

# Detaining people for psychiatric assessment or treatment

Hackett does not overrule JR 45



## At a glance

This briefing is for:

- legal advisers and all those involved in Mental Health Review Tribunal hearings;
- health and social care staff involved in making decisions to detain people for psychiatric assessment and/or treatment.

It considers the interpretation of the statutory phrase '*substantial likelihood*', which is found in the detention clauses of the Mental Health (NI) order 1986.

The briefing argues that in the majority of detention cases, the correct interpretation remains '*a real probability*' of serious physical harm; as per the decision in JR45. The Court of Appeal case of *R v Hackett*, which suggested that the threshold may be lowered to '*a real possibility*', only applies to cases which are at the upper end of the spectrum, where the anticipated physical injury is very serious or life threatening.

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## Introduction

JR45<sup>1</sup> is the lead case in Northern Ireland in relation to the degree of certainty required by a detaining authority, or a Mental Health Review Tribunal [MHRT], to determine whether the statutory test is met when deciding whether a person should be detained under the Mental Health (NI) Order 1986 [MHO]. JR45 held that the MHO test of ‘*substantial likelihood*’ can be interpreted as ‘*a real probability*’. Some would suggest that the recent case of *R v Hackett*<sup>2</sup> has completely overruled JR45 by reducing the threshold to that of ‘*a real possibility*’. This briefing argues that the application of Hackett is only relevant in relation to those cases at the upper end of the anticipated physical harm spectrum. For the majority of detention cases, the correct interpretation remains ‘*a real probability*’.

### 1. JR45: details of the case

JR45 concerned a student, a detained patient, who had a delusional belief that he was in a relationship with another student, XY. Behaviour was exhibited which XY found frightening, but which fell short of actual physical harm to XY or anyone else. In JR45, the Applicant had applied for a discharge from detention pursuant to the provisions of Article 77 of the MHO:

***Power to discharge patients other than restricted patients***

**77 (1)** *Where application is made to the Review Tribunal by or in respect of a patient who is liable to be detained under this Order, the tribunal may in any case direct that the patient be discharged, and shall so direct if—*

- (a) *the tribunal is not satisfied that he is then suffering from mental illness or severe mental impairment or from either of those forms of mental disorder of a nature or degree which warrants his detention in hospital for medical treatment; or*
- (b) *the tribunal is not satisfied that his discharge would create a **substantial likelihood of serious physical harm to himself or to other persons.** [our emphasis]*

The MHRT refused the application to discharge on the basis that it was satisfied discharge would create a substantial likelihood of serious physical harm to XY or other people. The patient initiated Judicial Review proceedings against the decision. The High Court found in

<sup>1</sup> [2011] NIQB 17 [http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2011/2011%20NIQB%2017/j\\_j\\_McCl8107final.htm](http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2011/2011%20NIQB%2017/j_j_McCl8107final.htm)

<sup>2</sup> [2015] NICA 57 [https://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2015/\[2015\]%20NICA%2057/j\\_j\\_MOR9743Final-PUBLISH.htm](https://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2015/[2015]%20NICA%2057/j_j_MOR9743Final-PUBLISH.htm)

his favour, thereby quashing the MHRT decision and directing that a new application be reconsidered by a differently constituted tribunal.

The judgement handed down by Mr Justice McCloskey, is wide ranging in scope and touches upon many other detention issues which are outside the remit of this briefing. His pertinent comments on ‘*substantial likelihood*’ are found in paragraph 13:

**[13]** *How is the word “likelihood” to be construed in the specific context of Article 77(1) of the 1986 Order? It is trite to observe that, in determining this issue, the context is of supreme importance. This is repeatedly stressed by Lord Nicholls in his opinion in H (Minors). Article 77 belongs to a statutory context which is multi-layered. This context is understood by identifying the main statutory purposes. These include the provision of mental health therapies and treatment to those in need, the rehabilitation of patients, the protection of the public and the prevention of crime and related mischiefs. These purposes are of more or less equally ranking importance and are readily identifiable in the discrete Article 77 regime. They are overlaid, in my view, by the hallowed importance of the liberty of the citizen. As Lord Nicholls observed in Re H (Minors), the primary meaning of the adjective “likely”, in daily usage, is probable. Similarly, it seems incontestable that the primary meaning of the related noun, “likelihood”, is probability. Focussing intensely on the statutory framework and giving effect to the principles rehearsed in paragraph [9] above, I conclude that the expression “a substantial likelihood” in Article 77(1) of the 1986 Order connotes a real probability. The statutory terminology, in my view, reflects an acknowledgement by the legislature of the human experience, which is that there are various shades of probability, some possessing more substance than others. Accordingly, in simple terms, Article 77(1) (b) is concerned with the formation by the Tribunal of an evaluative, predictive and rational judgment, applying the civil standard of the balance of probabilities, that the discharge of the patient would create a real probability of serious physical harm to the patient or some other person, with the burden resting on the detaining authority. **[our emphasis]***

## 2. Impact of JR45

The ‘*real probability*’ test set down in JR45 is applied by all working in the field. It provides a settled, clear and consistent approach across the jurisdiction, which has been approved by the courts. For example in *MH v MHRT*<sup>3</sup> where Mr Justice Horner states at paragraph 19:

<sup>3</sup> [2014] NIQB 87 [https://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2014/\[2014\]%20NIQB%2087/j\\_j\\_HOR9307Final.htm](https://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2014/[2014]%20NIQB%2087/j_j_HOR9307Final.htm)

*[19] Both parties agreed that McCloskey J had correctly set out the way in which Article 77 and Article 2(4) of the Order had to be approached when he dealt with issues in Re JR45. This is set out at length in his judgment at paragraphs [1]-[15]. The proper approach can be briefly summarised as follows:*

*(i) The burden of proof rests on the detaining authority.*

*(ii) The Tribunal must form an evaluative, predictive and rational judgment, based on the relevant available evidence.*

*(iii) "Substantial likelihood" means real probability*

*(iii) The question of whether there is a real probability falls to be determined in a narrowly focused and notably prescribed manner.*

*(iv) The harm must be of a serious physical variety.*

*(v) The evidence has to be that of violent behaviour to others or evidence that other persons were placed in reasonable fear of serious physical harm to themselves.*

### 3. Hackett

The reasoning in JR45 lay undisturbed and unchallenged until 14 September 2015 when the Court of Appeal NI handed down judgement in the criminal appeal against sentence brought by Mr Hackett.

#### 3.1 The case

The defendant was a 21 year old man who was convicted in 2013, when he was 18, of the manslaughter of his father on the grounds of diminished responsibility and the possession of a firearm and ammunition with intent. This was an appeal against his life sentences for those offences which had a minimum tariff of ten years imposed.

At trial there was limited medical evidence in relation to the nature of his mental illness and the impact which this had on his overall functioning. The sentencing judge remarked on the absence of an exact diagnosis of the defendant's '*abnormality of mental functioning*'. This led him to identify the defendant's indifference to the consequences of his actions as an aggravating factor. He concluded that there was a significant risk that he would commit further offences and that he presented a significant risk of harm to the public.

At appeal Mr Hackett introduced additional medical evidence from a consultant psychiatrist who considered that he was suffering from a delusional disorder at the time of the killing; that he was still suffering from that disorder and would benefit from psychotherapy and medication, and also that the condition was treatable. She felt that this was a mental condition which was very difficult to treat because '*the person appeared to be completely*

*normal*’ and the condition was only observable by detecting an emotional cut off when he spoke about the offences. It was also characterised by a complete lack of insight and a perception that the event did not matter to him. In her evidence, the psychiatrist explained that she had treated cases of this type in Broadmoor Hospital, but was not aware of another case of this nature in Northern Ireland. She described Mr Hackett as presenting with the purest case of ‘*delusional disorder*’ which she had encountered.

### 3.2. Hackett’s state of mind

The Appeal Court considered the evidence in relation to the ‘*delusional disorder*’ manifested by Mr Hackett and, given the additional medical evidence now before it, considered whether a hospital order with restriction pursuant to s44 of the MHO was more appropriate than the custodial sentence; which could in theory have resulted in Mr Hackett being discharged back into the community by the MHRT.

The issue of the interpretation of ‘*substantial likelihood*’ was raised in the Hackett appeal case by the prosecution, as summarised by the Lord Chief Justice at paragraph 42 of his judgment:

*[42] The prosecution also raised some concerns about the circumstances in which the test in Article 77 (1) (b) might be satisfied in light of the decision in JR 45 [2011] NIQB 17. At paragraph 13 of that decision McCloskey J held that the Article 77 (1) (b) required the Tribunal to be satisfied on the balance of probabilities that there was a real probability of serious physical harm to the patient or some other person. It followed that a real possibility of life-threatening injury to the patient or some other person would not be sufficient to satisfy the test and would lead to the release of a restricted patient unless the Tribunal concluded that it was appropriate for the patient to remain liable to recall for further treatment.*

### 3.3 The statutory regime

The power of the Criminal Court to impose a hospital order in respect of an imprisonable offence is set out in Article 44 of the MHO. It requires that a RQIA appointed medical practitioner gives oral evidence that the defendant is suffering from a mental illness or other mental impairment which warrants detention in hospital for medical treatment, and a written report from another medical practitioner which supports that view. Further, article 44 also requires the Court to carry out an assessment of all the relevant facts prior to determining that a hospital order is the most suitable means of dealing with the case.

A hospital order can be made with or without restrictions on the patient. However in both scenarios a patient can apply to the MHRT for discharge pursuant to the provisions of Article 77.

A determination on the appropriateness or necessity of continuing detention may fall within a spectrum in terms of certainty. A MHRT may have some doubt as to whether continuing detention is appropriate or necessary but still be satisfied '*on the balance of probabilities*' that it is the correct decision. This is less than the degree of certainty necessary in the criminal standard of proof, where the requirement is to be satisfied '*beyond reasonable doubt*'. Nevertheless the Tribunal is required to carefully consider the facts and evidence of a matter, so as to be satisfied '*on the balance of probabilities*' of the likelihood of an event occurring.

The statutory test set out in Article 77 (b) requires the Tribunal to make an evaluative judgement informed by a risk assessment of future events which should include the nature and the extent of the risk and the consequences if the event were to occur. It should then assess whether the likelihood of serious physical injury is substantial. Its analysis must be informed by the patient's history and be anchored to the particular facts of the case before it.

### 3.4 Outcome for Hackett

The nature and extent of the Appellant's mental illness in *Hackett* was still unclear, and so was the assessment of any residual responsibility for the offence beyond a medical diagnosis. The Criminal Court was clear that he required medical treatment, something he had not received until then. The potential risk to the public when the defendant was still considered to be dangerous mitigated against the imposition of a hospital order by the Criminal Court. The offence in this case was extremely serious but in the light of the medical evidence before the court, the impact this had on the defendant's culpability, and all the circumstances of the case, the court held it to be an offence of the utmost gravity and imposed a life sentence. The Court handed down an indeterminate sentence with a period of seven years before the Appellant could be considered for release on licence. The Parole Commissioners would be best placed to assess the danger presented by him.

## 4. Commentary

Ironically it is paragraph 45 of the Appeal Court's judgment that considers the approach taken by the High Court in JR45. Paragraph 45 states:

*[45] We consider that the approach espoused in JR45 unduly fetters the evaluative judgment which Article 77 (1) (b) of the 1986 Order requires. That approach is also out of kilter with the case law to which we have referred in the preceding paragraph. When considering this test the Tribunal should examine the nature and extent of the risk and the consequences if the event were to occur. It should then as a matter of judgment assess whether the likelihood of serious physical injury is substantial.*

*Likelihood is not to be interpreted as requiring a probability of serious physical injury. The context is one of risk assessment. Where the risk is of an injury that is very serious or life threatening a real possibility may well be sufficient to satisfy the test.*

Although the decision was made in the context of an appeal against sentencing in the Criminal Court, it has obvious implications for mental health law; interpreting, as it does, the scope of harm criteria in the phrase '*substantial likelihood of serious physical harm*'.

At first blush, the approach embraced by the Appeal Court provides greater flexibility to the MHRT and detaining authorities in evaluating risk in accordance with Article 77 (1) (b) MHO.

However, upon closer inspection, the core of JR45 remains intact for the majority of cases where the nature and extent of the risk falls below the nuanced circumstances envisaged by the Appeal Court. This is due in no small part to the carefully well-chosen words of the Lord Chief Justice in paragraph 45 above when he states: '*where the risk is of an injury that is very serious or life-threatening a real possibility may well be sufficient to satisfy the test*'. [our emphasis]

It remains the case therefore that, where the risk of injury is not very serious or life-threatening, the '*real probability*' test espoused in JR45 must still be applied.

## Conclusion

In the majority of detention cases, the correct interpretation remains '*a real probability*' of *serious physical harm*', as per the decision in JR45. The Court of Appeal case of *R v Hackett*, which suggested that the threshold may be lowered to '*a real possibility*', only applies to cases which are at the upper end of the spectrum, where the anticipated physical injury is very serious or life threatening.

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