

A Brain in Hand and a Brain Test Out of Control

By Bill Daniels

35 Advocate 18 (April 2008)

Holding a human brain in your two hands triggers odd thoughts. So does reading the *Wall Street Journal*, though I'm not suggesting the two experiences are exactly equivalent.

My close encounter with a thought organ took place on the last day of an excellent four Saturday UCLA Extension class: *Gross Anatomy: The Fundamentals Litigators Need to Know*. The course was the brainchild of CAALA Board of Governors member Steve Goldberg and UCLA Professor David A. Hovda, Ph.D. If it's offered again in the future, I highly recommend you attend.

Briefly, UCLA/Goldberg/Hovda put together a science-based program designed to teach 26 enrolled attorneys human anatomy from top to bottom. The course materials closely track the basic human anatomy class every first year medical student must pass. Dr. Hovda assured me that, as a graduate of the program I am now entitled to wear a UCLA Medical School sweatshirt and, I guess, root against USC.

We're talking detailed lectures, introductions to everything from functional MRIs and PET scans to cutting edge orthopedic surgery, followed by four afternoons in the laboratory dissecting human cadavers. Lawyers studying real science to improve their courtroom advocacy is a good thing. Especially since it goes directly against the stereotype that plaintiff attorneys care more about junk science than scientific fact when they bring a case in court.

On the other side of the spectrum was a *Journal* article that caught my eye. I found it on the front page just after my UCLA brain-holding experience, which is probably why I took such strong notice

"Malingering Test Roils Personal-Injury Law" blared the March 5 headline. The subtitle offered a bit more explanation, adding: "'Fake Bad Scale' Bars Real Victims, Its Critics Contend." "Great," I remember thinking. "What kind of junk have they come up with now?"



I found the news story both enlightening and disturbing. Enlightening, because I've always found traumatic brain injury cases to be among the most challenging and interesting matters a trial lawyer can handle. Disturbing because the *Journal* described a controversy surrounding the oddly named "Fake Bad Scale" validity (read "malingering") test that was recently made an official subset of the Minnesota Multiphasic Personality Inventory, aka the MMPI.

The MMPI, just in case you aren't familiar with it, is a psychological assessment test that has been around since the early 1940's and is frequently used to evaluate personal injury victims, particularly those alleging mild traumatic brain injury.

Even though the story talked about the MMPI, I think the reporter meant the MMPI-II, since that's the restandardized version of the original test and is the version most widely in use. Any way, it didn't really matter, since the point of the story was, a widely used test has been compromised by an apparent junk scientific validity scale designed to wash out deserving brain injury victims. As the *Journal* explained:

In two Florida court cases last year, state judges, before allowing the [Fake Bad Scale] 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." . . .

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." . . .

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.

In one episode mentioned in the article:

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.

Okay, so what does all this add up to? I think the answer is simple.

There's no shortage of quackery for hire that is ready, willing and able to use pretend science against our clients in the courtroom. Our best defense is to keep educating ourselves and improving our knowledge skills so that we can face trickery head-on and expose it effectively when it shows up on the defense side of our cases. Hence the importance of programs like what Steve Goldberg and Dr. Hovda put on at UCLA, or even just keeping up on changes in medical technology, like the abuse of the Fake Bad Scale.

The better educated we become, the better we can serve our clients and win the favor of Lady Justice. In the old days, maybe hitting a couple of seminars on tort law and getting your minimum MCLE was enough. I don't think that's the case any longer.

We need to find more ways to keep our skills at and beyond the state of the art. That's one of the thoughts that went through my brain while I was holding someone else's in my cupped hands. Another was a quiet prayer for a generous soul who made the most personal of gifts to help further human knowledge.

Sometimes you can't help but be humbled in our profession.

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