

IN THE VETERINARY SURGEONS BOARD OF SOUTH AUSTRALIA

COMPLAINT

ADELAIDE

BEFORE THE BOARD COMPRISING:

Presiding member: Mr P Leadbeter

Member Dr A Doube

IN THE MATTER OF A COMPLAINT AGAINST PETER KUBLER

DATE OF HEARING 14 March 2007

REASONS FOR DECISION DELIVERED 29 August 2008.

Ms T Scott for the Registrar
No appearance for Dr Kubler

BACKGROUND

This matter relates to a complaint brought by Sue Millbank, Registrar of the Veterinary Surgeons Board of South Australia pursuant to the provisions of Section 62 of the Veterinary Practice Act, 2003 complaining that a Veterinary Surgeon, Peter Kubler of 170 Payneham Road, Evandale was guilty of unprofessional conduct. When the complaint came before the board on Wednesday 14 March 2007, Ms T Scott appeared for the Registrar. There was no appearance for or on behalf of Dr Kubler. The Board was advised that Dr Kubler was served with a copy of the complaint on 15 September 2006 when a copy was served by registered post and signed for by Dr Kubler's nurse, Ms Sylvia Brooks. There were a number of preliminary hearings by the Board following that date. On the first occasion Dr Kubler appeared himself and on two other occasions was represented by a solicitor Mr John Bennett. The Board was advised that on 13 February 2007 the Registrar emailed Dr Kubler advising him of the hearing date and time and that he would be able to make submissions in person or in writing and furthermore that the matter could be heard in his absence should he choose not to attend. He was forwarded a copy of the pre-reading booklet by courier on 26 February 2007. That booklet was returned to Ms Scott at the Crown Solicitor's Office marked "return to sender". The Board were also advised that no attempt had been made to contact Dr Kubler as the Registrar was unaware of his current telephone number. The Board was advised that Dr Kubler had closed both his clinics and that he had advised the Registrar by email that he was intending to be travelling either interstate or overseas during 2007 and at most times he would not be able to be contacted.

The Board was also provided with a letter from Dr Kubler to the Registrar dated 19 January 2007. In that letter Dr Kubler makes a number of statements which are discussed in more detail subsequently and indicates that in his opinion there is no evidence to substantiate the charges and therefore there was no case to answer. That letter was written prior to a Preliminary Hearing that had been due to be heard on 2 February 2007. Dr Kubler indicated that it would be unlikely that he would be able to attend that Hearing. The Registrar indicated that she wished to proceed with the complaint despite Dr Kubler's non appearance. Ms Scott submitted that Section 65(4) of the Act enables the Board to proceed to hear and determine a matter in the absence of a respondent. She also drew the Board's attention to Section 77 of the Act which refers to service. The Board is of the opinion that the Registrar had satisfied the requirements of Section 77 in relation to service of the complaint and notice

of the hearing on Dr Kubler. The Board indicated that it would be prepared to hear the matter.

The Board had been provided with a set of pre-reading documents containing copies of the following:-

1. The complaint dated 12 September 2006;
2. Affidavit of Judith Anne Hayward dated 23 September 2007;
3. Copy of letter to Judith Anne Hayward from Peter Kubler dated 1 September 2005;
4. Transcript of interview with Peter Kubler conducted by Brian Rowett, Government Investigations Unit dated 28 June 2006;
5. Affidavit of Dr Allan Jack Mills, Veterinary Surgeon, Strathalbyn Veterinary Clinic dated 23 February 2007;
6. Affidavit of Dr Rhys James Hayward, Veterinary Surgeon, Strathalbyn Veterinary Clinic dated 23 February 2007;
7. Affidavit of Sylvia Jean Brooks dated 26 February 2007.

The circumstances that gave rise to the complaint are as follows:-

Dr Kubler operated a Veterinary Surgery at 170 Payneham Road, Evandale. On 4 August 2004 a female Persian cat, Toffee ("the cat"), belonging to Ms Judith Hayward ("the owner") was admitted to Dr Kubler's practice to be de-sexed and micro chipped. The cat was operated on by Dr Kubler who opened the cat's abdomen by making a midline incision and then sutured it at the end of the procedure. Following the procedure Dr Kubler produced a computer record stating an ovariectomy had been performed. The microchip number given to the cat was 982/009/101/357/487. The owner was charged \$99.00 for the operation and provided with a notice regarding the post-operative care of the cat. On 6 July 2005 the cat acted "*in oestrus*" and the owner became distressed. The owner telephoned Dr Kubler's practice and advised of the matter. Dr Kubler contacted the owner and provided her with reasons why the cat could be "*in oestrus*". He suggested that he perform exploratory surgery, but indicated that it would be unlikely he would find anything wrong.

On 19 August 2005 the cat again acted "*in oestrus*" and the owner contacted Dr Kubler's practice and organised a date for exploratory surgery. The owner then had second thoughts and took the cat to the Strathalbyn Veterinary Clinic for a second opinion.

On 23 August 2005 Dr Rhys Hayward, Associate Veterinarian of the Strathalbyn Veterinary Clinic performed exploratory surgery on the cat. The cat's microchip number 982/009/101/357/487 was recorded on the Strathalbyn Veterinary Clinics computer system. The operation was filmed on a video which was tendered to the Board by Ms Scott and marked Exhibit C. The Board viewed the video at the time of the hearing.

The surgery undertaken by Dr Hayward revealed the cat's entire uterus intact with two complete ovaries and uterine horns present. The ovaries did not appear to be functionally attached to the uterus. Dr Hayward subsequently performed a full ovariohysterectomy. Dr Hayward in the statement attached to his Affidavit indicated that in his clinic it was standard practice to perform the ovariohysterectomy on a cat which is on heat, and in all clinics that he had worked at, this had been the standard. He indicated that the more uterus that you leave behind the more likelihood of infection. It was his view that if the tissue had not been

removed there was a chance of a life threatening infection of the entire uterus known as a pyometra to occur and sepsis meaning that the infection spread into the blood stream which could also be life threatening. It was his view that leaving reproductive tissue behind in this type of surgery was unacceptable and well below the standard expected.

Dr Kubler in his letter to the Registrar dated 19 January 2007 advised that in his view there should have been a histopathology report of the tissue in question. He considered that the photographic still shots taken from the video of the operation were not clear enough to enable any clear identification of the tissue involved. He expressed the view that, considering the history of the cat was that it went off heat after de-sexing, there was no case for him to answer in relation to the allegations.

The owner of the cat had made a complaint to the Registrar of the Veterinary Surgeons Board on 30 August 2005 regarding Dr Kubler's treatment of the cat.

On or about 1 September 2005 Dr Kubler contacted the owner and offered to refund \$55.00 of the cost of original surgery subject to the owner consenting to conditions. The conditions provided were that the owner would not, in consideration of the refund a) discuss the matter with any one else, b) make any further claims current or in the future, or c) lodge any complaints with the statutory government body about the matter. It was further noted that the owner understood that a breach of the conditions would render her liable for legal action and that the refund was not an admission of liability on behalf of Dr Kubler.

The Registrar alleged the following:

- (1) That Dr Kubler was guilty of unprofessional conduct and that he was incompetent and/or negligent in relation to the provision of veterinary treatment to the cat by virtue of the following matters:-
 - (a) He operated on the cat for the purposes of de-sexing the cat when in fact he failed to remove the cats reproductive organs;
 - (b) In that a reasonably competent veterinary surgeon would not in the circumstances have closed and sutured the cat abdomen without the de-sexing procedure being performed;
 - (c) By producing a computer record indicating that an ovariectomy had been performed on the cat when in fact the cat's ovaries remained intact;
 - (d) By not removing all necessary reproductive tissue;
 - (e) By leaving behind reproductive tissue and subjecting the cat to a possible life threatening pyometra and sepsis; and
 - (f) By using a method of de-sexing the cat which was not representative of modern practice.
- (2) That Dr Kubler was guilty of unprofessional conduct and that his conduct was improper and/or unethical in relation to professional practice in that he improperly attempted to persuade the owner to not lodge a complaint by offering her a partial refund of the cost of the original surgery; and
- (3) That Dr Kubler was guilty of unprofessional conduct by contravening or failing to comply with the code of professional conduct for veterinary surgeons in that he:

- a) failed to perform work to a standard of competence acceptable to his peers,
- b) failed to promote the trust of the general public,
- c) failed to conduct himself in a manner that would maintain or enhance the reputation of the profession,
- d) failed to maintain an adequate record of the treatment carried out, and
- e) failed to consider the welfare of the cat.

Under Section 3(1) of the Veterinary Practice Act 2003 “unprofessional conduct” is defined to include:

- (a) improper or unethical conduct in relation to professional practice; and
- (b) incompetence or negligence in relation to the provision of veterinary treatment; and
- (c) a contravention of or failure to comply with –
 - (i) a provision of this Act; or
 - (ii) a code of conduct or professional standards prepared or endorsed by the Board under this Act; and
- (d) conduct that constitutes an offence punishable by imprisonment for one year or more under some other Act or law.

In determining whether or not Dr Kubler is guilty of unprofessional conduct it is this definition of unprofessional conduct which must be applied and not meanings given to the expression in previous Court decisions such as the case of *In re R, a Practitioner of the Supreme Court [1927] SASR 58* where the Court applied a meaning to the expression “unprofessional conduct” in circumstances where there was no statutory definition. This is clear from the decision of Chief Justice Doyle in the case *Keogh v The Medical Board of South Australia and Another [2007] SASC 342* at para. 64. The Board must consider whether on the evidence provided to it Dr Kubler’s actions were such as to warrant a finding of unprofessional conduct as that term is defined by the Act. It may be the case in any given situation and depending upon the facts and circumstances of the particular case that a Veterinary Surgeon may be guilty of unprofessional conduct on the basis that one or more of the four limbs of the definition have been satisfied.

There has not been any evidence put to the Board in this matter indicating that Dr Kubler’s conduct satisfies the fourth limb of the definition, namely “conduct that constitutes an offence punishable by imprisonment for one year or more under some other act or law”.

Taking each of the other limbs of the definition of “unprofessional conduct” separately the Board notes the following:-

- (b) Is there evidence of incompetence or negligence in relation to the provision of veterinary treatment to the cat.**

The Board notes that the first two limbs of the definition of “unprofessional conduct” under the Medical Practitioner’s Act 1983 are the same as those in relation to the Veterinary Practice Act 2003 except under the Medical Practitioner’s Act there is a reference to the practice of medicine, whereas the Veterinary Practice Act refers to “professional practice” under the first limb and “the provision of veterinary treatment” under the second limb. In *Keogh’s case* the Supreme Court notes that recognised professional standards and practices provide a guide in considering what amounts to incompetence or negligence in relation to the practice of the profession. A “trifling, or harmless departure from recognised professional standards” was unlikely to amount to unprofessional conduct. The Court held that prevailing standards are a guide to whether or not conduct amounts to unprofessional conduct but they must not be treated as “determinative”. Further Doyle CJ made the point that the reference to “negligence” in the definition of unprofessional conduct was not to be given the same meaning as negligence in the law of torts.

He said(at para 68), “Negligence is not tortious unless loss or damage is caused. There is no reason to think that when defining unprofessional conduct Parliament was limiting “negligence” to conduct that causes loss or damage. Parliament must have had in mind conduct that amount to a failure to take reasonable care. But when considering that question, and equally when considering whether conduct amounts to incompetence or negligence, the Board must have regard to a standard of competence and a standard of reasonable care that is not to be determined entirely by approved or recognised professional practices. It would be open to the Board to find that conduct amounted to incompetence or negligence even though the conduct accorded with recognised professional standards, or with standards observed by a responsible body of opinion in the profession. The Board would so find if it found that those standards were inadequate.”

In *Keogh’s case* the Supreme Court found that the medical board had treated the professional standards incorrectly as determinative, rather than influential.

The Board has evidence in an Affidavit form from two vets, Dr Allan Mills and Dr Rhys Hayward. Dr Hayward performed the second surgical operation on the cat. Dr Hayward also arranged for the video recording (Exhibit “C”) of part of the operation to be undertaken. The Board is not able to form an opinion from viewing the video evidence as to whether or not the tissue shown in that video is ovarian tissue. A histopathology report would have confirmed that fact. However, the Board does have affidavit evidence from two experienced vets to the effect that two complete ovaries were clearly identifiable when the cat was operated upon by Dr Hayward. The Board accepts the evidence from those vets that the cat’s reproductive organs had not previously been removed. Dr Kubler had also provided the owner with a computer record indicating that an ovariectomy had been performed. The Board is of the opinion that in performing the original surgery Dr Kubler was either incompetent or negligent, and certainly not using a method of de-sexing the cat which was representative of modern veterinary practice. Dr Kubler’s procedures were not in accord with professional standards and exemplify a failure on his part to take reasonable care.

(a) Was the conduct improper or unethical in relation to professional practice?

It is the Board’s opinion that there is nothing wrong in a veterinary surgeon offering to refund portion or all of the fees paid by a client for veterinary services including surgical procedures. However, where such refunds are made subject to conditions such as those which Dr Kubler sought from the owner in this matter requiring the owner to not discuss the issue with anyone nor take any complaints to the Registrar of the Veterinary Surgeon’s Board it is, in the Board’s opinion, improper practice by a

veterinary surgeon. It may also be unethical in that such action is not conduct which "will maintain or enhance the reputation of the profession as required by Section 2.3 of the Code of Professional Conduct. The Macquarie Dictionary defines "unethical" as including "contravention of some code of professional conduct".

(c) Did Dr Kubler contravene or fail to comply with the code of professional conduct for veterinary surgeons?

The Code of Professional Conduct for Veterinary Surgeons is a code developed by the Veterinary Surgeons Board of South Australia pursuant to its powers in Section 13(1)(e) of the Act. The Board has evidence of two vets who have expressed their opinion that the original surgery was unacceptable. The nature of the original surgery was such that the cat continued to experience signs of being "*in oestrus*", which was in the owner's opinion distressing to the cat and to the owner. Such surgery failed to promote the trust the general public is entitled to have in veterinary surgeons and therefore tended to adversely affect the reputation of the veterinary profession. It is the Board's view that Dr Kubler failed to comply with Section 2.3 of the Code which requires that "Veterinarians must conduct themselves in a manner that will maintain or enhance the reputation of the profession" and Section 3.1(a) which provides that, "A registered person must not practise veterinary surgery in a manner that would be likely to bring the practice of veterinary surgery into disrepute".

The Board was advised that the Registrar considered that Dr Kubler's behaviour in this matter required a disciplinary response. Further the registrar maintained that the unprofessional conduct was a serious breach which warranted a penalty at the higher end of the scale.

The Board was also advised that this was the third time that Dr Kubler has come to the Board's attention. On 12 May 2004 he pleaded guilty to four counts of unprofessional conduct in relation to a de-barking operation performed on a dog. On that occasion the Board found him guilty of unprofessional conduct and considered that the conduct was of such magnitude and breadth that it would normally warrant a suspension of his registration. However, the Board said that bearing in mind the Registrar's submissions with respect to penalty and the fact that Dr Kubler did plead guilty which saved all parties time and money they imposed a penalty in the nature of a formal reprimand, fine, and conditions on his practice. There was a further matter before the Board in 1985 the facts of which the Registrar was unable to provide to the Board. On that occasion Dr Kubler was found guilty of unprofessional conduct and suspended for 90 days.

The Registrar submitted that the purpose of a disciplinary hearing such as this hearing was to not only protect the public from Dr Kubler himself but also to ensure that other veterinary surgeons who might act in a similar manner to Dr Kubler are deterred from such actions and therefore from improper treatment of their animal patients, and, undermining the reputation of the veterinary profession.

The Registrar sought a substantial fine in the amount of \$5,000.00. The Board's attention was directed to another disciplinary matter against a Dr Irving who failed to keep adequate records of his procedures. He was fined \$6,000.00 in that situation. By way of comparison when questioned by the Board Ms Scott indicated that she had had some experience with the imposition of fines by the Nurses Board. She indicated that the fines imposed by the Nurses Board are not as substantial as the one previously imposed by the Veterinary Surgeons Board on Dr Irving. She indicated that the Nurses Board tended to focus on the disqualification of Nurses rather than the imposition of large fines.

After considering all of the evidence placed before the Board and the submissions of Ms Scott the Board makes the following formal orders:-

1. The Board finds that, for the reasons outlined above Dr Kubler is guilty of unprofessional conduct.
2. A \$5,000.00 fine is imposed.
3. Pursuant to the provisions of Section 62(4)(c) and section 62(5)(a)(i) the Board orders that Dr Kubler be permanently disqualified from being registered on the Register of Veterinary Practitioners in South Australia.
4. Pursuant to the provisions of Section 62(4)(g) Dr Kubler is prohibited from carrying on business as a veterinary services provider.
5. Pursuant to the provisions of Section 62(4)(h) Dr Kubler is prohibited from occupying a position of authority in a trust or corporate entity that is a veterinary services provider.
6. The Registrar's costs in the sum of \$9,000.00, which include the cost of investigating and prosecuting this complaint, shall be paid to the Registrar of the Board within 3 months from the date of publication of these written reasons.



Signed by the Presiding Member

29 August 2008