Using common law and statutory offences to address obstetric violence in South Africa

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In recent years there has been increasing concern about the various forms of abuse faced by birthing patients during labour and childbirth. Common examples include being scolded, slapped, pinched, stabbed with scissors or struck with a ruler or other instruments. This mistreatment is collectively termed obstetric violence.

A growing body of literature examines legal responses to obstetric violence including the potential use of the criminal law.

The present article explores whether, in South Africa, common-law crimes or statutory offences could be used to prosecute healthcare workers for the range of harms falling within the broad definition of obstetric violence. It does not question whether criminal law is an appropriate response in this instance.

The article concludes that existing crimes are sufficient to address obstetric violence. It is clear that the common-law crimes of crimen iniuria, assault, assault with intention to commit grievous bodily harm and the statutory offence of involuntary sterilisation, could be used to address both physical and emotional forms of obstetric violence.

It is submitted that they cater adequately for the broad range of conduct that potentially falls into the definition of obstetric violence. Further research is required in this area and it may mean that prosecutorial guidelines are needed.

Keywords. obstetric violence, criminal law, common law crimes, statutory offences.

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In recent years, concern has grown over the various forms of abuse faced by birthing patients during labour and childbirth.[1-11] Common examples include being scolded, slapped, pinched, stabbed with scissors or struck with a ruler or other instruments.[12] These forms of mistreatment have been collectively termed obstetric violence.[12]

A growing body of literature examines these forms of mistreatment, with much of the focus on legal responses to protect, enforce and remedy the harms suffered by patients.[12,13] Various legal and quasi-legal remedies could be used. First, a civil claim for damages could be instituted if a birthing mother's common law and/or constitutionally protected rights were violated.[14] For example, if a healthcare practitioner sterilised an HIV-positive mother without her consent.[15] Second, an administrative remedy may involve filing a complaint to the hospital where the alleged abuse occurred or reporting to bodies such as the Commission on Gender Equality,[16] the Health Professions Council of South Africa,[17] the South African Nursing Council[18] or the Health Ombudsman.[19]

While civil and administrative remedies have addressed some cases of obstetric violence, the role of criminal law warrants further research, given the scarcity of criminal law being used against healthcare practitioners in South Africa (SA). Over the past 75 years, there has been a paucity of reported case law and reports have predominantly arisen in the context of murder (S v Hartmann, 1975) and culpable homicide (R v van Schoor, 1948; S v Burger, 1975; S v Kramer and Another, 1987; Van der Walt v S, 2020).[20] Currently, our law does not recognise obstetric violence as a specific crime in its own right. However, prima facie, many acts of obstetric violence may also constitute crimes that are punishable under existing common law or statutory offences.

This article attempts to add to the literature by identifying and discussing possible common-law crimes or statutory offences that can be used to prosecute a healthcare practitioner for acts that fall within the definition of obstetric violence.

The article does not question whether criminal law is an appropriate response to obstetric violence, nor does it address whether a new statutory offence should be created to criminalise such acts.

Methods

The present study aimed to describe obstetric violence and determine whether any reported conduct or omissions could be considered to fall within the ambit of criminal law in SA. Its specific objectives were to: (*i*) identify possible common-law crimes or statutory offences applicable to harms described as obstetric violence and (*ii*) explore how all elements of criminal liability would apply in this context.

To achieve these aims and objectives, the research team conducted a literature review on obstetric violence and criminal law. This was followed by a systematic search through all health legislation using the keyword 'offences'.

Results

The study of the literature and relevant laws found the following:

1.1 There are various definitions of obstetric violence

Obstetric violence is broadly defined as the unwanted, physical or psychological abuse of birthing persons, occurring without their consent.[12] Another definition frames it as the intentional 'mistreatment, disrespect and abuse' of persons during labour and childbirth.[21] Both definitions limit their ambit to healthcare practitioners and birthing persons.

1.2 The purpose of the criminal law

Certain forms of conduct such as murder, rape and assault with intent to do grievous bodily harm are so reprehensible that they receive universal disdain. In these instances, the conduct is classified as criminal, invoking a societal response by the state through the criminal justice system.[22] The state uses its prosecuting authority to administer justice, punishing offenders for their conduct.[22] Theoretically, this has the effect of appeasing the community and victim, while deterring victims or others from taking the law into their own hands.[22] At its core, criminal law upholds the reprehensibility of many human rights violations including the right to privacy and bodily and psychological security, integrity, dignity and equality.[14]

1.3 The requirements for criminal liability need to be met when using criminal law

For any act recognised by law as a crime before its commission, three elements must be proved beyond a reasonable doubt to secure a conviction.[22] The court must establish that (*i*) there was a voluntary act or omission (the conduct meets the definitional elements of the crime), (*ii*) the conduct was unlawful (no defence) and (*iii*) the conduct was culpable, involving either intention or negligence.[22]

1.3.1 Conduct

There must be an act or omission on the part of the accused.[22] An act is the prohibited conduct,[22] while an omission is the failure to act. An omission is only punishable when there is a legal duty to act and the accused fails to comply.[22] An omission in the context of obstetric violence would be in instances where a birthing mother is deliberately refused medical treatment such as pain medication during labour.[12]

1.3.2 Fault

An accused person cannot be found guilty if they acted without fault.[22] Fault speaks to the state of mind of the accused and is assessed through either intention or negligence.[22] This rule applies to both common law and statutory offences.

1.3.3 Unlawfulness

The conduct (the act or omission) in question must be unlawful.[22] Burchell[22] defines unlawfulness as conduct that is 'contrary to the community's perception of justice or legal convictions of the community'. What a society considers to be criminal conduct is influenced by various contextual factors, including the accepted moral values of the community.[22] In the context of obstetric violence, it is submitted that given the societal value placed on parenting and children, the types of abuses reported during birth would be considered unacceptable, as they violate rights such as the constitutionally protected rights to bodily integrity and dignity.[23]

1.4 Defences that could be raised against criminal charges of obstetric violence

If an accused person successfully raises a defence against the crime they are charged with, a court will find them not guilty.[22] Grounds for justification include private defence, necessity, consent, acting in an official capacity and *de minimus non curat lex* (the law does not deal with trivial matters.[22] For the purposes of this discussion, private defence and official capacity are not relevant.

(*i*) The *de minimus non curat lex* rule would be a defence if the court is satisfied that the harm is trivial.[22] However, the trivial nature of the harm does not in and of itself preclude prosecution; it only means that it may be raised as a defence, and if accepted, a court would find the accused not guilty.[22] The rationale for this rule is that (*i*) the criminal law must only be applied to serious misconduct; (*ii*) applying criminal law in trivial matters is inappropriate owing to the serious consequences of a criminal conviction and (*iii*) the court's time and resources should not be expended on hearing minor matters.[22] Factors considered in determining whether an issue is *de minimus* include the accused's intention and the nature and extent of the harm.[22]

The applicability of this rule to some actions or omissions by healthcare practitioners will depend on determining what constitutes 'serious' harm as opposed to 'trivial' harm.

(*ii*) Necessity can be raised as a defence when an accused person alleges to have acted in protection of their own or somebody else's life, bodily integrity, property or other legally recognised interest that was endangered.[22] However, it is unlikely that this defence could be applied in cases of obstetric violence, as the other party involved 'would be the unborn child' who lacks legal personality under current law. In the context of obstetric violence, there exists an ethical dilemma regarding the potentially conflicting interests of the mother and unborn child. The criminal law has yet to address whether a medical practitioner could avoid liability if they acted in the best interest of the unborn child rather than the mother.

(*iii*) Generally, consent from the victim cannot justify the conduct of the offender.[12,24] However, consent may justify the offender's actions if the following criteria are met:[22] (a) the crime and type of act in question are recognised by law as grounds for justification; (b) the consent was given voluntarily, without coercion; (c) the person giving consent has capacity; (d) the consenting person was aware of the true and material facts regarding the act to which they are consenting; (e) the consent was given expressly or tacitly; (f) the consent was provided before the otherwise unlawful act was committed and (g) consent was given by the complainant. Literature indicates that birthing mothers often felt that obstetric violence was not committed with their lawful consent.[15,23]

1.5 The three common-law crimes that could be used to address certain forms of obstetric violence

In this context, three common-law crimes could be used to address the types of physical and verbal abuse reported by birthing persons.

1.5.1 *Crimen iniuria*

The first way to invoke criminal law in cases of obstetric violence is through the crime of *crimen iniuria*, defined as the 'unlawful, intentional and serious violation of the dignity or privacy of another'.[22] This

law aims to criminalise conduct that harms both the physical and psychological integrity of another person and has been interpreted broadly enough to include personality rights.[22] *Crimen iniuria* can be committed through either words or conduct, resulting in a violation of privacy or dignity.[22] Dignity encompasses concepts such as 'self-respect and mental tranquillity'.[22] In terms of violation of dignity, this part of the formulation assesses a dignity infringement subjectively. If a person feels degraded or humiliated by another person's conduct, the crime of *crimen iniuria* is deemed to have occurred.[22] According to Burchell,[24] our courts have interpreted the right to dignity as the freedom from 'insulting, degrading, offensive, or humiliating treatment'. One form of conduct that has been identified by birthing persons that could warrant a potential prosecution for *crimen iniuria* is verbal abuse.[12] The protected interest being violated is the birthing person's dignity.[22] Hoctor[22] submits that the 'seriousness' of the violation is determined using an objective test, taking into account factors such as the relationship between the parties, whether the conduct is ongoing, the social positions of both parties and how the conduct is perceived within a particular community.

The wrongdoer must be aware that their words or actions are violating the complainant's dignity, and no consent was given by the complainant to justify the offensive conduct.[22] This requirement of fault is met if the accused acted intentionally. Intention, in the form of *dolus eventualis*, is sufficient, meaning the accused foresaw the possibility that their conduct would infringe on the victim's dignity. Intention is assessed subjectively, based on what the accused personally or actually foresaw.

It is argued that the crime of *crimen iniuria* could be used to remedy the violation of a birthing person's dignity related to the conduct they experienced during the birthing process. Although such conduct must be intentional, it is submitted that the narratives of birthing persons clearly indicate that it would be difficult to argue that such verbal abuse was not intentional—that a nurse or doctor would not have perceived that their conduct could violate the dignity of the birthing patient. It is submitted that the courts would frown upon public servants in positions of authority verbally abusing birthing persons in such vulnerable circumstances, particularly as this behaviour contradicts the values enshrined in the Constitution.[4]

1.5.2 Assault

Assault is the unlawful and intentional act or omission that directly or indirectly impairs another person's bodily integrity.[22] Alternatively, it can involve an act or omission that instils a belief in another person that such a violation will occur.[22] While assault typically does not extend to emotional abuse, it can be argued that emotional abuse that creates the perception of impending physical harm may fall within the ambit of the crime of assault. This crime could be invoked by birthing persons who experience physical violence or threats thereof.

1.5.3 Assault with intent to do grievous bodily harm

Assault with intent to do grievous bodily harm is considered a 'more serious form of assault'.[22] This occurs when the accused intends to inflict serious bodily harm on the complainant.[22] Courts have identified several factors for distinguishing between the two types of assault including the type of weapon used, the manner in which it was used, the level of violence inflicted, the specific part of the body targeted and the nature of the injuries sustained.[22]

As with *crimen iniuria*, intention is crucial for securing a conviction in cases of assault. Intention in the form of *dolus eventualis* is sufficient. As relates to assault through the instillation of a belief that physical harm is likely to occur, the intention or fault requirement is satisfied if the accused intended merely to frighten the victim. Thus, the prosecution will have to prove that the doctor or nurse foresaw that their conduct would possibly frighten the victim. It is important to note that the crime of assault cannot be committed negligently.

1.6 There is only one statutory offence that could be used to address obstetric violence

Currently, there is no specific statutory crime dealing with obstetric violence. The Sterilisation Act 44 of 1998 is the only piece of legislation that addresses an aspect of obstetric violence. It gives statutory protection to a patient's right to bodily and psychological integrity as well as dignity.[25] This means sterilisations without consent are unlawful. In instances where there is non-compliance with the Act, the offender may be found guilty of a criminal offence.[25]

Regarding the state of mind of the accused, the Act[25] does not specify whether intention or negligence is necessary to establish criminal liability. Pickles[25] notes that 'there are presumptions that some degree of fault is required when interpreting statutory offences, and that the required form of fault is intention, unless there are express indications in the statute's language, context, scope or object that indicates to the contrary'. Therefore, it is submitted that for liability to be established, the prosecution must prove that the accused acted with intention, with *dolus eventualis* being sufficient. It is further submitted that it is unlikely that this crime can be committed negligently unless, for example, there was an administrative error regarding the identity of the birthing persons, leading to an incorrect procedure being performed.[24]

Conclusion

Although some studies advocate for the creation of a new statutory offence of obstetric violence,[12] and other jurisdictions have heeded this call, we submit that the existing crimes are sufficient at this time. The review of the literature and legal frameworks indicates that common -law crimes such as *crimen iniuria*, assault and assault with intention to commit grievous bodily harm, along with the statutory offence of involuntary sterilisation, can effectively address both physical and emotional forms of obstetric violence.

These legal provisions adequately cater for the broad range of conduct that could be classified as obstetric violence. To date, there have been limited cases in which these laws have been applied against healthcare practitioners, with much of the relevant case law focusing primarily on civil litigation.[15,26,27] Further research in this area is necessary, potentially leading to the development of prosecutorial guidelines.

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