

Injury as Melodrama

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Abstract

The legal injury narrative is a universalised version of individual injury stories. In litigation, injured plaintiffs must tell their own injury story in accordance with the legal injury narrative in order to be heard. The legal injury narrative is a melodramatic narrative and accordingly the plaintiff/protagonist must embody and communicate his or her virtue, in order to encourage the audience to feel sympathy and award compensation. To be accepted as virtuous, the plaintiff is required to demonstrate the feminine characteristics of weakness, passivity and muteness. This has concerning ramifications for particular injured plaintiffs as well as society in general.

1 Introduction

Our legal system has a well-established set of laws and procedures for injured people to seek redress for their injuries. Over the years universalised legal injury narratives have developed. In other words, repeated applications of the law have generated standard, abstract, generalised versions of individual injury narratives. Accordingly, from any particular injury narrative, there can be distilled an “*essential or abstract*” legal injury narrative which is the same universal narrative that can be distilled from other like cases (Klinck, 1992). It seems likely that there are different versions of the legal injury narrative that have developed due to an accumulation of a large number of similar cases. For example, there is likely to be a version of the legal injury narrative for injuries arising out of each of motor vehicle accidents, workplace incidents, occupier’s liability, medical malpractice or defective products. However, this paper will demonstrate that underlying all of these versions is the generic legal injury narrative with particular and common characteristics. This paper develops the idea of the universal “legal injury narrative” – that is, a legally idealised narrative about injury, based on a number of implicit rules about the way injuries occur and their consequences. The legal injury narrative is the framework by which other injury narratives are judged.

I should note here that there is a difference between what makes a narrative legally acceptable and what makes it “true”. The universal legal injury narrative may not necessarily correspond with any objectively identifiable “truth”. Theories of truth tend to fall into two categories: correspondence theories of truth and coherence theories of truth. A correspondence theory of truth assumes that events and states of

affairs occur and have an existence independent of human observation and that true statements are those which correspond with these facts (Jackson, 1990). In contrast, a coherence theory of truth proposes that a statement may be construed to be true primarily on the basis of the overall narrative plausibility of the story told, rather than a notion of correspondence with some external reality.¹ In this paper I argue that any universal legal narrative is acceptable based on its coherence rather than its correspondence with any pre-existing truth.

Legal narratives reconstitute people's stories of pain into a wider, more social "realm of shared discourse" (Scarry, 1985) and the personal injury client is required to submit their claim for compensation in terms of this wider narrative so that the legal decision maker can understand and sympathise. The legal injury narrative makes personal injury litigation more time efficient (certain aspects of the narrative can be assumed) and also reinforces normative ideas about injury. However, it is important to identify the characteristics of the legal injury narrative and, in particular, what makes it "coherent", so that we can examine it as a reference by which other individual injury narratives are judged. If the legal injury narrative is "significantly and qualitatively different" (Toombs, 1992) to the injury as it is experienced and given meaning by the individual, there are potential consequences affecting both litigants and society in general.

In this paper I suggest that what makes the legal injury narrative coherent is its melodramatic form. After first considering the characteristics of melodrama as a literary genre, I then examine how the legal injury narrative reflects the melodramatic form. I apply and develop Feigenson's definition of the accident melodrama (Feigenson, 1999/2000) and, using case transcripts and reports, identify the

¹ See for example, Jackson (1990).

melodramatic characteristics of the legal injury narrative. As a starting point, I discuss the use of stock characters and roles, in particular the stereotyping of plaintiff and defendant into “heroine” and “villain”. I then shift the focus to the plaintiff, and in particular the characteristics of virtue required by the role. I also consider the effect of a plaintiff’s gender and ethnicity on the representation of virtue. The difficulty in communicating those virtuous characteristics is the next topic of discussion. Finally the focus shifts back to the defendant and how blame is assigned in the legal injury narrative. This leads into the discussion about melodrama and morality.

I conclude by considering the possible ramifications of the melodramatic nature of the legal injury narrative. In particular, I point out that the fundamental role of a melodramatic narrative is the recognition of virtue. In the legal injury narrative, virtue is embodied in the plaintiff and its characteristics are implicitly reinforced by the requirements of the role. The two main questions that arise from this are (1) How does the plaintiff “prove” her virtue and (2) What are the consequences of this process? The following discussion will form the basis for the development of answers to those questions.

2 What is melodrama?

Melodrama was necessary to remind the audience, “by a presentation of constantly new situations and perpetually uniform results, of that great lesson shared by all great philosophies and religions: that even here on earth, virtue is never without reward, crime is never without punishment”. (Charles Nodier, “Introduction”, in Pixérécourt, 1971: vii-viii)

The *Concise Oxford Dictionary* defines melodrama as “a sensational dramatic piece with crude appeals to the emotions and usually a happy ending”. Its characteristics include strong emotions; moral polarities and schemes; extreme states of being, situations, actions; overt villainy, persecution of the good and final reward of virtue; inflated and extravagant expression; dark plottings, suspense, breathtaking peripety (Brooks, 1976). Melodramatic narratives are based on a simplified plot with an overriding monopathic tone. We enjoy the seductive pleasures of melodramatic wholeness without considering the effects on those outside the narratives or acknowledging alternatives (Smith, 1973).

The characters undergo extremes, passing from heights to depths (Brooks, 1976). The story inevitably starts by demonstrating the protagonist’s virtue, and reminding the audience about the desirability of, and the pleasure implicit in, the virtuous state. The protagonist’s virtue, and thus happiness, is then placed in peril due to the actions of an essentially evil villain. The events that follow are portrayed as having been caused by individual human agency and are explicable in terms of the individual’s characters (Feigenson, 1999/2000). Thus, the “villain” performs despicable actions, but the “heroine” demonstrates only virtuous conduct. Melodramatic plots are based on Manichean conflicts between pure goodness and pure evil. The drama is heightened by the use of one-dimensional characters.

In melodrama, the characters are stereotyped into the roles of “heroines” and “villains”. This binary opposition is reinforced by appeals to the audience’s emotions. Appeals are made to negative emotions directed against the villain (hatred, fear, vindictiveness) and positive emotions towards the heroine (sympathy, pity, compassion). The villain is driven by a morally negative motivation such as

ambition, avarice, anger, jealousy or lust (Smith, 1973). The heroine is always free from fault, defenceless and presented sympathetically as the helpless victim of the villain. Evil reduces virtue to powerlessness (Brooks, 1976). The passive victim does not act, but is acted upon (Heilman, 1968). This maintains the euphoric illusion that we are innocent victims of a hostile world (Smith, 1973).

In melodramatic plays the virtuous role is often represented by a young female. She demonstrates stereotypical feminine qualities, such as weakness, passivity and muteness. Muteness is a common theme in melodrama. Virtue is unable to “effectively articulate the cause of the right” and is symbolic of the defencelessness of innocence (Brooks, 1976). Muteness is often metaphoric or representative; for example, the protagonist is from another culture and cannot be understood. The protagonist’s muteness emphasises her helplessness, and places her in a position in which she needs assistance to demonstrate her virtue. Her message will often require elucidation by cross-examination or verbal interpretation (Brooks, 1976). The protagonist must also prove her moral identity. Traditionally in melodramatic theatre there are documents such as birth certificates setting clear identification and recognition (Brooks, 1976). The protagonist’s word is not sufficient and there must be other authoritative evidence to support her claim to virtue.

Melodramatic narratives place considerable focus on the heroine’s suffering. Virtue undergoes unbearable trials and endures extremes of pain and anguish (Brooks, 1976). The audience is thus encouraged to feel sympathy and compassion. However, the protagonist, consistent with her virtuous character, must demonstrate a passive response to this anguish. Again, this brings in the theme of muteness. The

protagonist must suffer in silence, and it is up to others to name and prove her pain, thus reinforcing her virtue.

Peter Brooks, in *The Melodramatic Imagination*, argues that melodrama is primarily aimed at resolving the problem of recognition of the protagonist's virtue. Mark Mullen (1998) extends Brooks' analysis, arguing that melodrama is characteristically concerned with the problem of expressing the radical interiority and communication of an individual's lived and felt experience. He also suggests that an important objective of melodrama is to encourage the audience to feel sympathy towards the protagonist. Mullen distinguishes between sympathy and empathy, the former including both a feeling of identification and the arousal to act on that feeling.

Consistent with melodrama's typical happy ending, the protagonist, against all the odds, overcomes the danger and the villain receives his come-uppance. The story ends with public recognition of virtue and evil and the eradication of evil to reward the virtuous. This "dream justice" inherently involves a moral claim. Brooks (1976) argues that melodrama takes the place of the sacred in demonstrating moral and ethical imperatives. Melodrama acts as a fictional system for making sense of experience and in the absence of any more transcendent principles, provides a creative rhetoric of moral law (Brooks, 1976).

However, the nature of melodrama means that morality becomes personal. Melodrama is dependent on Manichean dichotomies, so a person can only be morally good or morally bad. There is no middle ground and no allowance for ambiguity. Melodrama primarily reinforces the idea of the morally good and provides a very public representation and recognition of virtue (Brooks, 1976). It also demonstrates that virtue's suffering is caused by the moral failings of the villain. This

personification of moral evil simplifies the often complex question of responsibility for suffering (Feigenson, 1999/2000). Questions of morality are portrayed as self-evident. Melodrama simply “uncovers” or makes legible the underlying moral universe. As such, it makes an implicit statement about social reality and has the potential to wield a certain amount of power by normalization, particularly when held out as a realistic representation of experience.

When the melodramatic narrative is held out as universal and objective, the simplified and stereotyped representations of experience may not truly reflect the realities of the particular individuals who are subject to its moral imperatives. This is problematic when melodrama is more than simply entertainment, such as when it is enacted as part of a judicial system by which peoples’ actions are regulated. There is a danger that the melodramatic narrative and moral undertones tend to become generative, producing reality effects that become “facts”. In making these truth-claims, melodramatic narratives in the law have the potential to cut off everyday experiences as being irrelevant and by reducing the ability of those involved to cope with their everyday lives. This article focuses on one part of the law in which melodramatic narrative can be found – personal injury trials – and asks how the melodramatic nature of the legal injury narrative might affect plaintiffs’ abilities to cope with their injuries and their consequences.

3 How is the legal injury narrative melodramatic?

“...[T]he jury lawyer in his address to the jury [does] not confine himself to clear and concise logical arguments based on a passionless summary of the evidence: He does the reverse; he uses every trick of oratory and acting to appeal to the crudest emotions of the 12 good men and true.” (Frank, 1963)

Since Burke's *A Grammar of Motives* (1969) and Propp's analysis of folk narratives (1968), structuralist critics have proposed that "one principled way of analysing ordinary narrative is to fit it into classic literary form" or genre, which identifies the end point to which the explanation orients itself (Antaki, 1994). In this sense, I intend to demonstrate that the legal injury narrative fits neatly within the genre of melodrama and the end to which it is oriented is the recognition and reward of virtue.

Melodrama is traditionally a performance. When considering the legal injury narrative it is important to identify both the performer and the audience. In its most pragmatic sense, the legal injury narrative is performed repeatedly, with minor variations in the detail, in personal injury litigation. The performers include the parties to the case, their lawyers and witnesses. Neal Feigenson, in his article "Accidents as Melodrama" (1999/2000), suggested that accidents tend to be portrayed by plaintiff lawyers in melodramatic terms to play on certain inherent psychological characteristics of jurors and to elicit sympathy for the plaintiff. In Australia personal injury trials are rarely heard by juries. Instead, the judge is the factual and legal decision maker in the trial. In this sense the judge is the audience for the lawyers' presentation and performance of the case. Most judges will have heard a large number of personal injury trials during their time on the bench, and will have developed their own ideas about what makes a successful case. However, from an examination of the judgments, I suggest that a universal narrative has developed which is commonly applied by all judges. Thus, for the plaintiff lawyer to present their client's case in such a way as to maximise their chance of success in the litigation, he or she needs to make the story as similar as possible to the universal narrative for this kind of event – the legal injury narrative – which is fundamentally melodramatic in nature.

In this section I demonstrate how the legal injury narrative is melodramatic and discuss some of the possible consequences. I will draw on parallels from feminist legal theory as many of the issues legal feminist scholars have addressed with respect to the representation of women in the law are also worthy of consideration with respect to the representation of injured people. In many respects, my task is a similar one to the feminist legal scholar, but with a different subject – to consider the language of the law in order to assess how it represents injured people, in order to later assess the implications.

3.1 The basic plot

Generally speaking, the melodramatic injury narrative fits the following framework: The plaintiff, ideally characterised as inherently good, suffers from an injury due to the acts or omissions of the defendant, who is characterised as inherently bad. The injury results in the plaintiff's previously good life completely transforming into a life typified by pain and suffering. The plaintiff consequently feels dissatisfaction with life but resignation to their fate. The plaintiff and defendant are linked in a relationship of complementarity in that the defendant is portrayed as highly blameworthy and the plaintiff as not at all blameworthy. The plaintiff makes a public demonstration of virtue and the defendant is publicly judged. The plaintiff is then rewarded to the defendant's detriment and justice is served.

The following parts of this paper deal with some of the more prominent aspects of the legal injury narrative. Firstly, I will deal with how the legal injury narrative portrays fault and blame in a monocausal way. As blame is individualised and portrayed as attributable to character, this leads into a discussion about the use of stock characters and roles, particularly the dichotomies of heroine/villain and victim/oppressor. I will

also briefly consider the phenomenon of role reversal. As one of the main aims in melodrama is the recognition of virtue, I then focus on the plaintiff's virtuous characteristics. This includes an analysis of the implicit assumptions relating to gender and ethnicity that are often linked to the plaintiff role. I then address the problem of communicating the plaintiff's virtue. Following this I consider the role of communicating pain. Finally, I foreshadow some potential consequences of the melodramatic form of the legal injury narrative, particularly in relation to its moral overtones.

3.2 Assignments of Blame

“The defendant may indeed cause the plaintiff's injury, and if the story begins and ends with these two events, legal liability might well follow. The plaintiff's prior conduct, however, might have placed him in a position in which the defendant's actions would result in the injury, and if the plaintiff's actions were negligent, this fact might well reduce or eliminate the defendant's liability to him. To make matters more complex, a single cause may have several effects, some of them necessary, some of them not, and any effect may have many possible causes.” (Melton, 1998: 441)

In narrative, events may be related temporally, spatially and causally (Prince, 1982). In legal injury narratives, the concept of causation is particularly relevant. All events need to be connected in some way. For example, in an action about events in which two cars were involved in a head-on collision, there are typical events which might be connected to the accident. If one of the drivers had been drinking immediately before the accident, and is found to have a high blood alcohol content, then the events surrounding the driver's drinking would obviously be relevant. However, other events that could be seen to have an impact on the accident might not be as relevant, even though they may have contributed to the risk of the accident occurring. For

example, it might not be too far-fetched to refer to events such as the invention of a new kind of safety barrier that, if installed in between carriageways of major roads, would have had the potential to significantly reduce the risk of such accidents occurring. If the government had installed this type of barrier in the area in which the accident occurred, the accident would never have happened. In a sense, the invention of the barrier and the government's failure to install it are events which could be said to have caused the accident (or at least contributed to it). However, in a legal narrative they are unlikely to be seen as relevant unless the government is a party to the litigation.

In the legal injury narrative, events must be directly linked to the parties involved. The injury has to be portrayed as having been caused by the defendant's actions. Any external political or social issues are masked by the focus on individualised justice. The legal injury narrative is concerned about facts of individual injuries, not on the societal roots of such troubles (Koenig & Rustad, 1995).² The focus on human responsibility for events is inherent in the adversarial system. The plaintiff has to hold someone up as being responsible for their injury. This simplistic approach to blame clearly reflects the fault principle in tort law, that only the person causing the injury should bear the burden of the consequential loss (Atiyah, 1975). Compensation will not be awarded without the associated requirement for blame.

The legal injury narrative tends to convert the complex chains of events leading up to the accident into a compact monocausal account (Feigenson, 1999/2000). Feigenson explains that a melodramatic plot is satisfying because people tend to prefer simple

² See also Scheppelle: "If, for example, you see the particular car accident as the result of an individual driver's error ... you miss the role of broader forces that provide a context for these local causes. A public policy that encourages cars over mass transportation has a certain

explanations for events or behaviours to complex ones. He calls this the monocausal model. Monocausality may be preferred because people are motivated to accept a single sufficient explanation for any event above one that is the best of all possible explanations or because of the “seductive pleasures of melodramatic wholeness” (Smith, 1973). Lawyers are accustomed to simplifying causal explanations, usually choosing to interpret and/or portray the problem as one of necessary or ‘but-for’ causation (Melton, 1998).

In the legal injury narrative events are caused by human agency and the agent is the defendant. The defendant is masculinized in that he is the subject agent acting upon the plaintiff object. In order to attribute blame, it is necessary to show that the plaintiff has been subordinated to the defendant’s actions. The focus on the defendant as the agent of injury is emphasised in the legal injury narrative by the use of active voice to describe defendant’s actions, and the use of passive voice to refer to plaintiff’s actions (Feigenson, 1999/2000). This also reinforces the dichotomy between the defendant as the all-powerful agent and the plaintiff as the passive victim of the defendant’s conduct.

The defendant’s actions are explained by reference to his morally reprehensible nature. For example, in a drink driving case, the defendant is portrayed as:

“the sinner against society, the deviant ‘problem drinker’ as opposed to the ‘normal’ user of alcohol, the cause of half of all traffic deaths. From a complex reality, the drunk driver is constructed as the villain in a cultural melodrama, the sower of disorder in an otherwise orderly world. Thus, ... responsibility for these accidents is simplified,

causal effect in creating a particular accident rate, and hence may be seen as responsible for

personalized, dichotomized, and moralized – individual responsibility (the ‘unsafe driver’) rather than corporate (‘the unsafe car’) or collective (the ‘unsafe road’ or ‘unsafe transportation system’) responsibility.” (Feigenson, 1999/2000: 790)

Feigenson notes that this is supported by the psychological phenomenon of “fundamental attribution error” - the tendency to attribute the cause of a negative event to a person’s blameworthy act and to attribute the blameworthiness of the act to the person’s character (Feigenson, 1999/2000). Closely connected to this is the phenomenon of “culpable causation” – the tendency to assign more causal responsibility to an act which is more morally blameworthy, even if moral aspect is not relevant to the result (Feigenson, 1999/2000).

In the legal injury narrative this melodramatic theme is clearly evident – issues of liability focus on what the defendant could and should have done differently (Feigenson, 1999/2000). In order to provide an explanation as to why the defendant did not act as expected, reference is again made to the defendant’s role as villain/oppressor. Conversely, the defendant’s role is generally to challenge the plaintiff’s case by arguing that the defendant does not fit the role of villain (in other words, they haven’t done anything wrong) or that the plaintiff does not fit the role of heroine (and hence does not deserve to be compensated). The following section discusses the characteristics of these stereotyped roles of plaintiff and defendant.

the individual accident.” (1998: 323)

3.3 Stock characters and roles

“When individuals come before a court, they do not present themselves as they would in everyday life; instead, they come before the court in one of their roles.” (Bumiller, 1988: 62).

Universal legal narratives assign characteristics and define people in certain ways based on their position or circumstances (Gilkerson, 1992). They tend to rely on stereotypes with respect to the roles people are required to play in the narrative. For example, universal legal narratives may treat *“...black femaleness as unreliable, untrustworthy, hostile, angry, powerless, irrational and probably destitute”* (Williams, 1991). Some common roles include those relating to family, work, gender, race or victim status. These roles tend to be superimposed over and limit the information provided about the individuals’ identities, experiences, perspectives and images (Gilkerson, 1992). In many cases they may contradict the person’s own concept of the role they have played in the events in question. For example, in order to make a successful sex-based claim, women are often required to represent themselves as victims, although this may contradict their experience (Gilkerson, 1992).

Peoples’ relationships are also often stereotyped in legal narratives, such as in the reoccurring themes of poor client and state, and oppressor and victim. Consistent with law’s tendency towards binary systems of logic, the relationships between characters in legal narratives tend to be defined in oppositional terms (Smart, 1989). This is also typical of the melodramatic form, in which relationships are generally based on the characters’ polarized differences, particularly with respect to their power and moral nature. Given that the melodramatic narrative tends to explain peoples’ actions by reference to their characters, the representation of a character’s moral

nature is used to explain his or her actions. Universal legal narratives contain similarly preconceived ideas about peoples' expectations and motivations. For example, in universal legal narratives relating to welfare law, there is a clear distinction between the worthy poor, who are morally virtuous (for example the disabled, blind and elderly), and the unworthy poor (such as nonworking "employable" single people and heads of households), who are morally reprehensible (Gilkerson, 1992).

These kinds of stereotypical roles are clearly evident in the legal injury narrative where the plaintiff is inevitably characterised as the "heroine" and the defendant as the "villain". In the legal injury narrative the plaintiff and the defendant are diametrically opposed – they represent the polarization of good versus evil. In keeping with the melodramatic theme, the goodness and badness of the parties is highly personalized, and is inherent in their characters (Brooks, 1976).

Feigenson (1999/2000) uses the case of *Faverty v McDonald's Restaurants of Oregon Inc.* 892 P.2d 703 (Or. Ct. App. 1995) to demonstrate the polarization of characters in a personal injury trial. Theurer was an eighteen year old student employed by McDonalds. He had worked a 3.30pm to 7.30pm shift, then returned to do a midnight shift that same night. As he drove home, very tired, at 8am the next morning, he fell asleep at the wheel and hit the truck driven by Faverty. Faverty was seriously injured and Theurer was killed. Faverty settled with Theurer's estate and sued McDonald's. In this case Faverty, as the plaintiff, should technically have been cast as the heroine. However, in order to succeed in his claim he had to, in effect, argue Theurer's case for him. He had to show that it was McDonald's fault that Theurer was on the road in

an over-tired condition. Arguably, the case emphasizes Faverty's good, passive and mute status in that he is very rarely even mentioned in the arguments.

In essence, Faverty argued that McDonald's should be held responsible for allowing Theurer to work such long shifts and then drive home. Faverty's lawyer clearly set up a "heroine / villain" character opposition. Theurer was described as "a good kid. Everybody liked him. All the terrible things that kids can get involved in and exposed to, he'd done a good job of avoiding most of them". Faverty argued that McDonald's "should have known better", that they kept Theurer at work when they didn't have to, that "common sense" and "common decency" should have told them that, that McDonald's wasn't thinking about safety, they wanted to make money. McDonald's was cast as a greedy corporate profiteer who "pushed the kid off a cliff".

Faverty's case is perhaps an extreme example of how characters in a legal injury narrative are polarised. However, to a certain extent the same Manichean contrast can be found in all legal injury narratives. In *Lonsdale v Smith* [2000] ACTSC 15 the distinction between the characters of the plaintiff and defendant was made very clear, even though the circumstances of the accident were not particularly malicious. The plaintiff had agreed to give the defendant, who had been drinking, a lift home. The defendant then invited the plaintiff to come and see his new workshop and car inspection pit. Due largely to the lack of light and inadequate barriers, the plaintiff fell into the pit and was injured. However, the interesting aspect of the judgment was the clear reiteration of the fact that in the events leading up to the accident, the plaintiff was motivated by courtesy and resignation, whereas the defendant was motivated by pride which was exacerbated by the consumption of alcohol.

Another good example of the “heroine” / “villain” dichotomy can be found in *Australian Capital Territory v Van der Gevel and the Nominal Defendant* [1998] ACTSC 118. Ms Van der Gevel fell from a culvert when she stepped from a road over a guard barrier to avoid an oncoming car. She brought an action against the Nominal Defendant (in place of the unidentified driver of the oncoming car) and the Australian Capital Territory (as the relevant road authority). Her case emphasized the inappropriate behaviour of the men in the oncoming car and her entirely understandable response. The road authority was also interested in laying blame for the incident on the occupants of the car and presented their argument in clearly moralistic terms, stating that the accident was:

*“precipitated by the completely **unjustifiable** actions of a group of young men shouting and waving in an **errant** motor vehicle that they aimed at the plaintiff”*

and that:

*“the action of the driver and passengers in the car was **without any justification**, was almost certainly intended to frighten the plaintiff, had no redeeming social value of any kind and would be condemned by right thinking people.”³*

Gallop ACJ and Higgins J, in their judgments, accepted and reinforced the contrast between the actions of the men driving the car and Ms Van Der Gevel. Both judges clearly indicated their approval of Ms Van der Gevel’s state of mind and subsequent actions.

³ My emphasis.

*“The plaintiff was walking alongside a steel guard barrier when a car containing a group of young men approached, slowed down and weaved towards her. The plaintiff, a young woman alone on a lonely stretch of road at night, **understandably** feared for her safety and decided to step over the guard barrier to avoid the oncoming vehicle.”*

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*“At this precise point, the plaintiff was approached by a vehicle containing a number of young men. The car slowed and weaved towards her. The occupants were jeering and yelling. Some were waving their arms about. Being **understandably** alarmed, the plaintiff stepped over the guard-rail. She expected to find herself on a grassy slope down which the car could not follow her. Instead she found a void into which she toppled. She was seriously injured.”⁵*

Often, the defendant’s “villain” status is reinforced by evidence of habitual bad behaviour, even if this is not directly relevant to the case at hand. For example, in the *Faverty* case McDonald’s was portrayed as a greedy corporate profiteer with a history of exploiting its teenage employees (Feigenson, 1999/2000). The *Faverty* case also demonstrates another common characterisation of the parties to the injury narrative, the roles of victim and oppressor.

An interesting variation on the heroine / villain dichotomy is when the plaintiff becomes the villain. Defendants often attempt to use this role reversal, arguing that plaintiffs are guilty of malingering or exaggeration, or that they have a history of past accidents or illnesses. For example, in *Zorzi v Robbins* [1999] ACTSC 72, considerable time was spent discussing the plaintiff’s history of previous car

⁴ Gallop ACJ

accidents. This information was, strictly speaking, not legally relevant, but seems to have been used in an attempt to attack the plaintiff's character. There was also a large amount of discussion about the fact that the plaintiff was a migrant, and argument about whether or not the plaintiff was guilty of malingering. Similar discussions took place in *Bagic v Commonwealth* [1999] ACTSC 134, in which the plaintiff was described as being an immigrant, who had had previous accidents, had previously taken sick leave, and had a history of difficulties with management and other staff.

Character evidence was also heavily relied on in *O'Rourke v Gordon* [1999] ACTSC 120, in which it was found that the plaintiff's version of events was vague and confused, and considerable emphasis was placed on the fact that the plaintiff had a vision problem. A specific comparison was made with the defendant who was described to have given persuasive, clear and logical evidence. In this context, reference was also made to the fact that the defendant was a sworn officer in the RAAF, which could only have been relevant in terms of the defendant's character.

3.4 Recognising virtue

In order to be accepted as virtuous, and thus deserving of sympathy leading to an award of compensation, the plaintiff is required to demonstrate characteristics of weakness, passivity and muteness. Additional characteristics apply depending on whether the plaintiff is male or female, or from a different ethnic background.

Tort law, with the goal of deterring unsafe behaviour, has been said to be concerned with actual and potential victims (Bell, 1990). Interestingly, nearly all scholarly discourse in relation to personal injury litigation also refers to the injured person as a

⁵ Higgins J

"victim" in some form or another.⁶ The concept of victimhood relates to two aspects of the personal injury plaintiff's role. The first is in the sense of causation, in that the plaintiff is a passive victim, not responsible for having caused his or her invalid status. The plaintiff is clearly portrayed as being the innocent victim of the defendant's action or inaction. The second is in the sense of mitigation, in that the plaintiff is helpless and is not responsible for the continuation of her suffering.

The first aspect of victimhood is evidenced in the Faverty case, in which Theurer was cast as a passive victim of McDonald's lack of "parental" care (Feigenson, 1999/2000). Similar examples abound in Australian personal injury cases. Fundamental to the passive victim role is the need to establish a clear delineation between power vested in the plaintiff and the defendant. In other words, the defendant must be held out to be all-powerful, and the plaintiff subject to the defendant's control of that power. The plaintiff is represented as "virtue-as-innocence", placed in peril by the evil reign of the defendant (Brooks, 1976). The defendant controls the structure of events and the plaintiff, silenced and passive, is unable to call into question the defendant's conduct (Brooks, 1976). In the legal injury narrative, this power imbalance is often demonstrated by arguments that the defendant failed to protect the plaintiff by providing instructions, warnings, or assistance.

In cases in which the plaintiff has been injured at work, the plaintiff's silence and passivity is often characterised by the subservience of the employee to the power of the employer, and the lack of any right in the employee to criticise the employer's conduct. The plaintiff is portrayed as lacking any power to control his or her own destiny, for example by having no choice as to whether or not to carry out a

⁶ For example, Miller (1994) refers to "*victim[s] of value deprivations*".

dangerous task. For example, in *Bagic v Commonwealth* [1999] ACTSC 134, the plaintiff was injured when lifting a heavy beam at work. He gave evidence that he recognised the dangers inherent in trying to lift the beam by himself, and in fact asked his employer for assistance, which was refused. Although the plaintiff was described as “an experienced tradesman [who] knew about lifting”, Miles CJ found that:

*“The plaintiff was working, presumably under pressure, and did not fail to ask for assistance. When it was refused, the decision to try and lift the beam on his own did not constitute a failure to exercise reasonable care for his own safety. His decision does not need to be excused as momentarily inadvertent. **In practical terms it was either lift the beam or refuse to work. He chose to lift the beam.**”*

A similar example can be found in *Future Look Landscaping Pty Ltd v Hanlon* SC NSW, CA 40658/97, in which Giles JA (with whom the other judges agreed) stated that:

*“under the circumstances, the respondent had **no choice** but to help to lift in the manner...”, “[he] had **lifting thrust upon him**”*

The plaintiff is also frequently portrayed as not having sufficient knowledge to protect him or herself. For example, in *Frost v Woolworths Pty Ltd* [2000] ACTSC 106. the plaintiff was injured when he tried to move a carton that appeared to be stuck for some unknown reason. Miles CJ described the plaintiff as acting in a “*state of ignorance*”. However, ignorance is no excuse for a defendant, who is presumed to be all-knowing as well as all-powerful. In *Loiterton v PD Mulligan Pty Ltd* [2000] ACTSC 36, the plaintiff sued his employer for failing to protect him from an assault

by another worker. The plaintiff alleged that the defendant knew of regular acts of violence among staff but did not take any steps to discourage or prevent them.

The second aspect of victimhood requires the personal injury plaintiff to demonstrate that they do not derive any pleasure or satisfaction from their injured condition (Brody, 1987). This is constantly reinforced by the universal legal injury narrative in a number of ways. The plaintiff's case will generally present a stark contrast between the pre-injury able-bodied plaintiff and the post-injury disabled plaintiff. This contrast is important as it is inherent in the melodramatic genre that the central event results in a transformation between the protagonist's prior and subsequent condition. It is necessary to show that the injury is a turning point in the plaintiff's life, turning a previously happy (or at least bearable) existence into one centred on suffering and dissatisfaction. Any improvements in the plaintiff's condition are brushed over or immediately followed with a negative aspect. This seems to be important in order to achieve consistency in the post-injury state. This state, according to the melodramatic genre, is a negatively valued and generally unsatisfactory one, to which the plaintiff must resign him- or herself. The plaintiff is unable to improve her condition by her own will or actions.

Victim roles tend to draw on stock imagery to reinforce the desired sense of victimhood. They are based on stereotypes of people in similar circumstances. Tied in with these stereotypes are implicit requirements relating to gender and ethnicity.

3.5 Gender and ethnicity

“Women suffer in ways that men do not, and...the gender specific suffering that women endure is routinely ignored or trivialized in the larger (male) legal culture. Just as women's work is not recognized or compensated by the market culture, women's injuries

are often not recognized or compensated as injuries by the legal culture." (West, 1993: 179-180).

The casting of the personal injury plaintiff in the role of good, passive victim effects a kind of feminizing of the plaintiff role. The active agent in the legal injury is the knowledgeable defendant. This reflects the traditional association of reason and mind with masculinity. The focus on the plaintiff as silenced victim and the emphasis on her physical injuries and subsequent suffering reflects the feminine, characterised by the mute body, awaiting signification from the opposing masculine subject (Butler, 1990). In the melodramatic form of the legal injury narrative, these binary oppositions are exaggerated. Apart from the implicit feminization of the personal injury plaintiff, the characterisation of the personal injury plaintiff as innocent victim is often reinforced by corresponding stereotypes of gender and ethnicity, which often implicitly incorporate aspects of victimhood.

The roles of plaintiff and defendant in the legal injury narrative are usually implicitly gendered. This is particularly so with respect to the plaintiff. The plaintiff's character includes stereotypical assumptions about men and women, about men and women's work, about men and women's motivations and expectations and about their roles in relationships. When a woman or a man is a personal injury plaintiff, they come to the law in a pre-existing stereotyped role imposed by their gender. For example, a woman is already categorised as mother, wife, sexual object, pregnant woman, deserted mother, single mother and so on (Smart, 1990). Whether or not the plaintiff fits the stereotypical assumptions of gender may affect whether or not the plaintiff fits the role of "heroine" or "victim" and is thus deserving of compensation. It may also affect the amount of compensation that a plaintiff is awarded, due to consequential assumptions about the nature of a particular plaintiff's loss. Regina Graycar (1995)

notes that in Australian cases gender bias is pervasive, subtle, nuanced and therefore difficult to address directly. The effect of this bias is that the reality of women's life experiences is often not reflected in law (West, 1988).

In the melodramatic form, the legal injury narrative explains a person's actions by reference to their character. When their character's role is based on a gender stereotype, the explanations are necessarily affected. These kinds of role assumptions may have an effect on how liability is determined. For example, Leslie Bender (1993) suggests that tort law tends to be "male" as applied although the concept of foreseeability is "*broad and flexible enough to be inclusive of male and female experiences, perspectives and concerns*". She discusses the case of *Doe v Linder Construction Co.*, 845 S.W.2d 173 (Tenn.1992) in which a landlord was accused of negligent key handling such that two men were able to use the key to gain access to a female tenant's apartment and rape her. The Tennessee Supreme Court majority said that such an event was not reasonably foreseeable. Bender, and the sole dissenting judge, Justice Martha Craig Daughtrey, both argue that to the average woman, who lives in fear of rape in her daily life, rape was a very foreseeable consequence of key mishandling. In other words, the defendant in that case was characterised as having behaved as a reasonable "man" rather than the apparently neutral reasonable "person".

Brown et al 1996 note that mythic generalizations often reduce women to one of two archetypes: madonna or whore. This neatly corresponds to the melodramatic "heroine" and "villain" dichotomy with respect to the female gender. Brown et al (1996) describe the madonna as "*the ultimate maternal nurturer and virtuous role model, neutered and asexual*". Women who fit the madonna stereotype in the legal injury narrative are more likely to have their evidence accepted. For example, in

Conyard v Hancock Bros Pty Ltd (SC QLD, 1713 of 1995, 25th March 1998, White J) the judge commented that the male plaintiff's wife "*presented as a devoted, supportive and loyal wife and I accepted her evidence without reservation*". Other examples can be found where the female plaintiff's virtue is judged on the appropriateness of her behaviour with reference to stereotypical gender assumptions. The case of *Australian Capital Territory v Van der Gevel and the Nominal Defendant* [1988] ACTSC 118 is a good example. The judges placed considerable emphasis on why the female plaintiff was in this particular setting at that time. The judges explain that her partner had been apprehended for drink driving and she was walking to where his car had been left on the side of the road. This information is really not relevant to liability, but was mentioned a number of times. This raises an interesting issue about why an explanation for the plaintiff's presence in this particular setting was required. It seems likely that the judges thought that it was important enough to mention because its absence in the narrative would reflect badly on the plaintiff. In other words, nice girls don't walk on lonely stretches of road at night. This seems to add to the melodramatic characteristic of the narrative.

Another aspect of the plaintiff's role in the legal injury narrative is that it tends to include particular ethnic characteristics. This is not surprising given that the legal injury narrative has traditionally been developed by white anglo-saxon upper middle-class males. To a certain extent the legal injury narrative is a product of this culture and expresses that communities' values (Ifill, 2000). As such, the legal injury narrative tends not to "fit" those from other cultures, and the stereotypical roles it incorporates do not necessarily make sense to some of those people upon whom it is imposed.

This is particularly noticeable in personal injury unreported judgments, where a disproportionate number of the cases involve a plaintiff who is an immigrant, generally from an Eastern European country. The distinction between a “good” immigrant and a “bad” immigrant role is also clear in these judgments. The “good” immigrant is characterised as one who “through sheer effort” has established an affluent lifestyle, and takes pleasure and pride in this considerable achievement. The “good” immigrant shows evidence of having been a hard worker all of his life and as having assimilated well into the Australian culture. In contrast, the “bad” immigrant is one who has a poor command of English. They tend to have earned their livings in Australia as physical labourers, and accordingly, when they lose their physical capacity, their level of English limits their opportunities for future employment.

Medical practitioners often refer in their evidence to the “typical scenario in migrants” in which they are injured and “they don’t get better, because there’s something going on. They don’t all just decide on one day to stop work and tell lies and sit reading the newspaper, there’s something happening to them physically and mentally...” (Dr Knox, cited in *Risteska v The Commonwealth of Australia* [1999] ACTSC 56). There are repeated insinuations in the judgments that immigrant plaintiffs are prone to malingering. For example, they continue to wear cervical collars despite advice from rehabilitation specialists that it is no longer necessary, and tend to develop pain disorders associated with psychological factors such as the difficulties they have had in their life since coming to Australia. There is an implication that these difficulties make immigrants more prone to develop pain disorders and malingering compared with those born in Australia. This also ties in with the focus on the plaintiff’s suffering – these kinds of stereotypes include ideas about what makes these kinds of characters suffer.

In summary, the injured plaintiff's stereotyped victim role can be described as that of "invalid". The *Australian Concise Oxford Dictionary* defines the word invalid as: "(1) a person enfeebled or disabled by illness or injury; (2) not valid, especially having no legal force". Ironically, the role of invalid in the universal legal injury narrative incorporates elements of both aspects of the definition in the sense that the invalid is both physically and legally enfeebled. The concept of legal enfeeblement is based on the plaintiff's difficulty in communicating her virtue.

3.6 Communicating Virtue

In melodrama, everything must be said, even the unspeakable (Brooks, 1976). The characters must clearly demonstrate to the audience their status of virtue and villainy, and the lesson of their relationship. However, there is an inherent conflict between this need to speak and the muteness of the plaintiff role. Again, this reinforces the fact that the plaintiff is objectified, represented by her body, and in need of someone else (a lawyer or medical expert) to speak her pain in order for it to be heard.

If in melodrama the protagonist is unable to express her own virtue, in personal injury litigation the plaintiff is unable to present her own case. The plaintiff needs the assistance of a lawyer to represent her and to articulate her claim. In the courtroom, the lawyer does most of the talking, and when the plaintiff does take the witness stand, she only speaks in response to questions from the lawyers. Just as in traditional melodrama, the plaintiff's message will often require elucidation by cross-examination or verbal interpretation by the lawyers.

In melodrama, muteness is often metaphoric, in that the protagonist is from another culture, and although he or she can literally speak, the dominant culture cannot understand. In the same way, the plaintiff is generally not familiar with the legal

culture, and he or she needs someone well-versed in that culture to make the legal decision maker understand and sympathise.

The reliance on documentation in the personal injury trial also reflects traditional melodramatic theatre, in which the protagonist's virtue is finally demonstrated by documents such as birth certificates. In the personal injury trial, documents such as medical reports are necessary to prove the plaintiff's pain – the plaintiff's word is not enough.

3.7 Virtue in Pain

In the legal injury narrative the focus on the plaintiff's suffering makes positive emotions directed towards the plaintiff a central feature. These positive emotions are seen as necessary to encourage the decision maker to feel empathy. In her article "Legality and Empathy", Lynne Henderson (1987) notes that empathy has three distinct meanings:

1. Recognising emotions in others ;
2. Imaginative experience of the situation of another; and
3. The distress response that accompanies this experiencing – which may (but not must) lead to action to ease the pain of another.

In terms of the legal injury narrative, it is the third definition of empathy that is most relevant. The plaintiff wants the decision maker to feel empathy for his or her situation, and to take action to ease his or her suffering. The motivation to take action arising from feelings of empathy is "sympathy" (Mullen, 1998). Feigenson (1997) defines sympathy as "*a heightened awareness of the suffering of another and the urge*

to alleviate that suffering". He explains that sympathy goes a step further than empathy in that it *"includes the cognitive appraisal that the sufferer does not deserve his suffering and the desire to help relieve that suffering for the sufferer's sake"*.

In the legal injury narrative, it is the distress response that the plaintiff seeks to trigger in the decision maker, leading to the action of awarding damages as compensation for the plaintiff's suffering. The audience's focus moves from the evil defendant to the plaintiff and his or her suffering. The plaintiff thus becomes the central object of the audience's emotional participation in the legal injury narrative (Feigenson, 1999/2000).

Susan Bandes (1996) has considered the role of victim impact statements in encouraging empathy and compassion in judging. In the personal injury trial there is no real debate about the appropriateness of the "victim's" narrative. It is a fundamental part of the case. The injured plaintiff must demonstrate how the injury has affected his or her life in order to receive just compensation for what he or she has suffered. Accordingly, the role of sympathy is inherent in the part of the legal injury narrative relating to quantum. However, this part of the legal injury narrative is again subject to certain normative constraints. The particular must be reduced to the universal. Commonalities must be emphasized and personal perspectives downplayed (Bandes, 1996).

Given that physical pain resists objectification in language, the focus must move out of the body into the external circumstances that can be pictured as having caused the hurt (Scarry, 1985). This again reinforces the melodramatic nature of the legal injury narrative – shifting the focus onto the defendant as the cause of the plaintiff's

suffering. The plaintiff is relegated to the status of the object of the defendant's actions.

4 Melodrama and morality

“The Law – the archetype, the originary model – experienced in sacred times at the site of mythic reality, teaches us anew the proper patterns for belief, for feeling, and for social behaviour generally. Here lies the originary fount for cultural and characterological normalization. Here is a site where transgression of newly appreciated cultural and social norms may be appropriately assessed and resolved – with the aid of refreshed cultural forms: legendary or mythic themes, popular genres, familiar plots and character types through which the drama of trial is enacted. In this way the trial assures us of the intelligibility of reality. The heightened understanding it allows lifts us, at least for a while, above the constitutive ambiguity of everyday life. And in the transcendent euphoria it brings comes the moral beauty, and persuasive payoff, of a well-played narrative truth.”
(Sherwin, 2000: 69).

The legal injury narrative provides this truth with the aid of the melodramatic genre. Melodramatic narratives display an extreme form of moralizing, emphasizing the presence and force of good and evil in the world, and demonstrating the need to confront evil and remove it from the social order (Brooks, 1976). They imagine an alternative world in which good always triumphs over evil. The legal injury narrative reflects this melodramatic moral resolution. It attributes a morally charged meaning to the defendant's action and provides the community with a coherent and comforting resolution. The trier responds to the breach of a social norm – rationalizing and creating order over chaos (Berman, 1994). In true melodramatic form, the recognition of the appropriate order is often given in “a full-fledged trial, [with a] public hearing and judgment of right against wrong” (Brooks, 1976).

Public recognition is given by the judgment of where liability resides, but, as Brooks (1976) points out, correct recognition by judges does not always bring immediate resolution to the protagonist. The victim is still in an injured state and in need of catharsis. The legal injury narrative provides this desired resolution by the fiction that an award of damages puts the plaintiff in the position as if the injury had not occurred. The fact that it is the defendant making the payment of compensation⁷ reinforces the notion of individualised morality, inherent in the melodramatic form.⁸ This also reinforces the justice conception of tort – that negligence law is an articulation of our ordinary moral conceptions of agency and responsibility, carelessness and wrongdoing, harm and reparation (Keating, 2000).

In a sense, the whole concept of negligence presupposes some uniform standard of behaviour, based on the fiction of the reasonable person (Galligan, 1996). However, what is often more important in the sense of setting normative standards for behaviour, and which is highlighted when the legal injury narrative is viewed in its melodramatic form, is the implicit recognition of the characteristics of virtue **in the plaintiff**. Further work is needed to analyse in detail what those characteristics are and the possible ramifications of the fact that they are presented as “normal”.

Lloyd-Bostock (1979) points out that social norms about accidents tend to be based in law – that they tend to reflect law, rather than being reflected in law. If the legal injury narrative thus forms the basis for society’s response to injury, and the normative standards by which injured people are assessed, there is a risk that injured

⁷ At least theoretically, although there are obvious implications with respect to liability insurance.

⁸ Note that this has been criticised by subscribers to the enterprise liability theory of tort law, who urge adoption of compensation plans and strict liability rules by the courts in order to shift tort law in the direction of emphasizing social as against individual morality (Nolan & Ursin, 1999).

people will also assess themselves by the same standards. If the virtuous characteristics are not truly representative of the injured person's experience, what are the consequences?

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