Limited access to an individual's mental content – a constraint on the strength of our knowledge in the courts

In a recent issue of *SAJP* Professor Kaliski wrote an editorial entitled 'My brain made me do it – how neuroscience may change the insanity defence'.[1] The paper warns that the testimony provided by brain scientists may end up being found wanting, similar to psychoanalysts testifying that an accused could not choose (willfully or consciously).

This issue of *SAJP* contains an offended letter by Dr Lakie in response to the editorial, as well as Kaliski's reply. Both authors state their sentiments in unequivocal terms. I have sympathy on both sides for a number of reasons, but rather than attempting to address these, I thought of highlighting three related mistakes that in my view we mental health workers may make when we lose sight of a significant constraint on the strength of our knowledge. The constraint is that we have limited access to an individual's mental content.

Two of the mistakes are to either over-estimate or under-estimate the strength of our knowledge about an individual's mental content. Another mistake is to disregard (some of) the individual's mental content.

Access to an individual's mental content is dependent on its disclosure by that individual. Such disclosure may be direct, i.e. described by the individual, or indirectly disclosed through other ways of communication (gestures, etc.). In addition, we may be able to deduce indications that would support or refute particular mental content from the individual's behaviour. If mental content is not disclosed, we mental health workers are left with mere indications of an individual's mental content (in his or her suggestive behaviour, for example). Even when such indications are very strong, they remain mere indications.

Some mental content may be considered subconscious or unconscious, and of some we are less aware or even unaware. That people have such mental content is acknowledged in well-known psychoanalytical views, but no less so in neurophysiological literature in terms such as selective attention, selective inattention, perceptual filtering, and being less aware of mental content in doing activities semi-automatically, for example when driving a car, dressing, etc. Such mental content of an individual is only partially disclosed, if disclosed at all, for both the individual and the clinician have limited access to it. Then we mental health practitioners are left with mere indications and deductions about an individual's mental content, and our knowledge about it is at best tentative.

In expert court testimony, where the pursuit is almost always for certainty, one may be tempted to lose sight of how tentative our knowledge is, particularly about subconscious (or less conscious) mental content. My guess is that much contempt for psychoanalytical or similar understandings presented in court may stem from the mistake of over-estimating the strength and certainty of our knowledge about an individual's subconscious mental content. I am doubtful, moreover, that there should be place for this tentative knowledge in court. In the therapeutic setting, however, we may go a long way in spite of the tentative nature of our knowledge. We may even treasure this tentativeness as a therapeutic tool in creating opportunity for the patient to discover clarity about what he or she wants.

As Kaliski suggested, brain scientists may make similar mistakes in expert testimony. Neuroscientific findings are a far cry from knowing the mental content of an individual. Neuroscience too has limited access to the mental content of an individual, even when the neuroscientific findings are certain and robust. The mistake would be when brain scientists over-estimate the strength of their knowledge about an individual's mental content by taking neuroscientific markers as a proper and exhaustive substitute for an individual's mental content. The other mistake is similar – when brain scientists, or any other health worker for that matter, disregard an individual's mental content as ordinarily being critical to an individual's actions.

Limited access to an individual's mental content, and limited strength of our knowledge of it for a given person, does not however preclude sensible expert testimony in court by the psychiatrist. One reason is that an individual's mental content is but one aspect of a psychiatric assessment. For example, many a diagnosis of psychiatric disorder is made in consideration of other aspects, for example impairment of functioning. In fact, some psychiatric diagnoses can be made without even having access to an individual's mental content – for example, dementia of severe degree where much mental content is inaccessibly eroded. Furthermore, although access may be limited, many individuals disclose sufficient mental content about which expert testimony can be given, particularly when integrated with other relevant psychiatric aspects.

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1. Kalisky SZ. 'My brain made me do it' – how neuroscience may change the insanity defence. *South African Journal of Psychiatry* 2009; 15: 4-6.