

Evidence

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Overview

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One of the Fitness to Practise Committee's most important functions is to resolve disputes between the NMC and the nurse, midwife or nursing associate. Unless the nurse, midwife or nursing associate admits the charges against them, or agrees with our evidence, the panel will need to decide what happened.

This will include resolving whether a contextual factor was present as a matter of fact if it is disputed, and if the contextual factor would have a material impact on the outcome of the case. Panels resolve disputes using the evidence that is put before them.

If we can't agree any part of our case, we will attempt to prove it by putting evidence before the panel. The nurse, midwife or nursing associate is also able to put evidence before the panel in support of their position.

Admissibility of evidence

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The only evidence that may be provided to the panel is evidence which is relevant to one of the issues the panel needs to decide. It also needs to be fair to the people involved in the case, including patients, family members and loved ones, the nurse, midwife or nursing associate, us as a regulator, that the panel considers that evidence.

Evidence *may* be unfair where it cannot be challenged.

For example, this could be where the person who gives the evidence cannot be questioned, where it relates to a subjective opinion as opposed to an objective (although possibly disputed) fact, or where it relates to decisions reached by other tribunals or fact-finding organisations.

How evidence is given to a panel

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A nurse, midwife, nursing associate and we can put evidence before a panel in several different ways.

At a meeting, evidence is in the form of written statements and documents. At a hearing, witnesses might speak to the panel to give evidence and to answer any questions that we, the nurse, midwife, nursing associate or the panel may have. This will usually happen if there is a dispute over the facts in the case.

Our rules don't dictate how evidence should be given and witnesses can give evidence 'in-person' before a panel in a number of ways. This includes attending a hearing centre, over video-link or by telephone.

In most circumstances, there is no disadvantage in a witness giving evidence by video-link compared to appearing

in the same room as the panel¹. It is better to give evidence by video-link rather than over the telephone, although telephone evidence may still be a fair way for the witness to give their evidence.

Where we're calling a witness to give evidence, we'll consider what's fair and practical for the hearing in deciding how the witness will give their evidence. This includes if the witness has the right technology and any personal circumstances that might prevent their participation at the hearing centre or remotely.

We'll tell the nurse, midwife or nursing associate who is subject to the proceedings (and their representative) in advance of the hearing how our witnesses will be giving evidence.

If the nurse, midwife, nursing associate or their representative object to how a witness will attend, we'll try to resolve any disagreements. We'll do this by arranging a **preliminary meeting** as soon as possible so a chair of the Fitness to Practise Committee (FtPC) can decide how that witness should attend.

The chair will hear from both sides, and it may be relevant for them to consider our guidance on the **demeanour of witnesses**. They'll also consider what benefit there might be in requiring a witness to attend our hearings centre, bearing in mind any concerns the witness may have about this.

Where the nurse, midwife or nursing associate is calling witnesses to give evidence at the hearing, we'll ask them to give us some information about those witnesses which will include how they'd like to give their evidence.

If we object to the way it's proposed that the witness will attend, we'll arrange a preliminary meeting so that a chair of the FtPC can decide how that witness should attend.

When the substantive hearing starts, we'll let the panel know how each witness will give their evidence. We won't make a formal application, so the panel won't need to make a decision about how the witnesses will give evidence during the hearing.

If, however, there is an objection about how a witness is giving evidence and we haven't been able to hold a preliminary meeting before the hearing, the panel may need to decide how that particular witness will give their evidence.

If during the hearing, the panel or either side think that the way a witness is giving evidence is causing a risk of unfairness, the panel can ask the witness to give evidence in a different way.

Who decides what evidence is admissible

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The panel making decisions about the issues in the case will also decide what evidence is admissible.

This will usually mean that we provide that evidence to the panel. As professional adjudicators, we consider that if the panel members decide the evidence is actually inadmissible, they can put the information out of their minds when making a decision about what happened.²

Weight

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When considering how disputes of fact are decided by the panel, a useful analogy is a set of weighing scales. Into one pan of the scales goes all the evidence that's supportive of a fact, and into the other goes all the evidence that's unsupportive. When we talk about the 'weight' of evidence, we mean how far a piece of evidence moves the scales.

Some evidence may be obviously reliable and is therefore likely to carry substantial weight, for example documents created in the course of business, official records, audio/visual recordings.

The weight of other evidence may depend on what the panel decides about whether a witness or piece of evidence is credible. In those circumstances the panel will need to carefully consider issues like:

- whether the evidence is 'inherently plausible'
- whether it's supported by other evidence
- consistency with previous accounts
- how likely the person giving the evidence is to be mistaken

Burden of Proof

What does the Panel do if the evidence on the weighing scales in relation to a disputed fact is evenly balanced?

In these circumstances the Panel should find in favour of the nurse, midwife or nursing associate's position on the disputed fact, regardless of whether they raised the fact or we raised it. This is because in situations where facts relating to an allegation are in dispute the NMC bears the burden of proving that their position is the correct one – this can be referred to as the “burden of proof”⁴

Credibility of witnesses

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When considering the credibility of witnesses, the panel will keep in mind that minor inconsistencies can generally be explained by the effect the passage of time has on memory. The demeanour of a witness is actually often the least useful barometer by which to determine whether their account is accurate.⁵

It's also important to remember that if a witness is giving evidence about what did and did not happen, the fact that they may not be a clinical specialist, or don't have healthcare expertise, will not make them less able to remember what happened. It also won't mean that their evidence about what happened will be of less value than evidence given by a clinical or healthcare specialist.

Hearsay

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In general terms, hearsay is any evidence which is not given orally by a witness with direct experience of the matter they are giving evidence about, and which is being given to prove an issue in dispute.

Evidence given by telephone and video link is not hearsay evidence. To the extent that there are limitations on evidence given by remote means that is a matter of weight (see above).

Most commonly, hearsay evidence will involve a witness reporting what they were told about something in issue by another individual who is not themselves a witness, or a statement being placed before a panel without the maker of the statement giving oral evidence.

Hearsay evidence is not in-admissible just because it is hearsay in our proceedings. However there may be circumstances in which it would not be fair to admit it, for example where it is the sole and decisive evidence in respect of a serious charge and it isn't 'demonstrably reliable' and not capable of being tested.⁶

Hearsay statements will usually carry less weight than oral evidence because it cannot be tested. Hearsay evidence may also be inadmissible where the weight which could be given to it in the circumstances of the case is zero, even where there is other evidence that could 'corroborate' (or support) it.⁷ Although it's not possible to provide a complete list of situations where this could happen, one example is where the evidence of a crucial witness is hearsay, and the fact that the nurse, midwife or nursing associate can't challenge it is so unfair that nothing else in the hearing process can avoid the unfairness.

No case to answer

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There may be situations where, at the close of our case, the nurse, midwife or nursing associate feels that we just haven't put forward enough evidence to mean they still have a case to answer.

There will be no case for a nurse, midwife or nursing associate to answer where, at the close of our case, there is:

1. no evidence
2. some evidence, but evidence which, when taken at its highest, could not properly result in a fact being found proved against the nurse, midwife or nursing associate, or the nurse, midwife or nursing associate's fitness to practise being found to be impaired.

The question of whether there is a case to answer turns entirely on our evidence. Evidence which might form part of the nurse, midwife or nursing associate's case will not be taken in to account.

Where the strength or weakness of our evidence depends on the weight it should be given, a submission that there is no case to answer is likely to fail. That issue is best considered after all the evidence has been heard.⁸

When should panels resolve disputes regarding context

As mentioned above there will be times when a Fitness to Practice Committee will need to resolve whether a

disputed contextual factor was present or not, and make a factual finding about that.

This will only be necessary if the contextual factor would have a material impact on the outcome of the case. For more information about our approach to context please see our guidance on [taking account of context](#).

So at what stage of a hearing should a panel resolve whether a contextual factor is present? This is likely to be something that panels will need to decide on a case-by-case basis, and panels will need to be flexible in their approach.

Panels have a wide discretion under our rules to determine how a hearing is conducted, and they will need to use that discretion to decide when they think the dispute should be resolved⁹.

In some circumstances they might decide it is appropriate to determine the issue at the facts stage, or alternatively they may decide that it is more appropriate to decide the issue at the impairment stage. The decision on when to resolve a disputed contextual factor could depend on when the contextual factor is raised during a hearing.

Prior to the hearing, we'll have [reviewed the case](#) and tried to work with the nurse, midwife or nursing associate to clarify the important issues in the case. The case presenter should usually be able to assist the panel with whether a material contextual factor is in dispute and the most appropriate point to resolve it.

When the panel does resolve a dispute in relation to context they will need to make it clear in their reasons what the contextual factor was that they resolved, and how they reached their decision.

Further evidence

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Our overarching objective is the protection of the public. Because of this, the panel has a responsibility to ask us to obtain [further evidence](#) if they are concerned that there are gaps in the evidence which will prevent them from properly performing their function.⁹

1 *YI v AAW* [2020] CSOH 76 in which Lady Wise rejected the submission that it would be difficult to assess credibility of parties and witnesses giving evidence remotely on video screen and, whilst noting it was a little unsatisfactory that some witnesses gave evidence by mobile telephone, said that this did not have a bearing on her assessment of their credibility and reliability. See also: *Polanski v Conde Nast* [2005] UKHL 10; *A Local Authority v Mother, Father, SX* [2020] EWHC 1086 (Fam); *National Bank of Kazakhstan v The Bank of New York Mellon* [2020 unreported]; *Re Smith Technologies (Insolvency and Companies Court)* [2020 unreported]; *Re One Blackfriars Ltd, Hyde v Nygate* [2020] EWHC 845 (Ch); and *Municipio de Mariana v BHP Group* [2020] EWHC 928 (TCC).

2 For an example of the Court of Appeal commenting on a panel's ability to do this, see *R. (on the application of Chief Constable of Thames Valley) v Police Appeals Tribunal* [2016] EWCA Civ 1315

3 Rule 30 The Nursing and Midwifery Council (Fitness to Practise) Rules 2004

4 See for example, *R v Turnbull* [1977] QB 224; *Suddock v NMC* [2015] EWHC 3612 (Admin); and *R (on the application of SS (Sri Lanka) v Secretary of State for the Home Department* [2018] EWCA Civ 1391:

[36] ... it has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth. The reasons for this were explained by MacKenna J...:

"I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is that the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is he speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground perhaps from shyness or a natural timidity? For my part I rely on these considerations as little as I can help."

5 *Thorneycroft v Nursing and Midwifery Council* [2014] EWHC 1565 (Admin)

6 *The Professional Standards Authority v (1) The Nursing and Midwifery Council (2) Jozi* [2015] EWHC 764 (Admin)

7 Rule 24(1) The Nursing and Midwifery Council (Fitness to Practise) Rules 2004 allows Panels a discretion to determine the order of proceedings at a final hearing

8 *R v Galbraith* [1981] 1 WLR 1039

9 The Professional Standards Authority v (1) The Nursing and Midwifery Council (2) Jozi [2015] EWHC 764 (Admin)