HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA

♦♦♦

MEDICAL & DENTAL PROFESSIONS BOARD

PROFESSIONAL CONDUCT COMMITTEE: **PROF T NOAKES**

HELD AT: SEMINAR ROOM
BELMONT SQUARE CONFERENCE CENTRE
BELMONT ROAD
RONDEBOSCH
CAPE TOWN

DATE: 21 APRIL 2017

CHAIRPERSON:	**ADV J ADAMS**
MEMBERS:	**DR J GIDDY** **DR H SALOOJEE** **DR A S LIDDLE** **MR J VOGEL**
LEGAL ASSESSOR:	**MR T MKHONTO**
PRO FORMA COMPLAINANT: REPRESENTED BY [INSTRUCTED BY K M MMUOE ATTORNEYS]	**ADV M MAPHOLISA** **ADV A BHOOPCHAND** **MR K MMUOE** **PROF S KRUGER** **PROF A BARDAY**
ON BEHALF OF RESPONDENT: [INSTRUCTED BY PIKE LAW]	**ADV M VAN DER NEST (SC)** **ADV R RAMDASS** **DR C ZINN** **MR A PIKE** **MS B KELL** **MS C BASSON**

VOLUME 25
PAGES 3765 - 3849

[MATTER CONCLUDED]

PROCEEDINGS RESUME ON 21 APRIL 2017

CHAIRPERSON: Good morning. It is 21 April 2017. We are at Rondebosch, Belmont Centre in Cape Town of this final stage, or this hearing is coming to an end, not necessarily today, but of course it is reaching finality.

I would like to place on record we are starting late, it is almost quarter to 10. There were some hiccups this morning, we were meant to start at 9 o'clock, but be that as it may, everything is on board, we are ready to resume.

I just remind everyone why we are only five and not six people. You will recall on the last hearing date, being 4 April 2017, the legal assessor excused himself because he has a statutory board meeting, he is a board member of the Law Society, and he has assisted this committee to date and also up until this final stage as far as one of the final stages, as far as the Law of Evidence and Procedure is concerned, so he has been actively involved. He is just not present today and you will recall we placed it on record the last time round and no party had a particular objection and we did not deem it necessary to have another legal assessor because the legal assessor has actually assisted us up until this stage, and as indicated previously should we not finalise today the legal assessor will simply return. For the purposes of today and lengthy judgments we have already presumed we are taking most of the day and that should we go over to any other phase it will not happen today and

then the legal assessor will simply return to the proceedings. So there is no harm done, no prejudice to any party.

To place on record again just for the purposes of those who have not been here, on record that our committee is a five-member committee. We do not have six members, we have five. The legal assessor is not a committee member. He is a legal assessor. On my far right Dr Liddle. Right next to me on my right is Dr Giddy. Far left is Dr Salojee, and on my immediate left is Mr Vogel and I am Adv Joan Adams. Who appears on behalf of the pro forma complainant?

MR BHOOPCHAND: Thank you, good morning, Madam Chair. I am Adv Bhoopchand ...[intervenes]

CHAIRPERSON: Could you bring it a little bit closer to you? I think that is the problem.

MR BHOOPCHAND: Well, good morning for the second time, third time maybe. I am Adv Bhoopchand and I am instructed by Katlego Mmuoe Attorneys. We appear for the pro forma. May I at this stage also acknowledge the presence of the current president of ADSA, Ms Maryke Gallagher, who sits behind me to my right next to Prof Senekal.

CHAIRPERSON: Thank you very much, and who appears on behalf of the respondent?

MR VAN DER NEST: Morning, Chair. Michael van der Nest together with Dr Ramdass, instructed by Adam Pike and we are here for Prof Noakes.

CHAIRPERSON: Thank you very much. Without further ado we will go over to judgment. I would just like to place on record there is no provision made in legislation or the regulations for majority, minority and concurring judgments. However, there is nothing preventing that and obviously with a case of this nature – and it has often happened in the past – in the 10 years I have been specialising in medical law we have actually had majority/minority decisions. There would be no prejudice to any party. In fact it is in the interest of justice if judgments are given and not just merely a dissent.

So in other words of the five-member committee we do not need a unanimous decision, we need a majority. A majority is the decision which is binding at the end of the day and on this committee we have a majority decision of four persons, four members, and a minority decision. We have decided, regard it advisable that what will happen is I will first read out the majority and thus binding decision. Thereafter – we have not then ended – we will then give Dr Liddle the opportunity to give a minority judgment, he will read it out himself, and thereafter I will explain appeal rights of both parties. So just bearing in mind that is the procedure we are going to follow, and also bearing in mind I have had many questions today, so how long is this going to take. Well, it is going to take this long and we are going to try and get through it and we have had a later start, but I am hoping we can start making leeway. So without further ado, thank you.

J U D G M E N T

CHAIRPERSON: The respondent, Prof Noakes, has been registered as a medical practitioner with the Health Professions Council of South Africa since 1974. He has not practised clinically as a medical practitioner since the year 2000.

The respondent is an A1 NRF rated scientist in Nutrition and has authored various books, *inter alia* the *Waterlogged*, the *Real Meal Revolution* and *Raising Superheroes*.

On 6 February 2014 Ms Claire Julsing-Strydom lodged a complaint against the respondent with the Health Professions Council of South Africa. Mrs Strydom, or Ms Strydom is a registered dietician in private practice. She has a B.Sc. Dietetics degree and a Masters degree in Dietetics. She has been in private practice for 11 years. Ms Strydom was the chairperson of ADSA when the complaint was lodged – and ADSA standing for the Association for Dietetics in South Africa.

The complaint filed by Ms Strydom against the respondent reads as follows, and I am quoting:

> "I would like to file a report against Prof Tim Noakes. He is giving incorrect medical (medical nutrition therapy) on Twitter that is not evidence-based. I have attached a tweet where Prof Noakes …[and she uses the word 'advices,' it should be advises] …a breastfeeding mother to wean her baby on to a low carbohydrate high fat diet. I urge the HPCSA to please

take urgent action against this type of misconduct as Prof Noakes is a celebrity in South Africa and the public does not have the knowledge to understand that the information he is advocating is not evidence-based. It is especially dangerous to give this advice for infants and can potentially be life-threatening. I await your response."

Acting in terms of regulation 3(1)(b) of the regulations and the relevant regulations being Government Notice R102 and Government Notice 31859 of 6 February 2009, the regulations to the Health Professions Act, which is Act 56 of 1974, the Registrar of the HPCSA forwarded a copy of the complaint to the respondent, asking him to respond. The respondent's response was contained in a four-page letter of reply dated 2 May 2014, to which he attached an annexure.

In September 2014 the Preliminary Committee of Inquiry of the Health Professions Council of South Africa resolved in terms of regulation 3(3) and (4) – that is subparagraph (4) – that an inquiry into the conduct of the respondent should be held by a Professional Conduct Committee. The point of the inquiry would relate to the unprofessional conduct of the respondent in providing unconventional advice on breastfeeding babies. The charge was formulated by the pro forma complainant against the respondent and as amended reads as follows, I quote:

"That you are guilty of unprofessional conduct or conduct which when regard is had to your profession is unprofessional

in that during the period January 2014 and February 2014 you acted in a manner that is not in accordance with the norms and standards of your profession in that you provided unconventional advice on breastfeeding babies on social networks (tweet)."

There was subsequently a request for further particulars by the respondent and replies thereto by the pro forma complainant. It is trite that the council is bound by the charge and all further particulars provided thereto – council being this committee as well.

Section 22 of the Constitution of the Republic of South Africa permits every citizen to choose their trade, occupation or profession freely, albeit doctor, scientist, author, dietician, et cetera. The practice of a trade, occupation or profession may however be regulated by law for obvious reasons. The HPCSA's power to inquire into professional conduct of a registered medical practitioner, including the respondent, derives from the Health Professions Act and the regulations thereto.

Unprofessional conduct is defined in the Health Professions Act as improper or disgraceful or dishonourable or unworthy conduct or conduct which when regard is had to the profession of a person who is registered in terms of this act is improper or disgraceful or dishonourable or unworthy.

Section 33(1) of the Health Professions Act permits the Minister of Health on the recommendation of the HPCSA to specify the acts which shall for the purposes of the application of the Health

Professions Act be deemed to be acts pertaining to that profession.

Regulation 237 contains the regulations defining the scope of the profession of medicine in terms of section 33(1) read with section 61(2) of the Health Professions Act and it was published under Government Notice R237 in Government Gazette 31958 on 6 March 2009.

Acts that are deemed to be acts pertaining to a medical profession in regulation 2 include advising any person on his or her physical health status and on the basis of information provided by any person or obtained from him or her in any manner whatsoever, diagnosing such person's physical health status, advising such person on his or her physical health status. It is a bit of a repetition, but regulation 2, and specifically 2(c), and then we have 2(d)(i) and 2(d)(ii).

The salient facts which are common cause in this matter are as follows:

The respondent has a Twitter account. Twitter is an online news and social networking service where users post and interact with messages (tweets) restricted to 140 characters.

Pippa Leenstra with username Pippa J Styling @PippaLeenstra posted a tweet on 3 February 2014 addressed to the respondent with username Tim Noakes @ProfTimNoakes and Sally-Ann Creed, a dietician and co-author with respondent of the *Real Meal Revolution* with username Sally-Ann Creed @SalCreed.

Ms Leenstra tweeted as follows:

"Is LCHF eating okay for breastfeeding moms? Worried about all the dairy + cauliflower = winds for babies??"

In a tweet in response to Ms Leenstra's tweet on 5 February 2014 and addressed to Ms Leenstra and Sally-Ann Creed the respondent replied as follows:

"Baby doesn't eat the dairy and cauliflower, just very healthy high-fat breast milk. Key is to wean the baby onto LCHF."

The initial tweet and replying tweet instigated a series of tweets between various participants, including Ms Marlene Ellmer, a dietician, and the complainant. Ms Strydom (that is the complainant) has a Twitter account and uses the Twitter username Claire Julsing-Strydom @DieticianClaire. Ms Strydom participated in a series of tweets that followed the mentioned two tweets.

On the same day of the replying tweet, that is 5 February 2014, Ms Leenstra tweeted back to the respondent and Sally-Ann Creed. Ms Leenstra tweeted:

"Okay, but what I eat comes through into my milk. Is that not problematic for baby and their winds at newborn stage?"

Respondent did not respond to this tweet.

Ms Strydom *inter alia* tweeted on various occasions thereafter as follows – one tweet, the first tweet is addressed to Prof Noakes and states:

"I AM HORRIFIED!! How can you give advice like this????"

Another tweet on the same day stated – this was 5 February 2014:

"YOU HAVE GONE TOO FAR. Be sure that I will be reporting

this to the Health …[it says:] …Professional Council South Africa."

On the same day another third tweet by Ms Strydom:

"Pippa, I am a breastfeeding mom of a four-month old + RD with a MSc in Dietetics. This info is shocking."

Also on the same date Ms Strydom tweets:

"Pippa, please contact me on 011 023 8051 or Claire@nutritionalsolutions.co.za for evidence-based advice."

A fifth tweet on the same day Ms Strydom says:

"Was great chatting to you, Pippa – good luck with your little one."

Still on the same day Ms Strydom tweeted:

"We will post a blog on healthy eating for breastfeeding moms and infant weaning. Dangerous to wean an infant onto LCHF diet."

Further she tweets:

"It is out of control! I have reported the infant nutrition recommendations made by TM to the HPCSA – we will see the response."

A Dr Gail Ashford also tweeted as follows:

"I don't understand where the danger lies? Honest query; low carb is not NO carb. It is not high protein either."

And furthermore Dr Ashford subsequently tweeted:

"Eating fresh…"

And this was a tweet specifically addressed to Ms Strydom:

"Eating fresh real food from grass-fed animals, free-range eggs and full-fat products with vegetables beware?"

The critical part of the discussion ended on 8 February 2015 with Ms Leenstra addressing a tweet to Prof Noakes and his co-author stating:

"Too much conflicting information!!!!"

Followed by another tweet to both:

"Thx but I'll go with the dietician's recommendation."

Thanks is merely "thx."

The respondent did not answer the initial tweet about, or answer directly the initial tweet about whether LCHF was okay for breastfeeding moms and whether dairy and cauliflower would or could cause winds in babies.

The pro forma complainant argues, that is paragraph 27 of the pro forma complainant's submissions – when I say submissions, the initial submissions in argument, first bundle:

"That the focus of the charge and this inquiry relates to the unsolicited part of the respondent's replying tweet, namely 'key is to wean baby onto LCHF."

I am going to quote from various paragraphs of the pro forma complainant's arguments. As we know the pro forma complainant bears the onus of proof and I am quoting various paragraphs, the paragraphs will be from the pro forma's submissions, as well as the submissions in reply to the respondent's submissions. I will indicate paragraph numbers, not page numbers. I am going to make it easy

and I will also indicate when I am going over to which bundle. The reason I am doing this is to indicate what the pro forma has indicated is their problem and the case they stand to meet and the case they feel they have met.

As far as conventional advice is concerned the pro forma complainant – paragraph 213, and at this stage I am just quoting from the first bundle, pro forma's submissions:

> "Conventional advice is evidence-based nutritional advice contained in food-based nutritional guidelines, including the South African Paediatric Food-based Dietary Guidelines and the World Health Organisation Guidelines for breastfeeding and complementary feeding."

Paragraph 214:

> "The conventional advice to mothers breastfeeding their babies is for them to feed the baby exclusively on the breast for six months, to continue breastfeeding up to two years and beyond, to gradually introduce a variety of complementary foods from the age of six months till the infant can eat an adult strength diet from about two years onwards."

Paragraph 216:

> "Conventional advice to breastfeeding mothers does not include advising an LCHF diet or a ketogenic diet or a diet that is unexplained and calls for speculation as to what it entails, or a diet for which no reference material is available to establish the content of the diet. Understandably advice given to

breastfeeding mothers about the dietary needs of their babies should emanate from professionals with the requisite skills and experience in infant feeding as a breastfeeding period in a human life is the initial and major period of the important first thousand days of life. More understandably it calls for advice that is free of speculation and is evidence-based."

Paragraph 577:

"The pro forma shall argue that the respondent …[or has actually argued] …that the respondent is not an expert in neonatal or infant nutrition. In addition, ignorance about what is gestational age and his reference to weaning as the period of complementary feeding is a reflection that the respondent is not steeped in the practice of paediatrics and infant nutrition. The respondent does not have the knowledge or experience to give any advice on any platform in infant nutrition. He cannot be regarded as an expert in infant nutrition and more so as an expert in his own case."

As to what did the respondent mean by LCHF in "Key is to wean baby onto LCHF" at the time of posting the replying tweet, the pro forma complainant argues as follows:

Paragraph 279, and I am still on the initial pro forma's submissions, that bundle:

"The advice relevant to this hearing, "Key is to wean baby onto LCHF," was unsolicited advice and provided without obtaining any background information about the baby. Paragraph 282:

"It is apparent from the evidence that Ms Leenstra or any other mother who had sight of the respondent's tweet would not have obtained any information on what the respondent meant when he advised the mother to wean her child onto LCHF."

Paragraph 288:

"What was the definition of an LCHF diet in the context of complementary feeding or in the context of the respondent's weaning advice? What would Ms Leenstra and the other persons who read the replying tweet understand from the words 'Key is to wean baby onto LCHF'?"

Paragraph 130:

"The pro forma contends further with respect to the complaint that an undefined use of an acronym like LCHF permits a wide interpretation of its meaning."

Paragraph 487:

"The pro forma shall argue that the respondent's advice to Ms Leenstra to wean her baby onto the LCHF included, alternatively inferred, alternatively failed to warn against a weaning diet that could be interpreted to mean a diet that was comparable with a ketogenic diet."

381:

"The pro forma contends that the replying tweet is ambiguous about the message relating to breastfeeding. No practitioner involved in the care of neonates and infants would attempt to dilute the breastfeeding message. The message to encourage

breastfeeding has been a global initiative for many years."

Paragraph 398:

"The pro forma contends that if the replying tweet is read holistically it implies that the respondent is advising the mother that it is important to wean the child off the breast in the context of her fears for cauliflower and dairy."

Paragraph 400:

"The attention of this disciplinary committee is drawn to another concession. This evidence we would contend deserves two ticks in the box relating to unconventional advice. 'What is missing is key is to wean baby onto LCHF sometime in the future after six months or after two years. That is what is missing.'"

Paragraph 299:

"The pro forma contends that the admission in the latter part of his evidence that the respondent should have said real foods instead of LCHF is another tick in the unconventional advice column."

Paragraph 338:

"The pro forma contends that the advice to wean onto LCHF is not conventional advice. The themes that emerge in this part of the evidence once again underlines the lack of clarity in the advice to wean a baby onto LCHF, the definition of Banting, the advice against Banting, the relevance of the no carb message on the *Raising Superheroes* website, the testimony

about consulting prior to advising and then the quality of facts rather than the quantity."

And then this paragraph 126, that is actually, comes from the pro forma's submissions in reply to the respondent's submissions, paragraph 126 the pro forma says as follows:

"If the respondent's position against conventional advice for infants was that they should not be weaned onto cereals or grains then he should have rather maintained this stance rather than disparaging the entire conventional diet for infants."

I return to quotations from the pro forma's initial submissions. Paragraph 51:

"The ability to direct a message to a particular tweeter, and in this case an enquiry, is in our submission an indication that Twitter allows a one-on-one exchange to occur, an exchange that is akin to a doctor/patient relationship. The obvious differences are twofold. The first is that the message is shared with your followers (as the respondent confirmed) and the second is our submission from a legal perspective."

Paragraph 52:

"The enquirer tweeter can address any enquiry to the recipient tweeter and is not bound by any rules beyond those of Twitter. The same cannot be said of the recipient tweeter if he is a medical practitioner. If he is responding to a medical matter then he is under professional regulation. He is bound by the

provisions of the Health Professions Act and its regulations and by the ethical rules and good practice guidelines."

Paragraph 53:

"Prof Pienaar would have characterised the replying tweet as the point where the doctor/patient relationship would have had formed. There was an affirmative action; do this, you can do this, but the key is to wean the baby – the baby, mentioning baby. It was expert advice to an individual on which the mother could have acted and it could have had consequences."

They are actually quoting from the testimony of Prof Pienaar.

Paragraph 54:

"The charge is however independent of whether a doctor/patient relationship had formed. The provisions of the Health Professions Act and its regulations do not require proof of a doctor/patient relationship or proof of a contractual nexus to exist before the requirements of the act, including its disciplinary provisions, are applicable."

Paragraph 55:

"The pro forma contends that the initial tweet was a clinical enquiry from the mother about her diet. She was enquiring as to whether the low carbohydrate high fat diet (LCHF) was suitable for ingestion whilst breastfeeding. She was concerned that the dairy and cauliflower would cause winds in her baby. The pro forma accepts that the language used in

the initial tweet was couched in the plural."

Paragraph 56:

""Prof Pienaar characterised the initial tweet as one where a layperson (breastfeeding mom) was asking two specialists, which were the respondent and Ms Creed, the dietician, about the component within the dairy and cauliflower and whether they metabolise and are excreted in the breast milk. If their components are excreted in the breast milk would there be an effect on her baby? Prof Pienaar was of the view that specialised information was being sought …[and they quote him:]

'That is not just general knowledge.'"

Paragraph 57:

"The respondent alleges without any evidential basis that the mother was a consumer of information. It is immediately apparent from a reading of the initial tweet that this was no consumer enquiry. The anxiety, the double question marks, the specific concern about the winds and the reference to babies militates against this interpretation."

Paragraph 58:

"Prof Pienaar testified that a skilled clinician will contemplate the situation as:

'A breastfeeding mom is asking me for medical advice on open social media. I cannot just answer her. I do not know the baby. I do not know the age of the baby. I

do not know the health status of the baby. So there is a skill that goes beyond question and answer, question and answer.'"

Paragraph 59:

"The pro forma contends that the replying tweet was in answer to a clinical enquiry that went unanswered. Unsolicited clinical advice was provided by the respondent in the replying tweet, 'Key is to wean baby onto LCHF.' The pro forma submits that if language used in the tweets is a determinant of who the recipient of the clinical advice was directed at then the respondent's answer couched in the singular was directed to Ms Leenstra."

Paragraph 61:

"The respondent's evidence and his propositions to the pro forma appointed experts that Ms Leenstra had tweeted to seek advice or information on behalf of others is untenable as Ms Leenstra confirmed conclusively in the second tweet that the advice was sought for herself."

Paragraph 62:

"The respondent's contention that Ms Leenstra was seeking information from him as a scientist and not as a medical doctor and that he had provided information, alternatively scientific information, was unsubstantiated. In the context of the issues raised in this hearing an example of a scientific enquiry would be what are the components of an LCHF diet.

An example of scientific information in reply would be an LCHF diet is based on a diet composed of the three macronutrients, namely carbohydrate, fats and protein."

Paragraph 63:

"The contents of the initial tweet and the replying tweets are thus clinical in nature. This was a clinical enquiry and the reply was directed to Ms Leenstra and contained clinical or medical advice. For the purposes of these submissions and argument in this matter the pro forma shall deal with the content of the initial and replying tweets as a medical enquiry, alternatively a clinical enquiry and a medical response or clinical response that included unsolicited medical advice to Ms Leenstra."

Paragraph 64:

"The pro forma contends further that no scientist provides public or private advice or information on nutrition and diets as these functions fall within those of a dietician or a medical practitioner."

Paragraph 82:

"The ethical guidelines of the HPCSA implores practitioners to acknowledge the limits of their professional knowledge and competence. It was incumbent upon the respondent to refer the mother to an appropriate reference resource as he did not know the answer to her question, or more correctly refer the mother to a medical practitioner or dietician."

Paragraph 148:

"In further testimony respondent made an issue about where he had got the word 'advice' from in the context of him characterising Ms Strydom's complaint as medical advice in his letter of reply. Ms Strydom stated the following in her complaint …[and I quote:]

'The information he is advocating is not evidence-based. It is especially dangerous to give this advice for infants and can potentially be life-threatening.'

He thus had two options: information and advice, and he chose to use the word 'advice.' He in any event did not at any point in his letter indicate that he had engaged Ms Leenstra as a scientist as distinct from a medical doctor and neither did he indicate that he was giving information as distinct from advice. If the respondent was giving information it is submitted that he would have chosen that very word to paraphrase Ms Strydom's complaint."

In paragraph 158, still on the pro forma's submissions, he quotes portions of the respondent's testimony in this regard:

"And at the time, and let us look at this date in 2014, May 2014; I am in my final year as an academic at the University of Cape Town. I am going through retirement. I have to close off all that I have been doing. I am very busy. I am a really hard worker. I receive this notification which

literally – how can you take that seriously? I am a professor with various degrees and I receive this and I say but, but you cannot be serious. Can you be serious that you can base a charge on that? So I respond over a period of four or five days. I write this information and when you measure up how many words she wrote and how many words I wrote you will see that I did a reasonable job in responding. Now as I understand it there is a Preliminary Committee of Inquiry. This information would then be put to the Preliminary Committee of Inquiry and there would be another opportunity to provide more information if it were needed. So as far as I was concerned I did the job as best I could, understanding what needed to be done. I asked the questions and I, as far as I was concerned I had answered the complainant, the complainant's complaint, and so I was very happy with that, with what I had written. Had I known what would happen I would have done this, I would have given all this information, but how was I to know that at that time?"

As far as evidence about Twitter and its limitations are concerned the pro forma argues as follows – paragraph 112, and I am on pro forma's submissions still:

"The pro forma provides reasons why Twitter has limited application for providing medical advice on it. This list is not exhaustive."

Paragraph 113:

"The inherent nature of Twitter and its restrictions and the size of Twitter messages makes it an inappropriate medium for a medical practitioner to practise medicine in accordance with the provisions of the Health Professions Act, its regulations and the ethical guidelines for good practice in healthcare professions."

Paragraph 114:

"As a consequence of the content of the aforegoing paragraph it is extremely apparent that the traditional medical assessment as precursor to providing medical or clinical advice cannot be conducted on Twitter."

Paragraph 115:

"When clinical advice is mentioned the restrictions on the length of Twitter messages prevents a comprehensive explanation of that advice."

Paragraph 116:

"Twitter is not conducive to permitting a practitioner to offer and explain a differential diagnosis and offer and explain all options available to the recipient of the advice."

Paragraph 117:

"Privacy and issues of confidentiality shall arise."

Paragraph 118:

"Messages can be read by a large number of tweeters and persons who use social media actively or passively (also see

paragraph 125(2)).”

Paragraph 119:

“Twitter is not conducive to initiating and maintaining a good doctor/patient relationship.”

Paragraph 120:

“Members of the public are at risk from reading and following harmful and incorrect advice. (See also paragraph 125(3)).”

Paragraph 121:

“There is a risk of creating confusion in the minds of the public.”

Paragraph 122:

“The confidence that members of the public have in members of the medical profession can be undermined.”

Paragraph 123:

“The volume of tweets can result in tweets being missed.”

Paragraph 124:

“Tweets that are not secured with the necessary security measures can open up uncontrolled and unsuitable conversations relating to the content of the tweets.”

Then paragraph 125(4):

“Tweeting nutrition and dietary advice about the first thousand days of life requires some circumspection on the part of the advice giver.”

Paragraph 125(5):

“The medium is conducive to permitting a one-on-one enquiry

as tweets can be addressed to specific persons by using the @ symbol which calls out a username."

Paragraph 128:

"The pro forma contends that information that is available to the public like that on Twitter that can be acted upon by unsuspecting members of the public has to be reliable information."

As far as Twitter is concerned the nature of social medial, including Twitter, was briefly considered in *W v N 2013 (2) SA 530 (GSJ)* – Gauteng South Division. Paragraph 22 Willis J stated:

"Twitter is also commonly known as being part of the social media. It is an information sharing and micro-blogging site available on the internet. …[Further in that paragraph:] …Twitter has 517 million users worldwide sending some 172 million tweets per day. Tweets are publicly visible by default."

We must remember of course this was in 2013, the time of judgment.

As far as Twitter is concerned the respondent in their response Paragraph 254 of their written argument indicated as follows:

"Further, as stated above, there are over 200 million active users of Twitter and it handles some 1.6 billion searches per day. These numbers are derived from ADSA's own publication."

That was never in dispute at this hearing.

An expert summary of Prof Willie Pienaar was provided to this

committee, was handed in as an exhibit, as was a supplementary expert summary. These were both confirmed during the testimony of Prof Pienaar and of note is the following:

As far as the expert summary of Prof Willie Pienaar is concerned we will see on page 2, second paragraph, he says:

> "He will also testify that his brief is not to testify about the scientific and clinical soundness of the proposed diet to the mother of the baby by Prof Noakes. Whether the content of the advice was evidence-based and/or good science is outside of his scope of expertise. As bioethicist he will be able to reflect on the unprofessional action taken by Prof Noakes of giving medical advice on social media."

He actually had "un/professional action taken by Prof Noakes of giving medical advice on social media."

On page 3 under the doctor/patient relationship, and I am just highlight certain aspects, paragraph 5.1:

> "The doctor does not have a duty to treat all patients except in an emergency situation."

5.2:

> "A doctor willingly enters into a doctor/patient relationship."

Page 4, paragraph 6.1.1:

> "Patients place doctors on a pedestal."

6.1.2:

> "Patients trust the doctor."

6.1.3:

"Patients are in need and ask for help (vulnerable)."

Page 6, paragraph 8:

"Prof Pienaar will testify that in reconstructing the case at hand he is convinced that Prof Noakes did not act as a reasonable doctor by giving medical advice on social media without the necessary consultation."

It is evident in this expert summary of Prof Willie Pienaar on three occasions he refers to the good intent of the respondent. Firstly page 2, second paragraph – no sorry, page 3, top of the page, paragraph 3.3 he said:

"Or did he merely answer the tweet? Maybe it was a deed of good intent on his part. However, offering a medical advice on social media without consultation cannot be condoned as good practice."

Page 5, paragraph 6.5:

"If one would argue that this was never a doctor/patient consultation then medical advice should never have been given. Even though the doctor could have acted in good faith this may have resulted in negative outcomes."

And final page of this summary, page 7, paragraph 10, Prof Pienaar concludes with:

"Prof Pienaar will testify that he is convinced that although with good intent Prof Noakes did not act as a reasonable doctor and acted outside of good clinical practice."

In the supplementary expert summary of Prof Willie Pienaar, of note is page 7 of that supplementary summary. Paragraphs were added, 9.2 on page 7 – sorry, 9.3:

"On social media personal and professional persona should be kept separate. Offering medical advice is a professional act that would imply a doctor taking responsibility."

Paragraph 10:

"Prof Pienaar will testify that he is convinced that although with good intent, Prof Noakes did not act as a reasonable doctor and acted outside of good clinical practice."

As far as Prof Pienaar's testimony is concerned the pro forma argued as follows: Paragraph 8.44:

"Prof Pienaar is a retired Professor of Psychiatry and currently part-time lecturer in Psychiatry and part-time bioethicist at the University of Stellenbosch. He has been teaching Bioethics since 2000."

Paragraph 8.47:

"Prof Pienaar looked through the literature and it seemed to him that a doctor/patient relationship is formed …[and they quote him:]

'When a doctor takes, makes a response, acts on, care, take any affirmative action, and the literature would say also affirmative action could also be by phone, it could also be by mail, it could also be by open social media. So if a clinician, the expert would take an action,

responded, affirmative action which is expert advice, the patient, the lay patient can take an action to that. They can listen to that doctor and do it and this action could bring forth an outcome, a positive outcome or a negative outcome.'"

Paragraph 8.54 pro forma argues as follows:

"Micro blogs like Twitter permit only 140 characters per message. They are not conducive to a good doctor/patient communication. One cannot have a consultation on, with a tweet. One cannot get to know one's patient in 140 characters. There must be a consultation to make a diagnose and act upon that diagnosis."

8.55:

"The respondent ended the doctor/patient relationship without mutual understanding and consensus."

And they are quoting the whole time from Prof Pienaar and he said:

"This is:

'Also another virtue that we treasure. If I had started a doctor/patient relation to say I – and willingly started this relationship – I will care for you, I will give you expert medical advice, then we cannot just stop. That is not a professional act just to stop and back off. The doctor/patient relationship may be ended by, unilaterally by the patient, but if I end my relationship with my patient then I must confer with my patient and by not

answering the second e-mail …[which I suppose should be, not said e-mail but tweet] …I think Prof Noakes stopped the care that he started off with the previous tweet.'"

So I am actually quoting from the pro forma's submissions, so I am not sure if it said e-mail but I actually cut and paste, so it said e-mail, I am sure it meant tweet. It said e-mail. It is e-mail. Obviously that is just an error. Paragraph 8.56:

"A practitioner cannot give expert advice without making sure that he is not guilty of supersession."

This is all quoted by the pro forma in the context of Prof Pienaar's testimony. Paragraph 8.57, pro forma's arguments:

"If it is argued that there was no doctor/patient relationship …[this is their argument now of course] …then one should not give specialist advice. …[And then they quote Prof Pienaar:]

'The other thing that worried me is after giving specialist advice the patient could have acted on it, but my problem is there are maybe thousands of other laypeople out there that could have acted upon this expert advice and to me that is not respecting our patient population. We have respect, they look up to us, and we should not give expert advice without consultation.'"

Paragraph 8.78, this is also quoting Prof Pienaar:

"I only reiterated on what is in the literature, on when does a

doctor/patient relationship start. I did not contemplate whether Prof Noakes thought she was a patient or whether Ms Leenstra thought that Prof Noakes was a treating doctor, or what the first Twitter person thereafter thought. I went to the literature and I tried to get when does a doctor have to take responsibility for giving medical advice and when does the doctor/patient relationship start and I have given you the literature on when does the doctor/patient relationship start."

8.91, paragraph:

"Prof Pienaar agrees that:

'He is not saying that a medical doctor, a medical practitioner may never give any form of diet or nutritional advice and that is not his evidence.'"

Paragraph 8.93 – this is of course quoting from Prof Pienaar:

"When one is a medical practitioner and also an author and also a sport scientist, how would, ethically speaking would one be able to know, unless a doctor said so, that which hat a doctor is wearing at that particular stage when tweeting from an ethical point of view? What would be the ethical rules as far as the different hats? I mean there is the personal persona of a doctor, the medical persona, the persona as an author, the persona as a nutrition scientist."

Sorry, the quote was a question put to – paragraph 8.93 of the pro forma's submission was a question put by a committee member to Prof Pienaar and Prof Pienaar responded:

"That, Madam Chair, is a difficult one. The fact that Prof Noakes is registered with the Health Professions Council and Prof Tim Noakes is a medical doctor, not a practising clinician, but he is a medical doctor, he is a very, very well-known medical doctor. He is not only nationally well-known, he is internationally well-known, but a medical doctor. So should a layperson ask him a question he cannot not answer. He has to be part of the medical profession. He is part of our team. He is part of our group. He cannot just, he cannot answer just as an author and a sport scientist. He is always a doctor, and that is my concern."

And quoting from the respondent's submissions, paragraph 256, they said:

"Prof Pienaar agreed that when a writer publishes a book expressing a scientific view, books also have no privacy settings and that in an open and democratic society books can be read by anyone and are totally public in nature and are intended to be consumed by as much of the public as possible."

Going back to the pro forma's submissions, paragraph 65:

"Which hat was the respondent wearing when he answered the initial tweet? That of a scientist or that of a medical practitioner? This is a question of fact and the answer lies in the nature of the question asked, the nature of the reply and the content of the letter of reply. The latter had been written at

a time when the memory of the Twitter exchange was still foremost in the respondent's mind. The pro forma submits that the tweets point conclusively to clinical material and the replying tweet was a clinical answer. The content of the letter of reply indicates that the respondent was responding to the complaint that he had given medical advice and that he was protecting his reputation as a medical professional."

And paragraph 66:

"The pro forma argues that in the absence of a contemporaneous denial from the respondent that he acted as a scientist when he tweeted the replying tweet to Ms Leenstra, and with the content of his letter of reply suggesting that he acted as a medical practitioner, any allegation to the contrary smacks of a retrospective reconstruction of the evidence to evade the charge. It is a feeble defence that lacks any merit and deserves to be rejected out of hand."

Paragraph 5.6.1:

"The pro forma acknowledges that the HPCSA does not have guidelines advising practitioners on the use of social media. …[And at the end of that paragraph it says:] …The current guidelines indicate that they cannot be construed as a complete set of rules of conduct. The HPCSA is empowered to deal with any complaint of unprofessional conduct referred to it."

5.6.2:

> "Practitioners are implored to apply the set of ethical guidelines in booklet 1 to any situation that is not covered by the guidelines and to apply the ethical principles enunciated therein to determine whether they are transgressing the ethical constraints of registration as a medical practitioner."

Paragraph 5.6.3:

> "Respondent provided advice without consultation, provided advice without history taking and examination."

Paragraph 2.20:

> "Medical practitioners are guided to provide advice by the HPCSA after doing a medical consultation, which involves taking a detailed history, doing an examination and performing special investigations if required."

Paragraph 9.8.2:

> "The respondent's act of giving advice without a proper medical assessment, giving advice without explanation, is improper and unprofessional."

Paragraph 9.8.3:

> "The pro forma argues that he has discharged the onus in this matter and has proven the elements of the charge against the respondent."

And 9.8.4:

> "The pro forma has proven that the respondent provided unconventional dietary advice to breastfeeding babies on a

balance of probability."

9.8.5:

"In the premises the conviction on the charge should be made."

Besides this argument, in paragraph 158 of this – and this is of the pro forma's submissions in response to the respondent's submissions – the pro forma indicates as follows:

"The respondent burdened this committee with reams of paper, much of which addressed LCHF in adults, with little or no relevance to the narrow ambit of the charge."

And also on the submissions in response, paragraph 161:

"Respondent took up a considerable amount of trial time giving evidence on aspects that have no relevance to the charge."

Still submissions in response by the pro forma, paragraph 23:

"Respondent alleges that the pro forma's submissions that this hearing has nothing to do with the LCHF dietary advice in adults is wrong."

As far as the booklets and ethical guidelines are concerned and relevant legislation the pro forma relied on the following; at paragraph 547, the pro forma's submissions, paragraph 1.1 of booklet 1 – I quote from that booklet:

"Being registered as a healthcare professional with the Health Professions Council of South Africa (HPCSA) confers on us the right and privilege to practise our professions. Correspondingly practitioners have moral or ethical duties to

others and society. These duties are generally in keeping with the principles of the South African Constitution …[which is act number 108 of 1996] …and the obligations imposed on healthcare practitioners by law."

Paragraph 549 pro forma submits as follows, still booklet 1:

"Paragraph 1.3 states the following …[and they quote from that booklet:]

> 'More specific ethic guidelines and rules are derived from these general ethical guidelines. They offer more precise guidance and direction for action in concrete situations. They also make it possible for the HPCSA to implement sanctions against transgressors.'"

Paragraph 550, still quoting from booklet 1, the pro forma says the following:

"Paragraph 1.4 states the following …[and they quote:]

> 'It is impossible however to develop a complete set of specific ethical prescriptions applicable to all conceivable real life situations. In concrete cases healthcare professionals may have to work out for themselves what course of action can best be defended ethically. This requires ethical reasoning.'"

Paragraph 552 pro forma quotes from booklet 2 and paragraph 2.1 thereof, he quotes:

"Failure by a practitioner to comply with any conduct determining these rules or annexures to these rules shall

constitute an act of omission in respect of which the board concerned may take disciplinary steps in terms of chapter 4 of the act."

They said actually "will take," and it is incorrect, it says "may take."

Paragraph 2.2 of booklet 2 says:

"Conduct determined in these rules or an annexure to these rules shall not be deemed to constitute a complete set of conduct and the board concerned may therefore inquire into and deal with any complaint of unprofessional conduct which may be brought before such board."

Paragraph 2.3 of booklet 2 they also quote in their paragraph 552:

"At an inquiry referred to in sub-rule (2) the board concerned shall be guided by these rules, annexures to these rules, ethical rulings, the guidelines and policy statements which the board concerned …[and they actually quoted 'and the board makes from time to time,' it was or the council] …or council makes from time to time."

Paragraph 553 pro forma argues as follows, and this relates to paragraph 21 of booklet 2, this relates to performance or professional acts, they quote a certain section of booklet 2 and paragraph 21:

"Performance or professional acts: A practitioner shall perform, except in an emergency, only a professional act for which he or she is adequately educated, trained, and sufficiently

experienced and under proper conditions and in appropriate surroundings."

And that is more specifically paragraph 21 and subparagraphs (a) and (b).

As far as booklet 17 is concerned of the Health Professions Council, its title is, the subject matter is *General Ethical Guidelines for Good Practice in Telemedicine*, it deserves mention and this was on page 149 of pro forma's evidence bundles. I think this actually came out of bundle 2 – subject to correction, but I think it did. Just looking at the introduction – and that was on page 149 – it is obvious in terms of paragraph 1.1 the following about booklet 17:

"The objective of the South African Telemedicine subsystem as established by the National Department of Health is to deliver healthcare services at a distance to South African communities in under-served areas. The system has been established to alleviate the human resource crisis as experienced and is geared to improve the links and communication between developed healthcare facilities and the underdeveloped rural areas. Different categories of healthcare practitioners will be involved."

And of most importance, paragraph – this gives the gist, what is booklet 17 actually about, paragraph 1.3, this is still on page 149, pro forma's bundle 2, that is the evidence bundle:

"All telemedicine services should involve a healthcare provider where there is an actual face to face consultation and physical

examination of a patient in a clinical setting. The consulting practitioner will communicate information to the servicing practitioner, who will then provide the necessary assistance."

The pro forma complainant also in his argument referred to rule 27A of the *Guidelines for Good Practice in the Healthcare Professions*, issued by the Health Professions Council of South Africa, and 27A – and that is Government Gazette R717 of 2006 – indicates the main responsibilities of health practitioners and of relevance to this hearing what was quoted was 27A:

"A practitioner shall at all times …[that is capital A, 27A, and then subparagraph (a):]

(a) Act in the best interests of his or her patients;

(b) Respect patient confidentiality, privacy, choices and dignity;

(c) Maintain the highest standards of personal conduct and integrity;

(d) Provide adequate information about the patient's diagnosis, treatment, options and alternatives, cost associated with each such alternative, and any other pertinent information to enable the patient to exercise a choice in terms of treatment and informed decision-making pertaining to his or her health and that of others; …[and then:]

(f) Maintain proper and effective communication with his or her patients and other professionals."

So unless anybody wanted a quick comfort break, may I proceed? Thank you.

In disciplinary inquiries of the Health Professions Council of South Africa the onus has to be discharged by the pro forma complainant on a balance of probabilities. The maxim *res ipsa loquitur* has no application in South African law to matters involving alleged medical negligence or unprofessional conduct.

The following was stated by Innes CJ – that is chief justice – in *Van Wyk v Lewis, 1924 (AD) 438,* that is from paragraph 444:

> "Now that maxim means simply what it says, that in certain circumstances the thing, that is the occurrence, speaks for itself because it is frequently employed in English cases where there is no direct evidence of negligence. The question then arises whether the nature of the occurrence is such that the jury of the court would be satisfied in inferring negligence on the mere fact that the accident happened. It is really a question of inference. No doubt it is sometimes said that in cases where the maxim applies the happening of the occurrence is in itself *prima facie* evidence of negligence."

And further in *Van Wyk v Lewis* the following was stated:

> "The maxim *res ipsa loquitur* cannot apply where negligence or no negligence depends upon something not absolute but relative. As soon as all the surrounding circumstances are being taken into consideration there is no room for the maxim."

See also *Pringle v Administrator Transvaal*. It is a 1990 decision *(2)*

SA 379 (WLD). See also *Castell v De Greeff*, *1993 (3) SA 501 (C)*. In *De la Rouviere* (a very well-known case) *v SA Medical & Dental Council, 1977 (1) SA 85 (NPD)*, quote – this is from page 97:

> "There can be no quarrel with an approach that the respondent …[sorry, the respondent was in that case the council] …is the body par excellence to set the standard of honour to which its members should conform and to decide upon proved facts whether or not a member's conduct conforms thereto. There are however two legs to the inquiry of this nature: To establish the facts, and then upon those facts to conclude whether or not the proved conduct falls short of the required standard, which enjoins the body holding the inquiry to determine firstly whether sufficient facts have been proved to its satisfaction to support the charge, and secondly whether the charge so supported constitutes improper or disgraceful conduct. See also *De Beer v Raad van Gesondheidsdienste van Suid-Afrika, 2007 (2) SA (AD) 502* and *Thuketana v Health Professions Council of South Africa 2003 (2) SA 628 (T).* See also *Health Professions Council of South Africa v De Bruin 2004 (4) All SA 392 (SCA)* where in paragraph 23 on page 403 the court said the following …[and that is paragraph (d) of 403, page 403:]
>
> > 'The council is thus truly a statutory *custos morum* of the medical profession, the guardian of the prestige, status and dignity of the profession, and the public interest

> insofar as members of the public are affected by the conduct of members of the profession to whom they stood in a professional relationship." See also *Veriava & Others v President SA Medical & Dental Council and Others, 1985 (2) SA 293 (T).*"

Our courts have repeatedly cautioned that it should not be readily accepted that a professional person such as for example an advocate or a medical practitioner would act in an unprofessional manner.

In *Olivier v Kaapse Balieraad, 1972 (3) SA 485 (A)* the following is stated at page 496, and I quote – it is in Afrikaans:

> "Dit is derhalwe duidelik dat in 'n geval soos die onderhawige bewys op 'n oorwig van waarskynlikhede die toepaslike maatstaf is. Die toepassing van 'n maatstaf van oorwig van waarskynlikhede beteken natuurlik nie dat in 'n geval soos die onderhawige ligtelik aanvaar sal word dat 'n advokaat hom aan wangedrag skuldig maak nie want daar sal rekening gehou moet word met die onwaarskynlikheid dat 'n advokaat hom sal skuldig maak aan gedrag wat in stryd is met die reëls wat in sy beroep nagestreef word."

This was also applied in the mentioned *De la Rouviere* decision as far as medical practitioners are concerned, or the approach followed.

In *Mitchell v Dixon* [spelt] – and if you are wondering why I keep on doing this, the person transcribing is not legally trained, will not necessarily be able to spell the words or they may be spelt

incorrectly – *1914 AD 519* the court indicated the following at page 525:

> "A medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but is bound to employ reasonable skill and care. …[Further on:] …No human being is infallible and in the present state of science even the most eminent specialist may be at fault. …[Further on:] …A practitioner can only be held liable in this respect if his mistake is of such a nature as to imply an absence of reasonable skill and care on his part, regard being had to the ordinary level of skill in the profession. In *casu* in considering whether the appellant's conduct was culpable to the extent of being negligent, or going even further, unprofessional, it is essential that his conduct is not judged from the perspective and with the wisdom of hindsight. …[See also the *Van Wyk v Lewis* case I quoted above.]"

As explained in the judgment in *Castell v De Greeff* – which I have also quoted above, I quote – and this is on page 511:

> "Indeed a practitioner is not to be held to be negligent merely because the choice he made or the course he took turned out to be the wrong one. The test remains always whether the practitioner exercised reasonable skill and care, or in other words whether or not his conduct fell below the standard of a reasonably competent practitioner in his field. If the error is one which a reasonably competent practitioner might have

made it will not amount to negligence. If it is one which a reasonably competent practitioner would not have made it will amount to negligence." See also *S v Kramer 1987 (1) SA 887 (WLD)* and in *Buls & Another v Tsatsarolakis 1976 (2) SA 891 (T)* on page 893 the following was said:

> 'Obviously the reasonable man's test of negligence cannot be applied to an activity calling for expertise that the ordinary man does not possess and so there emerges the reasonable expert, a practitioner like the actor, both possessing no special flare or frailty, the reasonable doctor, the reasonable auditor, the reasonable mechanic. It is he who looks over the actor's shoulder to see if he attains the standard of his peers for if he does not he is negligent. That standard it is held is not the highest level of competence. It is a degree of skill that is reasonable having regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs.'"

Strauss in *Doctor/Patient and the Law, 1991* – I unfortunately do not have a page number – points out that whilst the dictum …[which I have quoted in *Mitchell v Dixon*] …still holds good today one should not lose sight of the fact that medical science has made tremendous strides since 1914 and in today's technological age are vastly superior to those which were available 90 years ago.

Furthermore, despite all scientific advances medicine is still not and probably never will be an exact science comparable to mathematics. In addition, much depends on the skill and experience of the individual practitioner.

On a number of occasions our courts have confirmed the principle that the standard of care expected from a general practitioner is not the same or as high as that which is expected from a specialist. In this regard the following was stated in *R v Van der Merwe, 1953 (2) PH H124 (W):*

> "When a general practitioner is tried the test is not what a specialist would or would not do in the circumstances because a general practitioner is not expected to have the same degree of knowledge and skill and experience as a specialist has."

See also the *Buls & Another v Tsatsarolakis* which I have quoted above.

In line with the aforesaid judgments there is a very real danger of measuring the reasonable practitioner against too high a standard or judging him too strictly and that should be guarded against. In this regard the principles enunciated in the following cases are equally applicable, and that is *Broom & Another v The Administrator, Natal, 1966 (3) SA 505 (N)*, and that was at page 516, *Minister of Transport v Bekker, 1975 (3) SA 128 (O)*, that was at page 132, *S v Burger, 1975 (4) SA 817 (A), page 879*, and *Minister of Police v Skosana, 1977 (1) SA 31 (A), page 32*, and then *Mukheiber v Raath & Another, 1993 (3) SA 1065 (A)*

The following was stated in *S v Burger*, which I have given the citation, on page 879:

> "One does not expect of a reasonable man any extreme, such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity or the trained reflexes of a racing driver. In short, a reasonable man treads life's pathway with moderation and prudent common sense."

And in *Minister of Police v Skosana*, which I have given you the citation of, the learned judge said the following, page 42, paragraph C:

> "The reasonable man is presumed to be free from both over-apprehension and over-confidence."

This committee is obliged to avoid adopting the approach of the armchair critic when judging the conduct of the respondent. It is trite that after the event even a fool is wise, and *Van Wyk v Lewis*, which I have given the citation, at page 461 to 462:

> "We cannot determine in the abstract …[and that was concerning a surgeon but same principles applicable] …We cannot determine in the abstract whether a surgeon has or has not exhibited reasonable skill and care. We must place ourselves as nearly as possible in the exact position in which the surgeon found himself."

Equally applicable to this case we have to place ourselves in the exact position in which the respondent placed himself – found himself, sorry.

Various nutrition expert opinions were presented and that of Prof Pienaar, the bioethicist. Determination of expert evidence will usually not involve considerations of credibility but rather the examination of the opinions and the analysis of their essential reasoning. The approach of the House of Lords in the medical negligence case of *Bolitho v City & Hackney Health Authority* was approved by the Supreme Court of Appeal – and I am not going to give that quotation because it is in our Supreme Court of Appeal decision *Michael & Another v Linksfield Park Clinic (Pty) Limited & Another* – let me just get that citation. Citation is *2001 (3) SA 1188 (SCA)*, and in this case, that is the *Michael & Another* case, Supreme Court of Appeal, the court said the following:

> "The court must be satisfied that such opinion …[that is of course expert opinion] …has a logical basis, in other words that the expert has considered comparative risks and benefits and has reached a defensible conclusion."

And further – I was quoting from paragraph 37, then from paragraph 39:

> "A defendant can properly be held liable, despite the support of a body of professional opinion sanctioning the conduct in issue, if the body of opinion is not capable of withstanding logical analysis and is therefore not reasonable. However, it will very seldom be right to conclude that views genuinely held by a competent expert are unreasonable. …[Further in that paragraph:] …Only where expert opinion cannot be logically

supported at all will it fail to provide the benchmark by reference to which the defendant's conduct falls to be assessed."

In the context of expert evidence it needs to be emphasised that where direct and credible evidence and the facts are in conflict with expert evidence such evidence must carry greater weight than an expert, however experienced he may be. I refer you there to *Mapota EA v Santam Versekeringsmaatskappy Beperk, 1977 (4) SA 515 (A)*.

Also in the *Michael & Another v Linksfield Park Clinic*, which I have already given you the citation of, the following was said, and that was at page 1201:

"One cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts a judge may be seduced into a position where he applies to the expert evidence the standard which the expert himself would apply to the question whether a particular thesis has been proved or disproved, instead of assessing (as a judge must do) where the balance of probabilities lies on a review of the whole of the evidence."

The court itself – and in this case the Professional Conduct Committee – and not expert witnesses, is obliged to determine questions of reasonableness and negligence on the basis of the various expert opinions presented. This committee must

not abdicate its decision-making duty.

And on expert opinions and their analysis see also *Louwrens v Oltwage, 2006 (2) SA 161 (SCA*.

And before I go on to the final section I would like a cup of coffee. What time is it?

FEMALE SPEAKER: 11 o'clock.

CHAIRPERSON: 11 o'clock, yes. Can we please say quarter past 11 sharp? Thank you.

PROCEEDINGS ADJOURN PROCEEDINGS RESUME

CHAIRPERSON: Please no noisy cameras, no flash while we are busy and no noisy cameras. Thank you.

This Committee is bound by the Health Professions Act and its various regulations. For this reason various collateral issues raised during argument will not and cannot be canvassed here. To do so, would entail this committee exceeding its statutory mandate. It also deserves mention that this committee's purpose and mandate is not to set nutritional or dietary standards for the world, South Africa or babies.

We are bound by the four corners of the charge, establishing the prudent facts and determining whether same indeed constituted unprofessional conduct in the particular circumstances of this case.

This Committee is tasked with a rather unique set of facts and circumstances.

Firstly, it is to the best of our knowledge the first of its kind at the HPCSA involving the use of social media as well as one of the

first of its kind in South Africa involving social media in general.

Secondly, the use of the various platforms of social media by healthcare professionals have not been directly regulated by the HPCSA in legislation, regulations, ethical rules or guidelines. As an aside, the HPCSA would appear to be seriously lagging in this regard.

The respondent has not practised clinically as a medical practitioner for many years. He is not a specialist physician nor a paediatrician, neonatologist or dietician by training.

The standard of reasonableness by which his actions as a medical practitioner must be measured in terms of South African law is that of a reasonable medical practitioner acting in the same set of circumstances.

Although the complaint of Ms Strydom refers specifically to the term medical nutrition therapy the pro forma complainant preferred to use the terminology medical or clinical advice.

Indeed the Preliminary Committee of Inquiry referred in the points of inquiry to unconventional advice and the charge sheet was also so formulated that the respondent provided unconventional advice.

The pro forma complainant contends that the respondent cannot be an expert witness in his own case. It is trite that a respondent has a right to remain silent. He also has the right to testify in his defence and to call witnesses, including expert witnesses. This is his constitutional right.

It is inevitable that on occasion a respondent's testimony may amount not only to evidence on the facts but also to expert evidence. This would depend on the facts of the case and the particular charge.

Certain matters are indeed a question of fact which this committee can decide. Other aspects of the charge, for instance whether or not the alleged advice was unconventional, falls within the realm of expert evidence and this committee would be hard pressed to make any decision without the assistance of experts.

One bears of course in mind the perception or possibility of subjectivity and bias testifying in one's own case but this does not detract from the inherent right to do so and this perception or possibility exists even when one is not giving expert evidence. And one of course runs the risk of being cross-examined and any bias being exposed, as is the case with all witnesses whether expert or not.

There is no case law or legislation in South African law prohibiting the respondent from giving expert testimony. From the manner in which the charge has been couched it would in any event not have been reasonable or fair and neither constitutional towards the respondent as a scientist with expertise in sports nutrition to prohibit him from giving expert evidence.

It, however, deserves mention that this committee is not a rubberstamp and is not obliged to follow all opinions or expert opinions which witnesses may have expressed in this matter,

especially on aspects which this committee is quite capable of deciding without an expert.

Establishing the facts and making a finding on the facts is the task of this committee. This requires scrutiny of the tweet by Ms Leenstra and the response by the respondent, not in vacuum, but in the context of Twitter as a social media platform and in the context of the entire Twitter or tweet thread.

To do otherwise would result in a gross injustice.

Facts must always be decided on all the surrounding circumstances prevailing at the time.

It is worth mention that one must not confuse admissibility of evidence with evidential or probative weight to be attached thereto.

The pro forma complainant was permitted various indulgences in this case, as was the respondent.

From the manner in which the charge sheet was formulated, read with the further particulars, it cannot without further ado simply be said that the matter concerns only infant nutrition and that all evidence in respect of adult nutrition is irrelevant.

For one, this is not common cause but vehemently contested and in dispute.

Secondly, the tweet concerned the diet of breastfeeding mothers. It deserves mention that breastfeeding mothers are also adults with the same rights, duties, obligations and freedom of choice as all adults, including matters concerning their nutrition and that of their babies.

After all, it is not babies and infants who are tweeting, reading tweets or deciding which diet to follow amidst a confusing minefield of information and divergent opinions, it is their adult mothers.

Thirdly, the pro forma conceded that adult nutrition is not totally unrelated to infant nutrition, and fourthly, on all the expert evidence tendered the relationship between infant and adult nutrition would appear to be somewhat controversial.

Much is made by the pro forma complainant in argument of the respondent's letter of reply to the HPCSA dated 2 May 2014 as being evidence of his intention and what he intended to convey when he tweeted on 5 February 2014 when matters were still fresh in his memory.

On scrutiny of this response by the respondent, it would not be a fair and reasonable assumption to make in the circumstances that he did not respond comprehensively or give the complaint due attention.

For one, the response is four typed pages and he also attached an annexure dated April 2014 regarding a response to the draft dietary guidelines submitted to the Minister of Health in New Zealand by the Human Potential Centre of the University of Auckland, the alleged relevance of which he adduced testimony before this committee.

From his own testimony in this regard it was blatantly apparent that he took this response seriously and gave it considerable attention but was somewhat perplexed by the actual complaint

levelled against him by Ms Strydom.

The respondent is not a trained lawyer and there is no indication that he consulted a lawyer or indeed saw any need before responding to the letter of complaint. Had he done so, a legal professional may have advised him otherwise and in characteristic legal fashion may have analysed each and every conceivable nuance and referred to extensive case law and legislation.

If anything, the respondent replied in a manner perhaps more typical or expected of a scientist, having regard to the evidence relating to his background as a non-practising medical practitioner, a scientist, an author and LCHF proponent.

In fact the only thing he did not do was actually say that he was a scientist and author and acting in such capacity on Twitter, the precise nature of the hat he was wearing being something an experienced lawyer may have capitalised on.

He may, however, be forgiven therefor as he appeared to hold the view, not entirely without reason, that most people at the HPCSA and the Medical and Dental Board actually knew that he was a scientist, author and LCHF proponent and would perhaps have known or assumed that he was acting in his capacity as such due to his public status.

After all, Ms Strydom herself referred to his celebrity status in her letter of complaint as a fact. Prof Pienaar was also at pains to emphasise the respondent's very well-known public status, domestically and internationally. Prof Vorster also referred thereto.

The HPCSA had also some two years prior to the complaint on 9 October 2012 made a media statement for immediate release relating to and warning the public of the dangers of, *inter alia*, the LCHF diet titled *HPCSA warns on high protein low carbohydrate diet*. See pages 92 to 93 of pro forma bundle 1. It concludes the media report as follows, and this is on page 93:

> "The public is urged to consult a registered dietician or nutritionist who has the expertise to design a balanced healthy diet if they want to lose weight and not be swayed by media reports suggesting expensive high protein and saturated fat diets with long term unhealthy effects."

See also page 94 of pro forma bundle 1 and when I say bundle 1 I am referring to the evidence in this regard where the *Daily News* links the HPCSA press release with the respondent, although his name was not specifically mentioned in the HPCSA media report.

There are other clear indications that the HPCSA knew exactly who the respondent was some time before and at the stage when the complaint was lodged and took exception to his nutritional views specifically relating to the LCHF diet.

The use of the words "advice" and "medical nutritional therapy" by Ms Strydom in her letter of complaint and the respondent paraphrasing according to the pro forma complainant and using the terminology "medical advice" is a question of semantics and neither here nor there.

Ms Strydom also used the word "advice" and she had after all lodged a complaint with the HPCSA against the respondent in his capacity as a medical practitioner.

The council would hardly have had jurisdiction if Ms Strydom had indicated that she was lodging the complaint against the respondent in his capacity as a scientist or an author.

Besides, Ms Strydom used the term medical nutritional therapy which was not terminology either the Preliminary Committee of Inquiry, the charge sheet or the pro forma complainant used in depicting the unconventional unprofessional conduct of the respondent.

Who can then expect the respondent to have kept to the exact wording used by Ms Strydom if neither Prelim, the charge sheet or the pro forma complainant did?

The respondent could not have reasonably been expected to respond as an astute and seasoned lawyer in the circumstances.

On the allegation that the respondent retrospectively during the hearing changed his nutritional stance for babies from an unconventional no-carb stance at the time of the ill-fated tweet based on his letter of reply to carbs in line with the current RSA paediatric dietary guidelines, the following deserves mention: Ms Leenstra's tweet referred to LCHF, an acronym standing for low carbohydrate high fat. It is not in dispute that this is what the acronym means.

The respondent's responding tweet also referred to the very

same acronym, LCHF. At no point in the tweeted question or response did either Ms Leenstra or the respondent refer to either no carbs or define LCHF as meaning no carbs or such low carbs as to make the carb content negligible.

Neither did either refer to or define or restrict LCHF to any particular meaning or definition, least of which the so-called ketogenic diet. At least one other tweeter, Dr Gail Ashford, noticed this and ventured comment as follows:

"I do not understand where the danger lies. Honest query. Low carb is not NO carb. It is not high protein either."

And also a subsequent tweet to Ms Strydom by Dr Gail Ashford:

"Eating fresh real food from grass-fed animals, free-range eggs and full fat products with vegetables, beware?"

At no stage did the respondent's letter of reply dated 2 May 2014 say no carbs for babies. When I say carbs, I mean carbohydrates.

In fact his entire response is devoted to a reasoning regarding a low carb diet as opposed to a diet high or higher in carbs, subsequently leading to all types of illnesses in children and later adult life.

There is one generalised statement by the respondent in his letter of reply relating to humans not needing carbs. See paragraph 2, pro forma bundle 1, page 15.

However the whole gist of his letter of reply was certainly not that of a no or zero or carb-free diet for babies. In fact the

respondent even indicates in the third paragraph of paragraph 5 that he advised both his son and daughter to raise their children on low carb high fat diets.

It is thus difficult to fathom how anyone could read the respondent's tweet or his letter of reply in context to mean or intend to convey a no carbohydrate diet for babies.

Even the Preliminary Committee of Inquiry could not have understood the respondent's letter of reply to mean a total deviation from dietary guidelines or an absolute no carb diet as column 3 of pro forma bundle 1, page 6, relating to the Preliminary Committee of Inquiry resolution, sums up the respondent's reply on 2 May 2014 as follows:

> "The respondent denies the allegations levelled against him and submits his methods are substantiated by dietary guidelines."

Although it may be debated as to what exactly Prelim understood from the respondent's letter of reply and to exactly what dietary guidelines are referred to in the Prelim resolution, this is mere speculation. After all, the annexure to the respondent's letter of reply clearly contains a response to draft dietary guidelines and were certainly not dietary guidelines as such, albeit in New Zealand.

In his letter of reply on top of page 2, the respondent furthermore acknowledges as follows. It is page 50 on top, the first paragraph, page 50, it is the second page of the letter of reply:

> "Neither she nor I can be certain of what is the best diet onto

> which one should wean a child. As a result we are allowed to come to our own conclusions based on our professional experience and training. It is perfectly my right to conclude that her advice is wrong and that children should not be weaned in the manner she has been taught."

It must also be noted that the respondent was at that stage unaware of the expert report which had been submitted to Prelim by Prof Vorster.

On reading of the initial tweet of Ms Leenstra of 3 February 2014, the following is evident:

She initiates the particular tweet. She addresses same directly to the respondent with twitter username Tim Noakes @ProfTimNoakes and Ms Sally-Ann Creed, a dietician and co-author of the book *The Real Meal Revolution*.

It must have been apparent to Ms Leenstra just from the Twitter username of the respondent that he was either a professor or regarded himself as one or preferred this Twitter username.

It is not known what exactly Ms Leenstra knew of the respondent at the time and whether she knew for a fact that he was a scientist, author, professor and/or non-practising medical practitioner. Neither is it known whether and to what extent she had read any of the books he may have written or co-authored at the time, including *The Real Meal Revolution*.

It is not unreasonable to assume on the probabilities that she had some prior knowledge of him and his book *The Real Meal*

Revolution as she addressed the tweet specifically to him and simultaneously to the dietician and co-author of the book and used the acronym LCHF which is associated with the respondent and also referred to in the book *The Real Meal Revolution*.

Had she not had some basic knowledge of the respondent, especially as an author and LCHF proponent, at the very least she would hardly have addressed the tweet to him and Ms Creed or phrased the question or used the acronym as she did.

The Twitter account of the respondent at the time provided the following description, and I am going to read from my phone, so I am not checking my mails, I am just reading from my phone. Okay so yes, I am quoting:

> "*Lore of Running*, *Challenging Beliefs*, *Waterlogged*, *Real Meal Revolution*, *Raising Superheroes* author, emeritus professor, runner, low carbohydrate diet proponent."

Other than addressing the respondent in the form of his Twitter username, Ms Leenstra does not otherwise specifically address the respondent formally as in "Dear Professor" or "Dear Doctor" which one would have expected if she was in awe of him and even more so if she was appointing or addressing or regarding him as her doctor.

Of course one must have regard to the basic style in which tweets are written, the purpose of Twitter and the restriction to 140 characters per tweet. In any event the specific tweet is simultaneously directed to the respondent and the dietician who also so happens to have co-authored the book *The Real Meal Revolution*

with him.

There was, however, certainly nothing stopping her from addressing him in this fashion if she had wanted to as on a count of characters used in this tweet, it would appear that together with spacing between words she had only used some 109 of 140 characters.

She uses the acronym LCHF. She refers to breastfeeding moms. She is worried that all the dairy and cauliflower which breastfeeding moms eat may equal or cause winds in babies.

Her question is thus posed in the plural and relates to breastfeeding moms and babies. Incidentally the Prelim resolution and charge sheet also referred to unconventional advice on breastfeeding babies, thus in the plural.

There is no indication whatsoever that she is posing a personal or a dual personal and public question. There is no indication that she is a breastfeeding mother herself. There is no indication that she has a baby and if so, the age or health status of her baby. There is no indication that either she or her baby is in any need of medical intervention, a medical or clinical consultation or medical or clinical advice from a medical practitioner.

She does not explain what LCHF means or what she means or intends to convey by the use of this acronym. No participant in the thread of tweets asks her what the acronym means or what she means or intends to convey by the use of the acronym.

One may reasonably accept that Ms Leenstra knew something

about LCHF or had heard of this acronym somewhere before, otherwise it begs the question as to why she used it.

Where exactly she had heard of this acronym, when and in what circumstances and what she understood thereby we will never know as she never testified.

One must not assume something short of a medical emergency by Ms Leenstra's use of the word "worried" in her initial tweet and neither read into baby winds more than that, namely a relatively normal bodily function of babies and humans in general for that matter. Baby winds are not an illness. Presumably Ms Leenstra meant more winds in babies than one would normally expect or want in a healthy baby, specifically winds caused by the breastfeeding mother's consumption of dairy and cauliflower.

Ms Leenstra could have meant or intended to convey anything by her use of the term "worried". People use all types of words, exaggerations, emotions and subjective expressions in their communications with others. Social media is certainly no exception.

One must not assume the worst or anything nail biting by the mere use of the word "worried". Worry is a subjective state of mind.

It deserves mention that Ms Leenstra initially tweeted on 3 February 2014. If there was any real cause for concern or worry, one can safely assume that as a concerned and hopefully devoted mother she would in all probability not have been wasting precious time on Twitter and would have used the time to consult face to face with a medical practitioner, paediatrician or the casualty or trauma

unit of her nearest local hospital or clinic if she indeed suspected that her child was ill.

In any event, such is the nature of Twitter that Ms Leenstra had no idea whether the respondent and/or Ms Creed would actually read and if so, respond to her tweet and if so, respond in a certain period of time or provide her with any useful information for that matter. Indeed Ms Creed never responded.

Had there in reality been any actual cause for worry or concern then Ms Leenstra would in all probability hardly have sat around waiting for some future uncertain event to determine her baby's fate.

The respondent was certainly not obliged to read, respond to the tweet or respond in a certain period of time or to provide Ms Leenstra with any specific information.

Indeed the respondent only replied to her initial tweet some two days later on 5 February 2014. As indicated Ms Creed never responded at all.

There is no indication on the respondent's Twitter account that he was a registered medical practitioner or indeed practising as such. This could certainly never have been inferred by Ms Leenstra or anyone following the Twitter thread.

There is no indication that Ms Leenstra intended to consult with or extract knowledge or information or any form of medical or clinical advice from the respondent in his capacity as a medical practitioner.

There is simply no indication that Ms Leenstra regarded herself as a patient of the respondent or regarded, addressed or appointed him as her medical practitioner – not expressly, not tacitly.

It is noteworthy that the respondent addressed his response directly to both Ms Leenstra and Ms Creed, thereby leaving the door open for Ms Creed to comment if she so wished.

Had he regarded Ms Leenstra as his patient, he would hardly have also addressed the tweet to Ms Creed. It is thus obvious that he recognised the possibility of others having opinions, albeit similar or different from his own and partaking in the tweet thread and the Twitter discussion based on their own expertise and training. This was also in accordance with his testimony and is precisely what happened. Such is the nature of Twitter.

It is common cause that the respondent did not answer Ms Leenstra's question or concern. The respondent acknowledged during testimony the fact that he did not in fact know the answer to her question. He was happy for others to partake in the tweet discussion, and express their opinions on her specific question, which they did.

Ms Leenstra did not receive a direct response to her question from the respondent and on finding the various comments in the Twitter thread confusing, presumably including the response by the respondent, she ultimately decided to take Ms Strydom up on her suggestion and consulted with Ms Strydom telephonically in her capacity as a dietician.

It is quite apparent in the context of the entire Twitter thread that the initial tweet and the respondent's response thereto were part of an information gathering process by a consumer, nothing more significant and no more medical an action than googling on the worldwide web before making an informed decision and taking a course of action.

Had Ms Leenstra intended to be the respondent's patient or appoint him as her doctor, then surely she would have made her intentions clear; would have addressed him on Twitter as such and in more courteous or formal terms appropriate to initiating a doctor/patient relationship, especially as she did not know him personally and had never consulted with him in such capacity before.

There is no way in which one can infer that by tweeting an open-ended general question that she was hoping for some version of a free medical consultation. She could not assume that he would ever respond and if this was really her intention, why would she have simultaneously addressed the tweet to Ms Creed and why would she even in the circumstances have attempted to consult with or obtain medical or clinical advice from the respondent online on a social media platform subject to public scrutiny?

Ms Leenstra did not testify. One must be cautious to assume or in assuming that she did not know what she was doing, or that she was a vulnerable ignorant user who did not understand the basic concept and public nature of Twitter. She was obviously not

concerned with privacy, confidentiality or trust issues, was posing a general question and was not divulging personal or private information to the respondent in his capacity as a medical practitioner. She was voluntary partaking in social media communication and sharing her concerns and information gathering for all and sundry to see and partake in should they be so inclined. It was her voluntary choice and constitutional right to associate with others on Twitter, including the respondent, and to divulge as much information, including any personal or private information as she cared to.

The respondent was for all intents and purposes on the probabilities at best someone she had heard of or read about. It makes more sense and is far more probable that she would pose such questions to him with the knowledge that he was indeed an author, especially of *The Real Meal Revolution*, a proponent of the LCHF diet and a scientist; that she had heard of and about him in such capacity and felt at liberty to address him on Twitter in the informal manner in which she did.

On the facts she was certainly not in awe of him and did not hesitate to dismiss his volunteered response and follow the advice of others or another course of action.

One cannot impute a doctor/patient relationship to either the patient or the doctor given the available evidence in this case. There is no evidence of such a relationship. In fact the circumstantial evidence proves exactly the opposite.

Are we to assume that a relationship is actually possible without the doctor and/or the patient being aware thereof and consenting thereto? Where are the patient's rights to informed consent, autonomy and freedom of choice, expression and association then in terms of the Constitution and booklet 3 of the HPCSA, *The National Patients' Rights Charter*?

One can likewise not assume that Ms Leenstra was some unenlightened or uninformed vulnerable and helpless consumer who happened to stumble upon Twitter by chance.

The tweet thread begs the opposite. Ms Leenstra knew exactly what she was doing and what she wanted, asked her question and acquired information on Twitter; did not receive a direct response from the respondent to a breastfeeding related query, decided to ignore whatever information or opinion the respondent offered and subsequently decided to consult telephonically with a dietician.

Ms Leenstra responded to the tweet of the respondent on the same day, that being 5 February 2014. This particular response by Ms Leenstra comprises 113 characters of 140 permissible characters, if one counts spacing between words as a character. She also did not address the respondent formally as in "Dear Doctor" or the like in this tweet.

In this responding tweet it is not entirely clear whether Ms Leenstra is asking a personal or a general question or a dual purpose question as the first part of her question seems to suggest

that she is asking a personal question as a breastfeeding mother by the use of the words:

"Okay, but what I eat comes through into my milk".

Yet, the second part of her question in the same sentence becomes general yet again by the use of the words:

"Is that not problematic for baby and their winds at newborn stage?"

She does not say "my baby" or "my baby's winds" or the like. It is certainly not unusual or uncommon for persons to ask personal questions or questions relating to themselves in a generalised manner and the same counts for the use of personal terminology in general questions.

It is also not uncommon for questions to have a dual or multiple purpose. Such is the complex nature of human communication.

The fact that it somewhat later in the thread of tweets indeed became apparent that Ms Leenstra was a breastfeeding mother herself, looking for knowledge or information for her own purposes in relation to her own baby, who may have been newborn, does not take the matter further as that was not apparent at the stage when she initiated her tweet and received the responding tweet from the respondent.

In any event the respondent did not respond to this particular replying tweet for the reasons advanced during his testimony and the charge does not relate to his failure to respond thereto.

One can safely assume that Ms Leenstra would not have been wasting time and tweeting if her baby was in actual need of medical treatment, urgent or otherwise, and this is borne out by her two mentioned tweets and her subsequent tweets.

In fact there is no indication at any stage that Ms Leenstra or her baby was in need of any medical or clinical treatment or advice at any stage or that she required the services of a medical practitioner.

As far as Ms Leenstra's response to the respondent's tweet is concerned one must be cautious not to read any form of urgency or medical emergency in such response. Just because she repeats the question certainly does not elevate her to the position of a concerned fragile or vulnerable mother or unsuspecting member of the public.

If anything, she was perhaps intending to convey nothing more than exasperation due to the fact that her actual initial question had not been answered directly by the respondent.

In her confidential report to the HPCSA Prof Vorster on page 45 of pro forma bundle 1, paragraph 2.1, sums up Twitter as follows, as defined by Wikipedia:

> "An online social networking and micro-blogging service that enables users to send and read short 140 character text messages called tweets. Registered users can read and post tweets but unregistered users can only read them. Tweets are therefore in the public domain. Users access Twitter through

the website interface, SMS or mobile device application."

One must be mindful of making assumptions or drawing inferences in this matter, especially inferences which are not the only reasonable inferences to be drawn in the matter and in certain respects not in keeping with the actual facts.

One must just not assume in this day and age of technology that the general public using Twitter or reading Twitter comments, including breastfeeding mums and Ms Pippa Leenstra, are ignorant and vulnerable users in need of protection from themselves and others.

Indeed with the information technology explosion the general public is far more enlightened and informed than it has ever been in the past.

In South African law there is no direct prohibition on the use of social media platforms, including Twitter, by the general public and/or medical practitioners. Indeed in terms of our Bill of Rights persons have the right to freedom of conscience, thought, belief and opinion. People also have the freedom to associate with whomsoever they please, albeit doctors, dieticians, authors, scientists, celebrities, etcetera, and people have the right to freely express themselves, which includes freedom of the press and other media, including social media, the freedom to receive or impart information or ideas, academic freedom and freedom of scientific research.

Of course there are exceptions or exclusions and limitations to constitutional rights, including the so-called section 36 limitations clause. No right is absolute. The law is often concerned with the delicate balance of various affected entrenched rights.

Understandably from the mere nature and limitations of Twitter, there is no provision for elaborate questions or answers. It is intended as a short cryptic and fast information sharing mechanism and was not designed for longwinded explanations or references. That would indeed defeat the whole purpose of Twitter.

There are other mediums and social media networks that are more suitable for lengthy debates and voluminous references. In fact evidence has been led, and it has been argued, that more detailed information on LCHF was available on blogs which were being written at exactly the same time by some of the same participants partaking in this particular Twitter debate.

Indeed even Ms Strydom tweeted a participant that she would resort to blogging for more breastfeeding related information.

This Committee agrees with the pro forma complainant that Twitter does not lend itself to proper consultations, history taking, diagnosis, investigations and clinical examinations required in the usual, traditional or standard doctor/patient relationship. It, however, finds on the facts that Ms Leenstra was never seeking any of these options for herself or her baby.

Indeed there is nothing to suggest that Ms Leenstra and others participated in the Twitter thread were not aware of Twitter's

limitations and purpose.

Is it not for this precise reason that Ms Strydom indicated that she would blog and not tweet more information on breastfeeding on the request of another Twitter consumer and Ms Strydom for the very same reason suggested a one on one consultation, albeit telephonic, with Ms Leenstra?

Incidentally, much was made of the respondent's erroneous use of the term "wean". Indeed in one of the tweets referred to above Ms Strydom herself tweeted to another consumer as follows:

> "We will post a blog on healthy eating for breastfeeding moms and infant weaning. Dangerous to wean an infant onto LCHF diet."

All and sundry were seemingly acutely aware that Twitter is a very public forum and not conducive or even remotely on par or comparable with a face to face traditional consultation where large amounts of information and advice may be shared in a professional, clinical, private and confidential setting. It is then that issues of trust, privacy and confidentiality would clearly arise, away from the prying eyes of Twitter and the general public. There would also be clarity and no ambiguity as to the nature of the professional relationship or the hat which anyone was wearing.

This committee agrees with the pro forma complainant that the respondent never actually answered Ms Leenstra's concerns regarding baby winds due to the consumption of dairy and cauliflower by breastfeeding mothers.

It also agrees that the respondent never obtained any background information or history regarding either Ms Leenstra or her baby.

This committee also agrees with the pro forma complainant that a member of the public may not or would not have known what either Ms Leenstra or the respondent meant or intended to convey by the use of the acronym LCHF or what exactly the respondent meant by “Key is to wean baby onto LCHF, neither would anyone have known what the definition or proportions of percentages of an LCHF diet is in the context of complementary feeding or weaning.

The undefined use of the acronym in the circumstances indeed permits an extremely wide interpretation. This committee thus agrees with the pro forma complainant that there is ambiguity in the respondent's replying tweet.

However, the law does not and cannot protect every user in cyberspace from themselves, their ignorance or downright absurd behaviour. If anyone had wanted more information, they could simply have tweeted and asked and hoped for a timeous intelligible and unambiguous response, for nothing is guaranteed. They could also have Googled, blogged or used other internet and/or also social media platforms - or not. They could have likewise made appointments and consulted with dieticians, medical practitioners and other healthcare practitioners in a traditional professional setting - or not.

If they randomly followed any cyber advice or information out

of context without a clear understanding of the actual nature of the advice or information and even misunderstanding same, it was at their own peril.

It has been said that Dr Google can vacillate between a diagnosis of a mild headache to clinically dead with a few clicks of a mouse.

This committee disagrees that the respondent by tweeting as he did, thereby intended to dilute the breastfeeding message. This is not the only reasonable inference to be drawn in the circumstances.

In fact the respondent, if anything, would appear to be very supportive of and not at all undermining of breast milk based on his praise thereof in the tweet. There is nothing to suggest that he was advocating immediate cessation of breastfeeding, discouraging breastfeeding or had a problem with breast milk. Even Prof Kruger commended him in this regard during her testimony.

This committee disagrees with the pro forma contention that concessions made by the respondent during his testimony that what was missing from the tweet was an indication that the key was to wean the baby onto LCHF some time in future, and that he should, hindsight being a perfect science, amidst the confusion, preferably have used the terminology real foods instead of LCHF, amounted to proof or an admission of unconventional advice.

In any event it is common knowledge that babies will grow and become adults and have to be weaned from the breast at some

stage and complementary foods introduced.

As far as Prof Pienaar is concerned, Prof Pienaar referred to literature and opined that the respondent's actions amounted to so-called affirmative action and by tweeting in the manner in which he did a the doctor/patient relationship was formed, whereupon the respondent incurred certain duties and obligations as a medical practitioner.

He was also of the opinion that there was serious potential harm caused by the respondent in the circumstances and he was extraordinarily concerned with the theoretical risk to poor vulnerable unsuspecting public and patients in cyberspace.

This committee cannot agree with this opinion in relation to the actual facts of this case.

Furthermore to even remotely regard the responding tweet of the respondent in the circumstances as affirmative action and a crucial moment when a doctor/patient relationship was formed is antiquated at best and certainly not in keeping with the Constitution, the information technology explosion or social media trends. There was also no potential harm proven.

This committee does not dispute the veracity of the literature quoted by Prof Pienaar, only the application of the literature and ethics by Prof Pienaar to the facts in this matter.

The inferences drawn by Prof Pienaar are not consistent with the proven facts. The proven facts do not exclude another or other reasonable inferences save the inferences sought to be drawn by

Prof Pienaar.

Information sharing, media and social media is no longer what it was. Not too long ago the social media explosion of today was not envisaged and if it was, considered to be the figment of a very disturbed imagination.

It is not unheard of that conventional science and medicine may become bad and even mad science or medicine. Something initially considered outrageous may on the other hand subsequently become established practice. History is indeed riddled with examples, some rather extreme. A good example is that of Dr Ignaz Semmelweis, the father of the germ theory, and early pioneer of antiseptic procedures. He introduced hand disinfection standards in obstetrical clinics. He was severely ostracised by his peers and society even after he had proven how he could prevent infant mortality. He spent his last days in an asylum at a relatively young age.

Today it is established practice to follow his protocol and scrub and hygienise and so prevent the spread of germs causing infection, disease and death.

We live in a dynamic, not static environment. Humans are ever involving, as is knowledge related to medicine, science and technology. Unconventional does not equate *per se* to unprofessional. It would depend on the facts in a particular case.

On the evidence before this committee it cannot be found that the pro forma has proven on a balance of probabilities that the respondent gave advice or information on Twitter which was not

evidence-based.

On the facts and all the expert evidence tendered it would appear that the respondent's advice was sufficiently aligned to prevailing South Africa paediatric dietary guidelines at the time, such that the only reasonable inference to be drawn is not that the advice was or could be deemed to be unconventional. In any event whether or not the advice or information was conventional really only becomes relevant if this committee finds on the facts that the respondent was indeed acting in his capacity as a medical practitioner.

After hearing all the expert evidence it is clear that the issue of the LCHF diet is complex and an evolving field of science and nutrition.

While the committee is aware of evidence that there is a strong link between diet and the fast growing global challenge of obesity and illness, this committee cannot pronounce upon the LCHF diet as such or the relationship between infant and adult nutrition.

This committee makes no credibility finding as far as any of the nutrition experts is concerned and in terms of the case law relating to expert testimony quoted above and on the totality of all the expert evidence presented before this committee it cannot be said that the testimony of the respondent and his witnesses do not also have a logical basis.

Summary:

The majority of this committee, being four of the five votes, find the following on the facts:

1. The pro forma complainant has not proven on a balance of probabilities that the respondent was acting in his capacity as a medical practitioner or in any dual or multiple capacity, which included the capacity of a medical practitioner, when he tweeted Ms Leenstra on 5 February 2014.
2. On the probabilities the respondent was acting as an author and proponent of the LCHF diet.
3. The pro forma complainant has not proven on a balance of probabilities that the respondent gave medical and/or clinical and/or medical nutritional advice and/or medical nutrition therapy when he tweeted Ms Leenstra on 5 February 2014.
4. On the probabilities the respondent provided information to Ms Leenstra as an author and proponent of the LCHF diet. At best his response was ambiguous and not a direct response to her query. At worse the response, without clarification, may be interpreted as confusing or unclear. To understand the response properly and in the context of the LCHF diet there would have had to have been meaningful dialogue between Ms Leenstra and the respondent. It is common cause there simply was none.
5. The pro forma complainant has not proven the existence of a doctor/patient relationship on a balance of probabilities.
6. On the facts and probabilities there was indeed no

doctor/patient relationship.

7. The pro forma complainant has not proven on a balance of probabilities that the respondent contravened any law, regulation or ethical rule. It has certainly not proven on a balance of probabilities a contravention of regulation R237 of 6 March 2009 in that this committee could not find on the facts that the respondent advised or diagnosed anyone or any baby on his or her physical health status.

8. The pro forma complainant has not proven on a balance of probabilities that the respondent gave unconventional advice or advice which is not evidence-based.

9. On the facts this committee finds that no actual or potential harm was proven, neither that any information provided on Twitter by the respondent, whether unsolicited or not, was dangerous or life-threatening.

10. The pro forma complainant has thus not proven on a balance of probabilities that the respondent as a medical practitioner acted unprofessionally and in a manner that is not in accordance with the standards and norms of the medical profession.

Prof Noakes, on the charge of unprofessional conduct the majority of this committee FIND YOU NOT GUILTY.

---ooOoo---

CHAIRPERSON: As indicated initially the minority judgment will be read by Dr Liddle. Dr Liddle you may proceed.

DR LIDDLE: Thank you, Madam Chair. I will not be long, it is just a couple of pages. I firstly wish to apologise to all the legal practitioners present ...[intervenes]

CHAIRPERSON: Sorry, before you continue. Sorry, I do not think it is – first let this gentleman finish what he is doing. Thank you. Sorry, otherwise it is…

DR LIDDLE: I do not accept the term "judgment" although I am in the minority. I cannot presume to profess a judgment and all I sort of wanted to do was to give my reasons why I have voted against the rest of the committee.

Firstly, when looking at the charge, Adv Van der Nest in the final submissions at point 8.2 advised, and I think that was the only applicable point that we should consider that it was unconventional in the sense of not being evidence-based and that it did not conform to the guidelines referred to.

That I think was the only applicable advice. I do not think any of the others really could be used in determining.

I felt that the pro forma in evidence and submissions had conclusively shown that the respondent is registered as a medical practitioner, and I just want to put in brackets there jurisdiction, and provided sufficient evidence to compel me to vote that Prof Noakes be found guilty as charged.

The pro forma presented evidence regarding jurisdiction that by virtue of Prof Noakes's registration the HPCSA had legal jurisdiction and also that the respondent was allowed ample

opportunity to contest this point.

It is interesting to consider that if that opportunities had been used and if it had been proven that there was no jurisdiction, this case would have ended at the beginning and it is open to speculation why the respondent did not exercise or argue that point.

I will record my reasons for my vote, but mostly based on Prof Noakes' evidence.

Unconventional:

The advice is unconventional in the extreme in that there had been extensive work and collaboration in public health globally towards exclusive breastfeeding and the usage of the term weaning had been phased out.

Prof Noakes admitted that his terminology was unconventional. He also suggested that he should have used other terminology, and the reference is volume 16, page 2450, lines 24 to 25.

No evidence was led that he had submitted any changes or corrections on Twitter subsequent to the initial tweet. Instead he commented that errors in his tweet should have and were corrected by other tweeters in "the nature of Twitter". It is volume 17, page 2516, lines 20 to 22.

Prof Noakes also accepted that ill-defined messages in Twitter are open to millions of people (volume 16, page 2404) and that the reader could have interpreted his tweet to infer discontinuation of breastfeeding (volume 16, page 2404, line 4).

He further in evidence agreed that the term “weaning” may not be conventional "but is acceptable to him" (volume 16, page 2371, lines 8 to 9).

Much has been made about the limitation of a tweet not allowing for long windedness and only being limited to 140 characters. However it is interesting to note that there is no limitation on the number of tweets or even consequential tweets and so two tweets would mean 280 characters, three consequent tweets would mean 320 characters and so and so.

I feel Prof Noakes was wrong to even have created an element of doubt against such an important public health message that took years to entrench.

Harm:

The absence of any recorded harm is I believe a fortunate consequence and not an indication of innocence and also does not exclude unreported and presently unknown evidence of harm.

Experience:

Prof Noakes confirmed that he had no clinical and/or nutritional experience in paediatrics or neonatology. He further evidenced that such experience was irrelevant (volume 17, page 2584, lines 9 to 20).

He further misunderstood and misquoted an important paediatric article (volume 17, pages 2698 to 2704).

It is thus patently obvious that tweeting on breastfeeding and infant diets fell outside his scope of expertise.

LCHF:

The term is poorly defined and open to confusion. This confusion has been further emphasised and aggravated by Prof Noakes who testified:

1. LCHF has several definitions.
2. LCHF is potentially different to low carbohydrate high fat diet (volume 17, page 2563, lines 11 to 25).
3. LCHF fits entirely with South African paediatric dietary guidelines (volume 17, page 2565, lines 4 to 5).
4. His book *The Real Meal Revolution* is the only resource to get further answers other than to e-mail him (volume 18, page 2633).
5. He further admitted to several errors in *The Real Meal Revolution* and the associated webpage.
6. *The Real Meal Revolution* does not deal with complementary feeding (volume 17, page 2565, lines 14 to 20).
7. Banting had been substituted for LCHF in *The Real Meal Revolution* (volume 16, page 2378, line 23 to page 2379, line 7).

Unsolicited advice:

Prof Noakes did not adequately answer questions as to why he made the unsolicited reference to weaning. The impression that the reason was only to punt his books was never refuted nor was any contrary evidence led. He further modified his assertions that carbohydrates were not essential in infancy by evidencing the need,

"the need to correct that statement at this time" (volume 16, page 2443).

Ethics:

A registered medical practitioner does not abrogate his ethical responsibility even on public platforms outside the doctor/patient relationship. One needs to always be aware of statements made in whatever capacity but especially so on public platforms.

Adv Van der Nest confirmed this in his final submissions.

Prof Noakes, according to Adv Bhoopchand, fell short on each of the four pillars of bioethics.

The further difficulty is the creation of the digital imprint on social media that remains permanently entrenched. The tweet remains still without any correction by author, A1 scientist, professor, Dr Noakes, who remains respected and revered by millions, including myself.

In conclusion I reiterate my conviction and vote that Prof Noakes be found guilty as charged. Thank you.

CHAIRPERSON: Thank you.

In terms of regulation 11(2) either party may appeal to an Internal Appeal Committee of the HPCSA by filing a notice to this effect within 21 days from today's date.

On a lighter note, Prof Noakes, if you would like to change your mind yet again you may in fact appeal and demand to be found guilty.

That then concludes these proceedings.

MR BHOOPCHAND: Madam Chair, may I?

CHAIRPERSON: Thank you.

MR BHOOPCHAND: Thank you to the committee as well as, for the majority as well as the minority judgment. We would like to thank our colleagues on the opposite side for their success in this matter and we would like to thank the members of the committee and I reiterate that this whole process has been quite trying on each of you in executing your public service in terms thereof. Thank you so much.

CHAIRPERSON: Thank you very much.

MR BHOOPCHAND: Sorry, just one last aspect and that is that before this is asked of the pro forma legal team, that we will consider the judgment very carefully. We have 21 days before we decide whether we wish to institute an appeal or not. Thank you.

CHAIRPERSON: Yes, obviously.

MR VAN DER NEST: Thank you, Chair. We will be magnanimous in victory.

CHAIRPERSON: Thank you, and I would like to thank everyone. This has taken its toll on private practitioners, on peoples' private and professional lives. I would like to thank the legal teams, very competent legal teams on both sides, and also extensive heads of argument and argument before this committee, which made our task considerably easier. There was extensive evidence, extensive exhibits and committee members did go to great lengths and I will always think fondly of the day of the first two-day hearing where Dr

Saloojee asked are we going to finish. At the end of the day I would like to say as chairperson it has been an absolute privilege. Thank you very much.

PROCEEDINGS ADJOURN

CERTIFICATE OF VERACITY

We, the undersigned, hereby certify that **so far as it is audible to us**, the aforegoing is a true and correct transcript of the proceedings recorded by means of a digital recorder in the matter between:

HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA

and

PROF T NOAKES

DATE OF INQUIRY	:	2017-04-21
NUMBER OF PAGES	:	85
DATE COMPLETED	:	2014-04-22
TRANSCRIBERS	:	 FY AUCAMP [Page 3765 – 3812]
		 L SCHLUTER [Page 3813 - 3849]