

**Nursing and Midwifery Council
Fitness to Practise Committee**

**Substantive Hearing
Wednesday, 28 April 2021**

Virtual Hearing

Name of registrant:	Mr William George Kennedy
NMC PIN:	87E0246E
Part(s) of the register:	Registered Adult Nurse (1 February 1991)
Area of registered address:	Mid Glamorgan
Type of case:	Conviction
Panel members:	Sophie Lomas (Chair, lay member) Louise Poley (Registrant member) Seamus Magee (Lay member)
Legal Assessor:	Ben Stephenson
Panel Secretary:	Melissa McLean
Nursing and Midwifery Council:	Represented by David Claydon, Case Presenter
Mr Kennedy:	Not present but represented in absence by Briony Molyneux, counsel, on behalf of the Royal College of Nursing
Consensual Panel Determination:	Accepted
Facts proved:	All
Fitness to practise:	Impaired
Sanction:	Caution order (5 years)

Service of Notice of Hearing

The panel was informed at the start of this hearing that Mr Kennedy was not in attendance, nor was he represented in his absence. The panel was informed that Notice of this Hearing had been sent to Mr Kennedy's registered email address on 25 March 2021.

The panel was informed that the Notice of Hearing provided details of the allegations, the time, dates and the video conferencing details required to join the hearing. The Notice also included information about Mr Kennedy's right to attend, be represented and call evidence, as well as the panel's power to proceed in his absence.

The panel accepted the advice of the legal assessor.

The panel noted that under the amendments made to the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended ("the Rules") during the Covid-19 emergency period, a Notice of Hearing may be sent to a registrant's registered address by recorded delivery and first class post or to a suitable email address on the register.

In the light of all of the information available, the panel was satisfied that Mr Kennedy has been served with the Notice of Hearing in accordance with the requirements of Rules 11 and 34 of the Rules.

Details of charge

'1. Mr Kennedy admits the following charge:

That you, a registered nurse:

On 20 February 2018, at Newport Magistrates' Court, were convicted of a offence contrary to section 44 Mental Capacity Act 2005, namely that on 20.9.2017 at Cwmgelli Lodge Care Home, Blackwood you had the care of Patient A who lacked or whom you reasonably believed to lack mental capacity, ill-treated or wilfully neglected her.

AND in light of the above, your fitness to practise is impaired by reason of your conviction.'

Consensual Panel Determination

At the outset of this hearing, Mr Claydon informed the panel that a provisional agreement of a Consensual Panel Determination (CPD) had been reached with regard to this case between the NMC and Mr Kennedy.

The agreement, which was put before the panel, sets out Mr Kennedy's full admissions to the facts and the conviction in the charge and that his fitness to practise is currently impaired by reason of his conviction. It is further stated in the agreement that an appropriate sanction in this case would be a caution order for a period of five years.

The panel has considered the provisional CPD agreement reached by the parties.

That provisional CPD agreement reads as follows:

2. Mr. Kennedy appears on the nursing register maintained by the NMC as a registered general adult nurse. He was first entered onto the register in February 1991.

3. *This is the first time his practice has been the subject of regulatory intervention.*
4. *On 20 October 2017, whilst working as a nurse at Cwmgelli Lodge, Mr Kennedy performed a vaginal examination on Patient A as she was suffering from an abnormal discharge. There were 3 female healthcare assistants present. After the examination, Mr Kennedy pulled each side of Patient A's vagina area and said "hello, my name is Patient A" mimicking Patient A. Patient A did not have mental capacity.*
5. *There was a police investigation that culminated with Mr Kennedy being charged with the offence shown in paragraph 1 above. He attended Newport Magistrates' Court on 20 February 2018. He entered a guilty plea. He was sentenced to a 12 month community order with a requirement to complete 200 hours of unpaid work within the community together with orders for payment of costs and a victim surcharge. The memorandum of conviction is at appendix 1.*
6. *Whilst subject to supervision by the Probation Service, Mr Kennedy made negative comments to his probation officer regarding the people responsible for his referral. These comments as recorded by the probation officer are at appendix 2.*

IMPAIRMENT

7. *Mr Kennedy admits that his fitness to practise is impaired by reason of his conviction.*
8. *Current impairment is not defined in the Nursing and Midwifery Order 2001 or the Nursing and Midwifery Council (Fitness to Practise) Rules 2004. The question of current impairment is often approached by addressing the questions posed by Dame Janet Smith in her Fifth Shipman Report, as endorsed by Mrs Justice Cox in the leading case of Council for Healthcare Regulatory Excellence v (1) NMC (2) Grant [2011] EWHC 927 (Admin):*

"Do our findings of fact in respect of the [nurse's] ... conviction ... show that his ... fitness to practise is impaired in the sense that [he]

- (i) *has in the past, and/or is liable in the future to act so as to put a patient or patients at unwarranted risk of harm;*
- (ii) *has in the past, and/or is she liable in the future to bring the professions into disrepute;*
- (iii) *has in the past, and/or is she liable in the future to breach one of the fundamental tenets of the professions;*
- (iv) *..”*

Also said when considering impairment

“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”

9. *The circumstances of this case raise public protection issues.*

10. *However, the parties agree and the panel is invited to accept that, Mr Kennedy’s considered and insightful reflection shows that he has remediated the public protection concern.*

11. *This is evidenced by his remorse and active steps taken to address the issues that led to the conviction, together with his subsequent period of practice without issue.*

12. *Mr Kennedy says in his reflection (appendix 3):*

“I fully understand that my actions and my actions alone, have caused an enormous amount of distress, not only to Patient A, but her family and the staff on duty at the time of the incident.”

13. Mr Kennedy has applied his reflections into practice. He says:

“Having gained a great deal of insight on why this incident occurred and having discussed [PRIVATE] with other nurses and social worker friends, I took their advice and recommendations to heart. [PRIVATE].”

14. His current unit manager, Ms 1, has commented (in her reference at appendix 4) as follows:

“I can confirm that William works within his restrictions and I have had no areas of concern with his practice, particularly in relation to the charges against him. I find him to be a very kind and caring nurse and he has developed a good relationship with his colleagues, residents and relatives and has gained trust from our team.”

15. The public interest issues remain to be addressed and it is clear that a finding of impairment is required on public interest grounds to preserve and maintain confidence in the profession and in the regulator and to declare and uphold proper professional standards.

16. The way in which Mr Kennedy acted was sufficiently serious that is merited criminal sanction. That fact to one side his actions, however motivated, involved touching a patient who lacked capacity in an intimate area without clinical justification and in such a way as to use her as, effectively, a prop in a joke between Mr Kennedy and the healthcare assistants who were observing.

17. Mr Kennedy’s actions have brought the profession into disrepute and damaged the public’s confidence in the profession. A finding that Mr Kennedy’s fitness to practise is impaired on a public interest basis is therefore necessary and appropriate to address the damage his actions have done to the profession and to send a clear and unequivocal message that his actions were wholly wrong and cannot be excused.

SANCTION

18. *The parties agree that Mr Kennedy's conviction relates to conduct so serious that all sanction options (up to and including a striking off order) need to be considered.*
19. *In the light of this the parties first considered whether Mr Kennedy's conduct was fundamentally incompatible with continued registration. The parties agreed that it may well be considered so, particularly in the light of Patient A's vulnerability and Mr Kennedy's comments to his probation officer which suggested limited insight.*
20. *However, stepping back from these issues the parties noted that:*
- a) *Mr. Kennedy has not been the subject of regulatory intervention prior to this incident during his 26 year career.*
 - b) *This incident can properly be said to be an isolated one and one in respect of which Mr Kennedy displays considerable remorse.*
 - c) *Mr Kennedy has engaged in detailed reflection to ascertain what led him to behave as he did.*
 - d) *[PRIVATE].*
 - e) *Mr Kennedy's insight has developed considerably over time and he has further reflected on the feelings that led him to take an apparent retrograde step with regard to insight in the comments he made to his probation officer, comments he now regrets and seeks to withdraw.*
 - f) *Mr. Kennedy has practiced as a nurse in similar employment since this incident without issue and with good reports of his practice and conduct.*
21. *In the light of the matters set out above, the parties agreed that Mr Kennedy's actions, whilst extremely serious, suggest he made a one off error in judgment which can be explained with reference to the personal issues which Mr Kennedy's reflection has drawn to his attention. In the light of this the parties agree that a striking off order, whilst meriting significant consideration, is not appropriate in this case.*

22. *The parties also agree that a conditions of practice order is also not appropriate as, in the light of the parties' agreement that Mr Kennedy has remediated the public protection concerns, there are no clinical concerns that require remediation or correction.*

23. *In the light of the above, the parties have carefully considered whether a suspension order or a caution order is the most appropriate vehicle through which to mark the public interest in this case.*

24. *The parties noted the NMC's guidance on caution orders:*

'A caution order is only appropriate if the Fitness to Practise Committee has decided there's no risk to the public or to patients requiring the nurse, midwife or nursing associate's practice to be restricted, meaning the case is at the lower end of the spectrum of impaired fitness to practise, however the Fitness to Practise committee wants to mark that the behaviour was unacceptable and must not happen again'.

25. *The parties have already agreed that there is no risk to the public in Mr Kennedy being entitled to practise without restriction. Whilst the parties are clear that Mr Kennedy's conduct is not at the lower end of the spectrum when the case as a whole is considered and Mr Kennedy's insight, remorse and remediation are taken into account it is agreed that his impairment is at the lower end.*

26. *The parties further agree that the seriousness of Mr Kennedy's underlying conduct could be marked by the length of the caution and further agree that a caution order for a period of 5 years is appropriate in this case.*

27. *The parties also considered whether a suspension order would be more appropriate and noted the NMC's guidance:*

'in cases where the misconduct isn't fundamentally incompatible with the nurse, midwife or nursing associate continuing to be a registered professional, and our overarching objective may be satisfied by a less severe outcome than permanent removal from the register'.

And further non exhaustive list of factors:

- a single instance of misconduct but where a lesser sanction is not sufficient*
- no evidence of harmful deep-seated personality or attitudinal problems*
- no evidence of repetition of behaviour since the incident*
- the Committee is satisfied that the nurse, midwife or nursing associate has insight and does not pose a significant risk of repeating behaviour*

28. The parties noted that Mr Kennedy's conviction represented a single instance and that a caution was, in their view, sufficient. They further noted that whilst consideration did need to be given to personality and attitudinal problems, Mr Kennedy had addressed these in so far as they arose and there had been no evidence of repetition since the incident.

29. Finally, and having decided that a caution order was, on the facts of the case and applying the relevant guidance the appropriate order, the parties reminded themselves that there is a public interest in allowing nurses to safely return to practice, if appropriate. This, the parties considered, reinforced their agreement that a caution order was appropriate.

30. The parties understand that this provisional agreement cannot bind a panel, and that the final decision on findings impairment and sanction is a matter for the panel. The parties understand that, in the event that a panel does not agree with this provisional agreement, the admissions to the charges set out at section 1 above, and the agreed statement of facts set out at section 2 above, may be placed before a differently constituted panel that is determining the allegation, provided that it would be relevant and fair to do so.

Here ends the provisional CPD agreement between the NMC and Mr Kennedy. The provisional CPD agreement was signed by Mr Kennedy on 22 April 2021, and by the NMC on 23 April 2021.

Decision and reasons on the CPD

The panel decided to accept the signed Consensual Panel Determination.

Mr Claydon, on behalf of the NMC, informed the panel that this is the first time that Mr Kennedy has been the subject of regulatory concerns since qualifying in 1991. He referred the panel to the signed CPD and stated that, after significant discussion, it has been agreed by both the NMC and Mr Kennedy. Mr Claydon stated that on the basis of Mr Kennedy's comprehensive reflection, and that this was an isolated incident with no further incidents or concerns about his practice since this event, the NMC have taken the view that a caution order is the appropriate sanction. Mr Claydon further submitted that Mr Kennedy has acknowledged that his fitness to practise is impaired but that he has taken the necessary steps to remediate through meaningful reflection. He therefore concluded that the concerns associated with the public protection issues have been remediated. Mr Claydon invited the panel to make a finding based on public interest grounds only. He stated that the NMC, Mr Kennedy and his representatives have agreed that the most appropriate and proportionate sanction on the basis of solely public interest grounds is a five-year caution order.

Ms Molyneux, on behalf of Mr Kennedy, told the panel that Mr Kennedy accepts the conviction and that his fitness to practise is currently impaired. She also stated that this is a public interest case only and that there are no public protection concerns. She submitted that Mr Kennedy has had an unblemished career of 30 years but for this one unpleasant incident. She submitted that this was an incident involving a moment of poor judgement [PRIVATE]. Ms Molyneux told the panel that both the NMC and Mr Kennedy's representatives at the Royal College of Nursing (RCN) have had significant discussions prior to agreeing that a five year caution order is the proportionate and appropriate

sanction in this case. She acknowledged that the decision to accept or reject the CPD is a decision for the panel but invited it to endorse the provisional agreement.

Ms Molyneux referred the panel to the CPD documentation and submitted that it contains a detailed and articulate reflective piece by Mr Kennedy. She submitted that Mr Kennedy accepts that what he did was inappropriate and is mortified by it. She further stated that Mr Kennedy has worked as a nurse for the last 18 months without further incident. She referred the panel to the references provided by Mr Kennedy's current employers and submitted that he is a very trusted member of staff and is a highly regarded member of the team. Ms Molyneux submitted that when considering all of the information, it amounts to a one off moment of poor judgement, an unpleasant incident in an otherwise unblemished career. She further submitted that Mr Kennedy has demonstrated significant remorse, fully developed insight and has engaged with the process throughout. Ms Molyneux also highlighted to the panel that the maximum five year caution order is the proportionate and appropriate sanction. Ms Molyneux outlined to the panel Mr Kennedy's employment history since being referred to the NMC.

The panel heard and accepted the legal assessor's advice.

The panel, in its considerations bore in mind the 'NMC Sanctions Guidance' (SG) and the 'NMC's guidance on Consensual Panel Determinations'. The panel noted that it could accept, amend or reject the provisional CPD agreement reached between the NMC and Mr Kennedy. Further, the panel considered whether the provisional CPD agreement would be in the public interest. This means that the outcome must ensure an appropriate level of public protection, maintain public confidence in the profession and the regulatory body, and declare and uphold proper standards of conduct and behaviour.

The panel took into account that Mr Kennedy admitted the facts of the charge. Accordingly, the panel was satisfied that the charge is found proved by way of Mr Kennedy's admissions, as set out in the signed provisional CPD agreement. The panel also had sight of the Certificate of Conviction from Gwent Magistrates' Court which

confirmed that, upon his own admission, Mr Kennedy had been convicted of the offence specified in the charge.

Decision and reasons on impairment

The panel then went on to consider whether Mr Kennedy's fitness to practise is currently impaired. Whilst acknowledging the agreement between the NMC and Mr Kennedy, the panel has exercised its own independent judgement in reaching its decision on impairment. It considered the guidance by Dame Janet Smith in her Fifth Report from Shipman, approved in the case of *CHRE v Grant & NMC [2011] EWHC 927 (Admin)* ('Grant') by Cox J.

- 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*
- d) ...;*

The panel determined that limbs b and c as identified in the case of *Grant* have been engaged. The panel was of the view that Mr Kennedy's actions were completely inappropriate and unacceptable. It was therefore of the view that Mr Kennedy's actions have brought the profession into disrepute and damaged the public's confidence in the profession. Further, that his actions as set out in the charge breached the fundamental tenets of the profession.

The panel then considered whether Mr Kennedy's fitness to practise is currently impaired by reasons of his conviction. The panel also took into account that Mr Kennedy has admitted that his fitness to practise is impaired.

The panel considered whether Mr Kennedy has demonstrated insight. It noted that Mr Kennedy admitted the charge and has provided a detailed written reflective piece. The panel was of the view that the reflective piece demonstrated insight and remorse. In Mr Kennedy's written reflective piece he has demonstrated an understanding of how his actions impacted Patient A, their family and his colleagues. Mr Kennedy has also demonstrated an understanding of why his actions were wrong. In Mr Kennedy's reflective piece he gave examples of how he has put his reflections into practice when dealing with patients in challenging situations in his current role. The panel further noted that Mr Kennedy has demonstrated an understanding into the attitudinal [PRIVATE] issues that he faced at the time of the incident. The panel took particular account of the following statement by Mr Kennedy which states:

'I would have been horrified if my parents knew of my shameful behaviour as they would have been extremely disappointed at such an act.'

The panel was of the view that Mr Kennedy has demonstrated a significant amount of insight and remorse. It took into account that Mr Kennedy had acknowledge in his reflective statement that his fitness to practise is impaired and that he understands the impact his conviction had on Patient A, his colleagues and the profession. The panel bore in mind the positive references from Mr Kennedy's current employer and that they hold him in high regard as a nurse. The panel noted that this case does raise public protection issues, however given Mr Kennedy's level of reflection and remediation, the public protection concerns in this case have been addressed. It noted this was agreed by the NMC and by Mr Kennedy.

The panel concluded that as Mr Kennedy has addressed the public protection concerns it was of the view that a finding of impairment is not necessary on the grounds of public protection.

The panel then considered whether a finding of impairment is required on public interest grounds. It was of the view that whilst Mr Kennedy's conviction and subsequent

punishment had gone some way to address the public interest concerns, there remain public interest issues to be addressed in order to maintain confidence in the profession and in the regulator and to declare and uphold proper professional standards.

In this respect the panel endorsed paragraphs 7 to 17 of the provisional CPD agreement.

Decision and reasons on sanction

Having found Mr Kennedy's fitness to practise currently impaired, the panel went on to consider what sanction, if any, it should impose in this case. 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 SG. The decision on sanction is a matter for the panel independently exercising its own judgement.

The panel bore in mind the relevant factors agreed by the NMC and Mr Kennedy:

- a) Mr Kennedy has not been the subject of regulatory intervention prior to this incident during his 26 year career.*
- b) This incident can properly be said to be an isolated one and one in respect of which Mr Kennedy displays considerable remorse.*
- c) Mr Kennedy has engaged in detailed reflection to ascertain what led him to behave as he did.*
- d) Having identified attitudinal and [PRIVATE] issues as the drivers for his actions he then sought appropriate help and support both peer to peer and from relevant professionals.*
- e) Mr Kennedy's insight has developed considerably over time and he has further reflected on the feelings that led him to take an apparent retrograde step with regard to insight in the comments he made to his probation officer, comments he now regrets and seeks to withdraw.*

f) *Mr. Kennedy has practiced as a nurse in similar employment since this incident without issue and with good reports of his practice and conduct.*

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 interest issues. 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 was of the view that although very serious, Mr Kennedy's behaviour was an isolated incident for which he has demonstrated considerable remorse and regret. The panel noted that Mr Kennedy made admissions and apologised for his action. The panel took into account that Mr Kennedy has identified attitudinal [PRIVATE] issues as the background to his actions and has sought appropriate help and support both peer to peer and from relevant professionals. It also noted that Mr Kennedy has been working as a nurse for the past 18 months without further incident.

The panel consider that while Mr Kennedy's *conduct* is not at the lower end of the spectrum of impaired fitness to practise, when considering the case in its entirety and Mr Kennedy's insight, remorse and remediation are taken into account Mr Kennedy's case can be properly regarded as at the lower end of the spectrum.

The panel agreed with the CPD that a caution order would adequately mark the seriousness of the case and address the public interest concerns. The panel was of the view that a caution order would be the most appropriate sanction. The panel considered that it should be for the maximum length permitted to reflect the seriousness of the

conviction and to mark the public interest. In this respect the panel endorsed paragraphs 18 to 30 of the provisional CPD agreement.

The panel considered whether it would be appropriate to impose a more restrictive sanction and looked at a conditions of practice order. The panel noted the public protection concerns in this case have been addressed and that there are no concerns that require remediation or correction. The panel concluded that no useful purpose would be served by a conditions of practice order. The panel did consider a suspension order but, having already determined that a caution order would adequately mark the seriousness of the case, concluded that this would be disproportionate. The panel also considered that there is a public interest in allowing experienced nurses to safely return to practice.

For the next five years Mr Kennedy's employer - or any prospective employer - will be on notice that his fitness to practise had been found to be impaired and that his practice is subject to a restriction. Having considered the general principles above and looking at the totality of the findings on the evidence, the panel has determined that to impose a caution order for a period of five years would be the appropriate and proportionate response. It would mark not only the importance of maintaining public confidence in the profession, but also send the public and the profession a clear message about the standards required of a registered nurse.

At the end of this period the note on Mr Kennedy's entry in the register will be removed. However, the NMC will keep a record of the panel's finding that his fitness to practise had been found impaired. If the NMC receives a further allegation that Mr Kennedy's fitness to practise is impaired, the record of this panel's finding and decision will be made available to any practice committee that considers the further allegation.

This decision will be confirmed to Mr Kennedy in writing.

That concludes this determination.