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Malingering Test Roils Personal-Injury Law

'Fake Bad Scale' Bars Real Victims, Its Critics Contend

By David Armstrong

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A test designed to expose fakers is roiling the field of personal-injury law, distressing plaintiffs and strengthening the hand of employers and insurers.

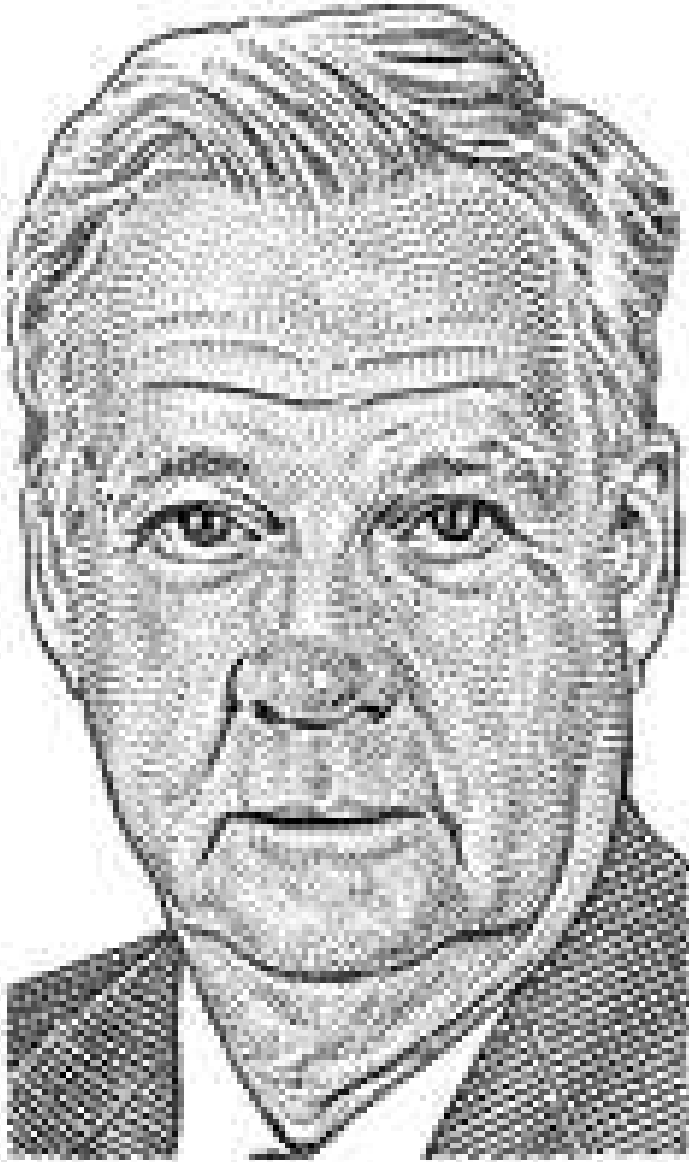
Proponents hail the true-or-false test as a valid way to identify people feigning pain, psychological symptoms or other ills to collect a payout. In hundreds of cases, expert witnesses have testified that the test provided evidence that plaintiffs were lying about their injuries, just as suggested by the test's colorful name: the Fake Bad Scale.

Use of the scale surged last year after publishers of one of the world's most venerable personality tests, the Minnesota Multiphasic Personality Inventory, endorsed the Fake Bad Scale and made it an official subset of the MMPI. According to a survey by St. Louis University, the Fake Bad Scale has been used by 75% of neuropsychologists, who regularly appear in court as expert witnesses.

But now some psychologists say the test is branding as liars too many people who have genuine symptoms. Some say it discriminates against women, too. In May, an American Psychological Association panel said there appeared to be a lack of good research supporting the test.

In two Florida court cases last year, state judges, before allowing the test to be cited, held special hearings on whether it was valid enough to be used as courtroom evidence. Both judges ended up barring it.

"Virtually everyone is a malingerer according to this scale," says a leading critic, James Butcher, a retired University of Minnesota psychologist who has published research faulting the Fake Bad Scale. "This is great for insurance companies, but not great for people."



James Butcher

The test asks a person to answer true or false to 43 statements, such as "My sleep is fitful and disturbed" and "I have nightmares every few nights." Someone who suffers from, say, post-traumatic stress disorder might legitimately answer "true" to these questions. But doing so would earn the test-taker two points toward the total of 23 or so that marks a person as a possible malingerer.

Other test statements are "I have very few headaches" and "I have few or no pains." These are false, someone who has chronic headaches would say. Again, those replies would incur two more points toward a possible assessment as a malingerer.

About a third of the questions relate to physical symptoms; there are questions about stress, sleep disturbance, and low energy. There is also a batch of questions related to denial of bad behavior. For instance, those who answer false to "I do not always tell the truth" get a point toward malingering.

Measuring Process

Paul Lees-Haley, the psychologist who created the test, says that while individual items "can be made to seem like evidence for a flawed" measuring process, what's important is the total score. He says the scale has "been tested empirically and shown to be effective."

Dr. Lees-Haley says criticism is being orchestrated by plaintiffs' lawyers. One, Dorothy Clay Sims in Ocala, Fla., has written guides for other plaintiffs' lawyers on how to challenge the Fake Bad test. She is leading an effort to reverse the decision that incorporated it into the Minnesota Multiphasic Personality Inventory, which is used in diagnosing and treating patients at mental-health facilities and in screening people for sensitive jobs like law enforcement.



Paul Lees-Haley

Dr. Lees-Haley himself once testified frequently for plaintiffs in personal-injury lawsuits, but about 18 years ago he began to work mainly for the defense side. He says he devised his test because he saw so many claimants he believed to be faking mental or other distress, and existing tests didn't spot them.

Working for litigants is Dr. Lees-Haley's main source of income. He has said in court cases that 95% of this work is on behalf of the defense. He charges \$3,500 to evaluate a claimant and \$600 an hour for depositions and court appearances, his fee schedule says.

Dr. Lees-Haley didn't dream up the 43 true-or-false statements in the Fake Bad Scale. He picked them from among the more than 500 true-or-false statements in the elaborate, decades-old MMPI.

He tested responses to the 43 questions on three groups. One was personal-injury litigants he said were malingering. A second group was people he asked to answer as if they were trying to fake emotional distress resulting from a car accident, toxic exposure or employment. A third group consisted of litigants he said had actually been injured.

The known fakers averaged a score of 27.6 on the Fake Bad Scale; those who had been instructed to try to fake emotional distress averaged 25; and the truly injured litigants averaged only 15.7, Dr. Lees-Haley wrote in a research report.

He also compared the scores with those of two large groups who had taken the MMPI; both averaged below 20.

Dr. Lees-Haley concluded that his test "appears to be a promising procedure" for detecting malingerers, and posited that anyone scoring over 20 tended toward fakery. He paid to have the results published in a small Montana-based medical journal, *Psychological Reports*, in 1991. Use of his Fake Bad Scale in litigation slowly grew.

It recently figured in the case of Steven Thompson, a onetime truck driver in Iraq for the KBR unit of Halliburton Inc. He said he hadn't been able to hold a job since returning to the U.S. in 2004. Two doctors concluded Mr. Thompson had "chronic" and "fairly severe" post-traumatic stress disorder. He filed a disability claim that was denied by the insurer of Halliburton's since-sold KBR unit.

Mr. Thompson appealed to the U.S. Labor Department, which has jurisdiction in such cases. He testified that memories of attacks on his convoys, seeing dead bodies and smelling burning flesh led to nightmares and sleeping problems that left him too irritable and difficult to work with to hold a job.

A psychiatrist hired by the defense, John D. Griffith of Houston, concluded Mr. Thompson was exaggerating his symptoms, and cited his score of 32 on the Fake Bad Scale. A Labor Department administrative-law judge denied Mr.

Thompson's claim, citing the test results along with inconsistencies in his testimony. Mr. Thompson is appealing.

Dr. Griffith won't discuss the case but says the Fake Bad Scale is helpful in confirming fakers, who he estimates make up 40% of personal-injury plaintiffs.

In seven prior cases where Dr. Griffith worked for KBR or its insurer, he found five of the claimants to be malingering, court records show. Asked about the high percentage of Iraq truck drivers he found to be faking, he said: "When you come back to the States, you suddenly discover if you are sick you can make more money than if you were working."

Cutoff Score

Dr. Butcher and some other researchers published a report critical of the Fake Bad Scale in 2003. They looked at more than 20,000 people, including several thousand psychiatric inpatients, who had taken the MMPI and calculated their Fake Bad Scale scores by checking their replies to the scale's 43 questions.

More than 45% of psychiatric inpatients had Fake Bad Scale scores of 20 or more, meaning they were possible fakers, under Dr. Lees-Haley's original cutoff score. Using a higher cutoff score, 24, the researchers still found that 23% of people were flagged as possible malingerers. In every subgroup, women had much higher scores than men.

The authors argued it was unlikely that so many psychiatric inpatients could or would have fooled doctors into diagnosing and admitting them to hospitals. It concluded that the Fake Bad Scale generated an "unacceptably high" rate of false verdicts of malingering, and also that it was biased against women.

Says Dr. Lees-Haley: "One of Dr. Butcher's primary strategies for criticizing the FBS is to apply it to groups for which it was never intended, and then complain that it isn't appropriate. Of course not. The FBS was designed for personal-injury claimants."

In 2006, the publishers of the Minnesota Multiphasic Personality Inventory took a look at the Fake Bad Scale. Those who take the MMPI receive scores on various categories, such as paranoia, depression and social introversion. The question was whether to make the Fake Bad Scale one of these scored categories as well.

The University of Minnesota Press convened a panel of eight experts and pointed to two published reports for them to consider. One was a book chapter partly written by Dr. Lees-Haley himself. The other report was a review of existing research, concluding that the "preponderance of the current literature" supports the use of the test in litigation.

The review of existing research ended up looking at 19 studies, at least 10 of which had been done by Dr. Lees-Haley or other psychologists who do work for insurance companies. The review had excluded 21 other studies from consideration, including the negative analysis by Dr. Butcher's team.

Dr. Butcher, a member of the advisory panel, opposed adding scores of the Fake Bad Scale to the results that are reported when a person takes the Minnesota Multiphasic Personality Inventory. Six of the eight panelists approved, although they differed on how the test should be used and what cutoff scores were appropriate. The University of Minnesota Press then did make the Fake Bad Scale a subset of the MMPI.

A few months later, the American Psychological Association's committee on disabilities protested to the publisher that it had acted prematurely. The APA committee later said it hadn't evaluated the test itself, but noted that the test was controversial and said: "Any test that over predicts malingering in persons with disabilities may result in their being denied necessary and due compensation, benefits or treatment." The committee asked the MMPI publisher to have the Fake Bad Scale reviewed by a group at the University of Nebraska that specializes in evaluating psychological tests.

The University of Minnesota Press didn't respond to a call. But in a letter to Ms. Sims, the Florida plaintiffs' lawyer, a lawyer for the university said it "recognizes that the FBS is the subject of significant debate in the academic and professional community.... The University believes that the process leading up to the FBS' release was sound."

Courtroom Test

The experts' disagreement spilled over into the courtroom in a case brought against a Florida gasoline carrier, Strawberry Petroleum Inc. Lloyd Davidson was sitting at a stoplight in May 2004 when his pickup was rear-ended by one of

the gasoline company's loaded tanker trucks, sending the pickup crashing into another truck ahead of him. His lawsuit said his head shattered the rear window and he ended up with diminished mental capacity and symptoms of depression and inattention.

A psychologist hired by the defense said in a deposition there was reason to believe Mr. Davidson was faking. The witness cited his "very high" score of 31 on the Fake Bad Scale.

Before the expert could testify at the trial, held in Hillsborough County Circuit Court, the plaintiffs moved for a hearing on the scientific validity of the Fake Bad Scale. Judge Sam Pendino ruled in June that "there is a genuine controversy surrounding use of this test" and "no hard medical science to support the use of this scale to predict truthfulness." He said that drawing conclusions from a test that gives points for malingering when a plaintiff gives honest answers to questions based on actual injuries "has no place in this courtroom."

In January, a jury determined that Mr. Davidson had suffered a permanent injury from the crash and awarded him \$1.4 million from the gasoline carrier.

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