MPTS Medical Practitioners Tribunal Service

Appeals Circular A05/25

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Professional Standards Authority for Health and Social Care v The General Medical Council (Garrard) [2025] EWHC 318 (Admin)

Learning points

- There are two ways in which evidence from one allegation may be cross admissible in respect of another allegation ('grounds for cross admissibility'). These are where the evidence:
  - 1) establishes propensity to commit that type of conduct and/or
  - 2) rebuts coincidence

  The tribunal needs to decide upon which ground(s) it is being asked to cross admit the evidence and advise itself accordingly. To avoid confusion, it should not advise itself on the other ground if only one ground is applicable.

- In making a direction on cross admissibility on either ground, the tribunal must ensure that there's "a sufficient connection and similarity between the facts of the allegations" but be cautious that they do not elevate this test to a higher threshold.

- In making a direction on cross admissibility on the ground of **propensity** in a case where there are two or more allegations, the tribunal needs to be satisfied to the required standard that the one allegation took place before relying on evidence in respect of the that allegation to deduce propensity from the other allegation.

- In making a direction on cross admissibility on the ground of **rebutting coincidence**, the tribunal must:

- clearly articulate the principle that it is *not* necessary to find evidence of one complainant proved before relying on that evidence in support of the other complainant;
- consider all the incidents together, holistically rather than sequentially;
- advise itself that it must exclude collusion or contamination as an explanation for the similarity of the complainants' evidence (*where such an explanation is raised*[1]) before it can assess the force of the argument that the allegations are unlikely to be coincidence. Once excluded, it must acknowledge that the fact of two complainants making such allegations reduces the likelihood of there being an innocent explanation for them.

Background

This was an appeal brought by the Professional Standards Authority for Health and Social Care ('the PSA') pursuant to section 29 of the NHS Reform and Healthcare Professionals Act 2002, against a Medical Practitioners Tribunal's ('the tribunal's') decision dated 13 December 2023 that none of the allegations against Dr Garrard ('Dr G') were found proved and accordingly, that his fitness to practise was not impaired.

Dr G was employed as a locum registrar in A&E. It was alleged that he behaved in an inappropriate manner to two vulnerable female patients; Patient A and Patient B ('the patients'), in separate hospitals in 2021:

- The allegations involving Patient A took place on around 27 March 2021. She made an immediate complaint to the hospital staff and to police. The following day, her husband made a complaint to the GMC on her behalf. Dr G was interviewed under caution, but the police closed the case with no further action.

- The allegations involving Patient B took place on around 27 December 2021. She made a complaint to the hospital the following day, but did not make a complaint to the police because she considered the complaint was being dealt with appropriately by the hospital. Dr G self-reported the Patient B allegation to the GMC.

The patients, who were not related and had no prior connection to one another, were both being treated in A&E for a mental disorder. Both gave evidence at the tribunal hearing. The allegations brought by the GMC in respect of each of the patients bore similarities to one another; they included sexually motivated touching in a clinical setting and speaking to the patients in a hypnotic manner.

At the tribunal hearing, Dr G denied all of the allegations, stating that both patients were unreliable witnesses due to their mental disorders/the effect of the medication they were taking, and that any similarities were coincidental. The tribunal found all of the allegations not proved. Within the determination, the tribunal summarised both the lay and expert witness evidence and the legal approach taken on the issue of

[1] The wording within the brackets has been inserted by the Tribunal Development Section, as it would not be necessary for the tribunal to need to explore collusion or contamination where it has not been raised.

cross-admissibility. The tribunal concluded that the two allegations were 'insufficiently similar' to find a pattern and that there was credible expert evidence about the effect of different medications prescribed to each of the patients.

Judgment

The PSA appealed on two grounds:

- The tribunal wrongly directed itself as to the test for the cross-admissibility of evidence (Ground One)

  - The PSA submitted various points, including that the tribunal should have directed itself in accordance with R v Freeman [2008][2] (a case concerning a defendant charged with sexual offences against two girls on separate occasions), namely that the tribunal could take one patient's evidence into account in relation to the allegations concerning another patient, and that it's not necessary to find evidence of one patient proved before relying on that evidence in support of the other patient. Finally, that the fact of two patients making such allegations (in the absence of collusion or contamination) reduces the likelihood of there being an innocent explanation for them, and/or more likely that the conduct occurred. [22].

    The PSA further submitted that the tribunal did not direct itself to consider whether the patients made allegations of a like nature against Dr G or that such circumstances made it more likely that the allegations of the patients were true. The tribunal incorrectly directed itself that, since it had not found an allegation proved, it could not rely upon the evidence in relation to it in respect of the other allegation [23].

- The tribunal wrongly interpreted and / or applied the legal test for cross admissibility (Ground Two)

  - The PSA submitted that the tribunal was wrong to interpret the law as to cross-admissibility as requiring something more than the similarities between the patients' respective allegations it relied on. The PSA stated that the tribunal was wrong to rely on the differences in the patients' evidence as to how Dr G had spoken to them as acting to exclude the admissibility of one patient's evidence in support of the other patient's allegations.

    Finally, the PSA submitted it was irrational for the tribunal to conclude that the patients' evidence was insufficiently similar to find a pattern of behaviour. Had it directed itself correctly, the tribunal should have appreciated that the patients were both vulnerable and being treated with medication for mental disorders and both alleged sexually motivated conduct in a clinical setting, therefore they were alike for the purposes of the test of cross admissibility of evidence. It was alleged that to look for something "sufficiently distinctive to link" the allegations of the patients in order to be able to take each patient's evidence into account set the standard of

[2] EWCA 1863; [2009] 1 WLR 2723

similarity required for cross-admissibility too high [25]. The tribunal's conclusion as to insufficient similarity was irrational, and similarities included the unusual character of Dr G's speech, the fact that both accounts included the removal of clothing, and both accounts included the making of controlling statements by Dr G [26].

At the appeal hearing, Dr G was represented by his barrister, Mr Rawlinson, who maintained that the tribunal's legal directions and decisions were correct.

Outcome

The appeal was heard by Mr Justice Macdonald, who acknowledged that the question of cross admissibility had given rise to confusion in previous Court of Appeal cases. He therefore set out the law on cross admissibility and concluded that, in the context of MPT hearings, a tribunal will need to bear in mind:

- There are two primary grounds on which evidence may be cross-admissible. Namely, (a) where it may establish propensity to commit that kind of conduct and/or (b) where it may rebut coincidence (Freeman [2008] EWCA Crim 1863 at [14] and [15]). The choice between seeking to admit evidence to establish propensity and seeking to admit evidence to rebut coincidence has consequences for the manner in which it is proper for the fact finder to proceed [35 and 47].

- The tribunal will need to decide on which ground or grounds it is being asked to cross admit the evidence and advise itself accordingly, in terms that are relevant to and reflect the particular circumstances in which the questions of cross-admissibility arise (Brennand [2023] EWCA Crim 1384) [47].

- The tribunal will need to take care to distinguish clearly between the grounds and to not advise itself on the other ground if only one ground is applicable, in order to avoid confusion (Nicholson [2012] EWCA Crim 1568 and BQC [2021] EWCA Crim 1944) [47].

- For evidence to be cross admissible it must be admissible which means it "must be relevant to the matter in issue", and this will depend on whether there is "sufficient connection and similarity between the facts of the allegations" [36 and 46]. The tribunal will need to consider whether the evidence in question is capable of being cross-admitted, by evaluating whether there is a sufficient connection and similarity between the allegations (Chopra [2006] EWCA Crim 2133). Once cross-admitted, the question of whether the evidence in fact establishes propensity or rebuts coincidence falls to be decided by the fact finder. How that is achieved differs depending on the ground under which the evidence has been admitted [37 and 47].

- Where the evidence is cross admitted to establish propensity in a case involving two or more allegations (ie if they did it on one occasion, either against the same or against a different complainant, it is more likely that they did it on this

occasion), before attaching weight to the evidence the tribunal will need to be satisfied to the required standard that one allegation took place before relying on evidence in respect of that allegation to deduce propensity from the other allegation (Adams [2019] EWCA Crim 1363 at [14] and R v Mitchell [2016] UKSC at [43]) [40 and 47].

- Where evidence is admitted to **rebut coincidence** (ie the extent to which the cross-admitted evidence is capable of disproving coincidence), there is no requirement to make a prior finding to the relevant standard before deciding whether coincidence has been rebutted. "Rather, the fact finder must consider all the incidents together, holistically rather than sequentially... A direction for such holistic reasoning must also take account of the defence explanation for coincidence…Where the evidence is admitted to rebut coincidence, the cogency of that evidence derives from the unlikelihood that a series of independent witnesses would make similar complaints" [39 and 46].

- Before attaching weight to the evidence the tribunal will need to advise itself that (a) it must exclude collusion or contamination as an explanation for the similarity of the complainants' evidence before it can assess the force of the argument that the allegations are unlikely to be the product of coincidence[3], (b) if collusion or contamination is excluded, considering the evidence as a whole, the fact of two patients making such allegations reduces the likelihood of there being an innocent explanation for them (R v H [2011] EWCA Crim 2344 at [24]) and (c) it is not necessary to find one allegation to be proved before relying upon the evidence in respect of that allegation in support of the other allegation concerning the other patient (Adams [2019] EWCA Crim 1363 at [15]). [47]

Mr Justice Macdonald emphasised that care must be provided when providing directions with respect to the issue of cross-admissibility given the risk of confusing the two bases of cross-admissibility. The directions must be relevant to and reflect the particular circumstances in which questions of cross-admissibility arise in the case, not template directions without adaption [41].

He noted that it was clear in this case that the GMC sought to rely on the similarity of the allegations made by the patients as rebutting coincidence, rather than demonstrating a propensity on the part of the Dr G to act in a particular manner [49]. However, the advice that the tribunal gave itself concerned both bases for the cross admission of the allegations, and Mr Justice Macdonald was satisfied that this advice risked conflating and confusing the two bases for cross admissibility in the minds of the tribunal [51].

- Ground One

Mr Justice Macdonald concluded that the advice given to the tribunal [55]:

[3] In this case, collusion and contamination could easily be excluded, as the incidents took place at different hospitals and there was no prior connection. In cases where complainants *did* have a connection, the circumstances should be analysed and tribunal may still reasonably conclude that there is no evidence to suggest the possibility of contamination or collusion. However, the more independent the sources of evidence, the less probable the coincidence [13 (including Chapter 13-2 of the Crown Court Compendium and R v H [2011] EWCA Crim 2344) and 39].

- made no clear reference to the test for cross admissibility, namely whether the evidence was relevant by reason of a sufficient connection and similarity between the allegations;
- incorrectly concentrated on the propensity ground;
- did not clearly articulate the principle that it is not necessary to find one allegation to be proved before relying upon the evidence in respect of that allegation in support of the other allegation;
- did not state that where they have excluded collusion or contamination as an explanation for the similarity of the evidence of the patients, the fact of two patients making such allegations reduces the likelihood of there being an innocent explanation for them.

Mr Justice Macdonald concluded that the tribunal did not clearly direct itself that it was not being invited by the GMC to reason from propensity, but merely being asked by the GMC to recognise that the evidence in relation to the allegations made by the patients may appear stronger and more compelling when all the evidence, including evidence relating to the other patient, was looked at as a whole [56]. Further, the tribunal did not receive a clear direction as to the proper approach to cross admissibility, in that context [56].

Mr Justice Macdonald was satisfied that the tribunal wrongly directed itself on the issue of the cross-admissibility of evidence. The PSA therefore succeeded on Ground One.

- Ground Two

Mr Justice Macdonald noted that structurally, the written reasons dealt separately with the allegations of each of the patients "without first addressing the issue of whether the tribunal could take into account the evidence in relation to the allegations made by Patient A and Patient B as a whole when deciding whether the allegations made by Patient A and Patient B were made out" [59]. The tribunal did later question the potential cross admissibility, but it incorrectly proceeded on the basis "that its findings prevent the evidence in relation the allegation made by Patient A being considered in relation to the allegation made by Patient B and vice versa" [60]. This was incorrect as the tribunal "was not being invited by the GMC to reason from propensity, but merely being asked by the GMC to recognise that the evidence in relation to the allegations made by Patient A and Patient B may appear stronger and more compelling when all the evidence, including evidence relating to other, was looked at as a whole" [60] and therefore the GMC "placed its case squarely on rebutting coincidence" [61].

Further, whilst at the very end of their decision, the tribunal did attempt to address the question of relevance based on similarity between the allegations, they "elevated the test beyond which in fact applies", ie to "insufficiently similar to find a pattern" and "very substantial differences". The Judge said that the case law simply requires the fact finder to consider whether there is sufficient connection and similarity between the facts of the allegations [61].

As to similarity, Mr Justice Macdonald noted that it is difficult to see how, properly directing itself as to the law, the tribunal could have reached any other conclusion than that there was sufficient connection and similarity between the facts of the allegations made by the patients for the evidence in respect of each allegation to be cross admissible. Both patients alleged that the Dr G acted towards them in an inappropriate manner in a clinical setting, and on a more granular level Mr Justice Macdonald presented a large list of similarities, similar to those advanced by the PSA. He concluded that it is also difficult to see on the face of it how, in circumstances where it was dealing with allegations from two patients attending different hospitals on different dates, who did not know each other and had never met, the tribunal could have reached any other conclusion than that collusion or contamination was excluded as an explanation for the allegations made by the patients [63].

Mr Justice Macdonald was therefore satisfied that the tribunal wrongly interpreted and applied the law with respect to cross-admissibility.

As both grounds of appeal succeeded, the Judge quashed the decision of the tribunal and remitted to a differently constituted tribunal, with a direction that the tribunal come to a fresh decision applying the correct legal approach to cross admissibility.

Kind regards

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