Name of registrant: Rosemary Davies

NMC PIN: 79Y0237S

Part(s) of the register: Registered Nurse – Sub Part 1
Adult (24 February 1992)
Registered Nurse – Sub Part 2
General Nurse (7 October 1980)

Area of Registered Address: Scotland

Type of Case: Misconduct

Panel Members: Graham Park (Chair, lay member)
Richard Lyne (Registrant member)
Yvonne O’Connor (Registrant member)

Legal Assessor: Angela Hughes

Panel Secretary: Sophie Cubillo-Barsi

Registrant: Present and represented by Scott Flannigan, instructed by the Royal College of Nursing (RCN)

Nursing and Midwifery Council: Represented by Bryony Dongray

Facts proved by admission: Charge 1 a) and charge 2

Facts not proved: Charge 1 b)

Fitness to practise: Impaired

Sanction: Conditions of practice order – 12 months

Interim Order: Interim conditions of practice order – 18 months
Details of charge:

That you a registered nurse:

1. On 3 September 2016 failed to complete and/or document accurately the consent process for Patient A to undergo endoscopy procedures in that you:

   a) Had Patient A sign a consent form that you had completed with Patient B’s details.  *Charge found proved by way of admission*

   b) On being made aware of the error tried to rectify it by placing addressograph labels for Patient A over Patient’s B’s details at the start of the form however Patient B’s details remained further down the form.  *Charge found NOT proved*

2. On 24 July 2017 failed to identify the correct patient attending for an endoscopy procedure.  *Charge found proved by way of admission*

AND in light of the above, your fitness to practise is impaired by reason of your misconduct.
Decision and reasons on application under Rule 19

Before beginning his submissions, Mr Flannigan, on your behalf, made a request that parts of the hearing of your case be held in private on the basis that proper exploration of your case involves reference to your health. The application was made pursuant to Rule 19 of the Rules.

Ms Dongray, on behalf of the NMC indicated that she supported the application to the extent that any reference to your health should be heard in private.

The panel was aware that while Rule 19 (1) provides, as a starting point, that hearings shall be conducted in public, Rule 19 (3) states that the panel may hold hearings partly or wholly in private if it is satisfied that this is justified by the interests of any party or by the public interest.

Rule 19 states

19.—(1) Subject to paragraphs (2) and (3) below, hearings shall be conducted in public.

(2) Subject to paragraph (2A), a hearing before the Fitness to Practise Committee which relates solely to an allegation concerning the registrant’s physical or mental health must be conducted in private.

(2A) All or part of the hearing referred to in paragraph (2) may be held in public where the Fitness to Practise Committee—

(a) having given the parties, and any third party whom the Committee considers it appropriate to hear, an opportunity to make representations; and

(b) having obtained the advice of the legal assessor, is satisfied that the public interest or the interests of any third party outweigh the need to protect the privacy or confidentiality of the registrant.
(3) Hearings other than those referred to in paragraph (2) above may be held, wholly or partly, in private if the Committee is satisfied—

(a) having given the parties, and any third party from whom the Committee considers it appropriate to hear, an opportunity to make representations; and

(b) having obtained the advice of the legal assessor, that this is justified (and outweighs any prejudice) by the interests of any party or of any third party (including a complainant, witness or patient) or by the public interest.

(4) In this rule, “in private” means conducted in the presence of every party and any person representing a party, but otherwise excluding the public.

Having heard that there will be reference to your health, the panel determined to hold such parts of the hearing in private. The panel determined to rule on whether or not to go into private session in connection with your health as and when such issues are raised.

**Background**

The charges arose whilst you were employed at NHS Fife (the Trust) as a Band 6 staff nurse within the Endoscopy Unit (the Unit). On 3 September 2016, you and another registered nurse, Ms 1, were responsible for admitting patients for endoscopy procedures. You completed the admission documentation for Patient A and Ms 1 had completed the admission documentation for Patient B. Ms 1 had not yet completed her training in taking informed consent and she asked you to complete the consent process for Patient B. It is your evidence that at this time, you remembered that you had not asked Patient A to sign his consent forms. You subsequently went to the waiting area to ask Patient A to do so. You then proceeded to take consent from Patient B. Patient B’s procedure was completed uneventfully.

It is alleged that whilst reviewing the health records for Patient A, Mr 1 noticed that the consent form for Patient A was incorrect and that the consent forms had the details of
Patient B on them, despite the forms being signed by Patient A. It is alleged that when this was brought to your attention, you attempted to rectify the error by placing addressograph labels for Patient A over Patient B’s details. However, Patient B’s details remained in place further down the consent form. Due to the discrepancy, Mr 1 could not proceed with the procedure as he was unable to be assured that the consent process for Patient A had been completed correctly and robustly. Mr 1 subsequently recommenced and completed the consent process correctly for Patient A.

It is further alleged that on 24 July 2017, you failed to identify the correct patient attending for an endoscopy procedure. On the morning of 24 July 2017, there were two female inpatients waiting in the endoscopy recovery area for their procedures. Patient C’s procedure had been booked as an outpatient gastroscopy and colonoscopy procedure when she was an inpatient in Ward 23. Patient D was also an inpatient on Ward 23. She was booked onto Ms 3’s list as an urgent inpatient. At the relevant time, you and Ms 2 were working alongside Mr 2. Mr 2’s procedure list had finished early. Meanwhile, Ms 3’s list was running late and it was agreed that Mr 2 would undertake Patient D’s procedure to assist Ms 3. You proceeded to the recovery area to collect Patient D. It is alleged that you did not check the patient’s name with Mr 2 and did not check anywhere else that you had selected the correct patient. Patient C subsequently had the procedure which was intended for Patient D.

**Decision on the findings on facts and reasons**

In reaching its decisions on the facts, the panel considered all the evidence adduced in this case together with the submissions made by Ms Dongray and those made by Mr Flannigan.

The panel heard and accepted the advice of the legal assessor.
The panel was aware that the burden of proof rests on the NMC, and that the standard of proof is the civil standard, namely the balance of probabilities. This means that the facts will be proved if the panel was satisfied that it was more likely than not that the incidents occurred as alleged.

The panel heard oral evidence from two witnesses tendered on behalf of the NMC. In addition, the panel heard oral evidence from you.

Witnesses called on behalf of the NMC were:

- Ms 1, Registered Nurse; and
- Ms 4, Clinical Nurse Manager;

The panel first considered the overall credibility and reliability of all of the witnesses it had heard from, including you.

The panel found Ms 4 to be a credible and reliable witness. Whilst Ms 4 did not provide any direct evidence, she assisted the panel in understanding the Trust’s procedures and investigation process. The panel found her evidence to be balanced and impartial.

The panel found Ms 1 to be a credible witness who was willing to answer the questions put to her. However, the panel found that Ms 1 struggled to recall certain aspects of the incident and at times, appeared non-committal in the answers she provided. Despite this, the panel did not detect any intention by Ms 1 to mislead it.

The panel found that you attempted to answer questions put to you to the best of your ability. Whilst you were clear in the evidence you provided during your evidence in chief, the panel noted that you appeared to become confused and at times provided inconsistent evidence during cross-examination. Despite this, the panel did not detect any intention by you to mislead it.
The panel acknowledged that the difficulty in recalling specific details of the incident and the inconsistencies, could be explained by the passage of time, in both your evidence and Ms 1’s evidence.

At the start of this hearing you admitted the following charges;

1.  **On 3 September 2016 failed to complete and/or document accurately the consent process for Patient A to undergo endoscopy procedures in that you:**

   a)  *Had Patient A sign a consent form that you had completed with Patient B’s details.*

   b)  ...

2.  **On 24 July 2017 failed to identify the correct patient attending for an endoscopy procedure.**

These were therefore announced as proved.

The panel then went on to consider the remaining charge.

**Charge 1 b):**

b) On being made aware of the error tried to rectify it by placing addressograph labels for Patient A over Patient’s B’s details at the start of the form however Patient B’s details remained further down the form.

**This charge is found NOT proved.**

In reaching a decision in relation to this charge, the panel considered all the evidence before it.
The panel had regard to the contemporaneous statements of both you and Ms 1 provided to the Trust investigation, dated 7 September 2016. The panel noted that whilst the statements differ as to who placed the addressograph labels on the form, both contemporaneous statements are clear as to the fact that both you and Ms 1 were involved in the incident.

The panel determined that, the mischief of this charge is contained within charge 1 (a), to which you have made a full admission. The panel could not determine what advantage, if any, you would gain by denying this charge. In light of the limited evidence before it, the panel was not satisfied that it was more likely than not that you had tried to rectify the mistake by placing addressograph labels for Patient A over Patient B’s details. The panel was not persuaded that the NMC had discharged it’s burden of proof and therefore finds this charge not proved.
Submission on misconduct and impairment:

Having announced its finding on all the facts, the panel then moved on to consider, whether the facts found proved amount to misconduct and, if so, whether your fitness to practise is currently impaired. There is no statutory definition of fitness to practise. However, the NMC has defined fitness to practise as a registrant’s suitability to remain on the register unrestricted.

In her submissions, Ms Dongray invited the panel to take the view that your actions amount to a breach of *The Code: Professional standards of practice and behaviour for nurses and midwives (2015)* ("the Code"). She then directed the panel to specific paragraphs and identified where, in the NMC’s view, your actions amounted to misconduct.

Ms Dongray referred the panel to the case of *Roylance v GMC (No. 2) [2000] 1 AC 311* which defines misconduct as a ‘word of general effect, involving some act or omission which falls short of what would be proper in the circumstances.’

Ms Dongray accepted that, when considered in isolation, charge 1 (a) may not amount to misconduct. However, she submitted that when considering charge 1 (a) and charge 2 collectively, and charge 2 in isolation, the threshold of professional misconduct is met. Ms Dongray invited the panel to find that your failings were serious enough to amount to misconduct.

She then moved on to the issue of impairment, and addressed the panel on the need to have regard to protecting the public and the wider public interest. This included the need to declare and maintain proper standards and maintain public confidence in the profession and in the NMC as a regulatory body. Ms Dongray referred the panel to the judgement of Mrs Justice Cox in the case of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Grant [2011] EWHC 927 (Admin)* in reaching its decision.

In paragraph 74 she said:
In determining whether a practitioner’s fitness to practise is impaired by reason of misconduct, the relevant panel should generally consider not only whether the practitioner continues to present a risk to members of the public in his or her current role, but also whether the need to uphold proper professional standards and public confidence in the profession would be undermined if a finding of impairment were not made in the particular circumstances.

Mrs Justice Cox went on to say in Paragraph 76:

I would also add the following observations in this case having heard submissions, principally from Ms McDonald, as to the helpful and comprehensive approach to determining this issue formulated by Dame Janet Smith in her Fifth Report from Shipman, referred to above. At paragraph 25.67 she identified the following as an appropriate test for panels considering impairment of a doctor’s fitness to practise, but in my view the test would be equally applicable to other practitioners governed by different regulatory schemes.

Do our findings of fact in respect of the doctor’s misconduct, deficient professional performance, adverse health, conviction, caution or determination show that his/her fitness to practise is impaired in the sense that s/he:

a. has in the past acted and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm; and/or

b. has in the past brought and/or is liable in the future to bring the medical profession into disrepute; and/or

c. has in the past breached and/or is liable in the future to breach one of the fundamental tenets of the medical profession; and/or
Ms Dongray submitted that the first three limbs of the test are engaged in your case. She stated that a failure to properly identify a patient could result in a patient receiving the wrong medication, treatment or procedure, thus placing them at an unwarranted risk of harm. Ms Dongray submitted that your misconduct has brought the reputation of the profession into disrepute and that your failure to perform basic nursing duties has also breached a fundamental tenet of the nursing profession.

Ms Dongray stated that the charges found proved demonstrate basic clinical failings which are capable of remediation. However, she reminded the panel that despite being subject to a supported improvement programme after the first incident in 2016, you repeated your failings. Ms Dongray submitted that your insight is limited at this time and that, during these proceedings, you have failed to acknowledge how your misconduct has impacted upon the reputation of the profession. Whilst Ms Dongray accepted that you have demonstrated remorse for your failings, she submitted that due to the lack of evidence of any retraining and/or safe practice since the incidents, there remains a risk of repetition of the misconduct found proved. She invited the panel to find that you are currently impaired on both public protection and public interests grounds.

Mr Flannigan referred the panel to the case of Calhaem v. GMC [2007] EWHC 2606 (Admin). He reminded the panel that neither of the incidents contained within the charges found proved resulted in actual patient harm. Whilst Mr Flannigan accepted that the incident within charge 2 resulted in a patient receiving an unnecessary procedure, he submitted that the cause of this error was as a result of the duplicated referral documents, rather than your failure to identify the correct patient.

Mr Flannigan stated that, whilst the incidents took place only ten months apart, the panel should consider your failings as ‘carelessness’ and ‘isolated errors’ in an otherwise unblemished career. Mr Flannigan invited the panel to carefully consider whether the facts found proved met the threshold for a finding of misconduct.

[PRIVATE]
When considering the risk of repetition, Mr Flannigan informed the panel that should you wish to recommence obtaining patient consent, it would be necessary for you to obtain the relevant qualifications by successfully passing a number of competencies. He submitted that in light of this requirement, the panel could be satisfied that the risk of repetition of the misconduct found proved is minimal. Mr Flannigan submitted that whilst you are angry with yourself for the errors you have made, you have since demonstrated an understanding of your failings and identified areas of your practice which require improvement. He referred the panel to numerous positive testimonials attesting to your practise as a registered nurse. Mr Flannigan concluded by inviting the panel to make a finding of no impairment.

The panel has accepted the advice of the legal assessor.

The panel adopted a two-stage process in its consideration, as advised. First, the panel must determine whether the facts found proved amount to misconduct. Secondly, only if the facts found proved amount to misconduct, the panel must decide whether, in all the circumstances, your fitness to practise is currently impaired as a result of that misconduct.
Decision on misconduct

When determining whether the facts found proved amount to misconduct the panel had regard to the terms of The Code: Professional standards of practice and behaviour for nurses and midwives (2015).

The panel, in reaching its decision, had regard to the public interest and accepted that there was no burden or standard of proof at this stage and exercised its own professional judgement.

The panel was of the view that your actions did fall significantly short of the standards expected of a registered nurse, and that your actions amounted to a breach of the Code. Specifically:

4 Act in the best interest of people at all times.

4.2 make sure that you get properly informed consent and document it before carrying out any action

10 Keep clear and accurate records relevant to your practice

19 Be aware of, and reduce as far as possible, any potential for harm associated with your practice

19.1 take measures to reduce as far as possible, the likelihood of mistakes, near misses, harm and the effect of harm if it takes place

20 Uphold the reputation of your profession at all times

20.1 keep to and uphold the standards and values set out in the Code

The panel appreciated that breaches of the Code do not automatically result in a finding of misconduct and accepted that charge 1 (a), when considered in isolation, may not
meet the threshold of misconduct. However, when considering both charges found proved collectively, the panel determined that your actions demonstrate a developing pattern of errors. Further, the panel determined that charge 2, when considered in isolation, was sufficiently serious to meet the threshold of misconduct.

The panel determined that despite being an experienced registered nurse, your failings found proved within the charges relate to basic nursing skills and therefore fell seriously short of the conduct and standards expected of a nurse and amounted to misconduct.

**Decision on impairment**

The panel next went on to decide if as a result of this misconduct your fitness to practise is currently impaired.

Nurses occupy a position of privilege and trust in society. Patients and their families must be able to trust nurses with their lives and the lives of their loved ones. To justify that trust, nurses must make sure that their conduct at all times justifies both their patients' and the public's trust in the profession. In this regard the panel considered the judgement of Mrs Justice Cox in the case of *Council for Healthcare Regulatory Excellence v (1) Nursing and Midwifery Council (2) Grant [2011] EWHC 927 (Admin).*

The panel accepted the NMC's submission that the first three limbs of the test are engaged in your case. It determined that the misconduct identified in your case placed patients at an unwarranted risk of harm, subsequently breaching a fundamental tenet of the nursing profession. Further, the panel determined that your failure to perform basic nursing duties has brought the nursing profession into disrepute.

Regarding insight, the panel considered your reflective piece, within which you accepted responsibility for your failings and demonstrated an understanding of why what you did was wrong. However, the panel determined that it would have been assisted by evidence of an understanding of how your actions could have impacted on the patients in your care and the importance of accurate patient identification.
In its consideration of whether you have remedied your practice the panel took into account that, despite being subject to a supported improvement programme by the Trust after the first incident, you repeated your failings. Within a relatively short period of time, you again placed a patient at risk when you failed to identify that patient by name.

Whilst the panel had numerous positive testimonials before it attesting to your practice as a registered nurse, it did not have any evidence of you working as a registered nurse, without incident, within a similar environment to that contained within the charges. Further, it had no evidence demonstrating that you had successfully completed any relevant training courses. In light of this, the panel is of the view that there is a risk of repetition in your case. The panel therefore decided that a finding of impairment is necessary on the grounds of public protection.

The panel bore in mind that the overarching objectives of the NMC are to protect, promote and maintain the health safety and well-being of the public and patients, and to uphold/protect the wider public interest, which includes promoting and maintaining public confidence in the nursing and midwifery professions and upholding the proper professional standards for members of those professions. Patients would expect to be correctly identified and to be consented correctly for any procedures that they require. Therefore, the panel determined that, in this case, a finding of impairment on public interest grounds was required.

Having regard to all of the above, the panel was satisfied that your fitness to practise is currently impaired.
Determination on sanction:

The panel has considered this case very carefully and has decided to make a conditions of practice order. The effect of this order is that your name on the NMC register will show that you are subject to a conditions of practice order and anyone who enquires about your registration will be informed of this order.

In reaching this decision, the panel has had regard to all the evidence that has been adduced in this case. The panel accepted the advice of the legal assessor. The panel has borne in mind that any sanction imposed must be appropriate and proportionate and, although not intended to be punitive in its effect, may have such consequences. The panel had careful regard to the Sanctions Guidance (“SG”) published by the NMC. It recognised that the decision on sanction is a matter for the panel, exercising its own independent judgement.

Ms Dongray invited the panel to impose a 12 month conditions of practice order. She submitted that taking no further action would not be an appropriate response in your case and that imposing a caution order would not address the public protection concerns identified by the panel. Ms Dongray submitted that permanent or temporary removal from the register is not necessary and would be a disproportionate response. Ms Dongray stated that appropriate conditions may include reference to patient identification checks and obtaining consent from patients.

Mr Flannigan asked that you are given an opportunity to demonstrate remediation into your misconduct. He agreed that there are workable conditions of practice which could be formulated in your case. Mr Flannigan told the panel that you had been subject to, and complied with, an interim conditions of practice order, which was imposed on 2 February 2018 and revoked on 21 December 2018. Mr Flannigan suggested a number of conditions which may be appropriate in your case.

The panel considered the following aggravating and mitigating factors:

Aggravating
• As a result of your misconduct, a patient received a procedure which was not required;
• Patients were placed at a significant risk of harm;
• The second incident occurred whilst you were subject to a supportive improvement plan which was designed to address a similar type of concern.

Mitigating
• You have engaged and demonstrated acceptance in both the internal Trust investigation and NMC regulatory investigation;
• You have demonstrated developing insight into your misconduct;
• You have expressed remorse for your failings;
• [PRIVATE];
• No previous regulatory concerns have been raised regarding your practice during your long career as a registered nurse;
• The panel have before it a number of positive testimonials from a range of professionals.

The panel first considered whether to take no action but concluded that this would be inappropriate in view of the seriousness of the case and the public protection concerns identified. The panel decided that it would be neither proportionate nor in the public interest to take no further action.

Next, in considering whether a caution order would be appropriate in the circumstances, the panel took into account the SG, which states that a caution order may be appropriate where ‘the case is at the lower end of the spectrum of impaired fitness to practise and the panel wishes to mark that the behaviour was unacceptable and must not happen again.’ The panel considered that your misconduct was not at the lower end of the spectrum and that a caution order would be inappropriate in view of the seriousness of the case and the risk of repetition identified. A caution order would not restrict your practice. The panel therefore decided that it would be neither proportionate nor in the public interest to impose a caution order.
The panel next considered whether placing conditions of practice on your registration would be a sufficient and appropriate response. The panel is mindful that any conditions imposed must be proportionate, measurable and workable. The panel had regard to the fact that, other than these incidents, you have had a long, unblemished career as a nurse. The panel was of the view that it was in the public interest that, with appropriate safeguards, you should be able to return to practice as a nurse.

The panel determined that it would be possible to formulate appropriate and practical conditions which would address the failings highlighted in this case. The panel accepted that you would be willing to comply with conditions of practice. Balancing all of these factors and after having taken into account both the aggravating and mitigating features of this case, the panel determined that that the appropriate and proportionate sanction is that of a conditions of practice order.

The panel was of the view that to impose a suspension order or a striking off order would be wholly disproportionate and would not be a reasonable response in the circumstances of your case. Further, the panel reminded itself of the importance of returning a registered nurse back to practice.

Having regard to the matters it has identified, the panel has concluded that a conditions of practice order will mark the importance of maintaining public confidence in the profession, and will send to the public and the profession a clear message about the standards of practice required of a registered nurse.

The panel determined that the following conditions are appropriate and proportionate in this case:

1. At any time that you are employed or otherwise providing nursing or midwifery services, you must place yourself and remain under the supervision of a workplace line manager, mentor or supervisor nominated by your employer, such supervision to consist of working at all times on the same shift as, but not necessarily under the direct observation of a registered nurse.
2. You must work with your line manager, mentor or supervisor (or their nominated deputy) to create a personal development plan which must include elements of training, insight and reflection designed to address the concerns about the following areas of your practice:

   a) Patient consent;
   b) Patient identification; and

3. You must meet with your line manager, mentor or supervisor (or their nominated deputy) at least every month to discuss the standard of your performance and your progress towards achieving the aims set out in your personal development plan.

4. You must forward to the NMC a copy of your personal development plan within 28 days of the date on which these conditions become effective or the date on which you take up an appointment, whichever is sooner.

5. You must send a report from your line manager, mentor or supervisor (or their nominated deputy) setting out the standard of your performance and your progress towards achieving the aims set out in your personal development plan to the NMC at least 14 days prior to any NMC review hearing or meeting.

6. You must allow the NMC to exchange, as necessary, information about the standard of your performance and your progress towards achieving the aims set out in your personal development plan with your line manager, mentor or supervisor (or their nominated deputy) and any other person who is or will be involved in your retraining and supervision with any employer, prospective employer and at any educational establishment.

7. You must tell the NMC within 14 days of any nursing appointment (whether paid or unpaid) you accept within the UK or elsewhere, and provide the NMC with contact details of your employer.
8. You must tell the NMC about any professional investigation started against you and/or any professional disciplinary proceedings taken against you within 14 days of you receiving notice of them.

9. a) You must within 14 days of accepting any post of employment requiring registration with the NMC, or any course of study connected with nursing or midwifery, provide the NMC with the name/contact details of the individual or organisation offering the post, employment or course of study.

b) You must within 14 days of entering into any arrangements required by these conditions of practice provide the NMC with the name and contact details of the individual/organisation with whom you have entered into the arrangement.

10. You must immediately tell the following parties that you are subject to a conditions of practice order under the NMC’s fitness to practise procedures and disclose the conditions listed at (1) to (9) above, to them:

   1. Any organisation or person employing, contracting with or using you to undertake nursing work

   2. Any agency you are registered with or apply to be registered with (at the time of application) to provide nursing services

   3. Any prospective employer (at the time of application) where you are applying for any nursing appointment

   4. Any educational establishment at which you are undertaking a course of study connected with nursing or midwifery, or any such establishment to which you apply to take a course (at the time of application).

The period of this order is for twelve months.
Before the end of the period of the order, a panel will hold a review hearing to see how well you have complied with the order. At the review hearing the panel may revoke the order or any condition of it, it may confirm the order or vary any condition of it, or it may replace the order for another order.

**Determination on Interim Order**

The panel next has considered the submissions made by Ms Dongray that an interim order should be made to allow for the possibility of an appeal, on the grounds that it is necessary for the protection of the public and is otherwise in the public interest.

Mr Flannigan did not oppose the application.

The panel accepted the advice of the legal assessor.
The panel was satisfied that an interim conditions of practice order is necessary for the protection of the public and is otherwise in the public interest. The panel had regard to the seriousness of the facts found proved and the reasons set out in its decision for the substantive order in reaching the decision to impose an interim order. To do otherwise would be incompatible with its earlier findings.

The conditions for the interim order will be the same as those detailed in the substantive order.

The period of this order is for 18 months to allow for the possibility of an appeal to be made and determined.

If no appeal is made, then the interim order will be replaced by the conditions of practice order 28 days after you are sent the decision of this hearing in writing.

That concludes this determination.