

# Legal Melodramas of Injury and Gender

## Abstract

This paper examines personal injury litigation as melodrama. It compares the bipolar roles of melodramatic heroine and villain with those of the plaintiff and defendant in adversarial court proceedings. It draws analogies between the stereotypical feminine characteristics of the heroine and those of the plaintiff in litigation. This paper argues that although, in theory, any individual plaintiff can comply with the requirements of the legal injury narrative, in practice the characteristics of the plaintiff role are paradoxical and result in subtle discrimination against women. The legal injury narrative also replicates existing gender inequalities and power systems in Australian society.

## 1 Introduction: Law, power and gender

Law, power and gender are inextricably linked. As Carol Smart argues, “law exercises power not simply in its material effects (judgments) but also in its ability to disqualify other knowledges and experiences” (Smart 1989, 10-11). Given our legal system’s masculocentric nature, it is frequently women who are alienated and excluded (Davies 1994, 191). Where the legal system does acknowledge women, it tends to construct them according to gender stereotypes and present these stereotypes as objectively true (Graycar and Morgan 2002, 56-66).

The impact of gender stereotypes can be found in many areas of the law, including personal injury litigation. Much of the feminist legal scholarship about women in personal injury litigation has revolved around the gendered nature of damages assessment.<sup>1</sup> This article extends that scholarship by considering the way in which personal injury litigation replicates existing gender inequalities and power systems in Australian society. The “hidden gender” of the law is revealed by closely examining the “dominant narrative” in personal injury litigation, a narrative I call “the legal injury narrative”.

## 2 Legal narratives

In his article "Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories", Gilkerson proposes that the law can be seen as a collection of authoritative narratives that play an important role in the “telling, receiving and interpretation of stories intended to explain, justify and claim” (Gilkerson 1992, 870).

The legal injury narrative is one such narrative that plays an important role when people attempt to tell their stories of physical injury resulting from negligence.

The legal injury narrative is more than just a story including evidence supporting the elements of a cause of action in negligence (duty of care, breach of the duty, causation and damage).<sup>2</sup> It is an explanatory narrative that builds around those elements a structure for telling a story about how people are undeservedly injured and how they are able to have their consequential suffering recognised and alleviated. It provides a framework for peoples' stories of physical injury as a result of negligence, starting with the time before the injury and finishing with judgment in a personal injury trial. The legal injury narrative is a paradigmatic version of many individual injury stories told in personal injury law and is not easily identifiable, in the sense that it cannot be found explicitly laid out in a document such as a trial transcript or judgment. However, evidence of the legal injury narrative's content and structure can be found in those texts, in the same way as the content and structure of a particular literary genre can be revealed by a study of a number of different novels.

The legal injury narrative reconstitutes people's stories of pain into a wider, more social "realm of shared discourse" (Scarry 1985, 9). Injured litigants are required to tell their injury stories and make their claims for compensation in terms of this wider narrative so that the legal decision maker can understand and empathise. The requirement to comply with the legal injury narrative is not an explicit one, such as the need to establish all the legal elements of a negligence action. Although clearly demonstrating that the plaintiff has fulfilled the legal elements of a cause of action in negligence seeking damages for personal injury will theoretically result in a judgment in the plaintiff's favour, essentially I argue that there are more subtle requirements found in the legal injury narrative that can impact on the plaintiff's case. Those litigants who tell their injury story in accordance with the implicit requirements of the legal injury narrative are most likely to be

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<sup>1</sup> See for example Graycar (1997).

<sup>2</sup> The characteristics of the legal injury narrative are not affected by the fact that many defendants are covered by insurance. In melodrama, the reward offered to the heroine, as compensation for the injury to her virtue and consequential suffering, does not usually come from the villain. The villain receives public condemnation from the judge for his immoral actions, but another party (such as a king or wealthy land owner) frequently provides the gold or financial reward to the heroine.

successful in their action, and how well their story fits the narrative may also impact upon the quantum of damages awarded.<sup>3</sup>

Those people whose stories of injury can not be told consistently with the legal injury narrative are thus excluded or at least disadvantaged. This in itself may not necessarily be problematic, but it is important to step back and examine legal narratives from time to time to ensure that we are not merely reproducing the conventional narrative, with its implicit, existing norms, simply out of habit (Baron and Epstein 1994). This is particularly important when a dominant narrative appears to portray the ‘natural’ state of affairs and has the power of truth, as these narratives tend to serve those who have a stake in the status quo (Sarmas 1994, 725).

Since Burke’s “A Grammar of Motives” (1969) and Propp’s analysis of folk narratives (Propp, 1968), the idea has developed that one principled way of analysing narrative is to fit it into classic literary form (Antaki 1994, 95). In this paper I analyse the legal injury narrative through the genre of melodrama, drawing on and developing the work of Neal Feigenson (2000; 1999/2000; 1997), with particular emphasis on the stereotypical gender roles and relationships inherent in the form.

### **3 The Genre of Melodrama**

Singer notes that the term melodrama is notoriously ambiguous and suggests the most useful way to deal with its “generic slipperiness” is to define it as a “cluster concept” (Singer 2001, 54). In other words, melodrama involves different combinations of at least five constitutive elements: moral polarization, overwrought emotion, pathos, nonclassical narrative mechanics and sensationalism (Singer 2001, 37). In melodrama there are usually six different roles: the heroine, her helpers, the villain, his henchmen, the judge/father figure, and an authority figure (such as a doctor). The villain and henchmen are morally evil roles, providing a stark contrast to the other roles, which represent virtue. These roles are filled by stereotyped characters. For example, the villain may be a lusty landlord or a greedy uncle; the judge/father figure may be an actual judge, a military

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<sup>3</sup> The recent reforms to the common law relating to claims for damages for personal injury proposed in the Ipp Report (2002) and enacted in the various States’ Civil Liability legislation do not alter the fundamental bases of actions for personal injuries. Subsequent to the reforms, personal injury actions are still adversarial, liability is still based on fault, and damages are still premised on the notion of compensating the plaintiff for harm suffered. Accordingly, to a large extent, the reforms have little impact on my concept of the legal injury narrative. In fact, in many instances, the reforms appear to have the potential to reinforce or exacerbate existing problems inherent in the legal injury narrative.

leader or a king. In classical melodrama the judge, villain and authority figures are almost always male, and the heroine is inevitably a young and beautiful woman.

Historically, one of the main purposes of melodramatic theatre was to provide instruction for the people by demonstrating good models of behaviour and moral sentiments (Hyslop 1992). Accordingly, there are models of behaviour for both the roles and the particular characters who fill those roles. The two main roles in melodrama are the virtuous heroine and the evil villain. The polarization of these roles reflects the reciprocal nature of the the Western patriarchal sex roles of the feminine and the masculine (Connell 1995, 22). The feminine heroine is weak, dependent, innocent, passive, mute, domestic, and emotional. The masculine villain is powerful and active, with tendencies towards aggression, competitiveness, hierarchy and territoriality (Connell 1995, 46). The masculine villain propels the narrative by investigating and manipulating the passively displayed heroine (Jacobs 1993, 123). The masculine villain causes the “primal scene” placing the heroine’s virtue and happy existence into peril. The heroine is helpless in response to the villain’s actions. The heroine continues to suffer greatly until such time as her virtue is recognised by the father figure. Only the father figure has the authority to declare or deny her virtue. This usually happens in an actual or metaphorical trial, in which virtue is recognised and rewarded, and the villain receives his comeuppance.

Historically, melodrama did not encourage spectators “to challenge or even question the hierarchical structure of a society which consisted of different groups with different rights, duties and privileges” and was often a coercive tool of the ruling class (Hyslop 1992, 66). However, melodrama’s coercive nature is subtle, and the existing hegemony is always implicit rather than openly confronted. Melodrama is “articulated within the dominant essentialist discourse [and] provide[s] escapist controls that support and solidify the political status quo” (Morse 1992, 18). In this way, melodrama diverts attention from aspects of the status quo that contribute to the heroine’s suffering, and also presents as a given that the heroine is dependent on other masculine characters for the alleviation of her suffering.

#### **4 The Legal Injury Narrative**

An examination of Australian personal injury judgments from 1998-2000 reveals some striking similarities between the characteristics of the legal injury narrative and classical melodrama. In its broadest sense, the legal injury narrative is melodramatic in that it

dramatises the ordinary kinds of misfortunes that everyday people experience in their lives (Brooks 1976, 13). However, it also reflects particular characteristics of the melodramatic genre, such as moral polarization, pathos, and nonclassical narrative mechanics.

The legal injury narrative's plot revolves around the primal scene of the plaintiff's injury, which is caused by the defendant, and leads to the plaintiff's suffering. The narrative is overly simplified, particularly with respect to causation, in order to reach a clear cut decision on liability. Much of the narrative is concerned with demonstrating the plaintiff's suffering, and why the plaintiff deserves to have that suffering alleviated. This is important in order to encourage the judge to feel pathos, leading him to take action to return the plaintiff to his or her "normal" state (or to compensate the plaintiff for the impossibility of a return to that state).

The legal injury narrative reflects the bipolar dichotomy of heroine and villain in the adversarial proceedings between the plaintiff and defendant. Just as the heroine role in melodrama represents the feminine as opposed to the masculine villain, the plaintiff is the feminine character opposed to the masculine defendant. Although the plaintiff role may be filled by either a male or female character, the role itself has typically feminine characteristics.

On one level the plaintiff role is inherently feminine, representing the injured suffering body. The injured plaintiff is the antithesis of hegemonic masculinity which is constituted through bodily performance (Gerschick and Miller 1994). The masculine values of strength, activeness, speed, virility, stamina and fortitude (Murphy 1990, 94) are incompatible with the plaintiff role. People with physical disabilities are generally perceived to be weak, passive and dependent – stereotypically feminine characteristics. This in turn makes them pitiable, which is necessary in order to encourage the pathos necessary to motivate the judge to recognise and alleviate their suffering.

Both melodrama and the legal injury narrative provide "necessary conditions" for the alleviation of the feminine character's suffering.<sup>4</sup> Both justify the power and control exercised over the feminine character by reason of her vulnerability (characteristic of her role as heroine/plaintiff in the narrative). They also require the feminine character to be

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<sup>4</sup> See Larcombe (2005) for a similar analysis of rape law and romance fiction.

worthy and deserving of the protections and rewards offered (in melodramatic terms, she must be virtuous).

## 5 The passive and mute plaintiff role

The heroine in melodrama and the plaintiff in the legal injury narrative are portrayed as vulnerable due to their feminine characteristics of passivity and muteness. Both these characteristics reinforce the characters' dependence on protection and support from others. When an injured person does not fit the expectations of the plaintiff role in the legal injury narrative they risk "losing whatever entitlements and compassion victim status may afford" (Minow 1993, 1432). In other words, personal injury clients may be punished for not possessing the qualities required by the legal narrative, much as women are often attacked by defense lawyers for not possessing the qualities of victimization required by the legal narrative of rape. A plaintiff who does not demonstrate the necessary passivity and muteness runs the risk of not being able to be portrayed according to the requirements of the plaintiff role. Where a plaintiff is too active or too vocal, she may be seen as not needing assistance from others (and thus not inspiring the necessary pathos in the judge), or as the cause of her own suffering (in which case no remedy can be sought from the defendant).<sup>5</sup>

Ideally, the plaintiff's passivity is demonstrated in three respects. Firstly, the plaintiff must be portrayed as passive in terms of the causation of the injury. The plaintiff is represented as "virtue-as-innocence", placed in peril by the evil reign of the defendant (Brooks 1976, 30-31). The defendant is portrayed as controlling the structure of events and the plaintiff, silenced and passive, as unable to call into question the defendant's conduct (Brooks 1976, 30-31). The second and third respects relate to the melodramatic "theme of failure" (Halliday 1971, 119), in that the plaintiff cannot resolve the situation in which she finds herself enmeshed. The plaintiff must be passive in the sense of not being responsible for her continued suffering, and also passive in terms of the resolution of the narrative. She must unquestioningly accept the choices by those in power as to the recognition of, and compensation for, her suffering.

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<sup>5</sup> The Civil Liability Reforms do not change the legal injury requirement of passivity for those in the role of plaintiff. In fact, the value of passivity of the plaintiff is reinforced by the proviso that intoxication will not give rise to contributory negligence where it was not self-induced. (See for example Section 5(4) *Civil Liability Act* (Tas) 2002). Similarly, volunteers who have not taken drugs voluntarily or who take them for therapeutic purposes (presumably in passive compliance with the advice of a recognised authority figure –

### 5.1 *Passivity with respect to causation of injury*

The plaintiff's passivity is a direct contrast to the active nature of the defendant's role. The defendant is portrayed as the active character, whose actions caused the plaintiff's injury. The plaintiff is portrayed as the passive injured object. However, passivity is generally speaking not a valued characteristic. It is only acceptable if it can be somehow justified.

In melodrama, the heroine's passivity is justified as a result of the female character's natural state. In other words, passivity is a valued feminine characteristic, and accordingly the heroine's feminine nature requires her to behave in a passive manner with respect to other characters. The heroine's passivity also obtains its moral power because she is represented in a family or social position that should command protection (Gledhill 1987, 21). As Hyslop (1985, 67) points out, in Pixérécourt's melodramas, women's roles are primarily domestic and they interact with others as mothers, wives or daughters.

In negligence law, the element of duty of care is, in effect, about establishing the circumstances in which the plaintiff's passivity is acceptable. This is because the duty of care requirement can be said to be based on the concept of the powerful having a responsibility to take care to protect those weaker than themselves:

“The elements of the duty of care which emphasise moral choice take their meaning from ideas such that certain people (like statutory authorities) have more power or control and therefore greater ability to make choices than weaker individuals and therefore are obliged to take more care of them.” (Vines 2000, 137)

In other words, where a duty of care is established, the defendant is required to take active care not to harm the plaintiff. Accordingly, the plaintiff may reasonably expect that this care will be taken by the defendant, and accordingly will not be responsible (at least to the same extent) for taking active steps to protect him- or her-self.<sup>6</sup>

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a medical doctor), will not lose the protection of the legislation (See for example Section 47(4) *Civil Liability Act* (Tas) 2002).

<sup>6</sup> This is not to say that a plaintiff has no responsibility for taking care for his or her own safety. Doctrines such as *volenti non fit injuria* (voluntary assumption of risk) and contributory negligence have the effect of denying or reducing a plaintiff's recovery of damages where she has caused or contributed to her own injury. However, this is not inconsistent with the legal injury narrative's portrayal of the ideal plaintiff as passive. Where the plaintiff is held to be at fault for her own injuries, this is usually in terms of the plaintiff actively choosing too little safety, rather than passively accepting the status quo (Abel 1990, 795). The

The moral acceptability of passivity may arise from the expectations attached to the particular character playing the plaintiff role, or from the particular circumstances of the interaction between the plaintiff and the defendant. For example, where the plaintiff role is filled by an infant character, the infant's passivity is naturally acceptable. Infants are generally dependent on adults to take care of their safety and protect them from harm, and adults will usually have a duty to take care of children within their control. Accordingly, passivity is morally acceptable in infant plaintiffs, who are not expected to be particularly active in avoiding injury. In the legal injury narrative the plaintiff's passivity may also be justified by portraying her in a metaphorical familial position (Feigenson 1999/2000).

Where the person in the plaintiff role is not stereotypically passive, such as an adult male, his passivity can be justified as a result of his position in a socially acceptable power relationship with the defendant. The classic example is the relationship between employer and employee, in which the employer typically has greater resources, greater knowledge and greater control over the people and the situation involved. In the employment relationship, the employee's situation of passivity is emphasised by the employer's ability to enforce obedience:

"The employer's obligation is not merely to provide a safe system of work; it is an obligation to establish, maintain and enforce such a system. Accident prevention is unquestionably one of the modern responsibilities of an employer...And in deciding whether an employer has discharged his common law obligation to his employees the Court must take account of the power of the employer to prescribe, warn, command and enforce obedience to his commands." *McLean v Tedman* (1984) 155 CLR 306 at 313.

In cases in which the plaintiff has been injured at work, 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 is often emphasised. 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 dangerous task. Given this notion of power in the employer, it is not

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obligation to take care for one's own safety does not conflict with the argument that, in order to fit the legal injury narrative, the plaintiff must be portrayed as a passive victim. Where a plaintiff has been injured because she has not taken appropriate care for her own safety (as opposed to being injured because of someone else's failure to take care), her story will not fit the legal injury narrative and she is less likely to obtain dream justice from the judge, who has the power to alleviate her undeserved suffering.

surprising to find that the plaintiff employee is frequently portrayed as having been “required” by the defendant employer to do something causing injury.

In *Bagic v Commonwealth* (unreported, SC(ACT), Miles CJ, No67/1995, 15 December 1999), 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.”

Even where the plaintiff and defendant are not in an employment relationship, the court will often find that the plaintiff was required to do something leading to injury. In *Future Look Landscaping Pty Ltd v Hanlon* (unreported, NSW(CA), Spigelman CJ, Sheller and Giles JJA, No40658/1997, 8 July 1988) the plaintiff was injured when the defendant’s driver asked the plaintiff to give him a hand to lift a concrete mixer off his truck. Although the plaintiff agreed to help out simply out of his good nature, the court held that the plaintiff “was more in the position of an employee required by his employer to perform a task with a risk of injury”. Giles JA (with whom the other judges agreed) stated that “under the circumstances, the respondent had **no choice** but to help to lift ...[he] had lifting thrust upon him”.

**Comment [SJH1]:** Clarify this – did court find that defendant knew? Or just deemed knowledge?

## 5.2 Passivity in response to suffering

The plaintiff role also requires a passive response to suffering in order that the plaintiff be seen as pitiable. This is important in order for the melodramatic characteristic of pathos leading to a distress response. 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 to be necessary so as to encourage the decision maker to feel sympathy. Feigenson (1997, 4) defines sympathy as “a heightened awareness of the suffering of another and the urge to alleviate that suffering”. He explains that sympathy “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” (Feigenson, 1997, 12). 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.

Tied into the passive response to suffering is the requirement that the plaintiff be dependent upon and passively comply with authority figures such as medical practitioners. For example, an injured plaintiff is expected to seek usual medical advice and treatment. If a plaintiff fails to accept the treatment recommended by a medical practitioner, the defendant may argue that this was a failure to mitigate. In other words, the plaintiff became actively responsible for the continuation of her suffering.

Injured plaintiffs are required to accept reasonable medical treatment in order to fulfil their duty to mitigate their loss. However, refusing medical advice can be excused, provided that the reason for refusing arises from the plaintiff being demonstrably passive in another way. This may be due to a recognised psychological condition, or because the plaintiff's personality gives rise to typically feminine or childlike behaviour. For example, in *Fontaine v Quality Platers* (1995) 12 WAR 71, the male appellant's failure to accede to medical recommendations was held not to be unreasonable given his very low threshold of pain, his anxiety state and his "childlike dependency" on his wife.

In *Walker-Flynn v Princeton Motors Pty Ltd* (1960) 60 SR(NSW) 488 a young married woman suffered injuries that rendered her incapable of having a child normally with the result that each pregnancy carried an increased risk to her life. It was conceded that she could avoid this risk by complying with medical advice to take contraceptive measures. However, the court did not discount her damages when she refused to do so on religious grounds. In a sense in this case, the plaintiff demonstrated a morally acceptable passivity or submission to a greater authority than the medical practitioners.

However, the plaintiff's passivity in response to pain and suffering is paradoxical. If the plaintiff is too passive in response to her suffering, she risks being classified as a "malingerer". If she is too active, she risks being identified as an "overcomer" (Rovner 2001) and thus not suffering enough. Where an injured plaintiff overtly tries to overcome the limitations they encounter, they risk being blamed for their suffering or their failures to break free of it (Minow 1993, 1429). Defendant lawyers often look for and emphasize evidence of the plaintiff's active behaviour as a reason for rejecting or

reducing the plaintiff's claim for damages. Surveillance is often relied upon to show behaviour that is seen as an inappropriate response to alleged suffering.

### **5.3 *Passivity in relation to resolution***

In melodrama, the heroine never attempts to alleviate her suffering by actively attempting to prove her virtue. She simply resists by continuing to demonstrate her virtuous nature and waiting for other more authoritative, and inevitably male, characters to recognise it. In the legal injury narrative the plaintiff role requires a similar passivity. In order to be successful in the action for compensatory damages, a plaintiff generally requires assistance from a lawyer. The plaintiff is expected to accept his or her lawyer's advice. In the courtroom, the plaintiff is required to behave appropriately. In practice this means complying with directions about when to sit, stand, speak and even what the plaintiff is allowed to say and when. Once the judge has decided the case, the plaintiff is also expected to comply with the judgment. In melodrama and the legal injury narrative it is always the masculine characters who have power, and the feminine characters who depend upon them for the alleviation of their suffering.

### **5.4 *The text of muteness***

In melodrama the passive nature of the heroine is often revealed in the theme of muteness. Muteness is symbolic of the defencelessness of innocence (Brooks 1976, 60). Muteness may be physical (the heroine has had her tongue cut out) or representative (the heroine is a foreigner and her language is not understood). However muteness in melodrama is paradoxical, in that melodrama requires the overt expression of the plaintiff's virtue and suffering so that it can be recognised.

The paradox of the text of muteness in melodrama is reflected in two respects in the legal injury narrative. Firstly there is tension between the plaintiff suffering passively and in silence, and the requirement that the plaintiff verbalise her pain in order for it to be recognised. Secondly, the fact that at trial everything must be expressed is in conflict with the plaintiff's inability to speak the appropriate language in order to be heard.

### **5.5 *Verbalising pain***

In the legal injury narrative the plaintiff is required to complain about pain contemporaneously with the injury and then consistently at every opportunity to every doctor he or she visits. Ideally, these complaints should continue and remain consistent and be recorded by the doctor. However, the requirement that a plaintiff verbalise

complaints of pain can work against a plaintiff's credibility if she complains too much. A plaintiff is at risk of being categorised as a victim-as-manipulator (Rovner 2001).

Even if the plaintiff successfully negotiates the balance between complaining too little and too much, there are particular problems with how to express pain and suffering. Elaine Scarry (1985) notes that pain is language destroying, but at the same time it can be imagined and verbalised. The plaintiff's suffering is "unmade" in the sense that it is often impossible to express in language. However, in the trial there is a need for others to be able to "make" her suffering real by imagining and verbalising it.

Scarry points out that "because the person in pain is ordinarily so bereft of the resources of speech, it is not surprising that the language for pain should sometimes be brought into being by those who are not themselves in pain but who speak on behalf of those who are." (1985, 6) In melodramatic terms, the plaintiff is effectively mute with respect to verbalising pain in the courtroom, and the judge can only "hear" her pain when it is spoken by another. In this way, the plaintiff's own subjective evidence of pain is more valued when presented through objective evidence.

Witnesses to the accident itself are frequently called to describe the plaintiff's demeanour immediately after the injury. They can give evidence about how they saw her attempt to lift a heavy object, how she dropped it and cried out, clutching her back, how she appeared to have difficulty walking away, her face grimacing. This kind of evidence reflects the importance of gesture in melodrama as an indicator of truth. Gestures of pain are universally recognisable. We know what pain sounds like, we know what a person in pain looks like, we know how a person in pain moves. However, the problem with this universal knowledge is that it allows people to mimic pain where there in fact is none. As Scarry puts it, "hearing about pain" may exist as the primary model of what it is "to have doubt" (1985, 4)

Accordingly, the legal injury narrative places considerable emphasis on authoritative evidence to establish pain and suffering. Evidence from a medical practitioner about a plaintiff's pain enables it "to enter into a realm of shared discourse that is wider, more social, than that which characterizes the relatively intimate conversation of patient and physician" (Scarry 1985, 9). In many cases a medical practitioner is able to objectify the plaintiff's experience of pain by telling what it should be. In other words, the doctor describes the pain "likely to be felt" by anyone experiencing such an injury.

### **5.6 Muteness in the courtroom**

The heroine's muteness is at its most profound when she is required to demonstrate her virtue and undeserved suffering during the trial scene. She is unable to "effectively articulate the cause of the right" (Brooks 1976, 31) and her message usually requires elucidation by cross-examination or verbal interpretation (Brooks 1976, 69).

In the courtroom, the plaintiff also needs others to speak on her behalf in order to have her virtue and suffering recognised. In the personal injury trial, the injured plaintiff is mute due to a cultural barrier. The plaintiff speaks a different language to the lawyers and judges, who are familiar with the "language of the law". The lawyer is frequently the plaintiff's "sole means of communicating with and participating in a proceeding" that may dramatically affect her life (Kell 1998, 640). In melodramatic terms, the plaintiff does not know how to describe her virtue, how to blame the defendant, or how to express her suffering. Without this knowledge, she is "legally mute" (Luban 1988, 193-4).

## **6 Female and male characters in the role**

Generally speaking, according to sex role theories, men are expected to engage in stereotypically masculine activities. What is defined and valued as masculine varies over time and cultures, and is "deeply enmeshed in the history of institutions and of economic structures" (Connell 1995, 29). However, no matter how the masculine and the feminine are defined, at any given time men who demonstrate feminine characteristics are condemned as aberrant by the dominant culture (West 1988, 38). Accordingly, when a male is cast in the feminine plaintiff role his weakness is seen as a stark contrast to his "normal" strong self and is often presented as a source of considerable frustration.

In contrast, the plaintiff role is, in many respects, reflective of the accepted feminine role of women in everyday life. The male/female power imbalance is an inherent part of the patriarchy, in which "being male itself confers power and ... being female itself confers powerlessness" (Turkheimer 1997, 172). Turkheimer (1997, 192) argues that women have been socialized to be weak, passive and mute, and to seek help from men in times of need. Accordingly, it may not be as difficult for a female plaintiff to conform to the feminine nature of the plaintiff role.

This distinction becomes important with respect to the value placed on the suffering of male and female plaintiffs. Where a female plaintiff is portrayed as suffering in a stereotypically feminine way, her suffering is consistent with her melodramatic heroine

role. There is nothing unexpected here. Women who are cast as passive, weak and mute heroines suffer in passive, weak and mute ways. However, where a male is cast in the heroine plaintiff role, there is discord. A man, normally seen as active, strong and articulate, is injured and unable to fulfil his “normal” male role. In addition to this, in the legal injury narrative he is suddenly cast in a suffering heroine role and thus doubly emasculated. In this way a male plaintiff’s suffering is more visible. This may provide support for the proposition that men generally receive higher awards of compensation than women.<sup>7</sup>

Where a plaintiff’s physical injuries result in a need for care and assistance from others this can also give rise to suffering that varies according to gender. The requirement for care is seen as a greater source of suffering for men, given that “the dominant male culture condemns as aberrant the man who needs others” (West 1988, 38). However, reliance on others is seen as a natural part of being a woman, and something that is generally valued as a source of connection. Accordingly, this dependence is not seen as significant with respect to the female plaintiff’s suffering.

## **7 The Virtuous Woman**

Melodrama is about “virtue made visible and acknowledged, the drama of a recognition” (Brooks, 1976, 13). The concept of virtue is inherently linked to melodrama’s aim of restoring the status quo of the social order. What is virtuous is what is consistent with that which is valued in the existing society. Accordingly, where virtue is recognised, melodrama in fact recognises what is valued in the status quo. How the legal injury narrative portrays women who are exceptions to the rule reveals some very resistant stereotypes still underlying many modern personal injury decisions.

In classical melodrama the young woman cast as the heroine is usually the epitome of stereotypical femininity. She is ready made for the role, demonstrating passivity, muteness, and dependence on masculine others (fathers, uncles, brothers, heroes) in her everyday life. However, many women who come before the courts do not find it so easy

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<sup>7</sup> Interestingly, unlike more comprehensive American studies, the Australian literature that refers to the phenomenon of female personal injury plaintiffs receiving lower damages awards than male plaintiffs either makes assumptions about inequity, or simply discusses a particular case where the damages awarded seem to be inequitable and then makes general assumptions about this being a pattern. See for example Graycar & Morgan (2002). This is an area in which empirical research is needed.

to fit the feminine stereotype.<sup>8</sup> They may be particularly active, have traditionally male career histories, and be unmarried and childless. Examining some unusual melodramatic heroines provides some insight into the way in which the legal injury narrative deals with women who do not easily fit a stereotype.

The fact that a heroine does not appear to fit the stereotypically feminine role does not necessarily mean that she is denied justice. However, the heroine's deservedness is usually justified by portraying her as acting "above her sex", often in the guise of a man, and usually for the benefit of her family (rather than in self-interest) (Hyslop 1985). Cooper (1993) points out that despite these heroines' heroics it is ultimately men who enable them to achieve their noble aims, and that these heroines always return to an "appropriate" role at home with family at the end of the struggle. She concludes that female heroism will only be rewarded if it is "exercised in service to the patriarchy and only if it does not induce a woman to forget her proper place once her mission has been completed" (Cooper 1993, 184).

Echoes of this female transvestite role-playing can be seen in personal injury cases in which women who have stereotypically male working careers are persistently portrayed as doing so either out of necessity to support their families, or as a poor substitute to marriage and children (Graycar 1995). Similarly, women who are unusually active in the context of alleged suffering are not penalised if they can demonstrate that they pushed themselves beyond the "normal" limits in order to take proper care of their children. In this way the legal injury narrative can still result in "justice" for the individual plaintiff, without disrupting the underlying norms of the status quo.

## 8 Conclusion

Feminist legal scholars have pointed out that the stereotypical characteristics of the male legal subject – rationality, independence, autonomy – are held out as the norm for any legal subject.<sup>9</sup> As a consequence, women and men are judged according to how well

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<sup>8</sup> A detailed discussion about the requirement for women in the plaintiff role to demonstrate virtue is beyond the scope of this paper. However, in short, the legal injury narrative tends to perpetuate longstanding stereotypes of female virtue, such as the fact that female plaintiffs are generally expected to be madonnas rather than whores, value their physical appearance, and find fulfilment in marriage and a domestic role. See for example works such as Graycar (1995) and Naffine and Owens (eds) (1997) *Sexing the Subject of Law*. Sydney: Sweet & Maxwell. See also the recent decision of *De Sales v Ingrilli* (2002) 193 ALR 130 in which a woman's damages were reduced due to the likelihood of her remarrying, assessed largely on the basis of her physical attractiveness.

<sup>9</sup> See for example Davies (1997).

they meet those valued standards. Many women are obviously disadvantaged as defendants when they are judged according to masculine standards. However, they are also disadvantaged when they are stereotyped as inherently passive, feminine characters, and the alleviation of their suffering depends on their complying with that stereotype.

In melodrama the heroine role is directed towards obtaining sympathy and relieving responsibility for suffering. However, although the decision maker's pity involves a moral requirement to respond to innocent suffering, it also involves taking a position of superiority, self-righteousness and power (Rovner 2001, 289). These things combine to place personal injury litigants, and particularly women, in victim roles that are "utterly inconsistent with an image of a whole, autonomous, integrated human being who is worthy and deserving of respect" (Rovner 2001, 290).

The legal injury narrative reinforces the value of the masculine over the feminine. The masculine is portrayed as the norm, comprising of the active, able body, and the feminine is the devalued form: the injured body, passive, dependent and suffering. The narrative also perpetuates the power of the masculine over the feminine, in that the feminine plaintiff's suffering can only be recognised and alleviated by and with assistance from the masculine characters.

## REFERENCES

- Abel, Richard. 1990. A Critique of Torts. *University of California Los Angeles Law Review* 37:785.
- Antaki, C. 1994. *Explaining and Arguing: the Social Organisation of Accounts*. London: Sage.
- Baron, J and Epstein, B. 1994. Is Law Narrative? *Buffalo Law Review* 45:141.
- Brooks, P. 1976. *The Melodramatic Imagination*. London: Yale University Press.
- Bruner, J. 2002. *Making Stories: Law, Literature, Life*. New York: Farrar, Straus & Giroux.
- Burke, K. 1969. *A Grammar of Motives*. Berkeley: University of California Press.
- Connell, Robert William. 1995. *Masculinities*. Sydney: Allen & Unwin.
- Cooper, B T. 1993. 'Up in Arms: Defending the Patriarchy in Pixérécourt's *Charles Le Téméraire*'. *Symposium* 47(3):171.
- Cover, R M. 1983. Nomos and Narrative. *Harvard Law Review* 97:4.
- Davies, Margaret. 1994. *Asking the Law Question*. Sydney: Law Book Co.
- Davies, Margaret. 1997. Taking the Inside Out. In Naffine and Owens (eds) *Sexing the Subject of Law*. Sydney: Law Book Company.
- Feigenson, Neal. 2000. *Legal Blame: How Jurors Think and Talk About Accidents*. Washington: American Psychological Association.
- Feigenson, Neal. 1999/2000. Legal Meaning in the Age of Images: Accidents as Melodrama. *New York Law School Law Review* 43:741.
- Feigenson, Neal. 1997. Sympathy and Legal Judgment: A Psychological Analysis. *Tennessee Law Review* 65:1.
- Gerschick, T.J. and Miller, A.S. 1994. Coming to Terms: Masculinity and Physical Disability. *Masculinities* 2:349.
- Gilkerson, C P. 1992. Theoretics of practice: the integration of progressive thought and action: Poverty Law Narratives: the critical practice and theory of receiving and translating client stories. *Hastings Law Journal* 43:861.
- Gledhill, C, ed. 1987. *Home is Where the Heart Is: Studies in Melodrama and the Woman's Film*. London: BFI Publishing.
- Graycar, Regina. 1997. Hoovering as a Hobby and Other Stories: Gendered Assessments of Personal Injury Damages. *University of British Columbia Law Review* 31:17.
- Graycar, Regina. 1995. Damaged Awards: The Vicissitudes of Life as a Woman. *Torts Law Journal* 3:160.
- Graycar, Regina and Morgan, Jenny. 2002. *The Hidden Gender of Law*. 2nd Edition. Sydney: Federation Press.
- Halliday, J. 1971. *Sirk on Sirk*. London: British Film Institute
- Hyslop, Gabrielle. 1985. Deviant and Dangerous Behaviour: Women in Melodrama. *Journal of Popular Culture* 19:65-77.

- Hyslop, Gabrielle. 1992. Pixérécourt and the French Melodrama Debate: Instructing Boulevard Theatre Audiences. In James Redmond (ed), *Melodrama*. Cambridge: Cambridge University Press.
- Ipp, DA, 'Final Report of the Review of the Law of Negligence' (Commonwealth of Australia, 2002).
- Jacobs, L. 1993. The Women's Picture and the Poetics of Melodrama. *Camera Obscura* 31:121-147.
- Kell, William A. 1998. Voices Lost and Found: Training Ethical Lawyers for Children. *Indiana Law Journal* 73:635.
- Larcombe, Wendy. 2005. *Compelling Engagements: Feminism, Rape Law and Romance Fiction*. Sydney: Federation Press.
- Luban, D. 1988. *Lawyers and Justice: An Ethical Study*. Princeton University Press.
- Minow, M. 1993. Surviving Victim Talk. *University of California Los Angeles Law Review* 40:1411.
- Morse, William. 1992. Desire and the Limits of Melodrama. In James Redmond (ed), *Melodrama*. Cambridge: Cambridge University Press.
- Murphy, R. 1990. *The Body Silent*. NY: WW Norton.
- O'Connell, J, and JR Baldwin. 2002. (In)Juries, (In)Justice, and (Il)Legal Blame: Tort Law as Melodrama - or Is It Farce? *University of California Law Review* 50:425.
- Propp, Vladimir. 1968. *Morphology of the Folktale*. Trans., Laurence Scott. 2nd ed. Austin: University of Texas Press.
- Rovner, Laura. 2001. Perpetuating Stigma: Client Identity in Disability Rights Litigation. *Utah Law Review* 247.
- Sarmas, Lisa. 1994. Storytelling and the Law: A Case Study of Louth v Diprose. *Melbourne University Law Review*. 19:701.
- Scarry, Elaine. 1985. *The Body in Pain: The Making and Unmaking of the World*. New York: Oxford University Press.
- Singer, Ben. 2001. *Melodrama and Modernity: Early Sensational Cinema and its Contexts*. New York: Columbia University Press.
- Smart, Carol. 1989. *Feminism and the Power of Law*. London: Routledge.
- Tuerkheimer, D. 1997. Street Harassment as Sexual Subordination: The Phenomenology of Gender-Specific Harm. *Wisconsin Womens Law Journal* 12:167.
- Vines, Prue. 2000. Fault, Responsibility and Negligence in the High Court of Australia. *Tort Law Review* 130.
- West, R. 1988. Jurisprudence and Gender. *University of Chicago Law Review* 55:1.