



Andoh, Benjamin. (2004). Absconding from mental hospitals and negligence. (Case comment: D v South Tyneside Health Care NHS Trust [2004] P.I.Q.R.P12. Moubatten Journal of Legal Studies, December 2004, 8 (2), pp. 79-85

Downloaded from <http://ssudl.solent.ac.uk/993/>

Usage Guidelines

Please refer to usage guidelines at <http://ssudl.solent.ac.uk/policies.html> or alternatively contact ir.admin@solent.ac.uk.

Absconding from Mental Hospitals and Negligence

(Case Comment: *D v South Tyneside Health Care NHS Trust* [2004] P.I.Q.R. P12)

Benjamin Andoh

Introduction

Absconding from mental hospitals is an important topic because it has consequences in four main areas: it has adverse consequences for the absconder's own health and safety, the public, including the absconder's own family, the absconder's hospital and, lastly, the police.

Put simply, absconding is the authorised absence of a patient from hospital, whether *via* actual "running away" or failing to return from authorised leave of absence. Where the patient is subject to compulsory detention in hospital, he/she is statutorily described as absent without leave.¹

Regarding negligence, if a hospital breaches its duty to a patient (whether informal or compulsorily detained), who because of his/her mental state, should not be allowed to go at large, by allowing him to abscond and that patient, after absconding, suffers foreseeable injury or harm, the hospital may be sued in negligence by the patient. One such case is *D v South Tyneside Health Care NHS Trust*.²

Effects of Absconding

Absconding can affect the absconder adversely in terms of his mental and/or physical condition. There is, first, interruption with any treatment the patient is receiving, the result of that being aggravation of

¹ S.18(6) of the Mental Health Act 1983 defines "absent without leave" as "absent from any hospital or other place and liable to be taken into custody and returned" under that section, which applies to only compulsorily detained patients.

² [2002] P.I.Q.R. P12.

symptoms. The absconder may also be the victim of a rail, road or other accident or the victim or perpetrator of a crime while at large. In addition, some absconders find it quite difficult to manage to live outside hospital; some of them sleep rough, get famished and have to steal to survive, get cold, especially, in the winter months or walk the streets day and night, etc.³

For the hospital concerned absconding can have financial consequences (in terms of the cost of retaking the absconder and legal expenses where the hospital is sued as a result of the absconcion); there is also the possibility of adverse publicity/reports in the media; there are, in addition, the anxiety suffered by some members of staff and other patients about what the patient may do or get into while absent, and the bad influence of the absconding behaviour on other patients.⁴

As regards the public a mental patient's absconcion may cause fear in the residents of the areas surrounding the hospital and/or in the patient's relatives and friends of what the patient may do (especially, if he/she has violent tendencies); those relatives and friends may also worry about the welfare of the absconder. Moreover, some absconders actually commit offences of various sorts while at large. For example, as reported in *The Times*, 4 June 1997, a patient, Michael Carradine, absconded from a mental hospital in Nottingham and, while at large, bought a knife with which he stabbed a baby girl in a random attack in front of her mother in a shopping precinct.⁵

For the police absconding imposes a demand on their time and resources in terms of manpower, equipment and, therefore, money. This is simply because they (the police) are often informed by the mental hospitals of absconcions and are requested to retake absconders and return them to hospital. This is what usually happens where the absconder is subject to compulsory detention in hospital under the Mental Health Act 1983.⁶

Institutional Negligence

³ See B. Andoh, "Consequences of Absconding from Mental Hospitals", *Mountbatten Journal of Legal Studies*, vol.2, no.1, June 1998, pp. 70-92.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

A mental hospital or institution may be said to owe a duty of care to its patients, whether of informal status or subject to compulsory detention under the Mental Health Act 1983 or some other legislation.⁷ This is because mental patients are in hospital for a purpose, be it assessment or treatment, and, so, are in law neighbours of their hospitals, which have to assess or treat them.⁸ They are, thus, proximate to their hospitals. Where a patient is, for example, suffering from depression and is actively suicidal, it may be said to be foreseeable that, if his/her hospital fails to closely observe him/her and he/she absconds, he/she will suffer serious harm in an attempt to commit suicide or hurt himself/herself. If so, then it will be fair, just and reasonable for the law to impose a duty on that hospital.⁹

Although the Mental Health Act 1983, section 139, affords protection for staff of mental hospitals and other persons for acts done in pursuance of the Act,¹⁰ where, by falling below the standard required of the reasonably competent hospital,¹¹ a hospital breaches its duty to a patient in its care and the damage suffered by the patient is reasonably foreseeable,¹² then the hospital will be liable to that patient in negligence.¹³

D v South Tyneside Health Care NHS Trust

The latest reported case concerning absconding from a mental hospital in England and Wales is *D v South Tyneside Health Care NHS*

⁷ E.g., the Crimes (Sentences) Act 1997.

⁸ They are “so closely and directly affected” by the acts of the hospitals that the hospitals ought reasonably to have them in contemplation as being so affected when the hospitals are acting or omitting to act: *Donoghue v Stevenson* [1932] AC 562.

⁹ See *Caparo Industries plc v Dickman* [1990] 1 All ER 568; see also *Hay v Grampian Health Board, The Scotsman*, 21 December 1994, a Scottish case, where the Health Authority in question was held liable in damages for the brain damage suffered by a patient whose regime of close observation to prevent her from attempting suicide broke down temporarily through the fault of the ward staff.

¹⁰ S.39 (1) provides that no person shall be liable to any criminal or civil proceedings in respect of any act he does purportedly in pursuance of the provisions of the Act or any rule/regulation made under it unless he did the act in bad faith or without reasonable care. S.39(2) requires leave of a High Court Judge to be obtained in civil proceedings and criminal proceedings to be brought either by the Director of Public Prosecutions or with his consent.

¹¹ See, e.g., *Hay v Grampian Health Board*.

¹² *Ibid.* See also *Pickford v Imperial Chemical Industries* [1998] 3 All ER 462.

¹³ See, e.g., *Lambert v West Sussex Health Authority* (*The Times*, 8 February 2000).

Trust.¹⁴ The patient in that case had a past history of several admissions to a mental hospital. While she was being detained in hospital for treatment under section 3 of the Mental Health Act 1983, she absconded, went home and swallowed large quantities of her mother's anti-asthma tablets. That caused her to suffer severe irreparable brain damage. She sued the hospital for negligence, alleging that:

- the hospital ought to have put her under observation every 15 minutes (not every hour), which regime would have ensured that her absence was noticed within 15 minutes (instead of the best part of an hour, as happened);
- on discovery of her absence the hospital should have asked the police to look for her and return her in accordance with the provisions of section 18 of the Mental Health Act 1983; and
- if the police had been so requested, she would have been retaken before she swallowed her mother's tablets.

The judge held, on the facts, that the hospital was not negligent in putting her under one-hourly (instead of 15-minute) observations, and that, even if she had been put under 15-minute observations and her absence had been notified to the police as soon as that absence was noted, she would still have swallowed those anti-asthma tablets before the police could have reached her. She appealed against these findings.

The Court of Appeal dismissed her appeal, holding that the hospital was not liable because (a) the contention that hourly observations were sufficient was supported by a reasonable body of professional opinion,¹⁵ (b) the hospital's failure to call the police immediately did not constitute lack of care as it was in accordance with its sensible, pragmatic policy of communicating with the absconder's family and giving her a chance to return of her own accord, as she had done previously and (c) moreover, even if the police had been alerted as soon as her absence was noticed, it was not likely, again on the facts, that they would have arrived at her mother's house in time to prevent her from taking those tablets.

¹⁴ [2004] P.I.Q.R. P12.

¹⁵ Which the judge at first instance had described as logically defensible – see *Bolitho v City and Hackney Health Authority* [1997] 4 All ER 771. However, in *Marriott v West Midlands Health Authority* [1999] Lloyd's Rep Med 23, the Court of Appeal, in applying *Bolitho*, upheld the rejection by the trial judge of expert evidence for the defendant as "illogical".

Several issues are raised by this case. First, one might well ask why the defendant NHS Trust did not argue that the appellant's own behaviour broke the chain of causation.¹⁶ The answer to that question could be that, although D's behaviour constituted an intervening factor *de facto*, it was not such a factor *de jure* because it was not unreasonable in the sense of it being far-fetched – a psychiatric patient with a clinical condition described as “extremely agitated paranoid”, “talking about her mother trying to melt her brain” and having a “very labile” mood, who is involuntarily detained in hospital for treatment under section 3 of the Mental Health Act 1983, can be reasonably expected to behave so abnormally after absconding from hospital as to take an overdose of her mother's tablets. Her behaviour, therefore did not break the chain of causation, it could be argued.

Secondly, one might well wonder why the appellant did not rely on, or ask the Court to consider *Lambert v West Sussex Health Authority*, where a mental patient, who, after absconding from a secure ward in Graylingwell Hospital, Chichester, jumped from a motorway bridge and severely injured himself (became paralysed from the waist down), was awarded damages of £757,114 by the High Court for the hospital's failure to take adequate security measures. Maybe D's legal team were not aware of that case or were aware of it but discarded it for reasons best known to themselves.

The description by Lord Philips MR of the appellant's hospital's absconsion policy as “sensible” also deserves some comment. In his judgement Lord Phillips MR said (at [2004] P.I.Q.R. P12, para. 71):

“The policy gave the hospital considerable latitude as to how to react to an absconsion. It is plain that in Miss D's case the hospital had adopted a policy, perhaps pragmatically, of communicating with her family and giving her a chance to return to the hospital of her own accord. It seems to me that this was a sensible policy. It avoided calling for police assistance when this was not necessary, and it avoided the risk that the exercise of s.18 powers would antagonise Miss D and impair her treatment.

The absconsion policy in question is similar to the policy of other mental hospitals up and down the country; their various procedures are

¹⁶ *Mckew v Holland and Hannen and Cubitts* [1969] 3 All ER 1621.

also similar since they are all generally within the National Health Service, as shown by previous empirical research.¹⁷

It is very commendable for the hospital to contact, or communicate with, the absconder's family and give him/her a chance to return voluntarily, especially, where that has happened before. It also saves the police time, effort and resources. Indeed, as research has shown, in the vast majority of cases it is the police, rather than any other agency, who retake and return absconders to their hospitals. They provide a free taxi-service when returning absconders to hospital.¹⁸

The communication with the patient's nearest relative/carer for relevant information about the patient's whereabouts is equally commendable because that information could well include the names and addresses of friends or other people he/she is likely to go to while at large. If so, then it narrows the boundaries of the search by the police, thereby saving them time, effort and money.

Lastly, a few words about the right to retake absconders, provided for by section 18(2) of the Mental Health Act 1983, as quoted by Lord Phillips MR in his judgement. First, that right is specifically a power (not a duty because of the statutory words used).¹⁹

In addition, section 18(2) provides that patients absent without leave may be retaken and returned to hospital by certain persons including "any other agent authorised in writing by the hospital managers". One would expect "any other agent authorised in writing" to imply action by the police or other agents after receiving authorisation in writing by the hospital. However, regarding the police, what actually happens on the ground is slightly different. The hospitals first telephone the police to report the patient missing, giving them all necessary items of information, including the patient's description, places he/she may go to, etc., and then the actual completed Missing Person's Form, which may be said to be the "authorisation in writing" (because there is no Authorisation Form or indeed any Form other than that Missing Person's Form), is collected later by the Police from the hospital.²⁰ Therefore, the authority in writing gets into the hands of the police at some point in time between notification by

¹⁷ See, e.g., B. Andoh, "Hospital and Police Procedure When a Patient Absconds from a Mental Hospital in England and Wales", *Medicine, Science and the Law*, vol. 34, no.2, 1994, p. 134.

¹⁸ Andoh, "Consequences of Absconding from Mental Hospitals", p.85.

¹⁹ See B. Andoh, "Jurisprudential Aspects of the Right to Retake Absconders from Mental Hospitals in England and Wales", *Medicine, Science and the Law*, vol. 35, no.3, 1995, pp.225-230.

²⁰ Andoh, "Hospital and Police Procedure", pp. 130-3.

telephone of the absence to them and retaking, and return to hospital, of the absconder. This also very sensible practice in that it makes possible early or speedy attempts to retake and return the absconder, especially, in urgent cases.

Conclusion

D v South Tyneside Health Care NHS Trust is, therefore, significant in two respects. First, it shows that, despite the protection granted by section 139 of the Mental Health Act 1983 to staff of mental hospitals, etc., for acts done in pursuance of that Act, where a mental hospital breaches its duty of care to a patient and, as a result, the patient suffers reasonably foreseeable injury, the hospital will be liable in negligence. The hospital (specifically NHS Trust) in *D v South Tyneside Health Care NHS Trust* was not liable on the facts, as held by both the High Court and the Court of Appeal because it did not breach its duty to D. Secondly, considering the fact that D suffered irreversible brain damage after absconding from a mental hospital, going home and taking an overdose, the case clearly demonstrates that the phenomenon of absconding from mental hospitals ought not to be ignored or taken lightly. Such absconding can have serious consequences for the absconder himself/herself, other persons, etc., as already stated. Thus, it is not surprising that there is, under the Mental Health Act 1983, section 18, power to retake compulsorily detained mental patients who abscond or go absent without leave.²¹

Benjamin Andoh
Southampton Institute.

²¹ Informal patients, however, cannot be retaken and returned to hospital under the Mental Health Act 1983 if they abscond because they are not subject to compulsory detention in hospital and, so, there is no power to retake them. They can only be invited to return to hospital.