

The Text of Muteness in Personal Injury Litigation

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Abstract

This paper identifies a characteristic of the genre of melodrama that is found in personal injury litigation: the text of muteness. The paper explores the manifestation of the text of muteness in three different aspects of the narrative: mute gesture, the mute role, and the relationship between muteness and suffering. It does not suggest that there is a causal relationship between melodrama and litigation, but rather argues that there are striking similarities in the narratives, and that examining the text of muteness in personal injury litigation draws attention to a number of characteristics of the process that are often overlooked. In particular, 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. Considering the role of the plaintiff as analogous to the mute role in melodrama also focuses attention on a number of power structures often ignored in examinations of personal injury litigation. In particular, it reveals the way in which the narrative effectively renders the plaintiff mute, thus restricting the plaintiff's ability to introduce complicating factors which have the potential to undermine the legitimacy of the legal narrative. The plaintiff's muteness also reinforces the control of other characters in the legal narrative who are empowered to speak authoritatively.

Keywords: *personal injury, melodrama, narrative, muteness*

Introduction

I have previously drawn a detailed analogy between the genre of melodrama and personal injury litigation (Hardy 2004; Hardy 2004, pp.155-177). 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 paper 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. In particular, it emphasises the importance of gesture. It also reveals the way in which the narrative effectively renders the plaintiff mute, thus restricting the plaintiff's ability to introduce complicating factors which have the potential to undermine the legitimacy of the legal narrative. The plaintiff's muteness also reinforces the control of other characters in the legal narrative who are empowered to speak authoritatively.

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 to 2000) from which I have identified the corresponding characteristics of the legal injury narrative.

The Text of Muteness

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). However, Brooks points out that melodrama frequently resorts to non-verbal expressions because words are so often inadequate to represent meanings. The 'text of muteness' expresses those primal urges, desires and fascinations which constitute the very heart of melodrama (Marcoux 1992).

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 melodrama, everything must be spoken (or at the very least, spoken *about* or explained, such as the relevance of films, photographs, diagrams, etc.). 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. 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 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 the claim.

Mute Gesture

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.

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.¹

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 demeanor 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.

In *Risteska v The Commonwealth of Australia*² the defendant alleged that the plaintiff was exaggerating or feigning her disabilities. Miles CJ did not find the plaintiff a convincing witness, explaining:

¹ *East v King* [1999] NSWSC 314.

² [1999] ACTSC 56.

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.³

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

The Mute Role

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 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, p.31). In contrast with the muteness of virtuous characters, the villain never has any difficulty speaking about his actions and intentions. For example, in *Le chien de Montargis* there is a stark contrast between the mute Eloi and the 'literate and talkative villain Macaire and his glib accomplice Landry' (Marcoux 1992, p.39).

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 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

³ *Risteska v The Commonwealth of Australia* [1999] ACTSC 56.

infanticide because she has promised silence to the true criminal, her ostensible father).

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.

In the legal injury narrative, the plaintiff is cast in the mute role, both in the circumstances leading up to the injury and in the trial. An example in which the plaintiff was mute, in the sense that nothing was said to prevent the accident occurring, can be found in *Simcoe v State Rail Authority of New South Wales*.⁴ 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*.⁵ 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.

The classic context of muteness in both melodrama and the legal injury narrative is 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 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 question, 'Do I have a case?' 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

⁴ [1999] NSWSC 1275.

⁵ BC9801028, Supreme Court of Queensland, 1713 of 1995.

communicating with and participating in a proceeding' that may dramatically affect the client's life (Kell 1998, p.640).

Lawyers play a fundamental role in the legal injury narrative, particularly those representing the plaintiff. 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, p.31). As previously discussed, the plaintiff's mute role requires that someone speak on his or her behalf. In the legal injury narrative the lawyer is the main character who speaks for the plaintiff. 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, p.1078). An injured person needs a lawyer to tell their story in accordance with the legal injury narrative, so that the decision maker can then adjudicate on their right to compensation.

The role of the lawyer in speaking for the client was examined by Clark 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 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. 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.

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.

Muteness and Suffering

Medical practitioners are also called upon to prove the plaintiff's suffering. Medical experts, like lawyers, are valued as authoritative experts due to their rational observations (Mann 1979). 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, p.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, p.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.

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 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.

Another paradox of muteness in the legal injury narrative involves the conflict between suffering in silence and the requirement that the plaintiff complain of pain to others. The legal injury narrative requires the 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 opportunity to every doctor he or she visits.

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...⁶

Although the connection between immediate complaint and genuineness seems to be a matter of common sense, the following extract from *Stankovic v Banfield* reveals the

⁶ *Umback v Wallace & Anor, Umback v Kelly* [1999] ACTSC 113 at 405-409.

way in which medical practitioners are often called upon to give authoritative support to this 'normal' conduct.

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...⁷

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...⁸

Dr Ong continued to record complaints of recurrent back pain.⁹

I find, however, that he did continue to make complaints of neck pain.¹⁰

Reports from Dr Stevenson...confirm the plaintiff's ongoing complaints of neck and back pain.¹¹

His evidence and his complaints to the doctors are, on the whole, consistent.¹²

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.¹³

However, there is no record of her complaining of back pain to any of the doctors before her complaint to Dr Newcombe in 1987.¹⁴

Total absence of any contemporaneous complaint to a medical practitioner.¹⁵

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.¹⁶

⁷ *Stankovic v Banfield* [2000] ACTSC 8 at 148-151.

⁸ *Dass v Firfai & Anor* [1999] ACTSC 67 at 211-212.

⁹ *Nguyen v Bucis* [1999] ACTSC 84 at 115-116.

¹⁰ *Blazeski v City Group Cleaning Contractors* [1999] ACTSC 69 at 203-207.

¹¹ *Stankovic v Banfield* [2000] ACTSC 8 at 116-117.

¹² *Artur Fatur v IC Formwork Services Pty Ltd and Civil and Civic Pty Ltd* [2000] ACTSC 14 at 410-411.

¹³ *Buttriss v Buttriss & Ors* [1999] ACTSC 121 at 88-93.

¹⁴ *Risteska v The Commonwealth of Australia* [1999] ACTSC 56 at 140-142.

¹⁵ *Umback v Wallace & Anor, Umback v Kelly* [1999] ACTSC 113 at 25-30.

As Scarry puts it, 'hearing about pain' may exist as the primary model of what it is 'to have doubt' (Scarry 1985, p.4). 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, p.10). This can be extraordinarily difficult in cases where there is pain without any remaining actual bodily damage or disability, where the injured bodies do not themselves bear the record of suffering (Scarry 1985, p.298). This difficulty is exacerbated if the injury is of a kind which does not manifest itself in some kind of physical gesture.

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, 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 highlighted by examining the legal narrative as melodrama. This also reinforces 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.

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¹⁶ *Simonfi v Fimmel & Simonfi v Dowden & Anor* [2000] ACTSC 54 at 471-472.

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