

What is a hospital?

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I. Introduction

Leslie Nielsen as Doctor Rumack: This woman has got to be taken to a hospital.

Elaine: A hospital? What is it?

Dr. Rumack: It's a big building with patients, but that's not important right now.²

One hesitates to cross swords with the estimable Leslie Neilson, both because he is estimable and also because, in this moment from a classic funny film, he gave a plain answer to what is, when all's said and done, a tricky question.

In the context of detained patients, the question has excited a great deal of deliberation, and it continues to cause concern and, occasionally, real problems for mental health practitioners. It's also a question that the next Mental Health Act seems unlikely to resolve.

A number of possible answers have been proposed. Though most are perfectly sensible and, to varying degrees, helpful, none resolves the question entirely. The purpose of this paper is to consider those answers and to identify the merits and demerits of each.

2. Definition

It is necessary to examine the definition of 'hospital' that appears in current law and the proposed definition under a new Mental Health Act.

2.1 The current law

On the face of it the Mental Health Act 1983 ('MHA 1983') has a comprehensive answer to the question. It states:

' "hospital" means –

- (a) any health service hospital within the meaning of the National Health Service Act 1977; and
- (b) any accommodation provided by a local authority and used as a hospital or on behalf of the Secretary of State under that Act.³

¹ Solicitor, and partner in *Hempsons*. The author would like to thank John Holmes, Bill Leason and Stephen Evans, who are also partners in *Hempsons*, for their very helpful comments on earlier drafts of this paper

² *Airplane!*, 1980, dirs: Jim Abrahams, Jerry Zucker, David Zucker

³ MHA 1983, s 145(1)

It is, perhaps, unhelpful for the 1983 Act to provide a definition that simply refers to another definition. The National Health Service Act 1977 ('NHS Act 1977') says:

' "hospital" means –

- (a) any institution for the reception and treatment of persons suffering from illness;
- (b) any maternity home; and
- (c) any institution for the reception and treatment of persons during convalescence or persons requiring medical rehabilitation;

and includes clinics, dispensaries and out-patient departments maintained in connection with any such home or institution, and "hospital accommodation" shall be construed accordingly.¹⁴

It might be thought that the word 'institution' is highly significant. Sadly, that is not so. The New Shorter Oxford English Dictionary defines it as:

'7. A society or organization, *esp.* one founded for charitable or social purposes and freq. providing residential care; the building used by such a society or organization.'¹⁵

This definition is provided here only for the sake of completeness. It takes an abstract approach and doesn't deal in mere bricks and mortar. It fails to suggest any differentiation between 'the building' used to house detained patients that is a discrete unit on a plot of its own and one that is part of a much larger medical 'campus'. As we shall see, the two forms of building are different things and their differences are of considerable importance.

It is regrettable that, despite two lengthy statutory definitions, we cannot now be sure what 'hospital' means. In fact, that uncertainty has been caused by the definitions, and by the fact that they have remained unaltered despite significant changes in the way mental health services are configured.

2.2 The Draft Mental Health Bill

The position is unlikely to be very different under the next Mental Health Act. The Draft Mental Health Bill published in September 2004 tells us that

"Hospital", except in Parts 6,⁶ 10⁷ and 12⁸ and sections 161(2)(c),⁹ 172(2),¹⁰ 280(1)¹¹ and 301(1),¹² means –

- (a) any health service hospital within the meaning of the National Health Service Act 1977 (c. 49),
- (b) any accommodation provided by a local authority and used as a hospital by or on behalf of the appropriate authority under that Act,
- (c) any other establishment –
 - (i) which is an independent hospital (within the meaning of the Care Standards Act 2000 (c. 14)) in respect of which a person is registered under Part 2 of that Act, and

4 NHS Act 1977, s 128(1)

5 Clarendon Press, Oxford, 1993

6 Which deals with the 'Informal treatment of patients aged under 18'

7 Which deals with the 'Functions of Commission for Healthcare Audit and Inspection'

8 Which deals with 'Miscellaneous' matters

9 Which deals with the 'Transfer of patients from England and Wales'

10 Which also deals with the 'Transfer of patients from England and Wales'

11 Which deals with the 'Ill-treatment or wilful neglect of patients'

12 Which contains the definition of 'carer'

- (ii) in which medical treatment is or may be provided to persons who are subject to the provisions of Part 2¹³ or 3¹⁴ of this Act.”¹⁵

This definition is the same as the one that appeared in the Draft Mental Health Bill published in June 2002.¹⁶

There is nothing in the various Government publications that preceded the Draft Bills to indicate why it was thought desirable to perpetuate the old definition of ‘hospital’ or unnecessary to depart from it.¹⁷

3. Confusion

If there is confusion as to the true meaning of ‘hospital’ it is a comparatively recent phenomenon.

As Professor Eldergill notes, at one time the position was very clear:

“Previously, all hospitals within a district had the same hospital managers, the local District Health Authority. If it was necessary to move a patient from the psychiatric ward of the local District General Hospital to a surgical ward, following a suicide attempt, the patient remained detained in the same hospital by the same managers. Consequently, no legal formalities had to be observed. Likewise, if a secure psychiatric unit was on the same site, but set apart from the District General Hospital, permitting the patients to wander the hospital grounds, or taking them to the general hospital for dental treatment, involved no legal formalities. The patient had not left the hospital where he was liable to be detained so no formal leave of absence was required.”¹⁸

However, in 1990 there came the National Health Service and Community Care Act (‘NHS & CCA 1990’), which fostered the creation of NHS trusts to manage hospitals (and, as we shall see, amended the statutory definition of ‘the managers’), but made no change to the meaning of ‘hospital’.¹⁹

The result was that more than one NHS trust might now be responsible for different parts of a single site, a site that was previously thought of as – and called – a hospital.

Eldergill has said:

“The position now is that different floors of a General Hospital may be managed by different NHS trusts. For example, the local General Hospital NHS Trust may manage the first and second floors, and also those wards on the third floor which admit patients for physical conditions. The local Mental Health NHS trust may manage the open psychiatric ward on the third floor, the secure unit set apart in the General Hospital grounds, and a number of wards left on the site of the old asylum, situated some miles away. Worse still, some psychiatric wards may be shared by two Mental Health NHS trusts, both having beds on the ward.”²⁰

13 Which deals with ‘Examination, Assessment and Treatment’

June 2002, Cm 5538-II

14 Which deals with ‘Patients Concerned in Criminal Proceedings etc’

17 See, for example: Department of Health, *Review of the Mental Health Act 1983: Report of the Expert Committee*, November 1999; Department of Health, *Reform of the Mental Health Act 1983: Proposals for Consultation*, November 1999, Cm 4480

15 Department of Health, *Draft Mental Health Bill*, September 2004, Cm 6305-I, cl 2(3); Department of Health, *Draft Mental Health Bill: Explanatory Notes*, September 2004, Cm 6305-II, para 32

18 Anselm Eldergill, *Mental Health Review Tribunals: Law and Practice*, 1997, London, Sweet & Maxwell, p 139

16 Department of Health, *Draft Mental Health Bill*, June 2002, Cm 5538-I, cl 2(3); Department of Health, *Draft Mental Health Bill: Explanatory Notes*,

19 See Eldergill, 1997, *op cit*, p 139

20 Eldergill, 1997, *op cit*, p 139

As the MHAC has put it:

“ ‘Hospitals’ for the purpose of the Mental Health Act come in increasingly different shapes and sizes.”²¹

Professor Eldergill suggests that:

“[...] trying to apply the legal framework devised in 1983 for the detention, removal and transfer of patients to this new managerial system has proved difficult.”²²

There is confusion, and, as has been noted, it is unlikely to be resolved by the new Mental Health Act, which will probably replicate the existing definition of ‘hospital’.

4. Competing concepts

In order to answer the question ‘what is a hospital?’ and make sense of the confusion that came with introduction of NHS hospital trusts, some commentators and practitioners have alighted upon two competing concepts, concepts that appear to be mutually exclusive.

The result has been a certain bifurcation in professional views, which the MHAC has summarised as follows:

“When MHA 1983 was drafted, it was thought that each ‘hospital’ would have a single managing body. It was not envisaged that one hospital could be divided into discrete units each of which was managed by a different body. However, now that hospitals may not be coterminous with managers, there is sometimes uncertainty as to what constitutes a hospital [...] In general, there are two schools of thought, which see a ‘hospital’ as: [(a)] all the buildings on a site defined by a single perimeter, even though some of those buildings may have different NHS managers than others; or [(b)] only those buildings on a particular site that are adjacent to each other and have the same NHS managers.”²³

The two schools of thought can, perhaps, be characterised as the ‘wide site’ concept and the ‘narrow site’ concept.

4.1 The wide site

The ‘wide site’ concept sees a ‘hospital’ as being defined by the largest boundary that fact or logic will allow. Like the rhinoceros, the wide site hospital is a beast that is perhaps more easy to recognise than to describe. However, where several clinical units inhabit a single site, which will usually be defined by a continuous perimeter, they will constitute a ‘hospital’ even though they are not all the responsibility of one NHS trust.

Adherents of the wide site concept might claim that it more truly reflects the intention of Parliament in 1983 (or 1977), because it sees a ‘hospital’ as being comprised of all the clinical facilities that inhabit a single site.

21 MHAC, *Seventh Biennial Report: 1995–1997*, 1997, London: The Stationery Office, para 10.10.2

22 Eldergill (1997), *op cit*, p 139. See also: Richard Jones (2003), *Mental Health Act Manual*, eighth edition, London, Sweet & Maxwell, para 1–208

23 MHAC, 1999, *Issues Surrounding Sections 17, 18 and 19 of the Mental Health Act 1983*, Guidance Note GN 1–99; accessible at www.mhac.trent.nhs.uk/s17.pdf. See also: MHAC, 1997, *op cit*, para 10.10.2; MHAC, *Placed Amongst Strangers – Tenth Biennial Report: 2001–2003*, 2003, London, The Stationery Office, para 9.40

It is the wide site conception of a hospital that is favoured by the MHAC.²⁴ However, it is worth noting that the Commission is by no means adamant in its propagation of this view. It states:

“The MHAC is aware that its preferred definition of ‘hospital’ is not shared by some commentators, and it does not insist that its preference is followed by NHS Trusts. However, every Trust should be in no doubt as to the physical limits of the hospital(s) of which it is the managers for the purposes of MHA 1983, and it should take legal advice where necessary.”²⁵

4.2 The narrow site

The ‘narrow site’ concept defines a ‘hospital’ by reference to its shortest logical boundary. Therefore, in the case of clinical units on a single site, it would see each of those – or, at the very least, each unit or group of units managed by a single NHS trust – as a discrete ‘hospital’.

Again, however, adherents of the narrow site concept might choose to claim it as the true inheritor of the spirit of 1977 (or 1983), as it conceives of a ‘hospital’ as an entity under a single organ of management. This is certainly so in the case of Professor Eldergill, who says:

“[...] the Act was drafted on the assumption that all of the wards on a single site would form a single hospital managed by a single group of managers.”²⁶

Professor Eldergill prefers the ‘narrow site’ concept. He says:

“Although the idea that one institution can comprise two hospitals seems odd at first glance, it is no different from a block of flats within which each floor has a different legal owner. The idea only seems strange because for historical reasons such institutions are known by a single name.”²⁷

His submission is:

“The context now requires that the term ‘hospital’ in section 145 means *that part* of an institution which is vested in an NHS trust.”²⁸

“Where two or more NHS trusts manage different parts of an institution which is a hospital for the purposes of the National Health Service Act 1977, each separately managed part is a hospital for the purposes of the admission, detention and discharge provisions in the Mental Health Act 1983.”²⁹

It may be that in the first of these passages Professor Eldergill overstates the position somewhat. The *context* may be less immutable than he suggests. The physical boundaries of a patient’s confinement can only be governed by the provisions that permit him/her to be confined, and as we shall see, different provisions in MHA 1983 now invoke different definitions of ‘hospital’.³⁰ Therefore, the context in which the word is used is not everywhere the same. However, and to anticipate the chief conclusion of this paper, it would seem that the conclusion in the second of these passages is broadly correct.

Richard Jones, after re-stating the views of Professor Eldergill and the MHAC, concedes that he prefers the conception of ‘hospital’ that is here labelled the ‘narrow site’, because it is “consistent with the scheme of” MHA 1983.³¹

24 MHAC, 1999, *op cit*. See also: MHAC, 1997, *op cit*, para 3.4; MHAC, *Eighth Biennial Report: 1997–1999*, 1999, *The Stationery Office*, para 4.58; MHAC, 2003, *op cit*, para 9.40

25 MHAC, 1999, *op cit*

26 Eldergill, 1997, *op cit*, p 139

27 Eldergill, 1997, *op cit*, p 141

28 Eldergill, 1997, *op cit*, p 141 (*original emphasis*)

29 Eldergill, 1997, *op cit*, p 141

30 See, for example, para 5.1, below

31 Richard Jones, *Mental Health Act Manual*, 2003, eighth edition, London, Sweet & Maxwell, para 1–208

In order to understand the problem fully, and also if one wishes to resolve it, it is necessary to look at its various manifestations; to consider each use of the word 'hospital' in MHA 1983 and the context in which it is used, together with the practical effects of the competing definitions.

5. Issues

What follow are not the only uses of the word 'hospital' in MHA 1983, but they are among those that are the most significant.

5.1 The consequences of admission

Under MHA 1983, a patient may be detained in the 'hospital', and only there. As far as an application for 'civil' – that is, non-criminal – confinement is concerned, section 6(2) states as follows:

'Where a patient is admitted [...] to the hospital specified in such an application [...], or, being within that hospital, is treated by virtue of section 5 above as if he had been so admitted, the application shall be sufficient authority for *the managers* to detain the patient in the hospital in accordance with the provisions of this Act.'³²

With regard to patients committed to psychiatric detention by the criminal courts, section 40(1) states

'A hospital order shall be sufficient authority – [...] (b) for *the managers* of the hospital to admit him at any time within that period and thereafter detain him in accordance with the provisions of this Act.'³³

In order that a patient may be confined within the permitted boundary and given free movement inside it, it is important to know the limits of the 'hospital' in which MHA 1983 authorises and compels him/her to be detained.

The wide site

If the 'wide site' conception of the word were to be applied, 'the hospital' to which it would be possible to confine a patient would have to be viewed expansively, and as consisting of all the land and buildings contained within its largest conceivable boundary.

The narrow site

If the 'narrow site' concept were to be applied, it would only be possible to confine the patient to a discrete unit, even where that unit was part of a larger medical campus. (It would, of course, be possible under MHA 1983, section 19(3) to 'remove' the patient to a second unit that was managed by the same NHS trust as the first. However, the second unit would not be part of the same 'hospital' as the first, for the section 19(3) power is to remove the patient 'to any *other* such hospital.'³⁴)

Discussion

It will be noted that in MHA 1983, sections 6(2) and 40(1), the power to detain a patient in the 'hospital' is given to 'the managers'. This is significant, for if one ignored the role of the managers and attempted merely to divine the one true definition of 'hospital', the 'narrow site' concept would be of equal force where the whole of a medical campus was within the management of a single NHS body. In such circumstances – and particularly so where it bore its own distinct name

32 MHA 1983, s 6(2) (*emphasis added*)

34 *Emphasis added*

33 MHA 1983, s 40(1)(b) (*emphasis added*)

– a psychiatric unit within a general hospital managed by a single NHS trust would be a discrete ‘hospital’, and its tight bounds would mark the limits within which a patient might be detained and beyond which s/he would require formal leave of absence.

However, it is to ‘the managers’ that the detention power is entrusted. Unlike the definition of ‘hospital’, that of ‘the managers’ has changed with the times.

As amended by NHS & CCA 1990,³⁵ and also by a subsequent statutory instrument,³⁶ MHA 1983, section 145 states:

‘[T]he managers’ means –

- (a) in relation to a hospital vested in the Secretary of State for the purposes of his functions under the National Health Service Act 1977, and in relation to any accommodation provided by a local authority and used as a hospital by or on behalf of the Secretary of State under that Act, the Health Authority or Special Hospital Authority responsible for the administration of the hospital;
- (bb) in relation to a hospital vested in a Primary Care Trust or a National Health Service trust, the trust;
- (c) in relation to a registered establishment, the person or persons registered in respect of the establishment;

and in this definition “hospital” means a hospital within the meaning of Part II of this Act.’³⁷

It is submitted that this revised definition, and particularly the part contained in sub-section (bb), is hugely significant. It identifies a hospital by reference to the physical responsibilities of the NHS trust that manages it. The ‘hospital’ ends at the point where the trust’s writ ceases to run.³⁸

Sub-paragraph (bb) does not appear to contemplate the possibility that a ‘hospital’ will be ‘vested’ in more than one trust. There is, it is true, nothing to suggest that the discounting of this possibility is to be inferred, nor that it was anything more than inadvertent. Furthermore, there seems to be nothing to preclude the argument that a hospital may be vested in more than one trust. However, ‘vesting’ can only ever be the result of a precise legal process, and its consequences can be verified objectively. A NHS trust would know if a hospital had been vested in it (and in another NHS trust), and if it had been so vested, the NHS trust would probably know the precise physical boundaries of the hospital for which it was now responsible.

Where two or more trusts share a single site, it is unlikely that all of the hospital that site comprises can be said to be ‘vested’ in each of them, or that any one trust can be said to be seized of parts of the site beyond those that have been vested in it. Therefore, although it may differ from the intention of the 1983 legislators, this newer, more restricted definition of ‘hospital’ is by no means illogical.

If the analysis set out in this section is correct, and the definition of ‘the managers’ means that ‘the hospital’ in which a patient is detained is now to be regarded as synonymous with the NHS trust detaining him/her there, it is hard to see how the ‘wide site’ concept can be preferred, at least for the purposes of MHA 1983, section 6(2) or wherever in the Act powers in connection with the ‘hospital’ are provided for the use of ‘the managers’.

³⁵ NHS and CCA 1990, s 66(1)

³⁶ *The Health Act 1999 (Supplementary, Consequential, etc., Provisions Order 2000, SI 2000 No 90, Sched 1, para 16(3))*

³⁷ MHA 1983, s 145(1)(a)

³⁸ *The new Draft Bill contains provisions to much the same effect. See: Department of Health, Draft Mental Health Bill, September 2004, Cm 6305–I, cl 2(4)*

Whether the word ‘hospital’ – which must be assumed to have been intended in 1983 to have a common meaning wherever it occurred in the Act – may now be given different, possibly contradictory, meanings is open to dispute, but the possibility seems remote. However, there are occasions when the use of the word ‘hospital’ in provisions of the MHA 1983 does not coincide with a reference to “the managers”.

5.2 Conveyance to the hospital

MHA 1983 contains various powers to convey a patient to the ‘hospital’ in which s/he is to be detained. Thus, in the case of a ‘civil’ patient, section 6(1) states:

‘An application for the admission of a patient to a hospital under this Part of this Act, duly completed in accordance with the provisions of this Part of this Act, shall be sufficient authority for the applicant, or any person authorised by the applicant, to take the patient and convey him to the hospital [...].’

As far as offender patients are concerned, section 40(1)(a) states:

‘A hospital order shall be sufficient authority – (a) for a constable, an approved social worker or any other person directed to do so by the court to convey the patient to the hospital specified in the order within a period of 28 days [...].’

Unless those conveying the patient know what the ‘hospital’ comprises to which s/he may be conveyed, they cannot know how far s/he must be carried and where on a particular medical campus s/he may be deposited.

The wide site

If the ‘wide site’ concept is accepted, a patient need be conveyed only to the first boundary of the overall hospital site, even if the physical limits of the mental health unit in which s/he is to be confined lay some way inside that boundary.

The narrow site

The ‘narrow site’ concept would require that the patient were taken onto the hospital site and deposited only at the door of the psychiatric unit. If s/he were to attain his/her liberty at an earlier point, the only power of confinement that might be exercised over him/her would be the one contained in MHA 1983, section 137(1) and (2) (which deals with the ‘Provisions as to custody, conveyance and detention’).

Discussion

On the face of it, there is nothing to preclude use of the ‘wide site’ concept in connection with MHA 1983, sections 6(2) or 40(1)(a). In neither case is the power to convey provided for the use of ‘the managers’; indeed, it is clear that a wider range of statutory actors may exercise that power, including some individuals whose authority doesn’t simply derive from the managers.

However, it is unlikely that the law would allow a multiplicity of definitions of the same word in a single Act. Therefore, in view of the comments made in connection with the power to detain,³⁹ one is probably forced back onto the narrow site conception.

³⁹ See paragraph 5.1

5.3 Detention in the hospital

The power to detain a patient under the civil provisions of MHA 1983 is also expressed in terms of ‘a hospital’.

To some extent, MHA 1983, section 2(1) – which permits a patient’s admission to hospital for assessment – replicates the power contained in MHA 1983, section 6(2). It states:

‘A patient may be admitted to a hospital and detained there for the period allowed by subsection (4) below in pursuance of an application (in this Act referred to as “an application for admission for assessment”) made in accordance with subsections (2) and (3) below.’

The same is true of MHA 1983, section 3(1) – the power to admit a patient to hospital for treatment – which states:

‘A patient may be admitted to a hospital and detained there for the period allowed by the following provisions of this Act in pursuance of an application (in this Act referred to as “an application for admission for treatment”) made in accordance with this section.’

The wide site

Acceptance of the ‘wide site’ concept would mean that a patient would be regarded as being still within ‘the hospital’ whenever he remained on the campus within which his psychiatric unit was contained, and even though he had left the unit itself behind him.

Moreover, where he was first detained in a part of the hospital that did not provide mental health care and treatment, he would also be regarded as having been admitted under section to that part of the campus that provided psychiatric care. The two would be of a piece, and, because he was simply swapping one part of ‘the hospital’ for another, his movement between them would be possible without any degree of formality. This would impact upon the need to invoke the power of transfer in MHA 1983, section 19⁴⁰ or the power to grant formal leave of absence under section 17.⁴¹

The narrow site

Adoption of the ‘narrow site’ conception of ‘hospital’ would mean that a patient detained in the ‘general’ part of a health care campus would not be regarded as having also been admitted to the psychiatric part. The two would have to be seen as entirely discrete units, and the patient would need formal leave or transfer in order to move to the psychiatric part while still subject to MHA 1983. For the reasons that follow, it is probably the narrow site concept that must prevail.

Discussion

Although they are not mentioned in MHA 1983, section 2 or 3, it is clear that the powers of detention referred to there are to be utilised by ‘the managers’. MHA 1983, section 6(2), which has been discussed already,⁴² states:

‘Where a patient is admitted [...] to the hospital specified in such an application [...], or, being within that hospital, is treated by virtue of section 5 above as if he had been so admitted, the application shall be sufficient authority for the managers to detain the patient in the hospital in accordance with the provisions of this Act.’⁴³

40 See paragraph 5.7

42 See paragraph 5.1

41 See paragraph 5.5

43 MHA 1983, s 6(2)

Therefore, arguments made about detention under MHA 1983, sections 6(2) or 40(1)(b) would appear to have equal force here. It would seem that one is forced to adopt the 'narrow site' concept in this case, or at least to proceed as though it had been adopted. The same goes for admissions pursuant to an 'emergency application' under section 4, which also give rise to a power to detain that is governed by MHA 1983, section 6(2).

5.4 Holding a patient in the hospital

One of the greatest controversies about the meaning of 'hospital' has concerned the use of the 'holding powers' contained in MHA 1983, section 5(2) and (4).

Under MHA 1983, s 5(2):

'If, in the case of a patient who is an in-patient in a hospital, it appears to the registered medical practitioner in charge of the treatment of the patient that an application ought to be made under this Part of this Act for the admission of the patient to hospital, he may furnish to the managers a report in writing to that effect; and in any such case the patient may be detained in the hospital for a period of 72 hours from the time when the report is so furnished.'

MHA 1983, s 5(4) states:

'If, in the case of a patient who is receiving treatment for mental disorder as an in-patient in a hospital, it appears to a nurse of the prescribed class – (a) that the patient is suffering from mental disorder to such a degree that it is necessary for his health or safety or for the protection of others for him to be immediately restrained from leaving the hospital; and (b) that it is not practicable to secure the immediate attendance of a practitioner for the purpose of furnishing a report under subsection (2) above – the nurse may record that fact in writing; and in that event the patient may be detained in the hospital for a period of six hours from the time when that fact is so recorded or until the earlier arrival at the place where the patient is detained of a practitioner having power to furnish a report under that subsection.'

The authority provided by MHA 1983 section 5(2) may be used to detain 'a patient who is an in-patient in a hospital'. In such circumstances, the section states, "the patient may be detained in the hospital."⁴⁴ It seems reasonable to infer that s/he may be detained only in the hospital in which s/he is already an in-patient (whatever the extent of that 'hospital' might be).

The authority provided by MHA 1983 section 5(4) is for a patient's detention within the 'hospital' in which s/he is 'receiving treatment for mental disorder as an in-patient.'

These powers are of particular relevance in the case of a patient accommodated on a general medical ward who appears to be suffering from mental disorder. If the two are not to be considered part of the same 'hospital', a patient may not be moved from a general ward to a psychiatric ward while remaining detained under MHA 1983, section 5. Neither may MHA 1983, section 19 be used to transfer him/her to another 'hospital', for the relevant provisions in section 19(1)(a) and (2)(a) apply only to 'a patient who is for the time being liable to be detained in a hospital by virtue of an application under this Part of this Act.'⁴⁵ A patient who is subject to one or other of the holding powers is not so subject 'by virtue of an application'. Therefore, the only solution would appear to be to apply for the patient's substantive admission to the psychiatric unit under MHA 1983, section 2 or 3 while s/he was still held on the general ward under section 5(2) or (4).

44 *Emphasis added*

45 *Emphasis added*

Professor Eldergill has suggested that it was at first assumed that a patient who nevertheless remained subject to MHA 1983, section 5(2) or (4) might be moved from one hospital to another, provided s/he was detained throughout the permitted 72-hour period by a single set of managers.⁴⁶ Now, however, when not just different medical units but different wards within those units might be under different management, that assumption no longer holds good. There is, Professor Eldergill suggests, a paradox, which can be summarised as follows:

- (i) to allow movement without formality between different NHS trusts may perpetuate the freedoms that existed before the NHS & CCA 1990, but it also contradicts the statutory principle that the authority to detain a patient cannot be transferred to different hospital managers; however
- (ii) the prohibition of such movement “is inconsistent with the original statutory assumption, expressed in section 145(1), that one institution equals one hospital.”⁴⁷

Therefore, Professor Eldergill submits:

“Patients detained on a general ward under section 5(2) may not be removed to a psychiatric ward under section 19(3) if that ward is separately managed. Nor can the authority to detain them be transferred to another NHS trust under section 19(1). [...] In extreme cases, their removal may be justified under common law and recourse may be had to section 4.”⁴⁸

In fact, it is unlikely that use of the common law to transfer a patient from a psychiatric ward to the ward in a ‘general’ hospital where s/he might receive treatment for a cardiac arrest (for example) is confined to extreme cases. If, being capable, the patient is an adult who consents to such a transfer, it will be lawful; the same will be true in the case of an incapable adult patient, provided the treatment is in his/her ‘best interests’.⁴⁹

Professor Eldergill’s conclusion is doubtless correct, but for at least one reason that he does not give. It is a reason that this paper has discussed already.⁵⁰

The wide site

It might be argued that on the strict wording of MHA 1983, section 5(2) or (4), the detention permitted is detention in ‘the hospital’, and therefore that if the ‘wide site’ concept is adopted, a patient detained under either of those provisions in the psychiatric part of a much larger hospital site might be moved to the general part while still subject to MHA 1983, section 5(2) or (4), even though the general part and the psychiatric part are managed by different NHS trusts.

Whilst superficially engaging, this analysis cannot withstand a detailed analysis of the full ambit of the power. Although they are not mentioned in MHA 1983, section 5(2) or (4), it is clear that the power of detention referred to there is to be utilised by ‘the managers’. As been stated,⁵¹ MHA 1983, section 6(2) states:

‘Where a patient is admitted [...] to the hospital specified in such an application [...], or, being

46 Eldergill, 1997, *op cit*, p 140

47 Eldergill, 1997, *op cit*, p 140

48 Eldergill, 1997, *op cit*, p 141

49 *F v West Berkshire Health Authority and another (Mental Health Act Commission intervening)* [1989] 2 All ER 545; *Re T (Adult: Refusal of Medical*

Treatment) [1992] 4 All ER 649, CA, *per Lord Donaldson MR*; *Re MB (Medical Treatment)* [1997] 2 FLR 426, CA; *R v Bournewood Community and Mental Health NHS Trust, ex parte L* [1998] 3 All ER 289, [1999] 1 AC 481

50 See para 5.1, Discussion

51 See paragraph 5.1

within that hospital, is treated by virtue of section 5 above as if he had been so admitted, the application shall be sufficient authority for the managers to detain the patient in the hospital in accordance with the provisions of this Act.⁵²

Therefore, arguments made about detention under MHA 1983, sections 6(2) or 40(1)(b) would appear to have equal force here. It would seem that one is forced to eschew the 'wide site' concept in the case of patients detained in a hospital under MHA 1983, section 5(2) or (4).

The narrow site

On the basis of the foregoing, it must be assumed that the MHA 1983 powers of transfer will not apply to a patient while s/he is detained under MHA 1983, section 5(2) or (4), and that, if they have different 'managers', s/he may be moved from the psychiatric to the general part of a hospital only: (i) once s/he has been detained under a substantive section of MHA 1983; (ii) if s/he is incapable, in his/her 'best interests' under the common law doctrine of 'necessity'; or (iii) if s/he is capable, with his/her consent.

5.5 Leave to be absent from the hospital

A patient who is subject to MHA 1983 need not remain forever confined to the hospital to which s/he is detained. Under section 17(1),

'The responsible medical officer may grant to any patient who is for the time being liable to be detained in a hospital under this Part of this Act leave to be absent from the hospital subject to such conditions (if any) as that officer considers necessary in the interests of the patient or for the protection of other persons.'⁵³

It is in connection with this provision that Richard Jones deals with the definition of 'hospital' at most length. He states:

'A particular difficulty has arisen where a single hospital site contains a psychiatric and a general facility and the two facilities are administered by different NHS Trusts. In this situation, should a detained patient who needs treatment for a physical disorder at the general facility be sent to that facility under the authority of section 17 leave? As this Act was not drafted in contemplation of NHS trusts, the answer to this question is not easy to determine.'⁵⁴

The question of whether it will be *necessary* to grant a patient leave to move from one ward, managed by one set of managers, to another ward, managed by a different set of managers, even though the two are on the same wide site, is not one that is created by MHA 1983, section 17, for that provision is entirely permissive.

In fact, the question is raised as a result of MHA 1983, section 2 or 3 (or section 37), which, as has been pointed out above, state that a patient may be detained in – but only in – the 'hospital' to which an admission application is made. In that context, the provisions in MHA 1983, section 17 for the giving of formal leave to be absent from the hospital are the solution to this problem. However, wherever a patient is detained under the Act, it becomes necessary to ask, not so much *when* s/he must be granted leave, but *how far* s/he may venture without it becoming necessary at all.

For the purposes of MHA 1983, the place within which the patient is detained is the 'hospital'.

52 MHA 1983, s 6(2) (*emphasis added*)

54 Richard Jones, 2003, *op cit*, para 1–208

53 MHA 1983, s 17(1)

The narrower the confines of that place, the greater is likely to be the need for formal leave of absence, granted under MHA 1983, section 17, for it is only with such leave that a detained patient may leave ‘the hospital’.

The wide site

If the ‘wide site’ concept were adopted, a patient would not need formal leave to move within the greater hospital site, even though the discrete unit in which s/he was detained only occupied a part of that site and was managed by a NHS trust that did not manage the whole site.⁵⁵ (However, s/he *would* still require such leave if, in making his/her passage across the greater hospital site, s/he would encounter a phenomenon for which none of the NHS trusts in whom various parts of that site were vested was responsible in law. This would be the case, for example, where a detained patient’s journey from a psychiatric ward to a newsagent’s stall, each of which were situated within a single hospital site, would take him/her across a public road.)

Richard Jones has identified a flaw in the ‘wide site’ conception in so far as it is applied to MHA 1983, section 17. He states:

‘[I]f the patient moves from a part of the hospital that is managed by the NHS trust that is detaining him to a part of the hospital that is managed by another NHS trust, the staff of that other trust would not be authorised to detain him. This is because the application for the patient’s detention would not have been addressed to the Hospital Managers of that other trust.’⁵⁶

The MHAC has said that it accepts this argument ‘in part.’ However, it continues:

‘Even in a Trust that is a detaining authority, staff employed in capacities that are neither nursing nor medical probably have limited powers of control over detained patients. The Act does allow that any “officer on the staff of the hospital” (the definition of which encompasses any employee of a detaining hospital) may take into custody and return an AWOL patient under section 18(1), and may be authorised by a patient’s RMO to act as that patient’s escort as a condition of leave (section 17(3)).’⁵⁷

This would not appear to address Jones’s specific point: what powers are to be enjoyed by doctors and nurses employed, not by the detaining authority, but by the NHS trust that manages another part of the same ‘hospital’ site? Are they ‘on the staff of’ the detaining ‘hospital’, as the ‘wide site’ concept would appear to imply, or can they utilise the take and return powers in section 18 only if they have been expressly authorised to do so, as the ‘narrow site’ conception implies? The MHAC does not answer this question, nor does it say which part of Jones’s argument it accepts (and which it rejects).

The narrow site

As the MHAC has put it, the implication of adopting the ‘narrow site’ concept would be that:

‘[...] formal leave would be required under MHA 1983, section 17 for a patient to move from a part of the hospital site that was managed by one NHS body to a part of the site that was managed by another NHS body.’⁵⁸

55 See MHAC, 1999, *op cit*

56 Jones, 2003, *op cit*, para 1–208

57 MHAC, 2003, *op cit*, para 9.42

58 MHAC, 1999, *op cit*

Discussion

Clearly the question is not without practical significance: a Trust that adopted the wide site concept might deny itself powers of control that it ought in fact and law to possess; whereas inappropriate insistence on the narrow site conception might open a Trust up to judicial challenge.

The intricacies of the former situation have been discussed already.⁵⁹ With regard to the latter situation, a patient might have a cause of action against those who detained him/her if s/he were prevented from going from one part of the greater hospital site to another solely because, on the basis of the 'narrow site' test, s/he was thought to require formal leave of absence and his/her mental state was not thought robust enough to warrant the granting of it.

This is the mirror image of the problem encountered under MHA 1983, sections 6(2) and 40(1)(b). It concerns, not how closely a patient may or must be confined, but how far s/he may venture without requiring formal leave of absence. However, and as has been indicated, in truth this problem is created by MHA 1983, sections 2 and 3. That is important, because, unlike MHA 1983 section 6(2) or 40(1)(b), neither section 2 nor section 3 involves 'the managers'. This means that the word 'hospital' stands alone for the purposes of those sections. Therefore, the word is unqualified, so that there is nothing to prevent its being given a wider definition. Nothing, that is, save the general illogicality of having the same word defined in two different – possibly contradictory – senses at different points in the same Act.

5.6 The returning of a patient to the hospital

Detained patients who go absent without leave ('AWOL') may be retaken and returned to the hospital from which they have absconded. Under MHA 1983, section 18:

'Where a patient who is for the time being liable to be detained under this Part of this Act in a hospital –

- (a) absents himself from the hospital without leave granted under section 17 above; or
- (b) fails to return to the hospital on any occasion on which, or at the expiration of any period for which, leave of absence was granted to him under that section, or upon being recalled under that section; or
- (c) absents himself without permission from any place where he is required to reside in accordance with conditions imposed on the grant of leave of absence under that section,

he may, subject to the provisions of this section, be taken into custody and returned to the hospital or place by any approved social worker, by any officer on the staff of the hospital, by any constable, or by any person authorised in writing by the managers of the hospital.'⁶⁰

There are two aspects of this provision to which the definition of 'hospital' is relevant: determining the point at which a detained patient becomes AWOL; and identifying the individuals who may re-take him/her.

The wide site

Under the 'wide site' conception of 'hospital', a patient might be re-taken and returned there by a larger number of staff, the pool of whom might include those from all units on a single site, even

⁵⁹ See para 5.1

⁶⁰ MHA 1983, s 18(1)

if those units were managed by different NHS Trusts. However, there would be fewer cases in which such a patient would be AWOL, as, if s/he wandered away from the psychiatric unit into the grounds of a 'general' hospital that, though it was managed by a different NHS trust, was contiguous with the grounds of the psychiatric unit, s/he would not have left the 'hospital' that both units comprised.

The narrow site

The patient would be AWOL immediately s/he left the grounds for which the NHS trust that managed the psychiatric unit was responsible. S/he could only be re-taken by someone 'on the staff of' the psychiatric unit.

Discussion

The power to authorise persons to retake a patient who has gone AWOL is granted solely to 'the managers', and so must be taken to be exercisable only by the NHS trust in which is vested the premises in which the patient is liable to be detained.⁶¹

However, there is nothing in MHA 1983, section 18 to limit the substantive power to re-take a detained patient to 'the managers': it may be exercised by, *inter alia*, 'any officer on the staff of the hospital.' There is, of course, now some uncertainty as to what the word 'officer' means, and in particular, whether it includes an employee who has no managerial involvement in his employer's affairs.⁶² That uncertainty apart, there is nothing in the wording of the statute itself to prevent a wider conception of 'hospital' being adopted and a wider pool of possible patient-takers being created. However, such a course would be inconsistent with the approach that, it would seem, must be taken in respect of other manifestations of the word 'hospital'. It has already been suggested that it would be curious if contradictory definitions of the word were permitted to co-exist within a single Act; it is surely the more so in the case of a single section of an Act.

5.7 Transfer from the hospital

The transfer of a detained patient from one hospital to another is dealt with in MHA 1983, section 19(1), which states:

'In such circumstances and subject to such conditions as may be prescribed by the Secretary of State –

(a) a patient who is for the time being liable to be detained in a hospital by virtue of an application under this Part of this Act may be transferred to another hospital [...].'

Once a transfer has been effected in accordance with MHA 1983, section 19(1)(a), section 19(2) provides:

'(a) in the case of a patient who is liable to be detained in a hospital by virtue of an application for admission for assessment or for treatment and is transferred to another hospital, as if the application were an application for admission to that other hospital and as if the patient had been admitted to that other hospital at the time when he was originally admitted in pursuance of the application[.]'

⁶¹ See paragraph 5.1

⁶² *R (on the application of PD) v West Midlands and North West Mental Health Review Tribunal [2004] EWCA Civ 311*, per Lord Phillips MR at paras 22–25

(Where, in the case of hospitals that are incontrovertibly distinct, they are nevertheless under the management of a single NHS trust, a detained patient may be transferred between them without formality under MHA 1983, section 19(3).⁶³ This possibility is considered in section 5.1, above.)

The wide site

Adoption of the 'wide site' concept would imply that a patient wouldn't leave the 'hospital' – and therefore would not need to be formally transferred under MHA 1983, section 19 – where all s/he did was quit one ward or unit on a larger medical campus for another, even though the latter ward or unit was managed by a different NHS trust than to the former.

The narrow site

The 'narrow site' concept would require that a transfer of the kind described above be made with formality, under MHA 1983, section 19.

Discussion

Once s/he has been transferred to a new hospital under MHA 1983, section 19(1), a patient's detention is to be regarded as always having been in that hospital.⁶⁴ Therefore, it is assumed, the managers of the new hospital will find their authority to detain him/her in the same provision that would have protected the managers from whom the patient has been received – in other words, in MHA 1983, section 6(2). This, it will be recalled, permits 'the managers to detain the patient in the hospital in accordance with the provisions of this Act.' However, in this context, the managers 'in relation to a hospital vested in a Primary Care Trust or a National Health Service trust' is merely 'the trust'.⁶⁵ Therefore, to apply the argument that has been already advanced,⁶⁶ whatever the institution to which the patient has been transferred, it would seem that it is only the NHS trust in which that institution is 'vested', and not a NHS trust responsible for another part of the site on which that institution is situated, that might detain him/her thereafter. Once again, the 'narrow site' concept must be introduced, even if only at arm's length.

5.8 Recommending that a patient be admitted to hospital

There is one other use of the word 'hospital' that should be addressed. It is different to the other uses described in this paper.

In section 12(3), MHA 1983 deals with the medical recommendations that must support an application for a patient's admission to hospital. The section states:

'Subject to subsection (4) below, where the application is for the admission of the patient to a hospital [...], one (but not more than one) of the medical recommendations may be given by a practitioner on the staff of that hospital [...].'

This provision creates a conundrum that is, perhaps, the mirror image of those discussed above, for the wider the concept of 'hospital' that one applies the more one reduces one's room for manoeuvre.

63 As amended by NHS & CCA 1990, s 66(1) and Sched 9, para 24(2), and by The Health Act 1999 (Supplementary, Consequential, etc., Provisions) Order 2000, SI 2000 No 90, Sched 1, para 16(3)

64 MHA 1983, s 19(2)(a)

65 MHA 1983, s 145(1)(a)

66 See para 5.1

As to which concept of ‘hospital’ is to be preferred, the MHA 1983 Code of Practice is of no practical assistance. All it says is:

“Where a Trust manages two or more hospitals which are in different places and have different names[,] one of the two doctors making the medical recommendations may be on the staff of one hospital and the second doctor may be on the staff of one of the other hospitals.”⁶⁷

In the situations discussed in this paper, the hospitals – insofar as the plural is the appropriate form to use – are not in different places, but on the same site, and they are not managed by the same NHS trust.

The wide site

The effect of MHA 1983, section 12(3) is to require at least one of the recommendations supporting a patient’s detention to be provided by a medical practitioner who is not on the staff of the hospital in which s/he is detained. Clearly, therefore, if one conceives of the hospital in broad terms, one may reduce the pool of practitioners who may be called upon to assist.

The narrow site

If the hospital is conceived of as a small entity, the number of practitioners outside it – and therefore not on its staff – will be that much greater than if one were to conceive of it as a large thing.

Discussion

As it is used in MHA 1983, section 12(3), the term ‘hospital’ is not linked to ‘the managers’, and therefore, there would seem to be nothing to require the narrow reading of the former term that is required by the up-dated definition of the latter term.

However, and as discussed before, it would seem to be unlikely that one and the same word might have different, contradictory meanings at different places in the Act. The word ‘hospital’ must probably be taken to mean the same wherever it appears. If so, the ‘narrow site’ concept will have to prevail, and the larger will become the number of doctors who may provide the second recommendation for a patient’s detention under MHA 1983.

5.9 A specific hospital

There is at least one situation to which the foregoing discussion is irrelevant. Under the Crime (Sentences) Act 1997, when sending to a hospital a patient who is subject to restrictions, the Courts or the Home Secretary may direct that s/he be detained in a *specific* unit or part of that hospital⁶⁸. This element of specificity goes beyond anything provided for in MHA 1983.

6. Summary

The argument advanced in this paper may be reduced to a number of propositions:

- (a) It is now necessary to attempt to apply the Mental Health Act 1983 in situations very different from those anticipated by the Act’s first framers.
- (b) This is especially so when one is dealing with a provision that relates to ‘a hospital’.
- (c) It is unhelpful to attempt to divine the true meaning of the word; the entity that was called ‘a

⁶⁷ Department of Health and Welsh Office, *MHA 1983 Code of Practice*, 1999, para 2.30

⁶⁸ *Crime (Sentences) Act 1997 s.47*. Also, see *Home Office Circular 52/1997*, paras 10–12

hospital' in 1983 has, for the most part, ceased to exist.

- (d) In any case, the task cannot be carried out in the abstract; one must define the word according to the context in which it is used and with regard to the powers with which it is associated in a particular case.
- (e) The existing definition of 'hospital' does not correspond to modern practice.
- (f) However, other terms – for example, 'the managers' – *have* been revised in to take account of changed circumstances.
- (g) Wherever the term 'the managers' is used in conjunction with 'hospital', the more restrictive definition of that term introduced by the National Health Service & Community Care Act 1990 would seem to require that the 'narrow site' concept of 'hospital' be adopted. Therefore, and must crucially:
 - (i) a patient who is subject to MHA 1983 may only be confined within the boundary that marks the limit of the responsibilities of the NHS trust that confines him;
 - (ii) formal leave of absence will be required if s/he is to cross that boundary;
 - (iii) a patient who is subject to the section 5 holding power may only be moved within the 'hospital' managed by the Trust whose doctor or nurse applied that power to him/her.
- (h) There is nothing in MHA 1983 to require adoption of the 'narrow site' concept of 'hospital' in cases where it is not qualified by mention of 'the managers', but it is unlikely that two competing conceptions of the word could be allowed to co-exist in one statute.

7. Conclusion

Sadly, the definition of hospital that is provided by the Mental Health Act 1983 is neither more clear nor more helpful than the one given by Leslie Nielsen in *Airplane!* However, as this paper has attempted to explain, there was one respect in which his otherwise admirable reply got it wrong: right now, the question is important.

If we base our argument on an attempt to divine the true meaning of "hospital" as it is used in MHA 1983, we could go on arguing forever. It has not been revised in the light of significant changes to the way mental health services are configured, and it is now hopelessly out of date.

However, some areas of MHA 1983 have been revised to take account of those changes. They include the definition of 'the managers' in MHA 1983, s 145. The amendments to this definition that were made in 1990, coupled with the failure to make such amendments to the definition of 'hospital', suggest that it was the government's intention that, at least in so far as concerns the power of detention (and the other powers specifically endowed upon 'the managers'), they should be exercisable by each discrete NHS trust in – and only in – the premises for which it was responsible. This paper has, perhaps, provided the least equivocal evidence for supposing that that is so.

As they wrestle with the competing conceptions set out here, mental health practitioners might draw some small comfort from the fact that, no matter how wide their conception of a 'hospital', its bounds could never approach the dimensions of those suggested by Sir Thomas Browne.⁶⁹ He said:

"For the world, I count it not an inn, but an hospital, and a place, not to live, but to die in."⁷⁰

69 1605–1682

70 *Religio Medici* (1647), part ii, 11