MEDICO-LEGAL ARTICLE

What about the right to a good name?

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With the explosion of negligence claims and the accompanied publication of the relative doctor's name, in addition to unproven facts and allegations of negligence, it is perhaps good to consider the doctor's right to a good name. This independent personality interest involves the law of defamation.

There is of course the right to freedom of speech and freedom of the press. The right to a good name has not specifically been protected by the Human Rights Chapter of our Constitution (except possibly by way of human dignity) but the right to freedom of the press is expressly mentioned in Section 15(1) of the Human Rights Chapter.

In practice, doctors experience vulnerability after getting involved in negligence claims, or even harassment claims. What can they do to protect themselves against slander and what are the boundaries of such a battle?

The Law of Personality deals with these questions and sets benchmarks against which to measure one's own case. When a claim arises, the Medical Protection Society handles these claims with expertise, but is often found lacking sufficient backup for the defendant doctor's good name and honour.

One's standing in society determines one's good name or *fama*. The Orthopaedic Society, and for that matter any doctor, has for millennia, enjoyed a good standing in the community. The community thinks highly of doctors and specialists who have sacrificed years of training in difficult circumstances, often to the detriment of their own family.

Is it not time to stand together as doctors, and orthopaedic surgeons in particular, to stem the flow of the general tendency of lack of respect for medical professionalism?

The opinion of the community in general is a measure standard called the *boni mores*. Here the reasonable man emerges, normally balanced, right thinking, not hypercritical or oversensitive. This representative of the general community is the crucial adjudicator of whether some allegations are defamation or should be seen as defamatory.

For instance, abusive language alone, does not affect one's standing in society. In addition defamation of all the orthopaedic surgeons as a group does not prove that one's good name has been dragged through the mud. However, it is another matter if one's competence or vocational abilities are at risk.

It is therefore clear that defamation of one's good name needs to be intentional (*animus injuriandi*) and not a mistake or a jest. The reasonable bystander however, could regard it as a joke. Wrongful or intentional publication of words or professional behaviour has the tendency to undermine one's standing in society, one's good name or one's reputation – no publication, no diminished esteem.

Publication should be to at least one person, and that same person should be aware of the intentional infringement of one's right to his good name. Communication of one spouse to another should be unhampered and can therefore not constitute defamation. Attorney-client privilege is excluded as well.

If one can prove that defamatory words are uttered within hearing distance of outsiders, or that they are published in newspapers and magazines, then defamation takes place, as one can expect that others will read the publication.

There are grounds of justification to cast suspicion on a person's vocational capabilities or competence. The first one is that of privilege. In this case someone has the duty or an interest but then has the limitations to act within a certain scope or limit. Malice excludes protection of privilege.

The second ground of justification is that of judicial or quasi-judicial proceeding where statements are made by witnesses, or litigants giving evidence. These statements however should be relevant to the matter concerned.

The third ground of justification is the reporting of proceedings of court or parliament or public bodies. This reporting must be fair and substantially accurate or correct. The report must be true and impartial and must be in the public interest.

The fourth ground of justification is a fair comment where an opinion is given and not a factual remark is made. This comment however, should be honest and *bona fide* and without malice.

Defamation however is not constituted only by the person who makes the remarks, but also by the one who repeats the remarks, and the one who confirms or directs the attention to these remarks. For instance, in the case of newspapers, it is not only the writer of the article who is responsible but also the editor, the printer, the publisher and even the owner. There is *prima facie* wrongfulness of remarks like this, if the reasonable man of ordinary intelligence and development feels that such a publication undermines one's reputation or good name. This objective, reasonable-man test is crucial.

The fifth ground of justification is private defence. This should however be relevant and not exceed the reasonable, necessary comments.

The sixth ground of justification is provocation and compensation, for instance during a quarrel. This should however not be validated out of proportion.

The last ground of justification is consent similar to an initiation ritual where it is known to take place.

The remedy against defamation is the *actio iniuriarum* where the person who has been slandered can institute an action in court against that person who, with improper motives, made the defamatory remarks and then made them public. A claim can also be brought in the case where financial loss has been suffered because of this defamation.

Is it not time to stand together as doctors, and orthopaedic surgeons in particular, to stem the flow of the general tendency of lack of respect for medical professionalism? Is it not time to counteract against patients who or newspapers that, far too casually, make defamatory and public remarks concerning the above-mentioned professionals?

Is it not time to take a stance in public against the spirit of the times that defamation will not be tolerated by the Orthopaedic Society with regard to their members? Should the Medical Protection Society not be approached with the proposal that paying members not only have the right to a defence against claims, but also the right to be protected against any intentional infringement of their right to their good name? It they agree to the proposal, would it be a problem to tax their members for this specific service?

Defamation of our good name could potentially destroy our career and even our lives.

Let us attempt to prevent information regarding justified claims for negligent professional behaviour being published in the press, and let us institute a process in which any claim, misconduct or negligence be adjudicated by an appointed panel or by colleagues. Let us as a Society of Orthopaedic Surgeons stand together to enable us to compel lawyers who are jumping on the bandwagon of negligence, to first submit their claims to a private hearing like an pre-appointed ombudsman.

The current process of the Health Professional Council of South Africa is not suitable as it is insufficient and overloaded with all the health profession's complaints. Let us put pressure on the Medical Profession Society to settle claims earlier and not to protract cases over years, thus allowing the opportunity for them to be published in newspapers and magazines. Let us stand together on this subject before it is too late. Let us sit and address these issues now and be positive about the protection of each other's good names.

Let us for once show the world that it is a privilege to be an Orthopaedic Surgeon, as it is acquired by hard and dedicated work. But let us remind the world of our dignity as professional people, there to serve the community. Let us imprint in peoples' minds that defamation is not to be taken lightly, as appropriate steps will be taken. Let us show the world that we are proud to serve as medical specialists but that we are not there to be ridiculed and trampled on. The vocation of Orthopaedic Surgeon is a profession to be proud of and to be treasured by society as a whole.