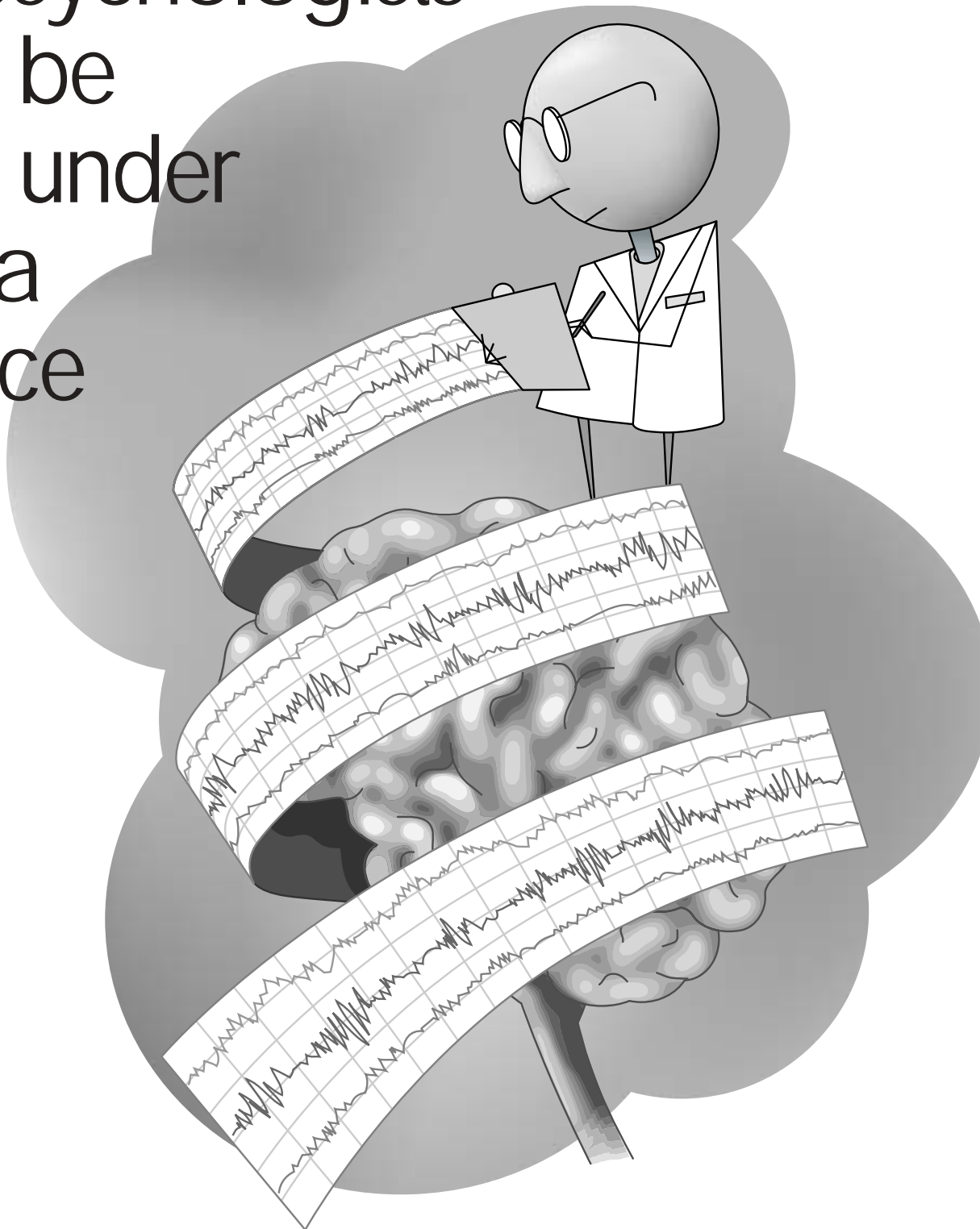


---

**Emerging Issues**

# Role of defense neuropsychologists should be limited under Virginia evidence law

by Roger T. Creager,  
John C. Shea,  
and Glen P. Larner



Attorneys opposing traumatic brain injury claims have turned with increasing frequency to neuropsychologists as defense experts. The defense neuropsychologist performs written testing of the plaintiff during a Rule 4:10<sup>1</sup> examination and then comes to trial ready to give opinions which undercut the plaintiff's case.

In years past, the defense neuropsychologist typically would have been called to testify that his interpretation of the plaintiff's test data established that the plaintiff's performance is within the normal range and the plaintiff's mental functioning is not impaired. The defense neuropsychologist often would reinterpret as normal the test scores obtained by the plaintiff's neuropsychologist, or might otherwise challenge the methodology or conclusions of the plaintiff's expert.

This type of testimony was centrally within the expertise of neuropsychologists. Administration of neuropsychological tests, scoring of the results, and categorization of the scores (e.g., as above average, average, low average, borderline impaired, impaired, severely impaired) is the kind of function that neuropsychologists have long performed.<sup>2</sup>

In recent years, however, neuropsychologists have been called with increasing frequency to offer a new kind of opinion. The defense neuropsychologist attempts to testify that the plaintiff's test scores establish the plaintiff is malingering, feigning or exaggerating his symptoms, that his purported impairments are of questionable validity, that his test results are "atypically abnormal" and inconsistent, and/or he was not using his "best efforts" during the testing process.

In a recent jury trial of a mild traumatic brain-injury case in Fairfax Circuit Court, the authors faced two heavily credentialed defense neuropsychologists who attempted to offer this type of testimony. A pretrial Motion in Limine was filed, seeking to limit and exclude much of their testimony. Several weeks before trial, Judge Jane Marum Roush held that the experts "will not, in direct testimony, opine that the plaintiff is lying, faking, malingering, or not credible."<sup>3</sup> Judge Roush further stated from the bench that no expert should be permitted to state opinions that amounted to "any variation" of these opinions.<sup>4</sup> Additionally, Judge Roush also stated from the bench that any reference to "secondary gain" would "invad[e] a province of the jury."<sup>5</sup>

At trial, the Court was asked to amplify the earlier Order and to preclude the defense neuropsychologists from giving any opinions or testimony that the plaintiff did not use his "best efforts" on their testing, was "not trying," "exaggerated his symptoms," or produced results that were "worse than you might have expected." The Court agreed that all of these variations were also

inadmissible, and limited the testimony of the defense neuropsychologists accordingly.<sup>6</sup> After a four-day trial, the jury returned a verdict of \$1.5 million.<sup>7</sup>

A review of pertinent scientific literature and legal authorities demonstrates that the ruling of the Fairfax County Circuit Court is well grounded and correct. "Malingering" testimony and similar opinions by neuropsychologists are not scientifically reliable and should be excluded under numerous well established principles of evidence law.

Current efforts to use "malingering" testimony can be traced back to outdated, purportedly scientific literature which many years ago proposed the notion of "accident neurosis." This speculative concept was premised on the unproven assumption that brain injury patients involved in litigation become markedly better after their cases resolved. Although this notion still enjoys some popularity among those who have not studied the issue, professional articles and studies have shown that the concept of "accident neurosis" was never based upon any substantial scientific foundation.<sup>8</sup> Thus, even neuropsychologists who frequently testify for the defense have admitted, in their more candid scholarly articles, that while some defense attorneys may accuse brain-injury claimants "of exaggerating their complaints in order to gain large settlements, . . . research has not supported this claim."<sup>9</sup>

Some researchers were initially very skeptical about whether a brain injury with lasting consequences could be sustained even though no loss of consciousness occurred, the person seemed normal at the time of the injury, and subsequent diagnostic imaging of the brain revealed no evidence of brain injury. Once again, however, actual scientific study of this question eventually showed "that persisting cerebral dysfunction sometimes can result from a seemingly mild head injury even in the absence of gross neurological complications,"<sup>10</sup> and even though there is no loss of consciousness and the person appears normal at the time of the injury.<sup>11</sup> Research has shown that an entire category of brain injury known as "diffuse axonal injury" causes microscopic brain damage which usually cannot be detected on CT [computerized tomography] and MRI [magnetic resonance imaging] scans.<sup>12</sup> Even though diffuse axonal injury is commonly "invisible" it can result in severe dysfunction.<sup>13</sup> This type of injury is most frequently associated with motor vehicle collisions.<sup>14</sup>

Lay people are, of course, usually unaware of these scientific findings regarding brain injuries. Thus, despite the scientific findings reviewed above, litigants without positive diagnostic images who have persisting problems months and years after an alleged brain injury are often unfairly suspected of malingering, or of exaggerating or faking their problems and deficits.

Testimony from a defense neuropsychologist regarding “malinger” or similar opinions would, if allowed, provide a seemingly “scientific” basis for these suspicions. This testimony would be particularly damaging since the neuropsychologist would often be backed by a lengthy curriculum vitae listing scores of published articles, creating an impression of scientific reliability and certainty.

Thus, if neuropsychologists are allowed to testify that a plaintiff is malingering, faking, feigning, or exaggerating, the testimony may well have an important, perhaps even decisive impact, on the jurors deliberations. Moreover, because defense neuropsychologists may have impressive academic credentials and are often very experienced and skilled witnesses, cross-examination may be inadequate to undo the damage done by such testimony. Correct determination of the admissibility of neuropsychological opinions of this sort is therefore vitally important. Additionally, courts have every reason to carefully scrutinize the admissibility of the opinions of defense neuropsychologists since, unlike the plaintiff’s treating neuropsychologist and doctors, they have no treatment relationship with or professional obligations to the plaintiff. Rather, the sole reason for their involvement in the case is they are hired and paid by the defense to examine the plaintiff and testify for the defense at trial.

Although the admissibility of testimony and opinions regarding “malinger” has not specifically been addressed by the Virginia Supreme Court, the general principles which govern the admissibility of expert opinions are well-developed. Even a cursory review of Virginia law readily establishes that expert testimony must be carefully scrutinized by trial courts. Under Virginia law, such testimony is admissible only if it satisfies numerous independent evidentiary requirements.

In civil cases, expert testimony is admissible only when it: 1) will assist the trier of fact in understanding the evidence,<sup>15</sup> 2) is based on an adequate foundation,<sup>16</sup> and 3) is not in any way speculative or founded on assumptions that have an insufficient factual basis.<sup>17</sup> When an expert has failed to consider all variables bearing on the inferences or conclusions the expert purports to draw from the facts observed,<sup>18</sup> the testimony is inadmissible. Expert testimony must be excluded if it consists of or contains inadmissible hearsay.<sup>19</sup>

When unfamiliar scientific evidence is offered, the trial court must make a threshold determination regarding whether the evidence is scientifically reliable.<sup>20</sup> Moreover, even if all other evidentiary requirements are met, the proponent must also establish that the particular expert being called to testify in fact possesses sufficient qualifications and expertise to reliably and authoritatively render each aspect of the opinions and testimony that he intends to offer.<sup>21</sup>

Virginia courts have also consistently held that expert opinion is inadmissible if it improperly invades the province of the jury.<sup>22</sup> The credibility of any witness or party is, of course, classically an issue which falls squarely and solely within the purview of the jury.<sup>23</sup> The Virginia Supreme Court has held that it is improper even to suggest that there is a scientific way to determine whether a witness is telling the truth.<sup>24</sup> Furthermore, the Court has held that “in reality, in our system of justice, the jury decides what is true and what is not.”<sup>25</sup> The Supreme Court has specifically held that expert testimony cannot be used even to imply that another witness’s testimony is not credible since “the jury properly resolves those issues without expert testimony.”<sup>26</sup>

Often, when expert testimony is challenged as inadmissible the proponent of the evidence will argue that any flaws and problems in the evidence can be brought out on cross-examination, and thus there is no need to exclude the evidence. Trial courts may be tempted to allow questionable expert testimony into evidence on the theory that its weaknesses can be exposed on cross-examination and the jury can then determine what weight should be given to it.

This approach is not permitted under Virginia law.<sup>27</sup> Rather, the Virginia Supreme Court has made clear that the trial court must act as the “gatekeeper” charged with the responsibility of limiting expert testimony to its proper bounds.<sup>28</sup> It is “for the trial court, not the jury, to decide whether the proper and sufficient foundation had been laid for the introduction of” the expert testimony.<sup>29</sup> The admissibility of expert testimony presents a “strictly legal question” for decision by the Court.<sup>30</sup> If the proffered expert opinions are not admissible, the jurors should never hear them. Moreover, it unnecessarily lengthens and complicates the trial to allow direct testimony and cross-examination of experts regarding opinions which ought to have been excluded.

Indeed, if cross-examination were sufficient to overcome the effect of inadmissible expert testimony, there would be no need for the numerous decisions of the Virginia Supreme Court carefully limiting the nature and scope of expert testimony that may properly be admitted into evidence. Particularly in the case of testimony from a highly-educated, articulate, persuasive, experienced, extensively-credentialed expert, there is every reason to believe that cross-examination will be insufficient to correct the harm done by allowing the jurors to hear expert testimony which ought to have been excluded. Presumably, it is for precisely such reasons that the Virginia Supreme Court has again and again held that trial courts committed reversible error by allowing into evidence expert testimony which failed to satisfy even just one of the numerous evidentiary require-

ments which must be met prior to admission of such evidence.<sup>31</sup>

The mere fact that a witness is qualified to testify as an expert does not relieve the trial court of its duty to act as the "gatekeeper." Rather, the court must make the required threshold admissibility determinations as to each and every aspect of an expert's testimony which is challenged. "Qualification of an expert witness does not insure admission of his every statement and opinion."<sup>32</sup>

Are the requirements of Virginia evidence law met when a defense neuropsychologist offers opinions that the plaintiff is malingering, faking, feigning, or exaggerating his symptoms? Application of the evidentiary standards reviewed above compellingly demonstrates that opinions of this type should be excluded on numerous grounds.

A recent comprehensive survey of attempts by neuropsychologists to research and study "malingering" indicates that opinions regarding malingering and similar matters have not achieved scientific reliability, but rather are riddled with problems, uncertainties, and inaccuracies.<sup>33</sup> Research that has directly examined the capacity of neuropsychologists to detect malingering "has provided little basis for confidence in their success."<sup>34</sup> There is little or no evidence that the subjective opinions of neuropsychologists regarding malingering are reliable.<sup>35</sup> A 1994 study indicated that even neuropsychologists performed comprehensive assessments including face-to-face contact with examinees they still had problems accurately detecting malingering.<sup>36</sup> Clinicians with extensive experience did no better than those with limited experience.<sup>37</sup> Additionally, "there is no credentialing or related process that provides a direct and representative assessment of a neuropsychologist's capacity to detect malingering."<sup>38</sup>

These studies indicate that neuropsychological methods and tests for detecting malingering have not achieved anything that even approaches scientific reliability. Indeed, in the clinical and forensic context, assertions that malingering opinions are reliable are almost entirely speculative since, "[i]n many, if not most, instances, the clinician does not receive feedback on the accuracy of positive or negative identifications of malingering."<sup>39</sup>

Defense neuropsychologists often claim that their opinions are based upon numerous studies regarding malingering. Obviously, however, the trial court cannot simply accept the defense neuropsychologist's bare, self-serving claims of expertise on the subject, and likewise cannot accept at face value his assertions that this topic is sufficiently developed to be amenable to "expert" testimony. Rather, the party offering the expert testimony must prove that the purported expert is indeed qualified to offer each and every one of the proposed expert opinions. In making this determination, the court must be mindful that the "ex-

pressed belief of a witness that he is an expert does not ipso facto require his qualification. . . . The facts must show that he possesses sufficient knowledge, skill or experience to make him competent to testify as an expert on the subject matter of the inquiry."<sup>40</sup>

As previously noted, even the fact that the witness is unquestionably a highly trained and experienced neuropsychologist with extraordinary credentials does not end the inquiry. Instead, the court must determine whether the expert is qualified to offer each opinion that he proposes to offer.<sup>41</sup>

Furthermore, even to the extent that the neuropsychologist points to purported malingering "studies" and malingering "expertise," the Court must itself examine the basis for these claims. Many of the purported "malingering studies" are "based exclusively or primarily on clinical impressions and anecdotal evidence (although terminology or descriptions of methodology sometimes makes it sound as if the data were something more than this)."<sup>42</sup> Such self-styled "malingering studies" often have involved only small numbers of people, and their reliability is suspect for this reason as well.<sup>43</sup> Furthermore, these efforts often involve attempts to distinguish between normal people and normal people pretending to malingering. This is a determination that is almost never involved in real-life situations, where the defense neuropsychologist is purportedly attempting to distinguish between a person who actually has a brain injury and a person faking a brain injury.<sup>44</sup>

Indeed, the whole topic of malingering is still a matter of pervasive "scientific controversy."<sup>45</sup> There is even extensive debate and uncertainty over how to define "malingering."<sup>46</sup> Insight into the full measure of uncertainty that plagues this subject matter is revealed by the following comment in a neuropsychological treatise regarding malingering: "[I]t is difficult to know how best to identify something you do not know that much about."<sup>47</sup>

Even the limited number of studies of "malingering" that have been attempted are of questionable value for numerous reasons. Studies in which some test subjects are told to try to perform poorly may serve as a "helpful beginning" but "will rarely yield findings that, by themselves, can be safely applied to clinical practice. In fact, one usually has little basis for determining how well such methods will work in practice."<sup>48</sup> There is no reason to believe that a person who is pretending to be malingering at the request of a researcher will perform in the same manner as a person who is actually malingering in real life. "Malingering studies have often been criticized because the circumstances under which research subjects falsify [their symptoms or performance] differ from those under which real malingerers operate."<sup>49</sup>

In fact, "[a]s is widely recognized, a fundamen-

tal problem with malingering research is that one cannot identify a representative sample of real-life malingerers to study.”<sup>50</sup> “The seeming paradox is that one would need to know how to identify malingerers before conducting the studies needed to learn how to identify malingerers, at which point one would not need to do the studies.”<sup>51</sup> Neuropsychologists are even not sure “what sources of information . . . might be most helpful in detecting malingering.”<sup>52</sup>

Determination of a “base rate” for malingering is vitally important to efforts to develop accurate tests for malingering. Once again, however, neuropsychologists are plagued by uncertainties. “Although estimates (guesses) have sometimes differed by many orders of magnitude, no one really knows the base rates for malingering . . .”<sup>53</sup>

In short, a defense neuropsychologist’s or defense counsel’s assertions regarding the scientific reliability of “malingering” opinions simply do not survive scrutiny. The current state of neuropsychology’s attempts to detect malingering by test subjects has been aptly summarized as follows:

In the absence of solid research evidence demonstrating satisfactory accuracy levels, given problems learning to detect malingering via experience and the difficulties appraising one’s own accuracy on this same basis, considering the negative research on the detection of lies and, at best, the mixed results of studies that have directly examined clinicians’ success in detecting malingering, confident pronouncements would seem unwarranted.<sup>54</sup>

Because this area of neuropsychology has not achieved scientific reliability or even a reasonable degree of scientific certainty, any testimony regarding malingering and related subjects should be excluded.<sup>55</sup> Exclusion of such opinions is particularly important because 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.

In some cases, the lack of scientific reliability of malingering testimony is even demonstrated by the neuropsychologist’s own test data. It is not uncommon for defense neuropsychologists to give numerous tests which purportedly are designed to measure and detect malingering. Frequently, the plaintiff will pass one or even more of these so-called tests of “malingering,” “test-taking motivation,” or “symptom-validity.” The neuropsychologist will often continue, however, to administer additional malingering tests. Eventually, if the plaintiff performs poorly on one of these tests, the neuropsychologist will rely on that one test score as showing that the plaintiff is malingering.

This testimony is inadmissible and should be

excluded. If neuropsychological testing of malingering were scientifically reliable and accurate, the same test subject would not pass one purported “test of malingering” or “symptom validity” and then fail another. Moreover, this testing procedure involves great potential for prejudicial unfairness and improper bias. Obviously, a defense neuropsychologist who is inclined to arrive at a finding of malingering can simply keep giving purported malingering tests until he finds one on which the plaintiff performs poorly. As previously noted, the availability of cross-examination eliciting the other “passing” test scores does not justify allowing the introduction of the inadmissible expert opinions and testimony. Rather, because expert testimony regarding these matters is inadmissible, it must be excluded, and its admission would constitute reversible error.

In effect, consideration of the neuropsychological literature regarding “malingering” and similar matters confirms what the law of evidence and common experience have always established. There simply is no scientifically reliable way of determining whether a person is telling the truth. Neuropsychologists and neuropsychology are no exception to this universal truth.

The opinions of the neuropsychologist hired by the defense should not be permitted to masquerade as science.<sup>56</sup> “Malingering” opinions, and the purported tests of “malingering,” “motivation,” or “symptom validity” upon which they are based amount, in effect, to a new type of “lie detector” test,<sup>57</sup> and, even worse, are probably even more unreliable than the other forms of such testimony routinely excluded by courts. Even though neuropsychological testimony regarding malingering and related matters is usually cloaked in seemingly scientific terminology,<sup>58</sup> the underlying message is that the neuropsychologist is testifying that the plaintiff has not been honest in demonstrating the impairments and difficulties he has displayed, has been dishonest and deceitful in claiming to have used his best efforts on the neuropsychological testing, and should not be believed. The Virginia Supreme Court has held that expert testimony should be excluded if it gives the impression that there is a scientific way of determining whether a witness or party is telling the truth.<sup>59</sup> Moreover, expert testimony that a party is malingering, faking, or exaggerating should be excluded for the further reason that it would improperly invade the function of the jury.<sup>60</sup>

Yet another serious problem with malingering testimony is that many of the purported malingering tests actually involve trickery and deceit by the neuropsychologist. Neuropsychologists have themselves described this issue as follows:

These various approaches usually require examinees to hold some type of faulty belief, or attempt to induce some false assumptions: They depend on tricking

the individual. The depth and difficulty of the tricks vary. In some cases, an examinee is told that a test that is practically shouting out, "Try me, I'm easy," is really difficult, and then must bomb the measure in order to be identified as a possible malingerer.<sup>61</sup>

Such practices raise serious ethical questions in any case.<sup>62</sup> These ethical concerns become even more profound and troubling, however, in the context of a court-ordered neuropsychological examination. Does the Court have the power to order a plaintiff to submit to an examination which may involve trickery? Even if the Court has this power, would it not be demeaning to the integrity of the justice system for the Court to order a litigant to submit to an examination involving trickery by the examining neuropsychologist? If the neuropsychologist is prepared to deceive the examinee during the examination, why should the Court and the litigants regard the neuropsychologist as honest and straightforward at trial? The "reliability" of this testing procedure is further undermined by the fact that the neuropsychologist's deceitful and false emphasis on how difficult the purported malingering test is might have created performance anxiety or confusion in the test subject that unfairly affected the results on the "malingering" test and even on other test scores. These problems are likely to be more severe for real-life examinees than for participants in simulated studies who face no real-world consequences based upon their performance.

Frequently, defense counsel will argue that even if the defense neuropsychologist cannot properly testify to his opinions as to malingering or related matters he still should be allowed to testify that the plaintiff's test scores indicate that the plaintiff demonstrated "inconsistent test-taking motivation," displayed questionable "symptom validity," failed to use "best efforts," or exaggerated her difficulties and impairments. Once again, however, there is no indication that neuropsychology has achieved the ability to determine a person's "motivation," whether she has used her "best efforts," whether her symptoms were "valid," or whether she has "exaggerated" her impairments. To the contrary, the extensive neuropsychological literature establishing that neuropsychological efforts to detect malingering have not achieved scientific reliability applies equally to opinions regarding "motivation" or "effort." All of these variations are tantamount to asserting that the subject is malingering, faking, or exaggerating his problems — opinions that are not scientifically reliable and are not admissible.

Moreover, each of these variations would, in effect, amount to improper comment by the expert on the plaintiff's credibility and honesty, and would constitute inadmissible testimony regarding the critically important, ultimate issue for the jury

(i.e., whether the plaintiff in fact has the difficulties, impairments, and injuries she claims to have).

The neuropsychologist also should not be allowed to testify regarding alleged variations or inconsistencies in the plaintiff's hearsay test data. For example, the plaintiff may have been given the same test on multiple occasions by different neuropsychologists or other experts. The defense neuropsychologist may attempt to tell the jurors that the plaintiff scored 15 out of 15 on the first testing, 7 out of 15 on the second testing, and 8 out of 15 on the third testing. He may then offer the opinion that this variation and inconsistency in scores can be explained only by "inconsistent test-taking motivation" or a "failure to use best efforts."

Any such testimony is plagued by all the layers of evidentiary problems discussed above. Additionally, the expert is not entitled on direct examination to testify regarding the actual hearsay test data obtained during test sessions other than the one he personally administered. A special statutory exception to the usual hearsay rules allows an expert to offer opinions based upon hearsay data (if of a type normally relied upon by experts in the field),<sup>63</sup> but the statutory exception clearly does not permit the actual hearsay data to be offered on direct examination. Thus, testimony regarding the hearsay test scores continues to be governed by the usual rules barring hearsay, and the expert may not testify to the hearsay test scores obtained by other experts.<sup>64</sup>

These principles also preclude the expert from testifying to the hearsay test data "in so many words." For example, because the hearsay rule bars the expert from testifying to the hearsay test data in the situation above, the expert also should not be allowed to testify that the plaintiff "got a perfect score on the first testing, and got about half right on the other two testings."

The defense expert also should not be allowed to opine that the plaintiff's variations in test scores indicate, "strongly suggest," or "raise questions about" test-taking motivation or effort. The meaning and significance of inconsistencies and variations in test scores have not achieved anything approaching scientific reliability. "Inconsistency within and across assessments is frequently mentioned as an indicator of malingering. However, there are presently few formal measures of consistency[.]"<sup>65</sup> Moreover, neuropsychologist's "subjective judgments often seem to substantially underestimate normal levels of variation[.]"<sup>66</sup>

Testimony that the plaintiff's test scores are "atypically abnormal" (and similar opinions) should also be excluded. Such testimony amounts to a bare, unsupported, subjective assertion by the neuropsychologist that even though the plaintiff's actual test scores revealed areas of impaired functioning (i.e., were "abnormal") the test results are not credible (i.e., were "atypical"). Moreover, a

Virginia statute dealing with expert testimony guarantees the plaintiff the right to probe the hearsay data on cross-examination if the plaintiff chooses to do so.<sup>67</sup> Opinion testimony that test results are “atypically abnormal,” which is based upon a comparison to other hearsay information which is unavailable and thus immune from cross-examination, would violate this statutory requirement and would be fundamentally unfair as well. Moreover, because the basis for the expert’s opinions is unknown, the court cannot properly perform its function of determining whether the expert’s opinions are reliable, involve any “missing variables” or assumptions, etc.

Neuropsychologists also are not permitted, under Virginia law, to offer opinions regarding medical issues, such as whether a collision caused the plaintiff to suffer a brain injury. In the recent case of *John v. Im*, the Virginia Supreme Court held that the trial court committed reversible error in allowing a neuropsychologist to testify on the issue of whether the plaintiff sustained a brain injury as the result of an automobile collision.<sup>68</sup> Thus, a defense neuropsychologist cannot properly be allowed to testify that the plaintiff has not sustained a brain injury or that the impairments were not caused by brain injury during a collision.

In summary, the proposed testimony of neuropsychologists must be carefully examined by the trial court to determine whether it comports with the numerous requirements which apply to expert testimony under Virginia law. These experts should not be allowed to offer their opinions regarding the validity of the plaintiff’s claimed impairments in the form of seemingly scientific opinions regarding purported “malingering,” “inconsistent test-taking motivation,” failure to use “best efforts,” or similar matters. This type of testimony is not scientifically reliable, would violate numerous evidentiary requirements, and would invade the province of the jury.

### Endnotes

1. Rule 4:10, *Rules of the Supreme Court of Virginia*.
2. Michael D. Franzen, *Reliability and Validity in Neuropsychological Assessment* (1989).
3. *Batzel v. Gault*, Law No. 195596, Order entered April 12, 2002 (Fairfax Circuit Court 2002) (copy on file with authors).
4. See Transcript of April 12, 2002 Hearing at 32 (copy on file with authors).
5. See Transcript of April 12, 2002 Hearing at 21.
6. See Transcript of May 2, 2002 Trial Proceedings at 3-4 (copy on file with authors).
7. See Trial Report published in June 17, 2002 issue of *Virginia Lawyers Weekly*.
8. Phillip J. Resnick, “Malingering of Posttraumatic Disorders,” in Richard Rogers (ed.), *Clinical Assessment of Malingering and Deception* at 140-41 (2d ed. 1997).
9. Jeffrey S. Kreutzer and Paul Wehman, *Community Integration Following Traumatic Brain Injury* at 63 (1990) (emphasis added).
10. L. Binder, “Persisting Symptoms After Head Injury: A Review of the Postconcussive Syndrome,” 8 *Journal of Clinical and Experimental Neuropsychology* 323, 341 (1986).
11. “[T]he plaintiff’s apparently normal actions at the scene of the injury (i.e. walking around, talking) do not rule out the presence of brain injury. Symptoms may have delayed onset.” Peter G. Bernad, *Closed Head Injury: A Clinical Sourcebook* at 396-97 (2d ed. 1998). “[A] person does not have to lose consciousness, have a skull fracture, or even have bruises to have sustained mild head injury.”
12. Jeffrey S. Kreutzer & Paul Wehman, *supra*, at 52. “[A] person does not have to lose consciousness, have a skull fracture, or even have bruises to have sustained mild head injury. Also, X-rays, CTs, MRIs, and other imaging techniques may not reveal diffuse brain damage such as microscopic axonal tearing caused by acceleration/deceleration (whiplash-like) forces.” Peter G. Bernad, *supra*, at 396. “Even though CT scanning is highly accurate, it has limitations. CT cannot detect damage at the cellular level. This would include diffuse axonal injury.” *Id.* at 80. “Normal findings on CT scan or MRI do not necessarily mean damaging trauma has not occurred.” *Id.* at 86.
13. Jeffrey S. Kreutzer & Paul Wehman, *supra*, at 52. “Shear, strain and tension, and torsion are subtle forces. The damage brought about by these forces is only visible by electron microscopy, but it nevertheless critical, and may result in severe brain dysfunction.” Peter G. Bernad, *supra*, at 160.
14. “DAI [diffuse axonal injury] is most frequently associated with motor vehicle accidents, and results from the short deceleration period when vehicles stop abruptly.” *Id.* at 164.
15. See Code §§8.01-401.1 and -401.3; *Keese v. Donigan*, 259 Va. 157, 161, 524 S.E.2d 645, 647 (2000); *Tittsworth v. Robinson*, 252 Va. 151, 154, 475 S.E.2d 261, 263 (1996).
16. *Id.*; *Tarmac Mid-Atlantic, Inc. v. Smiley Block Co.*, 250 Va. 161, 166, 458 S.E.2d 462, 465 (1995).
17. See *Keese*, *supra*, at 648; *Tittsworth*, *supra*, at 263; *Tarmac*, *supra*, at 466.
18. *ITT Hartford v. Virginia Financial Assoc.*, 258 Va. 193, 201, 520 S.E.2d 355, 359 (1999); *Tittsworth*, *supra*, at 263; *Tarmac*, *supra*, at 466.
19. See *McMunn v. Tatum*, 237 Va. 558, 379 S.E.2d 908 (1989) (a medical expert’s recital of the confirming opinion of an absent physician is inadmissible hearsay); *CSX Transportation, Inc. v. Casale*, 247 Va. 180, 182-83, 441 S.E.2d 212, 213-14 (1994) (reversing judgment for the trial court’s error in permitting medical expert to state that his diagnosis had been confirmed by the hearsay opinion of a non-testifying physician).
20. See *Satcher v. Commonwealth*, 244 Va. 220, 244, 421 S.E.2d 821, 835 (1992), cert. denied, 507 U.S. 933 (1993); *Spencer v. Commonwealth*, 240 Va. 78, 97-98, 393 S.E.2d 609, 621, cert. denied, 498 U.S. 908 (1990); *John v. Im*, 263 Va. 315, 322, 559 S.E.2d 694, 697 (2002).

21. *Swiney v. Overby*, 237 Va. 231, 233, 377 S.E.2d 372, 374 (1989). See *CSX Transportation, Inc. v. Casale, supra*, at 448.
22. See *Velazquez v. Commonwealth*, 263 Va. 95, 104, 557 S.E.2d 213, 219 (2002); *Virginia Power v. Dungee*, 258 Va. 235, 259, 520 S.E.2d 164, 178 (1999); *David A. Parker Enterprises v. Templeton*, 251 Va. 235, 467 S.E.2d 488 (1996); *Brown v. Corbin*, 244 Va. 528, 531, 423 S.E.2d 176, 178 (1992); *Grasty v. Tanner*, 206 Va. 723, 146 S.E.2d 252 (1966). The Virginia Supreme Court has continued to apply this rule despite the enactment in 1993 of special statutory provisions relating to expert testimony regarding ultimate issues. See Virginia Code §8.01-401.3; *David A. Parker Enterprises v. Templeton, supra*.
23. *Lenz v. Commonwealth*, 261 Va. 451, 469, 544 S.E.2d 299, 301 (2001) (“It was the province of the jury to assess the credibility of the witnesses”); *Kimberlin v. PM Transport, Inc.*, 264 Va. 261, 266, 553 S.E.2d 665, 667 (2002) (“a jury should weigh the evidence, [and] determine the credibility of the witnesses”).
- 24 “The mention of polygraphs in the presence of the jury impermissibly suggests that there is a scientific way to find the truth where in reality, in our system of justice, the jury decides what is true and what is not.” *Robinson v. Commonwealth*, 231 Va. 142, 156, 341 S.E.2d 159, 167 (1986).
25. *Id.*
26. *Brown v. Corbin, supra*, at 533.
27. In *CSX Transportation, Inc. v. Casale, supra*, the Virginia Supreme Court cited a Fourth Circuit Court of Appeals decision reversing a trial judge who “held that if an expert does not have an adequate basis for his opinion, it is for counsel to bring out the deficiencies on cross-examination and for the jury to decide what weight, if any, the opinion should be given.” 250 Va. at 367, 463 at 449-50. The Virginia Supreme Court quoted with approval the following language from the Fourth Circuit’s decision:
 

It was an abuse of discretion for the trial court to admit [the expert’s] testimony . . . . The court may not abdicate its responsibility to ensure that only properly admitted evidence is considered by the jury. Expert opinion evidence based on assumptions not supported by the record should be excluded.

*Id.* (quoting *Tyger Constr. Co. v. Pensacola Constr. Co.*, 29 F.3d 137 (4th Cir. 1994), cert. denied, 513 U.S. 1080 (1995)).
28. In cases where numerous aspects of the proposed expert testimony are challenged as inadmissible, the “gatekeeper” role of the trial court becomes particularly active and demanding. For example, if the court has already excluded five other forms of opinion offered by the same expert, the court may begin to feel that at some point fairness dictates that the expert be allowed to state at least some part of his opinions. In these situations, however, the trial court must bear in mind that each and every aspect of the expert’s opinions which do not meet the requirements of Virginia evidence law should be excluded, even if this means that the expert will be allowed to offer few, if any, opinions at trial. It is not the fault of the opponent of the evidence or of the Court that most or all of proffered opinions of the expert are inadmissible. In these situations, the trial court must serve as a “floodwall” against the steady flow of inadmissible expert opinions which would improperly prejudice the jurors. The party offering the expert testimony must conform the testimony to Virginia law regarding admissibility of such evidence. Any and all such testimony which does not satisfy the admissibility requirements must be excluded as a matter of law.
29. *CSX Transportation, Inc. v. Casale, supra*, at 449.
30. “In summary, the question before the trial court was one of the admissibility of evidence, not its weight - a strictly legal question.” *Id.* at 450.
31. See, e.g., *Keese v. Donigan, supra* (trial court committed reversible error in an automobile crash negligence case in allowing an accident reconstruction expert to testify concerning “average” driver perception and reaction times absent evidence that a party fell within the average range; expert testimony cannot be based upon assumptions without evidentiary foundation); *Tittsworth v. Robinson, supra* (trial court erred in admitting expert testimony regarding forces of collision and causation of injuries where experts failed to consider all pertinent variables and relied upon results of dissimilar tests); *CSX Transportation v. Casale, supra* (new trial was required because trial court erred in allowing expert testimony which included hearsay introducing a new and different diagnosis into the case); *Chapman v. City of Virginia Beach*, 252 Va. 186, 191, 475 S.E.2d 798 (1996) (case remanded for new trial because trial court erred in admitting testimony by a “human factors psychologist” that the physical properties, configuration, and unsecured condition of a gate section created a hazard and that it was reasonably foreseeable that a child’s head could become entrapped in it; this testimony did not assist the jury but rather concerned issues within the range of common experience).
32. *Swiney v. Overby, supra*, at 374. See *CSX Transportation, Inc. v. Casale, supra*, at 449.
33. David Faust & 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 Cecil R. Reynolds (ed.), *Detection of Malingering During Head Injury Litigation* (1998).
34. *Id.* at 1.
35. *Id.* at 3. Neuropsychologists Faust and Ackley survey the limited neuropsychological literature and studies regarding “malingering,” and additional citations to the materials that support the problems and concerns discussed in the text of this article can be found in their article.
36. *Id.* at 2.
37. *Id.* at 3.
38. *Id.* at 21.
39. *Id.* at 5.
40. *Lawson v. Elkins*, 252 Va. 352, 354-355, 477 S.E.2d 510, 511 (1996) (quoting *Noll v. Rahal*, 219 Va. 795, 800, 250 S.E.2d 741, 744 (1979)).

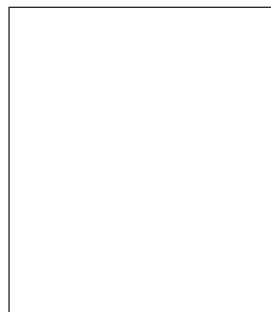


Roger T. Creager is an attorney with Marks & Harrison, P.C., in Richmond. Mr. Creager is a graduate of the College of William and Mary and the University of Virginia School of Law, where he served on the Law Review and was a member of the Order of the Coif. He serves on the Virginia Trial Lawyers Association Board of Governors and the Boyd-Graves Conference, and received the VTLA Courageous Advocate Award in 2001.



John C. Shea practices with Marks & Harrison, P.C. He is a graduate of Wake Forest University and the University of Richmond School of Law. He is the immediate Past President of VTLA, a member of the American Board of Trial Advocates and the Boyd-Graves Conference, a board member of the Southern Trial Lawyers Association, and a Fellow of the Roscoe Pound Institute.

41. See footnote 24 *supra*.
42. David Faust & Margaret A. Ackley, *supra*, at 7.
43. Robert K. Heaton, Harold H. Smith, Ralph A.W. Lehman, and Arthur T. Vogt, "Prospects for Faking Believable Deficits on Neuropsychological Testing," 46 *Journal of Consulting and Clinical Psychology* 892, 899 (1978).
44. David Faust & Margaret A. Ackley, *supra*, at 9.
45. Cecil R. Reynolds (ed.), *Detection of Malingering During Head Injury Litigation*, at vii (1998).
46. David Faust & Margaret A. Ackley, *supra*, at 9-18.
47. *Id.* at 41.
48. *Id.*
49. *Id.* at 33.
50. *Id.* at 31.
51. *Id.* at 28.
52. *Id.* at 50.
53. *Id.* at 36.
54. *Id.* at 22.
55. The neuropsychological literature and evidentiary principles that require the exclusion of "malingering" opinions also require the exclusion of any testimony which would tend to suggest or imply such matters. For example, admission of the results of a so-called "Test of Malingering," or a "Symptom Validity Test," would suggest to the jury that there is a scientifically reliable method of determining whether the plaintiff is malingering or exaggerating his symptoms (i.e., his symptoms are not valid). Evidence of this type should be excluded for all the reasons previously discussed.
56. See *Brown v. Corbin*, *supra*, 244 Va. at 533 (it was reversible error to allow an expert to offer "speculation in the guise of scientific opinion").
57. Defense neuropsychologists and defense attorneys who claim that malingering testimony is not tantamount to an assertion that the plaintiff is lying are disproved by the frank recognition by published literature in this field that a diagnosis of malingering "is tantamount to calling a potentially injured patient a liar...." Cecil R. Reynolds (ed.), *supra*, at viii (1998).
58. The capability of neuropsychologists, like perhaps many other professionals, to use "terminology or descriptions of methodology" that creates an erroneous and misleading impression of scientific reliability, has been acknowledged by neuropsychologists themselves. See David Faust & Margaret A. Ackley, *supra*, at 7.
59. *Robinson v. Commonwealth*, *supra* ("The mention of polygraphs in the presence of the jury impermissibly suggests that there is a scientific way to find the truth where in reality, in our system of justice, the jury decides what is true and what is not").
60. See *Robinson v. Commonwealth*, *supra*; *Nichols v. American National Insurance Co.*, 154 F.3d 875 (8th Cir. 1998) (admission of expert testimony regarding malingering was scientifically unreliable and improperly invaded the jury's role).
61. David Faust & Margaret A. Ackley, *supra*, at 42.
62. "The ethical dilemma of deception in assessment is raised by some . . . and we feel it is quite important to discuss this issue." Juan Manuel Gutierrez & Ruben C. Gur, "Detection of Malingering Using Forced-Choice Techniques," in Cecil R. Reynolds (ed.), *supra*, at 101 (1998).
63. See Virginia Code §8.01-401.1.
64. For similar reasons, the neuropsychologist should not be allowed on direct examination to testify to purported "inconsistencies" in the plaintiff's medical records. Even if the neuropsychologist has reviewed the plaintiff's medical records, the contents of the plaintiff's medical records are nonetheless hearsay, and often double- or triple-hearsay. The medical record documents themselves are hearsay (out of court statements offered to prove the truth of the matters asserted). Moreover, medical records typically contain notes (out-of-court statements of the notetakers) recording out-of-court statements made by other persons (information provided by doctors, nurses, other medical staff). Unless the necessary proof has been introduced to bring the medical records (or other hearsay) within a hearsay exception, an expert is not permitted to testify to the hearsay on direct examination. Moreover, neuropsychologists are not medical doctors. They are licensed psychologists. There is no separate special licensing for neuropsychologists. Because they are not medical doctors, neuropsychologists are not qualified to offer testimony regarding the opinions or conclusions to be drawn from medical records. See *John v. Im*, *supra*. These are important principles, since considerable portions of the expert reports of defense neuropsychologists are sometimes devoted to reviewing the medical records and marshalling their contents in support of the defense contentions. Moreover, there is no proper role for the expert to play here. The jury, rather than the neuropsychologist, should decide whether the plaintiff has made "inconsistent" statements regarding her condition or injuries.
65. David Faust & Margaret A. Ackley, *supra*, at 45.
66. *Id.*
67. See Virginia Code §8.01-401.1 ("The expert may in any event be required to disclose the underlying facts or data on cross-examination").
68. 263 Va. 315, 559 S.E.2d 694 (2002).



Glen P. Lerner is a native of Chicago, where he practiced as a defense attorney for eight years. He moved to Virginia in 1991 and is practicing plaintiff's personal injury law with Marks & Harrison, P.C.