

2007

The text of muteness in personal injury litigation

S. Hardy

University of Queensland

Follow this and additional works at: <https://ro.uow.edu.au/ltc>

Recommended Citation

Hardy, S., The text of muteness in personal injury litigation, *Law Text Culture*, 11, 2007.

Available at: <https://ro.uow.edu.au/ltc/vol11/iss1/14>

The text of muteness in personal injury litigation

Abstract

I have previously drawn a detailed analogy between the genre of melodrama and personal injury litigation (Hardy 2004a, 2004b: 155- 77). In particular, I have identified a kind of template narrative which is revealed in the trial transcripts and judgments of personal injury trials, which I call the 'legal injury narrative'. I have described this as an explanatory narrative that provides 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. Evidence of the legal injury narrative's content and structure can be found in collections of transcripts and judgments 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 and melodrama have many similar characteristics, including the simplified and individualised attribution of blame, the passivity of the protagonist, and the fictionalised restoration of the status quo in the resolution of the narrative. In this article I will focus on another similar attribute: the text of muteness.

The text of muteness in personal injury litigation

Samantha Hardy

Introduction

I have previously drawn a detailed analogy between the genre of melodrama and personal injury litigation (Hardy 2004a, 2004b: 155-77). In particular, I have identified a kind of template narrative which is revealed in the trial transcripts and judgments of personal injury trials, which I call the 'legal injury narrative'. I have described this as an explanatory narrative that provides 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. Evidence of the legal injury narrative's content and structure can be found in collections of transcripts and judgments 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 and melodrama have many similar characteristics, including the simplified and individualised attribution of blame, the passivity of the protagonist, and the fictionalised restoration of the status quo in the resolution of the narrative. In this article I will focus on another similar attribute: the text of muteness.

Considering the role of the plaintiff as analogous to the mute role in melodrama focuses attention on a number of factors often ignored in examinations of personal injury litigation. It reveals the *paradox* of

Hardy

the text of muteness which arises because the injured plaintiff is effectively cast in a mute role and yet must verbalise his or her right to compensation. This necessitates the plaintiff's dependence on others to articulate his or her claim, and also limits the plaintiff's opportunity to speak about matters which those with authority to speak do not perceive as relevant. The plaintiff is also often asked to articulate the inexpressible, particularly in relation to pain and suffering, which emphasises the importance of gesture in constructing the plaintiff's credibility.

To illustrate the points I make I will refer to a number of melodramatic plays by French playwright René-Charles Guilbert de Pixérécourt. I have chosen Pixérécourt's plays over other melodramatic playwrights, including English and more modern authors, for a particular reason. Pixérécourt is commonly referred to as the 'father of melodrama' as he, in effect, developed the genre (Marcoux 1992). His plays define the prototype of melodrama, with a strong moral message demonstrated through the actions of clearly virtuous or evil characters cast in the standard roles of heroine, villain, judge and other authority figures. I also refer to a number of personal injury judgments from Australian states and territories (1998-2000) from which I have identified the corresponding characteristics of the legal injury narrative.

The text of muteness and the mute role

The prevalence of muteness in melodrama gives rise to a paradox, since melodrama is primarily concerned with expressing clearly and unambiguously the moral problems with which it deals (Brooks 1976). Throughout the melodramatic narrative the mute protagonist struggles to express and have recognised his or her virtue. This recognition is usually only achieved by a combination of gesture and assistance from other more articulate characters.

A personal injury trial is also, to adapt Brooks's description of melodrama, primarily concerned with expressing clearly and unambiguously the problems with which it deals. In the trial, as in

The text of muteness in personal injury

melodrama, everything must be spoken (or at the very least, spoken *about* or explained, such as the relevance of films, photographs, diagrams, and so on). Even demonstrative evidence such as gesture must be described for the record. The lawyers orally address the court, the witnesses give oral evidence, and the judge 'reads' the judgment. However, despite the apparent emphasis on the spoken word in the personal injury trial, the paradox of the text of muteness is also evident in the legal injury narrative. The injured plaintiff is effectively cast in a mute role and yet must express his or her right to compensation.

The mute role

Melodramatic roles are morally polarised. Characters are either good or evil, there is no middle ground. In the resolution of a melodramatic narrative, the evil villain is punished for his bad behaviour, and the virtuous heroine has her undeserved suffering alleviated. Plaintiff lawyers tend to construct their clients' narratives in accordance with this dichotomy: the relationship between the plaintiff and the defendant is formed as a story of good against evil, and the characters are ascribed psychological traits according to their roles (Meyer 2002).

In melodramatic narratives, good characters are often cast in mute roles. In many of Pixérécourt's melodramas 'les bons' are often struck dumb, unable to express their innermost fears when confronted with the horror of separation or physical danger (Marcoux 1992). Muteness in melodrama can be as a result of a physical inability to speak, a cultural barrier or an imposed silence such as a vow (Brooks 1976). Perhaps the most extreme example of muteness in Pixérécourt's plays is that of Dragon the dog in *Le chien de Montargis*. Dragon is the sole witness to the murder, and although his cries lead the others to the site of his master's body, he is unable to name the murderer. Dragon does, however, use canine gestures to attempt to pass on the message that Eloi is innocent and Macaire is the guilty party: he licks Eloi's hands and viciously attacks Macaire. Eloi, the other mute role in the play, is mute because when he was younger he fell out of a tree and bit off his

Hardy

tongue. Eloi appears on the circumstantial evidence to be the murderer and is put on trial, but is unable to speak in his own defence. Gestures are inadequate to explain why he has Aubri's papers and a purse full of gold in his possession. In *Coelina*, the mute role is played by Francisque, who also has physically lost his tongue. However, in *Coelina* the circumstances leading to Francisque's muteness are much less innocent, in that his tongue has been cut out by the villain, Truguelin, in a primal scene at the start of the play. A cultural barrier leading to muteness can be found in Pixérécourt's play *Christophe Colomb*. In that play the American Indians are effectively mute as they do not speak English, and attempted communication with the English speaking characters takes place in the context of confusing gestures and misunderstandings. Brooks (1976) also gives a number of examples of melodramas in which the heroine's muteness arises due to a vow. These include *La pie voleuse* by Caigniez and d'Aubigny (in which Annette is willing to die on the scaffold rather than betray her father) and *Clara, ou le malheur et la conscience* by Hubert (in which the heroine cannot defend herself from a charge of infanticide because she has promised silence to the true criminal, her ostensible father).

In melodrama the protagonist's muteness can have consequences at various stages of the narrative. It may initially render the protagonist helpless to prevent the villain's evil conduct and avoid his or her suffering. For example, in *Coelina*, Francisque was unable to explain the true circumstances of Coelina's birth prior to Dufour banishing her. The mute role is unable to ask for assistance or oppose the villain. Muteness may also subsequently hinder the protagonist's attempts to explain what has happened and remedy the injustice. In *Le chien de Montargis* it is during Eloi's trial that his muteness creates the most difficulty. He is unable to explain to the magistrate his innocence or demonstrate his true virtuous nature.

Similarly, in the legal injury narrative, the plaintiff may be cast in the mute role in many different ways. A plaintiff may be rendered effectively mute by an inability to question or seek assistance from a defendant in order to avoid an injury occurring. A plaintiff may also be

The text of muteness in personal injury

culturally mute due to his or her inability to express pain and suffering and to claim a remedy through the court system without assistance. An example in which the plaintiff was mute, in the sense that nothing could be said to prevent the accident occurring, can be found in *Simcoe v State Rail Authority of New South Wales*. In that case the plaintiff was required to move some very heavy drums. He did not ask for assistance to move them from the defendant's manager or foreman. The foreman left before the plaintiff had a chance to ask for assistance, and although he theoretically could have sought out the manager, the judge acknowledged that he might have been unwilling to approach someone in that position to point out a perceived danger and ask for assistance. Another example in which the plaintiff was rendered effectively mute gave rise to the case of *Conyard v Hancock Bros Pty Ltd*. In that case, the plaintiff and his fellow workers regularly requested mechanical assistance with respect to certain manual tasks they were required to perform in the course of their employment. The defendant employer ignored their requests, although the assistance was eventually provided after the plaintiff's injury. A tension in the text of muteness in the legal injury narrative arises in this context: if a plaintiff is too verbal in complaining about unsafe conditions, he is at risk of a finding of contributory negligence in failing to take care for his own safety as he has demonstrated knowledge of the risk. However, where a plaintiff does not express concerns about safety issues of which he is aware, he may be similarly found guilty of contributory negligence.

The mute role is also evident when a plaintiff is asked to provide evidence of his or her pain and suffering. There are particular problems with expressing pain and suffering. Scarry (1985) notes that physical pain is difficult to express and that this gives rise to political and perceptual complications. In the context of the legal injury narrative, one could also say that legal complications arise. Scarry talks about two aspects of pain: 'unmaking' — based on the notion that pain is language destroying, and 'making' — the concept of imagining and verbalising pain. These two aspects reflect the paradox of the text of muteness in melodrama and the legal injury narrative. The plaintiff's

Hardy

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.

Evidence from a medical practitioner about a plaintiff's pain enables that pain '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). The '... success of the physician's work will often depend on the acuity with which he or she can hear the fragmentary language of pain, coax it into clarity, and interpret it' (Scarry 1985: 6). In many cases the doctor simply restates the patient's subjective reports of pain. However, a medical practitioner is also often able to objectify the plaintiff's subjective experience of pain by comparing it with what sort of pain should be felt by the plaintiff. In other words, the doctor describes the pain 'likely to be felt' by anyone experiencing such an injury.

Another tension arises with respect to the plaintiff's mute role because the legal injury narrative requires a plaintiff with a physical injury to complain of pain. The cases indicate that, in order to be believed, the plaintiff should complain about pain contemporaneously with the injury and then consistently at every appropriate opportunity to every doctor he or she visits. Ideally, the plaintiff should attend a medical practitioner immediately after the accident giving rise to the injury and complain of pain. This is treated as evidence of the genuine nature of the plaintiff's complaints and is often commented on by the judge. For example, in *Umback v Wallace & Anor*, the judge stated:

I am satisfied that the plaintiff attended her general practitioner immediately after the accident and complained of neck and low back pain ... (*Umback v Wallace & Anor*; *Umback v Kelly* at 405-9).

Although the connection between immediate complaint and genuineness seems to be a matter of common sense, even in this context support is required from an authoritative other to confirm the credibility of the plaintiff's statements. The following extract from *Stankovic v Banfield* reveals the way in which medical practitioners are often called upon to give authoritative support to this 'normal' conduct.

The text of muteness in personal injury

Dr Knox described in his report how he believed a person in this condition would complain of pain on the first indication of symptoms when under formal examination ... (*Stankovic v Banfield* at 148-51).

Ideally, these complaints should continue and remain consistent and be recorded by the doctor, as demonstrated by the following extracts from personal injury judgments:

The plaintiff has continued to complain of constant back and neck pain ... (*Dass v Firfai & Anor* at 211-12).

Dr Ong continued to record complaints of recurrent back pain (*Nguyen v Bucis* at 115-16).

I find, however, that he did continue to make complaints of neck pain (*Blazeski v City Group Cleaning Contractors* at 203-7).

Reports from Dr Stevenson ... confirm the plaintiff's ongoing complaints of neck and back pain (*Stankovic v Banfield* at 116-17).

His evidence and his complaints to the doctors are, on the whole, consistent (*Artur Fatur v IC Formwork Services Pty Ltd and Civil and Civic Pty Ltd* at 410-11).

The following extracts reveal that when the plaintiff has not complained of pain, his or her credibility is called into question:

In a case where the claimed symptoms are not otherwise objectively verifiable, and it is not suggested that there is any spinal damage in this case, it is difficult to accept a plaintiff's history of ongoing symptoms when there are contemporaneous treatment notes covering the period in question which, while recording regular complaints of various ailments, make no mention of the symptoms complained of (*Buttriss v Buttriss & Ors* at 88-93).

However, there is no record of her complaining of back pain to any of the doctors before her complaint to Dr Newcombe in 1987 (*Risteska v The Commonwealth of Australia* at 140-2).

Total absence of any contemporaneous complaint to a medical practitioner (*Umback v Wallace & Anor, Umback v Kelly* at 25-30).

Hardy

Ironically, however, the requirement that a plaintiff verbalise complaints of pain can work against a plaintiff's credibility if he or she complains too much, as was alleged in the case of *Simonfi v Fimmel*:

I can only say that the signs are negligible and the complaints are multiple (*Simonfi v Fimmel & Simonfi v Dowden & Anor* at 471-2).

As Scarry puts it, 'hearing about pain' may exist as the primary model of what it is 'to have doubt' (Scarry 1985: 4). This is particularly difficult in cases where there is pain without any remaining visible bodily damage or disability, where the injured bodies do not themselves bear the record of suffering (Scarry 1985: 298). However, hearing about pain from an authoritative other, who can objectify it, seems to lessen that doubt. Accordingly, lawyers and medical experts attempt to speak authoritatively on behalf of the plaintiff 'to communicate the reality of that person's physical pain to people who are not themselves in pain' (Scarry 1985: 10).

Muteness in melodrama is symbolic of the defencelessness of innocence (Brooks 1976). The heroine's muteness places her in a position in which she needs assistance to demonstrate her virtue, to 'effectively articulate the cause of the right' (Brooks 1976: 31). This is most evident in both melodrama and the legal injury narrative in the trial itself. It is when the protagonist/plaintiff is required to demonstrate his or her virtue and suffering that his or her muteness is most profound. In the melodramatic trial 'virtue's advocates deploy all arms to win the victory of truth over appearance and to explain the deep meaning of enigmatic and misleading signs' (Brooks 1976: 31).

In a personal injury trial, the injured plaintiff is mute due to a cultural barrier. A personal injury client speaks a different language to the lawyers and judges, who are familiar with the 'language of law'. This language is more than a knowledge of legal terminology. It involves an understanding of how legal narratives are constructed. As Clark Cunningham (1989) describes it, the client's 'inability to speak the language of the law prevents him or her from knowing the experience as a legal event. This desire for knowledge is often expressed in the

The text of muteness in personal injury

question, “Do I have a case?””. Miller notes that ‘accident victims seldom possess the skills of advocacy and argument necessary to be effective in pressing their claims for individual redress’ (Miller 1994: 1078). In melodramatic terms, the clients do not know how to describe their virtue, how to blame the defendant, how to express their suffering or how to claim their rights. Without this knowledge, a client is ‘legally mute’. The lawyer is required to give ‘voice to the legally mute’ (Luban 1988) and is frequently the client’s ‘sole means of communicating with and participating in a proceeding’ that may dramatically affect the client’s life (Kell 1998: 640).

The role of the lawyer in speaking for the client was examined by Cunningham in his article ‘The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse’ (1992). He suggested that there were three possible ways in which a lawyer could represent a client: by taking the place of, or acting the part of the client; by re-representing what the client had originally told; or by creating a representation of the client. In the legal injury narrative the personal injury plaintiff lawyer is not acting the part of the client. The personal injury lawyer has his or her own role in the legal injury narrative as the plaintiff’s helper. The lawyer is rather like the characters in melodramatic theatre who support the heroine, such as a comic woman who serves or befriends the heroine (Booth 1965), or an elderly man who never fails to doubt the heroine’s virtue (Brooks 1976).

In the legal injury narrative, the lawyer’s role is not to re-present what the client has told, as the client is legally mute and rarely expresses the kinds of stories needed in a courtroom setting. In the legal injury narrative the lawyer is in fact creating a representation of the client, somewhat like a novelist. In particular, the lawyer is creating a representation of the client’s virtue. However, Cunningham points out that lawyers do not ‘write the script’, so to speak, they are more like directors of the film. He suggests that an appropriate analogy may be that the lawyer writes the subtitles to a foreign language script. In this sense Cunningham embraces the notion of the lawyer as translator — allowing clients to be heard and understood in places where otherwise

Hardy

they are mute. He acknowledges that the metaphor of lawyering as translation cannot fully express the meaning of the lawyer's experience.

The problem with this notion of lawyer as simply a translator is that it assumes the client says everything that the lawyer needs to know, without the need for prompting by the lawyer. However, in practice, the lawyer needs to direct the client about what to tell in the first place, by asking appropriate questions. In the trial itself, the lawyer does much more than translate. The lawyer asks the questions of witnesses to elicit information, but they also formulate their client's story in opening and closing statements.

In particular, the lawyer plays a fundamental role in constructing the client's virtue in a public and acceptable fashion. The lawyer knows what elements are required for the legal narrative and searches for that information. In doing so, the lawyer sometimes also excludes from translation things that the client has said. For example, Sarat and Felstiner's study (1988) showed that the lawyers could not readily translate their clients' talk of moral responsibility into the language of no-fault divorce law. This illustrates the point that about some matters, the client is muted to a point where the lawyer is simply unable to speak for them.

The fact that plaintiffs have to rely on an authoritative other to translate their stories into an acceptable narrative is problematic when that narrative is hegemonic and functions as a mechanism of social control. The legal injury narrative is hegemonic in that, in Ewick and Silbey's (1995) terms, it:

Provides instruction about expected behaviours and warns of the consequences of nonconformity;

Colonizes consciousness with well-plotted but implicit accounts of social causality; and

Hides the grounds for its own plausibility.

The legal injury narrative also masks the 'huge inadequacies and inefficiencies of tort law itself' (O'Connell and Baldwin 2002). In particular, the melodramatic genre of the legal injury narrative simplifies

The text of muteness in personal injury

blame to such an extent that broader social factors that contribute (sometimes significantly) to accidents arising are ignored. The focus of attributions of blame is directly solely towards the named defendant. For example, in a personal injury matter arising from a motor vehicle accident in which the defendant was speeding and crossed on to the wrong side of the road, matters such as road design, the lack of public transport systems to reduce road use, the manufacture of vehicles that can drive at speeds far in excess of the legal speed limit, are not likely to be seen as relevant.

Melodramatic blame also tends to be moralised, which facilitates an attribution of blame to a defendant who can be portrayed as somehow immoral, but also leads to the converse situation in which a plaintiff needs to demonstrate good character in order to deserve to have his or her suffering alleviated. Again, where plaintiffs are unable to express their own stories, it is likely that the stories constructed for them do not accurately represent their versions of reality. In particular, aspects of the plaintiff's story that are not socially acceptable (that is, do not fit the legal injury narrative's notion of good character and virtue) are likely to be suppressed. The legal injury narrative also portrays and treats characters as monopathic, leaving no room for speaking about, or even acknowledging, complexity and inconsistency.

In the legal injury narrative, the law 'takes on the role of benevolent father, offering security and comfort' but simultaneously excludes or fails to convince some plaintiffs who do not have the opportunity to speak in their own voices (Aristodemou 2000). It obscures the fact that 'its history, decisions and stories could have developed in a different manner, taking in other experiences, other views, other voices' (Aristodemou 2000).

Mute gesture

In a narrative with the text of muteness, gesture becomes fundamentally important, both in expressing the verbally inexpressible, and in providing evidence of the credibility of the mute character. Brooks

Hardy

points out that melodrama often represents meaning through non-verbal expressions and gestures because words are so often inadequate. In this sense the 'text of muteness' expresses those primal urges, desires and fascinations which constitute the very heart of melodrama (Marcoux 1992). The use of mute gesture in melodrama probably stems from the genre's derivation from pantomime by way of the oxymoronic pantomime dialoguée (Brooks 1976). However, mute gesture itself is often inadequate to express certain meanings. For example, in Pixérécourt's play *Le chien de Montargis* (Pixérécourt 1814), the physically mute Eloi (who is accused of murdering Aubri) attempts to explain by physical action that Aubri gave him his possessions to carry them to Paris to give to Aubri's mother. This is almost impossible to convey without words, and his gestures cannot be understood. In order for him to get his message across, other characters are required to cross-examine him and then provide verbal interpretation for the audience.

This problem of imparting meaning by gesture is demonstrated in the tension between the stage directions in a script, the actor's actual gestures and their verbal translation (Brooks 1976). In Pixérécourt's plays, the stage directions frequently direct the actor to physically demonstrate some meaning, which is then verbally translated by another character. For example, in *Le chien de Montargis*, Eloi is being questioned about why he possesses Aubri's things:

THE SENESCHAL: But why did you have them? (ELOI indicates that he was to carry them somewhere for AUBRI). You were to take there? But where? And to whom? (ELOI points toward Paris and mimes that he was to deliver them to AUBRI'S mother.)

GONTRAN: Aubri's mother?

Accordingly, 'any specification of the conceptual meaning of the gestural sign must be relayed through the system of articulated language' (Brooks 1976). Translation is performed by other people on stage, by the context in which the gesture occurs, and by the spectator, whose interpretations are represented by those messages suggested in the stage directions.

The text of muteness in personal injury

In the courtroom, as on the melodramatic stage, gestures must frequently be interpreted and verbalised before they can be understood. Eloi's difficulties in explaining himself by gesture in *Le chien de Montargis* are reflected in the following example of a typical exchange between lawyer and witness in a trial:

COUNSEL: How tall was the man you saw leaving the property?

WITNESS: About this tall. (Witness holds her hand up in the air).

COUNSEL: For the record, the witness is indicating a height of about six feet.

However, in some circumstances, mute gesture in melodrama does not require any verbal translation, particularly when it demonstrates an emotion or moral stance rather than a set of factual circumstances. In many cases gesture is necessary as 'the conventional language of social intercourse has become inadequate to express true emotional valences' (Brooks 1976). In this sense, mute gesture in melodrama often takes 'the form of the message of innocence and purity', carrying 'immediate, primal spiritual meanings which the language code, in its demonetization, has obscured, alienated, lost' (Brooks 1976). It expresses meanings that are ineffable, but meaningful in human ethical relationships (Brooks 1976).

As in melodrama, gestures in the courtroom frequently demonstrate deep emotions and matters that are simply inexpressible in words. Although muteness in a courtroom is normally devoid of meaning, sometimes it is the physical presence of the legally mute body that gives rise to the pathos (Felman 2001). A judge will often refer specifically to the plaintiff's physical movements in the court room as evidence of his or her pain and suffering. For example, in *East v King*, the judge commented:

It is important in this case to record that the plaintiff needs to be seen in presentation, and to watch her struggle with ordinary activities like moving from the Court floor into the witness box and trying to speak. Her speech and her mobility are both impaired, and I observed many times that she moved her hands with a type of spastic waving.

Hardy

Witnesses to the accident itself are also frequently called to describe the plaintiff's gestures and demeanour 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 information is useful, as we all recognise certain common responses to pain in another person. We know what pain sounds like, we know what a person in pain looks like, and 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 (Scarry 1985).

As well as expressing what cannot be articulated, mute gesture can also corroborate spoken claims and indicate truthfulness. The legal system relies on a number of methods to identify deceit, including cross-examination of witnesses, the requirement of witnesses to swear an oath or affirm the truthfulness of their testimony, and the opportunity of the decision maker to observe the demeanour of testifying witnesses (Friedland 1998). This ties in with the text of muteness in that gestures are important in assessing the credibility of a personal injury plaintiff. These may include gestures generally believed to be indicative of deceit, such as touching the mouth while talking or avoiding eye contact, and specific pain behaviour, such as grimacing, guarding or bracing. In some cases where malingering is suspected, a psychologist or psychiatrist may also undertake behavioural evaluation of the plaintiff. These experts then provide a verbal interpretation of the plaintiff's gestures.

Gesture may also be indicative of a lack of truthfulness. In many cases the credibility of personal injury plaintiffs is called into question when they are seen to be too physically active after suffering injury. This is because their physical gestures are not consistent with their allegations of pain and suffering. For example, a plaintiff who is allegedly suffering extreme back pain may be filmed (during surveillance by a private investigator) carrying out activities such as carrying heavy bags of shopping. These kinds of activities may lead to the plaintiff being seen as not suffering enough.

The text of muteness in personal injury

In *Risteska v The Commonwealth of Australia* the defendant alleged that the plaintiff was exaggerating or feigning her disabilities. Miles CJ did not find the plaintiff a convincing witness, explaining:

The presentation of the plaintiff in the witness box was that of a person who was on some matters of importance not telling the truth. Dr Knox thought that she displayed genuine pain in the back. On the contrary, it appeared to me that it was only when her attention was directed to her back that she displayed pain and a conclusion that she was at least exaggerating, was inevitable ... The plaintiff appeared to approach and leave the witness box with a limp. She did not exhibit any physical problems in the witness box until she started to describe the condition in her back. She then made gestures appropriate to back pain.

Accordingly, the manner and timing of gesture is also important and may lead to different interpretations of meaning.

Conclusion

Examining the text of muteness in personal injury litigation draws attention to a number of characteristics of the process that are often overlooked. Notions of relevance, and what can and cannot be said, have a significant impact on the litigation and the plaintiff's experience of that process. In particular, it reveals the way in which the narrative effectively renders the plaintiff mute, thus restricting the plaintiff's ability to introduce complexity, inconsistencies, and matters that may be important to the plaintiff but are not seen as relevant to those who are authorised to speak on the plaintiff's behalf.

The importance of gesture, both before and during the trial, and the particular tensions faced by a personal injury litigant in relation to verbalising their claim and their suffering, are also highlighted. For mute plaintiffs, who must demonstrate virtue in order to deserve to have their suffering alleviated, gesture is also an important means of expressing credibility.

Considering the role of the plaintiff as analogous to the mute role in melodrama also focuses attention on a number of power structures

Hardy

often ignored in examinations of personal injury litigation. The plaintiff's muteness reinforces the control of other characters in the legal narrative who are empowered to speak authoritatively. This emphasises the important role of lawyers and medical practitioners in the legal process, and indicates a need for further research into the relationship between these 'experts' and personal injury plaintiffs.

References

- Aristodemou M 2000 *Law and Literature: Journeys from Her to Eternity* Oxford University Press Oxford
- Booth M 1965 *English Melodrama* Herbert Jenkins London
- Brooks P 1976 *The Melodramatic Imagination* Yale University Press London
- Cunningham C D 1989 'A Tale of Two Clients: Thinking About Law as Language' *Michigan Law Review* 87: 2459-94
- 1992 'The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse' *Cornell Law Review* 77: 1298-387
- Ewick P and Silbey S 1995 'Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative' *Law and Society Review* 29: 197-226
- Felman S 2001 'A Ghost in the House of Justice: Death and the Language of Law' *Yale Journal of Law and the Humanities* 13: 241-82
- Friedland S I 1998 'Law, Science and Malingering' *Arizona State Law Journal* 30: 337-95
- Graycar R and Morgan J 2002 *The Hidden Gender of Law* Federation Press Annandale (2nd edn)
- Hardy S 2004a 'Legal Melodramas of Injury and Gender' *Journal of Interdisciplinary Gender Studies* 9/2: 23-40
- 2004b 'Injury as Melodrama' in Kenyon and Rush eds 2004: 155-77
- Hugo A, Malitourne A and Ader J 1817 *Traité du mélodrame* Paris
- Kell W A 1998 'Voices Lost and Found: Training Ethical Lawyers for Children' *Indiana Law Journal* 73: 635-58
- Kenyon A and Rush P eds 2004 *An Aesthetics of Law and Culture: Texts, Images, Screens* Elsevier New York

The text of muteness in personal injury

- Lin V and Pearse W 1990 'A Workforce at Risk' in Reid et al 1990: 206-49
- Luban D 1988 *Lawyers and Justice: An Ethical Study* Princeton University Press Princeton
- Mann A 1979 *The Medical Assessment of Injuries for Legal Purposes* Butterworths Sydney (3rd edn)
- Marcoux J 1992 *Guilbert de Pixérécourt: French Melodrama in the Early Nineteenth Century* Peter Lang New York
- Meyer P N 2002 'Making the Narrative Move: Observations Based Upon Reading Gerry Spence's Closing Argument in *The Estate of Karen Silkwood v. Kerr-Mcgee, Inc*' *Clinical Law Review* 9: 229-92
- Miller R S 1994 'Tort Law and Power: A Policy-Oriented Analysis' *Suffolk University Law Review* 28: 1069-97
- O'Connell J and Baldwin J R 2002 '(in)Juries, (in)Justice, and (il)Legal Blame: Tort Law and Melodrama — or Is It Farce?' *University of California Law Review* 50: 425-59
- Pixérécourt R C G 1803 *Coelina, ou l'enfant du mystère* produced Théâtre de l'Ambigu-Comique 2 September 1800
- 1810 *Les ruines de Babylone, ou Jafar et Zaida* produced Théâtre de la Gaité 30 October 1810
- 1814 *Le chien de Montargis, ou La forêt de Bondy* produced Théâtre de la Gaité 18 June 1814
- 1819 *La fille de l'exilé, ou huit mois en deux heures* produced Théâtre de la Gaité 13 March 1819
- Reid J and Trompf P eds 1990 *The Health of Immigrant Australia: A Social Perspective* Harcourt Brace Jovanovich Sydney
- Sarat A and Felstiner W L F 1988 'Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction' *Law and Society Review* 22: 737-69
- Scarry E 1985 *The Body in Pain: The Making and Unmaking of the World* Oxford University Press New York
- Tuerkheimer D 1997 'Street Harassment as Sexual Subordination: The Phenomenology of Gender-Specific Harm' *Wisconsin Women's Law Journal* 12: 167-206

Hardy

Cases

Artur Fatur v IC Formwork Services Pty Ltd and Civil and Civic Pty Ltd [2000]
ACTSC 14

Blazeski v City Group Cleaning Contractors [1999] ACTSC 69

Buttriss v Buttriss & Ors [1999] ACTSC 121

Conyard v Hancock Bros Pty Ltd BC9801028, Supreme Court of Queensland,
1713 of 1995

Dass v Firfai & Anor [1999] ACTSC 67

East v King [1999] NSWSC 314

Nguyen v Bucis [1999] ACTSC 84

Risteska v The Commonwealth of Australia [1999] ACTSC 56

Simcoe v State Rail Authority of New South Wales [1999] NSWSC 1275

Simonfi v Fimmel & Simonfi v Dowden & Anor [2000] ACTSC 54

Stankovic v Banfield [2000] ACTSC 8

Umback v Wallace & Anor, Umback v Kelly [1999] ACTSC 113