

DOMESTIC VIOLENCE, ASSUALT AND RAPE:
INFORMATION FOR DOCTORS

Where a patient comes in to either an emergency room or a doctor's surgery with a complaint that she is the survivor of Gender Based Violence, there can be a few (legal) courses of action of which doctors must be aware. This affects issues such as being called as a witness, forms to be filled out, etc.

As it is estimated that 1 in every 4 women are survivors of gender-based violence in their lifetime, all medical practitioners are at some stage, whether knowingly or unknowingly, in contact with this group.

Some research also indicates an increase of incidences of male survivors, either by female persons or by male partners.

From a public health perspective research indicates that instances of gender-based violence underlie a variety of other health problems, physically and psychologically. This fact has prompted some to lobby for a universal screening process to be undertaken on all patients.

Criminal charges

The patient may choose to lay a criminal charge against the perpetrator on the basis of assault or rape. Due to the specific definitions of these crimes, evidence has to be presented that supports the factual elements of these crimes.

The Criminal Procedure Act provides the guidelines on how this process is to be started and followed in bringing the matter to Court.

Once a charge has been laid, it is up to the Investigating Officer and the Prosecutor to gather all the relevant and required information which will enable them to bring this perpetrator to justice.

CRIMINAL LAW (SEXUAL OFFENCES AND RELATED MATTERS) AMENDMENT ACT 32 OF 2007

DEFINITIONS

“child” means -

- (a) a person under the age of 18 years; or
 - (b) with reference to [sections 15](#) and [16](#), a person 12 years or older but under the age of 16 years,
- and **“children”** has a corresponding meaning;

“sexual act” means an act of sexual penetration or an act of sexual violation;

“sexual offence” means any offence in terms of Chapters 2, 3 and 4 and sections 55 and 71(1), (2) and (6) of this Act;

“sexual penetration” includes any act which causes penetration to any extent whatsoever by -

- (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person;
- (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
- (c) the genital organs of an animal, into or beyond the mouth of another person, and **“sexually penetrates”** has a corresponding meaning;

“sexual violation” includes any act which causes -

- (a) direct or indirect contact between the -
 - (i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;
 - (ii) mouth of one person and -

- (aa) the genital organs or anus of another person or, in the case of a female, her breasts;
- (bb) the mouth of another person;
- (cc) any other part of the body of another person, other than the genital organs or anus of that person or, in the case of a female, her breasts, which could -
 - (aaa) be used in an act of sexual penetration;
 - (bbb) cause sexual arousal or stimulation; or
 - (ccc) be sexually aroused or stimulated thereby; or
 - (dd) any object resembling the genital organs or anus of a person, and in the case of a female, her breasts, or an animal; or
 - (iii) mouth of the complainant and the genital organs or anus of an animal;
- (b) the masturbation of one person by another person; or
- (c) the insertion of any object resembling or representing the genital organs of a person or animal, into or beyond the mouth of another person, but does not include an act of sexual penetration, and

“sexually violates” has a corresponding meaning; and

“this Act” includes any regulations made under this Act, including the regulations made under sections 39, 53 and 67.

- (2) For the purposes of sections 3, 4, 5(1), 6, 7, 8(1), 8(2), 8(3), 9, 10, 12, 17(1), 17(2), 17(3)(a), 19, 20(1), 21(1), 21(2), 21(3) and 22, “consent” means voluntary or uncoerced agreement.
- (3) Circumstances in subsection (2) in respect of which a person (“B”) (the complainant) does not voluntarily or without coercion agree to an act of sexual penetration, as contemplated in sections 3 and 4, or an act of sexual violation as contemplated in sections 5(1), 6 and 7 or any other act as contemplated in sections 8(1), 8(2), 8(3), 9, 10, 12, 17(1), 17(2), 17(3)(a), 19,20(1), 21(1), 21(2), 21(3) and 22 include, but are not limited to, the following:
 - (a) Where B (the complainant) submits or is subjected to such a sexual act as a result of -

- (i) the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D; or
 - (ii) a threat of harm by A against B, C or D or against the property of B, C or D;
- (b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwillingness or resistance to the sexual act, or unwillingness to participate in such a sexual act;
- (c) where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that -
 - (i) B is committing such a sexual act with a particular person who is in fact a different person; or
 - (ii) such a sexual act is something other than that act; or
- (d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act –
 - (i) asleep;
 - (ii) unconscious;
 - (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B's consciousness or judgement is adversely affected;
 - (iv) a child below the age of 12 years; or
 - (v) a person who is mentally disabled.

Rape

Any person ("A") who unlawfully and intentionally commits an act of sexual penetration with a complainant ("B"), without the consent of B, is guilty of the offence of rape.

Compelled rape

Any person ("A") who unlawfully and intentionally compels a third person ("C"), without the consent of C, to commit an act of sexual penetration with a complainant ("B"), without the consent of B, is guilty of the offence of compelled rape.

Sexual intercourse with a girl under the age of 16 amounts to statutory rape, in terms of the Criminal Law (SEXUAL OFFENCES AND RELATED MATTERS) Amendment Act 32 OF 2007.

Sexual assault

- (1) A person (“A”) who unlawfully and intentionally sexually violates a complainant (“B”), without the consent of B, is guilty of the offence of sexual assault.
- (2) A person (“A”) who unlawfully and intentionally inspires the belief in a complainant (“B”) that B will be sexually violated, is guilty of the offence of sexual assault.

Violence is not an element of either crime. This means that rape or sexual assault could occur without signs of violence.

There is no legal requirement that before the doctor sees such a patient she must have reported the crime to the police.

In view of the fact that only 57% of women do report sexual assault to the police, making reporting a prerequisite would mean that 43% of women in this category would be denied access to health care.

Women often at that stage do not even know whether and if they would want to press charges. However, if they do, the relevant evidence should have been collected and she should be informed of issues such as access to anti-retroviral therapy. Moreover, research indicates that instances of gender-based violence underlie a variety of other health problems, of both a physical and psychological nature. For more on how to collect evidence in rape cases, see Martin et al "Forensic and clinical management of rape" *CME* April 2002.

In rape cases, doctors have to fill out J88 forms, and many hospitals do have new rape "crime kits". A doctor may be called to testify in a subsequent criminal trial. The success of the prosecution of criminals in South Africa therefore also depends on the witness, which may include the doctor.

There are however many difficulties that doctors experience in this regard:

- One relates to the fact that there are no more district surgeons, and community service doctors might have moved to another area when the case is brought before the court.
- Witness fees, as it stands currently, is very small and does not factually compensate doctors for the time spent waiting and time spent in court. Doctors may submit claims of actual costs and reasonable loss of income.
- A very important aspect to remember when one is to testify, is to get the name of the investigating officer (at the SAPS) of the case and the prosecutor's name. One can very successfully negotiate times and dates with them, so as to interrupt one's ordinary practice or work at hospital as little as possible, and prevent unnecessary trips and waiting in corridors.
- In this regard SAMA branches may be helpful in establishing good and formalized links with the prosecutors in one's area.

Some NGO's operating in this field assists doctors in that they make and store copies of records, follow up with the police, provide emotional support to survivors and provide some coaching before the actual court case. They often also liaise with doctors to facilitate communication with the prosecutor and survivor. A list of relevant NGO's / CBO's is attached to this document.

Civil cases: Domestic Violence Act of 1998

Definitions:

In this Act, unless the context indicates otherwise -

“arm” means any arm as defined in [section 1](#)(1) or any armament as defined in section 32(1) of the Arms and Ammunition Act, 1969(Act No. 75 of 1969);

“complainant” means any person who is or has been in a domestic relationship with a respondent and who is or has been subjected or allegedly subjected to an act of domestic violence, including any child in the care of the complainant;

“court” means any magistrate’s court for a district contemplated in the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944);

“dangerous weapon” means any weapon as defined in [section 1](#) of the Dangerous Weapons Act, 1968 (Act No. 71 of 1968);

“domestic relationship” means a relationship between a complainant and a respondent in any of the following ways:

- (a) they are or were married to each other, including marriage according to any law, custom or religion;
- (b) they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;
- (c) they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);
- (d) they are family members related by consanguinity, affinity or adoption;
- (e) they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration;
or
- (f) they share or recently shared the same residence;

“domestic violence” means -

- (a) physical abuse;
- (b) sexual abuse;
- (c) emotional, verbal and psychological abuse;
- (d) economic abuse;
- (e) intimidation;
- (f) harassment;
- (g) stalking;
- (h) damage to property;
- (i) entry into the complainant’s residence without consent, where the parties do not share the same residence; or
- (j) any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant;

“economic abuse” includes -

- (a) the unreasonable deprivation of economic or financial resources to which a complainant is entitled under law or which the complainant requires out of necessity, including household necessities for the complainant, and mortgage bond repayments or payment of rent in respect of the shared residence; or
- (b) the unreasonable disposal of household effects or other property in which the complainant has an interest;

“emergency monetary relief” means compensation for monetary losses suffered by a complainant at the time of the issue of a protection order as a result of the domestic violence, including -

- (a) loss of earnings;
- (b) medical and dental expenses;
- (c) relocation and accommodation expenses; or
- (d) household necessities;

“emotional, verbal and psychological abuse” means a pattern of degrading or humiliating conduct towards a complainant, including -

- (a) repeated insults, ridicule or name calling;
- (b) repeated threats to cause emotional pain; or
- (c) the repeated exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the complainant’s privacy, liberty, integrity or security;

“harassment” means engaging in a pattern of conduct that induces the fear of harm to a complainant including -

- (a) repeatedly watching, or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be;
- (b) repeatedly making telephone calls or inducing another person to make telephone calls to the complainant, whether or not conversation ensues;
- (c) repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant;

“intimidation” means uttering or conveying a threat, or causing a complainant to receive a threat, which induces fear;

“physical abuse” means any act or threatened act of physical violence towards a complainant;

“prescribed” means prescribed in terms of a regulation made under [section 19](#);

“protection order” means an order issued in terms of [section 5](#) or 6 but, in [section 6](#), excludes an interim protection order;

“residence” includes institutions for children, the elderly and the disabled;

“respondent” means any person who is or has been in a domestic relationship with a complainant and who has committed or allegedly committed an act of domestic violence against the complainant;

“sexual abuse” means any conduct that abuses, humiliates, degrades or otherwise violates the sexual integrity of the complainant;

“stalking” means repeatedly following, pursuing, or accosting the complainant;

Benefits of the Act

- The Domestic Violence Act aims to prevent repetitions of acts of domestic violence without removing the partner from the family (e.g. where s/he contributes to the household) or by having to wait months before a criminal case is brought.
- A second important benefit is the fact that the burden of proof is on a balance of probabilities, and not beyond a reasonable doubt as is the case in criminal cases. Beyond a reasonable doubt is a much higher burden of proof.

In terms of the Act, “domestic violence” means physical abuse; sexual abuse; emotional, verbal and psychological abuse; economic abuse; intimidation; harassment; stalking; damage to property; entry into the complainant’s residence without consent, where the parties do not share the same residence; or any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant. This means that it is not only physical violence that constitutes domestic violence and that doctors should provide information in their affidavits on the harm or immanent harm to the safety, health and/or wellbeing of the patient.

The police are involved insofar as they have to inform possible complainants of their rights in terms of this Act and assist them as far as possible. There is no criminal case, i.e. no docket and case number, unless the patient also lays criminal charges. There is also no J88 or police investigation, although police persons at the scene may be called later on to testify in the

protection order hearing. The police also often bring such survivors to doctors/hospitals, but one should not assume that it implies that a criminal case will ensue.

Any person may approach the court, even at night, for an interim protection order. In such an order is issued on *prima facie* evidence of the respondent committing domestic violence and the hardship suffered or to be suffered by the complainant (patient).

In terms of section 4(6) supporting affidavits by persons who have knowledge of the matter concerned may accompany the application. It is in this regard that the assistance of a doctor is often required. Evidence may be submitted by affidavit, i.e. the doctor does not need to go and testify in court.

The interim protection order is served on the respondent who then has to appear in court. If the respondent does not appear in court, the court will convert the interim order into a protection order on the basis of the evidence before it.

If the respondent does appear, further affidavits or oral evidence may be heard, and the court may also direct for such evidence to be heard. The court may then issue a protection order.

As with any civil case, the doctor may at any stage liaise with the complainant's attorney if s/he is required to testify in order or to clarify aspects of their affidavits. In terms of legislation witness fees is payable, but this may also be negotiated with the complainant's attorney.

In general, this process is much easier and less strenuous on both doctor and patient. It is also more expeditious and simple, often occurring in the Magistrate's chambers.

SAMA branches may liaise with the Magistrates in their areas on who of them are responsible for domestic violence cases. They may provide useful information as to the ideal format of- and requirements for the affidavits filed by doctors.