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StatPearls [Internet]. Treasure Island (FL): StatPearls Publishing; 2018 Jan-.

Defamation

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Last Update: November 13, 2018.

Introduction

Case Report

A 33-year old female underwent elective breast augmentation and botulinum toxin injections 2 weeks ago. After the dressing came off, she was not satisfied with the result. The surgeon had told her she had to wait until the swelling and edema subsided, only then would she see the cosmetic benefits. The patient went on social media and posted negative reviews about the surgeon. She claimed she had suffered major complications from the breast augmentation and that the surgeon ignored her. She suggested that other patients not visit this surgeon for cosmetic surgery because he was reluctant to see her after the surgery. Her opinion was that the surgeon was not skilled and incompetent. The surgeon came across the review on Yelp and filed a lawsuit for defamation. In court, the surgeon had the appointment book, pre- and post-surgery photos and all the communications between himself and the patient. The surgeon claimed in court that he never neglected the patient, asked her to follow up and wait for the swelling to subside before she would see the cosmetic result. She instead defamed him on social media, and the jury sided with him. The surgeon also claimed that this false statement about him has resulted in a decline in new patients seeking surgery. The patient lost the lawsuit and ended up paying the surgeon over \$300,000 in damages.

Introduction

People can write or say anything on the internet, and defamation cases are on the rise. One key reason is that lawyers and potential litigants are aware of the amount of money awarded by the court system. In several recent cases, litigants have been awarded millions of dollars because of defamation, and it is expected that this will continue. Since defamation immediately downgrades one's reputation, which can quickly result in a loss of income, these cases are heard by the court system without much delay.[1][2][3][4][5][6][7]

A cosmetic surgeon learns that someone has anonymously been posting negative reviews online. The review suggests this cosmetic surgeon is a bad surgeon with deceptive practice, never follows up with patients, cut corners in surgery that result in many complications for the patient. This defamation can have a tragic consequence and can quickly ruin the professional's name and character; furthermore, it can lead to a drop in the surgeon's business. In time, the surgeon notes that patient numbers are declining and income is dropping.

Consequently, the surgeon may have to change his or her practice. However, if these reviews are untrue, then the surgeon can file suit for defamation. In court, the surgeon must prove that none of the alleged complaints are true. They can do this by providing facts, which can include patient reviews, show how they manage their clinical practice, and present complication rates. They can present testimonials from many patients who are satisfied with their surgery. This seems simple, but it requires an enormous amount of time and money to fight defamation cases.

What is defamation?

Defamation usually involves publication, without any justification, of a derogatory and/or false statement regarding another individual or party. Defamation may either be slander or libel. Libel is a defamatory statement in writing or

other visible forms; whereas, slander is a spoken defamatory statement.[8]

A defamatory statement has the potential to injure the reputation of another individual, which may lower the opinion of the affected person in society; and this may result in him or her being disliked, hated, ridiculed, feared, or scorned. In most cases, the defamed person will almost always claim that it resulted in a loss of income.

Defamation was not historically considered to be a big issue in the healthcare industry. However, social media has resulted in an increase in defamation cases. Healthcare workers who post or make negative comments about other patients/healthcare workers can face serious legal action. There have already been many reported cases involving health care professionals in which allegations of defamation have been raised. This article presents several cases of defamation in the healthcare industry to demonstrate potential risk areas during communication.

- After a nurse resigned, her supervising manager wrote defamatory statements in a letter of reference. She mentioned that the nurse was unstable. The nurse could not get another job, but when she found out what the letter of reference had stated, she filed suit. She did not have a history of mental illness. She wanted a part-time job so that she could look after her mother, who was ill.
- A parent was questioned about suspected sexual abuse and one of the nurses, thinking that the parent would not hear, remarked that the father looked like an abuser. The parent went to a lawyer, and the nurse was charged with defamation of character and HIPPA violation. The child had not been sexually abused.
- During an internal hospital review, a nurse made negative remarks about 2 of her colleagues claiming that they were most likely stealing leftover medications. The colleagues filed a lawsuit claiming defamation of character. The hospital settled out of court. There was no evidence that any medication had ever been reported stolen.
- A doctor was wrongfully dismissed, and the employer stated that the doctor had committed malicious acts. The doctor filed a wrongful dismissal and defamation of character lawsuit. The hospital had to rehire the doctor and settle for an undisclosed amount. The person in human resources who made the information public was fired.
- A manager called in a nurse and berated her for releasing patient information to her colleagues, an allegation that was false. The manager claimed that the nurse was untrustworthy and unreliable. The nurse filed a lawsuit for defamation of character. It was later proven that another co-worker had released the patient information. The manager was assigned another position.
- A nurse educator commented to her colleagues that one of the nursing students was lazy and cheating in the exams. The information was hearsay, and the student filed a lawsuit against the nursing instructor and was awarded a lump sum. The nursing manager was assigned other duties.
- A senior surgeon wrote up a surgery resident for being negligent during the care of the patient, and said that the resident was unfit to be a surgeon. The surgery resident filed suit that his character was defamed and that there was no evidence to substantiate what the surgeon had written. The case went to trial, and the resident won. The court was told that a complication had occurred during surgery, but the surgeon was present at all times and it was he who controlled the events in the operating room. The hospital and the surgeon had to pay a huge penalty and court fees. The resident completed his training; the surgeon's privileges were curtailed.

Although it may seem that it takes time and money to fight these defamation charges; however, a healthcare professional's reputation is often the most valuable asset they have.

Function

Why are defamation cases on the rise?

Many people are compelled to speak out about things that they see that are unfair or unjust. Furthermore, with the availability of social media, instead of speaking their observations and feelings, people write what they think and feel online where nothing is private. While social media can help improve medical practice, generate a positive reputation,

and increase referrals, at the same time, social media is also used by former patients, disgruntled or unhappy patients, competitors, former employees, or others who can quickly destroy the reputation of a business.[9]

Two things that have increased the risk of defamation are the mobile phone and the internet. These days when people are not busy writing their thoughts on cyberspace, they are verbally expressing themselves on their digital devices. Not all comments rise to the level of defamation; healthcare workers should understand that they have legal rights and not all statements are a violation, and the same applies to the consumer.

While some patients may defame healthcare workers, sometimes, healthcare workers also defame patients. Healthcare workers are especially sensitive to negative comments made by their patients, because not only do they hurt, these comments can also ruin a business.

Unfortunately, healthcare workers may be quick to jump to litigation when they see negative comments. However, it is important to understand that not every comment is defamatory and some of the comments are opinions. For example, when a patient reports that his or her health care worker is careless because he or she is always rushing around the clinic, they are only expressing an opinion. The courts try and differentiate between an opinion and a fact; opinions are often hard to prove.

On the other hand, when a patient makes a statement like, "I think that Doctor X looks like a pedophile," it may sound like an opinion, but if it is untrue, it can be considered defamation.

What is "defamation per se?"

In some cases, defamation may be considered "defamation per se," which means that the statement is not true on face value. Examples of defamation per se, as applied to health care workers, are statements like falsely accusing someone of a crime. Examples include someone saying that a healthcare worker has been indicted for healthcare fraud, a healthcare worker saying that a patient transmitted a sexually transmitted infection to their child, or a patient stating that the healthcare worker has lost his/her medical or nursing license.[10]

Defamation per se can damage the reputation of a healthcare worker by saying false things like he or she lost his license when it is not true. The defamation may lead to a loss of patients, and consequently, income. All the healthcare provider must prove is that he never lost his license. In most defamation cases, once the truth comes out, the litigant wins.

Where are defamatory comments usually posted?

Patients generally post complaints about doctors on Healthgrades, Yelp, and ratemds.com. Once a comment is posted on these websites, physicians are not able to reply or identify the individual posting the comments. On the other hand, when comments are posted on Twitter or Facebook, the healthcare worker can quickly identify the individual who posted the comments. Some physicians feel they must reply to negative comments, but the reply must fall within the constraints of HIPAA; otherwise, they can be punished for violating the privacy act.

People can post comments anywhere online, and in many cases, they can write under a fictitious name. When this happens, it is often impossible to know who the author is, and most websites will not reveal the names of their users. Going to court can be costly.

Issues of Concern

How Healthcare Workers Can Protect Their Practice and Reputation

Patients today view medicine as a business, and thus, the healthcare professionals should remember the adage "the customer is always right." [11] To prevent false or misleading information from being posted, the following principles are recommended:

1. Regularly check out sites like Ratemds, Yelp, Facebook, and others to determine what is being posted about the clinic, and the staff and the service provides. Determine who is posting the material and their main complaint.

On some websites like YouTube, Google or Facebook, one can set up alerts so that you can get a notification of each posting or comment. This will counter the problem before it becomes widespread.

2. No matter how negative the comment, do not quickly reply to the complaint. There are hundreds of instances where business owners have replied to their customers and regretted it. The best advice is to take a timeout; calm down and then decide on a response.
3. If the professional knows the person who is posting comments, they should determine their address and phone, and connect with him or her privately to resolve the issue. Limit the interaction online because in general, the public may not be sympathetic to healthcare professionals.
4. If one chooses to reply, the tone should not be condescending, argumentative, or rude. Offer to help the patient with a follow-up visit. Do not post any medically-related information about the patient. This is a HIPAA violation that carries greater penalties than defamation.
5. If a person believes they have been unjustly defamed, it is best to get assistance from legal counsel. There are many rules and regulations for fighting defamation, but suing patients usually creates public animosity and rage, and can irreversibly harm a practice. In most cases where businesses resort to suing the customer for defamation, harmful publicity is generated. A great deal of thought must be given before resorting to litigation.
6. Legal Advice: There are many attorneys who specialize in dealing with defamation cases. In most states, the statute of limitations to sue for defamation is 12 months from the time of publication. Going to a lawyer is not always the right answer; win or lose the lawyer will get his money; however, the healthcare provider is at risk of losing patients.
7. If the statement made by an individual is extremely negative or inflammatory, one should first follow the rules of the social network's platform on dispute resolution. For example, one may want to write to Facebook, Yelp or Twitter to complain about the posting. In many cases, the social media site will not allow for defamatory statements to be posted on its platform. If this does not resolve the issue, then litigation may be the next step.
8. Educate employees: When someone posts negative comments about a medical worker or a practice, the first thing is to write back. However, all employees should be cautioned against writing back. In most cases, the public opinion usually always supports the patient. Keep calm and give it some thought. Support employees and explain the plan of action. Usually, a healthcare establishment can never fight customers and win online. All healthcare workers should know that they can be held responsible for any defamatory remarks made by their workers, including non-healthcare staff. So educate your workers on how to communicate with patients and other healthcare workers. Plus, you have to be very careful that you do not release any patient information and violate HIPPA.
9. Watch what you say: Healthcare workers may not be aware that even communication with a patient about other patients or other doctors can lead to a case of defamation. Be professional and limit conversation to what is medically important. Do not degrade other healthcare workers in front of patients and do not say negative things about patients to others.
10. Many times, healthcare workers are asked to write patient reports for referrals or consults. It is important to keep statements based on facts and refrain from making any other comments beyond the clinical issue of relevance. Problems are more likely to arise when a comment extends beyond objective clinical opinions and becomes critically judgmental of another healthcare worker. Because of the intense rivalry between healthcare workers for patients, there may also be ongoing personal or professional animosity. Thus, any negative comment fueled by the animosity can quickly lead to escalation to a defamation lawsuit. When writing reports, read over the letter and omit anything that ridicules others.

Clinical Significance

What does it take to prove defamation in court?

While many people say or write things about others, in most cases, these comments are opinions and not defamatory statements. Three key features that must be proven in court to win a case of defamation include the following:

- What does the communication itself convey to the public? Does it tarnish or damage the reputation of the individual concerned? A verbal or written statement can sometimes be deemed to be defamatory even if the author has no intention of defaming another person.
- Does the communication lack any justification? If the communication is outright false, then it can be considered defamatory.
- Where is the communication published? In most cases of defamation, the communication must be published in a public forum or conveyed as a message to a third party. Today the most common method of defamation is via social media.

Other Issues

Advice for healthcare workers for writing on social media

Because many healthcare workers now take to the media to write about their encounters with patients, here are some precautionary warnings:

1. Change the character: If writing about a bad experience with a patient, do not state any name. Make the story sound fictional. Remove all similarities from the person whom you are writing about. The more negatives things you have to say, the more changes one should make in that character.
2. Never rush in replying to any negative comments on social media. Replying exacerbates the situation and enflames the media.
3. If you are writing about patient cases, then omit the name and place of the patient. Never post patient photos, unless you have written permission. Even then, consult with risk management about HIPPA rules about posting patient images.
4. When responding to patients, do not use words like cheat, crooked, corrupt, or criminal. Only write verifiable facts and not a personal emotional response.
5. If as a physician you have had a negative experience with another patient, doctor, or business, do not be caustic and say things like "do not conduct business with XYZ." Instead tell your story, and hopefully, the readers will get the message
6. If you have facts that support your argument, support them with links to external sources. When you state something, mention that it is an opinion and not a fact.
7. Rely upon publicly disclosed information that can contain factual material.
8. If you want to post something negative and are not sure if you will be held liable for defamation, do not post it.
9. If one is accused of posting a defamatory statement, delete it. Not only will this tactic save much money, but it will also preserve one's reputation.
10. Finally, when writing anything, remain on the side of truth, it is the best defense to counter any defamation.

Questions

To access free multiple choice questions on this topic, [click here](#).

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