

**Welcome to Landmark Chambers’
‘Medical Evidence in the Asylum Determination
Process: Best Practice’ webinar**

The recording may be accessed [here](#).

Your speakers today are...



Galina Ward (Chair)



Samantha Broadfoot QC

Topic:
Medical evidence
in the asylum
determination
process:
8 Practical tips for
maximum impact



Alex Shattock

Topic:
Case law on the
use of
medical/medico-
legal reports in
court proceedings



Dr Bernie Gregory (Freedom from Torture)

Topic:
Medical Evidence:
a doctor's
perspective

MEDICAL EVIDENCE – A DOCTOR’S PERSPECTIVE

- Memory and trauma
- Medical evidence in the Covid era
- How to get the best from your medical expert

MEMORY MYTHS

- Memory is like a digital copy and accurately recalled every time
- People telling the truth tell a consistent story
- If there are differences between accounts, the person is likely to be lying.
- Memory of traumatic events is impressed in the memory and remembered in vivid detail
- Dates for significant events are easy to remember

FACTORS INFLUENCING MEMORY RECONSTRUCTION

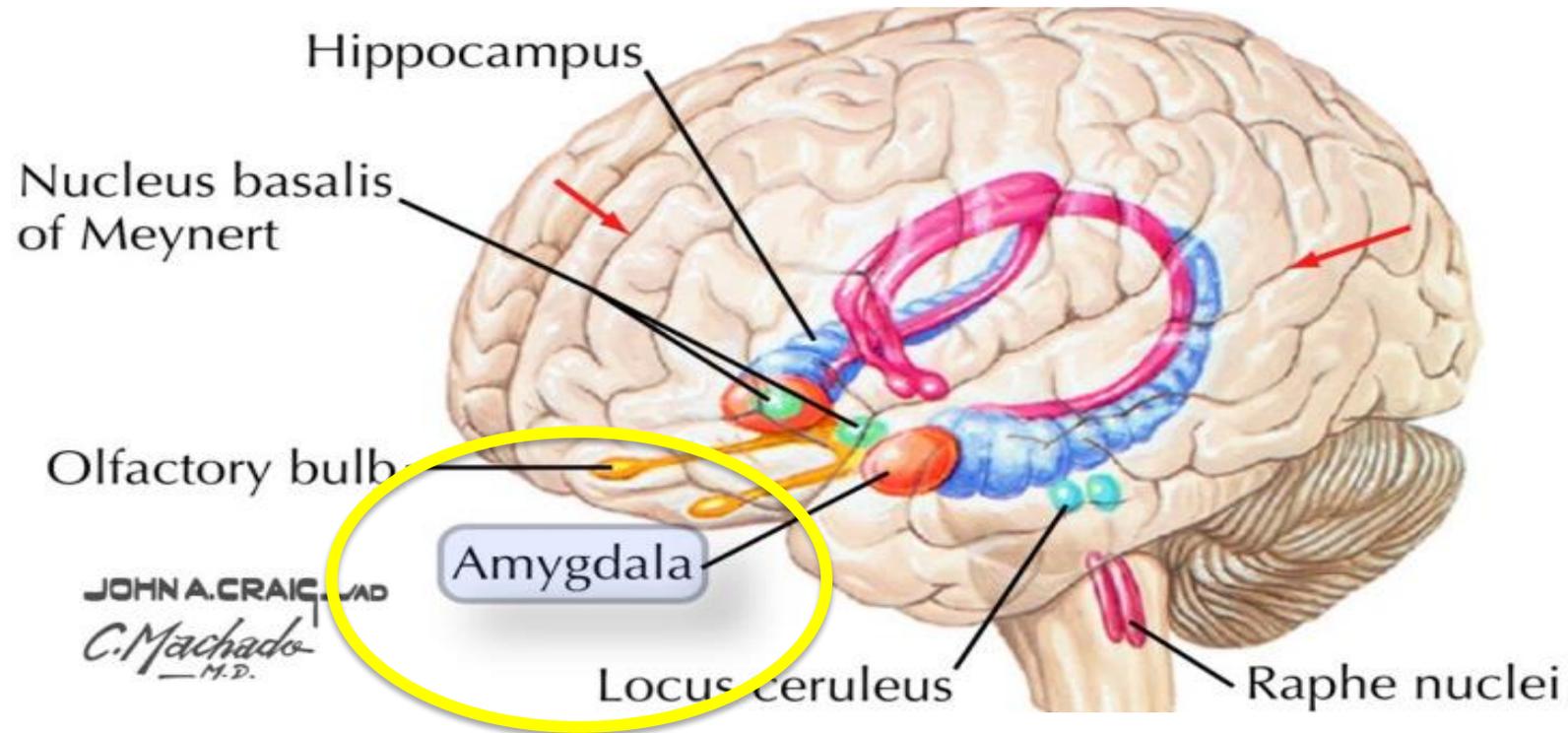
- Time since the event
- Number of times the event has been retold
- Is the event a repeated episode
- What we already know, hear and what we infer
- Culture, gender, language
- Language
- Who we are asked by and how they ask

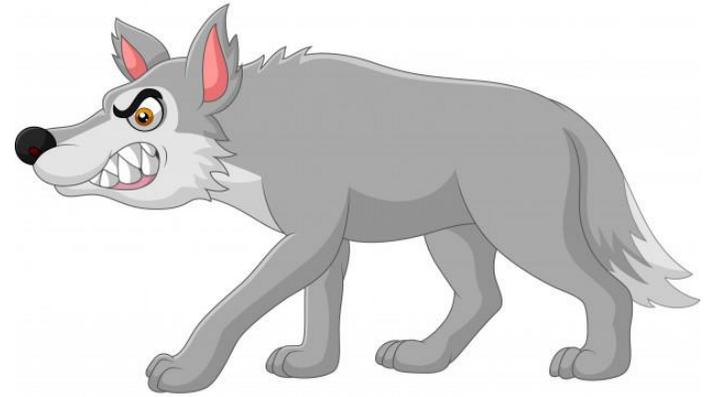
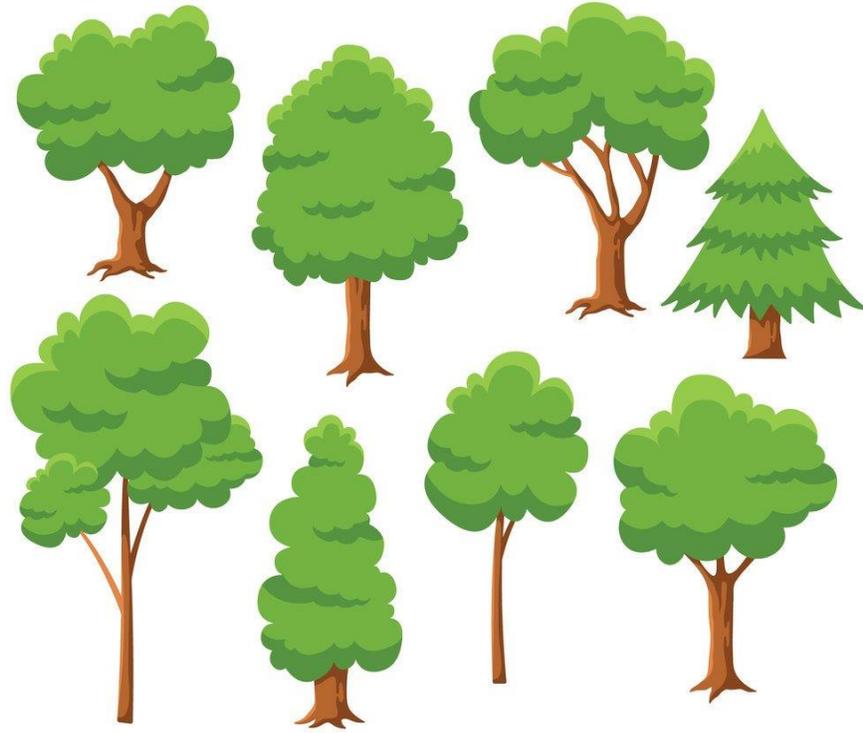
Studies show that 'normal' human memory is very poor in recalling:

- Dates, even for significant events
- How often something occurred
- How long it lasted
- In what order events occurred
- Common objects
- Peripheral information
- Names
- Verbatim conversation

It is these very things that asylum seekers are asked about to verify their claim and if incorrect are used as an indication of lack of credibility

Traumatic memories





Amygdala memories

- sensory or perceptual ‘snapshots’
- Little verbal narrative to tie the memories together
- Memories not marked as being in the past - the person re-lives the experience as if it is happening again.
- Memories cannot be consciously brought to mind but are triggered by external cues,
- Central details are more likely to be remembered than peripheral details.

Stressful environments

High levels of arousal interrupt memory recall.

Interviewer factors

- interrupting
- over-taking
- excessive use of yes/no questions
- inappropriate timing & sequencing of questions
- interrogative pressure
- demeanour of interviewer

Physical health factors affecting memory.

- traumatic brain injury**
- poor sleep
- chronic pain
- malnutrition.

Mental health disorders

- PTSD**
- Depression**

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Remote assessment

- Many MLR writers switched to remote assessments during first lockdown
- HO already working towards increasing asylum interviews by videoconference
- Remote hearings

However-

- Research shows
 - adverse credibility assessment more likely when giving remote evidence,
 - less likely to get bail,
 - more likely to get longer sentences
- Especially if
 - hearing difficulty,
 - cognitive or **mental health problems**,
 - **need an interpreter**
- Demeanour assessment on screen
 - eye gaze, body language
 - delayed responses,
 - misunderstandings not clarified

Results from 20 remote MLRs- 1

- **Confidentiality**- 20% of people were not alone
- **Disclosure**
 - 35% of clients reported some issues they felt unable to disclose
 - 80% felt they said all they wanted to
 - majority of doctors felt could not obtain full history of torture and its impact
 - Vulnerability, lack of visual cues
 - Rapport not as good as face to face
- **Assessing consistency of psychological findings with the torture**
 - partial in 60%,
 - satisfactory in 25%

Results from 20 remote MLRs- 2

- Detailed remote assessments can also be possible for
 - self-harm and suicide risk, demonstrating impact of the torture and future risk
 - Discussion of memory and clinical reasons for differences between accounts
 - Fitness to give evidence
 - Assessment of fabrication
- Further face to face assessment needed for physical examination *and* to update psychological assessment with benefit of improved rapport and visual clues

Challenges and implications

- Risk for individuals having partial or incomplete evidence
- Risk if submitting more and different information in later reports
- But if wait for face to face, risk long delays in obtaining medical evidence
- Challenges for decision makers in making fair and robust decisions on less evidence than previously- especially given seeming dependence on scars as evidence
- May better inform decision makers about problems of obtaining evidence remotely in asylum interviews or in the Court hearing
- More immigration detainees, and asylum seekers generally, may be able to access medical evidence

Can physical assessment also be done remotely?

- Risk decision maker gives no weight to the remote assessment because physical assessment is limited
- Good quality photographs in conjunction with video assessment
 - risk disadvantaging those without these
 - risk decision maker making their own conclusions about the scars, or lack of them
- Reduce risk if simply confirm presence of scars and caveat
 - ‘in keeping with the attribution given’
 - ‘further face to face assessment is indicated as other scars may be present and full evaluation can then be made’

How to get the best from your medical report writer

- Good instructions
- Provide all the documents in good time
- Good instructions
- Good instructions

Case law on the use of medical/medico-legal reports in court proceedings



Alex Shattock

This presentation

- *KV (Sri Lanka) v Secretary of State for the Home Department* [2019] UKSC 10
- *SA (Somalia) v Secretary of State for the Home Department* [2006] EWCA Civ 1302
- *Mehmet Eren v Turkey (2008) (Application No 32347/02)*

KV (Sri Lanka) v Secretary of State for the Home Department [2019] UKSC 10

- Key recent case- well worth understanding in detail
- Sri Lankan Tamil alleging torture and claiming asylum
- Branding scars on back- hot metal rod
- Question of self-infliction by proxy
- FtT dismissed appeal but made an error of law
- UT held the case was appropriate vehicle to provide guidance on medical scars caused by torture- Helen Bamber Foundation intervened



KV (Sri Lanka) v Secretary of State for the Home Department [2019] UKSC 10

- UT dismissed the appeal in a massive decision (78 pages)
- UT issued guidance to those preparing medico-legal reports in relation to scars from asylum-seekers who allege them to be the product of torture where self infliction by proxy (SIBP) is more than a fanciful possibility
- However on appeal, CA considered that wounding SIBP was generally so unlikely that it was inappropriate to issue the guidance- CA disagreed with the suggestion in the guidance that medical experts should routinely consider SIBP even when not canvassed by the Home Office as being a reasonably possible explanation of the asylum-seeker's scarring (unclear where we stand on this as CA overruled- more on this later)

KV (Sri Lanka) v Secretary of State for the Home Department [2019] UKSC 10

- In KV's case, the medical evidence concluded that his scarring was consistent with his account- 'perfect' branding in areas where he said he was unconscious when it happened- 'imperfect' branding where he said he was conscious (and thus his pain receptors and reflexes reacted to the branding by flinching etc)
- Doctor's conclusion was that his clinical findings were "highly consistent" with KV's account of torture- using Istanbul Protocol wording
- Court of Appeal strangely challenged this approach- said it was straying too far outside his remit to comment on his story:
- *“In my judgment, at this point he rather trespassed beyond his remit as an expert medical witness into the area where it was for the UT to make an assessment of all the evidence” [34]*

KV (Sri Lanka) v Secretary of State for the Home Department [2019] UKSC 10

- Supreme Court: this approach was wrong: clearly erroneous
- *“In their supremely difficult and important task... of analysing whether scars have been established to be the result of torture, decision-makers can legitimately receive assistance, often valuable, from medical experts who feel able, within their expertise, to offer an opinion about the consistency of their findings with the asylum-seeker's account of the circumstances in which the scarring was sustained, not limited to the mechanism by which it was sustained”*

KV (Sri Lanka) v Secretary of State for the Home Department [2019] UKSC 10

- Noted had the doctor in that case limited the report to saying the scarring was caused by a hot metal rod, that wouldn't be terribly helpful
- “Trauma described” in IP= claimant's account- CA definition was too narrow
- Therefore- possible (and, I would suggest, desirable) to link findings under IP to the appellant's account
- However- word of warning- unless injuries are diagnostic, not a good idea to say you believe the appellant (and even then prob not worth it)

KV (Sri Lanka) v Secretary of State for the Home Department [2019] UKSC 10

- SC said:

“*[after discussing diagnostic/not consistent under IP]* ...Where, however, more usually, the expert places his or her conclusion within categories (b), (c) or (d), there is no room, nor sanction in the protocol, for the expression of belief or otherwise in the account given. **The conclusion about credibility always rests with the decision-maker following a critical survey of all the evidence, even when the expert has placed his conclusion within category (a) or (e).** Indeed, in an asylum case in which the question is only whether there is a real possibility that the account given is true, not even the decision-maker is required to arrive at an overall belief in its truth; the inquiry is into credibility only of a partial character.”

SA (Somalia) v Secretary of State for the Home Department [2006] EWCA Civ 1302

- Cited with approval in KV: important as it sets out what a medical report is for
- the task for which an asylum-seeker tenders a medical report is to provide *"a clear statement as to the consistency of old scars found with the history given ..., directed to the particular injuries said to have occurred as a result of the torture or other ill treatment relied on as evidence of persecution"*.
- Emphasises that consistency is an expert question for the medical report- should not be left to the Court or Tribunal

SA (Somalia) v Secretary of State for the Home Department [2006] EWCA Civ 1302

- CA also gave some pointers on writing medical reports
- *“It is also desirable that, in the case of marks of injury which are inherently susceptible of a number of alternative or “everyday” explanations, reference should be made to such fact, together with any physical features or “pointers” found which may make the particular explanation for the injury advanced by the complainant more or less likely.”*
- Also emphasises importance of IP

Mehmet Eren v Turkey (2008) (Application No 32347/02)

- Also cited in KV
- ECtR case- ill treatment in police custody in Turkey
- Para 43- Court it relied upon the conclusion of a medical report about the consistency of the clinical findings with the applicant's account of serious ill-treatment while he was in police custody- court regarded it as conclusive evidence of ill-treatment for the purpose of a finding that Article 3 ECHR had been violated
- Medical reports can be decisive!
- Court *again* emphasised the importance of the IP

Takeaways from the case law

- Case law emphasises the primacy of the IP- follow it closely
- Express an opinion on consistency with story- but do not say you believe the story. Important to bear in mind objectivity part of IP- when describing account use language like “he/she reports that X occurred”
- Unclear where we stand on considering evidence of self-infliction- my advice to medical experts has always been include it anyway- despite it being implausibly unlikely in the vast majority of cases, some judges may think about the possibility, so good to head this off

(Same goes for likelihood of faking mental illness symptoms e.g. PTSD- common perception is it is easy to fake when the symptoms are quite specific)

T

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HIGH COMMISSIONER FOR HUMAN RIGHTS
Geneva



PROFESSIONAL TRAINING SERIES No. 8/Rev.1

Istanbul Protocol

Manual on the Effective Investigation and
Documentation of Torture and Other Cruel,
Inhuman or Degrading Treatment or Punishment

「Landmark
Chambers」

it closely

do not say you believe the

of self-infliction- my advice
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Medical evidence in the asylum determination process: 8 Practical tips for maximum impact



Samantha Broadfoot QC

1. Structure

- Asylum context: PD10 - can use the requirements as a structure.
- Civil context: CPR Part 35

PD 10.9: An expert's report must:

- (a) give details of the expert's qualifications;
- (b) give details of any literature or other material which the expert has relied on in making the report;
- (c) contain a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;
- (d) make clear which of the facts stated in the report are within the expert's own knowledge;
- (e) say who carried out any examination, measurement or other procedure which the expert has used for the report, give the qualifications of that person, and say whether or not the procedure has been carried out under the expert's supervision;
- (f) where there is a range of opinion on the matters dealt with in the report: (i) summarise the range of opinion, so far as reasonably practicable, and (ii) give reasons for the expert's own opinion;
- (g) contain a summary of the conclusions reached;
- (h) if the expert is not able to give an opinion without qualification, state the qualification; and
- (i) contain a statement that the expert understands his or her duty to the Tribunal, and has complied and will continue to comply with that duty.

- What is missing from this list is methodology – can be very important for judge to understand how long it has taken to elicit the information.

2. Set out key info at the beginning

- E.g. in a box on the front page:
 - Name, Dob, Address
 - Nationality
 - Religion
 - Language of assessment
 - Interpreter
 - Where examined, when examined, by whom
 - Instructed by
 - Other key info e.g. Documents read and their date – Screening i/v, SEF, Rule 35 etc.

3. Use Headings

- Make it easy to navigate

4. TYPOS

- Aka ytpos...

5. Language

- Keep it neutral where possible
- Use the terminology of your own field with lay explanations.
- Avoid superlatives
- Avoid using phrases like “I would argue that”

6. Solicitors: make it is easier for the expert

- e.g. chronology, draft WS
- Clear instructions as to what the issues are and where expert can help
- Don't forget to specifically mention that their opinion is sought on the impact of the asylum seeker's mental state on their ability to recall events or sequences of events with precision.

7. Experts – you are not the advocate

An expert that gives the impression of being anything other than impartial will have little credibility.

8. Don't forget the formalities

- Declaration
- Statement of truth
- Signature

Q&A

We will now answer as many questions as possible.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

Thank you for listening

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