

# **Legal Proceedings: Regional Guidance for Nurses and Midwives**

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## **Introduction**

Nurses and Midwives may be required to appear in court, albeit rarely, to provide evidence of their involvement in a case. This can be a stressful experience. In March 2014, the Public Health Agency (PHA) facilitated a workshop for safeguarding children nurse specialists to explore the challenges associated with court attendance. Other disciplines and agencies provided valuable contributions including BSO legal colleagues, PSNI, Guardian Ad Litem Service and a Social Services Senior Practitioner. Regional guidance for nurses and midwives was issued in November 2014. This document is the first revised version and replaces the November 2014 version.

## **Scope**

This guidance is for use by nurses and midwives however it contains information that is useful for other disciplines including allied health professionals.

This guidance relates only to legal requests for evidence, attendance at court or formal hearings in the context of a nurse or midwife's employment in a Health and Social Care Trust (Trust). It is relevant to attendance at a court of law or any other quasi-legal reviews convened under statutory regulation including nursing and midwifery council hearings.

This guidance compliments any existing Trust guidance

## **Purpose of Guidance**

Giving evidence in a court of law or at a formal hearing can be daunting particularly as this is a rare occurrence for most nurses and midwives. This guidance establishes a general principle that nurses and midwives called to give evidence should be given proper advice, guidance and support to assist them in fulfilling their responsibility confidently and appropriately, so that they assist the court or a panel in reaching a decision.

## **Aim**

The aim of this guidance is to ensure that nurses and midwives involved in court proceedings are adequately prepared and supported by their nursing/midwifery line managers.

## **Objectives**

The objectives of this guidance are to enable nurses and midwives to:

- Feel supported by their employing Trust when involved in court proceedings
- Understand what is expected of them in relation to court proceedings
- Have information relating to court proceedings
- Familiarise themselves with the court or panel's expectations of them
- Effectively contribute to legal proceedings.

## **Implementation**

This guidance is to be introduced with immediate effect for the benefit of nurses and midwives involved in legal proceedings. It is the responsibility of executive directors of nursing, with the support of heads of service/ heads of midwifery and the named nurses for safeguarding children, to ensure that this guidance is brought to the attention of all nurses and midwives employed within Health and Social Care Trusts.

## **Sharing Information for the purpose of court hearings**

Nothing in this guidance overrides the general principle of confidentiality relating to personal health records, or the duty of care owed by nurses and midwives to keep personal information confidential and not disclose a person's information without their expressed consent (or consent of a person with parental responsibility in respect of a child).

## **Data protection legislation**

Personal data may be disclosed under the Data Protection legislation, where the disclosure of the data is necessary for

- or in connection with any legal proceedings (including prospective legal proceedings)
- obtaining legal advice
- establishing, exercising or defending legal rights.

Nurses and Midwives should seek advice if uncertain from their line manager or Trust's litigation / information governance department..

Special consideration may apply where consent is not forthcoming and the court deems that there is an overriding public interest to disclose, for example, in a criminal case of alleged child abuse. Specific advice and support in such cases is available to nurses from safeguarding children nurse specialist teams.

### **Request for Records**

If nursing records are required by the court these will usually have been previously requested via a Court Order issued through the Directorate of Legal Services (DLS). The Judge decides what information is required. This is especially pertinent if the person to whom the information relates to does not consent to the disclosure. There will be occasions when records are requested without a Court Order, for example, in medical negligence cases. Practitioners are expected to comply with such requests in order that decisions can be made in relation to liability.

### **Request for Report**

Any request for a nursing or midwifery report should be notified to the relevant head of service/head of midwifery or line manager and safeguarding children nurse specialist (if the case involves safeguarding children issues). Advice in relation to sharing records without a Court Order should be sought from the Trust's litigation / information governance department.

There may be occasions when other relevant information is requested, for example, serious adverse incident reports or nursing and midwifery supervision records. These should be shared if they contain relevant information. Advice should be sought from the Trust's litigation/information governance department and or legal advisors in relation to redaction.

Nurses and midwives should adhere to the NMC Code and their Trust's report writing standards and guidelines.

### **Nursing and midwifery responsibilities in relation to court**

It is the responsibility of a nurses or midwife who is requested to attend and provide evidence at court to:

- notify their line manager (midwives should also inform their supervisor of midwives)
- discuss the relevant details of the case with their line manager
- request and avail of support.

It is important that nurses and midwives keep their line managers informed of all relevant information in relation to legal cases. HSC Trusts have vicarious liability, meaning that they are charged with legal responsibility for the negligence of an employee because the employee is held to be an agent of the employer. If a negligent act is committed by an employee acting within the general scope of her or his employment, the employer will be held liable for damages. If a nurse or midwife feels that there is a conflict of interest between the Trust and the nurses or midwife, they should seek independent legal advice. This may be achieved through membership of a professional organisation.

The nurse or midwife should make every effort to abide by the terms of the Witness Summons and must confirm their availability to the Solicitor who issued the Witness Summons. If for any good and compelling reason a nurse or midwife cannot attend, they must notify the court and the solicitor immediately, and clearly state the reason for unavailability. Failure to abide by a Witness Summons may result in a contempt of court which carries the possibility of a fine or, in extreme situations, imprisonment.

There are two types of Summons:

1. A Summons to attend
2. Summons duces tecum – (attendance with the documents specified on the Summons)

### **Line Manager's Responsibilities**

It is the responsibility of the nurse or midwife's line manager to provide support, including this guidance, to a nurses or midwife who is in receipt of a request to participate in legal proceedings. It is usual practice for a witness to be accompanied to court. The accompanying person should be a relevant senior nurse or midwife. Nursing or midwifery managers should seek support and advice from senior managers as required.

It is the responsibility of a line manager to assist a nurse or midwife who is a witness and ensure that the nurse or midwife is appropriately prepared for their appearance in court. It is essential that adequate arrangements have been made to discuss the case with the relevant



assistant director, complaints/claims/governance manager, solicitor, and appointed Barrister as necessary. A senior manager should attend all cases of coroner's inquest and civil court cases to support the nurse or midwife providing evidence.

The assistant director or complaints manager will keep the Trust's communications manager informed of any case likely to attract publicity. If the Trust is party to the proceedings the case should be discussed with DLS.

### **Additional Support**

Nurses and midwives need to have prompt access to supervision with line managers, and safeguarding children nurse specialist team where appropriate, before, during and following court process. Supervision relating to court appearances should be viewed as a priority by nurses who are witnesses and by their line manager. Midwives should inform their supervisor of midwives who will provide additional support through supervision.

Nurses and midwives can access "Care Call", occupational health and / or professional organisations for confidential personal advice and support.

### **Recording of Legal Advice in Nursing Records**

Advice provided by DLS in relation to court appearance, evidence and witness statements should not be recorded within nursing or midwifery records. Nurses may choose to retain a note of this for their own

reference in keeping with confidentiality and data protection policy and procedures.

If a person is called simply to describe how an event or course of events happened, he/she is a “*witness of fact*”.

A court may also call an “*expert witness*”, who has a special qualification and has usually provided a formal report giving a professional expert opinion. A nurse or midwife would not normally act as an “expert witness” in cases involving their employing Trust. Individuals who put themselves forward as an “expert witness” will almost always have completed specialist training to be accredited to this role.

## **Acting as a Witness**

### **Why have I been asked to be a witness?**

You have been asked to be a witness because you have something to contribute which may help a person (known as a “party”) who is making a claim or defending a claim in court. The person who introduces the claim is called the “*claimant*,” “*petitioner*” or “*applicant*” and the person disputing it is called the “*defendant*” or “*respondent*”.

You may be asked to give evidence by a party (or their solicitor) if you have witnessed an accident or have been closely involved with the treatment or care of a client who is the subject of a dispute.

If you receive a witness summons entirely unrelated to your employment with the Health and Social Care Trust you can request a leave of absence from your line manager. Court appearances which are

unrelated to work will normally be taken as annual or unpaid leave. Expenses can be reimbursed at a later date. Advice can be obtained from the court.

### **How will I give my evidence if I am a witness of fact?**

Most of the practical work associated with legal processes takes place out of the courtroom however you may be called to appear in court as a witness. The following guidance notes are intended to help you with your preparation:

- the court will decide if your evidence is to be given in writing or in person or both
- if you are required to give written evidence this should be contained in a “witness statement” (see Appendix 2)
- the opposing party may agree that the witness statement is sufficient evidence on its own and you may not have to attend the court hearing - you will be advised if this is the case
- if the parties do not agree with your written evidence, or feel for any reason that you should be at court, you will be advised of the time, date and place of the hearing and expected to be there.

## What should I do to prepare for the hearing?

In preparation for court you should:

- review and have a good knowledge of all relevant nursing / midwifery records applicable to the evidence, including those contained in multi-disciplinary records, before attending Court<sup>1</sup>
- take an opportunity to meet with the solicitor and/or barrister presenting the case who will prepare you for any difficult questions which you might face in court - these “devil’s advocate” questions are designed to be helpful rather than critical and will enable you to formulate clear and confident answers (‘coaching’ cannot be provided as this is ethically and legally unacceptable)
- use the support that is available to you
  - preparation of witnesses by Trust solicitors is only likely to occur in complex care proceedings cases or cases involving child abuse or neglect, maternal or infant deaths
  - support will be available from the relevant head of service/ head of midwifery / line manager, supervisor of midwives safeguarding children nurse specialist team
  - talk to your line manager regularly
- be sure about the time, date and venue of the hearing
- dress smartly and be comfortable as there can be long periods of waiting prior to giving evidence.

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<sup>1</sup> Supervision or reflective practice notes are discoverable if they are ‘relevant’.

## Attendance at Court

- make sure you go to the right court
- arrive in good time and report to the receptionist who will make a note of your arrival and go directly to the waiting area
- inform the Trust Solicitor that you have arrived
- check the list of cases to be heard on the day as this will tell you whether your case is in public or in private, and also the name of the Judge and whether he/she is a high court or district Judge. Some hearings take place in the Judge's room where there is no witness box.
- tell the Court Official or Trust Solicitor where you can be found if you have to leave the waiting area for any reason as well as your respective line manager/head of service(if in attendance)
- listen carefully to the Trust Solicitor who will brief you prior to going to court and may have some last minute instructions for you. Sometimes -the case is settled at the last moment and the hearing does not need to take place
- do not discuss the case in a public area where you may be overheard
- follow the directions of the court official who will usually call out your name when it is time to give your evidence and show you to the witness box where you should remain standing until requested to take a seat. It depends upon the parties and the Judge as to whether you will be in the court room or outside until your evidence is required.

- inform the court official of your preference before you go into the hearing if you are required to take an oath that what you say is the truth. This can be taken on a holy book (e.g. the bible) or a promise to tell the truth, known as an 'affirmation'
- answer questions about your statement and/or report from the solicitor/barrister who called you as a witness - you are permitted to bring your witness statement and or report into the witness box and will have access to such notes and records which have been already tendered as evidence (may be available in court bundles<sup>2</sup>)
- only answer the question you have been asked however it is important to answer fully and give explanations if appropriate
- answer the opposing party (or solicitor/barrister) - known as "cross examination"
- answer the Judge if you are asked questions
- say that you cannot remember if you cannot recall the detail (which may have occurred a long time ago)
- be guided by what was documented in your records at the time
- try to relax, keep control and stay calm as cross examination by the opposing barrister is often challenging - if the cross examination becomes too difficult the Trust or defendant's barrister will object and the Judge can intervene
- take your time answering questions

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<sup>2</sup> In some cases where there are a lot of records relevant to the case, these will have been collated into bundles so that the Judge, Lawyers and witnesses can find and refer to the same document easily during the hearing. In public law cases the DLS will prepare these bundles.

- speak clearly and direct your answers to the Judge and not to the person who asks the questions
- ask for the question to be repeated if you do not understand the question or cannot hear what is said
- keep responses factual and succinct - the Judge eventually makes a distinction between good witnesses and poor witnesses in terms of whose story he prefers to believe so straightforward answers are always best
- avoid the use of third party information if possible - in some instances this may be unavoidable but bear in mind that you are there to provide evidence of your own direct involvement in the case, and if someone else's information is that important, they will have been called as a witness.

### **What do I call the judge?**

Check what to call the judge with the Trust's legal advisor:

At high court the judge is addressed as "My Lord" or "My Lady".

At crown court and county court the judge is addressed as "Your Honour"

At magistrates court / family proceedings court the Judge is addressed as "Your Worship"

At coroner's court the coroner is referred to as Mr Coroner / Madame Coroner / Sir / Madame

## **Types of Court and other quasi-legal proceedings**

### **Criminal Court including Magistrates Court**

Criminal courts deal with offences against the law, with prosecutions brought by the police via the Public Prosecution Service. Crown court involves the use of a jury. Both courts may impose penalties including fines and imprisonment. Magistrates courts deal with lesser criminal offences and their powers of detention are limited to six months. A criminal offence committed in hospital or elsewhere where an employee was a material witness are exceptions to this.

### **Coroner's Court**

Coroner's inquests are held to investigate sudden death, maternal death, baby death or stillbirth. The Coroner has to establish how, when and where the death occurred, and the medical cause of death (see Appendix 3). The coroner has a medical advisor.

### **Family Law**

Some civil law courts deal with legal issues arising from the breakdown of families, child care proceedings, fostering and adoption. Health professionals including public health nurses, midwives and paediatricians may be required to provide evidence in cases involving children.



In public law cases the Trust will be a party to the proceedings and as such DLS will be available for assistance. In private law cases, which normally are issues between parents, the Trust will probably not be involved as a party to the proceedings.

A nurse or midwife may be required to provide information about their involvement with a child, parent or carer. Requests for such information may be received from a Guardian Ad Litem appointed by a court, a Solicitor representing a parent in child care or custody proceedings, or a police officer as part of a criminal investigation.

Nurses and midwives should adhere to own Trust guidance in relation to any request for supporting testimony in cases of parental dispute at family courts.

### **Civil Law Claims for Damages**

Acting on legal advice, Trusts often seek to defend claims for damages for personal injury (e.g. injuries sustained by a patient, visitor or member of staff on Trust premises). Clinical negligence claims tend to be dealt with as a separate category but are essentially a specialised type of personal injury case. Nurses or midwives involved in the particular incident or patient's management may be asked by the Trust's Solicitors to act as a witness in the court case.

### **Other quasi-legal proceedings**

Industrial or Fair Employment Tribunals are similar to other kinds of courtroom appearance and are heard by an Employment Judge. A nurse or midwife may be asked to appear as a witness where the Trust is defending a claim for unfair dismissal or discrimination (e.g. sex

discrimination, race discrimination). Both sides in the dispute are almost always legally represented, and court procedures are similar to other kinds of civil law cases, but where the claimant can petition for reinstatement as an alternative to financial compensation.

Hearings of professional regulatory bodies and statutory organisations such as the Nursing and Midwifery Council and General Medical Council are not legal courts but their responsibilities are underpinned by legislation. Processes are formal and usually involve legal representation. Much of this guidance will be helpful to any member of staff called to give testimony at a professional hearing.

Public inquiries or judicial inquiries are further examples of formalised settings for which much of this guidance is relevant. Where there is any doubt about a nurse's or midwife's responsibility in formalised hearings, they should seek help and guidance from their line manager in the first instance and as soon as possible.

## **Roles and Responsibilities of other Agencies**

### **Directorate of Legal Services (DLS)**

DLS represents Trusts and Health Boards in cases where the Trust and Health Boards are a 'party' to the proceedings. DLS cannot represent individual Trust staff in any other proceedings. In these other proceedings it may be helpful for the nurse or midwife to be accompanied by a line manager, colleague or representative from a professional organisation.

## **Court Children's Officers**

Court children's officers are qualified social workers, trained and experienced in working with children and families. Their role is to assist the court regarding the best interests of children in private law cases.

## **Guardian ad Litem (GAL)**

The role and functions of the Guardian is a statutory function determined by legislation. In public law proceedings, the child is a party to those proceedings and it is the role of the Guardian to ensure the child is legally represented.

The statutory duty of welfare is dictated by the principle enshrined in the Children (NI) Order 1995, which is that the welfare of the child is the paramount consideration. Nurses and midwives have a responsibility to share information with GAL and should refer to the regional guidelines for Nurses, Midwives and Specialist Community Public Health Nurses when sharing information with the Guardian ad Litem Agency (Public Health Agency, 2015)..

**Appendix 1 (insert Trust logo or use own proforma)**

**WITNESS STATEMENT PROFORMA**

**CLIENT'S NAME:**

**DOB:**

**CLIENT'S ADDRESS:**

**WITNESS STATEMENT**

**Witness statement of [TITLE/NAME]**

**[DATE]**

1. State your full name (you may wish to include your maiden name if used during your involvement with the case)
2. Provide professional address
3. State your current post
4. Provide details of your qualifications
5. Provide details of your post and grade at the time of incident or relevant episode of care
6. Provide details of where you worked, either unit or team, and explain the nature of ward/team and the client group that you work / worked with – you should state the shift or the specific period of time you have been involved with the client / family.

7. State the details of your role on the ward/team e.g. do you have primary Nurses responsibility, do you participate in multi-disciplinary team planning and so on.
8. A senior Nurse or Midwife should be responsible for providing an overview of the care provided by nursing/Midwifery services stating that this is taken from previous nursing / Midwifery records.
9. Make it clear that specific evidence provided is in relation to your personal involvement when this is the case and if it is from memory and/or your records for example *I documented in the notes that ..... I attended a multi-disciplinary meeting on....(date) where it was agreed that ....*
10. Provide summary of your first contact with the client.
11. Then set out in chronological order and in first person details of your contact with the client including relevant details of your interaction with them and/or others involved in their care. When referring to others use name and job title. So far as possible be clear where you have witnessed events. It is important to clarify source of any third party information.
12. Use the person's name rather than initials.
13. There is usually no need to provide a patient or client's hospital or health & care number.
14. Sign and date each page unless advised not to.

## **APPENDIX 2**

### **CORONER'S INQUEST**

#### **Who is the Coroner?**

- The Coroner is a lawyer and is an independent judicial officer. The Coroner has a legal duty to investigate sudden death where the cause is unknown, violent or unnatural. The Coroner will decide the identity of the person who died, how, when and where the death took place, and the medical cause of death.

#### **The Inquest**

- Despite the above the Coroner's inquest is a fact finding exercise not a fault finding exercise. There are no "parties", no prosecution, no defence and no trial. The relevant nursing or midwifery staff will need to attend the inquest as requested. The invitation from the Coroner's Court should be interpreted as an order, as the Coroner can subpoena witnesses if necessary.

#### **At the hearing**

- Witnesses will be informed of the date, time and place of the inquest. Where there are important clinical commitments which cannot be changed, it may be possible to request a Coroner to agree to call witnesses in a different sequence, given sufficient notice.
- Coroner's Inquests are usually held at the Coroner's Court, If you are called as a witness, report to the Coroner's Clerk upon arrival. Remember you will be waiting in a reception area with other

witnesses and members of the deceased family. Be careful not to discuss the inquest in public waiting areas and be sensitive to the formal nature of proceedings and the feelings of the bereaved family

- The degree of formality in court depends largely on the Coroner. Each witness will begin by taking the oath and will then be asked questions by the Coroner. If the Coroner believes the evidence contained in a statement is not controversial he may decide simply to read the statement and dispense with the need for the witness to attend.

### **Evidence from the Pathologist**

- The pathologist will be called either at the beginning of the inquest or at the end. With this one exception, witnesses are usually called in chronological sequence.
- When the Coroner has finished his examination of each witness the relatives or their lawyer may cross examine. Where a number of relatives have attended and there is no legal representation, one member will be appointed as spokesperson. It is important to recognise that the family's emotions may be running high especially if the inquest is soon after the death. There may be background noise or mutterings from the back of the court room which can be distracting. A Coroner is less likely than a judge to stop this.
- After the family (or legal representative) has asked questions, the Trust's legal representative will have an opportunity to ask further questions by way of re- examination.

## **Verdicts**

- The Coroner must give a verdict. Technically there is no prescribed list of verdicts, although the most well-known are accident, misadventure, unlawful killing, suicide, and natural causes. Where the evidence is inconclusive a verdict will be recorded in narrative outlining the 'findings'.
- The Coroner will normally sum up the evidence before giving his findings which are made on the balance of probabilities. No verdict can be framed in such a way as to determine any question of civil liability, but the Coroner does have powers to make recommendations where he believes that action should be taken to prevent occurrence of similar fatalities.
- Some verdicts may be supplemented by a rider such as "lack of care", "industrial disease", or "neglect". Comments of this nature can reflect badly on those responsible for the deceased's care, and could lead to the family of a deceased person pursuing a legal claim.

## **Publicity**

- Coroner's inquests are held in public and the press may be present. Trust staff should not speak to reporters after the hearing and should refer them to the Trusts Communications Manager. The Trust may have already prepared a press and publicity statement in relation to controversial cases or has aroused public interest.