



The myth of malingering: Is it the truth or a lie?

Doctors testify that science backs their ability to call plaintiffs liars. It's time to administer malingering tests to these experts.

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Every day, at trial and in depositions, doctors representing insurance companies as expert witnesses in a wide variety of cases involving plaintiffs' mental competency or brain injury trauma testify without supporting their conclusions with scientific data. In fact, the defense will often retain these so-called experts solely to brand the plaintiff a "malingerer," i.e., a liar. Although courts should strike this testimony for its lack of expert analysis, few plaintiffs' lawyers and judges understand the procedures required in valid malingering tests. As a result, these doctors get away with saying almost anything.

Five years ago, 50-year-old Hildergard Trotter sustained brain damage when a tractor-trailer broadsided her vehicle. The defendant's insurance company hired a doctor who claimed to perform "scientific" tests that proved Trotter was exaggerating the extent of her injuries; therefore, she was a malingerer.

Hundreds of hours of research proved that dishonesty was indeed an issue: The doctor eventually admitted that he may have lied to her and that one of the tests he relied on to determine malingering actually could have reflected answers on her part that were completely truthful.¹

This is only one example of how tests to determine malingering are abused or inadequately performed in personal injury, child custody, divorce, criminal and insanity cases all over the country.

With increasing frequency, defense doctors who are paid for their testimony are rendering malingering opinions based on tests of dubious scientific validity. Individuals are being diagnosed as liars or sociopaths and denied custody and even visitations with their children. They are denied Medicare, Medicaid, long-term disability benefits, workers' compensation or health insurance benefits based on tests with little to no scientific basis. In America, the jury or the judge decides truthfulness, not the doctor.²

A malingering claim is tantamount to accusing the plaintiff of committing insurance fraud. When this kind of testimony is presented, lawyers should consider a motion in limine based on scientific reproducibility standards. If granted, this motion could preclude the doctor from making unscientific claims about the litigant's honesty.

Malingering tests are divided into four different categories: Effort tests, pain scales, symptom endorsement and Waddell's signs.

Effort tests

The presumption behind some effort tests is that if an individual scores too low on an easy test, he or she knew the correct answer and intentionally answered incorrectly in an attempt to appear more impaired than facts would support. Examples of effort tests include the test of memory malingering, Rey's 15 Item test³ and the Word Memory test.⁴

Pain scales

Pain scales tests ask the patient to rate the frequency and type of pain. Some tests may question how the pain affects his or her life. If the patient endorses enough items, the examining doctor typically concludes that the patient is malingering. This point of view raises the question: Can a patient with serious physical problems ever not have an elevated score and not be malingering? These tests include the Pain Disability Index⁵ and the Oswestry Disability Index.⁶

Symptom endorsement

These tests ask the patient to endorse various psychological or perceived psychological symptoms. If the patient has too many symptoms – for example, stomach ache, hearing voices, crying fre-



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quently – then the examiner assumes the plaintiff is exaggerating symptoms because individuals with true psychiatric symptoms do not endorse those symptoms or as many. Examples of symptom endorsement tests include the Minnesota Multiphasic Personality Inventory (MMPI2)⁷, the Millon Clinical Multiaxial Inventory (MCMI)⁸ and the Personality Assessment Inventory.⁹

Waddell's signs

Waddell signs are actions the patient performs that would not typically cause pain; however, the patient complains of pain. Waddell's signs should never be used to support a malingering claim. When conducting the test, the doctor may be testing in a manner that would cause pain. For example, one of Waddell's signs is axial loading, pushing the top of the head to see if it elicits pain in the low back. Anatomically, pushing on a person's head cannot and should not cause low back pain. However, if the patient bends forward when the doctor pushes, he or she may feel pain in the low back. The doctor should note that the pain was caused by the patient's posture, not the axial loading. Waddell's signs were never created to determine malingering in the first place.¹⁰ They were created to determine whether the doctor should refer the patient to a psychologist. Rarely does the defense expert go the next step and refer the patient out for psychological testing.

Conclusion

Most of the tests used to determine malingering are problematic. Flaws in malingering tests, however, can be exposed in cross-examination by relying on the following proven facts about malingering tests:

- Doctors don't really know how a malingerer will answer a particular test question. Many of the samples on which malingering tests are based were performed on college students *pretending* to malingering. Studies indicate that the results

derived from a control group of actors may not represent how true malingerers behave.¹¹ Tests of this nature will never be able to predict the behavior of a group of individuals to whom they were never applied. This unreliable testimony, if allowed, would create a false appearance of scientific reliability and accuracy that would be extremely likely to improperly influence the jury.¹²

- Test batteries often take 16 hours to complete. Someone with genuine organic brain damage or depression may have difficulty staying on task and may end up frustrated and simply randomly responding toward the end of the 16 hours. Thus, the results may not accurately indicate the patient's true condition. Furthermore, what "malingering" tests were normed on individuals who have just undergone 16 hours of testing in the first place?

- Malingering tests may reflect poor effort, a clear symptom of depression rather than malingering. For someone who is depressed, "even the smallest tasks seem to require substantial effort. The efficiency with which tasks are accomplished may be reduced."¹³

- Poor scores can also reflect anger. The Portland Digit Recognition Test,¹⁴ in and of itself, can so irritate and insult the patient, he or she may become angry and discontinue putting effort into the test.¹⁵ Patients who performed at their best on all other tests report becoming sufficiently annoyed, either because the test is protractedly boring or because they feel it insults their intelligence. After a while, they give answer without attending to task.¹⁶

- Poor scores on "malingering" tests may actually reflect genuine psychopathology. Poor scores on the Rey's 15 Item test may reflect brain damage rather than malingering, especially if the individual is older.¹⁷ Another problem with the Rey's test is that when analyzing its accuracy rate, 27 percent of patients scored in malingering range, but only 15 percent were told to fake answers.¹⁸ What this

means is that the test is not much more than 50 percent accurate – the same as flipping a coin.

- Poor scores can reflect noncompliance. Noncompliance is a sign of brain damage.¹⁹

- Some malingering tests require impossibly high scores to avoid the malingering label. The Test of Memory Malingering concludes malingering unless the plaintiff passes at least 90 percent of the questions.²⁰ No school would "flunk" a student who tests at 89 percent.

- When malingering tests and their normative basis to which a patient is compared were created, they were not administered along with up to 16 hours of neuropsychological testing (as frequently happens to brain-injury plaintiffs today) Days of testing are exhausting, especially to the patient on narcotics, in pain, or suffering from brain damage or psychiatric conditions. Malingering tests should never apply to brain-injury plaintiffs because they were not represented in the normative sample.

- No malingering test was normed on individuals forced to be examined by a doctor he or she did not trust because of a relationship with the defendant. Results are skewed and should not apply.

- Some malingering tests are created in a way that the plaintiff gets a point towards malingering if he or she answers the question as true or false. The Lees Haley Fake Bad scale (a series of questions pulled from the Minnesota Multiphasic Personality Inventory) contain questions that if answered *true* may label the patient a malingerer. If the patient answers the same questions *false*, he or she would receive a point towards exaggerating on that same test, but using a different scale.

- Brain injury plaintiffs tend to be on pain medication when malingering tests are administered. Records do not indicate how many people in the normative sample were also on pain medication nor how many had the same level of pain and physical problems. Such tests should not apply unless the normative sample



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Endnotes:

¹ *Trotter v. Washington Group International, Inc., et al.*, Case No. A466763, Deposition of Paul Lees-Haley, Vol. 1, taken August 19, 2004.

² *The State of South Dakota versus Roger Allen Raymond*, 540 NW2d 407, 409 (S.C.T. SD 1995).

³ The Rey's 15 item is a simple visual memory test consisting of three columns x five rows.

⁴ The Word Memory Test claims to be a computerized memory test with multiple subtests measuring memory and effort. However, it has come under criticism as concluding malingering when bona fide mental illness exists see *Schizophrenia Research*, 78 (2005) 199-208, (Netherlands and Spain) found that when administered to schizophrenics who had no reason to malingering, a majority of them flunked. Also see: Bowden SC, et al. "Does effort suppress cognition after traumatic brain injury? A re-examination of the evidence for the word memory test," *Clinical Neuropsychologist* 20.4 (Dec 2006): 858-72.

⁵ This is a brief and simple questionnaire that asks the patient to indicate how pain has interfered with function in his or her life.

⁶ A 60 question test that weighs some answers heavier than others. Example: Pain killers give very little relief from pain [4 points] or Pain killers have no effect on the pain and I do not use them [5 points].

⁷ A 567 true/false question test asking questions like "I liked 'Alice in Wonderland' by Lewis Carroll." Pope, et al., "Listing of MMPI, MMPI-2, and MMPI-A Items," Appendix F, *The MMPI, MMPI-2 & MMPI-A in Court*, 2nd Ed., American Psychological Association (2000): 239.

⁸ The MCMI is a 175 question true/false test similar to the MMPI-2.

⁹ A 344 question test asking the test taker to rate answers as *False, Not at All True, to Very True*.

¹⁰ Cole, Brandy, Cutler, R.B. et al, "A Structured Evidence-Based Review on the Meaning of Nonorganic

accurately represents individuals similar to the plaintiff.

- When malingering tests require typing, results can be skewed when the plaintiff has vision loss, carpal tunnel syndrome or difficulty sitting. Symptoms of aging can also affect tests. The elderly frequently experience computer anxiety and this can affect test results, especially if the test is timed.

- Tests should be administered in the patient's native language. Poor reading skills can cause false test results.

- If patients have brain damage and are given tests of concentration, they may perform poorly because concentration is difficult. They are then branded a malingerer. If they pass the test, doctors may conclude that means no concentration problems and, therefore, no brain damage. Either way they lose.

No one knows exactly why a person may score poorly on a "malingering" test anyway. Even when test scores lead to virtual certainty that a person's self-report is unreliable, that alone says nothing about the motivation to give an unreliable account.²¹ Doctors should consider the obvious and ask the patient why he or she scored poorly.

- The doctor himself may lie to the patient when giving the test, calling the test difficult when it is very easy, or calling it a memory test when it is not.²²

- While studies published in psychological journals support the use of malingering tests, nowhere is the bias of the researcher discussed. Investigator bias may play a part in the creation of the test itself, particularly if the test creator receives his or her income from sources tending to benefit from malingering findings. Often a researcher may not disclose financial ties. For example, recent research reveals that in more than 95 percent of the cases, drug research papers do not reflect the author's economic ties to the industry.²³

- Sometimes the doctor can actually mislead the patient by the way the test is administered. When doctors give malin-

gering tests, the patient is not told he or she is being tricked. And the doctor can make testing conditions difficult. There are many ways in which the doctor can skew the results, including the doctor taking cell phone calls while the plaintiff is trying to concentrate on effort tests, or walking in and out of the room.²⁴

- A doctor may also mislead the plaintiff and his or her attorney by taking a test that was actually created to assess brain damage and, when the plaintiff does poorly on the test, claiming the test is actually a malingering test.²⁵

All this leads to one enormous question: Why use malingering tests at all? They cannot predict a future act. They cannot rule out the underlying condition, be it brain injury, incompetence, insanity, depression, etc. They cannot predict the probability of lack of candor in other areas (i.e., the patient scored 85 percent on a malingering test; therefore, only 85 percent of what she says is believable). Furthermore, they are not also administered to the defendant or the defense experts in the same lawsuit (although that might be an interesting suggestion).

The conclusion that an individual is overall untrustworthy or believable because of one test or event is unscientific. To what exact answer or symptom did the patient malingering in the first place? Most doctors have no clue. And even if someone fails a malingering test, there is still no scientific basis to construe the patient doesn't suffer from the condition he or she claims, such as post-traumatic stress, depression, brain injury, etc.

Many courts reject the ability of one witness to comment on the credibility of another.²⁶ That is the jury's job. Yet every day doctors who gain financially by their testimony are claiming under oath that science backs their ability to call plaintiffs liars. It's time to administer malingering tests to some doctors and see how they score. Let's protect the Hildegard Trotters of the world from false accusations.



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Physical Signs: Waddell Signs," *Pain Medicine*: 4:2:141-181, 2003.

¹¹ Faust, David & Margaret A. Ackley, *Did you Think It Was Going To Be Easy? Some Methodological Suggestions for the Investigation and Development of Malingering Detection Techniques*, in *Detection of Malingering During Head Injury Litigation*. Reynolds ed., Pub. Plenum Press, NY: 1998: pp. 28.

¹² Creager, Shea, and Lerner. *Emerging Issues, Role of Defense Neuropsychologists Should Be Limited under Virginia Evidence Law*. The Journal of the Virginia Trial Lawyers Association. Fall 2002: pp. 27.

¹³ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders Text Revision*, DSM-IV-TR. 2000, 4th ed., Washington, D.C.: pp: 350.

¹⁴ A test consisting of 72 timed trials, each of which contains two five digit numbers. Lezak, Howieson,

Loring, *Neuropsychological Assessment* at 772 (2004), 4th ed Oxford.

¹⁵ Lezak, Howieson, Loring, *Neuropsychological Assessment* at 773 (2004), 4th ed Oxford.

¹⁶ Lezak, Howieson, Loring, *Neuropsychological Assessment* at 773 (2004), 4th ed Oxford.

¹⁷ Spreen and Strauss, *A Compendium of Neuropsychological Tests, Administration, Norms, and Commentary* at 674 (1998), 2d.ed. New York Oxford.

¹⁸ Spreen and Strauss, *supra* at 672.

¹⁹ "Hope Through Research, Traumatic Brain Injury, National Institute of Neurological Disorders and Stroke" National Institute of Health: pp. 22.

²⁰ Lezak, *supra* at 774.

²¹ DeClue, *Behavioral Sciences and the Law*, 2002: 20: pp. 717, 724.

²² Sims, Dorothy C., Brain Injury Professional, *Controversies in Neuropsychology*: Vol. 2, Issue 1, pp. 36-37.

²³ *Under the Influence*, Wired Magazine, May 11, 2003, Issue 11.05: pp. 59.

²⁴ Sims, Dorothy C., "Cross Examining the Psychiatric Expert," *WILG* (April 2005): 12-15.

²⁵ *Id.*

²⁶ *Lenz v. Commonwealth*, 261 Va. 451, 469, 544 SE 299, 301, 2001; *Kimberlin v. PM Transport, Inc.*, 264 Va. 261, 266, 533 SE2d 665, 667, 2002; *Feller v. State*, 637 So.2d 911 (Fla. 1994); *See also, Mills v. Red Wing Carriers, Inc.*, 127 So.2d 453 (2d DCA 1961).

