

Part 1: Medico-legal documentation South African Police Services forms, Department of Justice forms and patient information

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Abstract

Medical practitioners share the responsibility of action against crime by supporting the justice system. The best way for a medical practitioner to achieve this is by proper examination of victims and/or perpetrators, and completing the legal documents meticulously. This can be a frightening experience without proper formal training.

Paper 1 addresses the role and responsibility of the medical practitioner and issues around consent, general information on the completion of the J88, as well as the perceived gold standard of medical information relayed to the courts.

Medico-legal documentation is more than the compilation of a medico-legal report. The clinical notes are part and parcel of the documentation to protect practitioners against negligence and malpractice investigations. Valid medico-legal consent differs from medical consent.

Knowledge of legislation pertaining to child pornography and the practical and ethical aspects of photography is also necessary.

Inappropriate completion of medico-legal documentation may necessitate the practitioner having to explain the documentation to make it understandable to the court.

This is Part 1 of a three-part series on medico-legal documentation. The aim of Part 1 is to equip medical practitioners with the knowledge and skills necessary for the completion of the appropriate medico-legal report, form J88, a legal document, which addresses the factual findings of the medical assessment and the opinion of the health worker as to the significance of the facts. Paper 2 covers assault and Paper 3, sexual assault.

Introduction

In 2004, the homicide rates in 28 countries ranged from 0.5 per 100 000 (Japan) to 69 per 100 000 in South Africa, which was ranked last.¹ According to the 2012/2013 official statistics of the South African Police Service (SAPS), 185 893 assaults, with intent to inflict grievous bodily harm, took place in South Africa (3 556 per 100 000). The overall rate of contact crimes was 1 180.8 per 100 000.²

Edmund Locard, a pioneer in forensic science, stated that it should be impossible for the perpetrator of a crime to leave no trace at the scene. Later, theorists expanded on this statement by saying that the perpetrator brings something into the crime scene and leaves with something from it, and that both can be used as forensic evidence. This has become known as the Locard exchange principle.³ The physician is the only person

who is qualified to search for the exchanged evidence by means of physical examination and the collection of biological evidence on the body of the patient.

Medical practitioners share the responsibility of the administration of justice by supplying the court with the relevant medical insight to advance informed decisions on legal matters. This responsibility is neither clearly understood nor accepted for a variety of reasons. The insecurity of less experienced health workers as to the significance of information opens the door for intimidation within the court environment, and may result in the reluctance of health workers to become involved.⁴ Doctors fear that attending court will be overly time consuming, and they may also feel intimidated by the court environment and having to testify. In reality, testimony does not take up too much time and the professional is respected by the courts.

Recent high-profile court cases may have exacerbated negative perceptions, but these cases are exceptions to the rule. The focus of the case is on the truth, not the doctor, and the latter does not need to feel that the testimony is threatening or personal. The role of the expert witness is to convey scientific information to the court and to be an educator.

It appears that the knowledge and skills provided at undergraduate level are not sufficient to equip students to deal with clinical forensic cases. Most cases of rape, child abuse, child sexual abuse and physical assault are primarily managed at primary healthcare level. Clinical forensic medicine is not a specialty. Thus, physicians who need to have the necessary knowledge may be poorly equipped. Currently, this vacuum can only be addressed through extensive formal and informal training. A postgraduate diploma qualification is being developed by the University of the Free State to fill this niche through a formal qualification. An Advanced Diploma in Forensic Nursing for registered nurses is being offered by the School of Nursing, University of the Free State.

Medical practitioners inform the court with regard to clinical forensic examinations using the medico-legal report, form J88, a legal document, which addresses the factual findings of the medical assessment and the opinion of the health worker as to the significance of the facts.

The courts rely heavily on medico-legal documentation.⁵ Current medical information taken from the J88, and presented in the courts, may be of inferior value because of misinterpretation by health workers, lawyers, police officials and social workers.⁶

Documentation in medico-legal cases does not exist only in the form of the J88. Clinical notes should not be neglected.^{5,7} A record of medical and medico-legal information must be available in the patient file. It is suggested that a copy of the medico-legal report, which more often than not is a completed J88, should be kept in the patient file as a record.⁷ Scarce resources in the public sector may cause this to be cumbersome. Copiers may be unavailable and copies may have to be made with old-fashioned and messy carbon paper. It is possible in this day and age of electronic development to scan a document in PDF format with a smartphone or tablet for personal and official records.

In cases of fraudulent, accidental or neglectful loss of the medico-legal report, a copy in the file may "save the day". In a case whereby a J88 is not complete or if a copy has not been kept in the file, the clinical records may be summoned by the court. To testify on clinical notes may prove to be less than optimal since personal and sensitive information, essential for good clinical records, but of no significance to the court, may be released in an open court, where the perpetrator is present. On the other hand, small injuries, which are insignificant to the medical management, but essential to the court hearing, may not be documented in the clinical notes.

Clinical notes carry great importance because of the dual responsibility of management of medico-legal patients.⁸ Patients must initially be assessed to determine whether or not they require urgent medical attention. Patients who need to be assessed in matters that have relevance to the justice system are no exception. The absence of conditions that need medical attention must be clearly documented. Particularly in cases of drug or ethanol intoxication, other causes with respect to the clinical picture must be ruled out, and the physician must be

able to prove that it was safe for the patient to be observed in police holding cells. Failure to keep good clinical records is a form of negligence.

Evidence collection and consent with regard to the investigation of medico-legal specimens are documented on evidence collection forms, and included in the evidence collection kits,⁹ which are available in the different evidence collection kits supplied by law enforcement officials.

Documentation of medico-legal consent or authorisation

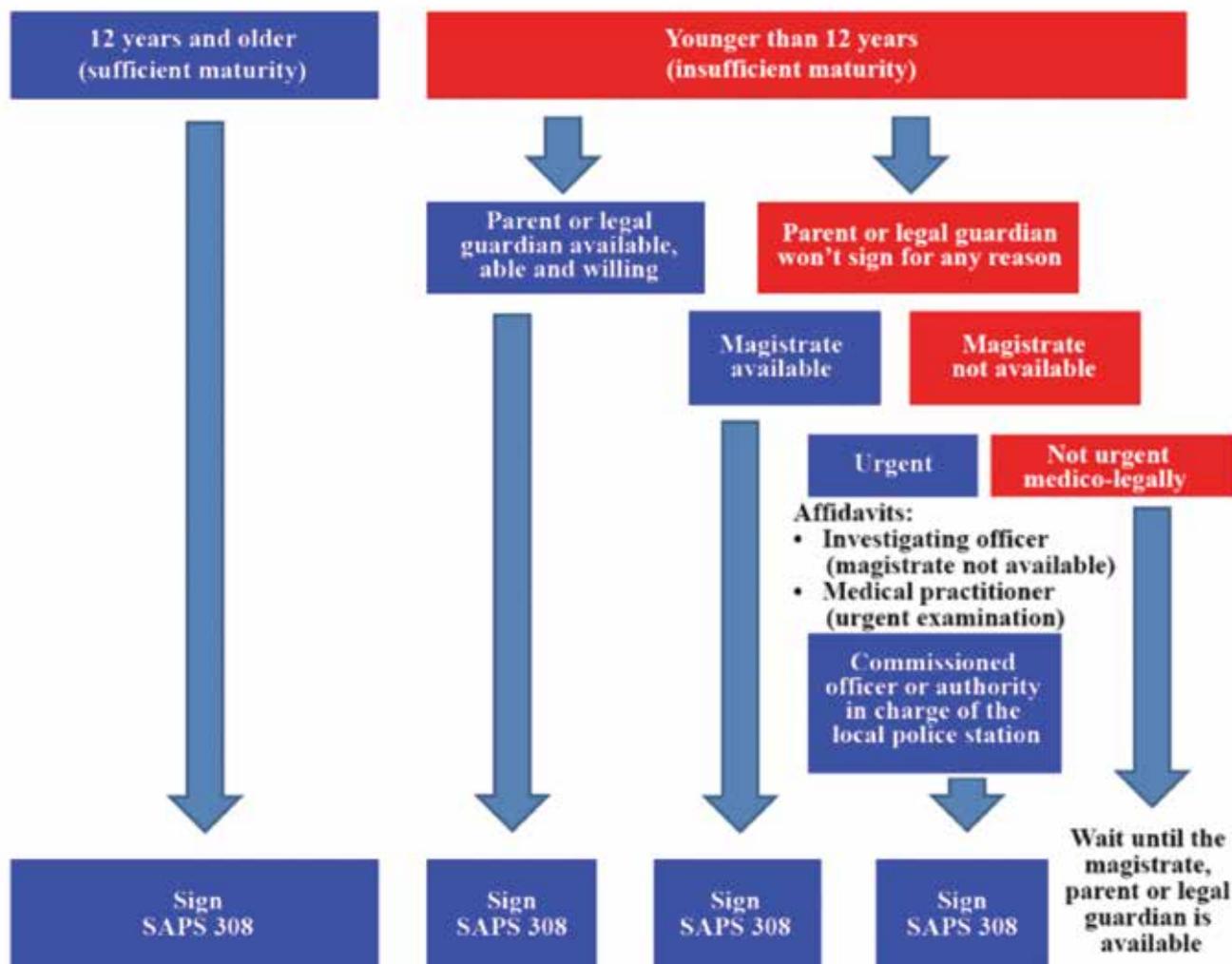
Informed consent

Informed consent to conduct a medico-legal examination, compile medico-legal documentation, collect evidence, investigate the evidence, take photographs, and most importantly, release information about the person, must be obtained.⁷

Release of information

The release of information about a patient, including information pertaining to attendance at a facility, is only legal when the user consents to that disclosure in writing, if there is a court order or law that requires disclosure, or if non-disclosure of the information represents a serious threat to public health, as stipulated in the National Health Act 61 of 2003 section 14.⁷ The relevant medico-legal consent is documented in a SAPS form, SAPS 308, which addresses the consent as discussed previously, and is submitted by the SAPS. This informed consent is voluntary and can be withdrawn or partially withdrawn. The police official must explain the implications of the consent and ensure that the consent is valid, but it remains the responsibility of the physician to confirm that the relevant person understands the implications of the consent, as stipulated in The National Health Act Sections 6, 7 and 9.⁷ In terms of the Promotion of Access to Information Act, the information officer must provide access by a patient to his or her medical records. The constitutional right to privacy applies.^{5,10}

Authorisation to carry out the procedure or examination is imperative in case of the management of detainees or suspects, when they do not have the right to refuse the procedure.¹¹ Authorisation is documented through the completion of form SAPS 308A by the law enforcement officer. A document supplied by the police official which contains all the information appearing in the SAPS 308A form may be accepted. The Criminal Procedure Act 51 of 1977 (Section 37) does not specify that the suspect has to be arrested. Failure to obtain and retain this authorisation on file may lead to charges of assault against the medical practitioner. The completed SAPS 308A form confirms that the patient is a suspect, and does not have the right to refuse the procedure, as ruled by the Criminal Procedure Act.^{11,12} Voluntary written and/or implied consent is preferable ethically, but the withdrawal of consent is allowed, and an allegation that the consent has been verbally or per implication withdrawn, cannot be challenged in a later court hearing without documentation. Thus, it is suggested that the SAPS 308A form is submitted instead, or in addition to voluntary consent. (The legal versus ethical debate regarding



SAPS: South African Police Service

Figure 1: Medico-legal consent with respect to minors

examination of a suspect against his or her will¹³ does not fall within the scope of medico-legal documentation.)

Medical, as well as medico-legal consent must be obtained from persons from their 12th birthday, and they must have sufficient maturity and understanding to give informed consent.¹⁴ Consent for the medical treatment of children aged 12 years and younger, or with insufficient maturity and understanding, must not be confused with consent for the medical examination of minors towards, or in connection with, certain offences that have been committed.

Consent for this group is governed by the Criminal Procedure Act Section 335B, inserted by Section 7 of Act 4 of 1992.¹¹

Medico-legal consent must be obtained from a parent or legal guardian. If a parent or legal guardian cannot be reached within a reasonable time, is a suspect in the crime in respect of which the medical examination is to be conducted, unreasonably refuses consent, is incompetent on account of a mental disorder, or deceased; the normal procedures for obtaining consent must be followed. Documentation of this procedure appears on the other side of the SAPS 308 form.

Medico-legal consent, which, per definition, does not cover medical emergencies, differs from consent for medical

indications which is regulated by the Children’s Act¹⁴ and the National Health Act,⁷ and allows for medical treatment, including post-exposure prophylaxis.

Figure 1 details the procedure to be following with respect to obtaining medico-legal consent in the case of minors.

The legislation is not clear as to consent for the medico-legal examination of the mentally incapacitated or intoxicated patient with respect to medico-legal procedures.

Documentation of obligatory reporting

Legally, child abuse, child sexual abuse, sexual abuse or suspicion thereof with respect to a mentally disabled person, as well as abuse of the elderly, must be reported.¹⁴⁻¹⁶ Failure to report in the prescribed way is an offence. When reporting to the relevant authorities, it must be documented.

Documentation in the absence of a South African Police Service 308 form

When a person does not initially want to open a case, the documentation must be such that the necessary information for the courts is available in clinical notes or on a J88, with consent, to allow the complainant time to contemplate whether or not to open a case.¹⁷

A victim of a sexual offence, who does not wish to open a case at the time, has the same rights as a victim who opens a case, except for the right to know the human immunodeficiency virus status of the suspect.¹⁶ These rights include prophylaxis, counselling and a complete medico-legal assessment, including the collection of evidence with his or her consent. The evidence, including the J88, must be protected from unauthorised access, and, if not needed, destroyed after 4-6 weeks.¹⁷ This measure must be taken to allow the victim time to make an unhurried decision about opening a case if he or she is uncertain about this at the time of the medical assessment.

Photographic documentation

Photographic documentation is generally the responsibility of the Local Criminal Record Centre (LCRC) of SAPS. When a health worker wishes to take photographs as evidence, the chain of evidence, in order for the evidence to be admissible in court, should not be compromised. Thus, a new memory card must be used.¹⁸ The settings of the camera must be selected according to certain rules, i.e. the numbering of photographs must be set on "continuous". The images must be in a complete series.¹⁸ Therefore, all photographs, even photographs accidentally taken, out of focus, or otherwise unacceptable, must be submitted. The processing of the photographs must be performed in such a way that the possibility of change can be excluded, preferably by the LCRC.

Photographs for a personal filing system, to assist with memory recall and for peer review, fall in a different category.

Obtaining consent to take photographs is essential.¹⁸ Patients must be informed of the reason for why the photograph is being taken, the related risks and benefits of the photographs, and how the images will be used. Furthermore, the person must have information on the integrity of the storage, of possible access to the images, and other information on the use of the photographs for training, peer review or research purposes.

It is suggested that photographic material is retained as part of the practitioner's confidential medical notes, and stored in a locked cabinet at locked premises.¹⁹ Anonymity must be preserved by labelling the material both on the casing and within, with the patient's initials or another identification code, together with the date of the examination. With the specific consent of the patient, the material can be shown to other colleagues for a second opinion, viewed by a named doctor providing expert testimony for the defence, and used for teaching purposes. The material should not be released to non-medical parties, except on the directions of the court.

In the case of a suspect, the person does not have the right to refuse photographs being taken after submission of the SAPS 308A form, as this is legal.¹¹

Preferably, genital images must not be included in police dockets. Police dockets end up in courts where the accused is present. The envelope must be sealed if this is deemed to be essential. It should be kept in mind that the seal will be broken eventually, and the medical ethics and dignity and privacy of the person are a concern. It is unlikely that a person who was

raped will be comfortable with the possibility that photographs of the genitals will be submitted when the perpetrator is present.

The images of children, although matter of fact for the health worker, can, per definition, be regarded as child pornography, and making them available to a layperson may be regarded as the distribution of child pornography, or viewed as making the distribution of child pornography possible. Utmost care must be taken with the management of this sensitive material.

Information on the safe storage of potential child pornography could not be found. As a minimum measure to safeguard the practitioner against criminal charges in this respect, sensitive photographs should not be kept on cellular phones. The material must also be password protected on computers.

Photographic images are of value for training purposes if the consent includes this, and are invaluable for peer review and consultation purposes.

Completion of the J88 form

The J88, a legal form of the Department of Justice, is widely used in most clinical forensic examinations in South Africa. Misinformed police officials, presiding officials and prosecutors may regard the J88 form as the only format for medico-legal documentation, and at times have refused to accept another format or have refused to provide training on medico-legal documentation in an alternative format.

Although the J88 is a legal form, it contains medical information, and as such, must be interpreted by a health worker, and completed in accordance with good medical practice and sound scientific principles. If the scientific and medical nature of the information contained in the J88 is not understood and honoured by the courts, unrealistic expectations could be raised.

The J88 form has not been thoroughly revised in the past two decades, despite the vast development of medical knowledge, based on extensive research. "New" editions of the J88,²⁰ with little change, apart from the addition of a Criminal Procedure Act Section 212 declaration, have been published.¹¹ The mentioned declaration has implications for the admissibility of the J88 form as evidence without the health worker having to be summoned. Availability of a copy of the J88 form, included in the Sexual Assault Evidence Collection Kits, is a welcome development.⁹

Who completes a J88 form?

The J88 form must be completed by a medical practitioner.^{6,21} The term "medical practitioner", in relation to the J88 form, is unclear, and practically includes all doctors, registered nurses, registered nurses with forensic training²⁴ and clinical associates with the necessary skills. Forensic nursing has recently been recognised as a specialty by the South African Nursing Council.

The J88 format, or another format of a medico-legal report, may be completed by medical practitioners in the public, as well as the private sector. It is regarded as unethical conduct to attend to a patient, and not to complete the necessary documentation

for future court cases. Referring the person to be examined at a later time by another examiner, which practically may amount to down referral to a nursing professional, may result in changes to the clinical picture and incomplete information, which is not in the best interest of the patient. This is particularly true in cases where injuries have to be assessed when complications, healing or treatment have occurred.

Under these circumstances, the patient is placed in a position in which a repeated examination has to be performed. The person performing the subsequent examinations is not in a position to make conclusions about the medical conditions of the patient at the time when he did not examine the patient. The examiner may only document what he or she finds during his or her own examination, and cannot confirm or sufficiently support the allegations of incidents and features not witnessed. The patient may not have an option when undergoing repeated examinations as to who performs the second one. A second examination, in order to be able to complete a medico-legal report, may be traumatic for the patient, and particularly children.

Ideally, the J88 form must be completed by the practitioner with the most relevant information.^{21,22} This is usually the first person to attend to the person medically, and who is generally in the best position to assess the mental health, clothing and age of the injuries, as soon as possible after the incident. Exceptions may exist in cases whereby a patient is transferred to another health worker in an emergency, and when it might cause death or permanent damage to the patient to delay the transfer. Young and Wells suggest that the most senior doctor involved in the management of the patient should complete the medico-legal documentation.²³

It is not advisable for more than one J88 form to be completed per incident. Great care must be applied when two J88 forms are completed. If more than one J88 form needs to be completed, it must be ensured that each practitioner confines him- or herself to a particular and well-defined part of information, and to not encroach on the factual records of a colleague.

An example of an indication for the completion of two complementary J88 forms would be a neurosurgeon attending to the head injury of a rape survivor, and another medical practitioner conducting the anogenital examination, in which case the practitioner performing the anogenital examination should restrict him- or herself to the aspects of which he or she has thorough knowledge, and indicate in his or her report that the surgeon will complete a second J88 form with regard to the head injury. In this scenario, injuries other than anogenital and neurosurgical must be discussed with respect to who is going to include these in the report. Cross-references to the existence of the two J88 forms must be made.

General information when completing a J88 form

The information requested in a J88 form is for judicial purposes. The medical practitioner is responsible for supplying the relevant information, omitting irrelevant information and preventing traumatising of the patient. All the information

must be true, and omission may not have an influence on the factual content:

- Only one person's handwriting may appear on a J88 form, with the exception of the transfer details.
- The J88 form may only be handed over to a police official. The J88 form is regarded as evidence, and the chain of evidence must be maintained by excluding the possibility of tampering. This can be achieved by documenting every transfer of the completed form.⁶
- Under no circumstances may a person sign the documentation if the examination was not carried out by him or her.
- *Language:* The official court languages are English and Afrikaans. The J88 form must be completed in an official court language. (Any language can be used when testifying.)
- Loose pages may be added if there is not sufficient space for documentation. Every loose page must be identified with the patient name and case number. A reference to the addition of the loose pages must appear in the J88 form.
- The documentation must be signed on every page, including the loose pages.⁶
- The documentation must be legible. Illegible documentation will need to be deciphered in court, and leads to the necessity of having to appear in court.
- The documentation must be capable of being understood. Medical terms, which may not be understood by a lay person, must be avoided or clarified. Unrecognised abbreviations are unacceptable.
- All alterations must be countersigned and dated. The original must be legible.
- No area may be left blank. A line may not be drawn through a section without explaining why it was not completed. The male examination of a female patient may be indicated as "not relevant" or "female patient", and the sexual offence examination in a physical assault as "not done" or "not indicated". Similarly, when an internal genital examination was not performed, the vagina and cervix was "not visualised because of the patient's age", "not internally examined because of discomfort to patient", "consent not provided for internal examination", "not indicated", or "not done".
- The document must be completed with a black unalterable pen. If the practitioner prefers to use contrasting colours for diagrams, the colour value must be high enough to photocopy well in black and white.
- Entering information obtained from a clinical report documented by a colleague is not allowed. It would be regarded as hearsay in a court of law.
- When completing a J88 form, the current clinical picture must be documented.
- Other records may be photocopied and attached to the J88 form. The addendum and the origin of the information must be referred to in the body of the J88 form. Although this will be considered to be hearsay, it places the prosecutor in the position of being able to access admissible information, if indicated, for the purposes of the hearing.²

- Reports must be completed in duplicate or photocopied, and the original given to the investigating officer.²² The duplicate is kept by the examining health worker or in the patient file. Records may be needed by the court long after the normal acceptable period at which inactive files are destroyed in a hospital or clinic. It is important to keep this fact in mind before destroying old files. The documents must be kept until the case is completed, which includes the appeal processes.
- Keeping records is compulsory.⁹

Access to the J88 form

If the J88 form cannot be transferred immediately, it must be kept under lock and key, in the same way as other evidence, until transfer takes place. Unauthorised access must be impossible.

The original J88 form may only be transferred to a police investigator or the court, and with written consent on the SAPS 308 form. The J88 form shall not be released to the patient, since this would compromise the chain of evidence and may render the evidence inadmissible.

Social workers, whether acting to keep the child safe or to conduct forensic assessments on children, should not have access to the medical records. Medical examinations may be wrongfully interpreted when making social work decisions, including the removal of the children to a place of safety or the placing back of children.

Medical information interpreted by a layperson may be detrimental to the victim, as well as to the case.

Conclusion

Medico-legal documentation comprises the holistic documentation of the clinical aspects of a case, as well as information that is necessary to the courts. All bases must be protected to avoid detrimental aspects to the case, civil and criminal liability of the health worker, and embarrassment to the health worker.

Refusal to write a medico-legal report or to testify is not a warranty for staying out of court. All medical documentation, including clinical notes, may be summoned and the person responsible called to court to testify.

Medical records must be interpreted by medical practitioners.

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