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Research paper

The emerging role of lawyers as addiction 'quasi-experts'

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ABSTRACT

This paper examines a discrete set of issues pertaining to the constitution of addiction in law. Based on qualitative interviews undertaken with lawyers in Australia and Canada, I examine how addiction figures in lawyers' daily practice. Drawing on ideas from science and technology studies scholars Sheila Jasanoff, Michael Lynch and Bruno Latour, and building on recent research I undertook on legal addiction veridiction, I explore the constitution of addiction 'facts' in law. I examine how and when lawyers claim to make decisions about addiction in the course of their legal practice. Lawyers report playing a central role in the making of decisions about addiction, at multiple stages of the legal process including: before taking cases on, while running cases in court, and while negotiating and/or settling cases. I argue that these decisions can be properly described as 'quasi-expert' determinations with important parallels to scientific, technological and medical claims often made in legal settings by more conventional 'expert witnesses'. I call these 'quasi-expert' decisions because they are decisions of the kind that might be assumed to be the purview of scientific or medical experts and because they have tangible implications for clients. Lawyers uniquely constitute addiction in unique ways, drawing on a combination of factors, including their own experience with and observations about addiction, the experiences of family members who have experienced alcohol and other drug problems, relevant legal concepts and frameworks, popular and scientific claims about addiction, emotions and values, including the gender politics of alcohol and other drug addiction. These addiction 'facts' can have a range of material and discursive effects, including potentially adverse implications for people characterised as 'addicts'. I conclude the paper with a discussion of some implications of these practices, and with reflections on how we might address these issues in future research.

Introduction

Addiction is a relatively new concept that first emerged in relation to alcohol (Levine, 1978; Room, 2003). A range of different behaviours (such as sex, Internet use, gambling, eating, exercise and shopping) are now being described as 'addictions', with apparently important similarities, in some instances, to the more familiar alcohol and other drug addictions.[1] Despite the ubiquity of the terminology of addiction and the mounting public visibility of the neuroscience of addiction (e.g. Koob & Volkow, 2016; Leshner, 1997), there is a lack of broad consensus among experts, policymakers and service providers, about what alcohol and other drug addiction actually 'is', how it works, and its relationship to agency, responsibility and culpability (e.g. Carter et al., 2014; Hall et al., 2015a; Karasaki, Fraser, Moore, & Dietze, 2013). In the addictions field, including in neuroscience, debate persists as to whether people characterised as experiencing addiction can control their drug use and under what circumstances (Carter et al., 2014). Also, as Fraser (2016: 12) has recently shown, policymakers and service providers across Australia and Canada hold internally contradictory views on addiction, marked by a 'dissonance between perceptions of the true complexity and variability of experiences labelled addiction, and the strategic indispensability of the term and its stabilising tendencies'. Debates about the nature and meaning of addiction are important for several reasons, not least because they may have social, legal, medical and ethical implications (Carter et al., 2014). It is argued, for example, that some models of addiction such as the brain disease model may work to alleviate the moral judgment, discrimination and stigma associated with drug use. To date, however, these promises have not been realised; disease models of addiction appear to actually entrench the stigma and

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[1] I note that the terminology of 'addiction' does vary, and in some contexts (such as Australia) 'dependence' is more commonly used.

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discrimination associated with alcohol and other drug use (Brook & Stringer, 2005; Courtwright, 2010; Hall, Carter, & Forlini, 2015b; Reinarman, 2011). Where people are constituted as 'addicts' and these addicts are understood to lack self-control, the use of coercive legal practices including mandatory treatment, and paternalistic policies including sterilisation, may follow (Lucke & Hall, 2014). How we understand addiction has implications for other legal realms, too, including how we approach the sentencing of offenders in the criminal law (Hall & Carter, 2012) and the liabilities of product manufacturers and distributors who disseminate 'addictive' painkillers.[2]

While a growing body of scholarship traces models and concepts of addiction in policy and service provision, research on how addiction features in legal settings is far less common (although see, for example, Seear & Fraser, 2016; Seear, 2015; Seear & Fraser, 2014a, 2014b). This paper seeks to extend this recent work by examining a discrete set of issues pertaining to the constitution of addiction in law. Through qualitative interviews with lawyers, I examine how addiction figures in lawyers' daily practice. Drawing on the theoretical framework of science and technology studies scholars Jasanoff (2004a, 2004b, 1995),Lynch (2007, 2004) and Latour (2013, 2009), and building on recent research I undertook on addiction veridiction (Seear & Fraser, 2016), I explore the constitution of legal 'facts' about addiction and the diverse ways in which decisions about the nature and meaning of addiction are made in legal settings. I concentrate on how lawyers describe their own role in the construction of addiction 'facts', looking at what they say about the decisions they make regarding the nature, meaning and effects of addiction, in the course of legal practice. As we shall see, lawyers report playing a central role in making decisions about addiction, with decisions made at multiple stages of the legal process: including before taking cases on, in the running of cases in court, and in the process of negotiating and/or settling cases. I argue that these decisions can be properly described as 'quasi-expert' determinations that bear important parallels with scientific, technological and medical claims that are often made in legal settings by more conventional 'expert witnesses'. I call these decisions 'quasi-expert' decisions because they are decisions about addiction of the kind that might have been assumed to be the purview of only scientific or medical experts—such as addiction medicine specialists, neuroscientists, social scientists or epidemiologists, and because these pronouncements have tangible implications for clients, and are often pivotal to legal outcomes. Quasi-expert determinations have a range of material and discursive effects, including potentially adverse implications for those labelled as 'addicts' in legal settings. In what follows, I outline the theoretical framework for my analysis. I then present data from lawyers' own accounts of their legal practice. Data are presented as four points in the legal process where addiction becomes relevant and action is taken by lawyers. I explore how lawyers describe their own roles in making important decisions about addiction and addiction concepts by concentrating on four occasions where lawyers make 'quasi-expert' decisions. I conclude the paper with a discussion of some of the implications of these practices, and conclude with some reflections on how we might address these issues in future research.

Approach

According to Faulkner, Lange, and Lawless (2012: 1), the connections between law, science and technology are 'ubiquitous and increasingly complex'. A sizeable amount of academic work seeks to examine this interplay (e.g. Caudill & LaRue, 2006; Faulkner et al., 2012; McGee, 2015), one of the leading works being Sheila Jasanoff's *Science at the bar* (Jasanoff, 1995). Jasanoff's work explores the tensions and power plays that figure in debates about how law and science do/should interact. It is also an exposé of the ways that legal processes, actors, institutions and languages shape the meanings of science and technology. One of the most important claims made about the relationship between law and science is that they are epistemologically and ontologically distinct, and that the law is an obstacle in the ostensibly natural and inevitable trajectory of science (towards progress). In her critique of these ideas, Jasanoff notes that, in the minds of some scientists who espouse this view: '"science" emerges as unswervingly committed to the truth, while the law is shown as intent on winning adversarial games at any cost' (Jasanoff, 1995: 6). According to Jasanoff, this view of science – as stable, singular, prior (to law) and an unquestionable source of rational knowledge and authority – reduces the law's role to a 'two-step prescription: courts or other legal institutions should first seek out the findings of mainstream science and then incorporate them into their adjudicatory decisions' (Jasanoff, 1995: xiv). In contrast, Jasanoff wants to problematise science, by highlighting the ways that scientific claims are 'highly contested, contingent on particular localized circumstances, and freighted with buried presumptions about the social world in which they are deployed' (Jasanoff, 1995: xiv). She offers a more nuanced approach to understanding the complex and entangled relationship between science and law, noting that 'ideas of truth and justice are co-constructed in the context of legal proceedings' (Jasanoff, 1995: xiv).[3]

I read Jasanoff's work on law's relation to science alongside Bruno Latour's more recent work on legal 'veridiction' (Latour, 2013, 2009). According to Latour, the law has a specific and unique means by which it produces knowledge, 'truth' and 'facts'. A more detailed exegesis of Latour's veridiction thesis can be found elsewhere (Seear & Fraser, 2016), but for present purposes, the key elements are, first, that the law is a 'highly distinctive world' (Latour, 2013: 54), with its own processes of veridiction—or truth making. Legal veridiction differs from other forms of veridiction including those in science. Law is an internally coherent total system of logic through which lawyers 'can indulge a power to invent fictions' or to introduce 'constructive solutions', including through the use of common sense assumptions about the world (Latour, 2009: 240). Lawyers are not only permitted to engage in the construction of facts (a process often described as 'the settling of facts'), but often *obliged* to do so. As should be clear by now, both Jasanoff and Latour's work involves engagement – sometimes implicit, sometimes explicit – with questions of expertise. As I will explain, questions of expertise are of central concern in this paper, and it is to those that I now turn.

The first point to make about the relationship between law and expert knowledges is a seemingly obvious one: the law plays an important 'gatekeeping' function with respect to expertise (Jasanoff, 1995). There are legal processes for certifying experts and deciding what constitutes expert knowledge, for instance, as a means of determining both who may speak to an issue and what might be said. These processes are complex, making it difficult to offer any neat or simple definition of 'expertise' in legal contexts. On occasion, where so-called 'non-expert' knowledge is allowed to feature in legal proceedings, as in the use of field sobriety tests by police officers,[4] this often still relies, in Jasanoff's view, on 'tacit' understandings of what constitutes science, constituting bound-

[2] See, for example: https://www.theguardian.com/us-news/2016/aug/28/opioid-addiction-west-virginia-lawsuit (accessed: 12th December, 2016).

[3] See also her work on 'co-production' (Jasanoff 2004a, 2004b).

[4] Jasanoff was speaking specifically about the use of the *horizontal gaze nystagmus test*, which is designed to help establish – through a series of eye movement tests – whether a driver may be intoxicated.