Evidence

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Overview

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One of the Fitness to Practise Committee's (FtPC) 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 and 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, or where it relates to a subjective opinion as opposed to an objective (although possibly disputed) fact.

Other investigations or proceedings

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Often another organisation or body[1] will have carried out some form of investigation into the matters being considered by the panel. It may even have reached a decision on the same or similar issues. For example, we sometimes need to investigate incidents that the police have investigated but have not resulted in a conviction, or conduct or circumstances that are closely related.

Both the material generated in the other investigations/proceedings and the decision itself could be admissible in NMC proceedings.

Material gathered in the course of other investigations or proceedings

f it is relevant to the regulatory allegations or necessary to understand the wider background, evidence generated by or put before another organisation or body could be admissible in NMC proceedings. It can be presented to a panel and form part of the bundle[2]. Such material can include statements of fact and expressions of expert opinion.

t is for the FtP Committee to decide what weight to give to this evidence, using its expertise and experience as an ndependent panel.

One reason why we might put such evidence before a panel is that there are inconsistencies between accounts a witness or professional has given at different times and in different proceedings. Inconsistencies between accounts can be relevant to a panel's assessment of witness credibility.

Sometimes, where a witness has provided a detailed account of events in other proceedings and is happy to confirm its truth in a brief statement, their adoption of a previous account (with or without any further comment) can be more efficient and avoid unnecessary distress.

When we are investigating a concern and know or suspect that such material exists we will usually seek it out, unless we are sure there is no need to do so – for example, the professional is no longer on the register or the referral is manifestly unfounded. If that material is relevant we will consider putting it before the panel.

Findings of other organisations or bodies

f a professional has been convicted of a crime or another health or social care organisation has made adverse findings against them, the NMC can always rely on these decisions when seeking to prove the underlying facts they are based on[3].

n all other instances, it will be a matter for the panel whether to admit the findings of other organisations or bodies[4].

When considering whether to admit evidence of findings made by another body, the panel will need to address the following:

1. What is the relevance of those findings to the issues it is considering?
2. Would it be fair to admit?
   This assessment should consider, among other things, how rigorous and fair were these other proceedings – for example, was there full argument, live evidence and cross-examination; was it a decision of a court or tribunal. Similarly, the panel might also consider the extent to which the professional was on notice that findings relevant to their practice may be made and what, if any, opportunity they had to respond.

The way such findings can be used, *if* admitted, is limited.

Decisions of third parties can be put before a panel for two reasons: to help explain or give necessary narrative in proceedings or, in rarer cases, such decisions might be given some (limited) value as evidence of facts alleged.

Conclusions reached by a court of law or judicial inquiry (such as Coroners proceedings) are more likely to be admitted as *prima facie* evidence of the facts they have established[5] than findings of other bodies. However, normally they will not be admissible, or raised only for their narrative value.

The fact that another body has found certain matters proved does not mean that the panel can simply adopt those findings. It must not use the findings of another body as a substitute for reaching its own decision on the issues before t. The panel must reach its own view and own conclusions having regarded all the relevant evidence. It must allow the nurse, midwife or nursing associate to argue their case and rely on their own evidence. It can be unfair for the judgments to significantly influence the tribunal's mind on the crucial issues before it for the same reasons[6].

Findings by non-judicial bodies, such as an employer's disciplinary process, on the issues the FTP panel would need to decide, or matters very closely related, cannot usually be fairly admitted. Where necessary they might instead be included to provide narrative background or establish related facts[7]. In some cases, for example, it might be important for the panel to know that a professional was disciplined and sanctioned at a certain point, because it is relevant to what happens next.

Consistency of accounts

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As well as consistency with known or accepted facts and consistency within the account itself, decision-makers can better judge an account's credibility by looking at its consistency with other accounts given by the same witness. This is one way in which evidence from other proceedings or investigations might be relevant to, and relied upon in, NMC proceedings.

A panel should closely consider any inconsistencies, assess evidence as a whole (including other factors going to credibility), and draw its own conclusions accordingly. Though it is entitled to find that since a witness is not reliable on one point of their evidence, they are not reliable on others[8], inconsistencies, unreliability or even evident fabrication in part of witness evidence does not automatically mean that everything they say is unreliable[9].

Inconsistencies between accounts could be attributed to numerous factors, including the passage of time, trauma of events[10] and neurodiversity.

Panels looking at concerns of sexual misconduct, or indeed any major trauma, should have in mind the CPS guidance on myths and stereotypes surrounding rape and other forms of sexual misconduct. In particular:

- Inconsistencies in accounts can happen where a person is telling the truth or not.
- Avoid an either/or argument that allows a complainant's evidence to be wholly dismissed because of a peripheral inconsistency. Don't present your argument as either you should believe the professional or the complainant for this reason.
- Rape can be very traumatic and memory can be affected in a number of ways. Understanding the effects of fear and the psychological mechanisms that may occur during a sexual assault is vital when considering recall and memory. Some, understandably, may try to avoid thinking about being raped or try to avoid recalling it all – this can impact upon recall.

How evidence is given to a panel

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Evidence can be given to a panel in several different ways. What is important is that the panel can fairly consider the case before them.

At a meeting, evidence is in the form of written statements and documents. At a hearing, people 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 people can give evidence to a panel in a number of ways. This includes attending a hearing centre, over video-link or by telephone.

A decision to hold a hearing at a hearings centre does not mean that a person needs to attend to give evidence 'in-person'. How a person gives evidence will be a separate decision.

In most circumstances, there is no disadvantage in someone giving evidence by video-link compared to appearing in the same room as the panel[11]. In some cases it may be better to give evidence by video-link rather than over the telephone, although telephone evidence may still be considered a fair way for the witness to give their evidence.

There is no requirement for witnesses located outside the UK who wish to give oral evidence remotely in hearings before our panels to seek prior permission from the authorities in the country from which they are giving their evidence.[12]

Where the NMC is calling someone to give evidence, we'll consider what's fair and practical for the hearing in deciding how they will give their evidence. This includes if they have the right technology and any personal circumstances that might prevent their participation at the hearing centre or remotely. The Equal Treatment Bench Book may assist you when considering this. This resource provides guidance and advice on how to make hearings accessible and fair for every person involved.

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

If the nurse, midwife, nursing associate or their representative object to how it is intended a witness will give evidence, we'll try to resolve any disagreements in advance of the hearing. We'll do this by arranging a preliminary meeting as soon as possible so a chair of the FtPC can decide how that witness should attend.[13]

The chair will hear from both sides. 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. Ultimately, the decision for the Chair (or panel if an issue arises about how a witness is to give evidence at a hearing) will be whether a fair hearing can take place with the witness giving evidence in that way.

Where the nurse, midwife or nursing associate is calling people 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 think the way it's proposed that someone will give evidence would mean the hearing is unfair to us and the public interest which we represent, we'll arrange a preliminary meeting so that a Chair of the FtPC can give directions about how they should participate.

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 people will give evidence at the hearing.

If, however, there is an objection about how someone gives evidence and we haven't been able to hold a preliminary meeting before the hearing, the panel may need to decide whether a fair hearing can take place with the witness giving evidence in the manner proposed.

If during the hearing, the panel or either side think that the way someone is giving evidence is causing a risk of unfairness, the panel can ask the individual 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.[14]

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 because of its nature 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.

Credibility

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Credibility considers how much a witness account can be relied on. It involves more than whether the account is honest or not.

A person may have confidence in his or her recollection and be honest. However, that does not mean that their recollection provides any reliable guide to the truth on this basis alone. An account can be honest but objectively unreliable.

We believe memories to be more reliable than they are. Two common errors are to suppose (1) that the stronger and more vivid the recollection, the more likely it is to be accurate; (2) the more confident another person is in their recollection, the more likely it is to be accurate.

Memories are fluid and malleable and can be subject to powerful biases. Events can come to be recalled as memories which did not happen at all or which happened to somebody else. The older the events, the more important it is to hold fast to these principles of reasoning.

The objective and reliable approach is to focus on the content of a person's evidence.

A panel will need to carefully consider issues such as:

- whether the evidence is consistent with contemporaneous evidence;
- whether it's consistent with admitted or incontrovertible facts;
- whether the evidence is internally consistent;
- whether it's consistent with previous accounts;
- whether it's supported by other evidence;
- how probable or plausible it is;
- the possible motive of the person giving evidence;
- the potential for mistake or unconscious bias.

Panels should consider whether evidence is plausible and consistent with objectively verifiable evidence (including evidence of what the witness has said on other occasions) and with known or probable facts. They should start with the objective facts as shown by authentic, contemporaneous documents, independent of the person giving evidence, and use oral evidence to test it[15].

Burden of proof

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Where facts relating to an allegation are in dispute (including those relating to context), the burden of proving such facts rests on the NMC[16]. If a panel finds it more likely than not that something did take place, then it must treat it as having taken place.

It is a difficult but vital function of a panel to make findings of fact, particularly when accounts before it are diametrically opposed.

There are many considerations which help a panel to make a decision. Panels will assess the internal consistency of evidence, as well as its consistency against accepted facts and contemporaneous documents (where available). They will consider the passage of time, witness motivation, the potential for mistake, overall probabilities and the plausibility of evidence.

Generally speaking a panel should be able to make up its mind where the truth lies without needing to rely upon where the burden of proof lies[17]. This is because it is rare for a panel to conclude, after careful consideration of the evidence, that the case for and against the issue of fact is completely balanced and it cannot reasonably make a finding one way or another[18].

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.[19]

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.[20] 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.[21]

When should panels resolve disputes regarding context

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As mentioned above there will be times when a FtPC 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 resolved.[22]

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.[23]

1 Possibilities include convictions, civil proceedings, family court proceedings, inquests, internal investigations by employers, and external investigations or inquiries such as those conducted by ombudsmen or commissioned by local authorities or other public bodies.

2 Enemuwe v NMC [2016] EWHC 1881 (Admin).

3 Criminal convictions are conclusive; findings of other health or social care regulators in the UK, or licencing bodies elsewhere provide prima facie evidence of the underlying facts; see rr.31(2)-(3) and r.31(4) of the Nursing and

Midwifery Council (Fitness to Practise) Rules 2004 (SI 2004/1761) respectively.

r.31(1) of the Nursing and Midwifery Council (Fitness to Practise) Rules 2004 (SI 2004/1761); Squier v General Medical Council [2016] EWHC 2793 (Admin); Enemuwe v Nursing and Midwifery Council [2015] EWHC 2081 and Towuaghanste v GMC [2021] EWHC 681 (Admin).

General Medical Council v Spackman [1943] A.C. 627; Constantinides v The Law Society [2006] EWHC 725 (Admin); Chaudhari v General Pharmaceutical Council [2011] EWHC 3433

Hoyle v Rogers [2014] EWCA Civ 257.

Enemuwe v Nursing and Midwifery Council [2015] EWHC 2081; Georgieva v Nursing and Midwifery Council [2017] 3 WLUK 479

Caldero Trading Ltd v Beppler & Jacobson Ltd and others [2013] EWHC 2191 (Ch)

Slocom Trading Ltd and another v Tatik Inc and others [2012] EWHC 3464 (Ch)

10 See for example Shabir v GMC [2023] EWHC 1772 (Admin)

11 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).

12 The principle articulated in Home Department v Agbabiaka [2021] UKUT 00286 (IAC) in relation to evidence given in UK courts and tribunals does not apply to hearings of our Fitness to Practise Committee because our Fitness to Practise Committee is not part of the judicial system of the state (see General Medical Council v BBC [1998] EWCA Civ 949).

13 This is a different decision to what support a witness might need to give evidence for which we have separate guidance.

14 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.

15 R (oao Dutta) v General Medical Council [2020] EWHC 1974 (Admin), para 39-40 and R (oao SS (Sri Lanka) v The Secretary of State for the Home Department [2018] EWCA Civ 1391, para 33-42.

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

17 Re B (Children) [2008] UKHL 35, para 32

18 Stephens v Cannon [2005] EWCA Civ 222; Verlander v Devon Waste Management and another [2007] EWCA Civ 835; Constandas v Lysandrou (a protected party by her litigation friend and son Mr Michael Lysandrou) and others 2018] EWCA Civ 613

19 Thorneycroft v Nursing and Midwifery Council [2014] EWHC 1565 (Admin).

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

21 R v Galbraith [1981] 1 WLR 1039.

22 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.

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