarios of concern which mental health teams and police custody centres are regularly faced with.
  - i. The legality of detaining in a police station someone who requires a Mental Health Act (MHA) assessment, after the criminal investigation is complete - either in its entirety or if the suspect has been bailed.
  - ii. The legality of detaining someone in a police station after a mental health assessment has been completed and the assessment team has reached a decision to admit someone to hospital under the MHA. In this scenario, the problem arises when the Approved Mental Health Professional (AMHP) is unable to complete and sign off the papers because they are unable to specify which hospital they will take the detained person to. This is often due to the AMHP being unable to find a hospital that has a bed in which to accommodate the detainee. In turn, this can often lead to delays for custody sergeants, who question the legal authority of the detention in such circumstances.

- iii. The legality of detaining someone in a police station under s136 Mental Health Act 1983, where the 72hrs custody time has expired and the person requires admission and no application has been made.
4. It is, in our view, highly unlikely that any police officers would find themselves having to consider detaining someone beyond the expiry of the 72 hour period. That should be more than sufficient time even with stretched public services to make suitable arrangements for an assessment. This would seem to be supported by the limited claims activity we see for such situations.
5. Scenario two - detaining someone after the mental health assessment has been completed and the assessment team have reached a decision to admit someone to hospital under the MHA – it would be for a court to ultimately to determine if this was lawful or not and there are arguments to be made for this course of action being shown as lawful.
6. The PSAEW paper highlights the protection provided by Section 139 Mental Health Act 1983.
  - a) In our view the protection provided by Section 139 only applies potentially to the second of the three scenarios. To get the protection the individual concerned must be exercising a power under the Act.
  - b) In the first scenario - detaining a person following the conclusion of a criminal investigation whilst a mental health act assessment is awaited – in our opinion the officer is not exercising a power under the act they are simply detaining someone until a power is exercised under the act. As they are not exercising a power under the act the protection afforded by Section 139 we do not believe would apply.
- c) In scenario three - the legality of detaining someone in a police station under section 136 once the 72 hours has expired and the person requires admission and no application has been made. After the expiry of the 72 hours they are no longer acting under the Mental Health Act and therefore the protection provided by Section 139 does not apply in our view. (Section 136 gives a police constable powers to remove an individual to a place of safety where they are in a public place and they appear to be suffering from a mental health disorder for up to 72 hours. Although a police station is defined as a place of safety under Section 135(6) Mental Health Act 1993 whether as a matter of good practice police custody is the appropriate venue for an individual who is suffering mental health crisis has been the subject of a lot of debate recently and the general prevailing view is that police cells are not suitable places to detain individuals thought to have mental health issues and should only be used in exceptional circumstances).
7. Any claim for false imprisonment against a force would normally trigger the public liability policy for Forces insured with RMP/QBE, subject to the policy usual terms, conditions and exceptions. . Whether officers were acting in good faith or not is not relevant to the court's determination of whether a period of custody is lawful. The court would decide whether the detention is lawful or unlawful on the facts of the case regardless of whether the officer(s) concerned were acting in good faith.
8. The public liability cover would provide an indemnity for damages, defence legal costs and claimant legal costs (all subject to the policy excess and the policy terms and conditions) and this would include any claim brought directly against the Officer concerned. The only exception to the indemnity to the Officer would be where the Officer has acted with complete disregard to the welfare of the individual the subject to the detention and for want of a better expression had 'gone on a frolic of their own' – the policy would however still indemnify the force concerned. We must state that it is very rare in civil matters for a claim to be brought against an individual and it is the usual process that the 'corporate body' (in this case the Force) that is the defendant.
9. The public liability policy would not cover the costs of legal representation for any Officer at a misconduct investigation/hearing arising out of these scenarios. That is obviously a matter for individual Officer to fund or seek possible financial assistance through the Federation of Police Officers.

## The Policing and Crime Act 2017

1. The Policing and Crime Act 2017 has brought some amendments to be inserted into the Mental Health Act. In relation to the specific query regarding detention at the end of a custody period, there is a new provision as an extension to the P&C Act 2017, which amends The Mental Health Act 1983 Section 136 2A, which will apparently allow the time in relation to the MHA detention to run from the time when it is decided that the individual is being held at a place of safety. Presumably therefore it will be possible to release from custody in relation to the criminal investigation and then further detain under s136 if this has not already been done.
2. The Mental Health Act 1983 Section 139 provides an arguable defence to a False Imprisonment claim on the grounds that officers were acting in good faith/with reasonable care. S139 also requires a claimant who is bringing a claim for damages relating to detained under S136 to seek the court's permission prior to bringing a claim (similar to a s329 Criminal Justice Act 2003 scenario.) See case of Seal v CC S Wales (2007 HL) and as to the test for permission see Johnson v CC MERSEYSIDE (2009).

## An Example Claim

This case involved the removal of the claimant from his home to the police station in order for him to undergo mental health assessment. Removal from home is not permitted under s136 MHA 1983, only from a public place. The only power open to the officers in this scenario was to arrest for breach of the peace, and that was not executed correctly, meaning the force were liable for false imprisonment and assault.

## Summary

1. *This is a difficult area, where there is a significant risk of creating liability for False Imprisonment whilst attempting to act in the best interests of an individual/the wider public.*
2. *There is significant scope for a European Human Rights Act claim to be brought.*
3. *The risks are ameliorated somewhat by s139 and further by the recent amendments.*
4. *Careful documenting of powers being exercised are essential; as well as exercising powers under the MHA 1983, there are also possible powers under the Mental Capacity Act 2005 and also detaining for anticipated Breach of the Peace may also be an option.*

5. *In theory in an efficient and professional custody office where there are clear channels of communication with well-resourced local social services and healthcare providers one would expect that none of the three scenarios outlined should arise given that each force needs to have a clear and controlled process working closely with third party agents. In practice however this may not always be possible and certainly at certain times of the year resources can be stretched beyond reason.*
6. *It is not automatic however that the Police should find themselves in these situations. The key is for officers to anticipate the need for an assessment at the earliest opportunity and not to start to consider the issue at the time of release. This is too late and risks giving rise to a claim for damages for false imprisonment without the protection afforded by section 139.*
7. *It is our opinion that a Police Force need to have a clear and controlled process in place for when these situations arise, an assessment process or similar that can be completed by Officers before considering whether detaining an individual is appropriate and required for their own safer or that of the wider public.*
8. *We fully appreciate the theory and the practice can be different but the focus should be on the Police training their staff and working with third party agencies so everyone clearly understands and appreciates the tensions and risks that can arise to ensure they minimise the prospects of these scenarios arising.*

## \* Source of Information

Police Superintendents' Association of England and Wales - PSAEW advice to the Superintending ranks: detaining individuals with mental health issues who are no longer subject to PACE/detention – Dated August 2017.

## Further RMP Resources and Articles

For access to further RMP Resources you may find helpful in reducing your organisation's cost of risk, please access the [RMP Resources](#) or [RMP Articles](#) pages on our website. To join the debate follow us on our [LinkedIn](#) page. Additionally we have specific discussion groups for the [Education](#), [Emergency](#) and [Government](#) sectors.

### Get in touch

For more information, please contact  
your Broker or usual RMP Account  
Director.

Risk Management Partners  
contact@rmpartners.co.uk

67 Lombard Street  
London  
EC3V 9LJ

020 7204 1800  
www.rmpartners.co.uk

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