

Mediating Personal Injury: Melodrama and Tragedy

Introduction

Stories are told in both litigation and mediation. However, the types of stories that can be told and who is allowed to do the telling are quite different in each forum. In accidental personal injury cases, the choice of forum is likely to have a significant impact on the health outcomes of the injured person. This paper argues that mediation allows, and in fact encourages, the telling of a story that is of a genre more conducive to improved health outcomes for the injured person than the genre of stories told in litigation.

The legal injury narrative

Litigation is a process in which stories are told and constructed. In particular areas of law, master narratives develop as a result of the cumulative effect of a set of stories that are frequently told. For example, over the years repeated applications of the law have generated a standard, abstract, and generalised version of individual personal injury stories. This narrative then forms the framework by which subsequent injury stories are judged, both explicitly and implicitly. I call this legal narrative of accidental personal injury the 'legal injury narrative'. In a sense the legal injury narrative is a prototype or genre. As a genre, it bears a striking similarity to that of classical melodrama.

Genre of melodrama

The genre of classical melodrama can be characterised by a number of different elements, including the simplified, individualised and moralised attribution of blame, the passivity of the protagonist, and the fictionalised restoration of the status quo in the resolution of the narrative. In personal injury litigation trial lawyers frequently and overtly use conventions of melodrama to construct persuasive arguments, particularly where the case is being heard by a jury.¹

Individualised blame / moral dichotomy

Characters in melodrama represent the polar opposites of good and evil. The villain's unjustifiable and morally reprehensible conduct results in the virtuous heroine's undeserved suffering. In the legal injury narrative the negligent defendant's theoretically avoidable conduct similarly causes the plaintiff's injury, pain and suffering. Although actions in negligence do not require any malicious intent, when a defendant can be characterised as morally reprehensible, the plaintiff's case is

strengthened. The adversarial nature of litigation also contributes to the likelihood that the plaintiff's story will tend to demonize the 'opposition'. Similarly, but more implicitly, a virtuous plaintiff is likely to attract greater sympathy as his or her suffering is seen as more 'undeserved'. This good/bad dichotomy translates well into the win/lose combat of litigation. It is also indicative of positional responses to dispute resolution. The plaintiff claims a remedy on the basis of his or her position as the wronged protagonist. The focus on individualised blame also narrows the scope of the story and consideration of broader factors that may have contributed to the injury or the plaintiff's suffering. Where a person's injury story is constrained by the limited scope of the legal injury narrative, that person's understanding and experience of the injury is likely to be similarly limited.²

Focus on restoring the status quo

In melodrama the resolution is 'dream justice' in which the status quo, represented by the happy opening scenes in which the heroine is well and happy in a socially acceptable position, is restored. The 'moral' of the story is that virtue will always be rewarded and that evil will be defeated. Melodrama is based on the premise that all suffering can and should be eliminated.³ However, the legal injury narrative cannot actually restore the plaintiff to his or her pre-injury condition, and rarely is the plaintiff's suffering totally alleviated.

Regardless of this cold reality, melodrama 'cannot tolerate the discrepancy between the idea and the actual...it tries to obliterate the actual by tugging it relentlessly towards the ideal, and thus it leads to the severe tensions of reformism and coercion, and to the eventual shocks of disillusionment'.⁴ This shock of disillusionment well describes the feeling of an injured plaintiff who, following the trial and receipt of compensatory damages, finds that he or she does not feel at all as though the accident did not occur. At the resolution of the narrative, a plaintiff's lawyer's congratulations, society's washing its hands of any further responsibility for her suffering, her sudden isolation after the withdrawal of support from others, frequently leaves a 'successful' plaintiff feeling less than the recipient of 'dream justice'. The aim of restoring the status quo also encourages the injured person to keep focusing on the past, rather than preparing themselves for the future.

Passive protagonist

Another major problem with the melodramatic genre of the legal injury narrative is the role in which it casts the injured person. The heroine/plaintiff role is one characterised by passivity: in relation to the causation of, and response to, suffering, as well as the resolution of the narrative. Like the melodramatic heroine, the plaintiff is effectively mute and highly dependent on others. The injured plaintiff must rely upon others, particularly lawyers, to tell his or her story in an appropriate way, and on the judge to dispense dream justice. The legal injury narrative thus discourages plaintiffs from taking control over their own destiny and in fact encourages them to become dependent on others.

Impact on health outcomes

Accordingly, the legal injury narrative does not support an adaptive resolution to the injury experience, that is, one which involves maintaining generally positive views, re-evaluating the experience in a positive light and taking active control over one's own destiny.⁵ In other words, litigation does not encourage the injured person to construct a story which is conducive to positive health outcomes.

Heilman explains that 'the abiding problem is to avoid being melodramatic when the tragic is called for, or tragic when the melodramatic is called for, and, still more, to avoid being one while having the illusion of being the other'.⁶ In a sense, Heilman summarises the problem with the legal injury narrative. It is melodramatic when the tragic is called for. Even worse, the legal injury narrative expressly avoids the tragic while supporting the fiction that the plaintiff's experience fits within the genre of the melodramatic. For the plaintiff, the story inevitably becomes one of tragedy. For it is a tragic structure in which the plaintiff 'tries to live in a melodrama and comes to learn that he must live in a tragedy.'⁷ The personal injury plaintiff attempts through, and is encouraged by, the legal injury narrative, to return to his or her pre-injury condition and eliminate any suffering. However, frequently in the end, even cold hard cash provides little comfort and warmth for the plaintiff dealing with continuing incapacity and a lack of societal support.

Genre of Tragedy

Tragedy is not based on artificial polarities of good and evil. The tragic hero is not monopathic, is never simply a loser in a social conflict nor a simple victor over evil.⁸ Tragic narratives 'avoid easy classifications and facile resolutions' and go instead 'beyond good and evil'.⁹ While melodrama insists on total victory or defeat, tragedy

‘defines life as the paradoxical union of the two’.¹⁰ Tragedy deals with an individual’s efforts to escape his or her destiny, and its conclusion is the individual’s reunion with destiny.¹¹

Although the tragic destiny is not the dream world of the melodramatic status quo, it does involve the suffering person finding a mode of recovery which is more conducive to improved future health outcomes. In the tragic view of reality, ‘man salvages, from the ruins of the present, the essential human powers on which continuity depends (a quite different thing from a melodramatic victory over an enemy). This may take place whether spiritual regeneration coexists with a new well-being in life...or man lives on in a paradoxical union of suffering and new wisdom...or comes to a new insight before dying...’¹²

Heilman suggests that a sound concept of tragedy may influence social well-being.¹³ The tragic figure understands what he or she knows, wants and needs, and becomes aware of his or her impulses, imperatives and alternatives.¹⁴ In tragedy, ‘division means choice: there are alternatives, and man must select one or the other.’¹⁵ However, choice requires strength and consciousness. The tragic protagonist must be stronger than the melodramatic heroine, who is fundamentally weak, unable to make choices, and resigned to her fate.¹⁶ This strength provides the tragic hero with a kind of spiritual triumph or enlightenment, which allows them to move on.

How can mediation encourage tragic stories?

The mediation process

In a mediation process, the injured person tells their own story in their own words. Thus, the procedure itself avoids the melodramatic text of muteness. In mediation the injured person is actively encouraged to speak. Dependence on others is not encouraged and the person is given an active role in the proceedings.

Mediation also focuses on the injured person’s particular needs, with no overriding framework by which some needs are not valid or not relevant. In this way mediation can achieve individualised justice. A participant in mediation will not be judged by any melodramatic stereotypes. Further, a person’s inner conflicts and inconsistencies are recognised and acknowledged, but not condemned. This is supported by the private nature of mediation. The participants are the focus of the process and there is no requirement that one of the party’s deservedness be recognised publicly.

Mediation, unlike melodrama, is not about blame. Past actions and emotions are discussed, but the focus of the process is to find a means for all parties to move on into the future. Most importantly, mediation does not promote a fiction of restoration of status quo. Mediation provides a means by which the injured person is encouraged to think about how they will move forwards and what they need in order to do so in a positive way. Mediation is about generating options for the future, not simply a calculation of whether or not someone deserves compensation and if so, how much.

Mediation, unlike melodrama, does not result in total victory or total defeat. A resolution is usually a tragic one, involving a paradoxical union of the two. Although an injured person cannot walk away having been restored to the position he or she was in prior to the injury, they can hopefully walk away with a resolution that they can live with, and some practical options for making the best of their future. Mediation, like tragedy, aims for participants to learn something in the process: some communication skills, an identification of their own needs and concerns, a better understanding of the party with whom they are in conflict, and a recognition of the realistic options available for them in the future. In a sense, mediation aims at the tragic awareness that comes from salvaging the essential human powers on which continuity depends.

Narrative Mediation - alternative stories

Mediation has a role to play in improving the health outcomes for injured people by encouraging them to tell their injury story in a tragic genre. In particular, narrative mediation seems perfectly suited to this endeavour. Narrative mediation is based on the premise that people live their lives according to stories, and that these stories are socially constructed. It aims to facilitate the parties' construction of an alternative story to the conflict story in which they are embedded.¹⁷

Winslade and Monk compare narrative mediation with problem-solving approaches to mediation, describing it as an "outside-in" rather than an "inside-out" phenomenon. By this they mean that in narrative mediation the social context of contested meanings are recognised, rather than treating the individual as context independent.¹⁸ This distinction also reflects the difference between the way in which conflict is treated in the melodrama and tragedy. In the former, conflict and blame are highly individualised, and broader societal factors are suppressed and even denied. In tragedy, the context in which the tragic figure must make choices, often encompassing a notion of fate, is a fundamental part of the narrative. In this way, narrative

mediation appears to be a particularly useful method for encouraging an alternative tragic story, to replace the typically melodramatic conflict story encouraged by the legal injury narrative.

The melodramatic narrative also has fairly rigid power structures and notions about who can speak authoritatively. Narrative mediation purposely deconstructs the dominant discourse that can create and entrench certain patterns of conflict.¹⁹ Narrative mediation also challenges entrenched notions of entitlement,²⁰ which form the basis of melodramatic narratives which assess whether a person is worthy of having their suffering alleviated.

Conclusion

Narrative mediation, which has its roots in narrative therapy, has particularly therapeutic benefits for personal injury litigants. It has the potential to encourage the injured party to move away from a conflict story in the melodramatic genre of the dominant legal injury narrative, and to tell an alternative story in a tragic genre. Tragic protagonists develop understanding into their wants and needs, and an awareness of the constraints and choices facing them. They also find the strength to make those choices and to move meaningfully into the future. These characteristics are likely to result in better health outcomes for an injured person.

Dr Samantha Hardy is a lecturer in law at the University of Tasmania, and can be contacted at Samantha.Hardy@utas.edu.au.

¹ See N R Feigenson, 'Legal Meaning in the Age of Images: Accidents as Melodrama' (1999/2000) 43 *New York Law School Law Review* 741 and P N Meyer, 'Making the Narrative Move: Observations Based Upon Reading Gerry Spence's Closing Argument in the Estate of Karen Silkwood v Kerr-Mcgee Inc.' (2002) 9 *Clinical Law Review* 229.

² J Shotter, *Social Accountability and Selfhood* (1984) Basil Blackwell, Oxford, at p 173.

³ Heilman, Robert Bechtold, *Tragedy and Melodrama: Versions of Experience* (1968), University of Washington Press, London at p 105.

⁴ Above note 3 at p 115.

⁵ R Janoff-Bulman and C E Thomas, 'Self-Defeating Responses Following Victimization' in R C Curtis (ed), *Self-Defeating Behaviours: Experimental Research, Clinical Impressions, and Practical Implications* (1989) 215 at p 222.

⁶ Above note 3 at p 101.

⁷ Above note 3 at p 144.

⁸ Above note 3 at p 156.

⁹ Aristodemou, Maria, *Law and Literature: Journeys from Her to Eternity* (2000), Oxford University Press, Oxford at p 65.

¹⁰ Above note 3 at p 154.

¹¹ Above note 3 at p 154.

¹² Above note 3 at p 160.

¹³ Above note 3 at p 4.

¹⁴ Above note 3 at p 15.

¹⁵ Above note 3 at p 14.

¹⁶ Above note 3 at p 15.

¹⁷ See Winslade and Monk, *Narrative Mediation* (2000), Jossey-Bass.

¹⁸ Above note 17 at p xi.

¹⁹ Above note 17 at p 58.

²⁰ Above note 17 at p 94-95.